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Editorial Note

Last year was a period of immense difficulty for the entire global population due to the Covid 19 pandemic. Academic institutions, from primary to post-graduate universities, suffered with the closure of physical classes and compelling students and teachers to learn and re-learn the digitized mode of online education. Under the leadership of Vice Chancellor Prof. (Dr.) Sudhir Krishnaswamy NLSIU was able to make a smooth transition to the various online delivery platforms and pursued it with same rigour of academic standards. Continuing with the same spirit the Editorial Board has put in laborious efforts in publishing the NLS Journal 2019-20, inspite of the challenges of the present times. After various levels of scrutiny 10 (ten) articles have been selected, from a pool of more than fifty articles, for the purpose of publication and conscious efforts have been made to include a wide range of topics which has significance in the contemporary legal world. We hope that the readers find the articles interesting and useful. We will look forward to the various comments and suggestions from our valuable readers in our endeavour to make National Law School Journal a leading global journal on contemporary legal issues.

Dr. Yashomati Ghosh
Chief Editor,
NLSJ 2019-20

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Role of Consent in Cosmetic Surgeries and Enhancements: A Comparative Analysis

Madhubanti Sadhya

Abstract

Cosmetic surgeries and enhancements may be defined as interventions to augment some feature, function or physical attribute in addition to what is considered vital for the preservation of physical health. These surgeries are unique in the sense that they seldom seek to remedy any ailment that interferes with the functioning of a healthy body. Patients voluntarily undergo cosmetic procedures that target the improvement or enhancement of physical appearance of an otherwise 'normal and healthy' bodily feature. But like all other medical procedures, cosmetic surgeons take prior consent from their patients before initiating any procedure. This article deals with the role and importance of consent in cosmetic procedures. Four important issued have been addressed in this article: Evolution of consent, its importance in medical practice and the relation between patient autonomy and consent. How are cosmetic surgeries different from traditional therapeutic procedures? Is there a higher threshold of disclosure of risks and available alternatives before seeking informed consent from a patient of cosmetic surgery than in other therapeutic procedures? What are the problems encountered by cosmetic surgeons in relation to informed consent? The article ends with the conclusion that a separate and special category of informed consent for elective or optional cosmetic surgeries must be contextualised which imposes on the surgeon a broader duty of disclosure, than what is associated with medically necessary surgeries.

Keywords: *cosmetic surgery, informed consent, real consent, medical negligence, autonomy, patient*

INTRODUCTION TO THE CONCEPT OF CONSENT IN MEDICAL TREATMENT

Etymologically, the word 'consent' owes its origin to the French term *'consentir'* which means to agree or comply and from the Latin *'consentire'* implying to 'feel

together'. In today's times a well informed and mentally capacitated patient may be of the opinion that securing his consent before undergoing any major or minor procedure is an imperative that the doctor or the hospital concerned cannot do without. But, this was not always the norm. Medicine for a greater period of time was practiced in a paternalistic fashion, especially owing to the position that the profession wielded in society. Dr. Robert Veatch[1] has even gone on record to state that "the old Hippocratic ethic saw the patient as a weak, debilitated, childlike victim, incapable of functioning as a real moral agent."[2] When a patient visited a doctor with his ailment, his complaints were noted down, his disease diagnosed either through clinical investigations or otherwise, and medication or further course of treatment advised. Although doctors did explain to the patients the nature of their ailments, purely medical considerations that defined what is in the best interest for the patient's recovery steered their viewpoints and decisions. Differing perspectives of the patients were more often than not written off, and they were expected to follow the recommendations and advice given to them. Opposition to the line of treatment suggested was not entertained and customarily disapproved by the doctors.[3]

India has been a seat of paternalism in the field of health care for a greater part of history, and even up until the early days of the twenty first century. If truth be told, the bulk of the Indian population lives below the poverty line with little or no understanding of medical science. They place doctors on the same pedestal as God and surrender themselves completely to the good sense and authority of clinicians if some medical tragedy befalls them. Around two decades back, the process of medical consent-taking in India was usually treated as a formality. Patients were presented with elaborate details that they failed to grasp but, nevertheless, assented to the procedure by signing the consent form or placing their thumb impressions. Under such circumstances, many

1 Professor Emeritus of Medical Ethics at Georgetown and Senior Research Scholar at the Kennedy Institute of Ethics.

2 Steven H Miles, 'Hippocrates and informed consent'(2009) 374 The Lancet 1322

3 K.S. Jacob, 'Informed consent and India' (2014) 27 The National Medical Journal Of India 35

Indian doctors assumed a paternalistic stance and perceived the idea of taking informed consent as a futile and time consuming exercise that directly impeded their duties towards patients and, sometimes, even intimidated them enough to decline life saving treatments. The doctors were of the view that when they had decided what was in the best interest of their patients who had no qualms about the treatment suggested, obtaining informed consent was a perfunctory routine practice of little importance.[4]

PATIENT'S AUTONOMY AND CONSENT

Obtaining valid consent from the patient before commencing medical treatment is a vital prerequisite that medical professionals cannot afford to avoid today. Consent is said to be 'valid' when it has been given by a person who is legally competent to give consent and when the consent given is an informed one. Consent is perhaps the only concept that touches all facets of health care services. The requirement of taking consent stems from the patient's legal and ethical right of self-autonomy.[5] The right of autonomy, often described as the 'right of self-determination, the right to privacy, liberty and the right to be let alone,' clothes a 'competent' patient with the legal right to accept or decline the treatment offered by a doctor. It authorizes him to assess his best interests without incurring any liability, either moral or legal, to defend or justify his choice. Despite its wide amplitude, a patient's autonomy is subject to two limitations: first, a doctor cannot be compelled to treat the patient in a manner that contravenes his clinical assessment of the patient's condition and is in blatant disregard of what he considers to be in the best interest of the patient, and second, fuelled by an urge to commit suicide, a patient cannot coerce a doctor to prescribe a course of treatment that would ultimately lead to his death and make the doctor complicit to the crime.[6]

4 A. K. Sanwal, S. Kumar, P. Sahni and S. Nundy, 'Informed consent in Indian patients' (1996) 89 Journal of the Royal Society of Medicine 196

5 Omprakash V. Nandimath, 'Consent and medical treatment: The legal paradigm in India' (2009) 25 Indian Journal of Urology 343

6 K. Kannan, *Medicine and Law* (1st edn, Oxford University Press 2014) 59.

Consent and patient's autonomy became the quintessence of ethical medical practice following the Nuremberg Trials of 1947. The trials brought to light the brutality of the medical experiments that were carried out by Nazi doctors in the garb of scientific research, and necessitated the laying down of ten basic principles. These basic tenets came to be known as the Nuremberg Code of 1947 and mandated the recording of voluntary and informed consent from human subjects.[7] This was followed by another set of principles - Ethical Principles for Medical Research Involving Human Subjects, popularly known as the Helsinki Declaration, adopted by the 18th General Assembly of the World Medical Association. The Declaration of Helsinki, as amended in October 2013,[8] contains detailed provisions on informed consent and specifically lays down that no individual who is competent to give informed consent shall be made a subject of medical research unless he or she freely consents to it.[9]

Schloendorff v. *Society of New York Hospital,*[10] decided by the Court of Appeals of New York in the year 1914 was the first case which gave legal recognition to the concept of patient's autonomy and established a legally competent adult's right to refuse medical treatment. In this case, a surgeon who had failed to obtain consent from the patient before conducting hysterectomy had to face charges of assault and was held liable in damages by Benjamin Cardozo J. who observed that every adult of sound mind has the privilege to decide what shall be done to his body.[11]

INFORMED CONSENT

The expression 'informed consent' was voiced for the first time by Justice Cardozo in the 1957 medical malpractice suit of *Salgo* v. *Leland Stanford Jr.*

7 ibid58

8 By the 64th WMA General Assembly held in Fortaleza, Brazil, in October 2013.

9 WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects <http://www.wma.net/en/30publications/10policies/b3/> accessed 20 January 2020

10 105 N.E. 92 (1914).

11 Tapash Kumar Koley, *Medical negligence and law in India, Duties, Responsibilities and Rights* (3rd edn, Oxford University Press 2014) 113.

University Board of Trustees.[12] In this case, the plaintiff, who became paraplegic following a procedure of aortography which was intended to locate a block in his abdominal aorta, alleged that his physician had not disclosed to him the potential risks of the procedure before he was made to undergo the same. The Court ruled that it was the duty of the physician to disclose to the patient "all the facts which mutually affect his rights and interests and of the surgical risk, hazard and danger, if any...." Any fact that a physician withholds which, in turn, incapacitates the patient to give an intelligent and sound consent to the proposed treatment makes the physician liable for non-disclosure.[13]

Informed consent is a relatively new concept in India that gained prominence after the enactment of the Consumer Protection Act, 1986, especially subsequent to the landmark judgment of the Supreme Court in *Indian Medical Association* v. *V.P. Shantha and Ors*[14] which brought the medical profession and its services within the purview of the Act. Nowadays, the two most prominent stakeholders of the medical profession, the doctors and the patients, are becoming more conscious about this idea, and patients are well armed with information concerning their rights vis-à-vis the medical services and treatment they avail of.[15] The wave of consumerism and commercialization that has engulfed India's health care services, particularly in the private sector in the recent decades, has empowered patients to have a say in their treatment choices and is symbolic of the shift from the paternalistic approach to medicine to a more patient-centric model.[16] Thus, in this backdrop, it can be safely said that the entire discourse on consent has become relevant today, particularly from the viewpoint of medical practitioners, because any doctor who treats a patient without securing his valid consent may be held liable under civil or criminal law.

12 154 Cal.App.2d 560 (1957).

13 154 Cal.App.2d 579.

14 1995 SCC (6) 651.

15 Arun Bal, 'Informed Consent - Legal and Ethical Aspects' (1999) 7 Issues in Medical Ethics 56.

16 Koley (n 11) 112

Although several attempts have been made to define 'informed consent,' one of the most comprehensive definitions of the term can be found in the book titled *Principles of Biomedical Ethics* authored by Tom Beauchamp, where informed consent has been defined by dividing its constituent elements into two components: the information component and the consent component. Beauchamp notes that the legal, regulatory, philosophical, medical and psychological writers seem to favour the division of informed consent into five essential constituents or 'building blocks,' namely, (1) competence, (2) disclosure, (3) understanding, (4) voluntariness and (5) consent which must co-exist for the consent to be informed. The information component consists of the disclosure of information to the patient which, in turn, allows him to comprehend what has been disclosed to him. The consent component comprises of a decision that the patient makes of his own volition and the ensuing authorization to proceed with the treatment or otherwise that follows. Thus, as per this definition, informed consent to a medical intervention is given when one is competent to act, has full disclosure of the proposed treatment, comprehends the information that has been disclosed, acts voluntarily on one's free will and gives assent to the intervention.[17]

The Supreme Court of India extensively dealt with the concept of 'consent' in medical treatment in *Samira Kohli* v. *Dr. Prabha Manchanda and Anr*[18] and went ahead to note that although the expression 'informed consent' is repeatedly used, it is an American concept which has no existence in English Law, and although it enshrines within itself the basic requirements that qualify an approval to be consent, its emphasis is on the doctor's responsibility to make known to the patient the vital information to obtain his consent. On the other hand, consent in the United Kingdom is defined from the perspective of the patient and is considered to be 'real' and valid when (i) it is given by the patient voluntarily; (ii) the patient has the competence to give consent; and (iii) the patient has the

17 Tom L. Beauchamp, *Principles of Biomedical Ethics* (Tom L. Beauchamp and James F. Childress ed., 5th edn, Oxford University Press 2001)

18 Appeal (civil) 1949 of 2004; 2008(1) SCALE 442.

least amount of adequate details about the nature of the medical intervention to which he is consenting.[19]

From a plain reading of the judgment of the aforementioned case, it becomes clear that the Supreme Court of India endorsed the UK approach of 'real consent.' The Court stated that keeping in mind the ground realities in the medical and healthcare situation in India, where the majority of the citizens requiring medical attention are incapable of understanding medical terms, concepts, and treatment procedures, the 'reasonably prudent patient test' developed by the United States Courts of Appeals, District of Columbia Circuit in *Canterbury* v. *Spence,*[20] which required the doctor to acquaint the patient with all the material risks in the proposed treatment before eliciting consent, was not suitable for India. The Apex Court sided with the concept of 'real consent' developed by the House of Lords, first in *Bolam* v. *Friern Hospital Management Committee*[21] and later adopted in *Sidaway* v. *Bethlem Royal Hospital Governors & Ors,*[22] where the majority were of the view that a doctor's duty of disclosing the intrinsic risks in the line of treatment proposed by him was the same as the test applicable to ascertain the liability of the doctor in any diagnosis or treatment, namely, that the doctor was required to act in accordance with the practice that was acknowledged as appropriate by a responsible body of medical men of the time in question.[23] The Supreme Court, however, hinted at the possibility of adopting the 'reasonably prudent patient test' in India in the days to come with the increase in awareness amongst the public of patient's rights.[24]

The Apex Court went on to elaborate the idea of real consent, when it noted that the patient must be given all the adequate information[25] that one requires

19 (2008) 2SCC 1 para 14.

20 1972 [464] Federal Reporter 2d. 772.

21 [1957] 2 All.E.R. 118.

22 [1985] 1 All ER 643.

23 (2008) 2SCC 1 para 14, 21, 24 and 33.

24 ibid. para 33.

25 The Supreme Court in para 32 of the said judgement noted that, "The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the

in order to reach a proper decision, but the doctor is under no duty to warn the patient of remote risks. The doctor is expected to inform the patient of only such risks which are recognized, rather than those complications which are a rarity or highly remote that may intimidate the patient. In advising a patient to undergo an operation, the Supreme Court, therefore, observed that the doctor is required to act in the way in which a competent surgeon (in this case a gynecologist) employing reasonable skill and care in comparable circumstances would have done. The Court gave a good amount of scope to the doctors in allowing them to decide the quantum of information that should be disclosed to the patient, keeping in view the patient's personality, the questions he/she asks and his view of how much of the information the patient is capable of comprehending.[26]

In the *Samira Kohli* judgment, the Court impliedly renounced the practice of taking an all-encompassing consent in medical treatment when it noted that consent which has been given for a particular treatment or procedure cannot be used and will not be held to be valid for conducting some other procedure. Even if the subsequent surgery or procedure is aimed at benefiting the patient or even if it saves time and prevents future medical expenses or relieves the patient from future sufferings, these facts would not absolve the doctor from liability in an action in tort for negligence or assault and battery, if the same are carried out without obtaining valid consent. The subsequent procedures conducted without securing consent would, nevertheless, be valid if they are performed to safeguard the life or preserve the health of an unconscious patient and delaying the procedure to seek consent would be unreasonable, and if the subsequent procedure becomes indispensable during the course of the surgery. If there is prior contemplation, a diagnostic procedure which later necessitates

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patient should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment, or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment.

26 (2008) 2SCC 1 para 34.

an operative procedure can both be conducted with a valid consent for the former.[27]

WHAT ARE COSMETIC SURGERIES?

Cosmetic surgery, often termed as aesthetic or beauty surgery, is not a modern phenomena. The birth of such surgeries can be traced back to the early sixth or seventh century B.C. when the Indian physician Susruta in his book Susruta-Samhita - the first known historical book to report reconstructive surgery had described the first reconstruction of the nose and ear.[28] There are some scholars who are of the view that it was in the period of Renaissance, towards the end of the sixteenth century, that surgeons began to articulate their views on aesthetic or beauty surgery. The fifteenth century ended with the outbreak of epidemic syphilis which had stigmatizing effects on the affected populace. Ottoman Hilderbrand (1858-1927), a reconstructive surgeon and a noted historian of aesthetic surgery, traced a relationship between this disease of an unaesthetic nature and the emergence of aesthetic surgery.[29] The latter decades of the nineteenth century witnessed the birth of modern aesthetic surgery in Europe, particularly in Germany, France and the United Kingdom and in the United States of America. The colonial and post-colonial era saw the growth and spread of this branch of surgery, treading the path of globalization and economic expansion, under the hegemony of Western medical theory and practice to continents of South America, Africa and Asia.[30] The twenty first century has witnessed an unprecedented number of cosmetic and aesthetic surgeries being performed all over the world. As per the International Society of Aesthetic Plastic Surgery (ISAPS) global statistics on aesthetic/cosmetic procedures released in December, 2019, more than 23 million (23,266,374)

27 (2008) 2SCC 1 para 33.

28 Dimitrije Panfilov, *Cosmetic Surgery Today* (Thieme 2005)

29 Sander L. Gilman, *Making the Body Beautiful: A Cultural History of Aesthetic Surgery* (Princeton University Press 2001) 10.

30 Sander Gilman, 'The Medicalization of Aesthetic Surgery,' in Arthur L. Caplan, James J. McCartney and Dominic A. Sisti (eds), *Health, Disease, and Illness: Concepts in Medicine,* (Georgetown University Press 2004) 221

cosmetic surgeries and procedures were performed the world over.[31] India ranked fifth in the total number of procedures performed, accounting for 895,896 procedures, preceded by USA, Brazil, Mexico and Germany.[32]

The Clinical Congress of the American Medical Association held in the year 1974 in Portland defined the term cosmetic surgery as "that surgery which is done to revise or change the texture, configuration or relationship with contiguous structures of any feature of the human body which would be considered by the average prudent observer to be within the broad range of "normal" and an acceptable variation for age and ethnic origin; and, in addition, is performed for a condition which is judged by competent medical opinion to be without potential for jeopardy to physical or mental health."[33]

Although the terms 'cosmetic surgery' and 'plastic surgery' are used interchangeably, they are different from one another. Plastic surgery derives its name from the term 'plastic' which stems from the Greek word 'plasso' meaning to mould or shape. It involves the restructuring or enhancement of appearance, form or function of parts of the body by resection, transplantation or implantation. Plastic surgery, thus, includes within its folds reconstruction of defects, especially those acquired due to trauma, or burn injuries, removal or replacement of congenital deformities, or damaged or amputated parts of the body, etc. Thus, cosmetic or aesthetic surgery which seems to focus more on the aesthetic or visual quotient of appearance is a part of the broader discipline of plastic surgery.[34]

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31 'ISAPS International Survey on Aesthetic/Cosmetic Procedures Performed in 2018' <https://www.isaps.org/wp-content/uploads/2019/12/ISAPS-Global-Survey-Results-2018-new.pdf> accessed 22 February 2020

32 ISAPS Global Survey Press Release <https://www.isaps.org/wp-content/uploads/2019/12/ISAPS-Global-Survey-2018-Press-Release-English.pdf> accessed 22 February 2020

33 Panfilov (n 28)1

34 ibid. See also, Sara Goering, 'The Ethics of Making the Body Beautiful: Lessons from Cosmetic Surgery for a Future of Cosmetic Genetics,' (2015) 13 The Center for the Study of Ethics in Society 1

Cosmetic surgeries and procedures can primarily be divided into two categories: firstly, procedures which are minimally invasive, that are carried out on the surface of the skin and can be done in a very short span of time, without the involvement of any surgical procedure; such as laser hair removal treatment and skin resurfacing, and secondly, surgeries which are akin to traditional surgeries and are carried out in a hospital or clinical setting that require the patient to be sedated or anesthetized.

An illustrative list of cosmetic procedures on the face would include[35] cheek implant, chin augmentation (mentoplasty), ear pinback (octoplasty), eyelid tightening (blepharoplasty), face-lift (rhytidectomy), nose reconstruction (rhinoplasty) and forehead lift; collagen and fat injections to enhance sunken facial features; hair transplantation; scar revision and removal of birthmarks; skin resurfacing, etc. Some of the common cosmetic surgeries which are carried out on the bodies of patients include[36] arm lift (brachioplasty), breast augmentation, breast implant removal, breast reduction (mammaplasty), breast tightening (mastopexy); buttock and thigh lift; calf and other implants; liposuction; male breast reduction (gynecomastia); penile enlargement and implant; transgender surgery which changes the form of primary and secondary sexual characteristics; tummy tuck (abdominoplasty), etc.

CONSENT IN COSMETIC SURGERIES AND PROCEDURES

In India, cosmetic and aesthetic surgeries are not governed under any specific legislation, and hence, the common law and other statutory provisions as applicable to other branches of medicine are also applicable to this field. It is important to bear in mind that, like in other fields of medicine, a cosmetic surgeon may have to face litigations in case of his negligence in treatment or on other grounds discussed in the article. Therefore, it is extremely crucial for the cosmetic surgeon to be aware of the legal aspects involved in aesthetic surgeries.

35 Gilman (n 29) 6,7

36 ibid

There is no denying the fact that there are certain peculiarities of cosmetic surgeries and enhancements which sets them apart from the traditional and mainstream medical interventions. Since the relationship between a cosmetic surgeon and his patient is different from that of a traditional doctor-patient relationship, there are certain legal and ethical issues that cannot and must not be ignored, securing informed consent from the patient being one of them. Despite its uniqueness, the fact that cosmetic surgery involves the performance of some kind of surgical interventions on individuals for the sake of improving appearance is indisputable, and hence, the requirement of taking consent before starting the procedures is very pertinent. Cosmetic procedures are one of the best examples of consumer driven medicine, that patients pursue not out of need, but to fulfill some 'want' that they have with respect to their physical features that they wish to get altered or augmented. Hence, if the outcome of the procedure or surgery fails to fulfill the expectations of the patient, in all likelihood a case may be instituted against the doctor for negligence. This makes effective communication and consultation between the doctor and patient one of the most crucial elements to avoid litigation. One of the fundamental duties of the doctor is to inform the patient of all relevant information relating to the procedure, the pre-procedure requirements, inherent risks, alternatives and post-operative care, etc., before commencing any surgery, and this gets legal sanctity in the procedure of taking informed consent through the consent form.

IMPORTANCE OF CONSENT IN COSMETIC SURGERIES AND PROCEDURES AND REMEDIES AVAILABLE TO PATIENTS

Taking of informed consent before any procedure is primarily important for two reasons; firstly, it upholds the patient's autonomy, and secondly, it safeguards the doctor from future legal tangles. Moreover, the principle of informed consent prevents physicians from downplaying the risks of surgery or exaggerating the possible outcomes of the surgery. The need to take informed consent also ensures that there are no 'information imbalance or asymmetry' between the patient and the physician.[37] The need of obtaining consent from patients before commencing any cosmetic treatment becomes further pronounced for cosmetic surgeons. Every surgery and intervention, whether major or minor, comes

37 Kristen Nugent, 'Cosmetic Surgery on Patients with Body Dysmorphic Disorder: Cutting the Tie That Binds' (2009) 28 Developments in Mental Health Law 77

with its share of risks which in some treatment procedures although remote, cannot be written off altogether. If any of these medical hazards are realized in the course of the operation or during further course of treatment, the consent taken from the patient, whether express or implied, acts as a valid defence in law for the doctor. Under the Indian law, this defence is available to the doctors under Section 88 of the Indian Penal Code, 1860,[38] which provides that no harm done to a person would be considered to be an offence if it is done for the benefit of the person concerned, in good faith, and with the person's express or implied consent to suffer the harm. Thus, Section 88 grants legal protection to the doctor against criminal action for any treatment or surgery undertaken in good faith for the benefit of the patient who has signified express or implied consent for the medical intervention, even if some harm results from it. The applicability of this section to medical professionals is further exemplified by the illustration appended to the section which states a doctor, despite being aware that a particular operation is likely to cause the death of the patient, would not be liable of committing any offence if he treats the patient in good faith for the benefit the patient, provided it is done with the consent of the patient. The protection afforded to medical professionals by Section 88 of the Indian Penal Code, 1860, has also been affirmed by the Supreme Court in *Kusum Sharma and Ors.* v. *Batra Hospital* and *Medical Research Centre and Ors.*[39]

Besides this, the doctrine of informed consent protects a patient from any unjustifiable touch. In such situations, a patient can only contend that he or she had no prior intimation of the nature of touch or the treatment provided to succeed in such a case. Under civil law, the patient may institute a suit against the cosmetic surgeon in tort for trespass to person or the tort of negligence. In some cases, the cosmetic surgeon may even be criminally held liable for assault or battery. Battery has been traditionally defined as an act of directly causing, either intentionally or by negligence, physical contact with another person without obtaining the person's consent.[40] The burden of proof in cases of battery is lower than a case of medical negligence where the patient is obligated

38 S.C. Srivastava, *Legal Framework for Health Care in India* (S.K. Verma ed., LexisNexis Butterworths 2002)

39 (2010 3 SCC 480).

40 Nandimath (n5)344

to prove that – (i) the doctor owed a duty of care to the patient, (ii) the doctor breached the said duty and (iii) the patient suffered consequent harm due to the breach of the doctor's duty. In a case of battery, the patient need not prove that the touch that was not consented for resulted in any harm or injury. So long as the physical touch and the contact by the surgeon is non-consensual, the patient has high chances of prevailing in a case of battery instituted against the surgeon.[41] Claims of battery are usually made in conjunction with claims of medical negligence and may be made in cases where the surgeon performs in the course of the surgery something which had not been discussed prior to the commencement of treatment, for instance, inserting a different type of chin implant without prior discussion.[42]

Through its decision in *Indian Medical Association* v. *V.P. Shantha,*[43] the Supreme Court has brought patients within the purview of the Consumer Protection Act, 1986, as 'consumers' of medical 'service.' Since the enactment of this Act, the consumer courts, or the quasi-judicial bodies established under this Act equipped with the powers of a civil court, have been the preferred forum for filing complaints of medical negligence, since these courts assure expeditious redressal of grievances, with simpler procedural formalities than those mandated by the civil courts. The Act has been recently superseded and repealed by the Consumer Protection Act, 2019, which defines consumer of service as any person who hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment.[44] Thus, by this definition, any patient who avails of the services of a doctor may file a complaint before the appropriate consumer forum.[45] The legal heirs and representatives of the deceased consumer and the

41 Mathew M. Avram and Daniel E. Kremens, 'Informed Consent and Treating the Cosmetic Patient,' in Pearl E. Grimes (ed), *Aesthetics and Cosmetic Surgery for Darker Skin Types*, (Lippincott Williams and Wilkins 2008)

42 Shafeek S. Sanbar, *Legal Medicine*, Seventh Edition, (7th edn, Mosby Elsevier 2008)

43 1995 (6) SCC 651

44 Section 2(7)(ii) of the Consumer Protection Act, 2019

45 The consumer forum where the complaint would be filed is determined by the pecuniary jurisdiction of each forum and the value of the goods or services paid as consideration.

parents or legal guardians of a minor consumer of service are also recognized as 'complainants'[46] under the Act.

There is no explicit mention of medical negligence under the Consumer Protection Act, 2019. A complainant, who wishes to seek remedy under the Act or make a claim of compensation for the negligent act of the service provider must file a complaint claiming 'deficiency in service.' 'Deficiency' in relation to any service has been defined as any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance of service, where the quality, nature and manner of performance have been stipulated under any law in force or specifically taken up for performance by the service provider in pursuance of a contract or otherwise.[47] The Supreme Court has clarified that a charge of deficiency in service leveled against a medical practitioner under the Consumer Protection Act would be decided by applying the same test comprising of the three elements of 'duty, breach of duty and harm suffered by the patient' to decide a claim of damages for the tort of negligence in a civil court.[48] In addition to this precedent that has been followed in assessing cases of medical negligence filed before the consumer courts, the Consumer Protection Act of 2019 Act has expanded the definition of deficiency in service by including within its purview any act of negligence or omission or commission by the service provider which causes loss or injury to the consumer. Thus, any

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The Act of 2019 has enhanced the pecuniary jurisdictions of the District Commission, State Commission and the National Commission vide Sections 34, 47 and 58 than the amount prescribed under the erstwhile Act. The Act has prescribed territorial jurisdiction for only the District Commission, and a complaint valued within one crore rupees can be filed within the territorial jurisdiction of that District Commission where the opposite party doctor or doctors reside or carry on business or personally work for gain, or where any of the opposite party doctors reside or carry on business or personally work for gain or where the cause of action arose, that is, the deficiency in service occurred. Additionally, 2019 Act also allows filing of complaint before the District Commission within whose jurisdiction the complainant resides or personally works for gain.

46 Section 2(5), Consumer Protection Act, 2019.

47 Section 2 (11), Consumer Protection Act, 2019.

48 *Indian Medical Association* v. *V.P. Shantha and Ors* 1995 (6) SCC 651

act of negligence committed by the doctor that causes harm to the patient has been statutorily recognized as 'deficiency' in service.

In addition, where a doctor's failure to take adequate care results in harm to the patient, the consumer courts, particularly the National Commission, has held in a number of cases[49] that failure to take informed consent, perfunctorily taking consent from the patient without explaining the details of the procedure or non-disclosure of adequate information about the procedure results in deficiency in service, since it robs patients of the opportunity to exercise their choice with respect to their treatment decisions. The importance of informed consent in medical interventions has been further enhanced by the Consumer Protection Act, 2019, which has also included deliberate withholding of relevant information from the consumer by the service provider within the definition of 'deficiency' in service.[50]

The law does not make any distinction between therapeutic and elective aesthetic surgeries while making remedies available to patients who have suffered due to the negligence of the treating doctor or hospital. The field of cosmetic surgery is replete with cases of alleged medical negligence, most of which are instituted before the Consumer Commissions established under the Consumer Protection Act. In addition to invasive surgical cosmetic procedures like liposuction[51] or hair transplantation,[52] patients who have undergone non-

49 *Manmohan Kaur* v. *M/S. Fortis Hospital* F.A.NO. 832 OF 2015 decided on 29 June, 2018, *S. Thamil Selvi* v. *Mrs. Dr. Sooriya Kala* II (2007) CPJ 216 (NC), *Prasanna Lakshmi* v. *Maxivision Laser Centre Pvt. Ltd.* F.A. No. 170 of 2013 and F.A.No 196 of 2013 decided on 5 April, 2019

50 Section 2 (11), Consumer Protection Act, 2019.

51 *Mrs. Noni Singh* v. *Dr. P.K. Talwar* (Original Petition No. 103 of 1996, National Consumer Disputes Redressal Commission decided on 16 December, 2009), *Smt. K. Shyamala Murthy* v. *Dr. Manoj Khanna & Ors* (Consumer Case No. 391 of 2001 National Consumer Disputes Redressal Commission decided on 9 February, 2016)

52 *Prof. Leonard G. De Souza* v. *Looks Cosmetic Clinic and Another* (Complaint No. 08/2017, Consumer Disputes Redressal Forum, North Goa. Decided on 28 July, 2017). *Dr. Ms. Jyoti Kacharu Avhad* v. *Dr. Smt. Anjali N. Dange* First Appeal No. A/11/687, (Maharashtra State Consumer Disputes Redressal Commission decided on 5 June, 2014).

invasive procedures such as laser skin treatment or laser hair removal[53] have also instituted complaints alleging deficiency in service under the Act and have been awarded compensation if the allegations against the doctor were proved.

If the service rendered by a doctor comes within the purview of contract of service, theoretically speaking, doctors can also attract civil liability for breach of contract. Courts in India have seldom held doctors liable for the breach of contractual obligations, although several decisions of the Supreme Court have recognized the contractual relationship shared by a doctor with his patient and have noted that the former has to compensate the latter under the law of tort, and/ or contract, if any harm is suffered for any negligent act or omission.[54] The field of cosmetic surgery is highly commercialized with patients demanding a result that exactly mirrors the image they had in mind. Therefore, it would not be wrong to contend that for cosmetic procedures where the relationship between the doctor and patient is more transactional than therapeutic surgeries, the doctor should be liable to compensate the patient for failing to deliver the result that had been expressly consented to for breach of contract.

An important decision that deserves a mention in this regard is *Sullivan* v. *O'Connor*[55] decided by the Supreme Judicial Court of Massachusetts. A professional entertainer consulted a plastic surgeon to undergo rhinoplasty to augment the shape of her nose. The doctor took photographs of her nose and drew on the image to depict the change that the procedure would bring about. However, after two surgeries, the patient's nose looked worse off than before, and the disfigurement suffered was apparently permanent that further corrective surgery failed to remedy. The patient alleged breach of contractual obligation of the surgeon for his failure to enhance her beauty through the surgery and negligence in performing the surgery. The jury found the surgeon

53 *Prashant Sahu* v. *Chairman and Managing Director, Kaya Ltd.* (CC/211/2017 Gurgaon District Consumer Disputes Redressal Forum, decided on 16 March, 2020)

54 *Samira Kohli* v. *Dr. Prabha Manchanda and Another* (2008) 2 SCC 1, *Dr. P.B. Desai* v. *State of Maharashtra and Anr.* [2013] 11 S.C.R. 863.

55 296 N.E.2d 183 (MASS. SuP. JUD. CT. 1973).

guilty of breach of contract and awarded $13,500 in damages. The Court in this case deduced an express contract to have been entered into by the parties through the drawings that were made on the photograph. The illustration made by the doctor was seen as an irrevocable promise of the outcome of surgery which he failed to deliver and had, hence, breached the contract. Unlike cases of negligence which necessarily require proof of harm, in an allegation of breach of contract, failure to reach the desired result that had been consented to, could be enough to hold the doctor liable. In *Sullivan,* although the outcome of the surgery was not as anticipated, the plaintiff had failed to establish that her botched up nose had adversely affected her employment as an entertainer.[56]

Medical professionals in India are yet to be charged solely for the breach of contractual obligations, but it is worth noting that the theory of contractual liability broadens the doctor's burden by making him accountable to fulfill every aspect of the surgery result he had expressly consented to deliver. The day does not seem far when courts may allow patients to recover damages from doctors, especially if the doctor has used aggressive promotion tactics or relied on computer imagery to convince the patient of the proposed outcome that led him to consent to the cosmetic procedure.[57]

STEPS TO SECURE CONSENT IN COSMETIC SURGERIES AND PROCEDURES

The foregoing discussions on the liability that a doctor can attract under civil and criminal law for not recording consent further reinforces the importance of consent in medical practice. The first part of the article has already pointed out the factors that are taken into account before a patient is said to have given an informed consent or a real and valid consent to a medical procedure or treatment. Cosmetic surgeries and enhancements being unique for reasons already hinted at require certain supplementary conditions to be fulfilled

56 *See* generally C.B. Bonebrake, 'Contractual Liability in Medical Malpractice - Sullivan v. O'Connor, *De Paul Law Review*, Vol 24, Issue 1, 1974, pp. 212-226.

57 Hanneke Verwey and Pieter Carstens, 'Cosmetic surgery and responsible patient selection – Does a broader duty of disclosure exist?' *De Jure,* Vol. 46, 2013, pp. 432-450 at p.448.

before an informed consent is secured by the cosmetic surgeon. The steps that should be involved in securing consent in cosmetic surgeries have been discussed hereunder.

COUNSELLING:

A counseling session between the cosmetic surgeon and the prospective patient is indispensable. Providing adequate information to the patients that enable them to take an informed decision is of utmost importance in cosmetic surgeries. The amount of information to be revealed also depends upon the patient profile and what a 'prudent patient' would want to know. Usually, in the course of counseling the following information must be shared - the condition the client has, or the alterations or enhancements the client seeks; modes of treatment or alternatives available; the proposed procedure; the number of sittings required; duration and approximate cost of such treatment; expected results; instructions to be followed before or after treatment; possible side effects, complications or health hazards, medical risks;[58] possible consequences if post-operative advice is not followed, etc.[59] If the surgical procedure to be undertaken, alternatives available and the risks are explained audio-visually or by some other health professional other than the cosmetic surgeon, the surgeon still owes a duty to the patient to meet him or her personally to ascertain that the patient has adequate knowledge about the procedure.[60]

PRE-PROCEDURE INVESTIGATIONS:

Before providing informed consent, patients undergoing cosmetic procedures are often made to undergo pre-procedure investigations. Some scholars are

58 K.H. Satyanarayana Rao, 'Medicolegal Issues in Esthetic Surgery in Mysore Venkataram (ed.), *Textbook on Cutaneous and Aesthetic Surgery*(1st edn, Jaypee Brothers Medical Publishers 2012)

59 Mark Gorney, 'Medical Liability in Plastic and Reconstructive Surgery' in Maria Siemionow, Marita Eisenmann-Klein (eds.) *Plastic and Reconstructive Surgery* (Springer 2010)

60 Melvin A. Shiffman, 'Medical Liability Issues in Cosmetic and Plastic Surgery,' (2005) 25 Medicine and Law 211

of the view that in addition to the medical history of the patient, a detailed account of the cosmetic procedures that have been undertaken in the past and the level of satisfaction derived from the same should be enquired. This can help the surgeon to gauge the expectations that the patient has from the proposed treatment. Besides the medical history of the patient, the social background of the patient, including occupation, is very pertinent.[61]

PHOTO-DOCUMENTATION:

Photo-documentation has become extremely pertinent in cosmetic procedures, which not only acts as a valid legal document, but also helps patients assess the outcome of surgery. Photographs help to increase patient satisfaction, since they allow patients to appreciate the change they have undergone and to ascertain whether they have received the treatment they had assented to. They also safeguard doctors if certain aberrations or scars which were present prior to the surgery are attributed to the procedure undergone by the patient.[62]

REQUISITES OF VALID CONSENT:

For the consent to be valid in cosmetic surgeries and enhancements, the following three conditions must be fulfilled: it should be given by a person who is legally competent to give consent, that is to say the person must have attained the age of majority and must be of sound mind and capable of appreciating what he or she is consenting to. In the case of minors, consent must be given by the parents, and in the case of teenagers (13-18 years), consent of both the teenager and the parent should be taken; the consent must have been given voluntarily; and it must be given after the patient has all the adequate details about the condition, need for undergoing the procedure, other modalities of the proposed procedure, duration of the procedure, number of sittings, expected

61 Sarvajnamurthy A Sacchidanand and Shilpa Bhat, 'Safe Practice of Cosmetic Dermatology: Avoiding Legal Tangles' (2012) 5 Journal of Cutaneous and Aesthetic Surgery170

62 David Beynet, Joseph Greco and Teresa Soriano, 'Approach to the Cosmetic Patient', in Murad Alam, Hayes B. Gladstone, Rebecca C. Tung (eds.) *Cosmetic Dermatology*, (Elsevier, 2009) at p.5 *See also supra* note, 44.

results; pre-operative and post-operative instructions and precautions that must be followed and possible side effects, etc. Besides these requirements, it must also be seen that the consent has been well documented. It must be in written form and signed by both the doctor and the patient or parent/guardian in the case of minors. The consent form should include a statement which in essence expresses that the surgical procedure was explained to the patient and risks and complications, viable alternatives and their risks and complications were discussed and that all questions were answered. It must be simple, comprehensible and in the language that is understood by the patient. It is always preferable to have a witness in cases of cosmetic surgeries. It is also important to obtain consent a day or two prior to the procedure, which should be recorded by the treating doctor. It should not be obtained on the date of the surgery or several days before the surgery. The General Medical Council in the United Kingdom[63] and the Medical Board of Australia[64] have recommended cooling off periods for cosmetic surgeries – that is, an interval of time after consultation before the decision to undergo the procedure is taken or the procedure is undergone. This period allows patients to weigh the options presented by the surgeon and not take a hasty decision. While this practice is yet to be formally adopted in India, professional associations of aesthetic and plastic surgeons in India recommend to their members to provide cooling off periods to their patients. If consent is provided for one procedure, the doctor cannot undertake any procedure in addition to the procedure consented to or in place of it, which may or may not bear the same results. Moreover, if a patient has consented to a particular surgery or enhancement to be conducted by one doctor, some other doctor cannot do the surgery. Furthermore, if some new procedure or equipment is being used, there must be a mention of it in the consent form.[65]

63 BAAPS Statement on GMC's 'Cooling Off' Guidelines, 5 June 2015. Available at https://baaps.org.uk/media/press_releases/1412/baaps_statement_on_gmcs_cooling_off_guidelines

64 FAQs - Guidelines for registered medical practitioners who perform cosmetic medical and surgical procedures, Medical Board of Australia. Available at https://www.medicalboard.gov.au/codes-guidelines-policies/faq/faq-guidelines-for-cosmetic-procedures.aspx

65 Rao (n 41) 172

HOW ARE COSMETIC SURGERIES DIFFERENT FROM OTHER SURGERIES?

One of the primary differences between mainstream medical surgeries and cosmetic surgical or non-surgical interventions is that cosmetic procedures are 'elective' or discretionary or voluntary in nature in contrast to 'non-elective' procedures like, for instance, a surgery for the removal of a ruptured appendicitis, where a patient has little scope for exercising choice but has to undergo treatment. There are very remote chances of death from cosmetic or aesthetic surgeries, and the success of these procedures is judged by the patients and not the doctors who undertake them. Patients who undergo aesthetic or cosmetic surgery are rarely referred to as patients, primarily because they are not unwell *per se* and are often addressed as 'clients.'[66] A fundamental question which has often confounded surgeons is whether cosmetic surgery even falls within the purview of healthcare, since some are of the opinion that the practice of cosmetic surgery falls beyond the scope of traditional medicine.[67]

Cosmetic surgeries and enhancements have been customarily defined as interventions intended to augment some feature, function or physical attribute in addition to what is considered vital or basic for the preservation of health.[68] The traditional practice of medicine has centered around pathological findings that mark out the nature, origin, progress, and cause of disease. This style of combating or remedying the condition of an ailing person concentrates on the cause of the ailment and the medication or therapy that would restore the vigour and bring the patient back to health. Enhancement procedures and surgeries on the other hand may or may not have a deficiency or disease as a starting point of reference that needs to be cured. The focal point of such surgeries lies in innovation, and enhancement of appearance and capabilities.[69]

66 Gilman (n 29) 4, 5

67 Avinash De Sousa, 'Concerns about cosmetic surgery' (2007) 4 Indian Journal of Medical Ethics 171

68 Linda F. Hogle, 'Enhancement Technologies and the Body' (2005) 34 Annual Review of Anthropology 695

69 ibid 696

When a cosmetic surgeon performs a cosmetic surgery, individuals who are otherwise in good health undergo procedures that may give rise to medical hazards, side effects and complications, the end result of which may be beneficial for the persons in question but are, debatably, non-therapeutic. The patient has a say in the line of treatment selected, and all decisions pertaining to the procedure are made in concurrence with the patient, since being subjected to the surgery or 'going under the knife' is the prerogative of the patient. The interaction between the cosmetic surgeon and his/her patient is unique in such surgeries, since the recipient has to be provided a level playing field to be able to freely articulate the expectations from such interventions.[70]

Since cosmetic surgeries primarily deal with aesthetics or features that appeal to the eye, their success or failure is dependent on whether the patient perceives the results to have matched his or her expectations.[71] This emphasis on patient's subjective opinion finds resonance in the fact that it is not uncommon to find patients who are often dissatisfied with the outcome of a cosmetic procedure that was otherwise successful in a technical sense. In such circumstances, even if a cosmetic surgeon is not held liable under civil or criminal law, the procedure would still not be deemed to be a success.[72] At times, the dissatisfaction of patients may stem from insufficient consultations with the doctor prior to surgery, which could result in mistaken presumptions about the results of surgery. Such dissatisfaction may be further heightened in patients with body dysmorphic disorders (BDD)[73] - whose estimations and anticipation about the

70 Hanneke Verwey and Pieter Carstens, 'Informed consent to cosmetic surgery – does a broader duty of disclosure exist?' (2013) 76 Journal of Contemporary Roman-Dutch Law 642 at p. 644

71 Hanneke Verwey and Pieter Carstens, 'Cosmetic surgery and responsible patient selection – does a legal duty to screen patients exist?' (2013) De Jure 432 <http://www.saflii.org/za/journals/DEJURE/2013/22.pdf>

72 Dr J.P. Meningaud, Dr J.M. Servant, Dr. C. Herve and Dr. J.Ch. Bertrand, 'Ethics and Aims of Cosmetic Surgery: A Contribution from an Analysis of Claims after Minor Damage' (2000) 19 Medicine and Law 237

73 Body dysmorphic disorder is a mental disorder where individuals are fanatical about physical frailties which may have either been imagined or blown out of proportion.

proposed treatment and its outcome are skewed even before the preliminary doctor-patient consultation.[74]

Another difference that sets cosmetic surgeries apart from other therapeutic interventions is that the cost incurred to undergo these surgeries are usually quite high, and they are seldom covered under medical insurance. Besides this, in other medical procedures like surgeries for curing cancer, serious heart ailments or other high risk procedures like neurosurgery, patients are often willing to accept some medical risk including death in extreme circumstances. But, in cosmetic surgeries, patients allow no room for complications or mishaps. [75]

A person undergoing cosmetic surgery has a self-image and may have been triggered to undergo the procedure for a variety of reasons that could range from social media influences, peer pressure, societal pressure and employment demands to racial discrimination. Patients undergoing cosmetic surgery may have their own whims, fancies and expectations that are often difficult to fulfill. Cosmetic surgeries are often undergone for reasons that are highly superfluous. For instance, in 2008, the American Society of Plastic Surgeons identified two groups of patients who were most inclined to surgically alter their appearances - first, patients who had a strong self-image in general, but were troubled by a particular physical characteristic, and second, patients who had low self esteem owing to some physical imperfection or cosmetic flaw.[76]

PROBLEMS ENCOUNTERED BY DOCTORS AND PATIENTS IN RELATION TO INFORMED CONSENT IN COSMETIC SURGERIES:

Since cosmetic surgery is unique and is at variance from mainstream medical practice for several reasons already outlined in the article, there are certain specific problems that cosmetic surgeons and patients face in the consent procedure, some of which have been discussed hereunder.

74 Nugent (n 36) 80

75 Rao (n 41)876

76 Nugent (n 36) 79

Patient selection, informed consent and legal liability of the cosmetic surgeon: 'Patient selection,' as the name suggests, is the exercise that cosmetic surgeons engage in to select patients they would operate upon or render their services to. Patient selection is another distinctive feature of cosmetic surgery which sets it apart from other medical interventions. Since the patients voluntarily elect to undergo such surgeries and do not have any ailment that needs to be treated, the surgeons have the ultimate say in deciding whether or not the patient in question is appropriate and fit to undergo the procedure. Thus, in a way, the surgeon selects the patient and not vice-versa. In order to gauge the patients' suitability to undergo the cosmetic treatment, the surgeons have to evaluate the patients psychologically besides physically evaluating them.[77] As has already been hinted at, some individuals are stimulated by emotional or psychiatric gains to undergo cosmetic surgeries. Therefore, it is extremely important for the cosmetic/aesthetic surgeons to have a thorough consultation and dialogue with prospective patients in order to gauge whether they suffer from any kind of psychiatric disorders, including body dysmorphic disorder, mood disorder, personality disorders, etc. On one hand, these surgeries may have a positive impact on persons who undergo them, and on the other hand, the psychological and emotional distress that urge patients to undergo these procedures may get aggravated post surgery, which could persuade them to institute legal action against their doctors.

Since the ability to provide informed consent for surgery is related to the mental make-up of the patient, the competency to give consent comes within the purview of the general medico–legal guidelines of securing consent. This requires surgeons undertaking cosmetic procedures to give additional attention to the patient's capacity to consent, because the issue of pre-existing

77 Joshua B. Hyman and Robert T. Grant, 'Evaluation of the Patient for Cosmetic Surgery,' in Robert Grant, Constance Chen (eds.) *Cosmetic Surgery* (McGraw Hill Professional 2010). The authors in the book have further pointed out that there are certain cosmetic surgery patients who exhibit 'danger signs' and must, therefore, be dealt with very carefully. Some of the danger signs that the authors have noted down that may be a sign of the patient suffering from psychological issues are: delusional distortion of body image, unclear motives for undergoing surgery, unrealistic expectations regarding changes in their daily lives as a result of the surgery, present adversities linked to their physical appearances, history of seeing physicians and being dissatisfied with them, bringing photographs of film stars with the expectation of having similar features, taking multiple opinions, etc.

psychological disorders is often brought up in medical malpractice suits.[78] An action for battery against the surgeon may be instituted if there is a lack of informed consent owing to the incapacity or incompetence of the patient to give consent. A patient would be considered competent to give consent when he or she is capable of taking a decision after evaluating the potential outcomes of the surgical or non-surgical intervention. There may be situations when the patient may make an irrational choice; one that is at odds with what the cosmetic surgeon perceives to be in the best interest of the patient. This does not necessarily prove that the patient is incompetent. However, patients who are severely troubled by their psychological problems may be found incompetent to give an informed consent if their emotional state prevents them from taking decisions or communicating their consent or accepting the fact that they are in need of psychological help.[79] Thus, ascertaining the physical and psychological suitability of the patient to receive cosmetic treatment and to give an informed consent becomes an uphill task for the cosmetic surgeon.

In the New York case of *Lynn* v. *Hugo,*[80] the plaintiff instituted a case against her former doctor on the allegation of failing to take her informed consent. Mrs. Lynn G. brought a malpractice suit against her former plastic surgeon, Dr. Norman Hugo, on the basis of two abdominal plastic surgeries performed by him in February and November 1993. In February 1993, Dr. Hugo performed a liposuction of the abdomen, flanks, thighs and knees, and a bilateral mastopexy, followed by an inner thigh liposuction and a full abdominoplasty in November 1993. Prior to these surgical treatments, Mrs. G had paid nearly 50 professional visits to Dr. Hugo and had undergone a number of elective procedures, such as eyelid surgery, facial liposuctions, removal of skin growths, wrinkle removal and tattoos on her eyebrows. After undergoing the abdominoplasty in November, Mrs. Lynn was unhappy with the unsightly scar

78 David B. Sarwer, 'Plastic Surgery in Children and Adolescents' in J. Kevin Thompson, Linda Smolak (eds.) *Body Image, Eating Disorders, and Obesity in Youth: Assessment, Prevention, and Treatment* (American Psychological Association 2001)

79 Verwey and Carstens (n 52) 445

80 272 A.D.2d 38 (N.Y. App. Div. 2000)

on her abdomen, which prodded her to institute a case of medical malpractice against Dr. Hugo based on his failure to obtain informed consent. Her first allegation was that Dr. Hugo had not advised her to undergo less intrusive alternatives to a full abdominoplasty, especially keeping in mind the fact that she had already undergone liposuction in that area just a few months earlier. Her second allegation was that she was incapable of giving informed consent because she had Body Dysmorphic Disorder, and Dr. Hugo was aware of the fact that, between 1986 and 1990, Mrs. Lynn had been under psychiatric treatment. It was her further contention that her psychiatric history coupled with her unusually high demand for surgical correction should have cautioned the defendant of her mental ailment which fed her demand for excessive surgeries and prohibited her from appreciating the associated risks and benefits. At the least, she expected that the defendant should have consulted a mental health professional before performing the second surgical procedure on her. After much litigation, the case was dismissed by the Court of Appeals of New York in 2001, since there was no evidence that the patient was suffering from Body Dysmorphic Disorder at the time of the surgery or that she was incapable of making an informed decision. The Appellate Court also held that the defendant had informed the patient about the risks associated with the surgery and that the patient had consented to these risks in writing.[81]

Disclosure of the 'rarest of the rare' risks: When the plea of lack of informed consent is taken by a patient, the law requires the patient to prove that a complication or risk which was not explained to the patient did in fact occur and that the patient would not have undergone the surgery if informed of that particular risk or complication. Cosmetic surgeries are fraught with risks. This poses some amount of difficulty for cosmetic surgeons, since they are required to inform the patient of the 'rarest of the rare' risks involved in the surgery. This is not an easy task because a cosmetic surgeon may not always be in a position to apprise the patient about all the possible reactions and side effects that a particular surgery may give rise to.

81 *Lynn* v. *Hugo* 752 N.E.2d 250, 251 (N.Y. 2001)

In *Martelli* v. *Reardon,*[82] the defendant doctor had to pay the plaintiff damages to the tune of $738,100 for the lack of informed consent. In June 1995, the plaintiff had a facelift and the surgical reconstruction of an eye-lid. After undergoing the procedures, the plaintiff developed permanent numbness behind the right ear extending to the angle of the jawbone and chronic facial pain which included sensations of shock over the right side of her face. Plaintiff alleged *inter alia* the lack of informed consent. Defendant claimed he was aware of the foreseeable risks, but had not disclosed the same to the plaintiff because the complications which arose were extremely rare.[83]

The Canadian law on the subject of informed consent is very interesting, and it requires physicians to inform patients if a particular procedure they intend to undergo is merely elective and not medically necessary, as such information enables the patient to postpone or forego the treatment. In *White* v. *Turner,*[84] the landmark case on the issue of disclosure, the court held that, when an operation is optional, risks that are negligible must also be disclosed to patients. In another case,[85] an attractive young woman underwent a rhinoplasty to reduce the size of her nose, and the defendant surgeon failed to mention the risk of scarring which was about 10 percent. Unfortunately, the risk was realized, and the plaintiff's nose was left with a scar and indentation, which subsequent surgery would not be able to remedy. The plaintiff instituted an action of negligence against the defendant, based, *inter alia*, on the fact that he had failed to inform her of the risks involved. The court held that surgeries performed for purely cosmetic purpose carry with themselves the requirement of a very high degree of risk disclosure.[86]

82 New York County (NY) Supreme Court, Index No. 12414/97

83 Shiffman (n 43)218

84 (1981) 15CCLT 81(Ont.)

85 *LaFleur* v.*Cornelis* 1980 28 NBR2d 569, See also Mavis Bergquist, 'Legal Liability of Cosmetic Surgeons: *LaFleur* v.*Cornelis,'* (1983) 21 Alberta Law Review 533

86 Verwey and Carstens (n 51) 650

In *Veena Sethi* v. *Dr. J.B. Ratti,*[87] the Delhi Consumer Disputes Redressal Commission found the doctor guilty of deficiency in service for not giving adequate details about the procedure to the patient, for his failure to inform about the after-effects of surgery and the subsequent corrective treatment that would be necessary to remove the scars and rectify disfigurement suffered in the arms. The patient had decided to undergo liposuction at the doctor's clinic after seeing an advertisement in a local daily. The complainant was assured that she would lose 50kg to 60 kg of weight the very same day. After the procedure, the complainant found that there were long cuts and scars in both her arms and that she had undergone lipoplasty although the advertisement mentioned liposuction. The State Commission found the doctor guilty of medical negligence, since the complainant suffered due to the false representation of the doctor who had been negligent in conducting the procedure. The State Commission ordered the doctor to pay a compensation of fifty thousand rupees to the patient for the deficiency in service.

Although, in therapeutic medical surgeries, it is often felt that minor or remote risks need not be informed to the patients for fear that they may decline to give consent to a procedure that could cure them of their ailment, the same cannot be done in cases of cosmetic or aesthetic surgeries. This is primarily because a minor aberration in the expected result may be of no consequence to one patient, but it may be highly relevant to another. For instance, a slight scarring on the skin after a nose reconstruction surgery may be of great importance to an actress, but it may not be so for a home maker.[88]

Risk tolerant attitudes of cosmetic surgeons and its consequence on patients: Patients, especially women, are often influenced by cultural norms and societal perceptions that fuel their desires to attain a body which conforms to the definition of beauty ordained by society. Similarly, surgeons who operate upon patients are very much a part of the same social and cultural fabric. Their

87 Complaint No. C-270/98, (Delhi State Consumer Disputes Redressal Commission. Decided on 4 November 2008).

88 Rao (n 41) 877

discernment of female beauty within the same cultural mould might direct them to be more tolerant to high risk surgeries or to even downplay the risks involved, which they would otherwise be more conscious of in the absence of such predefined norms of beauty. Thus, the risk tolerant attitudes of cosmetic surgeons may affect the patient's ability to make informed decisions, since they would not be adequately informed of the risks and complications of the surgeries they are consenting to, even though they may formally put their signatures in the consent forms. This may subsequently lead to disastrous consequences if complications do arise, because after giving an informed consent, a patient may find it difficult to prevail in a case instituted against the cosmetic surgeon.

Cosmetic surgery on minor patients: Cosmetic surgeons have to be doubly sure about securing valid consent before operating upon any minor patient. In India, the age for giving valid consent to medical treatment is 18 years and, thus, before treating a minor, the cosmetic surgeon must obtain consent from the parent or guardian. In some of the western countries, the concept of a "mature minor," i.e., a minor who is mature enough to understand the repercussions of the medical procedures he undergoes, is well recognized, although the same has not gained acceptance in India. Cosmetic surgeons must be extra cautious in dealing with patients who, although minors, may represent themselves to have attained majority, since the onus of ascertaining whether the patient is a minor or a major is on the doctor. The argument gaining momentum in the West, especially in America, is that children should not be exposed to cosmetic surgery unless it is found to be medically necessary.[89] Cosmetic surgeries on minors suffering from cognitive disabilities bring in further ethical considerations for cosmetic surgeons. For children with disabilities, the cosmetic surgery undertaken may be psychologically beneficial for the parents, like, for instance, facial plastic surgery on children suffering from down syndrome may ultimately benefit the parents who would like the world to perceive their children as 'normal,' but the children operated upon may never be in a position to appreciate the advantages of such surgery. In such circumstances, whether a cosmetic surgeon

89 Derrick Diaz, 'Minors and Cosmetic Surgery: An Argument for State Intervention' (2012) 14 *Depaul Journal of Health Care Law* 235

should look into the risks and benefits associated with the surgery from the perspective of children or their parents before securing their informed consent is a question worth looking into.[90]

Some of the issues related to consent that are faced by patients and doctors and the differences between traditional therapeutic medical treatment and aesthetic surgeries, as pointed out herein before, merit additional safeguards for the doctor as well as the patient for increased disclosure and informed consent requirements.

CONCLUSION

Cosmetic surgeries and enhancements are one of a kind for more reasons than one. The purposes for which people undergo cosmetic surgeries are diverse. While a pathological test may reveal that a person is suffering from hyperthyroidism or that one has high or low blood sugar, it is extremely difficult to ascertain what makes an individual aesthetically beautiful or what ensures that they have attained the ideal weight. Such norms and standards that individuals set for themselves are highly subjective, which makes it a herculean task for cosmetic surgeons to ascertain what a patient hopes to achieve by a particular cosmetic or aesthetic intervention. Securing valid consent is a *sine qua non* in all medical surgeries and procedures. Cosmetic surgeries and procedures are no exception. From the standpoint of the doctor, a valid consent acts as a valid defence and prevents legal complications that may arise in case the patient alleges that he or she was subjected to treatment without consent. A patient, also, stands to benefit from a valid consent. Since the consent form is supposed to include all the details about the intended treatment or surgery, any deviation from the same can be brought to the attention of the doctor, and legal remedy may be sought. The importance ascribed to consent in cosmetic procedures is further magnified when the liability that a doctor can attract for treating a patient without consent is considered.

90 See Douglas J. Opel and Benjamin S. Wilfond, 'Cosmetic Surgery in Children with Cognitive Disabilities: Who Benefits? Who Decides?' (2009) 39 The Hastings Center Report19

One must also be conscious of the issues associated with the securing and giving of informed consent in cosmetic surgeries, both from the perspective of doctors and patients and efforts must be made to remedy the same. For the differences that exist between cosmetic surgeries and therapeutic medical interventions there is a heightened need for prior communication and consultation between the doctor and patient, pre-procedure investigations, photo-documentation and the recording of consent that is well-documented, before the commencement of the procedure

Adequate information disclosure that allows a patient to make an informed choice is an unassailable element of the consent procedure. So far, the *Bolam Test* of English import has been adopted by Indian Courts in assessing standards of information and risk disclosure in cases of alleged medical negligence, which requires doctors to adopt a paternalistic stance and give patients the minimum level of information required to consent to treatment. There has been a change in this standard in the United Kingdom post the decision of the Supreme Court in *Montgomery* v. *Lanarkshire Health Board.*[91] This case departs from the standard laid down by the House of Lords in *Bolam* and enjoins upon the doctors to give details of all "material and significant" risks associated with any suggested line of treatment or the alternatives proposed before securing consent.[92] This shift demands an approach to be adopted by medical professionals that requires them to consider information disclosure from the standpoint of a reasonable and prudent patient - a patient centered approach, initially espoused by the United States Courts of Appeals, District of Columbia Circuit in the case of *Canterbury* v. *Spence.*[93]

In India, doctors have been held guilty of deficiency in service for failing to make adequate disclosures to patients before taking consent. In cosmetic procedures, information and risk disclosure assumes great importance since

91 [2015] UKSC 11

92 Albert Lee, 'Bolam' to 'Montgomery' is result of evolutionary change of medical practice towards 'patient-centred care' *Postgraduate Medical Journal*, Vol. 93, 2017, pp. 46–5.

93 1972 [464] Federal Reporter 2d. 772

patients may choose to not undergo a purely elective surgery if they find that the risks far outweigh the benefits they would derive from it. On the other hand, even if they decide to undergo an otherwise risky procedure, patients have the right to be informed of all consequences that their bodies are likely to face. Cosmetic surgeries also present unique challenges to doctors, since patient autonomy largely governs the practice and drives it and leaves little room for information imbalance between the parties. Moreover, patients of cosmetic surgeries squarely fall within the purview of the Consumer Protection Act, 2019, which has granted statutory recognition to information disclosure by the service provider by identifying deliberate withholding of relevant information from the consumer as a ground for deficiency in service.

In *Samira Kohli* v. *Dr. Prabha Manchandha,*[94] the Supreme Court acknowledged the shift towards the disclosure standards laid down in Canterbury, but continued to apply the *Bolam* test taking into account the ground realities in India where the overwhelming majority continues to be ignorant about medical science and treatment alternatives. Elective cosmetic procedures are voluntarily opted for by patients to alter the outward show of an otherwise 'normal' bodily feature. They are usually better informed about the procedure they want to undergo, unlike patients who submit themselves to the doctor's judgement to treat ailments they are afflicted with that often surface with no prior warning. With the commercialization of the medical field in India, a move towards greater information disclosure for all medical procedures is required, but the need is further heightened for the field of cosmetic surgery, and this should be formally recognized by the legislature as law, to safeguard the interests of both patients and doctors.

94 (2008)2 SCC1.

The Hyundai Model: A Quasi-Leviathan in The Making

Nikita Shah

Abstract

Hyundai Motor Company which started off as a small fish in a big sea (Hyundai Conglomerate) paved its way out successfully and established itself as an independent group from the conglomerate. Hyundai, with its officious power across the globe and, particularly, in South Korea in the automobile industry, has one of the most complex yet fascinating governance structures. Being the second largest contributor to the GDP of South Korea after Samsung and having a market share of 51.3% domestically in the automobile industry, Hyundai has faced its share of criticism owing to its anti labor union approach and, also, owing to its internalization of supply chain management. The paper focuses on the growth of Hyundai and its inward and outward investment structure. The paper questions the ability of Hyundai to become a mega corporation by focusing on its governance structure. The paper further elaborates on its compliance and disclosure regime in the field of Corporate Social Responsibility and explores how far the business structure adopted by Hyundai works in its favor to become one of the leading automobile contenders in the market.

Keywords: *Compliance regime, Disclosure regime, Hyundai Motor Company, Supply-chain management..*

CHAPTER I : INTRODUCTION

The traditional global framework saw a dominance of looking to a democratic institution for defining an stable state. The medium of expression to exert authority by the state was attributed exclusively to law. The policy framing and regulations were defined within the boundaries of state-defined law. The actual realization of the second phase of globalization which was initiated post Second World War started diminishing the excessive reliance on a state

governed entity.[1] Breaking the traditional boundaries, private and public enterprises swiftly moved out of the state precincts and started operating at an international level. The internationalization of national entities has created a conflict between the regulatory approach adopted within the confines of the state defined law and regulatory approach driven by the norms operating on the institutions within, between and beyond the state.[2]

The process of globalization paved the way for enterprises to become polycentric[3] and, hence, started transcending beyond national laws. Most of the multinational corporations started framing their own rules of governance or bowed down to the global economic regulations. However, the strong framework of national law as a regulating approach, instilled amongst the policy makers, led to the dwindling reliance on growing international regulation standards, in spite of them being plagued with inconsistency and unenforceability.[4] The overpowering skirmish between regulatory approaches has missed the mark. The main challenges faced by the world order with multinational corporations might not be MNE themselves, but could be the immense power they have come to achieve as a result of transnational supply and production chains, or it could be attributed to them becoming self-regulators,[5] There are two schools of thought, one which emphasize on these transnational organizations being the subject of regulation which must be achieved by domestic laws adapting to

1 Jim Sheffield, Andrey Korotayev, Leonid Grinin, 'Globalization: Yesterday, today, and tomorrow' <https://www.hse.ru/data/2013/05/23/1299088719/Globalization.pdf> accessed on 05/02/2019.

2 Fabrice Henard, Leslie Diamond, Deborah Roseveare, 'Approaches to Internationalisation and their Implications for Strategic Management and Institutional Practice' (2012) <http://www.oecd.org/education/imhe/Approaches%20to%20internationalisation%20-%20final%20-%20web.pdf> accessed on 05/02/2019.

3 Larry Kata Backer, 'Harmonizing Law in an Era of Globalization: Convergence, Divergence, and Resistance' (2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1026723> accessed on 05/ 02/2019.

4 Ibid

5 John Gerald Ruggie, 'Multinationals as global institution: Power, authority and relative autonomy' <https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12154> accessed 05/04/2018.

changes as per international movement.[6] The opposers of this view think that the reliance of policymakers on law as an instrument of regulation is overrated, and law no more enjoys the monopoly[7] as the only instrument of regulation.[8]

The trans-nationalization and globalization have weakened the old law making monopolies, and powerful non-state actors have superseded these rule-making monopolies in their influence on the world order.[9] These non-state actors have given rise to a parallel system of rulemaking vis a vis a formal rule making system.[10] This system finds its progression in the behavior of the participants and is characterized by self-awareness, a guild-like entity which also interacts with formal legal systems through which they sometimes find expression.[11] One of the significant non-state actors in this private law making is the multinational corporation. This influential non-state actor has hazed the source of the development of international order.[12] The significance that geography once held in the political setup has diminished with increased globalization, and distances have lost their meaning.[13] The private entities have

6 See: The civil society and the developed state take this view "Global Movement for a Binding Treaty." Treaty Alliance, 'Global Movement for a Binding Treaty' <http://www.treatymovement. com/#/#> accesses on 05/08/2018. Also see: Statement to the Human Rights Council in Support of the Initiative of a Group of States for a Legally Binding Instrument on Transnational Corporations, Sept. 13, 2013 <http://www.stopcorporateimpunity.org/?p=3830; accessed on 05/04/2018. U.N. Human Rights Council, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/26/L.22/Rev.1 (24 June, 2014).

7 Ibid

8 Ibid

9 Larry Kata Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator' (2007) CONNECTICUT LAW REVIEW 39(4). Accessed on 06/12/2020.

10 Ibid at 1749; Bruno Simma & Dirk Pulkowski, Of Planets and the Universe: Self-Contained Regimes in International Law, 17 EUR. J. INT'L L. 483, 492 (2006).

11 Ibid at 10

12 Ibid. Whether it is being sourced through legal norms by political processes or by the behavior of the participants that constitute non-state actors.

13 Walter B.Wriston, The Twilight Of Sovereignty: How The Information Revolution Is Transforming Our World, 61-62 (1992).

moved beyond the boundaries and have a momentous bearing on the relation between the states.[14] The duties that a multinational (mega) corporation has come to perform have muddled the distinction between the state and the corporation. Nation state[15] as a concept has evolved to also include the growth of mega corporations. These mega corporations are characterized by tremendous economic power, bearing heavily on the economy of the state, engaging in "diplomatic" and 'legislative activities,[16] economies of scale, influencing the monetary policies[17] and a centralized monitoring and control mechanism.[18] Certain questions which seemed absolutely naïve a couple of years ago have seemed to gain prominence today. For instance, what is the impact multinational corporations have on the economies of the nations? What is the impact of a multinational on the environment? What is the impact of a Multinational on the wages of its employees, its suppliers, and on the industry? What is the impact of multinationals on the employment measures of the country? The answers to these questions point towards the scale on which a multinational operates, and whether that multinational is fit to be called as a mega corporation. The initial understanding of mega corporation meant a conglomerate which had a monopolistic control in multiple markets and had a presence in both the horizontal and vertical production and supply chains.[19] The mega corporation was characterized as extremely powerful, with its private armies, having a sovereign territory, and a vertically integrated supply chain,

14 Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129 (2008) <https://digitalcommons.mainelaw.maine.edu/mlr/vol60/iss1/4>

15 Putting aside the technical difference between nation and state, the author treats them as synonyms.

16 Ibid at 15.

17 https://core.ac.uk/download/pdf/234110848.pdf

18 https://elibrary.gnlu.ac.in:2111/stable/pdf/40751857.pdf?ab_segments=0%252Fbasic_SYC-5187_SYC-5188%252F5188&refreqid=excelsior%3Af4ccd249dd1e9e544a31ee1d476d6e02The Essence of the Megacorporation: Shared Context, not Structural Hierarchy Sumantra Ghoshal, Peter Moran and Luis Almeida-Costa

19 Arthur Weststeijn, 'The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion,(2014) Cambridge University Press 38(1)

and could easily usurp the law.[20] For instance, the Dutch East India Company[21] was established as a trading company which diversified itself into multiple businesses and had a private army to look after its empire.[22] However, the modern-day mega corporations might not possess all the characteristics of the early mega corporations but do resemble them in the power they have come to exert on the economies of the state, with their widespread influence on people at large, as well as their instrumental role in policy making. The modern mega corporations do not have private armies to protect their economy; instead they protect it by monopolizing law-making in order to protect their empire. The modern day mega corporations cannot usurp the law, but to a great extent, they define law-making and work hand in hand with the government.

The process of internationalization[23] has incentivized the companies to shift from its gradual process, which has been argued by some scholars as being 'dead,' and instead adopt rapid internationalization. The intertwining concept of "born global" and "accelerated internationalization" theory is not without problems. This paper shall spell out the problem posed by this process using a large dragon multinational as a case study.

The rapid development of East Asian Economy has profoundly provided the best-case studies to coherently analyze the role of Multinational Corporations in acquiring the character of mega-corporations in light of the power they have come to possess owing to their size and their economic impact on the economy and on the world. The case study of Hyundai Motor Company is a perfect example and demonstrates its presence by the power it has come to exert on

20 Ibid.

21 Desjardins, Jeff (12 December 2017). "How today's tech giants compare to the massive companies of empires past." <https://www.businessinsider.com/how-todays-tech-giants-compare-to-massive-companies-of-empires-past-2017-12?IR=T>

22 Ibid

23 See: Internationalization is defined as the process of adapting firms' strategies, structures, operations and resources to international environments (Calof and Beamish 1995)). Romeo V. Turcan, 'De-internationalization: A Conceptualization' <https://www.researchgate.net/publication/228240827_De-Internationalization_A_Conceptualization> accessed on 05/09/2019.

the economy of South Korea, and it has become an entity with weight and content in the automobile industry world-wide.[24]

The story of rags to riches is best suited for describing the story of Hyundai Motor Company. Hyundai Motor Company came into existence in 1967 with an initiative of Hyundai Engineering and Construction who wanted an entity to assemble American cars for local consumption.[25] In 2005, it became the sixth biggest automaker in the world and one of the biggest competitors to some of the most established brands in the automobile sector.[26] In 2006, it showed a tremendous performance in sales and, also, in the sales to employment ratio.[27] The Hyundai Motor Company was a part of Hyundai Motor Group which existed as a chaebol in South Korea.[28] Chaebols are defined as "a business group consisting of large companies which are owned and managed by family members or relatives in many diversified business areas.[29] The Hyundai Chaebol that came into existence in the late 1950s was established by a member of the Chung family with the aid of the government. The government support proliferated in the form of grants, preferential tax treatment and disposing of government owned properties.[30] Hyundai Chaebol was a financial conglomerate which was marked by a circular shareholding of the Chung Family members.[31] The fight between the second generation directors of the Chung Family, which was also called as 'Strife of Princes' led to the breaking off of Hyundai Motor Group

24 The Economist, 'South Korea automotive, Key player- Hyundai Motor Group' <http://www.eiu.com/industry/article/1675316951/key-player-hyundai-motor-group/2017-04-12> accessed on 05/11/2018.

25 William J. Holstein, 'Strategy+Business' (2013) <https://www.strategy-business.com/article/00162?gko=8346f> accessed on 05/08/2019.

26 Ibid

27 The Economist, 'The Retreat of the Global company' (2017) <https://www.economist.com/briefing/2017/01/28/the-retreat-of-the-global-company> accessed on 05/09/2019.

28 Ibid

29 Gyubin Choi, 'North Korean Refugees in South Korea: Change and Challenge in settlement support policy' <file:///C:/Users/SHREYA/Desktop/kjis016-01-04.pdf> accessed on 05/27/2019.

30 Ibid

31 Ibid at 14

from Hyundai Group in 2000.[32] The Hyundai Motor Group was formed with Mong-Koo Chung as the Chairman.[33]

In view of the preliminary comments above, the assumption that one begins with is that Hyundai Motors, having been regulated initially, has come to achieve the power to self-regulate itself. This paper has been divided into five chapters. The first and second chapters shall deal with the legal and organizational structure adopted by Hyundai Motor Group in its operations. The chapters shall critically discuss the structure it has adopted to penetrate the boundaries of other nations. It shall focus on the process of internationalization that has been embraced by Hyundai Motor Company to gain wide access to the international markets and shall, also, analyze the downside of its strategy to acquire control in other territories. It shall, also, discuss the circular shareholding pattern that forms the dominant regulatory structure within the Hyundai Motor Group. The third chapter shall deal with the inward and outward regulatory confines that promote or restrict the expansion of Hyundai Motor Group at international fora. This shall be further illustrated by the disclosure and compliance regime that has persuaded the company's expansive scope to be limited or made broader. It shall set out the change in policies that has been brought about by the company at its central level due to the changes in the laws at the subsidiary country's level and, contrastingly, the changes that have been brought at the central level which have percolated to its subsidiaries. The fourth chapter deals with how 'soft' law has transformed the internal regulation of a company, and how far Hyundai Motor Group adhered to the 'soft' law by imbibing changes in its internal regulation. This part deals with how Hyundai on various occasions has observed CSR policies in its functioning and how, on various occasions, it has dishonored it owing to its own interests. The fifth part of the paper shifts the focus of Hyundai Motor Company from 'being regulated' to how HMC itself regulates its supply chains, manifesting itself as a modern 'guild'[34] like entity.

32 Ibid at 14

33 Ibid at 14

34 The ancient guild meant a commercial group of entities acting like a self-sufficient entity which is capable of managing its own affairs, legislating its own rules and governing its own

CHAPTER II: ORGANIZATIONAL STRUCTURE

Korea witnessed a dark, rough patch of economic crises in the 1990s, which could partly be attributed to the unavoidable economic turmoil that Asian economies were undergoing and partly to the mechanism of business functioning within Korea.[35] A wide range of literature got attracted towards the corporate governance mechanism prevalent in Korea and drew major disparagement from all perspectives.[36] The Chaebol system which drew major inspiration from Confucian ethics, which was Korea's State Religion, has spilled over substantially into the management styles of Chaebols.[37] The Confucian social system was hierarchical, where the power trickled down from the father to the eldest son.[38] The same structure is analogous to the corporate structure within Chaebols, where the chairman is the sole authority, and all the power filters through him to the lower employees, constituting a top-down hierarchical structure.[39] The Hyundai Motor Group depicts the same top-down hierarchical structure.[40]

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employees. It was characterized as a close-knit Community which is transparent, yet not transparent, and does business extremely secretively and has a very centralized decision-making system; and it is very powerful, has an extremely high shock absorbent capacity and loyalty and innovation work hand in hand for them. Epstein, S.R.; Prak, Maarten, eds. (2008). Guilds, Innovation and *the European Economy,* Cambridge University Press.

35 See: 90% of the economy GDP was coming from 30 chaebols, which shows the immense power of chaebols in the functioning of economy of Korea. Iain Marlow, 'South Korea's chaebol problem' <https://www.theglobeandmail.com/report-on-business/international-business/asian-pacific-business/south-koreas-chaebol-problem/article24116084/> accessed on 05/15/2019.

36 Ibid at 12

37 Ibid at 12

38 Ibid at 12

39 Author's views.

40 Russell D. Lansbury, 'Globalization and Employment Relations in the Korean Auto Industry: The Case of the Hyundai Motor Company in Korea, Canada and India' <https://www.tandfonline.com/doi/full/10.1080/19761597.2016.1207423> accessed on 05/10/2019.

The corporate governance structure of Hyundai Motor Group is based on the traditional system of corporate governance, an "insider dominated framework."[41] This framework is dominated by no, or very little, separation of corporate ownership and corporate control. The insider dominated corporate governance of Hyundai Motor Group is owned and controlled by the close-knit Chung Family.[42] The word Chaebol means wealth clan, wherein the rich man becomes the head of the clan,[43] and this was also prevalent in Hyundai Motor Group headed by Chung Family.[44] The other dominant feature of Chaebol, which was also dominating in HMG, was the strategy of centralizing production as much as possible with complete opaqueness to the outside and the least influence of external management in the working of the Chaebol.[45] The process of integration was kept close knit to exert direct say in process, setting prices as well as determining the adaptions in supply chain management. In order to keep the outside interference to a bare minimum and exert maximum control over the supply chain, HMG sourced all the products from its own companies.[46] The board of all companies under the Chaebol predominantly constituted a tight network of people the Chung family could trust and over whom they could exert their influence. The control exercised by Hyundai over their supply chain was so absolute that they could also dictate the speed of delivery, the prices right down to the supply chain, as well as the production of raw materials, and also determine the logistics. The Hyundai Motor Group adopted an equity-based approach, wherein the subsidiaries of Hyundai Motor Company in other nations represented a closely controlled group of companies

41 Jill Solomon, Aris Solomon and Chang-Young Park, 'A Conceptual Framework for Corporate Governance Reform in South Korea' <https://onlinelibrary-wiley-com.ezaccess.libraries.psu.edu/doi/epdf/10.1111/1467-8683.00265> accessed on 05/05/2019.

42 Ibid

43 Carlos Tejada, 'Money, Power, Family: Inside South Korea's Chaebol' <https://www.nytimes.com/2017/02/17/business/south-korea-chaebol-samsung.html> accessed on 05/14/2018.

44 Ibid at 25

45 Ibid at 25

46 Ibid at 18

which were allied with the parent company by way of shares and intermediate subsidiary companies.

As held by OECD, "a foreign subsidiary may be seen as having relatively little autonomy if it belongs to a large multinational group established in many foreign countries, if it manufactures fairly standardized products, if the activities of the members are largely integrated, and if the parent company holds a large portion of the equity."[47] The other noteworthy feature of Hyundai Motor Group Chaebol is the circular shareholding structure.[48]

A major reason for the swift expansion of Hyundai Motor Group could be credited to the cross-shareholding structure, as can be seen in Figure 1.[49] Under the cross-shareholding structure, each subsidiary that forms a part of the group holds some percentage of stakes in the others, thereby restricting the founding family owner's stake to a minority in the controlling company.[50] The interlink of subsidiaries facilitate the movement of funds within the group as well as incentivizes the group to establish a new subsidiary by merely pulling out the money from another subsidiary instead of raising funds from scratch.[51] Notwithstanding the minority stake of the holding family in the controlling entity, they enjoy considerable influence over each subsidiary.[52] The Chairman Chung Mong Koo holds 6.96% stake in Hyundai Mobis which, in turn, holds 20.8% in Hyundai Motors in which Chung Mong's stake is 3.99%. Hyundai Motors holds 33.9% stake in Kia Motors which holds 16.9% in Hyundai

47 Korean LII, 'Circular shareholding' <http://r.search.yahoo.com/_ylt=AwrgEaLHXwlb WloAOVE36At.;_ylu=X3oDMTByaDNhc2JxBHNlYwNzcgRwb3MDMQRjb2xvA2dxMQR2dGlkAw--/RV=2/RE=1527369799/RO=10/RU=http%3a%2f%2fwww.koreanlii.or.kr%2fw%2findex.php%2fCircular_shareholding/RK=2/RS=Xx7XGP0HvmjjWHVlPd7Bo.tEECs-> accessed on 05/15/2019

48 Ibid

49 Global Capital, 'Can Park Geun-hye peel back the chaebol's power 18 Mar 2013 <https://www.globalcapital.com/article/k33lqspsr12l/can-park-geun-hye-peel-back-the-chaebols-power> accessed on 05/08/2018.

50 Ibid

51 Ibid at 34

52 Ibid at 34

Mobis.[53] Chung does not hold any stake directly in Kia Motors which is why Kia's position is lower in the group structure.[54] Even though Chung enjoys minority shareholdings in the entities, the decision making in Hyundai Motors is essentially centralized, and Chung enjoys excessive influence in the subsidiaries of Hyundai Motor Group which reinforces the hierarchical structure of Hyundai Motor Group. This can be exemplified by the fact that, in 2003, even though Chung Family members owned only 4.8% shares, they enjoyed 31.9% of voting rights.[55] There are some firms in the group which are owned directly by Chung Mong Koo; for e.g., Glovis.[56]

The Hyundai Motor Group's equity investment structure can be understood by Figure 2. It is a combination of two forms: circular equity investment structure, which has been dealt with above, and vertical equity investment structure in which Hyundai Steel does not form a part. In this vertical structure, the automakers and module makers separately hold and finance the subsidiaries under them to maintain strong and stable relationships with their affiliates.[57] Hyundai Motor Group, with its centralized and integrated production system, has promulgated the strategy to produce products itself and enjoys direct say in the process, sets target prices and adapts to supply chains.[58] This furthers the centralization of decision making within Hyundai Motor Group and results in waning of separation between ownership and control.

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53 Ibid at 34

54 Gregory W. Noble, 'Fordism Light: Hyundai's Challenge to Coordinated Capitalism' [2010] BRIE Working Paper 186. Figure 1.

55 Ibid

56 Heitor Almeida, San Yong Park, Marti Subrahmanyam, Daniel Wolfenzon, 'Valuation and performance of firms in complex ownership structures: An application to Korean chaebols 21 March 2007 <http://w4.stern.nyu.edu/finance/docs/pdfs/Seminars/071f-almeida.pdf> accessed on 05/15/2018

57 Kim Woojin, 'An analysis on the low-cost production system of Hyundai Motor Company focused on Wage-Labor Nexus' <http://www.jspe.gr.jp/files/36kim-p.pdf> accessed on 05/17/2018

58 Chan K. Hahn, Edward A. Duplaga, Janet L. Hartley 'Supply-Chain Synchronization: Lessons from Hyundai Motor Company <https://pdfs.semanticscholar.org/2e03/8ed95f07e20d91ca5ed864df975b2891626a.pdf> accessed on 05/17/2019.

CHAPTER III: LEGAL STRUCTURE: INWARD AND OUTWARD INVESTMENT

The legal structure adopted by Hyundai Motor Group to enter into the global phase of expansion can be divided into two perspectives: host state control over inward investment, which takes place at the stage of entry and the post entry stage, and home state control over outward investment.

The year 1987-88 saw a revamp in the Hyundai Motor Company by Se Young Chung who shifted the focus of the organization from a functional to a divisional organization.[59] This induced motivation in the management and an ability to cope with a diversified market. This ideology was followed by his son Mong Chung who became the Chairman of Hyundai Motor Group. The first phase of globalization was seen with the establishment of Hyundai Motors America in 1985 as a wholly owned subsidiary of Hyundai Motor Company.[60] The adoption of wholly owned subsidiary model to penetrate the international market was to endorse the culture of Hyundai group which focused on centralized decision making.

It was in 1988 that HMC decided to build a manufacturing plant in Quebec to assemble cars for the American Market.[61] However, heavy reliance on Korean sub-contractors, as well as strategy development for America being developed in Korea, were analyzed as impediments for the growth of HMC and, consequently, led to the declining sales of HMC in American Market.[62] In addition to the already existing problem, Hyundai had to overcome and adapt to the change in the trade conditions in the US with introduction of NAFTA

59 UKESSAYS, 'Growth And Change Management In Hyundai' <https://www.ukessays.com/essays/business/growth-and-change-management-in-hyundai-business-essay.php> accessed on 05/04/2019.

60 Myeong-kee CHUNG, 'Globalization Strategies of Korean Motor Vehicles Industries: A Case Study of Hyundai' <http://gerpisa.org/ancien-gerpisa/actes/22/22-5.pdf> accessed on 05/14/2019.

61 Ibid at 24

62 Ibid at 24

and EU.[63] Hyundai, in order to achieve economies by cutting labor costs, opened offshore manufacturing in South East Asia. India, which had recently undergone liberalization, was open to investment from foreign companies and, also, became a target of Hyundai due to cheap labor, and a wholly owned subsidiary was set up in Chennai in 1997.[64] Localizing assembling plants close to the target market had become the most viable way for the companies to escape the encumbrance of tariffs and shipping costs. This could be best achieved by either entering into joint ventures with a local partner or establishing a wholly owned subsidiary. Hyundai Motor Company most often preferred the wholly owned subsidiary model, in line with the culture at the central management in Korea which demanded high level of control and did not face substantial resistance from any host country at the entry level except in China. Owing to substantial flexibility of all states at stage of entry, and least control exercised by the host country over Hyundai Motor Group subsidiaries, including in China, HMG was allowed to assume its "Asian Plant" style of production in their plants which was being used in their domestic plant in Korea.[65]

Post Hyundai's successful attempt to enter into Europe, India and America by way of setting up wholly owned subsidiaries, it directed its attention to China. However, due to legal regulations in China, it faced resistance in following its established wholly owned subsidiary model to keep strict vigilance and control over the subsidiary. To ensure the benefits percolate to its economy and state-owned enterprises, the central government mandated the foreign automakers to form a joint venture with a cap of 50% ownership with no more than two SOEs.[66] The ownership regulations in China posed an impediment to the success of HMC's expansion spree which was dominated by maximum control by the parent company. The mandate by the Chinese government created an

63 Ibid at 24

64 Ibid at 24

65 Ibid at 24

66 Nicholas C. HOPE, FAN Gang, 'The Role of State-Owned Enterprises in the Chinese Economy <https://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf >accessed on 05/27/2018.

"obligated embeddedness" on the foreign automakers whose success depended on the Chinese partner.[67] The Hyundai Motor Company formed a 50-50 joint venture with Beijing Automotive Holding Corp called Beijing Hyundai.[68] The extent of control exerted by the Chinese government could be gauged by the drop in sales of HMC China by 50% with four plants ceasing production when the issue of THAAD arose between China and South Korea.[69] From this, it could be inferred that Chinese government exercised immense control on the commercial activities of foreign subsidiaries, undermining the control of HMC Korea (refuting the deep embedded insider-dominated corporate governance structure). China, being the host country, posed obstacles for Hyundai Motor Company at pre-entry as well as post entry phase.[70]

Law governing the subsidiaries: The foreign subsidiaries of Hyundai Motor Company are governed by general laws of the country where the subsidiary is established. In Carlson v. Hyundai Motor Company,[71] the personal jurisdiction governing the Hyundai Motor Company was raised in question. The HMC submitted itself voluntarily to the jurisdiction of District court of USA,

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67 Weidong Liu and Peter Dicken, "'Transnational Corporations and 'Obligated Embeddedness': Foreign Direct Investment in China's automobile industry" Environment and Planning A, industry' (Vol. 38, No. 7 (, 2006), pp., pages 1229 – 1247;) < http://journals.sagepub.com/doi/10.1068/a37206> accessed on 05/13/2018; Victor F.S. Sit and W., Weidong Liu, "'Restructuring and Spatial Change of China's Auto Industry under Institutional Reform and Globalization," Annals of the Association of American Geographers, Globalization' (Vol. 90, No. 4 (, 2000), pp., pages 653-673) < https://www.tandfonline.com/doi/abs/10.1111/0004-5608.00216> accessed on 05/13/2018.

68 Hyundai Motors, 'Globalization strategy 1967-2013' <https://www.slideshare.net/NomieFrontre/research-project-hyundai-group-globalisation-strategy> accessed on 05/17/2018.

69 See: THAAD = Terminal High Altitude Area Defense. It is basically a missile weapon system and the United States deployed a battery of the THAAD weapon system in South Korea. Lockheed Martin, 'THAAD- Terminal High Altitude Area Defense' < https://www.lockheedmartin.com/en-us/products/thaad.html> accesses on 05/ 22/2018.

70 Seung-Youn Oh, 'Fragmented Liberalisation in the Chinese Automotive Industry: The Political Logic behind Beijing Hyundai's Success in the Chinese Market' (The China Quarterly 216, 2013: 920-945F) <https://repository.brynmawr.edu/cgi/viewcontent.cgi?article=1030&context=polisci_pubs> accessed on 05/22/2018.

71 Carlson v Hyundai motor Co. 164 F.3d 1160)8th circuit 1999

conforming to the law of the land. In addition, HMC has a legal department in Korea which deals with foreign issues comprising of pre-entry and post entry. Correspondingly, the foreign subsidiaries have their own legal departments to deal with post entry issues which are governed by the subsidiary countries' laws.

CHAPTER IV: DISCLOSURE AND COMPLIANCE REGIME

The Hyundai Motor Company's disclosure regime has been of importance particularly in respect of carbon emission, since it is an automobile industry and, hence, faces tremendous pressure from global investors to reduce the carbon emission. It has been a voluntary party to the carbon disclosure project which requests disclosure on carbon risk and management from the 500 largest global companies.[72] As per the report released by CDP in 2016, Hyundai has faced severe slamming, being addressed as laggards with E grades in the area of supporting low carbon regulation, grade D in fleet emission and overall C grade in performance, as can be seen in Figure 3.[73] However, this is in contrast to what has been disclosed by Hyundai Motor Company in its sustainability report in 2017, where it disclosed that it has earned an A grade in carbon disclosure project for the year 2016.[74] The CDP grades the companies on various performance indexes; however, it remains unclear as to which index mentioned in the sustainability report has Hyundai graded as A.[75] This shows the inaccuracy and ambiguity of Hyundai in maintaining and reporting disclosures. Moreover, the non-submission of information or failure to disclose their data on water score has attracted an F grading by CBP in water issues.[76] Kia Motors, which is another main subsidiary in the Hyundai Motor Group, is one of top 16 automakers which have failed to respond to the climate change

72 Katie Southworth, 'Corporate voluntary action: A valuable but incomplete solution to climate change and energy security challenges' <https://www.tandfonline.com/doi/full/10.1016/j.polsoc.2009.01.008> accessed on 05/10/2018.

73 CDP, 'The A List' <https://www.cdp.net/en/scores-2016> accessed on 05/18/2019.

74 Won Hee Lee (President and CEO), '2017 Sustainability report' <https://csr.hyundai.com/upfile/report/sar/Sustainability_Report_en_2017.pdf> accessed on 05/11/2019.

75 Ibid at 34

76 CDP, 'The A List' <https://www.cdp.net/en/scores-2017> accessed on 05/18/2019

questionnaire and, thereby, were being graded F.[77] The sustainability report of Kia Motors has failed to disclose its non-adherence to the climate change disclosure as required by CDP.[78]

However, even though Hyundai has been struggling to adhere to the carbon regulation standards, its efforts could be seen in minimizing greenhouse emissions by switching to eco-friendly vehicles. It has simultaneously been trying to enforce low-carbon business policies and integrating them within its production and sales network, percolating to its subsidiaries in other nations as well, which can be seen in figure 4.[79] Moreover, adoption of Hyundai Blue Drive, which focuses on development of ecological vehicles and technology to sustain low carbon emissions and minimize fuel consumption, shows their drive towards environmental preservation.[80]

The other instance of Hyundai's response to the disclosure regime is the adoption of International Financing Reporting Standards which constitute the "harmonized financial reporting requirements for multinational groups."[81] The adoption of IFRS standards for accounting disclosures satisfies the national corporate disclosure requirements of various states and, hence, is a widely celebrated mechanism internationally for accounting disclosures. Hyundai, which used K-GAAP, the general accounting standard in Korea, adopted K-IFRS in 2011, to make business more conducive for foreign investors and to have an accounting mechanism in line with international standards.[82] In line with the

77 Ibid.

78 Ibid at 34

79 Hyundai, 'CSR' <https://csr.hyundai.com/ta_300_01.do?CSR_LOCALE_PARAM=en> accessed on 05/18/2019

80 Ibid at 60

81 Katta Ashok Kumar, 'International Financial Reporting Standard (IFRS): Prospects and Challenges' (2014) Account Mark 3:111. doi:10.4172/2168-9601.1000111

82 Rebecca Henderson, 'South Korea's Transition from K-GAAP to IFRS' <https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1162&context=honors-theses> accessed on 05/22/2019.

new accounting law in place, Hyundai Motors maintains its audit committee with 4 non-executive directors and one external auditor.[83]

The corporate governance reforms that gained momentum majorly in the 1990s became a governing point for all the corporates world-wide and focused majorly on maintaining transparency and accountability of these big corporates. The South Korean Securities and Exchange Commission, induced by various corruption scandals, realized the importance of engraining corporate governance reforms within the complex organizational structure of the Chaebol's working and adopted the Fair disclosure rule in 2002.[84] The realization of the shift from government steered corporate governance to shareholder oriented corporate governance made the government to mandate Chaebols to create an external board of directors to address the lack of independence issue and to reassure stronger monitoring and more involvement of shareholders in decision making.[85] The other set of reforms mandated in the Chaebols, which was rightly adopted by Hyundai, was to publish combined financial statements, including of the domestic and overseas firms under its control.[86] Hyundai followed the disclosure regime, as was driven by these reforms adopted centrally by the Korean government, which shows that Hyundai Motor Company did react positively to the disclosure regimes from time to time.[87] Keeping in line with the above reforms, the independent audit committee of Hyundai has the authority to access documents at any time and mandate a director to present reports as and when required and inspect the assets status of the company.[88]

Moreover, the proactive adoption of disclosure regimes by Hyundai has not only limited itself to mandates by the government or external forces, but

83 Ibid

84 Byung S. Min, 'Corporate governance reform: the case of Korea' (2016), 24:1, 21-41, DOI: 10.1080/02185377.2015.1106956

85 Ibid

86 Ibid

87 Nabyla Daidj, 'Strategy-, Structure- and- Corporate-Governance-Expressing-inter-firm-networks/Daidj/p/book/9781472452924 Governance' (2016-Routledge)

88 Ibid

Hyundai has also learnt lessons from its peers and is taking actions based on how laws are applied to the other corporations. For instance, Deloitte Korea which was the second largest accounting firm in South Korea and was working for KIA Motors until 2017 was alleged and, eventually, disqualified for not complying with the laws which induced Hyundai Motors to leak its plan on changing its accounting firm to Deloitte Korea. This leaked plan of switching to a different accounting firm forced the current accounting firm of Hyundai to comply with the law.[89]

The disclosure regime adopted by Hyundai has not only made Hyundai's reach in international markets commendable owing to its adaptability to the stringent disclosure regime in consonance with international requirement, but has also displayed its self-governance in self-regulating itself by complying to the disclosure requirements as mandated by different nations with the presence of Hyundai subsidiary. This will be expounded in the next section, along with how the Company learnt lessons from its other affiliates and brought itself in compliance with the law.

Compliance Regime: This section shall promulgate the changes brought about by Hyundai in its internal regulation due to the change brought about by laws in the host country of its subsidiaries or due to the change in the home country laws, by way of case laws. This section further promulgates how desecrations by subsidiary company can endow liability on the parent company, and how Hyundai Motor Company has embedded those despoliations in its internal regulations to further avoid such violations and remain in compliance with laws of other nations.

In the case of United States of America & California Air Resource Board v HMC and HMA & Ors.,[90] defendants' violation was attributed to the inability of defendants to report road load force in certificates of conformity which led

89 Deloitte Anjin, 'Scandal-hit Deloitte Anjin loses 50 key clients' (19 April 2017) <http://www.theinvestor.co.kr/view.php?ud=20170419000921> accessed on 05/10/ 2019.

90 *United States of America & California Air Resource Board v HMC and HMA & Ors.*

to lower fuel economy and increased emissions of air pollutants than reported, particularly greenhouse gases. The nonconformity resulted from Defendants' improper testing, analysis[91]. The violation that accrued on the level of Hyundai Motors America endowed liability on all other defendants since all form part of Hyundai Motor Group and since the operations are interrelated including sharing testing facilities and personnel the liability was shared by all which can also be illustrated by the organisational structure of Hyundai Motors as explained in the second chapter of the paper.

The settlement that was reached mandated the defendants to pay $100 million penalty, along with corrective measures which included reorganisation of their certification group, revising test protocols, improvement of management of test data, enhancing employee training and forfeiting GNG emission credits.[92] Hyundai Motors, in compliance with these mandates, changed their working, which led to their ranking in reducing greenhouse emission gases[93] from 11 to 3.[94] The change in the governmental policy wherein South Korea ratified the Paris Agreement in 2016, post this case, helped them easily adapt to the policies as they were introduced by the national government since they were already in place.

The next case study deals with how, due to the introduction of policies in the country of their subsidiaries, a change had to be brought in the parent company and, by virtue of that, had to be complied with by all its subsidiaries in other countries.

The European Union had passed a new chemical law called REACH[95] which stood for registration, evaluation, authorisation and restriction of chemicals.

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91 California Air Resources Board v. Hyundai Motor Company; Hyundai Motor America; Kia Motors Corporation; Kia Motors America; Hyundai America Technical Center, Inc. [2014] 1:14-cv-01837

92 Margo T. Oge, Catherine Witherspoon, 'Memorandum of Agreement between EPA and California Air Resources Board' (2004) (3 pp, 204)

93 Figure 5

94 Ibid at 60

95 European Commission, 'Internal Market, Industry, Entrepreneurship and SMEs' <http://ec.europa.eu/growth/sectors/chemicals/reach/restrictions_en> accessed 05/15/2018

Under this legislation, EU had banned the use of four major heavy metals in the territory of European Union. Hyundai Motors, in order to comply with the law passed in the European Union, the country of their wholly owned subsidiary, introduced a chemical substance management system and introduced a database that accumulated all information on chemical materials being used in manufacturing of its vehicles and parts, inside and outside Korea, in order to curb the usage of chemicals not only subjected to EU REACH, but also substances which are likely to be subjected to restrictions in the future, to minimize regulatory risks.[96] In furtherance of mandating the Hyundai Subsidiaries and its parent company to ban the usage of heavy metals in parts and materials in its new vehicles, it created a 'global standard for four major heavy metals' which prohibited such use.[97] This was enforced in the EU for all the new vehicles sold after July 1, 2003, and the prohibition was applied in Korea for new cars sold after 2008 and was further expanded to all overseas markets in 2009.[98] Till date Hyundai remains entirely compliant with this rule. The case study mentioned shows how Hyundai has been forthcoming in adopting and amending its internal regulations to come in compliance with laws passed in other countries and making it, internally, a responsible corporate. Moreover, the steps taken by Hyundai show its concern to the heated hue and cry created about climate change, and rightly so, which, also, shows its compliance to international standards. However, Hyundai as a company has not been all positives specifically in respect of Labor and employee Unionization. Even though there were changes brought by parent company due to organisational change and law being changed in Korea, the subsidiaries did not potentially adopt it. In Korea, due to mass upsurge by Labourers and employees and dominant working of chaebols, government insisted that all chaebols must recognize union of labourers. HMC was mandated to hold talks with Union Movements owing to organisational strength and changes brought about in

96 Ibid

97 Mong-Koo Chung (Chairman), '2013 Sustainability Report' <http://csr.hyundai.com/upfile/report/sar/Sustainability_Report%28ENG%29_2013.pdf> accessed on 05/11/2018

98 Ibid *at 60*

the legislation of Korea.[99] In spite of the mandate by the Korean government to make the Union Movement stronger, Hyundai has always been against forming trade unions. This could be inferred from its failed stint in Quebec, where its first plant was opened, owing to labour disputes, failure of HMC[100] to manage cordial relationship with its managers and employees and to avoid unionization of the plant.[101] The tactics used by Hyundai, though they seemed subtle, became apparent when employees who were thought to be in favour of organizing unions were suspended, transferred or dismissed. Moreover the tactic of 'Silent Majority' adopted by HMC, which propagated pro-company and anti-union strategy, showed the subtle yet significant steps by HMC to avoid unionization.

However, even with the change in laws and mandate on the parent company owing to changes brought about in legislation in Korea, HMC did not allow this to trickle down to the working of its wholly-owned subsidiaries, specifically in India. HMC opened its plant in Tamil Nadu, as the union movement in that area was not apparent or dominant. Hyundai has so far been able to avoid unionization in India as can be expounded by the fact that HMIEU is a registered union, but is not recognized by the Hyundai Motor India Ltd. management, and hence HMI has been able to remain union free.[102] The case study of Hyundai Motors exemplifies the complicated impact on employer-employee relations in the wake of globalization. The interplay of local, global and internal forces within the company shapes the policies adopted by a company when transcending boundaries and establishing its plants in other countries.

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99 See: Furthermore, since the 'democratisation' of Korea in 1987, collective bargaining rights have been extended to unions, and the employers have faced an increasingly unionised workforce. Seoghun Woo, S. 'perspectives 21st Century: Perspectives on Korean….,' Economic and Labour Relations Review, Industrial Relations' (1997) vol. 8, no. issue 1, pp. page(s):22–43.>.

100 Teal, G. (1995) Korean management, corporate culture and systems of labour control between South Korea and North America, Culture, 15(2), pp. 85–103 7

101 Ibid at 24 , Ibid at 39

102 Rajesh Chandramoulil, 'Hyundai Workers form Union' *The Times of India* (Chennai, 11/22/2011)

The above case studies show how Hyundai has been compliant in framing its rules, regulations and internal policies in adherence to the change in globalisation trend and the change in the policies and laws in the host countries which has had the effect of Hyundai bringing in changes in its internal policies of its parent company and has had the effect of adapting its wholly owned subsidiaries to such changes in other countries. Additionally, changes brought about in the parent company, working in response to change in laws of the host country, has also impacted the working of its subsidiaries in host countries which shows the close knit and centralised organisational structure of Hyundai Motor Company.

CHAPTER V: INTRODUCTION TO CSR

Corporate Social Responsibility has achieved a new dimension owing to the much-settled debate now over corporates giving back to society. CSR includes everything and anything that corporate does for the benefit of its stakeholders. The nature of beneficial activity can take any form, voluntary, legal, self-regulatory, all comes within the umbrella of CSR.[103] The expansive scope that CSR has come to achieve has culminated into a new form of corporate governance. This corporate governance is much required owing to the accelerated internationalization which has limited the power of nations, territorially, and also the authority to sanction for want of regulatory power. This new form of corporate governance which has shaped itself into a new form of societal governance[104] has put extra pressure on states to implement CSR in driving its economy, which is being facilitated by these big corporates either by way of self-regulation or collective standards and systems. The limited resources available with states has called for other entities to contribute in achieving social well-being, and rightly so. The mandate of CSR has pursued

103 McBarnet, 'Social Responsibility Beyond Law, Through Law, For Law' (2009) Edinburgh, School of Law, Working Papers<https://www.research.ed.ac.uk/portal/files/14183638/SSRN_id1369305.pdf> accessed 05/18/2018

104 Jeremy Moon, 'The contribution of Corporate Social Responsibility to Sustainable Development' (2007) Volume 15, Issue 5 <https://onlinelibrary.wiley.com/doi/abs/10.1002/sd.346> accessed 05/15/2019

corporations to take into consideration labor policies, employee well-being, etc., which has made these corporations far more answerable and responsible to the people.[105] Moreover, with the power that these corporations have been witnessing and have come to exert, they can be called a mega corporation. Further, this statement holds true in South Korea due to the momentous power and size of the Chaebols and their impact on the economy of South Korea.

Korean Companies' drive towards CSR has been relatively recent. The interplay of various factors like pressure from NGOs, self-interest, profit, etc., has increased the companies' issuing of their sustainability report from 4 in 2003 to over 80 at present.[106] The Federation of Korean Industries (FKI), impelled by deliberations on ISO 26000 indexes, persuaded the Federation to pass a formal resolution to increase the social involvement of its organizational members. Deriving its power from this commitment, FKI formed a CSR committee to monitor Member Companies' social, moral, and legal responsibilities.[107] The awareness of CSR amongst the Korean companies is more or less related to philanthropy. It has been argued that the Korean companies majorly adopt giving of donations in order to cover the practices of corruption and hide the precarious employment conditions.[108]

The move towards CSR has further been fuelled in the direction of green management, owing to Lee Myung-bak administration portraying South Korea as an environment-friendly country. Contrastingly, South Korea's reliance on nuclear energy and building of a dam affecting the ecosystem[109] has raised

105 Ramon Mullerat, 'the Economic Order of the 21st Century' [2010] (*Kluwer Law International* 2009)

106 Tae-Hyun, 'LG Electronics union declares social responsibility of union' <http://www.edaily.co.kr/news/news_detail.asp?newsId=01662966592842312&mediaCodeNo=257> accessed on 05/19/2019

107 BBC News, 'South Korea country profile' <http://www.bbc.com/news/world-asia-pacific-15289563> accessed on 05/19/2018

108 Wol-san Liem, 'Corporations, Unions, and CSR in South Korea' < https://amrc.org.hk/content/corporations-unions-and-csr-south-korea> accessed 05/18/2018.

109 Ibid

arguments about its "go green policy" being a marketing gimmick and, thereby, refuting its stand of being a champion of the environment. The positive move of Korean companies towards CSR is further diluted by the fact that it still remains quite weak in its labor and human rights categories. This is due to the practice of Korean companies suppressing Unions and engaging in unfair practices to dissuade workers to form Unions. This can be illustrated from the example of Hyundai Motor Company which has met with criticism from all corners in all of its subsidiaries for not allowing workers to form Unions or not recognizing the unions. This was apparent from the strikes that were being witnessed at various plants of Hyundai. However, over the period of HMC's membership with Korean Federation of Trade Union,[110] the parent company has moved towards a more inclusive and cooperative approach to maintain employment relations.[111]

The company, in pursuance of becoming a more responsible citizen, implemented an extensive welfare system, trainings were increased, union members were made part of project teams and wages were substantially increased. The benefits were not only given to managers, but also to the Union Members.[112] The move of HMC towards CSR became more apparent when it established its Ethics Charter and Employee Code of Conduct in 2001.[113] The company also introduced Fair Trade compliance program[114] and became a signatory to the UN Global Compact.[115] It has also implemented the Fair

110 Jiyeoun Song, J. 'Economic distress, labor market reforms, and dualism in Japan and Korea' (2012, 25, 415–438) accessed 05/20/2018.

111 Cho, H.J. 'The employment adjustment of Hyundai Motor Company: A research focus on corporate-level labour relations.' Korean J. Lab. Stud. 1999, 5, 63–96.)

112 Ibid at 39

113 Heung-Jun Jung, Mohammad Ali, 'Corporate Social Responsibility, Organizational Justice and Positive Employee Attitudes: In the Context of Korean Employment Relations <file:///C:/Users/Vivan%20Shah/Downloads/sustainability-09-01992.pdf> accessed on 05/20/2019

114 '2013 Sustainability Report' <http://csr.hyundai.com/upfile/report/sar/Sustainability_Report%28ENG%29_2013.pdf> accessed 05/16/2019.

115 Ibid

Trade Agreement with its suppliers, which shall be implemented in three phases.[116] Moreover, it has published sustainability reports which have met the parameters of G3.1 Global Reporting Initiative guidelines and gets the data verified from an outside expert to increase its authenticity.[117] The 2013 report[118] illustrates its commitment towards a comprehensive and collaborative approach to attain business goals, which can be seen from its multi-stakeholder philosophy which promulgates three key approaches: "a sense of unlimited responsibility (signifying stakeholder responsibilities and sustainable growth), the realization of possibilities (signifying imaginative ideas and innovation), and love for humanity (signifying the contribution of humanity)."[119]

The growth of HMC as a socially responsible corporate was not mandated by any specific legislation, but Hyundai has always been proactive in responding to the changing needs in the international community. This can be illustrated by its dominance in the automobile market in the world in such a short span of time. Hyundai has not only contributed philanthropically, but has also adopted mechanisms to control pollution and emissions which remain the major concern of automobile production companies. Moreover, the ability of HMC to self-regulate itself in response to the soft law has marked its image as one of those companies which has not indulged in CSR merely for profit.

The much heated 'dieselgate' scandal that had hit India owing to Volkswagen automobile company manipulating and cheating, with data which showed that cars met the emission norms in a test environment even though the cars running on the road had nine times more emissions than the permissible limit, showed how difficult it was for automobile companies to meet the emission norms as were set by host countries' Environment Protection Agencies.[120] This scandal

116 Ibid at 99

117 Ibid at 100

118 Ibid at 100

119 Ibid *at 39.*

120 Leah Mcgrath Goodman, 'Why Volkswagen Cheated' <http://www.newsweek.com/2015/12/25/why-volkswagen-cheated-404891.html> accessed 05/22/2019

was a follow up to a previous recall in Europe, where it was conceded that 11 million diesel cars were fitted with defeat device to 'greyball' emission norms.[121] Hyundai, in the wake of controversies surrounding the automobile industry, introduced IONIQ a range of eco-friendly car models in order to expand the eco-friendly car market and to maintain environment sustainability.[122] Furthermore, Hyundai started the "Go Green" village adoption program in Tamil Nadu, India, in order to promote environment and forest cover in the state of Tamil Nadu.

Hyundai's stint has not only been active in promoting environment protection schemes, but has also been successful to a great extent in eliminating a much-entrenched problem in the Korean Chaebol market: corruption. The conglomerates in Korea were the main contributors to the GDP of the country, and since government was intervening with the development of the economy, it made economic policies in favor of these conglomerates. In response to the favorable policies by the government, the conglomerates were obligated to submit to the political power by bribing them. The intensity of corruption in the South Korean Market including Hyundai could be witnessed from the arrest of Hyundai Motors head, Chung Mong Koo, in 2006 for embezzling $106 million.[123] With a lack of specific legislation on combating corruption, coupled with failure of existing legal mechanisms, public officials could not control this menace. This was further aggravated when lobbying corruption charges were levied against head of Hyundai Automotive's logistics unit, Glovis, for embezzling funds up to $7.1 million. The Korean Market, including all major conglomerates, was being severely criticized on the international front by all the major stakeholders and other countries.

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121 'Volkswagen submits roadmap on recall of 3.23 lakh cars before NGT' *The Times of India (*New Delhi, 18 Aug 2017)

122 Ibid at 100

123 Choe Sang-Hun, 'Hyundai chief is arrested on fraud charges' *The New York Times* (Seoul, 28 April 2006)

In response to these corruption charges, Hyundai set up a Cyber Audit Office in 2004[124] to collect data and information on all unethical business practices including bribery and corruption and to provide consultations to employees facing ethical dilemma. Under this move, Hyundai had instilled a whistle blowing protection, where the complainant's identity shall not be disclosed under the policy of secret assurance and identity protection assurance. Specific departments were equipped to deal with specific issues related to human rights, labor issues, etc.[125]

With the enforcement of **Improper Solicitation and Graft Act** 2016, it made it illegal for public officials to accept gifts, with a cap of certain amount in wedding or funerals, with the objective of combating corruption.[126] However, owing to the widespread criticism being drawn to Hyundai from stakeholders over bribery charges, Hyundai self-regulated itself much before the act came into being.

Additionally, the signing up of Hyundai, voluntarily, in the UN Global Compact which is derived from UDHR, International Labour Organisation's declaration on fundamental principles on Right at Work, Rio Declaration on Environment and Development, The United Nations Convention against Corruption, etc., shows its commitment to become a responsible corporate in the wake of self-regulation.

The other practices adopted by HMC which shows its commitment to society includes its project Hyundai Hope on Wheels in America, wherein it awards research grants to fight paediatric cancer. This project raised $14 Million in 2014 and has been in existence since 1998. It has not only transformed the fight

124 Hyundai Motor Company, 'Annual REPORT 2002' <https://www.hyundai.com/content/dam/hyundai/ww/en/images/about-hyundai/ir/financial-statements/annual-report/hw026555.pdf> accessed 05/24/2019.

125 Ibid

126 See: Clifford Chance's Asia Pacific Anti-Corruption Group by Wendy Wysong. Wendy Wysong, 'Foreign Legal Consultant (Hong Kong); Partner (Washington DC)' <https://www.cliffordchance.com/people_and_places/people/partners/cn/wendy_wysong.html> accessed 05/25/2019

against paediatric cancer disease by providing funding, but has also brought the entire community of those affected by this cancer together.[127]

Hyundai striving to become socially responsible is exemplified by its rank at 1 in an index measuring CSR among companies in China. It has seen a growth from 17th ranking in 2014, to 3rd in 2016 and 1st in 2017. The program undertaken by Hyundai has been to combat desertification in China's Inner Mongolia and has been, so far, extremely successful in doing so. Kia and Hyundai have not only helped in reconstructing impoverished areas, but have also provided education to children about road safety by conducting after school programs. As part of its efforts, in 2011, Hyundai was able to transform 30 square kilometres of desert into grassland in an attempt to maintain conservation efforts.[128]

CHAPTER VI: SUPPLY CHAIN MANAGEMENT

The supply chain of a company promulgates the functioning of the company, beginning from raw material suppliers, assemblers and sub assemblers, distribution channels and end consumers.[129] The objective of SCM is to coordinate and integrate the information within the supply chain to make it more responsive to the consumers, and at the same time, to reduce the overall cost borne by the company. Attaining synchronization of information at different levels in the supply chain is a grueling task. Supply chain management demands a shift from functional specialization to horizontal integration of functional activities.[130]

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127 Calif, 'Hyundai Hope on Wheels completes a successful fifth Annual National September as Childhood Cancer Awareness Month Campaign' *Press Releases* (Fountain Valley, 9 Oct 2014)

128 Park Hyong-ki, 'Hyundai Motor: most socially responsible Company in China' *The Korean Times* <https://www.koreatimes.co.kr/www/tech/2018/01/419_242862.html> accessed 05/25/2019.

129 Chan K. Hahn, Edward A. Duplaga, Janet L. Hartley, 'Supply-Chain Synchronization: Lessons from Hyundai Motor Company' <https://pdfs.semanticscholar.org/2e03/8ed95f07e20d91ca5ed864df975b2891626a.pdf> accessed 05/25/2019.

130 Ibid

Hyundai Motor Company started its car production by importing components from Ford Motor Company in 1968. By 1975, it became the first Korean automaker to integrate its manufacturing facilities.[131] Additionally, in order to address the interplay of various factors simultaneously, such as reducing overall cost and reducing the delivery time while increasing the product quality, Hyundai established a production and sales (P/SC) department to mediate on the "conflicts between manufacturing, the domestic and export sales departments, and the domestic and foreign purchasing departments."[132] The approach adopted by Hyundai to coordinate these was using a centralized approach, because majority of its manufacturing facility was restricted to Ulsan plant in Korea. The P/SC department has the function of synchronizing production planning across all facilities.[133] By way of establishing P/SC department, Hyundai Motors created its own internal governance mechanism to deal with all dealerships and production plants around the globe under one roof and to integrate them. The P/SC department, by way of cross-functional meetings and centralizing production scheduling, coordinated the supply-chain activities. Hyundai Motors, instead of increasing productivity, shifted to sales forecast prediction, and responding to such prediction, Hyundai Motors revamped their supply chain management in 2005 and gave the role of sales forecasting to dealership (their role shifted from selling cars to majorly reporting sales forecast) around the globe, to optimize their strategy of quick response on the basis of sales forecast predictions, thereby, strengthening and effectively controlling their supply-chain management.[134]

From dealers accumulating data around the globe, to production planning department informing them about the plant capacity on the basis of which P/SC develops preliminary production plans, and on the basis of which P/SC works with suppliers to acquire parts, and then develops production schedules which conclude with a master production plan - the working of the P/SC

131 Ibid at 115

132 Ibid at 115

133 Ibid at 115

134 Ibid at 115

department substantially indicates the integrated supply chain perspective adopted by Hyundai during the planning process.[135]

The approach adopted by Hyundai illustrated the model of a closed supply chain which constitutes of a "highly integrated set of networks in which many of the technologies being applied are developed at least partially by the company orchestrating the supply chain."[136] Hyundai Motor Company, for the longest time, kept the manufacturing facilities centralized to Ulsan plant and orchestrated the supply chain from Korea.

Initially most of the companies followed the closed supply chain model. For instance, Henry Ford owned the forests, iron ore and steel that constituted its various segments of vertically integrated supply chain. The strategy adopted by Henry Ford included centralized control over all key value chain aspects, including the control over raw materials.[137] Owing to various innovations and expansive scope to reach customers, the supply chain coordination was endowed on OEMs. OEMs controlled the major aspects of the vehicle, which included quality, aesthetics and performance which constitute around 30% of the price of the automobile. Owing to such substantial amounts in the hands of OEMs, there has been a shift yet again towards closed supply chain management.[138] This shift can also be attributed to the willingness of the companies to enjoy substantial control over the innovations and associated intellectual property and, majorly, over input pricing.[139]

Hyundai Motors reemphasized its reliance on closed supply chain network in the supply of steel. Hyundai was looking for alloys of steel that could substantially decrease the weight of its new cars. Instead of relying solely on two global

135 Ibid at 115

136 Ibid at 115

137 Bob Ferrari, 'PRESCRIPTIVE OR PREDICTIVE ANALYTICS' <https://www.theferrarigroup.com/supply-chain-matters/2011/11/hyundai-moves-closer-to-closed-supply-chain-network-model/> accessed 05/27/2019.

138 Ibid

139 ibid

steel suppliers, it invested $8 Billion in Hyundai Steel (a company within the Chaebol) to induce innovation in the company and increase its capacity.[140] Hyundai move towards closed supply chain for steel could be a result of both factors mentioned above, since steel forms the main part of body panels, and by integrating its production within the supply chain, it can help drive down the cost. Moreover, having some control over the production of steel can also save them from highly fluctuating prices.

The closed supply chain model of Hyundai can also be illustrated by the centralization of all logistic activities of Hyundai-Kia Motors to Hyundai GLOVIS for the first-tier supply role.[141] Hyundai GLOVIS is entrusted with all the functions related to logistics process for production and sales of automobiles, including delivering auto-parts for final assemblage, just in time delivery of finished vehicles,[142] transporting vehicle to other places and to regional warehouses and providing the tracking information on every product that goes out of their warehouse to Hyundai Company.[143] Moreover Hyundai GLOVIS used bar code labels to the parts boxes, which made it extremely difficult to automate distribution and obtain accurate distribution information.[144] In order to overcome the burden of increased cost of human errors during repacking, GLOVIS shifted to Radio-frequency identification which uses "electromagnetic fields to automatically identify and track tags attached to objects.[145]" The SCM

140 ibid

141 ibid

142 Just-in-time (JIT) is an inventory strategy companies employ to increase efficiency and decrease waste by receiving goods only as they are needed in the production process, thereby reducing inventory costs. This method requires producers to forecast demand accurately. Investopedia Academy, 'Just In Time-JIT' <https://www.investopedia.com/terms/j/jit.asp#ixzz5GgxnNN9b> accessed 05/26/2019.

143 Huafeng Zhou, Zhenming Gu, 'SCM 303 Introduction to Supply Chain Management' <http://scm303.blogspot.in/2014/06/hyundai-special-logistic-management.html> accessed 05/26/2019.

144 Andrew Price, 'RFID Enhances Supply Chain Management for Automotive Parts at Hyundai/Kia Motors' (2007) <https://www.rfidjournal.com/purchaseaccess?type=Article&id=3208&r=%2Farticles%2Fview%3F3208> accessed 05/27/2019.

145 IGI Global: Disseminator of Knowledge, 'What is RFID' <https://www.igi-global.com/dictionary/communicame/25361> accessed 05/23/2-018.

integrated with RFID technology automatically taps down the entire report for each process when a particular box passes through the RFID interrogator. It further provides a comprehensive detailed delivery status report which includes information on dispatch from the distribution center to prediction of arrival at port for export and arrival oversees at various Hyundai-Kia Motors factories.[146]

Hyundai GLOVIS, in entirety, handles the total transportation system of raw material shipping business and offers real-time distribution information to Hyundai/ Kia Motors, which makes them have a stronger control over the inventory and production plans, thereby optimizing the logistics and production costs.

The centralized and integrated supply chain management strategy adopted by Hyundai had both positives and negatives. In 2003, the company was hit with tremendous disruption owing to a 47-day strike, due to which the supply network did not remain completely resolute.[147] The centralization and integration of manufacturing parts and supplies at Ulsan Plant in Korea, and the decision on not having manufacturing plants in advanced markets but, substantially, relying on importing it from Ulsan plant, led to Hyundai European supply network in specific to suffer, as it was majorly dependent on the Korean plant for Complete Knockdown kits.[148] Even though Hyundai was able to cope up due to close-knit control over the entire supply network, which aided them in coordinating accelerated international logistics and, hence, better reach to customers, the excess reliance on Ulsan plant cost them a lot of money.

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146 Ibid at 130

147 Sanjib Dutta, E Agrawal, 'HR Problems in Hyundai Motor Co' <https://www.thecasecentre.org/educators/products/view?id=20222> accessed 05/ 25/2019.

148 See: CKD is the keyword. CKD stands for Completely Knocked Down. The term has its origin in the automotive industry and refers to a form of production of vehicles. The car manufacturer exports a not-assembled vehicle in the form of individual parts that is assembled into a finished vehicle in the respective country of import and sold there. Stefgoettler, 'Completely knocked down. What does it mean and why is it used' <https://logisticsmgepsupv.wordpress.com/2014/06/19/completely-knocked-down-what-does-it-mean-and-why-is-it-used/> accessed 05/26/2019.

The Indian plant remained unaffected due to its low dependence on supplies from Korea, emphasizing a flexible approach to supply chain management.[149]

Contrastingly, a close vigilance over the supply-chain proved beneficial when Hyundai initiated National Green Supply Chain in 2003,[150] as can be seen in Figure 6. This mandated the suppliers to put an environment management system into place and make sure that the products are free from any hazardous substances as was induced by REACH legislation in EU.[151] The vigilance over supply chain by Hyundai has not only aided them in monitoring the environmental performance, but has helped under-resourced suppliers to establish effective green management systems.[152] Hyundai has signed environment-friendly parts supply agreements with its first-tier suppliers since 2007, and by 2012 all domestic suppliers signed the agreement.[153] Post 2012, Hyundai instituted signing of this agreement with its European suppliers. This shows the internal governance that Hyundai has come to achieve over its suppliers by keeping a close vigil on its working and mandating them to act in compliance with international and domestic norms. The supply chain management under green partnership program can be seen in the figure below.[154]

CONCLUSION

Hyundai Motor Company which started off as a small fish in a big sea (Hyundai Conglomerate) paved its way out successfully and established itself as an

149 UKESSAYS, 'Supply Chain Risk in the Hyundai Motor Company' <https://www.ukessays.com/dissertation/literature-review/business/supply-chain-risk-and-vulnerability.php> accessed 05/ 27/2019.

150 Seung Lee, Soo Kyung Kim and Su-Yol Lee, 'Sustainable Supply Chain Capabilities: Accumulation, Strategic Types and Performance' < file:///C:/Users/SHREYA/Desktop/sustainability-08-00503.pdf> accessed 05/26/2018.

151 Ibid

152 Donghyun Choi, Taewon. Hwang, 'The impact of green supply chain management practices on firm performance: the role of collaborative capability' (2015) 8: 69. <https://doi.org/10.1007/s12063-015-0100-x> accessed 05/25/2019.

153 Ibid at 136

154 Making Life Better, '3 Suppliers' <https://csr.hyundai.com/upfile/report/pdf/partner.PDF> accessed 05/27/2019.

independent group from the conglomerate. During the crises, it efficaciously understood the ill effects of bearing the burden of failing companies within the conglomerate and the burden to be borne by successful companies. This induced them to form a separate, yet one of the biggest and most influential, conglomerates in South Korea. The drive of Hyundai Motors to become one of the biggest names in Automobile market in the world could be seen through its adaptability to international laws and its ability to conform to the domestic laws of the host country. Even though it expanded exponentially internationally, it never lost sight of its basic organizational structure which, till date, they have kept extremely centralized. It could be inferred from the fact that all the companies that existed under the umbrella of Hyundai Motor Group provided Hyundai everything from raw materials to the end products being sent out to the consumer, which shows the extremely integrated and close knit working. In continuance of its policy to maintain centralized decision making, Hyundai adopted 'wholly owned subsidiary' as its model to enter into host countries. This model was an extension to its Business model of keeping everything within the close confines of its parent company. Even though the companies were established in various parts of the world, the parent company substantially effectuated control over its subsidiaries in all matters, except in China. Hyundai Motors is the perfect example of a company which learnt from its failures. The failure of its Quebec plant made it realize the importance of adapting to the local market requirements, which they then engrained in their eventual expansion. The company did not fail in understanding how important disclosures were for the successful and transparent functioning of the company. Hyundai has always been extremely transparent in maintaining its disclosures, as well as conceding their faults and correcting them, which was illustrated in various cases. Moreover, the willingness of Hyundai to adapt to changing laws in host countries and bringing the change in to the working of the parent company, as well as trickling it down to other subsidiaries, shows how it allowed itself to be regulated when required, and then adopted self-regulation where it saw the policy to be beneficial for their company. They also realized at a very early stage, unlike other conglomerates in South Korea, the importance of giving back to society, which made them compete in CSR with other leading automobile manufacturers and surpassing a lot of other companies

to become CSR compliant. Keeping in mind their organizational strategy, the supply-chain management of Hyundai Motors was extremely centralized and integrated, which made them a regulator of themselves. Hyundai Motor Company has outperformed its competitors by being flexible enough to adapt to changes and rigid enough to keep decision making under one roof, which has proved to be a successful business model for HMC till now. The extreme centralization brought in by Hyundai in its supply chain management shows its resemblance to a modern 'guild' in its functioning by keeping control at all steps of production, distribution and supply. However, the close knit working of Hyundai has majorly worked in its favor, and the momentous growth and impact it has come to exert in the automobile industry in the world, which to a great extent could be credited to its governance structure and, some of it, to its ability to adapt to the changing environment and, also, being wary of the reprehensible nature of the business environment, it could be rightly said that it is a mega corporation, or a mega corporation in the making, but not an evil one.

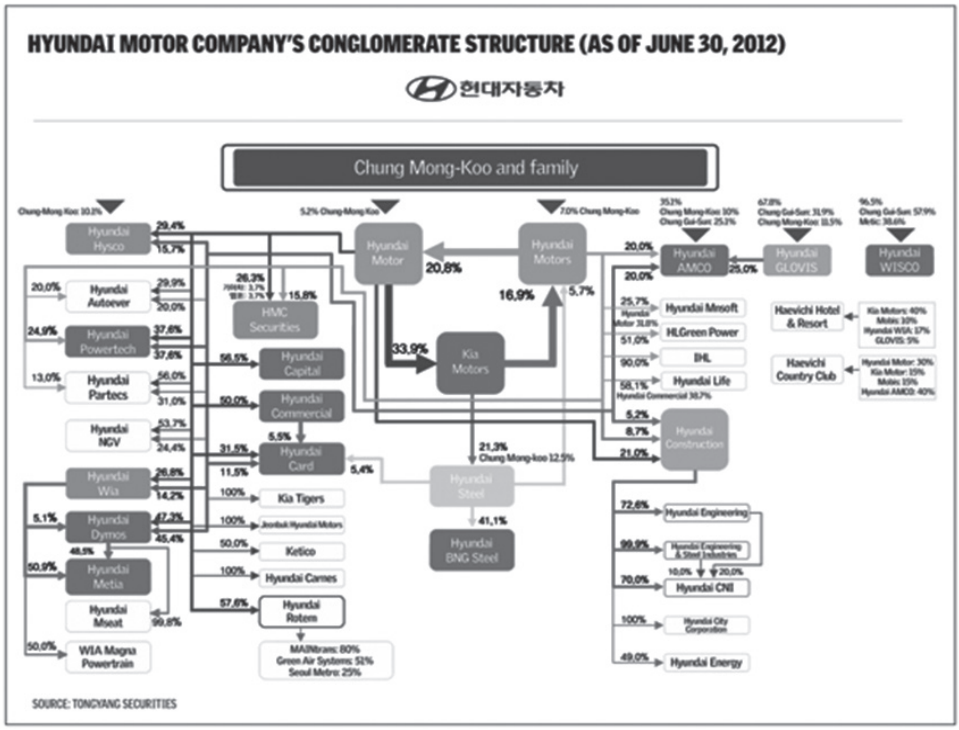

Figure 1: The Holding Structure of Chung Family

[Figure 1] *The Vertical Equity Investment Structure of the HM Group (2011)*

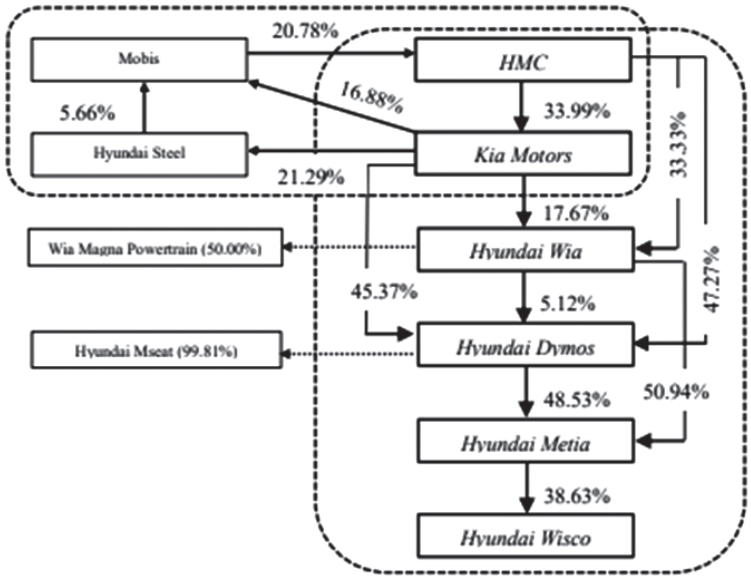

Figure 2: Vertical Investment Equity Structure of Hyundai Group

Condensed summary of the Super-League Table for global OEMs

2016 SLT rank	2015 SLT rank	OEM	Country	Market cap 2015 (USDbn)	Global market share (2014)	Overall SLT Score	Fleet emissions grade	Advanced vehicles grade	Manufacturing emissions grade	Carbon regulation supportiveness grade	CDP Perfomance band (i)
1	1	Nissan	Japan	45.0	7%	4.42	C	A	D	A	A
2	3	Renault	France	27.5	3%	4.87	B	A	B	A	A-
3	8	BMW	Germany	70.0	3%	5.34	B	B	A	B	A
4	2	Toyota	Japan	222.0	11%	5.76	A	B	B	B	B
5	5	Daimler	Germany	95.2	3%	7.05	A	C	A	E	A-
6	7	Honda	Japan	59.3	4%	7.30	C	D	D	A	A-
7	10	Ford	US	59.3	8%	7.38	C	B	D	D	B
8	9	PSA Peugeot Citroen	France	14.0	4%	7.41	C	D	C	B	A-
9	4	Mazda	Japan	11.9	2%	7.94	A	E	B	D	B
10	12	General Motors	US	54.6	13%	8.39	E	B	D	B	A-
11	6	Volkswagen	Germany	97.1	13%	8.70	E	A	A	C	N/A
12	11	FCA	Italy	19.0	6%	9.29	D	D	A	E	A
13	13	Hyundai	South Korea	30.5	6%	9.63	D	C	C	E	C
14	14	Tata Motors	India	22.1	1%	10.27	C	E	E	C	C
15	N/A	Suzuki	Japan	18.1	4%	11.14	D	E	E	C	C
				Total	89%						
						Weights for each area	**40%**	**30%**	**15%**	**10%**	**5%**
						Adjusted weighting for VW	**42%**	**32%**	**16%**	**11%**	

(i) This is the CDP annual performance band (A to E) awarded to companies that respond to CDP Climate Change Questionnaire. The distribution of A to E grades is awarded relative to 2,233 companies that respond to CDP. As Volkswagen withdrew its response to CDP after its emissions scandal, it is not ranked and graded in this area.

Source: CDP

Figure 3: CDP Annual Performance Index

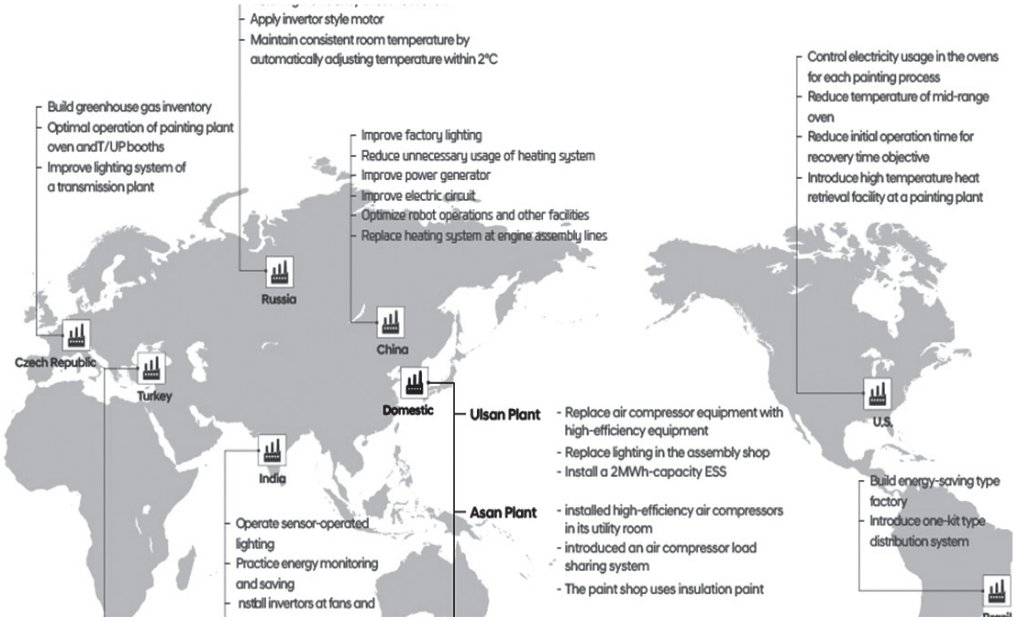

Figure 4

Greenhouse Gas Emissions

Hyundai manages its GHG emissions and energy consumption while responding to the government's climate change policies. While the number of vehicles produced declined by 1.67% from 4,948,315 in 2015 to 4,865,500 in 2016, the GHG emission was reduced by 1.01% over the same period, from 2,570 thousand tons in 2015 to 2,544 thousand tons in 2016.

Greenhouse Gas Emission Intensity

	2014	2015	2016
Greenhouse gas emissions per vehicle production	0.521	0.519	0.523

Greenhouse Gas Emission

	2014	2015	2016
Scope 1	835,240	816,952	806,933
Scope 2	1,745,981	1,753,243	1,737,914
Total	2,581,221	2,570,195	2,544,847

Figure 5

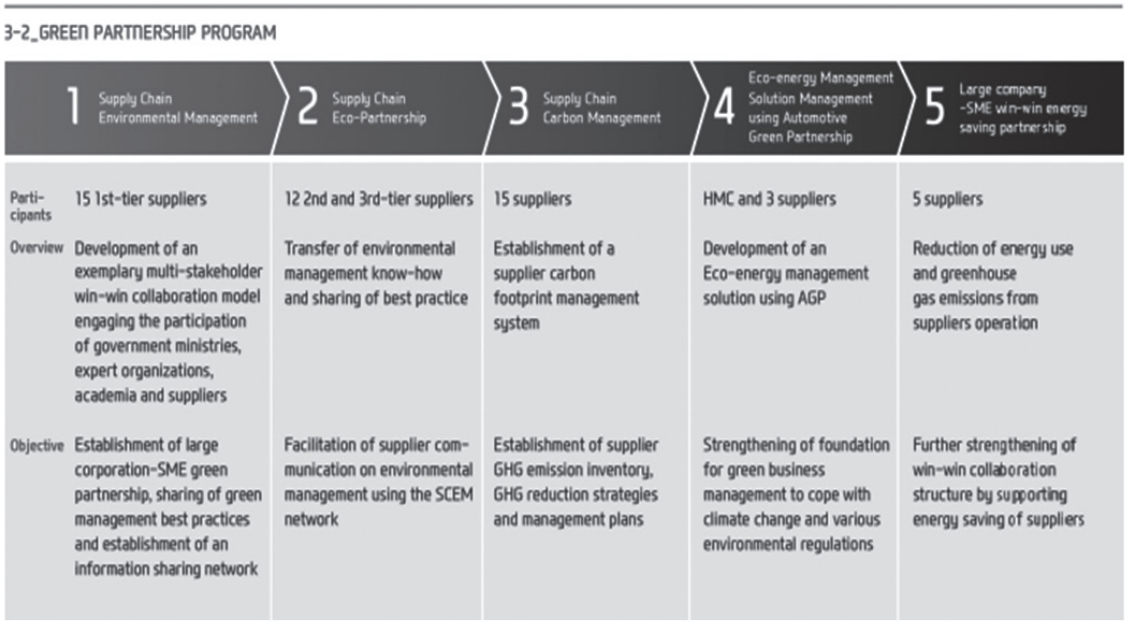
3-2_GREEN PARTNERSHIP PROGRAM
1 Supply Chain Environmental Management
2 Supply Chain Eco-Partnership
3 Supply Chain Carbon Management
4 Eco-energy Management Solution Management using Automotive Green Partnership
5 Large company -SME win-win energy saving partnership
Parti-cipants
15 1st-tier suppliers
12 2nd and 3rd-tier suppliers
15 suppliers
HMC and 3 suppliers
5 suppliers
Overview
Development of an exemplary multi-stakeholder win-win collaboration model engaging the participation of government ministries, expert organizations, academia and suppliers
Transfer of environmental management know-how and sharing of best practice
Establishment of a supplier carbon footprint management system
Development of an Eco-energy management solution using AGP
Reduction of energy use and greenhouse gas emissions from suppliers operation
Objective
Establishment of large corporation-SME green partnership, sharing of green management best practices and establishment of an information sharing network
Facilitation of supplier communication on environmental management using the SCEM network
Establishment of supplier GHG emission inventory, GHG reduction strategies and management plans
Strengthening of foundation for green business management to cope with climate change and various environmental regulations
Further strengthening of win-win collaboration structure by supporting energy saving of suppliers

Figure 6

Roadmap To Strengthen Contractual Enforcement and Ease of Doing Business In India

Prof. (Dr.) Sairam Bhat & Vikas Gahlot

Abstract

Ease of doing business is the flagship project of the World Bank which has garnered positive response from different stakeholders over the years. India is also taking its Ease of Doing Business ranking very seriously with several reforms being introduced to improve it. However, contract enforcement has been the Achilles' heel of India's Ease of Doing Business rankings. In the present article, an attempt has been made to draw a short and concise roadmap for strengthening contractual enforcement in India and improving the Ease of Doing Business rankings. Radical reforms bringing paradigm shifts, such as that brought by the Specific Relief (Amendment) Act, 2018, are the need of the hour to address India's grim contract enforcement regime. The present article looks at both substantive and procedural laws of the country to suggest avenues for reform regarding contract enforcement in the country.

I. INTRODUCTION

Apart from constitutional, penal and family laws, the law of contract is one among the fundamental laws of any country. It forms the basic foundation for business, trade, commerce and any economic transaction. It has application in the day-to-day lives of people and gives rise to complex questions that arise out of contracts entered into by parties, individuals, firms and corporate bodies or governments. The prevalence of e-commerce and e-transactions further adds to such complexities.[1] Understanding and finding solutions to these complexities is of paramount importance.

1 Dr. Justice GC Bharuka, *Preface to Twelfth Edition* of Mulla, The India Contract Act (Anirudh Wadhwa ed., 15th ed. 2019).

Business, trade and commerce in any economy cannot thrive without a strong and robust contractual enforcement and commercial dispute resolution mechanism. The quality and efficiency of contractual enforcement and dispute resolution reinforces the faith of the parties in the efficacy of the legal system and allows them to carry out commercial transactions with confidence that their rights and interests will be protected.

Today, Ease of Doing Business has become the catchphrase for initiating many policy reforms and making legislative changes. The genesis of this annual endeavour by the World Bank lies in the seminal research carried out by Simeon Djankov, Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer.[2] In their research, they have presented and analysed data on the regulation of entry of start-up firms in 85 countries. They have covered a plethora of procedures, official timelines and official costs that must be incurred by start-ups before they can start their operation legally. Through their analysis and data evidence, they have discredited the Public Interest Theory of Regulation[3] and corroborated the perspective of Public Choice Theory[4] and the '*tollbooth*'[5] view (a second strand of Public Choice Theory).

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2 Simeon Djankov, et al, *The Regulation of Entry*, 127 Quarterly Journal of Economics (2002).

3 *See* Arthur Pigou, The Economics of Welfare (4th ed., 1938) as cited in Simeon Djankov, *supra* note 2 (the primary stand of this theory is that regulated of market is better than unregulated markets, because unregulated markets are prone to frequent failures such as monopoly and externalities. They view government regulation as an instrument to attain social efficiency and protection of public).

4 *See* Gordon Tullock, *The Welfare Cost of Tariffs, Monopoly, and Theft*, 5 Western Economic Journal 224-232 (1967); George Stigler, *The Theory of Economic Regulation*, Bell Journal of Economics and Management Science, 3-21 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 Journal of Law and Economics 211-240 (1976) (as cited in Simeon Djankov, *supra* note 2) (this theory views government as less benevolent than viewed by Public Interest Theory; and views regulations as 'socially inefficient' & ultimately unbeneficial to consumers).

5 Simeon Djankov, *supra* note 2 (holds that regulations are pursued for their own selfish interest by those in power).

Another inspiration for the Ease of Doing Business Rankings came from the seminal research work of Prof. Oliver Hart and Prof. Andrei Shleifer in 2008.[6] Their Report made an analysis of debt enforcement in 88 countries. The analysis was made by taking inputs from the respondents using a case study of "standardized" insolvent firm 'Mirage.' Mirage is a limited liability, domestically owned hotel business located in the most populous city of the country. They went on to discuss different procedures available as part of the insolvency proceedings, such as foreclosure, liquidation and reorganization. It suggested that keeping the business afloat as a going concern is a better and more efficient alternative as opposed to a piecemeal sale of its assets. Towards the end, the authors concluded that debt enforcement across the world was highly inefficient (even in the simple case of Mirage that they dealt with). It was found that this inefficiency came from high administrative costs and long delays, but also due to excessive piecemeal sales of still viable business entities.[7] Further, the authors noticed that developing nations often follow and emulate laws introducing elaborate bankruptcy procedures, in their efforts to save insolvent entities. Although time-consuming and costly, it works well in developed nations who are able to save such firms as a going concern. However, this is not the case with developing countries, as these bankruptcy procedures nearly always fail to save the firm in these countries. In fact, the Debt Enforcement Report states that nearly 80% insolvent businesses end up being sold piecemeal.[8]

Though the foundation for the EoDB rankings can be said to have been influenced by the struggle between the Communist & Socialist regulatory approach to economic activity and the Liberal Free Market Economy approach with a certain bias towards the latter, nonetheless, the rankings over the years have gained a prestigious international reputation with countries pushing reforms after reforms to improve their position in the rankings. This is

6 Simeon Djankov, et al., *Debt Enforcement Around the World*, 2008, https://www.doingbusiness.org/content/dam/doingBusiness/media/Methodology/Supporting-Papers/DB-Methodology-Debt-Enforcement-around-the-World.pdf (last visited May 24, 2020).

7 *Id.*

8 *Id.*

particularly true in the case of India, where in the recent past several legislative and regulatory reforms have been undertaken to improve the EoDB rankings. The Enforcement of Contract indicator is one of the original indicators in the Ease of Doing Business rankings,[9] and it remains till date one of key indictors used to calculate the Ease of Doing Business score and ranking.[10] As stated in Ease of Doing Business Report 2004, the primary reason for inclusion of the enforcement of contract indicator is the measure the efficiency of courts which are the main institution for enforcing contracts.[11] With regard to stimulating economy and business, the courts have four important functions to play, namely:

1. Encouragement to new business relationship - as new partners do not fear being cheated.
2. Confidence in complex transactions – as they clarify threat points in the contract and enforce such threats in the event of default.
3. Enable rendering of more sophisticated goods and services – by encouraging asset- specific investments in their production.
4. Limiting injustice and securing social peace – without courts, commercial disputes will end up in feuds, to the detriment of everyone involved.[12]

Weakness of the legal system, inefficiency of courts and delays in justice is neither a recent phenomenon, nor a particularly Indian specialty (though Indian courts are notorious for delays). Weakness of legal system and inefficiency of judicial setup span across countries and even centuries as demonstrated by the following quote from Shakespeare's *Hamlet*[13] (who counts law's delay among the calamites of life):

9 World Bank Group, Doing Business in 2004, *supra* note 9.

10 World Bank Group, Doing Business 2020, *supra* note 11.

11 World Bank Group, Doing Business in 2004, *supra* note 9.

12 *Id.* at 41.

13 Shakespeare, Hamlet: Prince of Denmark, act III, scene 1.

> "To be, or not to be, that is the question: …… That makes calamity of long life; For who would bear the whips and scorns of time, the oppressor's wrong, the proud man's contumely, the pangs of despised love, *the law's delay…*" [emphasis added]

The Ease of Doing Business Report 2004 further strengthens the case for need of efficiency in courts and judicial set up by the following hypothetical situation:

> "Imagine that a new client comes to a textile company and orders shirts. The client and the company manager sign a contract for payment on delivery. But, at delivery, the client refuses to pay in full. What happens next? In New Zealand, the company manger will show the client the contract and ask for payment. The client is likely to pay. In Poland, the company manager will show the contract to the client and ask for payment. The client is likely to refuse to pay. In Cote d'Ivoire, the company manager would probably not deal with the new client unless the client could provide references from other textile companies or from companies that operated in the same region. In Vietnam, the client might not bother going to the company without having at least half of the money available for an advance payment. Why the difference? The answer lies in the efficiency of courts."[14]

Further, the reason for determining courts' efficiency by measuring enforcement of contracts is also stated in the following terms on the World Bank's Doing Business website:

> "Efficient contract enforcement is essential to economic development and sustained growth [citation omitted]. Economic and social progress cannot be achieved without respect for the rule of law and effective protection of rights, both of which require a well-functioning judiciary that resolves cases in a reasonable time and is predictable and accessible to the public [citation omitted].

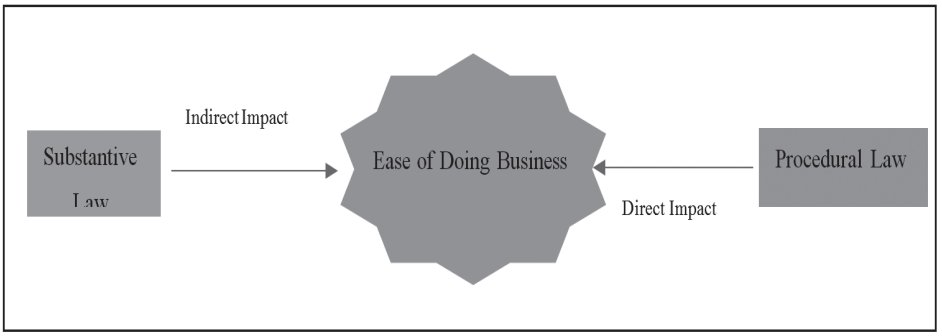
14 World Bank Group, Doing Business in 2004, *supra* note 9.

> Economies with a more efficient judiciary in which courts can effectively enforce contractual obligations have more developed credit markets and a higher level of development overall [citation omitted]. A stronger judiciary is also associated with more rapid growth of small firms [citation omitted]. Overall, enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract foreign direct investment and secure tax revenues [citation omitted]. … [Further] effective courts reduce the risk faced by firms and increase their willingness to invest [citation omitted]."[15]

In the present article, we are attempting to draw a short and concise roadmap for strengthening contractual enforcement in India and improving the Ease of Doing Business rankings. In the following section, we will first discuss the key parameters of Ease of Doing Business, India's performance and continuous improvement on various parameters of the Ease of Doing Business rankings and the grim state of affairs of contract enforcement parameter in India. After that, we will identify some of the substantive laws which can be strengthened to make contractual enforcement effective. This will include exemplary damages, liquidated damages, interest provisions, etc. Though the concept of Ease of Doing Business as envisaged by the World Bank Project relates only to procedural laws (objectively) and are not concerned with the specifics of substantive law of a country, the interpretation and significance of the concept of Ease of Doing Business should not be restricted to just procedural laws, and it should be given a wider interpretation. This broad conceptualization of the Ease of Doing Business should also include business friendly substantive laws, which provide for predictability and certainty about legal rights and obligations. The aforementioned substantive law reforms will not only provide an indirect improvement to Ease of Doing Business ranking, but will also result in reformation of legal regime to meet the demands and challenges of carrying out business in contemporary times. After dealing with substantive laws, we

15 *Enforcing contracts - Why it Matters,* https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/why-matters(last visited June 30, 2020).

dig deeper into aspects of procedural laws which can be improved to directly impact the Ease of Doing Business in India, such as Commercial Courts System and Quality of Judicial Process Index.



INDIA'S PERFORMANCE ON CONTRACT ENFORCEMENT AND EASE OF DOING BUSINESS INDEX

The present state of contractual enforcement in India is reflected in the Ease of Doing Business (EoDB) Index which is published annually by the World Bank since 2003. Apart from contract enforcement, the Index ranks countries on a variety of indicators, such as starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, and resolving insolvency.[16] The 2003 Report brought to the world's notice that it takes more than 10 years to resolve a bankruptcy proceeding in India, and with regard to contractual enforcement, it mentioned that it takes about 365 days, involves 22 different procedures and costs about 95% of income per capita to enforce a contract in India.[17] It also gave India a procedural-complexity index of 50 (a very high number) in relation to contractual enforcement, which indicates how heavily dispute resolution is regulated and measures substantive and procedural

16 World Bank Group, Doing Business 2020 (Oct. 2019), https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf.

17 World Bank Group, Doing Business in 2004: Understanding Regulations (Sept. 2003), https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB04-FullReport.pdf.

statutory intervention in civil cases in the courts. A high procedural-complexity index is associated with greater corruption and indicates delay.[18]

The successive EoDB Reports portrayed an even grimmer picture of contractual enforcement in India. In 2015, India ranked 142nd among 189 countries, and its contract enforcement rank was 186.[19] According to the 2015 report, contractual enforcement in India involved 46 different procedures, took 1420 days and cost 39.6% of the claim value.[20] Since then, India has jumped 65 places to reach 77th position in the 2019 rankings.[21] However, this substantial improvement in the overall ranking was not supplemented by a good performance on the contract enforcement front. From ranking186th among 189 countries in 2015, India was only able to jump to the 163rd position among 190 countries in 2019 rankings.[22] India's improvement on Ease of Doing Business index continued in 2020 Report as well, with India jumping 14 places to reach 63rd position among 190 countries.[23] However, the scenario with respect to contractual enforcement remained unchanged for India, as it remained at the 163rd position.[24]

The contract enforcement rank is calculated on the basis of three criteria, namely – **time taken** by the court of first instance to dispose of the case (counted from the moment the plaintiff decides to file the lawsuit in court until payment of damages and includes both the days when actions take place in the court and the waiting periods in between. It is calculated in number of days), **Cost** incurred in the dispute (calculated as percentage of the claim value and is based on court

18 *Id.*

19 World Bank Group, Doing Business 2015: Going Beyond Efficiency (Oct. 2014), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf.

20 *Id.*

21 World Bank Group, Doing Business 2019: Training for Reform (Oct. 2018), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf.

22 *Id.*

23 World Bank Group, Doing Business 2020, *supra* note 2.

24 *Id.*

fees, attorney fees and enforcement fees), and the **quality of judicial process index** (which varies from 0 – 18, higher number indicating better quality of judicial process and is based on parameter of court structure and proceedings, case management, court automation and alternative dispute resolution).[25]

One such reform initiated by the Indian Government was the enactment of the Commercial Courts Act, 2015, which established dedicated Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of the High Courts for the speedy resolution and adjudication of high value commercial disputes.[26] It was the understanding of the Parliament that early resolution of commercial disputes will create a positive image to the investor world about the responsive Indian legal system.[27] Originally, the Courts under this enactment were given jurisdiction over commercial disputes above the threshold of One crore rupees.[28] The Act was amended significantly in 2018 by which the threshold value was reduced to three lakh rupees.[29] The Amendment also established Commercial Appellate Courts and introduced provisions for Pre-Institution Mediation and Settlement.[30] The concept of mandatory pre-institution mediation is one of the most interesting and remarkable reforms in commercial litigation and provides for, as the name suggests, compulsory mediation before institution of a suit where no urgent interim relief is contemplated by the parties.[31] If successful this will reduce the burden and workload of the courts significantly.

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25 World Bank Group, *Doing Business: Enforcing Contracts Methodology*, http://www.doingbusiness.org/en/methodology/enforcing-contracts. (last visited May 1, 2020).

26 Commercial Courts Act, 2015, No. 4, Acts of Parliament, 2016, Statement of Objects & Reasons (India).

27 *Id*.

28 Commercial Courts Act, 2015, § 2(1)(i) & § 12 (how the specified value is determined in a case depends upon whether the case is for recovery of money, moveable property, immovable property, or intangible right).

29 Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, No. 28, Acts of Parliament, 2018 cl. 4(II) (India).

30 *Id.* cl. 7 and cl. 11

31 Commercial Courts Act, 2015 §3A.

Another significant reform brought about by Parliament was the Specific Relief (Amendment) Act, 2018. This Amendment to the Specific Relief Act, 1963, brought radical changes in the arena of contractual enforcement in India. The most important change brought about was limiting the discretion of the court in granting the remedy of specific performance and injunctions. Earlier, the courts were conferred with wide discretionary powers to decree specific performance and grant or refuse injunctions. The result of this wide discretionary power was that the courts used to award damages as a general rule in majority of cases and granted specific performance as an exception.[32] To facilitate smoother contractual enforcement, the discretionary powers of the court were taken away, and it was made obligatory on the courts to grant specific performance as a matter of right, subject to certain limited grounds.[33] Further, the Amendment also made provisions to provide for substituted performance, i.e., where a contract is broken, the party who suffers was entitled to get the contract performed by a third party or by his own agency and to recover expenses and costs, including compensation from the party who failed to perform his part of the contract.[34] The remedy of substituted performance is an alternative remedy made available to the party who suffers as a result of the breach of contract.[35] Another important feature of the 2018 Amendment was the insertion of section 20A dealing with infrastructure projects. It bars the court from granting injunction in any suit, where it appears to the court that granting injunction would cause hindrance or delay in the continuance or completion of the infrastructure project.[36]

More such radical substantive and procedural reforms will be required in the future to keep the contractual law in India at par with the challenges posed

32 Specific Relief (Amendment) Act, 2018, No. 18, Acts of Parliament, 2018, Statement of Objects & Reasons (India).

33 Specific Relief Act, 1963, No. 47, Acts of Parliament, 1963 § 10 (India) ("The Specific Performance of a contract shall be enforced by the court…").

34 Specific Relief (Amendment) Act, 2018, Statement of Objects & Reasons; Specific Relief Act, 1963, § 20.

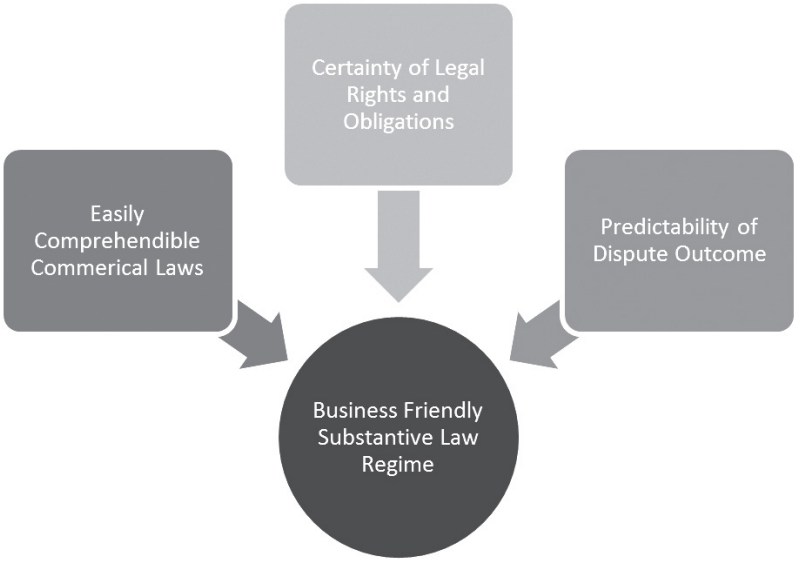
35 *Id.*

36 Specific Relief Act, 1963, § 20A.

by economic and technological developments. This will require a serious assessment and study of the justice delivery system with regard to adjudication of commercial disputes in order to realize the gaps that are currently present in legal and procedural framework. We need to carefully identify the existing loopholes in the application and execution of the law and strengthen the existing legislative framework of commercial dispute resolution as well as strengthen the capacity of arbitrators and judges in applying the law, so that Indian Legal system can become capable of rendering quality and efficient/timely dispute resolutions.

AVENUES TO PROVIDE A BUSINESS-FRIENDLY SUBSTANTIVE CONTRACT LAW REGIME

As discussed earlier, the idea of Ease of Doing Business should be given a broad conceptualization. For business and trade to be carried out smoothly in the country, it is paramount to have a strong substantive legal regime in place that is easily comprehendible, fairly predictable and lays down with certainty the rights and obligations of parties.



To put it simply, this means that the understanding of the basic provisions of law should not require advanced legal knowledge, technical skills and expertise.

Anyone who is interested in carrying out a business or enterprise should be able to understand the requirements of the law by reading the statute itself. If the language of the law is too technical or advanced, then any business enterprise will have to bear the extra burden of seeking expert legal advice in the matter and will also have to bear the risk of relying totally on the advice of lawyers. This demand of simplified legal language has been advocated time and again by the "plain-legal-language movement."[37] The main driving force of this movement is the idea of completely dispensing with lawyers as intermediaries between the law and its subjects and providing direct access to the law for the lay people.[38] This idea does seem to be a utopian one and is practically unattainable. However, there are two main advantages of pursuing this move. First, drafting easily comprehensible laws written in simple language may clarify the law for lawyers and, thus, improve the quality and efficiency of their legal service.[39] Second, a simpler legal language can also enhance the capacity of lay people to evaluate the service provided by their lawyers and by the legal system.[40]

Moreover, legal certainty has been widely regarded as one of the three fundamental pillars of law (the other two being justice and purposiveness).[41] It is linked with individual autonomy[42] and is an established principle of both civil and common law systems.[43] If the subjects of law are certain of their rights

37 *See* Zsolt Zodi, *The Limits of Plain Legal Language: Understanding the Comprehensible Style in Law*, 15 International Journal of Law in Context 246-262 (Special Issue Article 2019). (The author in this article has argued that the comprehensibility of the legal texts is not entirely a linguistic problem. According to the authors the main distinction between comprehensible and non-comprehensible laws is that comprehensible laws either demonstrates 'use' of the text in a particular situation, or they give practical hints, checklists, and advice to guide and regulate behavior in a particular situation.)

38 *See* Rabeea Assy, *Can the Law Speak Directly to its Subjects? The Limitation of Plain Language*, 38 Journal of Law and Society 376-404 (2011).

39 *Id.* at 404.

40 *Id.*

41 Heather Leawood, *Gustav Radburch: An Extraordinary Legal Philosopher*, 2 Washington University Journal of Law & Policy 489 (2000).

42 James R Maxeiner, *Some Realism About Legal Certainty in Globalization of the Rule of Law*, Houston Journal of International Law (2011).

43 Erik Claes et al, Facing the Limits of the Law 92-93 (2009).

and obligations, then they can conduct their actions and transactions with confidence, which will result in an environment in which trade, business and commercial relationships can flourish. The two aspects of legal certainty can be (i) clear and un-ambiguous legislations, and (ii) the doctrine of *stare decisis* (let the decision stand). Passage of time has a net decreasing effect on legal certainty. As time passes by, the principles and rules of law tend to become more and more uncertain in content and in application. As argued by Anthony D'Amato,[44] this decreasing effect emanates from inherent bias of the legal system in favor of unravelling those rules and principles.[45] People disadvantaged by any rule, even if the rule is fully congruent with natural law, would still have a net economic incentive over their counterparts to challenge that rule and make their conduct appear more morally sympathetic. Furthermore, legal uncertainty can have a "regressive distributive effect."[46] It creates a situation in which wealth from parties with weak bargaining power is transferred to those with strong bargaining power.[47] Therefore, though complete certainty is unattainable, the legal regime must strive to provide a legal regime with clear and unambiguous laws and consistent and coherent decisions, using which the people can carry out transactions with confidence.

Thirdly, for achieving a business-friendly legal regime, predictability of decisions is crucial. Legal predictability[48] forms a fundamental part of Rule of Law.[49] It becomes very difficult for citizens to manage their affairs effectively if there is

44 Anthony D'Amato, *Legal Uncertainty*, 71 Calif. L. Rev. 1 (1983).

45 *Id.*

46 Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. Disp Resol. 149 (2019).

47 *Id.*

48 *But See* P S Atiyah, *Justice and Predictability in the Common Law – The 7th Wallace Wurth Memorial Lecture*, 15 UNSW Law Journal 448 (1992) (arguing predictability is one of the cornerstones of common law; it has been attacked and challenged by lawyers, academic lawyers especially, on the ground that law itself is inherently uncertain and can never be wholly predictable, so the search for predictability often leads to the sacrifice of other values for a goal which can never be attained.)

49 Stefanie A Lindquist and Frank C. Cross, *Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm* (2010), https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf (last visited Sept. 23, 2020).

no predictability of the outcome of legal proceedings. It is not to say that there should be absolute legal stability and predictability (that is impossible to achieve and would produce a rigid legal paradigm impervious to changing societal conditions).[50] But, when judges frequently, dispense with prevailing doctrine in favor of a new rule, it has the potential to throw citizens' expectations into disarray and creates a less predictable legal environment for the development of economic and other relationships.[51]

With the above theoretical framework, we will now examine the three possible avenues for substantive law reforms that can be undertaken to strengthen contract enforcement in India and, thereby, improve Ease of Doing Business in India. These reforms are namely (i) Exemplary damages for unjustified intentional breach of contract, (ii) Shifting legal position of liquidated damages in India from common law to civil law/UNIDROIT model, and (iii) Making award of interest on damages a matter of right.

(i) **Award of Exemplary Damages for unjustified intentional breach of contract** – The award of damages for breach of contract is enshrined in Section 73 of the Indian Contract Act, 1872.[52] It is based on the famous cases of *Hadley v. Baxendle.*[53] *The rule of awarding reasonable damages for contractual breaches is an inherent part of the principle enshrined in Section 73. However, the rule of reasonableness – i.e., awarding damages based on what is deemed reasonable by the courts – is not a proper tool to deter parties from breaching contracts. To counter frequent contractual breaches, the courts have started awarding exemplary damages in recent cases.*[54] *Further, since what is reasonable depends on*

50 *Id.*

51 *Id.*

52 Indian Contract Act, 1872 § 73.

53 Hadley v. Baxendle, (1854) 9 Exch 341.

54 *See* General Motors (I) Pvt Ltd v. Ashok Ramnik Lal Tolat (2015) 1 SCC (holding that Punitive damages are awarded against a conscious wrongdoing unrelated to the actual loss suffered); Time Incorporated v. Lokesh Srivastava, 2006 131 CompCas 198 Delhi (holding that The award of compensatory damages to a plaintiff is aimed at compensating him for the loss suffered by him, whereas punitive damages are aimed at deterring a wrongdoer

the discretion of the courts, there is no predictable outcome, which creates a fear in the mind of the parties of not being awarded fair and just damages in the event of breach. Awarding exemplary damages and restricting the scope of court's discretion solves this problem. Section 73 should be amended to ensure exemplary action as a consequence of intentional or willful breach of contract. The current regime of awarding damages can be described as a "strict liability" regime, where the "mental state" of the breaching party is not considered for awarding damages. The aim and central argument of this paper is not to move towards an absolute liability regime of awarding contractual damages by limiting the number of exceptions but, rather, to strengthen contractual enforcement in India by providing a higher quantum of damages in cases where breach of contract is committed knowingly/intentionally/deliberately. Thus, for making contract enforcement stronger in India, exemplary damages for unjustified intentional breach of contract should be one of the avenues that should be looked into.

(ii) **Shifting Legal Position for Liquidated Damages in India from common law to civil law/UNIDROIT Model:** The legal position on liquidated damages in India should be shifted from the common law approach to civil law approach which can provide strengthened contractual enforcement, save time and cost in contractual enforcement and, also, provide the required stability and predictability to the legal proceedings.[55] Section 74 of the Indian

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and the like-minded from indulging in such unlawful activities. Whenever an action has criminal propensity also punitive damages are called for, so that the tendency to violate the laws and infringe the rights of others intending to make money is curbed. The punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases, these must be awarded to give a signal to the wrongdoers that law does not take a breach merely as a matter between rival parties, but feels concerned about those, also, who are not party to the list but suffer on account of the breach. This Court has no hesitation in saying that the time has come when the Courts dealing with actions for infringement of trademarks, copy rights, patents, etc., should not only grant compensatory damages but award punitive damages also with a view to discourage lawbreakers who indulge in violations with impunity out of lust for money, so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but, would be liable to pay punitive damages also, which may spell financial disaster for them).

55 *See* J. Frank McKenna, *Liquidated Damages and Penalty Clauses: A Civil Law versus Common Law Comparison*, The Critical Path, Spring (2008); Ignacio Marin Garcia,

Contract Act should be amended to make the liquidated damages and penalty clauses enforceable, as they are stipulated under the contract to the extent they are not "manifestly unreasonable."[56] The requirement imposed by judicial interpretation of section 74 that some loss/damage needs to be shown to claim liquidated damages[57] needs to be done away with and the law brought on par with international instruments, such as UNIDROIT, which do not impose any such requirement and make liquidated damages claimable ipso-facto of the breach without the need to show any loss/damage suffered, i.e., making the aggrieved party entitled to the "agreed payment of non-performance" *simpliciter eo instant.* However, to prevent misuse and miscarriage of justice, it should be restricted with the proviso that the liquidated damages can be restricted by the courts if found grossly excessive in relation to the harm resulting from the non-performance of contractual terms.

(iii) **Making award of interest on damages a matter of right**: The award of interest on damages for breach must be made the rule and claimed as a matter of right and should not be left to court's wide discretion. At present, courts in India are awarding interest in a discretionary manner and at a rate (which

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Enforcement of Penalty Clauses in Civil and Common Law: A Puzzle to Be Solved by the Contracting Parties, 5 EUR. J. LEGAL STUD. 95 (2012); *See also* French Civil Code of 1804; German Civil Code § 339-345; UNIDROIT Principles 2006, https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. (last visited on Dec. 20, 2018).

56 UNIDROIT Principles, Art. 7.4.13(1) & 7.4.13(2) (it entitles the aggrieved party for "agreed payment for non-performance" irrespective of actual harm by non-performance. The illustration attached to it makes it clear that in the event of breach, the aggrieved party will be entitled to the agreed payment *simpliciter eo instant.* However, the amount specified may be reduced to reasonable amount where it is "grossly excessive" in relation to the harm resulting from the non-performance).

57 *See generally* Fateh Chand v. Balkishan Das, AIR 1963 SC 1405; Maula Bux v. Union of India, AIR 1970 SC 1955; Union of India v. Rampur Distillery and Chemical Co. Ltd., AIR 1973 SC 1098; Union of India v. Raman Iron Foundry, AIR 1974 SC 1265; Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629; Kailash Nath Associates v. Delhi Development Authority, 2015 (1) SCALE 230; (2015) 4 SCC 136. (for elucidation of legal position enshrined in section 74 of the Indian Contract Act, 1872, regarding Liquidated Damages and Penalty clauses in India).

can vary from case to case) without providing any justification as to the rate of interest.[58] This violates the principle of predictability and certainty as discussed earlier. The rate of interest should be standardized as per the current RBI rates.[59] The award of interest is not part of the compensation awarded, but it is separate from that and over and above damages.[60] It is not a penalty but normal accretion of capital which the innocent party is entitled to. A Division Bench of Supreme Court of India comprising of S. B. Sinha & Markandey Katju, J.J. cleared the air in this regard in the case of *Alok Shanker Pandey v. Union of India*[61] by stating the following:

> "*It may be mentioned that there is a misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital.* For example, if A had to pay B a certain amount, say, 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that, A has kept that amount with himself and earned interest on it for this period. Hence, equity demands that A should not only pay back the principal amount, but also the interest thereon to B." [*emphasis added*]

58 *See generally* Gian Chand and Ors. V. York Exports Ltd. And Ors, AIR 2014 SC 3584 (interest @6 %); Fateh Chand v. Balkishan Das, A.I.R. 1963 S.C. 1405 (interest @6%); Harbans Lal v. Daulat Ram, (2007) ILR 1 Delhi 706 (interest @6%); State of Saurashtra v. Punjab National Bank, A.I.R. 2001 S.C. 2412 (interest @17.5%); Kailash Nath Associates v. Delhi Development Authority, 2015(1) S.C.A.L.E. 230 (interest @ 9%).

59 The Reserve Bank of India, in the capacity of the primary financial institution of the country, can either fix a special rate for awarding damages or can utilize one of its rates for fixing of the rate on which interest should be awarded.

60 Alok Shanker Pandey v. Union of India & Ors, Civil Appeal 1598 of 2005, Supreme Court of India (decided on Feb. 15, 2007).

61 Alok Shanker Pandey v. Union of India & Ors, Civil Appeal 1598 of 2005, Supreme Court of India (decided on Feb. 15, 2007).

AVENUES TO REFORM PROCEDURAL LAW FOR STRENGTHENING CONTRACT ENFORCEMENT IN INDIA

The Ease of Doing Business index as conceptualized by the World Bank takes into account only the procedural aspects of law in an objective manner to come up with the Ease of Doing Business Rankings. The contract enforcement parameter deals with Time, Cost and Quality of Judicial Process Index. India still ranks 163 out of 190 countries in contract enforcement. We have well worded judgements, but are not sure whether justice is always done to the parties. The problem persists not with the legislations, but with the efficiency of the judicial processes.[62]

To address the concerns of time and cost associated with various legal processes, District Courts in various states have also made the provision for making online payments, e-filing and e-summons. A few states have also filled up vacancies in District Courts/Commercial Courts to ensure availability of adequate capacity for dealing with various cases.[63] To further strengthen the procedural aspects of contract enforcement regime, the following avenues can be looked into for pursuing reforms:

(i) **Strengthening of Commercial Court Setup** – Case Management Hearings (CMH) is an important innovative tool brought about by the Commercial Courts Act, 2015.[64] Proper implementation of CMH can systematize the adjudication process by mandating the parties to adhere to the timeline agreed upon by them. Judges taking up commercial matters must be well trained in order to equip them with the process of Case Management Hearing. The Higher Courts must strictly direct the lower courts to follow the procedural

62 Mayank Kumar, *Ease of Doing Business in India the User's Perspective*, Centre for Civil Society (July 2017), http://easeofdoingbusiness.org/resources/ease-doing-business-india-user%E2%80%99s-perspective.

63 Mayank Kumar, *Ease of Doing Business in India the User's Perspective*, Centre for Civil Society (July 2017), http://easeofdoingbusiness.org/resources/ease-doing-business-india-user%E2%80%99s-perspective.

64 Commercial Courts Act, 2015, Schedule Order XVA.

mandate and not to deviate from it. The provisions of Mandatory dispute resolution mechanism[65] must be followed by the Judges. If parties to the suit are by-passing the pre-institution mediation, the Court must dispose of the application and encourage the parties to settle the matter, rather than relying on the court to decide the matter.

The weakness in the functioning of Commercial Courts currently despite the amendment to the Commercial Courts Act can also be attributed to the fact that the Arbitration and Conciliation Act, 1996, was not amended on an equal footing. Hence, amendments should be carried out in the Arbitration and Conciliation Act as well, to make Commercial Courts the exclusive forum for arbitration matters.

Furthermore, with respect to section 12A of the Commercial Courts Act, the process of pre-institution mediation lacks effectiveness due to the lack of quality and specialisation of the mediators. The role played by pre-institution mediators can be improved by taking into consideration the following points:

a. Mediators should be specialised persons having knowledge and expertise in the area of the particular dispute before them, especially with respect to subject matter of the dispute.
b. Mediators should undergo training in specialised matters.
c. Mediators should be able to frame issues.
d. Mediators should be capable of formulating a resolution which can subsequently be placed before the Commercial Court for adjudication of a dispute.

(ii) **Quality of Judicial Process Index is the Key**: There is a clear relationship between the **'Quality of Judicial Process Index'** and **'time taken'** in resolving a commercial dispute, as has been highlighted in the Ease of Doing Business Report 2016. Strengthening the Quality of Judicial Process Index will result in the reduction of time taken in resolving commercial disputes.

65 Commercial Courts Act, 2015, § 12A.

Presently, India's Quality of Judicial Process Index stands at 10.5 which can be strengthened by carrying out the following reforms:

Cases can be assigned randomly through electronic case management systems as done in Bosnia and Herzegovina (as compared to manual assignment done in India). Developing an automated electronic case management system will help India in securing a perfect 5 points (as compared to 4.5 it holds presently due to manual assignment of cases) on the Court Structure and Proceedings sub-parameter of Quality of Judicial Process Index.

Stricter time lines should be provided for the following:

- service of summons
- first hearing;
- filing of written statement;
- completion of the evidence period;
- filing of testimony by expert; and
- submission of the final judgement;

If not feasible in all of the above, then at least in three of these key court events, monetary incentives and penalties (by way of awarding a higher interest in damages or by way of other means as suggested in 2.b) for compliance and non-compliance will help in ensuring that timelines are respected in more than 50% of the cases, which will help India in registering 0.5 in Time Standards factor of case management parameter under Quality of Judicial Process Index.

Limiting the number of adjournments in commercial cases to unforeseen and exceptional circumstances will help India in registering an improvement of 1 point in the adjournment factor of Case management parameter under Quality of Judicial Process Index. Additionally, imposing monetary disincentives for seeking casual adjournments will ensure that the court process is not taken as a free ride, which is a prevalent practice in India, and that the procedure is followed in at least 50% of the cases.

Pre-trial conferences should be introduced as a part of the general law of contracts and should not be restricted to Commercial Courts Act, under which it has been a failure. An option should also be given to participate in the pre-trial conference electronically through introduction of e-services in the existing case management techniques. In the pre-trial conference, the following issues should be discussed: (i) time schedule of filing of documents, etc.; (ii) an estimation of case complexity and projected length of trial; (iii) possibility of settlement or ADR; (iv) exchange of witness lists; (v) evidence; (vi) jurisdiction and other procedural issues and (vii) narrowing down of contentious issues. Furthermore, it should be mandatory on the courts to discuss these points and pass necessary thereupon in the pre-trial conference, as compared to the present discretion that they have under the Commercial Courts Act. Doing so will help India in registering 1 point under the pre-trial factor of Case management parameter under Quality of Judicial Process Index.

Judges and the court staff should be trained to use and access electronic case management system to all of the following[66]:

i. Access laws regulations and case laws
ii. Automatically generate a hearing schedule for all cases on their docket;
iii. To send notifications to lawyers;
iv. Track the status of case on their docket;
v. To view and manage case documents (briefs, motions);
vi. To assist in writing judgements;
vii. To semi automatically generate court orders (i.e., where judges can use judgement/order templates to help them write court orders and judgements).
viii. To view court orders and judgements in a particular case;

Doing so will help India register an improvement of 1 point under the case management parameter of Quality of Judicial Process Index.

66 During the time of Covid-19 outbreak, the courts are reinventing themselves through technological developments. Supreme Court of India has also issued guidelines in this regard, permitting filing of e-summons and e-notices.

Similarly, lawyers should also be trained during their legal education and training in the use of case management system for the following:

i. Access laws regulations and case law;
ii. Access forms to be submitted to the court;
iii. To receive notifications (of the key events of the case, dates, documents required to be submitted on the next date, etc.);
iv. Track the status of case;
v. To view and manage case documents (briefs, motions);
vi. To file and submit documents to court;
vii. To view court orders and judgements in a particular case;

Doing so will help India register an improvement of 1 point under the case management parameter of Quality of Judicial Process Index.

The suggestions made above regarding stricter time standards, adjournments framework and complete electronic management will help India in registering an improvement of +4.5 points over its present standing at 1.5 ratings and reach the maximum of 6 in the case management parameter of Quality of Judicial Process Index. Suggestion in this regard can be taken from Australia which has registered the highest score of 5.5 in this parameter by making a completely electronic system. (On a trial basis, these reforms can be implemented and made mandatory in the cities of Delhi, Mumbai, Chennai, Kolkata & Bengaluru, which are possibly eyed for Ease of Doing Business ranking data collection by the World Bank and are the prime commercial centers in the country).

Further, the initial plaint and lawsuit should be filed electronically through a dedicated platform by development of e-filing system as done by Estonia. Also, this initial plaint and complaint should be made serviceable on the defendant electronically by e-mail, fax or SMS. Both these systems will help India in registering a +2 point improvement on its present 2 points out of 4 under the Court Automation parameter of Quality of Judicial Process Index.

CONCLUSION

The advent of globalisation and liberalisation has increased the scope of entering into numerous commercial transactions. The portrayal of a country in the global scene as a convenient destination for doing business is one of the key factors that contribute to achieving higher economic growth rate. That is to say, any economy looking for growth of trans-national businesses and cross-border investments must first ensure that it provides an environment that is

conducive and feasible for businesses and contractual transactions to thrive.[67] Similarly, from the investor's perspective, the feasibility of the destination for business is a key factor. Thus, there arises a need for developing a standard which can serve as a 'market place' for both the country and the investor. The Ease of Doing Business Rankings developed by the World Bank and updated annually serves this purpose.

Radical changes in both the substantive law as well as procedural laws are required to strengthen the Indian Contract Enforcement regime to make it responsive to the needs of present times. The substantive law and procedural law reforms identified throughout this short paper, if successfully implemented, strengthen the overall legal framework with regard to enforcement of contracts in India by providing a robust time-responsive legal regime. This will also aid in improving the enforcement of contract parameter under the Ease of Doing business Rankings by helping in reducing the time taken to

67 Ameen Jauhar & Vaidehi Misra, Commercial Courts Act, 2015: An Empirical Impact Evaluation, (2019), https://vidhilegalpolicy.in/wpcontent/uploads/2019/07/CoC_Digital_10June_noon.pdf.

enforce a contract in India. The substantive reforms will help in reducing the time taken in contract enforcement by reducing the discretion of courts, which will provide for a stable and clear law in which the parties can anticipate the outcomes of their dispute. These reforms are in line with the recent radical reforms that have been carried out in India, such as the Specific Relief (Amendment) Act, 2018, and includes allowing enforcement of exemplary damages and penalty and liquidated damages clauses. Procedural law reforms also help in reducing the time taken to resolve a dispute, as a stricter procedure will ensure that the procedure of commercial courts is smoother and effective with respect to Pre-Institution Mediation and Court Management Hearings. The Improvement in the Quality of Judicial Process Index will also enhance the quality of overall justice delivery system, by making it more efficient and robust to meet the challenges of modern day business.

A Socio-Legal Study on Impact of Solid Waste on Wetland Environment: A Case Study from 'Deepor Beel' wetland, Assam

Utpala Barman

Abstract

Water is the life of all living creatures, so use of polluted water harmful for all being of this earth. But forgetting the importance of water, people are destroying our natural environment. Growth of population gradually impact on natural resources. With the increase of the urban population every year the figure of urban solid waste also increases. It creates problem for the local bodies in solid waste management as well as causes major sanitary problem which ultimately effect on human health and the environment. Solid Waste Management (SWM) or unplanned garbage disposal is a neglected area of unsustainable urban development. In most of the cities more than half of the solid waste generated remains unattended. 'Deepor Beel' is one of the largest natural wetland of Guwahati city, Assam. In 2002, the whole area of the 'beel' was declared as Ramsar site and 4.14 km was proposed as wildlife sanctuary. 'Deepor beel' bird sanctuary is recognized as a home of various rare and endangered species of flora and fauna and a huge gathering of migratory birds in every year. But the open dumping site of West Boragaon which encroached the 'beel' has created many environmental problems for nearby areas. Though various international, national and state laws exist for the protection of the environment but their implementation is vary unsatisfactory. Apart from these, the National Green Tribunal (NGT) also issued directions to the local authority (Guwahati Municipal Corporation) for unrestricted and unregulated illegal dumping of wastes on the wetland. The NGT has asked the Assam government and State Pollution Control Board to take necessary steps to control and prevent damage to the environment and the public health. But the concerned authorities failed to implement the directions so far. The Government has taken some initiatives under the Smart City Project, Swachh Bharat Mission, etc. for better protection and conservation of the water bodies including river, wetland, lake, etc. The engagement of civil society in productive utilization of natural resources offers a great significance. The role of indigenous people and local

communities for conservation of natural resources is also internationally accepted. Enactment of policies will not be effective, if people are not aware of reduction of pollution or recycling or waste management.

INTRODUCTION

All living or non-living creature of this Earth directly, or indirectly, depend on nature. Our eco-system is a composition of both terrestrial and aquatic ecosystems. An aquatic ecosystem is the connection among people, land and wildlife, through water. Lakes, rivers, marine and wetlands constitute the aquatic ecosystems. Aquatic organisms mostly depend on water for their basic necessities such as food, shelter, reproduction. But, forgetting the importance of water, people are destroying our natural environment and polluting water bodies, which has made them unhealthy or poisonous.[1]

People, naturally, started migrating and, gradually, started settling down in city areas because of better trade and commerce, education and better medical facilities. Uncontrolled urbanization may cause many problems such as overcrowding, all kinds of pollution, water crisis and increasing solid waste in the cities. With the increase of the urban population every year, the figure of urban solid waste also increases. It creates problems for the local bodies in solid waste management and, also, causes major sanitary problems, which ultimately affect human health and the environment.

MEANING OF SOLID WASTE

In the present day scenario, due to the growth of population, urbanization, industrialization and the changing nature of standards of living, waste generation has increased. Solid wastes are those materials which are unwanted or useless products generated from society, either from household, commercial, industrial, mining or agricultural activities.

1 Jayati Ghosh, 'Destruction of Wetlands,' The Frontline, (January, 2018) http://frontline.thehindu.com accessed 15th February, 2020

The World Health Organisation (WHO) in 1971 defined solid waste as waste, which is not free flowing, arising out of man's activity. Solid waste refers to all non-liquid wastes (e.g., rubbish or garbage).[2] Though the earth has its special self purification capacity, it may result in environmental pollution if waste materials exceed this capacity and become unbearable. An unhealthy and unscientific disposal of waste leads to environmental pollution.

TYPES OF SOLID WASTE

Household waste (Municipal waste)	Industrial waste (Hazardous waste)	biomedical waste (Hospital waste)

Municipal solid waste includes all degradable, partially degradable and non-degradable materials. Paper, textiles, food waste, straw and yard waste are some example of degradable materials. On the other hand, wood, disposable napkins and sludge, sanitary residues, etc., are partially degradable. Non- degradable materials are like leather, plastics, rubbers, metals, glass, ash from fuel burning like coal, briquettes or wood, dust and electronic waste, etc.

Section 2(e) of the Environment (Protection) Act of 1986 (EPA) defines a 'hazardous substance' as 'any substance or preparation which, by reason of its chemical or physio-chemical properties or handling, is liable to cause harm to human beings, other living creature, plants, micro- organisms, property or the environment.' In modern industrialized society, industries generate, use and discard such hazardous substances without being adequately treated, which may cause acute or chronic health effects.[3]

'Bio- medical wastes' means any waste, which is generated during the diagnosis, treatment or immunization of human beings or animals or in research activities pertaining thereto, or in the production or testing of "biologicals" that means

2 J.R. Rouse,' Solid waste management in emergencies,' World Health Organisation, https://www.who.org accessed 16th February, 2020

3 The Environment (Protection) Act of 1986

a substance of biological origin used as a drug, vaccine, pesticide, etc., and including categories mentioned in Schedule of the Rules.[4]

SOLID WASTE MANAGEMENT

Solid Waste Management (SWM) is a neglected area of unsustainable urban development. In most of the cities, more than half of the solid waste generated remains unattended.[5] Some local governments have managed solid waste with the help of communities, NGOs, and private agencies. The SWM includes the whole process of collection, transport, treatment and disposal of waste, along with monitoring and regulation of the waste management process. Apart from these, waste management also offers solutions for recycling from the waste to reusable products.

Unplanned communities and frequent development of the city areas create problems for developing countries in SWM. People unconsciously use drains, water bodies or open places as dumping grounds, ignoring the risk of flooding and health hazards. As per the Planning Commission's Reports of High Power Committee on Urban Solid waste Management in India, in most cities, the municipal solid waste generated remains unattended. Due to such unhealthy environmental conditions, people living in nearby areas have to suffer a lot.

The Ministry of Environment, Forests and Climate Change (MoEF&CC) of India is responsible for regulating and ensuring environmental protection. The MoEF&CC, along with Central Pollution Control Board and State Pollution Control Board, administers and regulates the pollution level in our country. The Municipal Corporation, Municipal Boards or Urban Local Bodies are responsible for management of bio-medical wastes generated in the areas under their jurisdiction.

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4 Bio-Medical Waste (Management and Handling) Rules, 1998

5 Government of India, Planning Commission, Report of Power Committee on Urban Solid Waste Management in India 1 (1995)

TREATMENT METHOD OF SOLID WASTE

SWM Treatment is a method, technique or process, designed to change the physical, chemical and biological characteristics or composition of any solid or hazardous waste to make it harmless for the environment.[6] Environmentally sound management of solid waste is a necessity to protect human health and environment from the negative impact of such waste materials.

The following are the top three methods used for the treatment of solid waste:

1. **Landfill**: In this method a natural or man-made pit or hollow is filled with the solid waste and covered with soil after selecting the site of landfill to avoid subsequent problems. Such landfill sites can be used as a source of biogas or reclamation of derelict sites to develop landscaped gardens. It is considered as one of the cheapest and common disposal method for treatment of solid waste.

2. **Composting:** Waste materials which are organic in nature such as plant materials, food scraps, paper products can be decomposed and use for agricultural or landscaping purposes. It can be recycled using biological composting and digestion processes.

3. **Recycling:** Some materials are recyclable, such as ferrous and non-ferrous metals, construction debris, scrap tires, paper or cardboard, plastics, textiles, glass, wood or timber, waste oil and grease, etc. For implementing this method, waste should be collected separately. This method leads to the development of enterprises and encourage some sections to engage themselves in recycling waste to industries.

SOLID WASTE MANAGEMENT IN GUWAHATI CITY, ASSAM

The Guwahati Municipal Corporation (GMC) has the primary responsibility to collect the municipal waste. The GMC is divided into 31 wards, and there is

6 Dr. S.C. Tripathi, *Environmental Law*, (3rd ed. 2008), 475

one NGO each assigned for the job of Primary Collection and Street Sweeping within the respective wards. After that, the wastes are collected through modern compactor, tippers, dumpers, excavator cum loaders by GMC.[7] There are only two functional Transfer Stations in Guwahati. After that, the waste is transported to Boragaon dumping site.

GMC has also initiated a project for segregation of waste at source and purchasing dry waste from the generators. Accepting the Daily Dump project for home composting facilities will definitely be a successful activity for waste management.[8] Installation of Drum Composting (site composting technique) at various bulk waste generators like vegetable markets, agricultural market, hostels, etc., will make it easier to reduce the environmental effect in such areas. Apart from these initiatives, a high-powered committee was formed to monitor all the activities for solid waste management.

Every day Guwahati produces around 500 tonnes of garbage.[9] From 2006, the GMC started to dump waste in Paschim Boragaon, close to the water body of '*Deepor Beel.'* About 24 hectares area of east side of the *'beel'* is covered by the dumping site. The area gradually increases due to the increase of the amount of waste collection from the cities. The solid waste management plant at Boragaon has the capacity of only ten tonnes, which is not sufficient for segregation of wastes.[10] As per reports, the new plant will be set up in one of the four identified locations, i.e., Chandrapur, Sonapur, Basistha and Udalbakra. After getting official permission to start the project and after implementing the same, they will stop the dumping of waste at Boragaon.[11]

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7 Retrieved from https://gmc.assam.gov.in 21st February, 2020

8 ibid

9 The Assam Tribune, November 26, 2016, www.assamtribune.com, accessed July 20,2019

10 GMC (Guwahati Municipal Corporation) for Power from waste, Staff Reporter, The Sentinel, 23rd July, 2019

11 GMC to set up a solid waste management plant, Staff Reporter, The Sentinel, 6th February, 2020

The GMC has consulted with the Indian Institute of Technology, Kharagpur, to suggest a design for the processing and disposal required for the scientific management of the dump site at Boragaon, to prevent environmental impact and to develop municipal waste management system for Guwahati city.[12] The Government has estimated a cost of Rs. 139 crore for West Boragaon dumping site with scientific processing and disposal of solid waste under the Swachh Bharat Mission project.[13] It is assured that a properly engineered landfill will help in reducing any environmental impact on *Deepor Beel*. Though a plot of land measuring 20 bighas near Noonmati has been allotted for the construction of solid waste processing plant, it will not be sufficient.

It is great news for the people of Assam that the Oil India Ltd, Numaligarh Refinery Ltd, and the North Eastern Electric Power Corporation are planning for a plastic to fuel project. A memorandum of understanding is already signed with the OIL and the NRL for this project. The NEEPCO has also supported this waste to energy project in Guwahati. For this project, they requested the GMC to supply waste generated in the whole city, as well as an appropriate land/site for this project. But, the project is still not implemented due to the insufficiency of the land for the processing plant.

'*DEEPOR BEEL*' WETLAND- ASSAM'S LONE RAMSAR SITE

'Deepor Beel' is one of the largest natural wetlands of Guwahati city, Assam. It covers 40.14 km area having biological and environmental importance. In 2002, the whole area was declared as Ramsar site, and 4.14 km was proposed as a wildlife sanctuary.[14] '*Deepor beel'* bird sanctuary is recognized as a home of various rare and endangered species of flora and fauna with a huge gathering of migratory birds every year. In 2004, the Birdlife International declared the '*beel*' as an important bird area, because of its unique environment where a variety

12 Retrieved from www.assam.gov.in 21st February, 2020

13 ibid

14 Sushant Talukdar, 'NGT notice to Assam on garbage dumping on wetland' (The Hindu, 16th Oct.2013) https://www.thehindu.com accessed 20 February, 2020.

of birds fly in nearby areas. The two reserved forests, Rani and Garbhanga, are home for elephants, in addition to other birds and animals, and they are mostly depending on the '*beel*' for water and food. These forests increase the socio-economic importance of the '*beel.*' About 80 to 120 Asiatic elephants are found in these forests (Government of Assam records, unpublished). The '*beel*' attracts every nature lover, ornithologist, as well as tourist, from every corner of the world, to enjoy its natural beauty.[15] The '*beel*' can be called a guesthouse for 19,000 migratory water birds in winter season.[16]

Though the wetland was internationally recognized as Ramsar site, the area has been suffering from environmental degradation due to illegal dumping of waste as well as encroachment. The '*Paschim Boragaon*' area is very much near to the '*beel*' where the Guwahati Municipal Corporation dumps all the wastes collected from the city. This is one of the reasons for the degrading water quality of the '*beel*' and many health hazards for aquatic animals as well as local bodies. It is reported on January 22, 2017, that 22 storks were found dead in *Deepor beel*. It is suspected that death might have been caused by eating trash at the dumping ground. India, being a signatory to the Ramsar Convention, is committed to sustainable use of their wetlands. They are bound to preserve the ecological integrity and character of these wetlands having international importance. The main objective of this study is to evaluate the impact of municipal solid waste dumping on the water and soil quality in '*Deepor Beel*' wetland. The role of hydrology of wetlands like '*Deepor Beel*' should be focused on mitigating the artificial flooding in nearby areas.

IMPACT OF SOLID WASTE DUMPING GROUND ON '*DEEPOR BEEL*'

Research works done in various waste dumping sites in Guwahati found the scenario of degrading condition of the environment and many health hazard

15 'Assam's wetland, Deepor beel under threat,' Down To Earth, (July 4, 2015), http://downtoearth.org.in accessed 20th February, 2020

16 R. Barman, An Ecological Analysis of the Wetland in Relation to Waterbird Diversity of Brahmaputra Valley, Assam, Unpublished Ph.D. Thesis, Gauhati University (1997)

problems. The open dumping site of West Boragaon which encroached the '*beel,'* has created many environmental problems for nearby areas. Water of the east side of the '*beel'* has become dusky and smelly, which is slowly moving towards the west side, and a clean water body is becoming more dusky day by day. One can witness that, everyday, hundreds of trucks are downloading urban solid waste collected from the whole city by GMC.

The GMC is also following the rules provided under the Solid Waste Management Rules 2016, but due to lack of, or insufficient, capacities it is unable to execute scientific methods for disposal of waste generated in the city. Again, increase of population in urban areas in Guwahati minimise the land capacity for waste management facility. There is a limited area, disproportionate to a huge quantity of waste released in the city, which causes a problem in proper management of these wastes. Disturbance in the natural drainage system also affects the carrying capacity and connectivity towards the wetlands, because of which, during monsoon period, wetlands and other water bodies could not store excess water when the river Brahmaputra flows over the danger level. This is one of the reasons why people of Guwahati city have frequently faced flash floods and water logging problems in different areas. Being located in the city area, the '*Beel'* plays an important role to maintain the water regime of the whole city.

There is an urgent necessity to understand the need of the *beel* because it receives water from the entire city of Guwahati through different channels. At the same time, spreading awareness among the people of the city areas about proper management of solid waste of their households and limited use of plastic materials is equally important to protect the environment from health hazards and different types of pollution.

Brick kilns located near the *Beel* areas are also considered to be a threat to land, water and the environment. Waste materials produced from such industries are dropped into the *beel* along a 2 km radius from each brick kiln, which affects the growth of flora and fauna in the *beel*. The whole brick making process not

only pollutes the surrounding environment, but also affects the health of the workers as well as the people living in nearby areas.[17]

Though the *beel* is not directly connected to the industrial effluents, a channel of Bharalu River carries the effluents of Guwahati Refinery situated in Noonmati and other industrial effluents of Guwahati city. Industries established in the periphery of the *beel* also produce industrial wastes, which flow into the *beel* through rain water.[18] Untreated sewage and industrial wastes that flow into the *beel* enhance the growth of weeds like ploygonnum barbatum, ploygonnum hydespiper, ploygonnum orientale and rumex maritimus which are harmful for the fish.[19] Several dead fish were found floating around the *beel* by the local people. The Pollution Control Board of Assam ascertained that because of water contamination, the fish could not survive in the *beel*. It is a form of water pollution caused by human activities. A study conducted by the State Pollution Control Board of Assam suggested the need for dredging the Deepor beel, like the Dal Lake in Jammu and Kashmir, to save it for future generations.

The National Green Tribunal (NGT) has asked the Assam government and State Pollution Control Board to take necessary steps to control and prevent damage to the environment and the public health from the GMC's dumping ground at Boragaon which plays a drastic role in polluting the *beel* and, thereby, infecting underwater flora and fauna as well as affecting the endangered birds found on the *beel*. But, the concerned authorities neglected the issues. The State Pollution Control Board has failed to manage the waste in the city, and NGT has fined the board with Rs. 1 crore.[20]

It is observed that 'plastification' of the *Beel* degraded the water quality and turned the wetland into a 'wasteland.' The migratory birds, which seasonally

17 Md. Sarfaraz Asgher, *Land Degradation and Environmental Pollution: Impact of Brick Kilns*, (2004,B. R. Publishing Corporation, Delhi) 1

18 Mobaraque Hussain, Detailed study of Deepor Beel mooted, *The Assam Tribune*, (Guwahati, Nov.5, 2013) www.assamtribune.com accessed 21st February, 2020

19 Study lists Deepor woes- Pollution Board suggests Dal Lake dredging model, The Telegraph, (Sep.2, 2007) accessed 21st February, 2020

20 www.pratidintime.com, (May 10, 2019)

come here, have now chosen to stay away due to changes in the environment. In fact, the Hargila has been dying in recent times due to the increasing toxicity.

NATIONAL LEGAL PROVISIONS FOR THE MANAGEMENT AND HANDLING OF WASTES

The Constitution of India under Part IV A imposes a duty on every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife.[21] Further, Article 48A stipulates that the State shall endeavor to protect and improve the environment and to safeguard the forest and wildlife of the country. In our Constitution, water is included in State list, i.e., List II in Entry 17. Being a state subject, it is the responsibility of each state to make appropriate rules and regulations to deal with water related problems.

People have a right to take recourse under Article 32 for removing environmental pollution, including water pollution which is dangerous or impairs the quality of life. Apex Court, extending the boundaries of Article 21, includes both right to development and clean environment as an integral part of human rights. To implement the constitutional provisions, the Government of India has enacted the following legislations for better protection of the environment.

1. The Environment (Protection) Act, 1986

The Act is enacted to give effect to the decision of the United Nations Conference on the Human Environment of 1972, in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property. The Act is applicable in protecting wetlands and groups of wetlands.

The following are some of the important provisions guaranteed under the Act:

(i) The Act prohibits activities that are harming the environment or are banned, such as discharge of environmental pollutants in excess of prescribed standard.[22]

21 The Constitution of India, Article 51A

22 The Environment (Protection) Act, Section 7

(ii) If any foreseen or unforeseen event takes place which harms the environment, the person responsible for such harm has the duty to take appropriate measures to reduce and prevent such activities and inform the proper authorities about such events having possibility of harming the environment.[23]

(iii) Any persons carrying on any industry, operation or process or handling any hazardous substance are bound to render all assistance to the Central Government and its authorized persons, and any failure or willful delay or obstruction on the part of any such person shall be treated as an offence and is punishable under this Act.[24]

The following are some rules aimed at ensuring better management and handling of different wastes generated throughout the country.

2. The Solid Waste Management Rules, 2016

The Ministry of Environment, Forest and Climate Change released the Solid Waste Management Rules, 2016, replacing the earlier Municipal Solid Waste (Management and Handling) Rules of 2000. These rules were issued under the Environment (Protection) Act, 1986, for management of municipal solid wastes as per the powers conferred on Central Government.

Some of the highlights of the Solid Waste Management Rules, 2016, are:

- It is now mandatory to segregate waste materials into three separate streams, i.e., organic (bio-degradable), dry waste (plastic, paper, metal, wood, etc.) and domestic hazardous wastes (diapers, napkins, mosquito repellants, cleaning utilities, etc.). Again, wastes generated from hotels, hospitals, etc., are also treated as organic waste.
- The local bodies (Municipal authorities) have given the power to decide and levy the user fees for collection, disposal and processing from bulk

23 Ibid, Section 9

24 Dr. Sukanta K. Nanda, *Environmental Law*, (Central Law Publication, 2003) 239

generators. If Waste Generators are throwing, burning, or burying the solid waste generated on the streets, public spaces outside the generator's premises or in the drain or water bodies, it should not be tolerated.

- The new rules also lay emphasis on promotion of waste to energy plants. The Ministry of New and Renewable Energy Sources should provide assistance for Waste to Energy plants.

- The new rules also revise the parameters. A landfill site or dumping ground shall be 100 meters away from rivers, 200 meters from a pond, 200 meters away from highways, habitations, public parks and water supply wells and 20 km away from an airport.

3. The Hazardous and Other Wastes (Management and Trans-boundary Movement) Rules, 2016

Superseding the earlier rule, a new rule was framed in 2016 by the Central Government under the enabling provisions of the EPA to deal with the hazardous waste problem which was generated, by the use and discarding of this waste by a large number of industries operating for urbanized societies. For the first time, rules have been made to separate 'Hazardous Waste' from other wastes.

A person generating hazardous wastes and the operator of a hazardous wastes facility are 'responsible' for the proper handling, storage and disposal of wastes.[25] The Rules prescribe that for handling and disposal of hazardous wastes, the person must take a permit from the State Pollution Control Board.

The following are some important features of the Hazardous and Other Wastes (Management and Trans-boundary Movement) Rules, 2016:

- Under the new rules, prevention, minimization, reuse, recycling, recovery, co- processing and safe disposal have been incorporated in the hierarchy of waste management.

25 The Hazardous Waste (Management and Handling) Rules, Rule 4

- To safeguard the health and environment from waste processing, industries should follow Standard Operating Procedure (SOPs). The concerned State Pollution Control Board should also ensure that it is complied with, while granting such authorization.
- By simplifying the process of import/ export of waste, the co-processing of hazardous waste to recover energy has been streamlined.

4. The Bio-Medical Waste (Management and Handling) Rules, 2016

These rules are issued by the Central Government, replacing the earlier Rules of 1998, which deals with the management of bio-medical waste disposed in open garbage dumps, either within the premises of the hospitals or in the nearby municipal bins. These rules are applicable for all persons and institutions that generate, collect, receive, store, transport, treat, dispose or handle bio-medical waste in any form.

Some salient features of the Bio-Medical Waste Management Rules, 2016, are:

- These new rules will help in bringing a change in management of biomedical waste in India. Increasing the coverage area, the new rules also provide for treatment of lab waste, blood samples, microbiological wastes, etc., which will definitely make a big difference in the Clean India Mission.
- The scope of the rules has been expanded by including vaccination camps, blood donation camps, surgical camps, etc.
- It mandates the use of bar code system to control the bio-medical wastes.
- To reduce the emission of pollutants in the environment, these rules ensure more stringent standards for incineration.
- It is the duty of the Health Care Facilities (HCF) to take necessary steps to identify a safe, ventilated and secured location for storage of segregated biomedical waste within the premises.

5. The Plastic Waste Management Rules, 2016

The Government has issued the Plastic Waste Management Rules, 2016, replacing the earlier Plastic Waste (Management and Handling) Rules, 2011, to deal with the issue of scientific plastic waste management.
Some of the highlights of the new Plastic Waste Management Rules, 2016, are:[26]

- New rules introduce the responsibility of waste generators like officers, commercial establishments, industries, etc., to segregate the plastic waste at source itself and handover to appropriate authority or agency.
- The producer and brand owners who are engaged in manufacture or import of carry bags have been made responsible for collecting waste generated from their products. They should formulate appropriate plan or system for the plastic waste management under their local bodies.
- New rules impose fine on retailers and street vendors for using plastic bags or multi-layered packaging. Only registered vendors can use plastic carry bags. The registration fees collected by the local bodies are to be used for waste management.
- In 2018, the Rules were further amended, which prescribe a central registration system for the registration of the producer or importer or brand owner. The CPCB has assigned the centralized registration system.
- By applying various recycling methods, plastic can be reused for road construction, waste to energy and waste to oil, which can reduce the environmental impact from plastic.
- The multi-layered plastic which is non-recyclable or non-energy recoverable, or with no alternate use, was supposed to be banned, but it is still circulated as earlier. Due to lack of implementation of these rules, plastic wastes are still a worldwide crisis.

26 Retrieved from www.pib.gov.in 21st February, 2020

6. The E-Waste (Management) Rules, 2016

Electronic waste becomes an environmental problem when it goes to a landfill and to water bodies. According to the Global E-Waste Monitor 2017, about 2 million tonnes of e-waste are generated in India in a year. Only 20 percent of such waste is recycled.[27] E-Wastes generally include all waste electrical and electronic equipments that are rejected from their manufacturing and repair process, or are discarded, or are unused computer devices like monitors, motherboards, compact discs and other electrical materials like mobile phones and chargers, headphones, television sets, air conditioners and refrigerators, etc. Though e-waste should be recycled in a safe, appropriate and efficient manner, only a limited portion of total wastes are recycled due to poor infrastructure and ineffective implementation of existing legislation. People engaged in e-waste management are basically from informal sectors not having adequate knowledge to deal with e-waste. Such activities pose great health risks to the workers as well as huge damage to the environment. The E-Waste (Management) Rules, 2016, were enacted in suppression of the earlier 2011 Rules. The following are some of the salient features of these Rules[28]:

- Introducing new arrangement entitled 'Producer Responsibility Organisation' (PRO) to strengthen the Extended Producer Responsibility (EPR) which ensures the take-back of the end-of-life products.
- Under the new rule, the manufacturers are mandated to take back their sold products with recommended mechanisms. The producers should replace their product with less pollutant electrical and electronic equipments.

Under the Digital India initiatives, the Ministry of Electronics and Information Technology has started an E-waste Awareness programme to educate the general public about the alternative process of disposing e-waste and to make them

27 Samar Lahiry, Recycling of e-waste in India and its potential, www.downtoearth.org.in accessed 20 February,2020

28 ibid

aware about the hazards of e-waste recycling. 'Swachh Digital Bharat' is also initiated to encourage the public to participate in environment friendly e-waste recycling practices by giving their e-waste to authorized recyclers only. Besides, 'E-Waste Mass Awareness Campaign through Cinema' has also been initiated to encourage awareness amongst the youth.[29]

RULES AND REGULATIONS ASSOCIATED WITH WETLAND PROTECTION

The Ramsar Convention, 1971

The Convention on 'Wetlands of International Importance, Especially as Waterfowl Habitats' is also called Ramsar Convention. It is an international treaty for the conservation and the sustainable use of wetlands. The main aim of the Convention is to halt the loss of wetlands worldwide and to conserve the remaining ones for the present as well as the future generations.[30] The contracting parties are obliged to consult each other about implementing obligations arising from the convention regarding conservation and the sustainable use of wetlands in their respective states.[31] In 2002, '*Deepor Beel*' (Assam) was added to the list.

Linking with the Ramsar Convention, other International Environmental Conventions are equally important for the conservation of various resources available in wetlands. Some of them are the Convention on Biological Diversity 1992, The Convention for the Protection of the World Cultural and Natural Heritage 1972, The Convention on International Trade in Endangered species of Flora and Fauna 1973 and the Convention on the Conservation of Migratory Species of Wild Animals 1979. The Government of India has enacted various laws to give effect to these International Conventions.

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29 Harshini Vakkalanka, 'The A-Z of e-waste management,' The Hindu,(19th June,2018) www.thehindu.com accessed 22nd February,2020

30 P.C. Sinha and R. Mohanty, *Wetland Management, Policy and Law,* (edition 2002), 86

31 ibid

It is true that there is no particular legislation for wetland conservation in India, but there are a number of laws having some relevance to wetland habitat regulation. Some of these are as follows:

1. The Wetland Conservation and Management Rules, 2010

These rules are notified for the better Conservation and management of wetlands to implement the obligations under Ramsar Convention. These rules prohibit a range of activities in wetlands, like setting up and expansion of industries, waste dumping and discharge of effluents, etc. Setting up of State Wetlands Authority (SWA), headed by the State's environment minister along with the other officers and experts from different fields such as ecology, hydrology, fisheries, landscape planning and socio-economics, definitely helps in enhancement of wise use of wetlands. The National Wetlands Committee (NWC) is another initiative taken for monitoring implementation of these rules and for overseeing work carried out by the States.

That Committee advises the Central Government on taking up appropriate policies and actions plans and recommends international importance of Ramsar Convention for conservation and wise use of wetlands. The Committee also advises on necessary collaboration with other international as well as national agencies on issues related to wetlands, etc.

2. The Water (Prevention and Control of Pollution) Act 1974

The Act is enacted for the prevention and control of water pollution. Disposal of any polluting matter to a stream or well or sewer or land blocks the proper flow of water, and such blockage creates water pollution. Under this Act, violation of any provision is considered as against the public interest and punishable offence. Central and State Pollution Control Board is constituted as the primary authority to regulate such acts. The Act also imposes duty on the local authorities to assist and furnish information to the board.

The Act could not achieve its goal, as the court has not given the authority to take cognizance of any offence under this Act on a complaint made by a Board

or any Officer authorized in this behalf. Citizens can not directly prosecute the polluter who discharges an effluent beyond the permissible limit. Only the government has been given the exclusive power to take action for statutory remedy against the polluter.

3. Indian Fisheries Act 1897

This Act penalized the polluter for killing fish by poisoning the water or by using explosives or chemical substances that cause water pollution. This Act should be strictly implemented for the better protection of wetlands and conservation of fish diversity from water pollution. The State Government is also empowered to prohibit fishing in any specific location for some specific periods. Persons can be arrested without warrant for violating any provision under the Act.[32]

4. The Indian Forest Act, 1927

The Act deals with safeguard of ecological and environmental security of the country. Forests help in regulating soil erosion, reducing pollution, mitigating flood flows, prevention of desertification and salinization. Forests depend on wetlands or groundwater for their survival and support flora and fauna. Due to such interdependency, damage to forest areas can have adverse impact on biological diversity as well as water quality of nearby wetlands, and damage in wetlands can impact on forest areas.[33] The same observation may be applicable in case of '*Deepor Beel*' and nearby reserved forest areas.

The State Government should take appropriate measures for the conservation of the '*Beel*' as well as the forests for balancing the ecosystem. Any unauthorized felling of trees, quarrying, grazing and hunting or other such acts which cause, willfully or negligently, damage to the forest area are punishable with imprisonment for a term which may extend to six months or fine which may extend to five hundred rupees, or both.

32 The India Fisheries Act, 1897, Section 7

33 Nanda, Supra, 239

5. The Wildlife (Protection) Act, 1972

The Act ensures the protection of wild animals, birds and plants, to maintain the ecological and environmental security of the country. A National as well as State Boards for Wildlife was constituted under this Act for the conservation and development of wildlife and forest.[34] Wetlands are generally surrounded by forest areas having dominant tree species of botanical as well as economic importance. Most of the wild animals and birds depend on wetlands for their survival. This Act is equally applicable for conservation of such wildlife.

Dumping garbage into the wetlands is also a gross violation of the Act because it pollutes the wetlands when rain water brings the contaminants into the water bodies. People have been witnessing a number of dead fish floating on the water, due to the polluted water with toxic materials and lack of sufficient oxygen and, also, the presence of decomposed grass and some kind of algae. Though there are various provisions for wildlife protection, due to lack of enforcement, the area is not well protected.

6. The Biological Diversity Act, 2002

The Act deals with conservation of biological diversity, sustainable use of its components and fair, equitable sharing of benefits arising out of the use of biological resources, etc. Indian Parliament has enacted the Biological Diversity Act, 2002, to give effect to the international Convention.[35] Both the Central and State Governments have the duty to develop strategies, plans and programmes for conservation, and to take immediate measures against any abuse or neglect of rich biological diversity. Most of the wetlands have biological and environmental value. They support a large number of plants and animal species in their deep and shallow waters and in the occasional highlands adjoining, with hills and natural forests. Having rich floral and faunal diversity, this Act is, also, applicable to provide legal protection to the wetlands.

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34 The Wildlife (Protection) Act, 1972, Section 8

35 The United Nations Convention on Biological Diversity, 1992.

7. The Guwahati Water Bodies (Preservation and Conservation) Act, 2008

The Act was enacted by the Government of Assam, aiming to preserve the wetlands, minimize the problem of water logging in the city and develop eco-friendly environment. By enacting such an act, the government has initiated the re-acquisition of land in the periphery of *'Deepor beel'* and aims to work for eco-tourism development. Considering the importance of urban water bodies, the Act provides for restoration and conservation of these wetlands for the flood mitigating programme under Guwahati Development Department (GDD).

Though the Government of Assam is fully empowered to make rules for carrying out the purpose of the Act, yet the Government has been keeping mum on the issue of adopting the Rules. The GMDA, one of the major responsible authorities for planning and development of the Guwahati metropolitan region, is competent to take up projects or schemes for eco-tourism or water based recreation for better management, preservation and conservation of the waterbodies declared in the Act.[36]

The following activities are prohibited and declared as illegal under this Act[37]:

(i) Any activities, including the filling up of water bodies, which may cause damage or reduce the size of water bodies;

(ii) Constructing or erecting any structure in the water bodies;

(iii) dumping or throwing solid waste or garbage in the water bodies;

(iv) extending or reinforcing of any building standing upon the water bodies;

(v) Carrying out any kind of business, except fish curing, aqua culture, conservation measures and flood control measures, without the specific permission of the Competent Authority.

36 The Guwahati Water Bodies (Preservation and Conservation) Act, 2008 Section 7

37 Ibid, Section 4

All the above legislations are directly or indirectly related to the protection and conservation of the *'Deepor beel' and* have some relevance to wetland habitat regulation. The *'beel'* is surrounded by two reserve forests which are rich in biological diversity. So, the existing laws should be properly implemented to develop the *'beel'* into an eco-tourism hub and a protected area for future generations. To minimize the environmental problems from dumping sites, all waste management rules must be followed by applying scientific technology and organized methods of processing the waste generated in the urban societies.

JUDICIAL ACTIVISM IN WETLAND CONSERVATION

There are many case laws where the Supreme Court has directed the States and principal municipalities to implement solid waste management rules. Considering the importance of wetlands in maintaining ecological balance, a bench of Justices Madan B Lokur and Prafulla C Pant directed the states to provide details of all wetlands and directed the Centre to frame policy for preservation of wetlands having effective carbon sinks to mitigate climate change and support biodiversity.[38] The court reminded the Centre that they are bound to frame a policy for the preservation of wetlands being a signatory to the Ramsar Convention on Wetlands 1971. The Apex Court had also directed the High Courts to monitor the management of all 26 sites identified in the Ramsar Convention. Though it is the responsibility of the State authority to take appropriate actions for the preservation and protection of wetlands, it has been seen that their actions are not satisfactory. In many cases, it has been seen that NGT intervened to restrict construction of industrial complexes or curb release of waste materials within the wetland areas.

In *M. C. Mehta v. Kamal Nath & Others,*[39] the Apex Court has opined that Article 48A and Article 51A (g) have to be considered in the light of Article 21 of the Constitution and have decided that any disturbance of the basic element

38 The Times of India, (9th Feb. 2017) http://timesofindia.com accessed 21st February, 2020

39 (2000) 6 SCC 213

of environment, i.e., air, water and soil, would be hazardous to 'life' within the meaning of Article 21. Enforcing Article 21, the court has also given effect to other fundamental rights and has held that people violating these rights by disturbing the environment can be awarded damages for restoration of ecological balance as well as for the victims who have suffered due to such disturbance.

In 2007, the residents nearby the *'beel'* filed a PIL for the conservation and protection of the '*beel*' from environmental pollution. The Gauhati High Court considering the matter formed a committee to analyze the issue and directed the local authority (Guwahati Municipal Corporation) to spray pesticides in the neighboring areas of the lake to reduce health hazards.

In 2014, Rohit Choudhury, an environmentalist, filed a legal petition (Application No. 472/2018, *Rohit Chaudhury vs. Union of India and Ors*) against environmental damage of the '*beel'* due to pollution and encroachment.[40] Considering the environmental importance, the NGT issued a directive to the State Government and asked it to submit a status report on the condition of the '*beel.'* After that, several times, the NGT issued directives to GMC on the unrestricted and unregulated illegal dumping of wastes on the wetlands that create an imbalance in the wetland eco-system. But, GMC had pleaded before the NGT to allow the present dumping ground for disposal of solid waste, as GMC is working on the reduction of the impact of waste disposal on the '*beel'* under the instructions of the Indian Institute of Technology of Kharagpur.[41]

Hearing a Public Interest Petition, the Jammu and Kashmir High Court directed the government to demarcate the wetlands to protect them, and to take measures to conserve water bodies. Following such direction, demarcation was carried out with Geographic Information System (GIS) technology.[42] In the name

40 Rajat Ghai, 'The Earth is not for humans alone, says NGT over Deepor Beel', https://www.downtoearth.org.in (March 2, 2019), accessed 22nd February, 2020

41 The Assam Tribune, December 12, 2016 http://www.assamtribune.com accessed 22nd February 2020

42 HC directs Government to demarcate wetlands, conserve water bodies, The Rising Kashmir, (19th August, 2017) http://www.risingkashmir.com accessed 22nd February 2020.

of development, government has done a lot of damage to water bodies. The NGT in August, 2019, also directed the government of Assam to declare the actual area around '*Deepor Beel*' and put restrictions on industrial and other human activities which affect the natural ecosystem of the '*beel.*' The NGT further directed the state to take appropriate steps to prohibit encroachment and manage the dumping ground inside *beel's* system.[43] Though the NGT has directed the Assam government to shift the MSW Plant at the '*beel,*' it has still not been implemented.

ROLE OF CIVIL SOCIETY

The engagement of civil society in productive utilization of natural resources offers a significant contribution. The role of indigenous people and local communities for conservation of natural resources is internationally accepted. Enactment of policies will not be effective, if people are not aware of reduction of pollution or recycling or waste management. Every action of civil society and the latter's responsibility lies in the contribution to effective monitoring of the natural resources.[44]

After declaring the Ramsar site, various campaigning programmes were organized for conservation of the '*Deepor beel';* participating members from different sectors included the faculty members, research scholars, students, officers, employees and workers of academic institutions and, also, concerned citizens of the nearby areas. The people near the dumping site also filed a PIL to save the lake from pollution. The All Assam Student Union (AASU), an active student organization of Assam, arranged a protest demonstration along with the concerned residents, highlighting the different threats in the wetland. Some local people have taken the initiative to remind various departments to implement the developmental project on the *'beel.'*

43 National Green Tribunal seeks eco- sensitive zone tag for Assam wetland Deepor Beel, 23rd August, 2019, The Hindu

44 Role and Responsibilities of India Inc. and Civil Society in Tackling pollution, Economic times, (6th Jan, 2017) http://www.economictimes.org.in accessed 23rd February 2020

Some NGOs, like 'Aaranyak,' 'Early Bird' (Assam) played an important role to spread awareness amongst the general public for the protection of the environment and sustainable use of various products. Our lifestyle and unawareness very often create environmental issues. So, it is our duty to work for the protection of the environmental. Otherwise, our lives will be at risk.

CONCLUSION

The present study is to analyze how waste has harmful effects on water bodies, soil and flora and fauna. For the better implementation of the existing rules for the management of waste generated in our society, massive awareness campaigns should be organized in association with communities, NGOs, students and other stakeholders. The promotion of greener and cleaner cities can be the solution for many environmental issues. Guwahati is the only city from India's Northeastern states, among a 100 other cities, that has been included under the smart city initiative launched by the Government of India. The smart city project will be effective only when there is standard of quality and transparency in the working of the engaged authorities. '*Deepor beel'* also finds its place in the smart city project. Under the smart city project, various departments are involved in the wetlands developmental programme, such as GMDA, GMC, the Jal (Water) Board, the Water Resources Department, the Public Health Department, the Tourism Department and Assam State Electricity Board.

'*Deepor Beel'* is also included in the list identified for conservation and management under the National Wetland Conservation Programme (NWCP) because of its unique nature. The State Government works for conservation and management of wetlands, undertaking different activities through its concerned authorities, with funds provided under the scheme.

The following are some of the measures suggested to minimize the harmful effect of waste on wetlands:

1. All industries, hotels, restaurants, hospitals, nursing homes, etc., should arrange their own effluent or waste water treatment facilities. All

polluting establishment should take technical knowledge and support from the Pollution Control Authority to establish effluent or waste water treatment plants. All the departments, like Municipal Authority, State Pollution Control Board and the State Public Health Dept. should jointly work to inspect or monitor the functional condition of industries to ensure proper wastewater treatment before release into drains or wetlands.

2. The solid waste should not be dumped near drains to be carried away to the wetlands or near to any wetland areas which enhances water pollution. The solid waste should be properly disposed of to avoid pollution on wetlands. The Municipal Authority should monitor periodically to prevent dumping of solid waste near drains or wetlands.

3. Public awareness plays an important role in minimizing environmental effects from solid wastes. The Municipal Authority, in co-ordination with Pollution Control Board and NGOs, should undertake frequent pollution awareness programmes wardwise in the presence of the general public. They may organize citizen committees in every ward to implement or monitor the functions of domestic waste water treatment. For effective awareness of the public, a door to door campaign may be introduced to prevent water pollution.

4. 'Deepor Beel' is one of the main water reservoirs of Guwahati City. Waste water is carried away to the wetlands through different channels. Sewage treatment facility should be more effective to reduce the pollution load of waste water. The Connecting network of drains, to the wetlands, should be desilted regularly for proper flow of waste water.

5. Human encroachment or other such interference should be limited within the area of the wetlands for proper functioning of ecosystem and to maintain a healthy environment.

6. Existing rules regarding management of solid waste, bio- medical waste and plastic waste, etc., should be strictly implemented by the concerned

authorities. New rules may be introduced if there is any necessity to combat water pollution.

7. Many government departments and agencies have limited their jurisdiction to wetland protection and conservation. Due to lack of clarity of functional jurisdiction between different departments, action for conservation is not satisfactory. So inter-departmental coordination is the ultimate strategy for the conservation and wise use of wetlands to ensure a sustainable future.

Tourism also contributes to India's economic growth. Including other tourist places, wetlands can be developed for tourists' attraction. Various *beels* and water bodies of Guwahati city could become a tourism hub as well as sustain ecological balance. The '*beel*' is an Important Bird Area and is given more priority in conservation by Birdlife International. The "Eco-Tourism Project for the Surrounding Area of the "*Deepor beel*" is a tourism development project in and around the '*beel.*' It aims at protecting and restoring the ecological balance as well as working for development of tourism infrastructure. The project also includes assessment of natural as well as artificial linkages of drainage systems affecting the water bodies. The project will develop a sustainable way to protect the environment and a better life, not only for the present generation, but also for future generations of Guwahati city.[45]

Nowadays, many countries apply the wetland recovery strategies in which the primary treatment phase helps to separate hazardous materials from organic waste streams. Such waste streams may be tapped at different points along the treatment process to remove hazardous substances before terminating in the wetland. Decomposers such as bacteria, fungi, etc., naturally exist on the surfaces of the aquatic plants and the soil of wetlands, which helps in removing the dissolved biodegradable materials from the water.

MSW will rise with the continuous growth of global population and industries. So, people should give more focus on reuse, recycling and recovery for reducing

45 www.assamppp.gov.in, accessed 29th July, 2019

solid wastes. Disposal of waste materials into wetlands is not the problem of a particular area or state. Many wetlands have to face such problems due to lack of awareness of people and lack of strict implementation of the existing rules and regulations. It may be due to limited understanding of the importance of wetland ecosystem among the policy makers, and a failure to realize their unique characteristics may be one of the major causes for the absence of an appropriate legal instrument on wetlands conservation. Again, effective monitoring strategies on water quality need to be developed for protection and improvement of the ecological value of wetlands.

Death in The Era of Perpetual Digital Afterlife: Digital Assets, Posthumous Legacy, Ownership and its Legal Implications

Dr Prashant Mali, Aswathy Prakash G

Abstract

Man dies, but his online assets survive and, often, intestate. These digital assets by themselves may not have too much significance, but the data they hold is invaluable to the legal heirs, often mired in secrecy; man lives a secret life, and these online digital assets are privy to the same. The enormous digital assets a user creates during his or her lifetime result in a sizable amount of digital footprint posthumously. The consequence of all these cybernated dossiers is as unpredictable as the death itself, for there's no uniform practice of preservation, removal, and inheritance of these digital assets by the data handlers like social media platforms and other content hosting websites. Adding to this is the lack of proper definition and legal consensus as to what constitutes digital assets and how the deceased user's digital estate should be handled after his/her death. The objectives of this paper are to analyze the impact of death on digital assets and the association between unbequeathed online accounts and issues of identity theft and copyright violations of deceased user's accounts. This paper has adopted a doctrinal research method. The paper also broached the concerns about how these data should be managed in the best interests of legal heirs of the departed. The study shows that there's a lack of awareness among the netizens as to how to plan their digital estate while they are alive, and the personal laws of succession are also not drafted or revised foreseeing this new genre of assets.

Keywords : *Digital Death, Succession, Social Media, Digital Assets, Digital Footprint*

1. INTRODUCTION

The bourgeoning of cyberspace and digital media across the society in a short time has been phenomenal. There are over 4.33 billion active internet users

worldwide, which makes 56 per cent of the world population. Facebook leads the pack with more than 2 billion active users in the beginning of 2020.[1] As per the reports of the Internet and Mobile Association of India, there are around 451 million active internet users in India, which makes India the second largest country of internet users after China.[2] The adulation of cyberspace means that people are spending a substantial amount of their time interacting in the virtual space. From a sociological point of view, this virtual space has nullified the physical distance between people and their family and friends. Most of us live deliberately oblivious to the inevitability of death, and cyberspace will keep us alive for perpetuity in digital form once we die, preserving our thoughts, memories and relationships' traces online. Based on Facebook's user statistics in 2018, researchers have predicted that by the end of this century the number of dead users in Facebook will outnumber the living.[3] This will turn the platform into a digital graveyard with the possibility of remodeling the demised user's profiles into memorial accounts, where friends and family can visit in remembrance of the expired. Digital platforms have changed our understanding about death in a biological setting; in the latter, we may have a few physical possessions of the deceased and the moments etched in our memory, whereas the digital media platforms enable us to animate the dead through online conversations and, with the help of computation technology, interact with others through the social media posts. Through these platforms, the dead often maintain a presence in the life of the living, be it as a contact in our phone or as a connection in our social media accounts or even as a search result in Google.

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1 'Facebook Bigger than 3 of the World's Biggest Countries' <https://www.cbsnews.com/news/facebook-users-2-billion-biggest-countries/> accessed 30 January 2020

2 'India Has Second Highest Number of Internet Users after China: Report - The Economic Times' <https://economictimes.indiatimes.com/tech/internet/india-has-second-highest-number-of-internet-users-after-china-report/articleshow/71311705.cms?from=mdr> accessed 30 January 2020

3 'Dead Could Outnumber Living on Facebook within 50 Years' (*Sky News*) <https://news.sky.com/story/dead-could-outnumber-living-on-facebook-within-50-years-11706879> accessed 5 February 2020

1.1 DEATH IN CYBERSPACE

From the early nineties, scholars from various specialisations have researched how the dead have been remembered and commemorated in cyberspace. The pre-web period practiced bulletin boards and print obituary notes and the mourners used to gather around the casket and support the bereaved (Roberts, P. and Vidal, L. A. 2000).[4] When the practice of web commemoration of the dead started it was more of a tool to communicate either to a likeminded support group or to remember the deceased on their special days like birthdays and anniversaries (de Vries, B. and Rutherford, J. 2004).[5] Various digital media platforms radically changed the way society perceives death with newer options related to death, grieving, and remembering. With *DeadSocial,*™ users can create messages to be published to social networks even after their death. Facebook's legacy contacts enables users to memorialise their page and nominate a trusted contact to manage the accounts, and other platforms like 'If I Die' enables users to create a video or text message for posthumous publication in Facebook. Similarly, Twitter platform _LIVESON accounts can be programmed to mimic the tweeting habits of the user and shall keep tweeting even after the user is gone (Moreman CM and Lewis AD 2014).[6] The purpose of this 'digital remains' is to preserve the life of the deceased for perpetuity in a frozen form. These digital ghosts inhabit these digital graves as a mere replica of the mental life of the deceased with no autonomy of its own. (E. Steinhart 2014).[7] Digital media also affects news sharing about death, as news can spread extremely quickly online, so much so that in 2009 when Michael Jackson died, there was an increase in the traffic to leading news sites, and CNN later published

4 Roberts P and Vidal LA, 'Perpetual Care in Cyberspace: A Portrait of Memorials on the Web' (2000) 40 OMEGA - Journal of Death and Dying 521 <http://journals.sagepub.com/doi/10.2190/3BPT-UYJR-192R-U969> accessed 7 February 2020

5 de Vries B and Rutherford J, 'Memorializing Loved Ones on the World Wide Web' (2004) 49 OMEGA - Journal of Death and Dying 5 <https://doi.org/10.2190/DR46-RU57-UY6P-NEWM> accessed 7 February 2020

6 Moreman CM and Lewis AD, Digital Death: Mortality and Beyond in the Online Age: Mortality and Beyond in the Online Age (ABC-CLIO 2014)

7 Steinhart E, Your Digital Afterlives: Computational Theories of Life after Death (Springer 2014)

in its headline that "*Jackson dies, almost takes the internet with him.*" These online memorials offer an opportunity to connect a bigger audience with identical experiences.[8] (Nathaniel A. Warne 2016). In the published outcome of the International Conference of cultural informatics, it's concluded by one of the presenters that digital environment creates new social relationships and practices that have the potential of substituting age old traditions associated with death. Adding to this is the effervescent presence of the deceased in the digital world which attributes a sense of immortality to him or her, affecting the relationship of the living and the deceased (Graikousi 2019).[9] This study explores the fundamental questions that are posed by the scientific community as to what extent the narration by digital mourners about the dead affects the identity that the deceased have left behind in digital space, and what is the impact of it on the privacy of the deceased, even though they may not be a legal personality under strict interpretation. Does this digital presence for an indefinite future pave the way for perpetual digital immortality that allows the bereaved to get rid of the grief at some point of time?**.** (M Sideri 2020).[10]

1.2 DIGITAL ASSETS: DEFINITION AND CLASSIFICATION

The term digital assets, though popular in usage, is even now a misnomer, as there's no legally accepted definition. An asset to be classified as a digital asset should exist in a binary format and should capacitate the holder or their successor with a right to use. A comprehensive definition of digital assets would be 'any digitally stored content or an online account, owned by a legal person.[11]'

8 Warne NA, Emotions and Religious Dynamics (Routledge 2016)

9 Graikousi S and Sideri M, 'Death in Digital Spaces: Social Practices and Narratives' (2020) 1 International Conference on Cultural Informatics, Communication & Media Studies <https://eproceedings.epublishing.ekt.gr/index.php/cicms/article/view/2728> accessed 22 February 2020

10 Graikousi S and Sideri M, 'Death in Digital Spaces: Social Practices and Narratives' (2020) 1 International Conference on Cultural Informatics, Communication & Media Studies <https://eproceedings.epublishing.ekt.gr/index.php/cicms/article/view/2728> accessed 18 February 2020

11 Romano J, 'A Working Definition of Digital Assets.' (The Digital Beyond) <https://www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/> accessed 23 February 2020

These digital assets can be tangible or intangible, depending on the medium of storage. Digital assets include and can be categorised as under:

A. **Personal Digital Assets** include emails, documents stored in computers and other portable digital devices, multimedia contents like photos and videos stored in various digital devices, content stored in social media profiles, contacts stored in email and or mobile phones, loyalty reward points for various subscriptions and services availed by user, etc.

B. **Financial Digital Assets** include online banking data, user Ids and passwords for net banking and other online transactions, online insurance, mutual funds, shares and other investments, virtual properties and goods of value traded in online gaming platforms, details of credit and debit card transactions, e-wallets payments given for online gambling, digital, virtual and crypto currencies like Bitcoin, Ether (ETH), etc.

C. **Professional Digital Assets** include domain names, official email accounts, social media handles, blog and web content, visual content and other content management system (CMS) used, customer database of online businesses, auction sites, etc.

D. **Technical Digital Assets** include an inventory of passwords for various digital services, computer networks, device backup logs: both local and cloud based, web hosting services, software projects: both enterprise and individual, etc.

The digital assets comprise of the data of the users, and not the device or platform where it is stored. For instance, the email messages are stored in the service provider's hardware like drives, networks, etc., while the user owns only the content they generated there. There's also the issue of who owns information once it's uploaded or stored onto a website. The absence of a uniform legal definition as to what accounts for digital assets brings us to the moot point of whether the user owns the account or just the content stored and accessed using that account. For example, the account the user creates using an internet service like Facebook or Instagram may not be

considered as an asset of the user, and he or she may have ownership only on the content created or stored by means of that account. This dichotomy was discerned in the early 2005 matter before an Oakland Probate Court, in the case filed by *John Ellsworth*, father of *Justin Ellsworth,* a marine who was assassinated in Fallujah. Yahoo denied the father's request to access Justin's email as the executor of his son's Yahoo mail account. Yahoo contended that providing access to the account is violative of their terms and conditions, as the account is non-transferable. The court partly accepted Yahoo's plea and ordered them to give only the content of the email account to the father and not granted the access to the account. Yahoo complied with the court's mandate and handed over the contents in a CD and as print outs.[12] The dearth of legal enactments favours the terms and conditions of such online platforms to precede the conditions as to who can access the account and transferability of the account in the unfortunate event of the death of the user. This is one major roadblock to the executors of the deceased, as clearly the content in such platforms belongs to the deceased, but the executor will be unable to access or operate such accounts if the access is denied by the service providers.

2. INHERITANCE OF DIGITAL ASSETS

Inheritance can be defined as the process of transferring the ownership to the legal heirs upon death of the actual owner. A person can inherit another's property in two ways, i.e., by a will or testamentary succession and intestate succession (through personal laws of succession, if no will is created during the lifetime of the owner). As per law, both movable and immovable properties can be subject to inheritance. The laws of inheritance in India are applicable based on types of succession and religion, which include: (a) The Hindu Succession Act, 1956/ 2005, which applies on intestate succession among Hindus which is also applicable to Sikhs, Jains and Buddhists. (b) The Indian Succession Act, 1925, which applies on transfer of property

12 Olsen S, 'Yahoo Releases E-Mail of Deceased Marine' (CNET) <https://www.cnet.com/news/yahoo-releases-e-mail-of-deceased-marine/> accessed 23 February 2020

of Hindus by a 'Will,' i.e., a testamentary succession. This law allows any individual to transfer his own property legally to any individual he wants by getting a 'Will' drafted. The legal heirs can inherit both ancestral property and self acquired property of the deceased based on the personal laws applicable. While during the lifetime of a person, the whole intent is to secure the digital estate, after life inheritance poses a real challenge. There are no explicit legal provisions on digital inheritance in most countries including India. This makes the matter more complex, especially when digital assets or estates have great monetary value. The primary reasons for these lacunae are the absence of a clear definition of laws to include digital estate, which may also include outstanding debts and intellectual property. On the global scale, popular social media and services platforms, like Google, Facebook and Twitter, do offer some help in retrieving accounts of their dead users. But, the nominee may not have full rights to operate the inherited account/s. For instance, Facebook allows the users to choose a 'legacy contact' to manage their account after death.[13] However, the nominee can only add a pinned post (like announcing the death or funeral arrangement) and change the profile and cover photo. The legacy contact cannot log into the account, read messages or add or remove friends. Google also has an 'inactive account manager' that allows a user to nominate or add a trusted contact who can have access to the data in the account after a certain period of inactivity. When an account stays inactive for a period of time, Google sends an alert to the entrusted contact. If the user has instructed to share data with the trusted contact, Google will inform the nominee about the data that can be accessed by them. Instagram, too, has the option where friends and family of a deceased user can report their death and request memorialization of the account. Twitter, however, allows only the legal successor to deactivate the user account and nothing else.[14] In a watershed moment for the legal heirs of

13 'What Is a Legacy Contact and What Can They Do with My Facebook Account? | Facebook Help Centre | Facebook' <https://www.facebook.com/help/1568013990080948> accessed 23 February 2020

14 'How to Contact Twitter about a Deceased Family Member's Account' <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> accessed 23 February 2020

a deceased Facebook account holder, a German Federal court in its judgement allowed the mother to access the FB account of her 15 year old daughter, killed in an accident in an underground train at Berlin. The court observed that "*the daughter's contract with Facebook was part of her legacy and, hence, should be passed on to the mother, giving her full access to the daughter's account including her posts and private messages.*"[15] Other convenient options for passing on digital inheritance include using password vaults and digital inheritance services. The password vault service-providers store multiple passwords which will be sent to the nominated person after the death of the user. Periodic emails will be sent to the user to check if the user is alive. Depending on the service-provider's terms and conditions, if there is no response to multiple mails, the passwords are shared with the nominated person/s. There can be additional formalities like production of an authentic death certificate and verifying the death claim with two persons.

2.1. LEGAL FRAMEWORKS: USA, UK AND INDIA

In the USA, laws for digital assets make it a criminal offence for a spouse or family member to access email, social media or other online accounts of the user. Various US states are adopting *Uniform Fiduciary Access to Digital Assets Act (RUFADAA), 2015,* a property law that recognizes for the first time the existence of digital property as a property right in the same manner as in other rights in real and tangible personal property. S. 2(10) of the act defines "Digital Asset" as an electronic record in which an individual has a right or interest and excludes an underlying asset or liability unless such asset or liability is an electronic record. This definition would include all electronic records of the user, like email accounts, social media accounts like Facebook, LinkedIn, Twitter, etc., blogs, cryptocurrencies, photos and videos posted to the internet, websites, online purchasing accounts like Amazon, music subscriptions like iTunes, Spotify, etc., movie services like Netflix, reward programs for airlines,

15 'Grieving Parents Can Inherit Their Late Daughter's Facebook Account' (South China Morning Post, 12 July 2018) <https://www.scmp.com/news/world/europe/article/2155027/grieving-parents-can-inherit-their-late-daughters-facebook-account> accessed 23 February 2020

credit cards, etc.[16] As of March 2018, the bill has been adopted by more than 39 US states. The Act applies to (a) an agent or attorney acting under a power of attorney executed before or after the effective date of the Act; (b) a legal representative, whether under a will or intestate, acting for the deceased (c) a court-appointed guardian, and (d) a trustee acting under a trust created before or after the effective date of the Act. However, the Act does not apply to the digital assets of an employer, which are used by the employee during the ordinary course of business. The act recognises two classes of people who can handle the digital assets of the user: i.e., the custodian and the fiduciary. While custodian is the person that carries or maintains or stores the user's digital assets, fiduciary is the original, successor or personal representative of the user. The user gets to decide whether the custodian should disclose to the fiduciary the existence and contents of his digital assets. In the absence of such a direction from the user, the fiduciary can demand that the custodian provide access to the user's digital assets. In the case of a guardianship, the court will decide the extent of such permissions.

There's no proper legal definition of digital assets in the UK, but it includes, in general parlance. email accounts, social media, photographs stored in online platforms, etc. In 2015, Mr. James Norris, the founder of DeadSocial, formed "The Digital Legacy Association" to create awareness about digital assets and digital legacy. They have created a free manual titled "Digital asset and end of life framework" to educate healthcare professionals and users who are in their late life to prepare and plan for their digital possessions. They have also conducted various surveys among the general UK public to ascertain the password management mechanism of users and the succession plan they have chartered for their digital assets. The study shows that though users spend considerable time online, when it comes to password management and planning of digital assets, a majority of them are either not aware or have planned for such an eventuality. The study further reveals that 65 to 80% of the respondents have not shared the passwords of their SNS (Social Networking Sites) or E-mail and

16 'Journal Estate Planning for Digital Assets: Understanding the Revised Uniform Fiduciary Access to Digital Assets Act and Its Implications for Planners and Clients' <https://www.onefpa.org/journal/Pages/APR18-Estate-Planning-for-Digital-Assets-Understanding-the-Revised-Uniform-Fiduciary-Access-to-Digital-Assets-Act-and.aspx> accessed 23 February 2020

net banking details with anyone else. This may pose an earnest challenge to their immediate family and friends to manage their digital assets posthumously. A whopping 92% of respondents have not documented what should transpire with their social media accounts following their death. A majority of them has not set up a Facebook legacy contact, either[17].

This lack of awareness among the users and absence of legislative mandate in the UK make matters complicated for the bereaved families of the deceased users. Recently this issue came to the attention of the Central London County Court in the matter of *Rachel Thompson vs. Apple*.[18] In early 2019, *Rachel Thompson*, a widow, had sued Apple to release the photos and videos stored in her late husband's Apple account. Apple refused and demanded a court order, as the user had not made any provision for access to the content in the event of his death. Under UK law, there's no legal right to access information held in a deceased person's online account. The account contained photos and videos of their young daughter along with her father, and Mrs. Thompson wanted her daughter to inherit those. Mrs. Thompson obtained the court order and, thereby, forced Apple to grant her access to the account.[19] In the US, laws for digital assets make it a criminal offence for a spouse or family member to access email, social media or other online accounts of the deceased user. It is prudent to orchestrate and apportion the details of your entire digital assets to your heirs through a pellucidly defined Will, as they may remain locked forever if such is not done.

In India, The Information Technology Act, 2000, is applicable to all digital information, data and assets. However, its applicability is excluded to testamentary, disposition and wills. The law pertaining to wills is governed by

17 Warwick-Ching L, 'From Facebook and ITunes to Cryptocurrencies — What Happens to Your Digital Assets When You Die?' (22 November, 2019) <https://www.ft.com/content/8ed79406-06f3-11ea-9afa-d9e2401fa7ca> accessed 24 February 2020

18 'Social Media – What Happens to Our Online Data after We Die? | Clarion' <https://www.clarionsolicitors.com/articles/social-media-what-happens-to-our-online-data-after-we-die> accessed 26 November, 2020

19 'Make Sure Your Will Includes Digital Assets' (Lifehacker Australia, 13 May 2019) <https://www.lifehacker.com.au/2019/05/make-sure-your-will-includes-digital-assets/> accessed 24 February, 2020.

the Indian Succession Act. One of the shortcomings of this act is that it does not have specific provisions pertaining to digital legacy and bequeathing of digital assets to the next of kin of the deceased. Digital assets like email, social media accounts and other digital data will come under movable property, and legal heirs can claim access over it and can demand that the service providers give access, after furnishing necessary proofs. However, the service provider may refuse such access, citing violation of terms and conditions and can demand a court order to that effect. Since India is known for its red tape menace, getting a succession or legal heir certificate to approach the courts for obtaining such an order will be a time consuming and costly affair. In cases of posthumous legacy of Digital Assets, where there is no testamentary intention made by the deceased, can a writ help? Indian constitution has envisaged the writ jurisdiction of the High Court and Supreme Court as a saviour for those whose fundamental rights have been contravened.[20] It is interesting to dwell on the fact of whether the same could be of any help in cases of posthumous intestate digital assets legacy. While most writs are in the nature of a command of the sovereign to uphold the fundamental rights as per the constitution, can a denial by Social Media giants to provide access to posthumous digital asset legacy fall within the purview of a writ? In the current context, one would need to play the devil's advocate and, in such cases, filing a writ just may not be good. On the other hand, approaching the courts by treating it as a digital legacy can stand in good stead. This paucity of uniform legal standing of digital assets is clearly visible in the management of welfare schemes like Aadhar, which is the largest digital depository of personal data of Indian citizens. Unlike other government databases, like electoral rolls which removes the details of the dead voter by linking their database with that of registrars of birth and death, an Indian cannot opt out of Aadhar even when they are dead, and hence they live virtually in the database of the Aadhar project even though they no longer need any subsidy or proof of residence.[21]

20 Art. 32 & 226; Constitution of India

21 Delhi January 15 SGN, January 15 2019UPDATED: and Ist 2019 11:11, 'You Can Set Facebook Account to Delete in Case You Die, but Aadhaar Is Forever' (India Today) <https://www.indiatoday.in/technology/features/story/you-can-set-facebook-account-to-delete-in-case-you-die-but-aadhaar-is-forever-1431057-2019-01-15> accessed 26 February, 2020.

3. ISSUES OF IDENTITY THEFT AND COPYRIGHT VIOLATION OF DECEASED USER ACCOUNTS

One of the greatest challenges of social media is the event of non-closure of accounts, which exposes them to the risk of being surmounted illicitly by rogue elements. Reports suggest that about 2.5 million dead user profiles are subject to identity theft in the USA alone.[22] These stolen identities were used to obtain credit cards, mobile phone connections and fabrication of social security numbers. Unlike in the popular drama "Game of Thrones,' the dead won't come back and regain their identity, but their bereaved family or the businesses they serve could bear the brunt of these identity thefts.[23] Since a whole lot of information is documented in social media platforms, this makes it easily accessible for potential identity thieves. In most cases, the perpetrators of this fraud are friends or close relatives of the deceased themselves.[24] However, even strangers can be the culprits by accessing the efflux of data that can be collected from online accounts, internet obituaries, etc. There are also reports of crooks filing tax returns with the identity of the dead and collecting refunds from authorities.[25] This type of fraud is highly lucrative to the fraudsters, as it takes months or years to identify this category of fraud by the legal heirs or financial institutions. In most jurisdictions, the law protects the legal heirs against such frauds, and they are not legally bound to pay up for any loss incurred by such fraud. But, nothing can alleviate the mental pain and trauma they may have to go through. There is no dearth of case laws that emphasise the frugal copyright protection given to digital assets of a deceased user. The online content platforms like Apple ITunes, Amazon Kindle allow the users

22 White MC, 'Grave Robbing: 2.5 Million Dead People Get Their Identities Stolen Every Year' [2012] Time<https://business.time.com/2012/04/24/grave-robbing-2-5-million-dead-people-get-their-identities-stolen-every-year/> accessed 25 February 2020

23 'Fraudsters' Latest Target: Dead People' (PYMNTS.com, 25 April 2019) <https://www.pymnts.com/fraud-prevention/2019/deceased-digital-id-theft-trulioo/> accessed 25 February 2020

24 'Protecting Deceased Loved Ones From Identity Theft - Family' <https://www.aarp.org/money/scams-fraud/info-03-2013/protecting-the-dead-from-identity-theft.html> accessed 26 November 2020

25 Ibid

to purchase the digital content, but the user hardly has any control over the music or books they have purchased. The user is only getting a license to use it for their personal use, no matter how long you may be reading or listening to the content. Without Apple or Kindle's permission, the user cannot bequeath these digital assets to his/her children. In 2014, State of Delaware proposed a legislation that will grant access to the families of the deceased or incapacitated user's digital assets.[26] The bill recognises not only email and social media accounts, but other data like audio, video, sound recordings and software licenses, etc., as digital assets. However, the trustees of the deceased can manage it, subject to the terms and conditions prescribed in the End User License Agreement (EULA) signed between the user and service provider. It was reported in 2012 that Hollywood actor *Bruce Willis* wanted to bequeath his extensive iTunes music collections to his daughters, but the click wrap agreement be signed before downloading the content grants him only a license to listen to the music, and not ownership to transfer.[27] Willis can probably leave music loaded MacBook and Ipod/Ipad to his children, but the kids may not be able to transfer songs to other devices. There are other challenges of granting ownerships to the users of these digital contents, as it may affect the actual artists by losing out on their income, since Apple is only a middle man or a facilitator between artists and the consumers. In early 2019, a Manhattan court *In re Scandalios*[28] ordered Apple to give access to a deceased user, late Mr. Ric Swezey's husband *Nicholas Scandalios* access to extensive photographs of their life together on Apple iTunes and iCloud accounts. When Mr. Ric Swezey passed away, he had failed to consider his digital presence when making his Will. The Court found that the "disclosure of electronic communications, unlike disclosure of other digital assets, requires proof of a user's consent or a

26 Bogle A, 'Who Owns Your Kindle EBooks After Death?' (Slate Magazine, 22 August 2014) <https://slate.com/technology/2014/08/digital-assets-and-death-who-owns-music-video-e-books-after-you-die.html> accessed 25 February 2020

27 CNN BBG, 'Can Bruce Willis Leave His ITunes Music to His Kids?' (CNN) <https://www.cnn.com/2012/09/03/tech/web/bruce-willis-itunes/index.html> accessed 25 February 2020

28 [2019]-2976/A (N.Y.).

court order" but clarified that the "deceased's photographs stored in his Apple account are not 'electronic communications.'"[29]

India is not a signatory to WIPO Copyright Treaty, or to the WIPO Performances and Phonograms Treaty. However, as a part of its 2012 amendment of copyright laws, it implemented digital rights management protection. Section 65A of Copyright Act, 1957, imposed criminal sanctions on circumvention of "effective technological protection measures." Section 65B criminalized interference with digital rights management information. Any distribution of copies whose rights management information was modified was also criminalized by Section 65B. It is important to note that the WIPO Internet Treaties themselves do not mandate criminal sanctions, merely requiring "effective legal remedies." Thus, India's adoption of criminal sanctions ensures compliance with the highest standards of the WIPO Internet treaties.[30] Another area of copyright issue is the ownership and transfer of cryptocurrencies, like Bitcoin, which will remain available even after the death of the user. The content can be accessed only through the private key of the user. If the deceased user does not provide access to the key to the legal heirs, the Bitcoin asset will be lost. The only methods of protection is to store the key at any safe place or in pen drive and make it available to the legal representatives, or avail the service of any reputed password manager service. Another potential asset will be the online gaming accounts, YouTube videos, blogs, Vlogs etc that may have some significant financial value.

4. EMERGING PRACTICES OF ASSET MAINTENANCE AND POSTHUMOUS SCHEDULING

At their most fundamental, digital asset management (DAM) systems consist of computer software and hardware used for storing digital assets. Digital Asset

29 'Recent Digital Assets Case Highlights Confusion over Online Ownership after Death | STEP' <https://www.step.org/news/recent-digital-assets-case-highlights-confusion-over-online-ownership-after-death> accessed 25 February 2020.

30 'Digital Rights Management & Its Interaction With Net Neutrality - Intellectual Property - India' <https://www.mondaq.com/india/copyright/597256/digital-rights-management-its-interaction-with-net-neutrality> accessed 27 November 2020.

Maintenance (DAM) begins with the assessment of the available digital assets. The researcher had identified the following inclinations in general: Digital Asset Maintenance or Management practiced in developing countries like USA and UK.[31]

A. KNOW WHAT YOU HAVE

The first logical step is to know what digital assets one has, and what they are used for. Conducting an audit of one's existing digital content can help in setting up the Digital Asset Management or Maintenance goals and gives one an insight into which type of software they need. It is different if you work mostly with static content, than if you work mostly with video and multimedia files. Preparing a comprehensive inventory of one's digital assets, with instructions on access as well as the disposition of these items, is critical to ascertaining the assets are congruously maintained after one's death. In additament, one may have to share their plans for their digital assets and the subsistence of an inventory with family and the DAM advisors. Ideally, one can run a thorough "pre-death audit" to understand where one may encounter problems or need supplemental guidance to ascertain that their wishes are carried out as intended.[32]

B. CHOOSE THE RIGHT DIGITAL ASSET MANAGEMENT TECHNOLOGY

When choosing the right DAM solution, one needs to take into consideration the following aspects:

- **Integrates with existing systems** — If the user already have a content management tool that can integrate with the DAM system, they can look for solutions that work with what they have, instead of changing the whole infrastructure.

31 'The Importance of Digital Asset Succession Planning for Small Businesses by Jamie Hopkins, Ilya A. Lipin, John Whitham:: SSRN' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532557> accessed 26 November 2020.

32 'Asset Management as a Digital Platform Industry: A Global Financial Network Perspective - ScienceDirect' <https://www.sciencedirect.com/science/article/pii/S0016718519302520> accessed 27 November, 2020.

- **Is secure** — While no platform is 100% secure, most DAM solutions come with security features to avoid security lapses. If the digital asset has any monetary value, such as a PayPal account, an online business or a website which engenders advertising revenue, then it's best to discuss these with one's executor, or DAM advisor, to enable them to assess the value of the digital asset and liaise with the third party owner of the data storage facility to have the asset transferred to, or the value of the asset paid into, the estate.[33]
- **Easy to use** — The platform needs to be easy to use, so it actually gets used by your employees. A platform with a myriad of extra features can sometimes be too complicated to use and is left unused. Choose the one that has just the right features for your company or individual needs with an easy interface.

C. LAYER SECURITY BY CONTROLLING ACCESS AND PERMISSIONS

Large companies or organizations with different levels of stakeholders can find it challenging if all users have access to the digital assets repository. A DAM strategy can help by setting different levels of permissions on a user-role basis. That means, for instance, that only people involved in a given campaign can have access to that campaign's assets. Additionally, one can restrict access to proprietary assets, to avoid copyright issues. The more the protocols used to manage the digital assets are integrated with sectors and stakeholders that deal with other types of a digital asset, like copyrightable materials, cryptocurrencies, etc., the more utilizable and valuable these assets are likely to become.[34]

D. AUTOMATE WORKFLOWS

Automating workflows can help control the flow of digital assets in an effective manner. A good DAM strategy can help automate some tasks such as sharing

33 'When You Pass on, Don't Leave the Passwords behind: Planning for Digital Assets 26 Probate and Property 2012' <https://heinonline.org/HOL/LandingPage?handle=hein.journals/probpro26&div=11&id=&page=> accessed 27 November, 2020.

34 Pasztor J, 'The Increasing Importance of Digital Assets in Estate Planning' (2020) 74 Journal of Financial Service Professionals 18 <http://search.ebscohost.com/login.aspx?direct=true&db=bsh&AN=145310259&site=ehost-live> accessed 27 November, 2020.

content automatically within the relevant users or distributing new versions to agencies. In countries like USA, UK, etc., there has been a steady stream of online digital legacy services. They offer various services on managing digital assets to suit the individual needs of their clients. These legacy account managing services offer an individual an opportunity to digitally store their life story, leave messages to loved ones and record their last will in one safe place. Listing below, a few notable ones:

- www.afternote.com
- Aftervault.com
- www.bcelebrated.com
- www.boxego.com

In addition to the conventional memorialization of social media pages and creation and management of legacy accounts, the service providers like AfterVault give an individual secure, online, encrypted information vaults with established categories for their documents, such as life insurance, other consequential documents and photos, pet wishes, the dispensation of social media accounts, etc.[35]

5. CONCLUSION AND SUGGESTIONS

With the rapid growth of technology in the last few years, the amount of digital data the average person holds in cyberspace has increased tremendously.Hence, it becomes all the more important not only to maintain this content, but also to plan for its intestate and testamentary disposition. The users need to work with the digital platforms they operate and understand what they can and cannot do based on the terms and conditions agreed upon. While some digital

35 Gulotta R and others, 'Engaging with Death Online: An Analysis of Systems That Support Legacy-Making, Bereavement, and Remembrance,' Proceedings of the 2016 ACM Conference on Designing Interactive Systems (Association for Computing Machinery 2016) <https://doi.org/10.1145/2901790.2901802> accessed 26 November, 2020.

assets may have sentimental value, others may be more of a financial value. It's a practical approach to prepare a will that covers digital assets. But, that won't automatically transfer the assets to the legal heirs if the terms and conditions of the platform do not allow transfer of ownership. The succession laws have not kept pace with the rapid advancement of technology, too. Not planning one's digital legacy can trigger a lot of unwanted stress for the bereaved families once the user is gone. Moving towards Digital Asset Management Strategy, which takes a holistic view of the entire inventory of digital assets, is the need of the hour. It is imperative that effective legislative efforts from statutory authorities across countries, coupled with the framework of a worldwide convention, can go a long way in aiding posthumous dispositions.

Application of Peremptory Norm of General International Law to United Nations Security Resolutions: One Step Forward and Two Steps Back

Atul Alexander

Abstract

The modern-day international law is chiefly regulated by International Organisations (hereinafter also referred to as 'IO'). One such organisation that has emerged at the forefront is the United Nations (hereinafter also referred to as 'UN'). The advent of UN saw the rise of the Security Council, which is one of the six primary organs of the UN. Post-1990s, the Security Council started establishing its footprint through its resolutions, thereby imposing its own will in specific instances of violations of human rights of individuals. This paper attempt to finds answers to questions like, firstly, is there a restriction on the Security Council resolutions? If affirmative, does the solution lie in a higher norm called jus cogens (hereinafter also referred to as 'peremptory norm'); secondly, is there any mechanism for security council impact assessment in the Security Council to place a tap on the Security Council's actions; thirdly, the emergence of fragmentation and its repercussion in the domain of jus cogens and Security Council; and finally the consequences and implication of the Security Council resolutions contradicting jus cogens. The paper is divided into four sections; the first portion tracks the concept of jus cogens in international law. The second part analyses the interaction of jus cogens and Security Council resolutions. The third section covers the consequences of the violation of peremptory norm through the Security Council resolutions. And, the final segment highlights the impact of fragmentation of international law on peremptory norm and Security Council resolution.

Key Words: *Peremptory Norm, Security Council, United Nations, fragmentation, International Organisation.*

1. INTRODUCTION

The United Nations Security Council (hereinafter referred to as 'UNSC') is widely regarded as the most powerful organ in the globe.[1] The distinctive character of UNSC is reflected in Article 24 of the UN Charter[2]; notwithstanding this, the Security Council has continuously been wielding its power to violate international law, flagrantly. To place a check on the unbridled power of the UNSC, there need to be robust checks and balance mechanisms; one such norm to put a lid on the unchecked regime of UNSC is 'peremptory norms of general international law.'[3] The UNSC operates through a more extensive system of International Organisations and is based on the constitution of limited powers; therefore, bound by standards set by international law.[4] The principle of sovereign equality is inapplicable to International Organisation.[5] The regulation on the organs in an institution is usually carried out through a review process.

However, the constituent instrument which regulates the functioning of the organisation cannot breach the peremptory norm of International Law. Having said this, in modern international law, the role of the Security Council is indispensable in the maintenance of peace and security; the extent and scope, however, remain vague and unclear. The question about the nature of the UNSC is shrouded in mystery, as is the nature of the organ as legal or political.[6] The enormous power does not guarantee the UNSC to do anything under the sun, and the check and balances in the system are very evident, as was understood through a UNSC resolution 1483.[7] In this resolution, the President of the

1 Erik Voeten, 'The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force.'

2 United Nations, 'UN Charter (Full Text) | United Nations' [1945] 1945.

3 Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter' [2005] Santa Clara Journal of International Law.

4 Julie Bishop, 'United Nations General Assembly High Level Debate - Building Global Security and Prosperity' (2013).

5 ibid.

6 Voeten (n 1).

7 Mahmoud Hmoud, 'The Use of Force against Iraq: Occupation and Security Council Resolution 1483.'

Security Council stressed on the inherent limitations to UNSC resolution in Article 1 of the United Nations Charter.[8] However, the concern of this paper is limited to the peremptory norm of general international law. The UNSC, as a legislative organ, needs to be analysed. Exempting a few resolutions post 9/11, the UNSC has not legislated laws. The Security Council could only adopt measures in the restoration of peace and security. The decisions from the International Court of Justice (hereinafter also referred to as 'ICJ') and tribunals confirm the fact that specific international legal standards bind the UNSC.[9] The scope of the present article is to confine the study to the implication of the UNSC in breach of peremptory norm obligations.

2. MYSTERY AND CONCEPT OF PEREMPTORY NORMS

International Law operates in a highly decentralised manner, predominantly dominated by States; hence, to indict a State for a wrongful act becomes impossible.[10] In order to break this vogue in international law, a different term is floated around, i.e., jus cogens, a phrase that challenges the entire notion of the Statist approach to international law. The term or, rather, the concept of jus cogens is highly controversial and ambiguous. Academicians across the board have debated extensively on its content.[11] Some scholars even point out the fact that jus cogens is the sole remedy to the present-day international law, which is State Centric and Voluntaristic.[12]

The term jus cogens developed mainly because of the contribution made by International Legal Scholarship (hereinafter referred to as 'ILS'). It's a movement towards the revival of natural law in the domain of international law, which

8 United Nations (n 2).

9 Gordon A Christenson, 'The World Court and Jus Cogens' [1987] The American Journal of International Law.

10 Abram Chayes and Antonia Handler Chayes, 'On Compliance,' *International Law and International Relations* (2007).

11 Matthew Saul, 'Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges.'

12 A. Hameed, 'Unravelling the Mystery of Jus Cogens in International Law' [2014] British Yearbook of International Law.

had lost its glory post-world war II due to Nuremberg fallout and positivism taking center stage. The resurfacing of the concept of jus cogens has brought forth a moral dimension in international law which, hitherto, was lacking. Thus, in short, jus cogens, as scholars depict, is the only possible quick-fix to the already declining international law. The term gets its root in Natural Law; which is based on morality and values.[13]

Hence, it is evident that in the background of all the debate on treaty framework, jus cogens could act as a buffer to regulate the giant sovereign called 'State'. The concept of jus cogens got a universal footprint after the codification of the Vienna Convention on Law of Treaties, 1969 (hereinafter referred to as 'VCLT'). Article 53 of VCLT clarifies on what constitutes jus cogens: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[14] Although peremptory norm was mentioned in the VCLT, the drafters failed to clarify its precise scope and content; this, in turn, resulted in the host of debates surrounding the expression today.[15] The growth of international law is mainly through subsequent practice as elucidated in the VCLT. The two nodal institutions which are conferred with this task, i.e., ICJ and International Law Commission (hereinafter also referred to as the 'ILC'), have failed to explain its content and scope, albeit in certain instances the contribution of the separate and the dissenting opinions in the ICJ have to some degree shed light on its evolving nature.[16] The major work on the topic is undertaken by scholars who need acknowledgement and praise.

13 Mary Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms,' *The Role of Ethics in International Law* (2011).

14 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2008).

15 Hameed (n 12).

16 Christenson (n 9).

The ILC in its fourth report on peremptory norms of general international law identified eight norms that could be categorised as peremptory norms. As pointed out by the ILC in the draft conclusion 24, the list enumerated is non-exhaustive; hence open to progressive development. As ILC is widely regarded as the legislative institution in international law, the list can reflect consensus amongst the States.[17]

Article 53 of 64 of VCLT deals with the invalidation of treaties in conflict with the peremptory norm. One of the inherent deficits in this is that it's confined to treaties and not other sources of international law.[18] Therefore, the question arises as to whether peremptory norms apply to UNSC resolutions. In one of the leading Judgments in the ICJ, i.e., *Bosnia v Serbia,*[19] Judge Lauterpacht[20] observed that the UNSC binds jus dispositivum; for more clarity, an in-depth of Article 103 of the UN Charter is required, which will be discussed in the subsequent section. The substantive contents of jus cogens as enumerated by the ILC are a matter of least concern, as it is open-ended.[21]

3. INTERACTION BETWEEN JUS COGENS WITH SECURITY COUNCIL

A bare reading of Article 24 and 25 of the UN Charter would suggest that the Security Council shall act in compliance with the purpose and principle of the UN Charter. It is quite evident by the literal interpretation of the UN

17 Draft Conclusion 24 of Fourth Report on peremptory norms of general international law identifies eight peremptory norms, viz., (a) the prohibition of aggression or aggressive force; (b) the prohibition of genocide; (c) the prohibition of slavery; (d) the prohibition of apartheid and racial discrimination; (e) the prohibition of crimes against humanity; (f) the prohibition of torture; (g) the right to self-determination; and (h) the basic rules of international humanitarian law.

18 Alexander Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions.'

19 Richard J Goldstone and Rebecca J Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' [2008] Leiden Journal of International Law.

20 ibid.

21 Villiger (n 14).

Charter that[22] one of the principles embedded in Article 2(4) of the charter on the non-use of force[23] has been elevated to the jus cogens; this implies any resolution in contradiction to Article 2(4) is ultra vires; this analogy could be stretched to other principles in the UN Charter, i.e., self-determination, fundamental human rights. Another relevant treaty that forms the soul of interpreting international law is the VCLT; as an International Organisation, the VCLT applies to the UN.[24] The UN Charter is bound by Article 53 and 54 of VCLT, as it is a treaty framework. An idealist might argue that the UN is beyond a treaty,[25] something like a super-treaty. Since treaties are primarily based on consent, could it be presumed that a State in the garb of autonomy could insert a provision subsuming and contradicting jus cogens? Can a State escape the moral authority called jus cogens through the establishment of an International Organisation?[26]

It could be safe to say that jus cogens have percolated into other regimes of international law, like the World Trade Organisation (hereinafter also referred to as 'WTO') through the WTO agreement which has been challenged on the ground of breaching jus cogens norm.[27] The writers defending the charter obligation over jus cogens argue that by Article 103, the charter obligation prevails over any other obligations, but its rivalry with a jus cogens norm is blurred, but international practice suggests otherwise. In certain times, jus cogens hit directly at the acts of the Security Council; for instance, the 1986 convention on International Organisation hits directly in terms of coercive treaties.[28] To decipher the philosophy of norm clash between the Security

22 United Nations (n 2).

23 Hossain (n 3).

24 Villiger (n 14).

25 Nico Schrijver, 'The Future of the Charter of the United Nations' [2006] Max Planck Yearbook of United Nations Law Online.

26 O'Connell (n 13).

27 Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission' (2013).

28 Orakhelashvili (n 17).

Council and jus cogens is a challenging proposition. The term 'conflict' requires to be clarified to understand the debate in the proper sense. The analysis of the term conflict should be tested in the background of rights and duties of States; the paradox of the Security Council and jus cogens needs to be looked into. The intention of the drafters needs to be deciphered to reveal the real theme of the resolution and absolve any contradiction with jus cogens.[29]

Practice in the UN has indicated that a resolution is in contradiction with jus cogens; the UNSC has brazenly toed the line and gone ahead with the resolution.[30] For instance, the notorious resolutions 731 (1992) and 748 (1992) contradicted prohibition on the use of force, i.e., Article 2(4). UNSC resolutions 731 and 748 demanded that Libya extradite two suspects allegedly involved in the bombing of an aircraft over the airspace of the Scottish town of Lockerbie to either United Kingdom (UK) or United States (US). When requesting extradition, both UK and US undertook a policy of threat to use force against Libya to force it to comply with its demand[31] In the East Timor case,[32] the counter-memorial of Australia was more on the lines of a literal interpretation of the UNSC resolution, as it did not refer to the rights of the third State; however, the ICJ acknowledges the 'Right of Self-determination' of the people of East Timor. The action of the Security Council itself could violate jus cogens; this can be because of the composite measure under chapter VII imposing economic sanctions affecting the lives of innocent civilians.[33] This has occurred in many instances in international relations. The sanctions in FRY, Haiti or Iran contributed to the increased causality and impaired access to food and medicine. Although, the Security Council has approved humanitarian exception to sanction through the General Comments of International

29 Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' [2019] Max Planck Yearbook of United Nations Law Online.

30 Sufyan Droubi, *Resisting United Nations Security Council Resolutions* (2014).

31 Orakhelashvili (n 17).

32 Case Concerning East Timor (Portugal v. Australia), Judgement of 30th June 1995, International Court of Justice (ICJ).

33 Droubi (n 29).

Covenant on Economic, Social and Cultural Rights (hereinafter referred to as 'ICESCR'),[34] those exceptions are very limited in their scope and application, despite the humanitarian exception, and the sufferings are perpetual. What could be done to stem this kind of alarming situation is that the Security Council can seriously contemplate carrying out an impact assessment before passing a resolution concerning human rights issues of the individuals or the victims.[35] The illegality stemming from the breach of the peremptory norm is objective, which would mean that the rules of international law do not independently generate legal consequences in case of their violation, but that such consequences arise only in the event of a subsequent determination of illegality by one or another institution.[36] Such an outcome would cause fragmentation of legal relations and defeat the primary purpose of jus cogens, which is to avoid such fragmentation in the first place. The International tribunals are to determine the legality of the resolution; but the courts and tribunals have applied high standards, and in most cases involving peremptory norm, have declined to delve deeper.[37] In short, the acts of the Security Council, because of the lack and reluctance of the courts, go untested in terms of their legality.

4. CONSEQUENCES OF THE VIOLATION OF PEREMPTORY NORM BY SECURITY COUNCIL RESOLUTION

A careful analysis of the text of the UNSC resolution is required to evaluate the legality of the Security Council resolution. Conducts prohibited under peremptory norm are outside the scope of the Security Council resolution. This is the position concerning the States. Now, an organisation like the UN which is established by the States cannot be conferred with powers and functions to act as a supra-state.[38] The interpretation of the UN Charter is

34 Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (2007).

35 ibid.

36 Orakhelashvili (n 17).

37 Jure Vidmar, 'Rethinking Jus Cogens after Germany V. Italy: Back to Article 53?' [2013] Netherlands International Law Review.

38 Voeten (n 1).

done in consonance with the purpose and principles of the UN as well as to give effect to the will of the States, and the intention is looked upon by taking into consideration the previous practices reflected in the resolutions.[39] Having said this, the outright interpretation of the UNSC resolution could be perfectly justifiable in a flat system, whereas in international law which is governed by a system based on hierarchy, the clash becomes inevitable. The charter law is subject to the charter obligation and is, in its entirety, subject to the peremptory norms, the interpretative tool to ascertain that the UNSC resolution is absent.[40] Certain resolutions contain a specific paragraph that places a priority on human rights. In case of resolutions being vague and marred, the resolution requires to be interpreted in a way that is consistent with the peremptory norm.[41] The clauses in Resolution 1483 (2003) on Iraq referring to 'a properly constituted, internationally recognised representative government of Iraq' (paragraphs 16, 20 and 21),[42] without defining any further requirements such government would have to satisfy, must be construed as referring to a democratically elected government as far as the disposal of Iraqi oil resources is concerned.[43] Whether the subsequent events could lead to the resolution ending up violating peremptory norm, in the ICJ case of 'Certain Expenses of the United Nations',[44] it was reiterated that when the organisation takes action to fulfill its object and purpose, it is not ultravires of the organisation. The law of invalidity is applied when the said resolution is not in fulfilment of the object and purpose of the UN. Now, the issue is which body oversees the actions of the charter.[45] Therefore, the onus is upon the individual member States in the absence of any process of judicial review. Other recourse is that

39 Wood (n 28).

40 ibid.

41 Orakhelashvili (n 17).

42 Hmoud (n 7).

43 Jeremy M Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits' [2014] Journal of Conflict and Security Law.

44 Certain Expenses of The United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion of 20th July 1962.

45 Orakhelashvili (n 17).

individual State could challenge the validity of a specific act. The institutional determination of the validity of the peremptory norm is problematic, as no institution is competent. There cannot be a separate regime established to determine a particular act to be in contradiction of peremptory norm, as the act per se is void in the first place.[46]

Another controversial issue is concerning the severability of the resolution. In case of a paragraph in a resolution contradicting peremptory norm, is the entire resolution ultra-vires or can the particular provision from the resolution be severed and subsequently interpreted.[47] The VCLT supports the proposition that the entire treaty stands invalid. Some scholars argue that to give life to the treaty, the so-called 'innocent' clause requires preservation. Having discussed the legality and the various interpretative nuances involved in the process of placing UNSC resolution in harmony with the peremptory norm, it is essential to examine the recourse available to States to challenge the resolutions in contravention with peremptory norms. The legal restraint on the conduct of the Security Council, i.e., whether lawful or not, is determined by three institutions: a) The ICJ, b) The national courts, c) Internal mechanism under the Security Council working as a full-fledged review mechanism; further, the Security Council is bound by Article 24(2) of UN Charter and is also bound by peremptory norm of international law under Article 53 of VCLT.[48] The present paper is confined merely to the authority of ICJ to review the Security Council resolution. At the San Francisco conference, the issue of judicial review of the Security Council resolution was proposed by Belgium, but did not get through, because it was felt by the States that this could be detrimental to the essential rights and could be a hindrance to the exercise of the functions of the Security Council.[49] However, the issue was brought as an advisory opinion in the

46 *Regime Interaction in International Law* (2011).

47 Wood (n 28).

48 B. Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' [1999] European Journal of International Law.

49 Yoram Dinstein and others, 'The Charter of the United Nations: A Commentary' [2004] The American Journal of International Law.

certain expenses case.[50] Notwithstanding this, the court rejected the possibility of judicial review by the ICJ. The dissenting opinion of Judge Christopher Gregory Weeramantry in the same judgment is noteworthy. The late Judge observed that the court is not debarred from the matter which comes under Chapter VII.[51] Despite the jurisprudence in the certain expenses case, the ICJ has remained passive in judicial activism, seldom interfering in the functioning of other organs of the UN.

5. FRAGMENTATION OF INTERNATIONAL LAW VIS-À-VIS JUS COGENS AND SECURITY COUNCIL RESOLUTION

The era of globalisation led to the increasing universalisation of social life around the world. It has led to fragmentation and, subsequently, the emergence of autonomous regimes in International Law. The phenomenon of fragmentation has impacted significantly, especially in the realm of diplomatic law, wherein the interaction of immunity with jus cogens is ubiquitous.[52] The impact of fragmentation on jus cogens vis-à-vis Security Council requires detailed analysis. Some of the questions that pop up are whether fragmentation leading to specialisation has diluted jus cogens or the Security Council resolution. If affirmative, to what extent, or has the interaction of jus cogens and Security Council resolution been impacted by the interplay. The fact compounds the problem that there is no general order or hierarchy in international law.[53] The application of the lex specialis or lex posterior rule depends on the prior assessment of a particular criterion, which is value-oriented; the prior assessment is weighing it with jus cogens norm, a norm which is inherently superior to catapult the constitutionalism in international law, although the

50 Certain Expenses of The United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion of 20th July 1962.

51 Christopher Gregory Weeramantry, 'Dissenting Opinion of Judge Weeramantry' [1992] The American Journal of International Law; Martenczuk (n 47).

52 Koskenniemi (n 26).

53 M. Koskenniemi, 'Hierarchy in International Law: A Sketch' [1997] European Journal of International Law; Dinah Shelton, 'Normative Hierarchy in International Law' [2006] American Journal of International Law.

formal hierarchy in international law is absent. The vocabulary of jus cogens gives rise to an informal hierarchy. A similar kind of norm is outlined in Article 103 of UN Charter.[54] The formulation of this provision had a precursor in the Covenant of the League of Nations in Article 20.[55] A bare reading of these two provisions would indicate that the language of Article 103 is broader in its scope, as its application extends to the future agreements and agreements with non-UN members. The question arises as to whether council resolutions adopted ultra vires prevail by virtue of Article 103. Scholars, like Susan Lamb, Niels Blokker, and Robert Kolb,[56] argue that in the first place there is no question of conflict, as it is per se ultra vires. The extent of the application of Article 103 has given priority to the charter obligation, rather than invalidating the whole treaty in contradiction to Article 103. In the case of *Hilal Abdul-Razzaq Ali Al-Jeddah v Secretary of State for Defence*,[57] the court granted priority to Security Council resolution over human rights breach; however, the court was silent on the violation of human rights in the context of detention in the said case.

In case of a conflict between jus cogens and charter obligations, the charter obligation is invalidated.[58] The UNSC resolution in stricto sensu is an international agreement, which is often accused of contradicting jus cogens norm. The clash was apparent in the court of the first instance of the EC; the court decided that the obligation under the UN Charter prevailed over any other obligation. On the other side, it also made it clear that the Security Council resolution must comply with a peremptory norm of jus cogens.[59] Many of the

54 United Nations (n 2).

55 Maxwell Garnett and others, 'The Covenant of the League of Nations,' *A Lasting Peace* (2019).

56 Koskenniemi (n 26).

57 Hilal Abdul-Razzaq Ali Al-Jedda v. Secretary of State for the Home Department [2012] EWCA Civ 358.

58 Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' [2002] Leiden Journal of International Law; *Regime Interaction in International Law* (n 45).

59 Türküler T. Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' [2010] European Law Journal.

1990s Security Council resolutions have outlawed any other obligation.[60] Before the 1990s, the world court has mentioned Article 103 once in the Namibia advisory opinion. The ICJ had an opportunity to discuss in detail about the relation between Security Council resolutions and other treaties in the Lockerbie case.[61] In the provisional measure requested by Libya, the world court, although not going into the legality of the resolution, underscored the fact that according to Article 103, the charter prevails over any other international agreement. Several separate and dissenting opinions confirm this fact.[62] However, the comprehensive understanding of the nexus between Article 103 and jus cogens was provided through the separate opinion of Judge Lauterpacht in the *Bosnia v. Serbia* case,[63] accordingly: The concept of jus cogens operates as a concept superior to both customary international law and treaty.[64]

6. CONCLUSION

The paper was an attempt to answer a central question in international law, i.e., whether the notion of the peremptory norm or jus cogens has checked the incessant violation of the Security Council. The answer remains vague, as there is very limited jurisprudence on the said question; however, the study has revealed the fact that, through the separate and dissenting opinion and judgments of the regional court in Europe, the Security Council is bound by certain minimum standards, which are jus cogens. However, it is not precisely evident as to which institutions determine the legality of the Security Council resolution, as the regimes in international law are fragmented. Secondly, through this paper, the researcher argues that there has to be a mechanism called Security Council impact assessment to offer an internal mechanism to check the proliferating legal implications of the Security Council resolution. Thirdly, unlike domestic law, in international law, there is lack of checks and

60 Farrall (n 33); Droubi (n 29).

61 Martenczuk (n 47); Koskenniemi (n 26).

62 Koskenniemi (n 26).

63 Goldstone and Hamilton (n 18).

64 Koskenniemi (n 26).

balances; the author opines that jus cogens can act as a buffer to pre-empt the Security Council's actions to legislate on unchartered areas; thus, offering an alternative solution to State-Centric approach to international law. However, the researcher is cautious in stating that the content and scope of jus cogens remains the subject matter of progressive development and codification of international law. Finally, the researcher reckons that Article 53 of VCLT requires broad interpretation to extend its scope to International Organisations - in particular, to avenues like resolutions and customary laws - thereby, ensuring sovereign equality of International Organisations.

'AMOUNT A' – OECD's New Taxing Right and the Indicators for its Economic Nexus

Manoj Naudiyal

Abstract

One of the key cornerstones of the International Tax Architecture hitherto has been the notion of a Permanent Establishment (PE). However, the traditional concept of PE has been inadequate in addressing the tax challenges of digitalisation of the economy. Taking up the gauntlet, the Organisation for Economic Cooperation and Development (OECD) has unveiled the Outline of the Architecture of a Unified Approach on Pillar 1[1]on 29-30 Jan, 2020. With this, it has become clear that Amount A is the primary response of the International Tax community to the tax challenges posed by the digitalisation of the economy.[2] In the latest statement of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS IF), OECD has pledged to continue its work on the key policy features of a consensus-based solution to the Pillar One issues.[3] To that effect, it has divided the program of work for the technical and policy issues under Pillar One into 11 work streams.[4] Among these, the second work stream is focussed towards the creation of new nexus rules and interactions with the existing treaty provisions.[5]

It is in this context that the essay analyses the inadequacy of the traditional concept of PE and discusses the concept of Amount A. Further, the essay focuses on the second

1 OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy – January 2020*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.

2 ibid 9, [13].

3 ibid 24, [4].

4 ibid 22, [3].

5 ibid 22, [3.2].

work stream and proposes a number of indicators which could be factored into the new economic nexus for the Amount A of the 'Unified Approach under Pillar One.[6]

"There is a consensus to build a solution by the end of 2020. Let's be clear – either we have at the end of 2020 an international solution… clearly in the interest of all countries and digital companies, or there is no solution and … then it will be up (for) the national taxes to enter into force."[7]

France's Finance Minister, Bruno Le Maire at the sidelines of G20 Finance Ministers' Meeting in Riyadh, Saudi Arabia, on 23 Feb, 2020.

1. INTRODUCTION

The above statement of the French Finance Minister, howsoever ominous, nevertheless gives vent to a simmering global discontent vis-a-vis the aggressive tax planning strategies deployed by the tech giants and other digitalised MNEs which have in the recent past led to Base Erosion and Profit Shifting (BEPS) across many countries of the world. The traditional notions of PE hinging primarily on the 'physical presence' requirement have been insufficient in bringing the aforesaid businesses within the tax net. This has forced the hands of the countries and has led to proliferation of unilateral actions – the so called 'Digital Taxes' by countries like France, Austria, Spain, India, UK, Turkey and others. These unilateral actions threaten the present International Tax architecture and with it the multilateral tax collaboration. Allowed to continue, this could spiral into tax wars and ultimately into trade wars between nations.[8]

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6 OECD (2019), Public consultation document *Secretariat Proposal for a "Unified Approach" under Pillar One*

https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf. 9,[30].

7 Desk Editor Insider, 'G20: No Global Digital Tax in This Year' (*the insider stories*, 24 Feb 2020)<https://theinsiderstories.com/g20-no-global-digital-tax-in-this-year/> accessed 28 Feb 2020

8 Pan Pylas, Jamey Keaten, 'US France reach tax deal averting broader trade war' (*abc news,* 22 Jan 2020) <https://abcnews.go.com/Business/wireStory/davos-hopes-digital-tax-breakthrough-france-us-68444242> accessed 28 Feb 2020

It is in this context that the OECD has been working ceaselessly for developing multilateral consensus-based 'revised profit allocation and nexus rules'[9] that could restore balance to the about-to-tip international tax regime.

Amount A is the culmination of these efforts and represents formula based allocation of the share of deemed residual profits allocable to a market jurisdiction.[10] However, work remains to be done as the new profit allocation rules inter alia require indicators for the new economic nexus.[11] This essay proposes several such indicators – the so-called 'plus-factors' that could be utilized to create the new economic nexus for the allocation of Amount A to the market jurisdictions.

2. THE FALL OF THE TRADITIONAL PE AND ITS NEXUS

The concept of nexus has been the necessary connection that enables a jurisdiction to impose taxes on the businesses in its territories. This has been concretised in the concept of PE which has had a long history. It reflects the international consensus that, as a general rule, until an enterprise of one state has a PE in another State, it should not be regarded as participating in the economic life of that other state to such an extent that the other state should have taxing rights on its profits.[12] The concept of PE, thus, determines whether an enterprise has sufficient connections - a *nexus* with a country to subject it to tax on its income attributable to the PE.[13]

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9 OECD (2019) Public Consultation Document, *Addressing the Tax Challenges of the Digitalisation of the Economy*. 8-16.

10 OECD (2020), *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy – January 2020*, OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.8,[10].[Statement]

11 ibid 13, [39].

12 OECD (2017), *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing. *http://dx.doi.org/10.1787/mtc_cond-2017-en* 177-178,[11].

13 Brian J. Arnold, *International Tax Primer* (3rdedn, Wolters Kluwer 2016) 214.

Over the years, the concept of PE has steadily evolved from a real 'brick and mortar' PE[14] to a conceptual PE defined in the OECD Model Convention (MC) as a 'fixed place of business where business of an enterprise is wholly or partly carried on.'[15]

Due to this, interalia, a physical presence of an enterprise in a country has been held as a pre-requisite for the creation of a PE. The PE, in turn, creates a *nexus* that enables the country to impose taxes on the business activities of that enterprise.

However, in recent years, the *physical presence* requirement for a PE has increasingly come under pressure because of spread of digitalisation. The global spread of the internet, increasing band widths, falling data rates, corresponding advancements in the hardware, availability of smart phones and other devices like PDAs, tablets, enhancement of the ICT to 2G to 3G to 4G and even to 5G, optical fibre networks – all these have enabled the businesses to reach even the remote corners of the world *without* creating any *physical presence*.

In spite of this fact, the OECD MC commentary till date maintains that whilst a location where automated equipment is operated by an enterprise may constitute a PE in the country, the web site per se does not constitute a PE, simply because it's *not a fixed place of business*.[16]

Not only this, if the Internet Service Provider (ISP) is different from the enterprise that carries on business through the web site, then also no PE is created for the enterprise, as the location, server and the disk space are '*not at the disposal*' of the enterprise.[17]

Furthermore, if the ISP acts as an independent agent in the ordinary course of its business, then it does not attract the status as an Agency PE. This is because

14 OECD Model Tax Convention (n 6).31,[5.2-5.3].

15 ibid 31, [5.1].

16 ibid 152, [123].

17 ibid 152, [124].

the ISPs inter alia act in the ordinary course of a business as an independent agent, as evidenced by the fact that they host the web sites of many different enterprises.[18]

Thus, the traditional concepts of PE and nexus have been inadequate in responding to the tax challenges posed by digitalisation. This is because, in a digital age, the allocation of taxing rights can no longer be exclusively linked to *physical presence* of a business in a jurisdiction. Hence, the current but, simultaneously, a century old international tax rules are no longer sufficient to ensure a fair allocation of taxing rights in an increasingly globalised world.[19] This was highlighted when the BEPS Action 1 Report [20] called for continued work in the area of "nexus, data and characterisation," with a further action report to be delivered by the end of 2020.

3. OECD'S RESPONSE – THREE TIER PROFIT ALLOCATION MECHANISM

Since the initiation of the BEPS project in 2013, the OECD has been working ceaselessly for addressing the aggressive tax planning strategies by the Multinational National Enterprises (MNEs). The BEPS IF mandated the Task Force on Digital Economy (TFDE) to continue working towards tackling the tax challenges posed by digitalisation of the economy. This has seen the release of a series of documents by the OECD. The Interim Report of the TFDE[21] (April

18 ibid 154, [131].

19 OECD (2019), Public consultation document *Secretariat Proposal for a "Unified Approach" under Pillar One* https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf, 6,[16]. [Pillar 1]

20 OECD (2015), *Addressing the Tax Challenges of the Digital Economy*, Action 1 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris.

21 OECD (2018), *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. *http://dx.doi.org/10.1787/9789264293083-en*

2018), Policy Note (Jan 2019), Public Consultation Document[22] (Feb 2019), Program of Work[23] (May 2019) and the Public Consultation Document on the Unified Approach on Pillar One[24] (Oct 2019). The last document proposed a **Three Tier Profit Allocation** mechanism comprising of **Amount A** – a share of deemed residual profits allocated to market jurisdictions using a formulaic approach, i.e., **the new taxing right**; **Amount B** – a fixed remuneration for baseline marketing and distribution functions in the market jurisdiction; and **Amount C** – binding and effective dispute prevention and resolution mechanisms pertaining to all elements of the proposal, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B.[25]

This three tier allocation has been endorsed by the BEPS IF in its latest statement[26] on Jan 29-30, 2020, with a commitment to reach a consensus based solution by the end of 2020.

4. AMOUNT A – ESSENTIAL COMPONENTS

Amount A has been held as the primary response to the tax challenges of the digitalisation of the economy and is a new taxing right over a portion of residual profits allocable to market jurisdictions.[27] It represents a new taxing right for market jurisdictions over a portion of ***within the scope MNE groups' deemed residual profit*** and would potentially be calculated on a business line basis.[28]

22 Public Consultation Document (n 3).

23 OECD (2019), *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy, OECD/G20 Inclusive Framework on BEPS*, OECD, Paris, www.oecd.org/tax/beps/programme-of-work-to-develop-aconsensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm.

24 Pillar 1 (n 13).

25 ibid 6, [15].

26 Statement (n 4).

27 ibid 9, [13].

28 Pillar 1(n 13)9, [30].

Explained simply, the deemed residual profit will be the profit that will remain after routine activities have been compensated in the countries where those activities are performed.[29] It is further proposed that Amount A would be arrived at by simplifying conventions.[30] This would in turn require determination of the deemed routine profit as well as the proportion of the deemed residual profit to be allocated to the market.[31] Once done, these profits would be allocated to the market jurisdictions that would fulfil the new nexus rule through a formula based on sales.[32] Percentages remain to be determined and would form a part of the consensus-based agreement among BEPS IF members.[33]

5. NEW NEXUS AND THE PROPOSED INDICATORS

5.1. Economic nexus

Economic nexus does not mandate a 'physical presence before tax' requirement. Instead, the connection that brings a business within the scope of a country's tax net is economic. Accordingly, the new challenge is to create a connection – a new nexus rule which is based on *indicators* that capture a MNEs' *significant and sustained engagement* with a market jurisdiction.[34]

In this context, OECD highlights two types of businesses - Automated Digital Services[35] (ADS) and Consumer facing.[36] It also provides a non-exhaustive list of both the categories. ADS is expected to include online search engines, social media platforms, online intermediation platforms, including online market places, used by businesses as well as consumers, digital content streaming, online gaming, cloud computing services and online advertising services. On

29 ibid.
30 ibid
31 ibid.
32 ibid.
33 ibid.
34 Statement (n 4) 12, [36].
35 ibid 10, [22].
36 ibid 11, [24-28].

the other hand, Consumer facing businesses would include personal computing products (e.g., software, home appliances, mobile phones), clothes, toiletries, cosmetics, luxury goods, branded foods and refreshments, automobiles and franchise models, viz., licensing arrangements involving the restaurant and hotel sector - including businesses that sell goods and services directly to consumers, as well as those that sell consumer products indirectly through third-party resellers or intermediaries that perform routine tasks such as minor assembly and packaging. While it proposes only a revenue based nexus for the former, it proposes revenue as well as other indicators - the 'plus factors' for the creation of the new nexus for the latter.[37]

With this end in view, the author proposes the following indicators which may be utilized to create the new nexus. There is a proviso however – some of these are quantifiable, whilst others may be not and, hence, would require qualitative studies for their incorporation into the new nexus rule.

5.2. Proposed Indicators for the Economic nexus

5.2.1. Revenue generated in the market jurisdiction

The generation of in-scope revenue in a market jurisdiction over a period of time is the primary evidence of a significant and sustained engagement of an MNE with the jurisdiction.[38] Even in the absence of any other parameter, the author considers this as the single most important indicator of the value addition to the MNE business from the market jurisdiction. This view is grounded in the US Supreme Court's decision in the *South Dakota V. Wayfair Inc.*[39] that overturned *Quill Corp. V. North Dakota*[40] and obviated the physical presence requirement for taxing a business. Although, Wayfair pertained to the collection of sales tax from out of state sellers, the repercussions, however,

37 ibid 13, [39].

38 ibid 12, [37].

39 138 S.C t. 2080 (2018)

40 504 U.S. 298 (1992)

were far reaching even for Corporate Taxes, as the decision has paved the way for an Economic or a Revenue based nexus.

Acknowledging this fact, the OECD highlights that the new nexus will be triggered for in scope ADS, if they *just* meet the revenue threshold requirements.[41] Thus, for within scope businesses, the unified approach proposal on Pillar 1 creates a new nexus based on sales revenue, which is independent of the traditional *physical presence* requirement of the PE.[42] It is proposed that country specific sales thresholds would be a part of the new nexus, which would be calibrated to ensure that jurisdictions with smaller economies can also benefit.[43] It is also proposed that this would be designed as a new stand-alone treaty provision to limit any unintended spill-over effects.[44]

5.2.2. Number of active participatory user accounts held by an MNE

Highly digitalised businesses have created immense value for their businesses by developing an active and engaged user base which, in turn, provides them with data and content contribution.[45] This contributes to the creation of the brand, the generation of valuable data and the development of a critical and loyal user base which has helped these businesses to establish market power.[46] Under these circumstances, it's only fitting that the number of active participatory user accounts in a market jurisdiction held by such businesses must be factored into the new nexus rule.

However, as discussed at 5.1 above, the consumer facing businesses are expected to include the ones that sell directly to consumers as well as those which sell through third party resellers and intermediaries. Therefore, I must add here that the proposed factor would be applicable to the former type only, i.e., the ones

41 Statement (n 4) 13, [38].

42 Pillar 1 (n 13) 5, [15].

43 ibid.

44 ibid.

45 Public Consultation Document (n 3) 9, [17].

46 ibid 9, [18].

which sell *directly* to consumers. These could be businesses dealing with personal computing products (e.g., software, home appliances, mobile phones), clothes, toiletries, cosmetics, luxury goods and branded foods and refreshments. This is so because active participatory user accounts are most likely to be created with such businesses, for example, Amazon. For these businesses, a larger number of such accounts would signify a sustained engagement with the user base and, hence, a stronger nexus with the market jurisdiction.

5.2.3. Rate of growth of the active participatory user base

Not only the number of active participatory user accounts, but their growth rate is also indicative of a digital MNE's active, significant and sustained engagement with a market jurisdiction. This rate can be measured in spatio-temporal terms, i.e., in terms of percolation in various regions of the country as well as growth over specific time intervals (5 years, 10 years or so).

5.2.4. Number of completed transactions and their growth rate

The total number of completed transactions per unit time interval (on a quarterly, half yearly or annual basis) plus their growth rate again on a per unit time interval basis is also a potential indicator which can be factored in the new nexus rule.

It must be highlighted at this juncture that although sales revenue is already prescribed as an indicator, *number of completed transactions* as a factor does play a complementary role. For understanding this, one must first appreciate the subtle difference between the two indicators. This is crucial for pinpointing the instant when the nexus gets created. It is a known fact that sales revenue is the *consequence* of a completed transaction. However, even before the *consequence*, a completed transaction already creates an engagement or an *irreversible nexus* with the market jurisdiction. Therefore, even where a completed transaction that has led to the *consequence* gets *reversed* or cancelled by the consumer, the nexus with the jurisdiction cannot be deemed to have been reversed. Although in this case, there will be no sales revenue and, hence, no profit to tax.

Once the above difference is understood, the complementary role becomes clear. Suppose a consumer facing business carries out 100 completed transactions, out of which a large number, say 98 get cancelled, and only the remaining 2 generate taxable revenue. Now, if revenue were the sole factor the business could claim insufficient engagement with the market jurisdiction and, hence, an insufficient nexus. This is because for consumer facing businesses, revenue has to be supplemented by other *plus* factors for creation of a nexus. However, in the instant case, the business gets caught in the tax net if *number of completed transactions* is also included as a nexus factor as discussed above. Hence, in my opinion, sales revenue and number of completed transactions are both crucial and complementary nexus indicators.

5.2.5. Marketing Intangibles[47]

The proposal for inclusion of Marketing Intangible in the scheme of revised profit allocation and nexus rules was first mooted in the OECD Public Consultation document of Feb 2019.[48] The term "marketing intangibles" is defined in the OECD Transfer Pricing Guidelines as "*an intangible . . . that relates to marketing activities, aids in the commercial exploitation of a product or service and/or has an important promotional value for the product concerned. Depending on the context, marketing intangibles may include, for example, trademarks, trade names, customer lists, customer relationships, and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers.*"

The existence of Marketing Intangibles in a jurisdiction can provide evidences of functional links that an MNE, not just a digital business, might have in a market jurisdiction. This is because their creation requires active efforts and intervention by the MNE in the market jurisdiction. Further, the existence of most of the marketing intangibles, viz., *trademarks, trade names, customer*

47 OECD (2017), *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017*, OECD Publishing, Paris. http://dx.doi.org/10.1787/tpg-2017-en. 27.

48 Public Consultation Document (n 3) 11-16.

lists, customer relationships, and proprietary market and customer data can be empirically established in a jurisdiction. Since these are significant values drivers for the MNEs, therefore, once their existence is established, it would very cogently point towards their significant and sustained engagement with the market jurisdiction. This, in turn, would point towards a strong nexus enabling the allocation of the appropriate profit, i.e., Amount A to the jurisdiction.

5.2.6. Situs of the end user or the customer

The location of the end user or the customer was highlighted when, in Aug 2019, the US Department of the Treasury and the Internal Revenue Service issued a set of proposed regulations[49] dealing with treatment of "cloud transactions" and transactions involving digital content. These rules propose to use the customer's/end user's location for the sourcing of the sale of digital copyrighted articles over the internet. Such a sale would be sourced to the location of download or installation on an end-user's device or to end user's location, if the location of download or installation is unknown[50]

Similarly, the user location ("eyeballs") of the customer could also be used to source the revenue for certain other digital transactions, for example, online advertising services and other in-scope digital services where they are consumed.[51] In my opinion, thus, customer location or *situs* is a prominent indicator which can strengthen the economic nexus.

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49 'Proposed Rules' 2019, 84 (157) (*Federal Register*, 14 Aug 2019) <https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17425.pdf>accessed 28 Feb, 2020

50 Joe P Helm, 'United States: Treasury Proposes New International Tax Rules For "Cloud Transactions" And Sales of Digital Content' (*Mondaq*, 18 Nov, 2019) <https://www.mondaq.com/unitedstates/Tax/864844/Treasury-Proposes-New-International-Tax-Rules-For-Cloud-Transactions-And-Sales-Of-Digital-Content> accessed 28 Feb, 2020

51 Statement (n 4) 13, [41].

5.2.7. Targeted advertising directed at the market jurisdiction[52]

This is an indicator of the level of active intervention by the MNE in a market jurisdiction. Targeted advertising can develop a positive attitude in the minds of the customers which can cultivate brand loyalty, goodwill for the business and is, thus, co-relative of values creation by the MNE in a market jurisdiction.[53]

On the contrary, the absence of targeted advertising in conjunction with other actors can indicate absence of a significant and sustained engagement of the MNE with the market jurisdiction. Thus, the presence or absence of targeted advertising may also be an indicator for the new economic nexus.

5.2.8. Number of in-operation business verticals or business lines of MNE in a jurisdiction

Both automated digital businesses and consumer facing business may operate multiple verticals in a market jurisdiction. Amazon, for instance, focuses on e-commerce, cloud computing, artificial intelligence, digital streaming and even groceries and, to that effect, operates a number of verticals i.e., Amazon.com, Alexa, Amazon Music, Amazon Appstore, Amazon Prime, Amazon Prime Video. A market jurisdiction may witness an operation of any or all of these verticals. This, in my opinion, is a strong indicator of the significant and sustained engagement of the MNE with the market jurisdiction as well as for the new nexus rule for allocating Amount A to it.

5.2.9. Number and scale of mergers and acquisitions in the market jurisdiction

MNEs grow organically, i.e., by way of increase in output and sales. But, perhaps more importantly, in the present digital age, they also grow inorganically, i.e., by way of mergers and acquisitions.[54] While the output and sales are directly

52 ibid 13, [39].

53 Public Consultation Document (n 3) 12,[33].

54 See, for example, the list of acquisitions by:

related to the revenue, the number and scale of merger and acquisition activity may or may not be directly proportional to the revenue. For example, a MNE may acquire a loss making target as a part of its long term strategy of market penetration. While this might result in a temporary decrement in the revenue, nonetheless, it indicates MNEs' significant engagement with the market jurisdiction.

In short, both the number and the scale of merger and acquisition activity (esp. the recent activity within the last 5 or 10 years) of an MNE reflect the significance accorded by it to the market jurisdiction. For instance, Amazon's recent acquisition of 49% of Future Coupons that enabled it to acquire a 3.6% stake in the Future Group speaks volumes of the significance accorded by Amazon to India.[55] This, in turn, is indicative of Amazon's significant and sustained engagement with India and, in my opinion, a very apt indicator for the new nexus.

5.2.10. Dominance in the market jurisdiction

The scale of dominance by an MNE by way of product(s) and/or service(s) is also a strong indicator of its engagement with the jurisdiction. The dominance may be abusive or non-abusive and needs to be adjudged from the Competition law point of view – Google, for instance, was recently fined by Competition Commission of India (CCI) for the misuse of its Android dominance in India.[56] However, from the tax law perspective, market dominance surely, in my opinion, indicates a significant and sustained engagement with a market

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i. Alphabet<https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet>accessed 28 Feb, 2020

ii. Amazon <https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Amazon>accessed 28 Feb, 2020

55 Karan Choudhury, 'E- commerce giant Amazon buys 49% in Kishore Biyani's Future Coupons' (*Business Standard*, 17 Jan, 2020) <https://www.business-standard.com/article/companies/e-commerce-giant-amazon-buys-49-stake-in-kishore-biyani-s-future-coupons-119082300058_1.html>accessed 28 Feb, 2020

56 CCI Case No. 39 of 2018, *Umar Javeed and others v. Google LLC and others.*

jurisdiction. Thus, the position of the MNE in a market jurisdiction also needs to be factored in while creating the new nexus rule for the allocation of Amount A to the market jurisdiction.

5.2.11. Scale and number of engagements with the tax authorities

Engagements, like Advanced Pricing Agreements (APAs), Advance Rulings and Mutual Agreement Procedures (MAPs), with the tax authorities may also be used as indicators of MNEs' significant and sustained engagement with the market jurisdiction. Both ongoing and concluded number and scale of such engagements may be used as significant indicators for the new nexus rule.

5.2.12. Product offerings in a market jurisdiction

New product launches, tailor made goods and services for a market jurisdiction, global unveilings effected in a market jurisdiction - all these highlight the importance given by MNE to a market jurisdiction and, hence, indicate its significant engagement with the jurisdiction.

5.2.13. Business Interface

The types of business interface - Business to Consumer (B2C) or Business to Business (B2B) or both –employed by an MNE in a market jurisdiction may also be factored in creating the new nexus for the allocation of the new taxing right to the market jurisdiction.

OECD, however, has highlighted that the Unified Approach should focus only on large consumer facing businesses (B2C).[57] However, in my opinion, such an approach would be opposed by developing countries. This is because these jurisdictions have large markets where the tech giants and other digitalised businesses operate their B2B models as well. Hence, focussing only on consumer facing businesses would leave out sizable amount of profits out of the ambit of the new nexus rule. Thus, it remains to be seen how OECD addresses this

57 Pillar 1 (n 13) 7, [20].

genuine concern of the developing countries which also house some of the largest markets for the tech giants and other highly digitalised businesses.

6. CONCLUSION

The digitalisation of the global economy has posed serious challenges for the international tax regime. MNEs no longer need to be physically present in a state to have a significant and sustained engagement with its economy. As a result of this phenomenon, well established concepts such as PE and the 'physical presence before tax' rule have come under tremendous pressure. Lately, the countries have started responding to these tax challenges on a unilateral basis. In the *Wayfair case,* the US Supreme Court ruled in favour of an economic or revenue based nexus. OECD has also responded to these tax challenges by proposing a coherent revision of profit allocation and nexus rules in its Unified Approach on Pillar One.

In its unified approach, Amount A has been proposed as the new taxing right and represents the primary response to the tax challenges of digitalisation. In short, it represents a formula based allocation of a share of deemed residual profit to the market jurisdictions. For this, OECD further proposes to create a new nexus rule based on indicators of significant and sustained engagement with the market jurisdiction. The new nexus rule for allocation of Amount A in particular market jurisdiction will be based on sales and other indicators. The foregoing sections have proposed a number of indicators that could be factored in the new economic nexus rule primarily based on sales that would represent MNEs' significant and sustained engagement with the market jurisdiction.

However, questions that remain unanswered at present include: Which one of the indicators would be finally factored in to the new nexus rule? What weight would be accorded to them? What would be the resulting formula? Would the country-sales based thresholds be subject to periodic revisions? If yes, after how many years? What would be the relative importance given to Amount B and C vis a vis Amount A? In the ultimate event of non-inclusion of the B2B models, would the solution be lasting?

If OECD endeavours to bring about a consensus-based solution by the end of 2020, it needs to find answers to these and many other questions, and it needs to do it fast! The author hopes that BEPS IF in its July 2020 meeting on the key policy features of a consensus-based solution to the Pillar One issues is able to achieve this.[58] After all, the future of International Tax architecture and, with it, multilateral tax and trade collaboration, as we know it, is at stake.

58 Statement (n 4) 24, [4].

Investigation of Sexual Offences against Women in India – A Review of Legal Procedural Mandates and Directives

Dr. Nagarathna A

Abstract

While the number of reported cases of sexual offences against women in India is increasing, as per official records, including that of the recently published report of the NCRB, the number of cases that result in timely and successful investigation which is crucial for successful prosecution are very few. A victim of such offence often faces difficulties, including getting the FIR registered on time and getting the criminal process initiated. This not only affects the following criminal process, but also curtails her access to justice, including legal remedies available in the form of medical treatment, counselling and compensation. Additionally, criminal procedure code mandates compliance with certain procedures of law in the course of such a crime's investigation, including recording of FIR by a women officer, judicial recording of victim's statement, medical examination of victim, forensic analysis of evidence, etc.

Despite these legal provisions, compliance with such rules is hardly seen. To add to these legal mandates, Ministry of Home Affairs has come up with a few important directives, including the latest one in the month of October 2020. This paper makes an analysis of the abovementioned legal mandates and Government Directives in relation to investigation of sexual offences committed against women in India. The analysis also includes critical assessment of effectiveness of such provisions.

KEY WORDS: *Sexual offences, Rape, Cyber-Crimes, India, MHA Directives.*

INTRODUCTION

"Unfortunately, in our society, the victim of a sexual offence, especially a victim of rape, is treated worse than the perpetrator of the crime."

Supreme Court of India.[1]

Sexual offences against women continue to haunt with an alarming increase in the number of reported cases in India. Statistics of crimes reported as per National Crimes Records Bureau indicates an increase of over 7.30 % of cases in 2019, compared to the cases registered in 2018. It also shows that the crime rate registered per lakh women population has increased to 62.4 % in 2019, compared to 58.8 in 2018.[2] While 81.5 cases of the offence of rape have been investigated and chargesheeted, only 27.8 percent of the cases have led to conviction. Metropolitan city recorded a total of 45,485 cases of crime against women, registered during 2019, showing an increase of 7.8% over 2018 (42,180 cases).[3] Rate of convictions in cases of rape in metropolitan cities were was 22.4 % in 2019.[4] According to the latest data released by the National Crime Records Bureau (NCRB), India recorded 88 rape cases every day in 2019.[5] Statistics, hence, show an increase in the number of reported offences committed against women including sexual offences. However, the number of disposed cases are less compared to number of cases registered, thus raising questions about effectiveness of our regulatory approach.

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1 *Nipun Saxena v. Union of India,* [2012] Writ Petition (Civil) No. 565 decided on 11 December, 2018.

2 <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf> accessed 5 December 2020.

3 Ibid at page xix.

4 Ibid at page xxi.

5 Dipu Rai, 'No country for women: India reported 88 rape cases every day in 2019,' India today, [2020] September 30, quoting NCRB statistics <https://www.indiatoday.in/diu/story/no-country-for-women-india-reported-88-rape-cases-every-day-in-2019-1727078-2020-09-30>accessed 2 December 2020.

SUBSTANTIVE LAWS WIDENING THE HORIZON

Indian Penal Code, the substantive criminal law of India, has been time and again amended to widen its scope to deal with various sexual offences committed against women. Law in this regard has been widened to include various forms of sexual offences, specifically through the following provisions:

- Assault or use of criminal force to a women with intent to outrage her modesty, dealt with under Section 354 IPC.
- Sexual harassment under Section 354A
- Assault or use of criminal force to women with intent to disrobe her under section 354B
- Voyeurism under Section 354C
- Stalking under Section 354D
- Rape and its aggravated forms, dealt with under Section 375 to 376-E
- Word, gesture or act intended to insult the modesty of a woman under Section 509, Etc.

Additionally, with extended interpretation of existing statutory provisions, other sections relating to criminal intimidation, defamation, etc., may also be used to regulate said offences committed targeting a women. However, they are not gender specific legal provisions.

LEGAL PROCEDURAL MANDATES IN RELATION TO INVESTIGATION OF SEXUAL OFFENCES AGAINST WOMEN

Since sexual offences are regarded as serious offences, the law mandates compliance to certain procedural requirements, including investigation into such offences by State investigation agency. Almost all sexual offences including the ones mentioned above are declared as cognizable offences by laws, thereby mandating investigation of such cases by Police. According to Section 154 of

the Criminal Procedure Code, a Police Officer, upon receiving information about any cognizable offence, has a duty to register an FIR. However, many times, a woman victim of crime fails to get her case registered. At times, police refuse to register an FIR on grounds of lack of jurisdiction. In fact, such refusal, if is unjustified and unwarranted, is criminalised under Indian Penal Code. Supreme Court of India, in Lalita Kumari v. Government of U.P. & Ors,[6] held that registration of First Information Report is mandatory under Section 154 of the Code of Criminal Procedure, if the information discloses commission of a cognizable offence. The Court further said that "the police officer cannot avoid his duty of registering offence if a cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by them discloses a cognizable offence."[7] Hence, when any information disclosing a cognizable offence is laid before the officer in charge of a police station, he has no option but to register the case on the basis thereof.[8] Even lack of jurisdiction cannot be a ground to refuse to register FIR, and such refusal can be seen as 'dereliction of duty'[9] on the part of such officer. It is interesting to note that even in a recent case based on a petition filed before the Delhi High Court seeking inquiry into communal riots that had taken place in Delhi in February, Justice S. Muralidhar had remarked "the police should be guided by the judgment of the Constitution Bench of the Supreme Court in Lalita Kumari v. Government of UP and Others case and go strictly by the mandate of the law."[10] Further, according to Section 166A, Indian Penal Code, whenever a police officer receives information in relation to crimes of acid attack, outraging modesty of women, use of criminal force with intent to disrobe, trafficking, exploitation of a trafficked person, rape

6 W.P. (Crl) No; 68/2008

7 Ibid

8 *State of Haryana –v. Ch. Bhajan Lal,* AIR 1992 SC 604.

9 *State of Andhra Pradesh v. Punati Ramube,* 1993 Cr L J 3684 (SC).

10 Apoorva Mandhani, 'What's Lalita Kumari Case? SC verdict judge Muralidhar held up as model for Delhi Police,' The Print, 28 February, 2020, <https://theprint.in/theprint-essential/whats-lalita-kumari-case-sc-verdict-judge-muralidhar-held-up-as-model-for-delhi-police/372375/> accessed 2 November 2020.

including aggravated forms of Rape, Rape on Child, Gang Rape and Criminal Intimidation of a Woman, he is duty bound to register an FIR. Refusal to register an FIR in such cases is made punishable with imprisonment that can extend up to two years along with fine. Thus, this provision, inserted into IPC in 2013, has expressly made such refusal a punitive offence. In many cases, Courts have also, alternatively, suggested for registration of Zero FIR when police otherwise lack territorial jurisdiction, so that there is no delay in initiating investigation.

Despite all the above legal requirements including statutory requirements and judicial orders, many times, it is alleged that police refuse to register FIR, thus denying a victim's right to access to justice. According to a recent study conducted by the Commonwealth Human Rights Initiative and the Association for Advocacy and Legal Initiatives, in the State of Uttar Pradesh, rape 'survivors faced delay, derision, pressure, and severe harassment when they approach the police to report complaints and seek the registration of a First Information Report.'[11] Though victims have alternative legal options against such refusal to register an FIR, including that of taking up the matter to Superior Police Officers or of filing Criminal Complaints with the Magistrate, yet it is important to ensure that FIRs are registered on time. Such registration marks the initiation of investigation that involves collection of evidence. With every delay in registration of FIR, there are less chances of collection of admissible evidences. Thus, initiation of investigation on time is of great significance for succession investigation and prosecution of a criminal case. Delay in registration of a case might adversely affect criminal process as, with the passage of time, there might be likelihood of losing crucial evidences due to various reasons including fading of memory of witnesses, possibility of destruction of evidences, etc. In cases of sexual offences on women, it is more important to initiate timely investigation, considering the nature of sensitivity of such cases as well as the need of timely procurement of evidences including forensic evidences. It is, more so, important from the victim's perspective since, for her, registration of

11 'Barriers in accessing Justice - Commonwealth Human Rights Initiative' [2020] <https://www.humanrightsinitiative.org/download/CHRI%20and%20AALI%20Barriers%20in%20accessing%20justice%20English.pdf>accessed 5 November 2020.

FIR may mark the beginning of her access to justice and other legal remedies. Such reporting is also necessary to claim compensation under concerned State's Victim Compensation Schemes and also to avail other remedies such as medical treatment, counselling, etc.

Though legal provisions do not prescribe any time limit for registration of FIR, it being the '*information received first in point of time*' must be reported and registered at the earliest. However, often delay from victim's side is also seen in getting an FIR registered, especially in cases of sexual offences. In such cases, courts are required to be more vigilant, but must also be sensitive to understand the reasons for such delay and condone such delay, instead of seeing it as an adverse ground to affect the prosecution case. The Supreme Court in State of Punjab v. Gurmit Singh had rightly observed, "*In sexual offences, delay in lodging the FIR can be due to variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. …..such delay would not matter.*"[12] It is necessary to understand that for various reasons a victim might not come forward to register the case on time.The harsh reality is that many times cases of rape do not even get reported because of the false notions of so called 'honour' which the family of the victim wants to uphold.[13] Hence, the concern should be addressed more empathetically.

Sexual offences are not just a matter of legal concern, but also involve sensitive and emotional aspects. Hence, legal process must take care of emotional stress the victim might undergo during the entire procedure, and it must ensure that the victim is not made to undergo unnecessary stress and trauma. In this regard, certain concerns must be taken care of in the process of registration of an FIR as well as during the investigation and trial. According to the recent amendment

12 1996 CR L J 172 SC.

13 *Nipun Saxena v. Union of India*, [2012] Writ Petition (Civil) No. 565, decided On 11 December, 2018.

made to Section 154,[14] information relating to sexual offences must be recorded by a woman police officer or any woman officer.[15] Additionally, if the victim of such offence is a person with temporary or permanent mental or physical disability, such report must be recorded by a police officer at the residence of the informer or at a convenient place of such informer's choice and in the presence of an interpreter or a special educator. The law also requires video recording of such information. It is also important to note that this provision even insists on mandatory recording of such information by a Judicial Magistrate under Section 164.[16]

Further, even according to Section 157, in the course of investigation of a case of rape, such investigation must include "recording of statement of the victim at the residence of such victim or in the place of her choice and, as far as possible, by a woman police officer in the presence of her [victim's] parents or guardians or near relatives or social worker of the locality."[17] Interestingly and most importantly, such recorded statement becomes a valid piece of evidence during trial and can even be used as '*Statement in lieu of Examination in Chief*' during trial.[18]

Recently, some Police Stations have started online portals for registration of complaints, and such complaints can be considered as an FIR. But, this approach has not been effectively utilised so far. In relation to cybercrimes against women and children, the Government of India has opened up a portal to "facilitate victims/complainants to report cybercrime complaints online," and such complaints will then be dealt with by law enforcement agencies/ police based on the information available in the complaints.[19] But, this portal can only be used for filing of complaints of cybercrime and not any other conventional crimes including rape and other sexual offences.

14 Proviso to Section 154, added through Amendment to Criminal Procedure Code in 2013.

15 Proviso to Section 154, added through Amendment to Criminal Procedure Code in 2018.

16 Proviso to Section 154 and Sub section 5A of Section 164

17 Also laid down under Section 164(5A) (a).

18 Section 164(5A)(b)

19 See for details <https://cybercrime.gov.in/#> accessed 3 December 2020.

MEDICAL EXAMINATION AND COLLECTION OF FORENSIC EVIDENCES

Rape and most of the sexual offences being crimes committed against the human body, they involve physical evidence and, hence, forensic examination of such evidence will be of crucial importance to a prosecution case. It is, at the same time, necessary to ensure that such forensic evidences are collected and analysed on time and with adherence to legal and forensic science requisites, so as to avoid loss of its evidentiary value.

According to Section 164A of the Criminal Procedure Code, if the case under investigation is that of rape or attempt to rape, if the victim consents, she shall be subjected to medical examination. Such victim must be sent for medical examination within 24 hours from the time of receipt of information of such offence. According to the provision, such medical examination must be conducted without any unnecessary delay, and a detailed report along with the conclusion arrived at, with reasons for such conclusion, must be prepared by the Medical Practitioner. Such report must be annexed to the Charge Sheet. Section 357C Criminal Procedure Code makes it mandatory on the part of all hospitals, public or private, to provide first aid or medical treatment free of cost to the victims of acid attack, rape and aggravated forms of rape and to, also, immediately inform the police of such incidents.

As indicated earlier, since forensic examination is an integral part of crime investigation, especially in cases of sexual offence and cyber-crimes, it is important to conduct such forensic examination in a manner approved by the law, so as to get admissibility of such evidences. The Ministry of Home Affairs on 9th January, 2019, issued guidelines for strengthening of DNA Testing, Cyber-forensic and mobile laboratory facilities for DNA sample collection, preservation and examination in State Forensic Science Laboratories under Nirbhaya Fund Scheme.[20] The guidelines recognise the relevance of use of forensic science in cases of sexual assault and insist on the States having

20 <http://dfs.nic.in/pdfs/FSL%20Guidelines%20MHA.pdf.> accessed 8 December 2020.

suitable forensic capabilities to be able to provide forensic service during crime investigations. These guidelines recognise the need for strengthening State forensic labs for forensic testing facilities, as they are crucial to ensure 'speedy and efficient investigations in cases of sexual assaults.' States were called to seek for financial assistance under Nirbhaya Fund Scheme to strengthen their forensic facilities.

MHA's recent advisory dated 5th October, 2020, on 'Sexual Assault Evidence Collection Kits, Use in Investigation' states that 'as part of several measures for ensuring timeliness and application of scientific method in investigation,' the 'guidelines for collection, handling and preservation of forensic evidence in sexual assault cases' notified by the Directorate of Forensic Science Services of the MHA must be adhered to by the investigation agencies.[21] The Ministry has also distributed the kits to all States and Union Territories and emphasises that 'in sexual assault, collection and preservation of evidence from the scene of crime is critical and is, inter-alia, important not only for timely and efficient investigation, but also for conviction.' It, hence, highlights for the usage of these Kits by the investigating agencies. Recognising the importance of State Forensic Science Laboratories and in order to strengthen them, the Government of India has also enhanced the financial assistance for the same vide its letter dated 10th September, 2019.[22]

MEDICAL EXAMINATION OF AN ACCUSED

Apart from subjecting the victim of rape and other sexual assault offences to medical examination, it is important to also conduct medical examination upon the accused since it might be helpful in procuring evidences essential for the prosecution of such offences. An accused's medical examination is prescribed through Section 53A of the Criminal Procedure Code, according to which even "force as is reasonably necessary" may be used, for the purpose of conducting

21 <https://www.mha.gov.in/sites/default/files/Advisory_05102020SexualAssaultEvidenceCollectionKits_15102020.PDF.> accessed 8 December 2020.

22 <https://www.mha.gov.in/sites/default/files/Advisory10092019HSDOonFSL_15102020.pdf> accessed 8 December 2020.

such medical examination of a person arrested on a charge of committing an offence of rape or attempt to rape. This report should also be annexed to the Charge Sheet by the Investigation Officer.

MEDICAL TREATMENT AND COUNSELLING OF VICTIM

In addition to medical examination of a victim, it is also important to extend medical services in form of treatment and counselling to the victim on time. Hence, access to justice in the real sense also includes access to medical service. Law must more clearly identify this object, too. Even though law mandates taking of consent of the victim for medical examination, same shall not be construed as denial of consent for medical treatment.[23] The findings of a study conducted by monitoring 16 cases of rape in Delhi indicated that in most of the cases, the medical procedures emphasised only those processes that are relevant for the collection of evidence to feed into the trial, and there was negligence in granting continued medical attention to the victim, including her treatment of injuries incurred during the assault, and counselling.[24] Thus, it is necessary to bring a law to make it mandatory to provide necessary counselling to victims, along with medical treatment and examination. In fact, the Protection of Sexual Offences against Children Act, 2012, provides for such an approach in cases of sexual offences committed against children.

COMPENSATION TO THE VICTIM IN THE COURSE OF INVESTIGATION:

For a long time now, Indian Criminal Justice System has been 'accused centric' with the object of punishing the accused. In order to ensure fair criminal process,

23 Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Home Affairs, Chandigarh: 'Guidelines for Forensic Medical Examination in Sexual Assault Cases' [2018] <https://www.mha.gov.in/sites/default/files/womensaftyDivMedicalOfficers_06082018_0.pdf.> accessed 8 December 2020.

24 Partners for Law in Development, Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi, Jan 2014 – March 2015, <https://doj.gov.in/sites/default/files/PLD%20report.pdf> accessed 8 December 2020.

certain procedural safeguards are provided to the accused through constitutional law provisions and criminal procedure rules. But, recently, we see a shift in this approach towards recognising certain rights of the victims. Commission of crime is a violation of right to life of a victim, and hence such shift is justified. It is hence necessary to ensure that the victim does not continue to be a 'forgotten party' in the justice delivery system. Providing compensation to the victim, in many cases, is crucial to ensure 'justice' to the victim, in a real sense.

Section 357A, Criminal Procedure Code, requires every State Government to prepare a Victim Compensation Scheme in coordination with the Central Government. In addition, Section 357B Criminal Procedure Code further clarifies that the compensation payable to the victim of acid attack under Section 326A of IPC and of sexual offences punishable under Section 376AB, 376D, 376DA and 376DB, IPC shall be in addition to the payment of fine to the victim. In fact, Section 326A IPC provides that the amount of fine to be imposed upon the convict should be 'just and reasonable, to meet the medical expenses of the treatment of the victim,' and that such fine should be paid to the victim, thus shifting the focus of criminal law from being merely punitive to compensatory in nature, especially in cases of crimes against women. Similar are the provisions under Sections 376AB, 376D, 376DA and 376DB, IPC.

Grant of compensation need not wait for the completion of the criminal trial process. In fact, in most of the cases, a victim might need financial assistance for her medical treatment and rehabilitation, thus necessitating interim compensation. Earlier, Courts, *suo moto* or upon an application made by the victim, used to grant compensation to victims of crime in justifiable cases.[25] With the setting up of the Victim Compensation Scheme, a victim can now get compensation much before the commencement of criminal trial through legal services authorities. The report titled, 'Compensation Scheme for Women Victims or Survivors of Sexual Assault / other Crimes,' submitted by

25 Note that under Section 357, Criminal Procedure Code, in case of any crime, upon conviction, the Court while imposing the sentence of fine can grant compensation to the victim from the amount of fine imposed. However, this is within the discretionary power of the court and not obligatory.

the National Legal Services Authority, New Delhi,[26] to the Supreme Court in April 2018 suggested that there must be a mandatory reporting of FIRs before seeking compensation for offences against women, especially relating to acid attack and sexual assaults. Necessary relief, including compensation, should then be awarded by the State or District Legal Services Authority. Hence, timely registration of FIR becomes crucial for this reason as well.

TIME FRAME TO COMPLETE INVESTIGATION

Generally, there is no time limit prescribed for completion of investigation of a crime. However, Section 167 of the Criminal Procedure Code indirectly prescribes the time limit of 90 days for offences punishable with imprisonment for a term of not less than 10 years or with life imprisonment or with death sentence, and of 60 days in other cases. The duration of 90 or 60 days must be calculated from the date of first remand order issued by a Magistrate, if the accused is arrested and committed to custody. However, non-compliance with this time frame will not *per se* affect the criminal process but becomes a ground to release such accused from the custody on default bail under Section 167. But, in relation to the offence of rape, in 2009 an amendment was bought into the Code, thus fixing a time frame for completion of investigation. According to this amendment, currently as per Section 173(1A), it is essential to complete investigation of the offence of rape within two months from the date of registration of FIR.

OTHER GOVERNMENT INITIATIVES

With the unfortunate Delhi gang rape incident of 16th December, 2012, that had shocked the entire country and the world, a need was felt to extend additional protective measures to women, especially at public places. The Government, to comprehensively deal with the issue of women's protection,

26 National Legal Services Authority, New Delhi: 'NALSA's Compensation for Women Victim's /Survivors of Sexual Assault / other Crimes (2018) <https://nalsa.gov.in/services/victim-compensation/nalsa-s-compensation-scheme-for-women-victims-survivors-of-sexual-assault-other-crimes---2018> accessed 9 December, 2020.

created a fund called the 'Nirbhaya Fund.' The setting up of this fund was an important and essential step taken towards adding efficiency to the criminal process as well. It has allocation of funds for emergency response support system, central victim compensation fund, cyber-crime prevention against women and children, setting up of one stop centre scheme, mahila police volunteers and universalisation of women helpline scheme.[27] But, though the fund was instituted in 2013, its disbursement gathered pace only from 2015.[28] It is also criticised for having not been completely utilised by States. Recently, the 31 Member Standing Committee on Human Resource Development in its Report titled, 'Issues related to Safety of Women' presented to Parliament stated that, 'the total apportioned amount under the Nirbhaya Fund currently stood at Rs 7436.66 Crore for 32 different projects or schemes across the country."[29]

The One Stop Centres that came up through Nirbhaya fund have proved to be of great significance in India. The Union Minister for State, in his response to parliament, has stated that the One Stop Centre Scheme, which got initiated from 1st April, 2015, provides for 'integrated services, such as medical aid, police assistance, legal counselling, court case management, psycho-social counselling and temporary shelter to women affected by violence,' and that there are about 728 such Centres approved by the Government for the entire country.[30]

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27 Ambika Pandit, 'Nearly 90% of Nirbhaya Fund lying unused: Govt data,' TNN (Dec 8, 2019) https://timesofindia.indiatimes.com/india/nearly-90-of-nirbhaya-fund-lying-unused-govt-data/articleshow/72421059.cms>accessed 8 December, 2020.

28 Ibid.

29 Fatima Khan, 'Only 36% of Nirbhaya fund used since 2013, panel tells House hours before convicts' hanging' [March 20, 2020] https://theprint.in/india/governance/only-36-of-nirbhaya-fund-used-since-2013-panel-tells-house-hours-before-convicts-hanging/384866/ accessed 1 December, 2020.

30 '595 One-stop centres to help women victims of crimes,' Deccan Herald (November 19, 2019) <https://www.deccanherald.com/national/595-one-stop-centres-to-help-women-victims-of-crimes-777673.html>accessed 8 November, 2020.

The Ministry of Women and Child Development, Government of India,[31] has designed a set of Standard Operating Procedures [SoPs] to be used by functionaries of the One Stop Centres, so as to guide the manner in which appropriate services are provided to the women victims of sexual offences. This SoPs adopts a 'victim-centric approach' which it defines as the one that involves "systematic focus on the needs and concerns of a victim, to ensure the compassionate and sensitive delivery of services in a non-judgmental manner. It seeks to minimize re-traumatization associated with the criminal justice process by providing the support of victim advocates and service providers, empowering survivors as engaged participants in the process."[32]

In addition to the above, following measures have been taken by the Ministry of Home Affairs to prevent as well as regulate crimes against women and include the following[33]:

a) Legal changes brought in through the Criminal Law (Amendment) Act 2013 that has now expressly recognised various crimes as offences under IPC, including acid attack on women, sexual harassment, stalking, etc. Parallel procedural provisions have also undergone changes, so as to ensure better criminal law process in such cases.

   Additional changes were also bought in to the laws, through the recent Criminal Law (Amendment) Act 2018.

b) Setting up of Emergency Response Support System with the aim of providing a single and internationally recognized number (112) based system for all emergencies as the helpline.

c) First formal initiative towards profiling of accused involved in the commission of sexual offences commenced with the launch of the

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31 Detailed Reference Material on Standard Operating Procedures for One Stop Centre for Centre Administration, Case Worker, Doctor / health Worker, Doctor/health Worker, Police Facilitator Officer, Legal Aid Lawyer: [2017] <http://sakhi.gov.in/assets/site/main/resource_directory/1565612340_OSC%20SoP_07%20Feb%202019.pdf>accessed 1 December, 2020.

32 Ibid, quoting from 'Standards for providing services to survivors of sexual assault' [1998] <http://www.njdcj.org/standar2.htm>

33 https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1595696>accessed 8th December, 2020.

'National Database on Sexual Offenders' (NDSO) on 20th September, 2018.

d) An online analytic tool called 'Investigation Tracking System for Sexual Offences' was launched on 19th February, 2019, to help investigation of such cases.

CONCERNS SPECIFIC TO CYBER CRIMES AGAINST WOMEN

Indian Penal Code today is widened enough to take care of certain forms of sexual offences committed with the use of cyber technology, such as online sexual harassment,[34] Voyeurism,[35] Stalking including Cyber Stalking,[36] Pornography and Obscenity. The Information Technology Act of 2000 also specifically deals with the offence of cyber obscenity, cyber pornography and child pornography under Section 67, 67A and 67B, respectively. Additionally, Protection of Children from Sexual Offences Act of 2012 also has provisions to address concerns of online safety of children. While POCSO provides for certain procedural rules that can favour the prosecution case, no such approach is adopted under IT Act of Criminal Procedure Code. POCSO provides for presumption based liability in some cases, especially the ones that provide for presumption of mensrea in cases with proof of actusreus.[37] No such presumption, nor procedural rule, exists in relation to other cyber-crimes committed against women under IPC or IT Act.

Better regulation of cyber-crimes requires proper identification, collection and analysis of digital evidence. But, lack of expertise and infrastructure, essential to make such forensic analysis of digital evidences, hampers effective crime investigation and prosecution. Hence, establishing new, or upgrading existing, cyber forensic labs are important. The Government of India, realising this need, has set up Cyber Crime Forensic Labs across States. It even funds training

34 Section 354A, IPC

35 Section 354C, IPC & 66E of Information Technology Act 2000.

36 Section 354D, IPC

37 Section 29 and 30, POCSO Act 2012.

programs of investigating officers, judicial officers and public prosecutors, so as to strengthen the stakeholders' hand in this field. However, due to other problems, including relating to jurisdiction issues on cyber space, lack of coordination by Internet Intermediaries, etc., effective combatting of such crimes is not taking place in the country. The Supreme Court of India in the case of Re Prajwala Letter dated 18.2.2015[38] has issued several directives relating to regulation of cyber-crimes, especially the ones that victimise women and children.

REALITY CHECK

Criminal laws of India, both substantive as well as procedural, have undergone various amendments so as to give better protection to women against sexual offences. Changes to make the initiation and continuation of criminal processes, including investigation process, have also been brought in. But, in spite of these legal changes, even today a victim of crime finds it hard to get access to justice. The Commonwealth Human Rights Initiative and the Association for Advocacy and Legal Initiatives' Study on 'Barriers in accessing Justice[39] found that the survivors of offences such as rape, even today face problems of delayed registration of FIR or refusal to register FIR, non-compliance to the statutory requirement of women police officers recording such FIRs and police disbelieving the victims. The Report also states that Dalit survivors of sexual violence face more discrimination in the criminal justice process and that victims even face pressure and intimidation by police, thereby forcing them to look for remedies outside the legal system. Most often, victims are unaware of legal provisions and other remedies available under the law.

There are also concerns for victims and witness safety, leading to their hostile

38 SMW (Crl.) No (S). 3/2015 <https://sci.gov.in/supremecourt/2015/6818/6818_2015_Order_22-Oct-2018.pdf.>15 September 2019.

39 Barriers in accessing Justice, Commonwealth Human Rights Initiative [2020] <https://www.humanrightsinitiative.org/download/CHRI%20and%20AALI%20Barriers%20in%20accessing%20justice%20English.pdf.>accessed 5 November, 2020.

approach towards the justice delivery system. In many cases, the criminal process continues for years, thereby demotivating such victims and witnesses from continuing to fight for justice. It was reported that more than 32,500 cases of rape were registered with the police in 2017 with about 90 a day and that Indian courts had disposed of only about 18,300 cases related to rape that year, leaving more than 127,800 cases pending at the end of 2017.[40] The scenario is almost the same, even today.

Even in relation to cybercrimes against women, there is a huge hurdle faced by victims in getting cases registered. Also, since cyber space provides anonymity and, also, raises other technical challenges, not many cases lead to successful investigation and prosecution.

MHA'S DIRECTIONS REITERATING NEED TO COMPLY WITH LEGAL MANDATES

Ministry of Home Affairs has many a time issued directions requiring investigation agencies to comply with legal mandates in relation to crime investigation, especially with regard to crimes against women. The MHA's earlier directions issued on 12th May, 2015, had required for mandatory registration of crimes committed against women. It even insisted on ensuring that the victim does not face harassment from any State or public or private agencies in this entire process. States were asked to, also, immediately implement the Crime and Criminal Tracking Network System [CCTNS] project which, in fact, has a module on database of offenders. This directive also insisted for creation of Cyber Cells to effectively tackle cyber-crimes committed against women and children, including Cyber Pornography. The Ministry's advisories issued on 22nd April, 2013, and on 26th August, 2014, had even insisted on an increase in the number of women staff in the police force.

40 Reuters Staff, Statistics on rape in India and some well-known cases, <https://in.reuters.com/article/us-india-rape-factbox/statistics-on-rape-in-india-and-some-well-known-cases-idUSKBN1YA0UV>accessed 9 November, 2020.

Further, in continuation of the strategies adopted from time to time by Government of India in combatting crimes against women, the recent advisory issued by the Ministry of Home Affairs on 10th October, 2020, on "Compulsory Registration of FIR u/s 154 Cr. P. C when the information makes out a cognizable offence" is noteworthy. The circular, while it calls for necessary legal action by police in cases of crimes committed against women which are 'cognizable' in nature in general, further mandates compliance to specific legal procedures in cases of sexual offences committed against women in particular. Most importantly, the advisory mandates and reiterates the need for:

- Registration of FIR,
- Completion of investigation within prescribed period,
- Medical examination of victims of rape and sexual assault,
- Adoption of forensic scientific process in collection of evidences in cases of sexual assault.

CONCLUSION

From Mathura to Hathras, and from Nirbhaya to Disha, each incident of violent sexual offence on a woman has raised questions about the efficiency of our legal approach adopted in regulation of such offences in India. Many of these incidents have also led to legal changes in the country. Yet, even today, a victim of sexual offence faces problems in accessing justice.

A victim's right to justice in a legal system often depends upon the legal process that facilitates her 'accesses' to justice delivery mechanism. Laws must ensure timely legal remedies to victims, including immediate initiation of criminal process. In India, registration of the Frist Information Report marks such an initiation, especially in cases of crimes that are 'cognizable' in nature. Most of the sexual offences committed against women are regarded as cognizable offences, thus involving state law enforcement agencies in the criminal justice

process. Indian courts have time and again insisted on mandatory recording of FIR in cases of cognizable offences. From Punati Ramulu to Lalitha Kumar and till date, courts have directed for mandatory registration and investigation of cognizable offences. Timely initiation as well as completion of criminal process is crucial to ensure that the victim does not withdraw herself from the legal process.

States must also adopt a comprehensive approach in regulating sexual offences against women, with a combination of preventive, punitive, rehabilitative as well as compensatory approach. This requires a deviation from the traditional approach that Indian Criminal justice administration system has adopted for a long time, which focused more on accused's concerns rather than on victim's needs.

In this scenario, compliance with legal mandates and adherence to the MHA's advisories, including the recent one of October 2020, becomes crucial, so as to ensure that women victims of sexual offences are no more subjected to further victimisation. These directives, however, should not just remain as mere directions on paper, but must be implemented in its true spirit so as to achieve the intended objectives. But, mere amendments to laws and directions from authorities may not be helpful in completely doing justice. Most importantly, a change in the attitude of stakeholders involved in the implementation of these laws and directives is also essential.

Restoring Electoral Equilibrium in the Wake of Electoral Bonds Scheme for Electoral Donations

Zeenia S & Jehosh Paul

Abstract

This Essay attempts to capture and describe the fundamental tension that now exists in the Indian electoral funding system and considers the issues this tension presents for electoral politics in general. Instead of building a case for, or against, the constitutionality of the Electoral Bonds Scheme, this paper argues that the Electoral Bonds Scheme has created a dystopic system for donations that lends itself to no quick and simple remedy. The Electoral Bonds Scheme poses difficult questions about whether the Parliament can remedy this situation or whether the situation is remediable only by the Supreme Court.

To solve this dilemma, Part I deliberates upon the role that money plays in Indian elections and the changes in the relative power of the political parties while campaigning during elections after the introduction of the electoral bonds scheme. Part II outlines and explores how today's electoral donation system has completely altered the balance of power into favouring the party of the incumbent government. Finally, Part III discusses the dystopic effects of the imbalance of power the Supreme Court has created in the electoral system through its refusal to either adjudicate upon, or grant a stay order, and the barriers to remedying this problematic system by restoring electoral equilibrium.

Keywords: *Equilibrium, Electoral Bonds Scheme, Donations, Supreme Court, Parliament.*

INTRODUCTION

"*Any attempt on the part of anyone to finance a political party is likely to contaminate the well springs of democracy. Democracy would be vitiated if results were to be arrived at not on their merits, but because money played a part in the bringing about of those decisions. The form and trappings of democracy may continue, but the spirit underlying democratic institutions will disappear. History of democracy has proved that in other countries democracy has been smothered by big business and money bags playing an important part in the working of democratic institutions, and it is the duty not only of politicians, not only of citizens, but also of a Court of law, to the extent that it has got the power to prevent any influence being exercised upon the voter which is an improper influence or which may be looked at from any point of view as a corrupt influence.*"[1]

Chief Justice Mohammed Ali Currim Chagla

Introduced by the Finance Act 2017,[2] notified by the Ministry of Finance in 2018[3] and challenged in the case of *Association for Democratic Reforms v. Union of India,*[4] the Electoral Bonds Scheme became a matter that was frequently debated and deliberated among the legal scholars, politicians and citizens. While the Government batted for the Electoral Bonds Scheme as a much required electoral reform to promote transparency in electoral funding, its adversaries treated the Electoral Bonds Scheme as a wolf in sheep's clothing, a creature

1 *Jayantilal Ranchchoddas Koticha v Tata Iron & Steel Co. Ltd.,* [1957] 27 Comp Cas 604

2 Ministry of Law and Justice, 'The Finance Act 2017' (*The Gazette of India,* 31 March 2017) <https://www.civilaviation.gov.in/sites/default/files/MoL%26amp%3BJ%20%28Legislative%20Deptt%29%20The%20Finance%20Act%20.pdf> accessed 08 February 2020

3 Ministry of Finance, 'Electoral Bond Scheme 2018' (Press Information Bureau Government of India, 02 January 2018) <https://pib.gov.in/newsite/PrintRelease.aspx?relid=193519>accessed 08 February 2020

4 W.P (Civil) No. 880 of 2017

which would ultimately overwhelm and throttle democracy.[5] Alas, when the Electoral Bonds Scheme was challenged before the Supreme Court, the Court has, time and again, evaded adjudicating upon the constitutional validity or granting a stay order against the Electoral Bonds Scheme. In the eyes of the Chief Justice's court, the weighty issues involved in the matter could not be adjudicated within the limited time available.[6]

The gross effect of the Supreme Court's refusal to grant stay order on the Electoral Bonds Scheme was seen in the colossal increase of funding received by the incumbent government's political party – leaving the opposition and other political parties way behind. This was because the Electoral Bonds Scheme created a *quid pro quo* relationship between the government and the donors, ensuring that the incumbent government always received a lion's share of electoral funding.

The Electoral Bonds Scheme effectively opening up the floodgates of money for one political party, while leaving behind all other political parties,[7] led to the complete change in relative resources available to the party belonging to the incumbent government and the rest of the parties. What further exacerbated this disproportionate funding received by the political parties were, firstly, the amendment to Section 29C of the Representation of the People Act, 1951, which now excludes the disclosure of donations received through the means of

5 Gautam Bhatia, 'Supreme Court's interim order on electoral bonds is disappointing' (*Hindustan Times*, 13 April 2019) <https://www.hindustantimes.com/columns/sc-s-interim-order-on-electoral-bonds-is-disappointing/story-yIzsFRChHZMoMZwbezMk4N.html> accessed 08 February 2020

6 Editorial, 'Return of bonds: On Supreme Court refusal to stay electoral bonds scheme' (*The Hindu*, 22 January 2020) <https://www.thehindu.com/opinion/editorial/return-of-bonds-on-supreme-court-refusal-to-stay-electoral-bonds-scheme/article30618412.ece> accessed 08 February 2020

7 Chart 1: EBS Donations to Political Parties, 'Decoding India's electoral bonds scheme' (*Observer Research Foundation* 30 November 2019) <https://www.orfonline.org/expert-speak/decoding-indias-electoral-bonds-scheme-58260/> accessed 08 February 2020

electoral bonds[8]; secondly, an amendment to Section 13A of the Income Tax Act, 1961, which now exempts political parties from maintaining a record of the donations made through electoral bonds[9] and, thirdly, an amendment to Section 182 of Companies Act, 2013, which now does not levy any restrictions or prohibitions on the companies with respect to making political contributions,[10] and lastly, the amendment to the Section 2(1)(j)(vi) of Foreign Contributions Regulation Act, 2010, which now allows foreign companies to monetarily influence the Indian elections and policies[11]; thereby, ensuring that not only would the incumbent government's party receive huge disproportionate sums of electoral funding, but also escape from any form of accountability for the funds received through the Electoral Bonds.

This Essay attempts to capture and describe the fundamental tension that now exists in the Indian electoral funding system and considers the issues this tension presents for electoral politics in general. Instead of building a case for, or against, the constitutionality of the Electoral Bonds Scheme in being introduced as a Money Bill under Article 110[12] of the Constitution, or about the amendments being violative of the principles of 'free and fair elections,' this paper argues that the Electoral Bonds Scheme has created a dystopic system for donations that lends itself to no quick and simple remedy. The Electoral Bonds Scheme poses difficult questions about whether the Parliament can remedy this situation or whether the situation is remediable only by the Supreme Court.

To solve this dilemma, Part I deliberates upon the role that money plays in Indian elections and the changes in the relative power of the political parties while campaigning during elections after the introduction of the electoral bonds scheme.

8 Representation of the People Act 1951, s 29C

9 Income Tax Act 1961, s 13A

10 Companies Act 2013, s 182

11 Foreign Contributions Regulation Act 2010, s 2(1)(j)(vi)

12 Constitution of India 1951, art. 110

Part II outlines and explores how today's electoral donation system has completely altered the balance of power into favouring the party of the incumbent government.

Finally, Part III discusses the dystopic effects of the imbalance of power the Supreme Court has created in the electoral system through its refusal to either adjudicate upon or grant a stay order, and the barriers to remedying this problematic system by restoring electoral equilibrium.

I. ESTABLISHING THE RELATIVE POWER BETWEEN MONEY AND POLITICAL PARTIES: UNDERSTANDING THE ROLE OF MONEY IN INDIAN ELECTIONS.

A. The Role of Money in Elections

In order to understand the role of money in campaigning during elections, one must understand the structure of the electoral campaigning procedure. The democratic process of elections to fill the seats of the state assemblies and the parliament includes the candidates belonging to different political parties campaigning against their rival candidates and parties. This process would require the political cadre of the party, which is mainly constituted of the grassroots workers, to campaign for their party candidate, and it would require money to run an effective campaign. Few party workers would agree to campaign without taking money as remuneration.

Adding on to it, the modern day campaigning is not just limited to the door to door campaigning and giving public speeches, but includes the advertisements made through digital and print media, running a research team for countering the narratives and fake propaganda by the rival parties, running a social media team, etc.

Further, the decisive role that money plays during the elections has been time and again testified to by the Former Chief Election Commissioners (CECs). Former Chief Election Commissioner, Mr. N. Gopalaswamy, remarked that the

Election Commission which was able to contain the muscle power in elections had miserably failed to do so in the case of the money power,[13] and former Chief Election Commissioner, Mr. S. Y. Quraishi, acknowledged that the horrors of the money power during elections are obvious, and the overarching influence of money in politics is a blot on the principle of fairness, freeness and transparency which are the cornerstones of the Constitution. He further opined that the increasing role of money power in determining the outcome of elections has had a rippling effect on the legislators by making them lethargic and inactive when it comes to formulation of policies.[14]

Further, to statistically substantiate the decisive role of money in elections, eminent journalist P. Sainath in his article, titled 'The medium, message and the money,'[15] has highlighted that a candidate with a worth of 5 crores was 75 times more likely to win an election over a candidate who was worth less than 10 lakhs.

Such are the realities of modern day campaigning, which requires incurring huge costs to run an effective campaign.[16] However, there is no straight jacket formula to ascertain what would be an ideal amount of money that is actually required to run an effective modern day election campaign because of the very nature of elections being a costly affair.

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13 N Vittal. 'Tackling Money Power' (*Pune Mirror*, 5 July 2009) <https://punemirror.indiatimes.com/columns/columnists/Tackling-money-power/articleshow/32561399.cms> accessed 08 February 2020

14 A CMS Report, 'Poll Expenditure, The 2019 Elections' (*CMS Research House*, 30 May 2019) <http://cmsindia.org/sites/default/files/2019-05/Poll-Expenditure-the-2019-elections-cms-report.pdf> accessed 08 February 2020

15 P. Sainath, 'The medium, message and the money' (*The Hindu,* 26 October 2009) https://www.thehindu.com/opinion/columns/sainath/The-medium-message-and-the-money/article13666073.ece accessed 08 February 2020

16 See Association for Democratic Reforms & National Election Watch, 'Analysis of Funds Collected and Expenditure Incurred by National Political Parties – Lok Sabha 2004, 2009 & 2014' (*Association for Democratic Rights*, 2 March 2015) <https://adrindia.org/research-and-report/political-party-watch/combined-reports/2015/analysis-fundscollected-and> accessed 08 February 2020

B. The Effect of Electoral Bonds Scheme

In light of the decisive role that money plays in elections, it became pivotal in the words of former Prime Minister, Dr. Manmohan Singh, to "*tackle the growth of money power in elections in order to maintain the health of our (India's) democratic polity.*"[17] Against this backdrop, the finance ministry introduced the electoral bonds scheme which was proclaimed as an alternative system devised to clean up the political funding system and establish a transparent mechanism for funding elections.[18] However, the major drawback of the Electoral Bonds Scheme was the abandonment of the disclosure requirements for donations made thorough Electoral Bonds, which were put in to incentivise and ensure that unclean money from unidentifiable sources are not able to enter electoral funding.

It is paradoxical that the Electoral Bonds Scheme that was intended at securing accountability and transparency in the system effectively crippled the system into ensuring that the incumbent government receives a major chunk of electoral donations through electoral bonds. The research conducted by the think tank – 'Factly' uncovered the dominant trend of the incumbent government's political party always receiving donations that were way ahead of the rest of the parties combined, as shown in the figure below.[19]

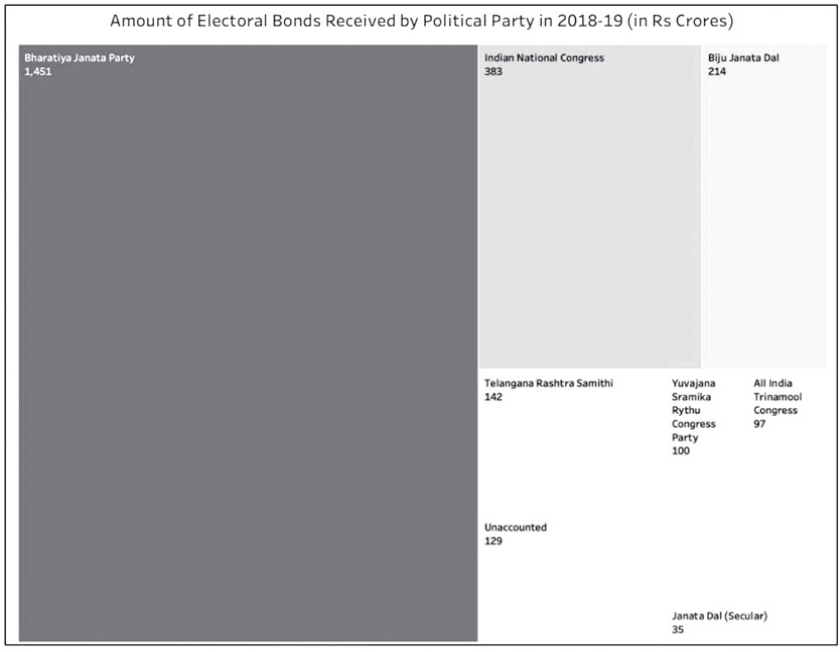
Then came the challenge to the Electoral Bonds Scheme in the case of *Association for Democratic Reforms v. Union of India*,[20] a case which would forever alter the

17 Niranjan Sahoo, 'Towards public financing of elections and political parties in India: Lessons from global experiences', *Observer Research Foundation,* 20 November 2017) <https://www.orfonline.org/research/towards-public-financing-elections-political-parties-india-lessons-global-experiences/> accessed 08 February 2020

18 Arun Jaitley, 'Why Electoral Bonds are Necessary' (7 January 2018) <https://www.facebook.com/notes/arun-jaitley/why-electoral-bonds-are-necessary/729708620551022/> accessed 08 February 2020

19 Bharath Kancharla, 'Income of National Parties soars in 2018-19, thanks to Electoral Bonds' (*FACTLY*, 11 January 2020) <https://factly.in/income-of-national-parties-soars-in-2018-19-thanks-to-electoral-bonds/> accessed 08 February 2020

20 W.P (Civil) No. 880 of 2017.



jurisprudential discourse on the electoral campaign financing. The court laid down its seminal judgement which created a dichotomy in electoral donation by evading answering the issues pertaining to the constitutional validity of the electoral bonds scheme, yet issuing an order mandating the political parties to furnish the account of funding received through electoral bonds to the Election Commission in sealed covers. However, the Court effectively upheld the electoral bonds scheme by virtue of it evading answering the issues pertaining to the constitutional validity, denying the stay order and, lastly, ordering the political parties to furnish the details to the election commission, which would not be made public during the course of elections and, thereby, enabling the government to enforce the electoral bonds scheme to its fullest efficacy.

II. THE CURRENT STATE OF ELECTORAL DONATIONS AND FUNDING

As a result of the Supreme Court's denial in granting a stay order on electoral bonds scheme, today's electoral donation system essentially allows anonymous persons, corporations, including foreign companies, to fund elections in

unlimited amounts to equip the political party which has their best interests at heart to win elections. This serves a far different purpose, now, than that advocated by the government, i.e., to reform the electoral donation system and promote transparency. As one observer noted: "the early trends, as revealed from RTI information and quantum of donations (Rs 6128 crore in just 18 months) flowing via this channel, point to very a serious challenge facing India's electoral democracy and nature of politics. In effect, the government has legalised crony-capitalism in the country's democratic system."[21]

Parties are now viewed with, at least, as much scepticism as are other invisible hands that have influence over the elected officials.[22] Rather than the parties providing a vital link between the elected officials and the interests of voters, they now pose a daunting threat to the interests of the voters, as the big corporate donors have their own special interests.[23] The integrity and independence of the parties have been compromised by the special interest groups such as corporates who donate huge chunks of funds, because the special interest groups now can donate unlimited amounts to a political party which would agree to meet their selfish interests, over the general welfare of the people, for the sake of receiving funds for campaigning.[24] Since the parties now depend substantially upon the corporate donations, the issues of national interest such as the issues pertaining to farmers, economy, employment and poverty, to name a few, will no longer have an edge over the crony interests in the elections.[25]

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21 Niranjan Sahoo, 'Decoding India's electoral bonds scheme' (*Observer Research Foundation*, 30 November 2019) <https://www.orfonline.org/expert-speak/decoding-indias-electoral-bonds-scheme-58260/> accessed 08 February 2020

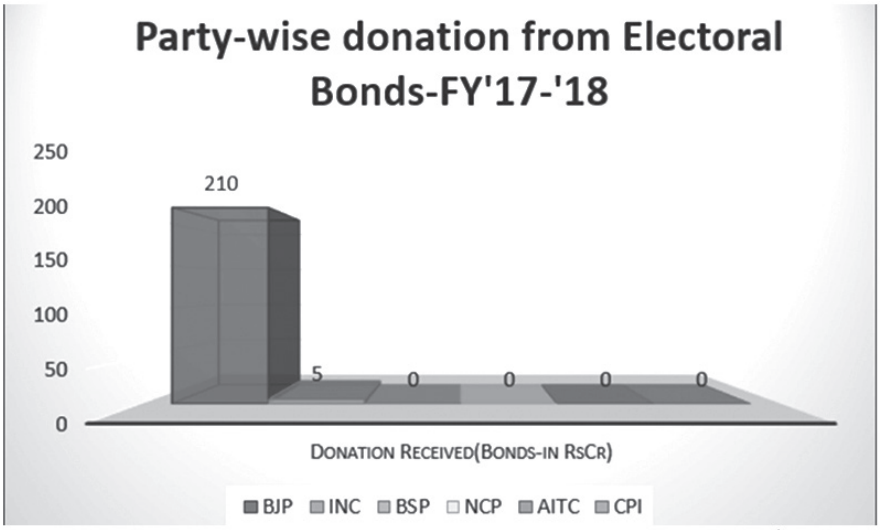
22 *See* James Madison, 'The Federalist Papers No. 10' (*Yale Law School: The Avalon Project,* 23 November 1787) <https://avalon.law.yale.edu/18th_century/fed10.asp> accessed 08 February 2020

23 *See* John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (1995) 68-92.

24 *Davis v FEC*, [2008] 128 S. CL 2774.

25 See Samuel Issachroff & Pamela S. Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 TEX LR 1705, 1708.

Whatever values the government pursued in crafting the electoral bonds scheme, they have been tacitly upheld by the Court's subsequent rulings. Once the Electoral Bonds Scheme passed the judicial hurdles and came into existence, it was observed that the incumbent government's political party received such disproportionate sums of donations, so that the sum of all the other political parties' combined together was not even half as much as that of the incumbent government's party. The sheer disparity among the donations received by the political parties through means of electoral bonds is best represented by the graphical representation below:



Source: Computed from ADR Data (based on March 2018 tranche) [26]

This graphical representation portrays a complete paralysis of equilibrium in the electoral funding system.

There are endless possibilities for how to redesign the electoral bonds scheme and the system of electoral donations. A full examination of them is outside the scope of this paper, but there are important questions to ask in considering

26 Chart 1: EBS Donations to Political Parties, 'Decoding India's electoral bonds scheme' (Observer Research Foundation, *Observer Research Foundation* 30 November 2019) <https://www.orfonline.org/expert-speak/decoding-indias-electoral-bonds-scheme-58260/> accessed 08 February 2020.

the next steps. In reforming the system, we must ask what roles we want the different actors, political and non political, to play.

Some would argue that the State funding of elections is a good thing, so that it would bring the issues pertaining to the welfare of the people to the forefront of election campaigning as well as eliminate the role of the corporate vested interests in influencing the outcome of elections.

This method of State financing of elections would be more persuasive if, practically, the economy of the country would be conducive to the total funding of elections, such that the political parties would be fully prohibited from taking donations from private persons.[27] Some would still argue that the electoral bonds scheme and the electoral donations by individual persons are essential to reduce the black money that gets circulated in the form of cash during election campaigning, so we should not be concerned about any imbalance between the political parties. This is a valid argument coming from a principled position, but it does not address the concern this paper raises: the resulting power imbalance between the incumbent government's party and all other parties in the electoral market. To put it in the words of Professor Kathleen Sullivan, one can be pro speech libertarian[28] vide the uncapped electoral bonds scheme and, also, be concerned about the power imbalance among actors and entities within the realm of the campaign. The realisation of these concerns is a must for establishing a level playing ground for the other political parties as well as putting an estoppel over the illegitimate and excessive funding of elections.[29]

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27 Government of India, Indrajit Gupta Committee Report on State Funding of Elections (*Committee on The State Funding of Elections*, December 1998) <http://lawmin.nic.in/ld/erreports/Indrajit%20Gupta%20Committee%20Report.pdf>accessed 08 February 2020.

28 Kathleen M Sullivan, *'The Supreme Court, 2009 Term – Comment: Two Concepts of Freedom of Speech'* (2010) 124 Harv. L. Rev 143.

29 Government of India, 'Ethics in Governance' (*Second Administrative Reforms Commission*, January 2007) <https://darpg.gov.in/sites/default/files/ethics4.pdf>accessed 08 February 2020.

III. RESTORING ELECTORAL EQUILIBRIUM?

The Supreme Court of India has shied away from answering the critical questions such as the constitutionality of the electoral bonds scheme and of the amendments made through the Finance Act, 2017, but surprisingly it also denied the granting of a stay order against the electoral bonds scheme.[30] However, as a measure to strike a balance and to avoid one single party having an unfair advantage in electoral donations, Supreme Court has mandated the political parties to furnish the funds received by them to the Election Commission of India. Perhaps, establishing an equilibrium was its aim, or perhaps not, but the refusal to grant the stay order has an impeding effect on establishing any sort of equilibrium in donations.

A. Can the Parliament Re-establish Electoral Equilibrium?

It appears that the Parliament should take the initiative to address this problem in good faith. But, the only way in which the Parliament can bring in an equilibrium in electoral donations would be through passing laws that are *parimateria* to the laws that existed prior to the amendments brought through the Finance Act, 2017. This road is quite bumpy, as the Parliament has spent a significant amount of energy in breathing life into the electoral bonds scheme, and it was a well planned and executed policy of the government, which was published a year before the amended law was passed.[31]

It is sine qua non to note that the government was itself of the view that the electoral bonds scheme is a much required electoral reform which promotes clean money and transparent funding mechanism in the system of political

30 W.P (Civil) No. 880 of 2017.

31 Gautam Bhatia, 'Judicial Evasion and the Electoral Bonds Case' (*Indian Constitutional Law and Philosophy*, 13 April 2019) <https://indconlawphil.wordpress.com/2019/04/13/judicial-evasion-and-the-electoral-bonds-case/> accessed 08 February 2020

funding.[32] Therefore, expecting the government to change its stance on electoral bonds would be a futile exercise. Even if the government reintroduces the earlier caps that were levied on political donations due to the sheer virtue of people clamouring for change, it would be very undesirable to bring back the system of making cash donations using black money.

It is further unlikely that sitting legislators would have a personal interest in abolishing the electoral bonds system or levying caps on the political donations made through electoral bonds, since doing so would sacrifice some of their incumbent's advantage.[33] It is also ironical that any political attempt to abolish the dubious framework of electoral bonds scheme will itself be affected significantly by large donors who have vested interests in retaining the electoral bonds scheme.[34]

Perhaps, one may deliberate that the electoral bonds scheme can be overturned by a change in the political scenario when the government of the day changes. But, here lies the irony that even when there is a change in the regime, the attempt to overturn the electoral bond scheme will be affected a great deal by the large donors who would have vested interests in retaining this framework.[35]

Therefore, the answer is no, the parliament cannot re-establish the electoral equilibrium.

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32 Arun Jaitley, 'Electoral bonds aimed at checking use of black money in elections' (*livemint*, 7 April 2019) <https://www.livemint.com/elections/lok-sabha-elections/electoral-bonds-aimed-at-checking-use-of-black-money-in-elections-arun-jaitley-1554640929741.html> accessed 08 February 2020

33 See, Peter J Wallison & Joel M Gora, '*Better Parties, Better Government*' (2005) 47-48.

34 Udit Bhatia, 'Electoral Bonds and the Political Party as a Vehicle of Representation' (*Indian Constitutional Law and Philosophy*, 18 April 2019) <https://indconlawphil.wordpress.com/2019/04/18/electoral-bonds-and-the-political-party-as-a-vehicle-of-representation/> accessed 08 February 2020

35 Udit Bhatia, 'Electoral Bonds and the Political Party as a Vehicle of Representation' (*Indian Constitutional Law and Philosophy*, 18 April 2019) <https://indconlawphil.wordpress.com/2019/04/18/electoral-bonds-and-the-political-party-as-a-vehicle-of-representation/> accessed 08 February 2020

B. Can the Court Re-establish Electoral Equilibrium?

1. *The Government (Attempt to) Strike Back: In Association for Democratic Reforms v. Union of India*,[36] the government has made its submission against the challenge to the electoral bonds scheme, but it has not yet been successful in persuading the Court to declare that the electoral bonds scheme is constitutional. Attorney General K. K. Venugopal argued before the Court that the electoral bond scheme did not violate the right to know under the Article 19(1) of the Constitution[37] because, in a system where there is no State funding of elections, the protection of the donors' identity must be maintained. Further, the scheme would help in eliminating black money from elections.[38] However, the Supreme Court took a neutral stance by not deciding upon the constitutionality of the scheme, yet ordering the political parties to furnish the donations received through electoral bonds to the Election Commission in sealed covers.[39] Regardless of this, the Court's denial in granting a stay order would tantamount to tacitly upholding the scheme.

2. *An Unlikely Resolution: Embrace the precedent set in Raj Narain case:* In the case of *State of Uttar Pradesh v. Raj Narain,*[40] the Court had held that Article 19(1)(a) of the Constitution guarantees the freedom of speech and expression to all citizens in addition to protecting the rights of the citizens to know, the right to receive information regarding matters of public concern. However, it is very unlikely that the Supreme Court will extend the applicability of the 'right to know' to the electoral bond scheme, because

36 W.P (Civil) No. 880 of 2017

37 *State* of Uttar Pradesh v. Raj Narain, [1975] AIR 865

38 *Association for Democratic Reforms and Anr. v. Union of India and Ors*. [2017] W.P (Civil) No. 880

39 Supreme Court Order, 'Association for Democratic Reforms. v Union of India' ([2017] W.P (Civil) No. 880) <https://scobserver-production.s3.amazonaws.com/uploads/case_document/document_upload/741/16902_2015_Order_12-Apr-2019.pdf> accessed 08 February 2020

40 *State* of Uttar Pradesh v. Raj Narain, [1975] AIR 865

to do so would require revisiting of its earlier jurisprudence on the matter wherein twice it has denied even granting a stay order as an interim relief. Therefore, it is difficult to argue that the Court will actually take positive measures to regulate the donations received through the electoral bonds to strike a balance in the system of political funding.

Embracing the *Raj Narain* case would be a radical departure from the current jurisprudence of the Court not fully deciding the case on merits, but buying time as a mode of judicial evasion wherein the judiciary sleeps over the case and, thereby, effectively upholds the law in a very tacit manner. Abandoning this practice of judicial evasion would be a bold step towards reclaiming the spirit of the activist judiciary of the 1950s. In the case of *Jayantilal Ranchchoddas Koticha v. Tata Iron & Steel Co. Ltd.,*[41] the Court had remarkably held that there is an inherent danger in permitting private funding to the political parties. Chief Justice M. C. Chagla remarked that "Any attempt on the part of anyone to finance a political party is likely to contaminate the very springs of democracy. Democracy would be vitiated if results were to be arrived at not on their merits, but because money played a part in the bringing about of those decisions. History of democracy has proved that in other countries democracy has been smothered by big business and money bags playing an important part in the working of democratic institutions, and it is the duty not only of politicians, not only of citizens, but also of a Court of law, to the extent that it has got the power, to prevent any influence being exercised upon the voter which is an improper influence or which may be looked at from any point of view as a corrupt influence."[42]

This precedence set by Chief Justice Chagla's Court was adhered to in the Court's jurisprudence for the past 15 years. For example, in the landmark case of *Union of India v. Association for Democratic Reforms*, the court held that the public had a 'right to know' which included the right to hold

41 *Jayantilal Ranchchoddas Koticha v. Tata Iron & Steel Co. Ltd.,* [1957] 27 Comp Cas 604

42 *Id.*

opinion and acquire information, because a successful democracy strives towards an aware citizenry, and misinformation or non-information of any kind will create an uninformed citizenry which makes democracy a farce.[43]

However, the departure from the precedence set by Chief Justice Chagla's court was evident when Chief Justice Bobde joined Former Chief Justice Gogoi in concurrence to deny the stay order on the electoral bonds scheme. It is harder to surmise Chief Justice Bobde's and Former Chief Justice Gogoi's positions on the constitutionality of the electoral bonds scheme in the light of their positions taken in the case challenging the constitutional validity of the electoral bonds scheme, especially because the case was initially filed in early 2018, right after the electoral bonds scheme was passed as a law, yet the position taken by Former Chief Justice Gogoi in the case was of there being very little time for the Court to adjudicate upon the matter. Six long months later, Chief Justice Bobde was still of the opinion that there was once again very limited time available to adjudicate upon the constitutionality of the electoral bond scheme. This position taken time and again serves as a reminder that to deliberate that the Court will revisit its stance in the light of the jurisprudence set by Chief Justice Chagla or *Raj Narain* judgement is a farfetched dream that cannot be reckoned upon.

3. *A Third Route for the Court:* The Court may still have a third path to restore the electoral equilibrium. Recall the order passed by Former Chief Justice Gogoi to ensure that no single party takes an arbitrary advantage of the electoral bond scheme. It required the political parties to furnish the details of the funds received by them through the means of electoral bonds. Full disclosure about funding information may either deter quid pro quo transactions or nudge voters against electing candidates who have used or are likely to use their public office for quid pro quo arrangements. Therefore, funding information is relevant information for the voters.[44]

43 *Union of India v. Association for Democratic Reforms* [2002] 3 SCR 294

44 Aradhya Sethia, '*Where's The Money?: Paths And Pathologies Of The Law Of Party Funding*' (2019) Vol. 1 NJLS 86, 107

However, the efficacy of the 'disclosures by the political parties' type system, as devised by the Court, depends upon the power of the Election Commission to impose strict penalties or disqualify the political parties for non-disclosure or discrepancies in the details of funds received through the electoral bonds. But, alas, the Election Commission of the present day is not just a toothless tiger, but even a tiger which errs on the side of the government of the day.[45]

Thence, the only middle path available with the Court to re-establish equilibrium in the political donations received through the electoral bonds scheme would be as follows –

i. Upholding the electoral bonds scheme but striking down the amendments to the Representation of the People Act, 1951, Income Tax Act, 1961, Companies Act, 2013, and Foreign Contributions Regulation Act, 2010, so as to restore the accountability that the political parties owed to the voters in the interest of democracy. This would restore the voters' right to know; thereby, restoring the equilibrium in the system, because now the voter will know who has funded the political party that is forming the government and what are the triggers and the tugs and pulls that the government is being influenced by, while formulating its policies.

ii. The Right to Information Act, 2005, must be made applicable to the political parties in the interest of the voters' right to know. Any reformative decision by the Court would remain a writ in water, if the Court does not extend the applicability of the RTI Act to the political parties, because RTI has time and again proved itself to be a valiant weapon against the excesses and corruption of the governmental institutions. RTI enables the public welfare spirited persons, such as Common Cause and Association for Democratic Reforms, to seek information on the donations received and the spending done by the

45 Staff Reporter, 'Election Commission acting in favour of BJP' (*The Hindu*, 04 April 2019) <https://www.thehindu.com/news/cities/Madurai/election-commission-acting-in-favour-of-bjp/article26736446.ece> accessed 08 February 2020

political parties during the elections. All of such information would play a key role in providing the voter with a genuine opportunity to make an informed decision.

- iii. There must be a reintroduction of the provisions that omitted the sections which promoted caps on anonymous and corporate donations or, at best, there must be a complete ban on anonymous, corporate and foreign donations, so that the invisible hands will no longer dictate the policies of the government. It does not come as a surprise that the government chose to provide cuts on corporate tax despite the public of the country being in desperate need of relief from the government's end.[46]

- Further, it can be reasonably expected that as and when the court takes up this approach, the issue of freedom of speech and expression would be likely to come up. In a similar instance, the Supreme Court of the United States, while dealing with campaign finance laws that imposed ban on corporate donations, held that the ban was against the free speech clause of the first amendment rights.[47]

- However, the judgement in the Citizens United case, when considered in the Indian context, would hold a persuasive value, but it would still not be sufficient because it would be overridden by the Indian Supreme Court's interpretation of the scope of freedom of speech and expression under the Constitution of India. Firstly, freedom of speech and expression under the Constitution of India is limited to the citizens only. In the case of *The State Trading Corporation of India Ltd. & Ors. v. The Commercial Tax Officer,*[48] the Supreme Court of India held that:

46 MG Arun, 'Why corporate tax cuts may not bring down consumer prices' (*India Today*, 25 September 2019) <https://www.indiatoday.in/india-today-insight/story/corporate-tax-cut-consumer-price-1602907-2019-09-25> accessed 08 February 2020

47 Citizens United v. Federal Election Commission,558 U.S. 310 (2010)

48 The State Trading Corporation of India Ltd. & Ors. v. The Commercial Tax Officer & Ors.,1963 AIR 1811

"The precedents of the Supreme Court of the United States which hold that corporations are citizens of the State of incorporation for purposes of federal jurisdiction cannot be followed in India. The diversity of citizenship which has led to such rulings does not exist in India. As a corporation is a separate entity from its members, it is not possible to pierce the veil of incorporation to determine the citizenship of its members in order to give the corporation the benefit of Art. 19."

Secondly, Article 19(2) of the Constitution of India, unlike the First Amendment of the United States Constitution, provides for a reasonable restriction on freedom of speech and expression. Further, this point can be read with the preamble of the Constitution which intends to establish justice – social, economic and political. In the light of the same, it will only be reasonable to restrict the corporate funding of elections, so as to protect and promote the economic and political justice under the Constitution

In *Kanwar Lal Gupta v. A. N. Chawla & Ors,*[49] in the context of limiting election expenditure by political parties and their candidates, the Court noted that:

"The other objective of limiting expenditure is to eliminate, as far as possible, the influence of big money in the electoral process. If there were no limit on expenditure, political parties would go all out for collecting contributions and, obviously, the largest contributions would be from the rich and affluent who constitute but a fraction of the electorate…."

Thus, imposition of strict caps or banning the anonymous, corporate and foreign donations would clearly prevent the quid pro quo relationship between the government and other entities that seldom care for the larger interest of the nation and democracy in general.

49 *Kanwar Lal Gupta v. A. N. Chawla & Ors.* (1975) 3 SCC 646

However, the barrier to this solution is that the Court has no say over it as it is a policy matter.

iv. The concept of State funded elections may be introduced in India. It might prove to be a radical measure because of the quantum of burden that would be thrust upon the state exchequer to fund the elections. Further, in theory, the benefits of State funded elections outweigh the demerits of private funding of elections which has a very detrimental effect at the very core of democracy. Private funding creates disparities in the resources available in the hands of the political parties, and the abundance of resources with one single party while the other political parties are deprived of them, substantially, means a death knell to democracy.[50] However, while the state funding of elections in India looks like a panacea, in practise, it may still not be enough to do away with the imbalance in funding, because when the functioning of state funded elections are examined across countries like Belgium, Denmark, Canada, Germany, etc., state funding of elections have only been successful when it is complemented with a strict compliance by the political parties of disclosure norms and spending limits.[51] In India, the spending limits and disclosure norms have seldom been a deterrent to the candidates from not complying with the spending limits. For example, Former PM Atal Bihari Vajpayee once stated that "Indian politicians start their legislative careers with a lie – the false spending returns they submit,"[52] and the evidence of the same can be traced in the independent reports which show that the candidate who can spend

50 Law Commission of India, (*255th Report on Electoral Reforms*, March 2015) 57 <http://lawcommissionofindia.nic.in/reports/Report255.pdf> accessed 08 February 2020

51 Niranjan Sahoo, 'Towards public financing of elections and political parties in India: Lessons from global experiences,' (*Observer Research Foundation,* 20 November, 2017) <https://www.orfonline.org/research/towards-public-financing-elections-political-parties-india-lessons-global-experiences/> accessed 08 February 2020

52 Prof. Jagdeep S. Chhokar, "The charade of limits on election expenditure by candidates" *(Association for Democratic Reforms*, 26 October 2020)<http://blog.adrindia.org/the-charade-of-limits-on-election-expenditure-by-candidates/> accessed 1 December 2020

more would more likely win, with the 2004 Lok Sabha consisting of 30% of MPs whose net value was in crores, 2009 Lok Sabha consisting of 58%, 2014 Lok Sabha consisting of 82% and 2019 Lok Sabha consisting of a whopping 88% of MPs who had their income and value in crores.[53] Therefore, while a radical malady requires a radical remedy, the evidence on the ground would point out that the radical remedy to the imbalance in the electoral funding will 'wither on the vine' due to the failure in the enforcement of the electoral spending limits. Lastly, one more barrier to this solution is that the Court has no say over it, as it is a policy matter.

v. The transformation of the institution of the Election Commission of India into an independent organisation with the power to deregister the political parties that do not disclose the account of funds received or practice any kind of non-compliance with respect to the duty to disclose is needed. The need to ensure appointment of Election Commissioners on a non-partisan basis and to conduct an independent scrutiny on the bank accounts of the political parties is required now, more than ever.[54] However, neither the Court has any say over the transformation of the Election Commission into an independent body, nor does the current Election Commission seem any too keen on wanting institutional autonomy and powers.

vi. The Court must mandate that the political funding should be a separate head in the accounts and annual reports of a company. Further, any donations made by the corporate must be processed digitally in the

53 Shelly Mahajan, 'Election Campaign Expenditure in India: Trends and Challenges', *(Association for Democratic Reforms)*<https://adrindia.org/sites/default/files/Election Campaign Expenditure in India Trends and Challenges.pdf> accessed 01 December 2020

54 Milan Vaishnav and Jagdeep Chhokar, 'Have Electoral Bonds made a bad system worse?', <https://carnegieendowment.org/2019/12/06/have-electoral-bonds-made-bad-system-worse-pub-80519>accessed 03 December 2020

interest of transparency.[55] This will ensure transparency in the long run. However, the barrier to this solution is that the Court has no say over it, as it is a policy matter.

IV. CONCLUSION

After receiving an overwhelming amount of donations in the 2019 Lok Sabha elections, the incumbent government changed their mind by extending the Electoral Bonds Scheme as a medium for donations in the subsequent State Assembly elections. With this government being unwilling to give up on its incumbent's advantage, it seems the time for making a decision on where to go next with the electoral bonds scheme with respect to restoring the equilibrium in the electoral donations should be imminent. But, the options for reform remain drastically limited and potentially fatally flawed. So, we may be stuck with this imbalanced electoral equilibrium of donations received by the political parties until either the Parliament or the Court invents a way to work with, or around, the Court's jurisprudence on Electoral Bonds Scheme.

55 Milan Vaishnav, 'Electoral Bonds: The Safeguards of Indian Democracy Are Crumbling,' https://carnegieendowment.org/2019/11/25/electoral-bonds-safeguards-of-indian-democracy-are-crumbling-pub-80428 accessed 05 December 2020

No Beauty, Just A Beast?
Reflections on Anuj Bhuwania's 'Courting the People'

Shreya Shree

Abstract

In his radical 'anti-PIL' critique, Anuj Bhuwania portrays the lived realities and theatricality of PILs in the High Court of Delhi. He shifts the focus from 'good PIL' and 'bad PIL' to 'PIL' per se, whose 'non-procedural' and 'malleable nature,' gave a 'free rein' to the Judges to manoeuvre the judicial processes and embark on remaking the city of Delhi. The review reflects on Bhuwania's account of the process of PIL, which relaxed procedures with a promise to enhance participation and ended up with neither. Noting that PIL is here to say, it lays emphasis on the need for democratising PIL through introduction of procedural safeguards and rethinking access to justice and legal aid.

Anuj Bhuwania's radical 'anti-PIL' critique in Courting the People (2017)[1] has been widely discussed and debated.[2] Labelled by Baxi as an 'obituary of PIL,'[3] the book portrays the lived realities and theatricality of PIL in the post-

1 Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India (2017).

2 Upendra Baxi, *Farewell to Adjudicatory Leadership?: Some Thoughts on Dr Anuj Bhuwania's Courting the People: Public Interest Litigation in Post-Emergency India*, 4 Nlud Student L.J. 1 (2017); *see generally* Gautam Bhatia, *ICLP Book Discussion: Anuj Bhuwania's 'Courting the People' – Roundup,* Indian Const. L. & Phil. (Feb. 1, 2017), https://indconlawphil.wordpress.com/2017/02/01/iclp-book-discussion-anuj-bhuwanias-courting-the-people-roundup/ (last visited Apr. 1, 2018) (hyperlinks to a four-part book discussion by Anuj Bhuwania, Aparna Chandra, Gautam Bhatia and Suhrith Parthasarathy); Cambridge India, *Book Discussion on Anuj Bhuwania's Courting the People*, Youtube (Apr. 19, 2017), https://www.youtube.com/watch?v=0e7HAF5u9EQ (last visited Apr. 1, 2018); Public Law and Policy Discussion Group - National Law University Delhi, *Prof. Upendra Baxi & Dr. Anuj Bhuwania: Exclusion by Judicial Innovation?*, Youtube(Mar. 2, 2017), https://www.youtube.com/watch?v=kHpenASz2iw (last visited Apr. 1, 2018).

3 Baxi, *supra* note 2, at 1.

Emergency period. In an interesting departure, this ethnographic account largely focuses on the developments in the High Court of Delhi, in addition to those in the 'most powerful'[4] Supreme Court.

Instead of looking at the 'outcomes' of PIL cases, this book focuses on the process of PIL and studies the exercise of its 'creeping jurisdiction' to show 'how' and 'why' PIL emerged as the tool through which the Judges embarked on 'remaking' the city of Delhi - at times, even riding 'roughshod' over negotiations within a political society. Bhuwania's core claim is that it is the *non-procedural* and *malleable nature* of PIL[5] that empowered the Judges to manoeuvre the judicial process according to their ideological predilections, which resulted in large-scale injustices. He calls for shift in focus from 'good PILs' and 'bad PILs' to 'PIL,' which itself is the problem.[6]

Through his survey of existing literature and courtroom ethnography, Bhuwania illustrates how the initial discomforts with procedure that resulted in the genesis of PIL manifested into disappearance of the 'public spirited' petitioner,[7] prominence of amici,[8] unmediated *suo motu* actions by the Court, which snowballed into omnibus PILs, absence of affected parties,[9] reliance on flimsy evidence and opportunistic denial of adjudication on questions of fact by the Courts. The 'protean' nature of PIL gave Judges a free hand to steer the cases in the manner they desired which, coupled with the Court's inherent limitations in understanding and handling polycentric disputes, made the perfect recipe for disaster.[10]

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4 Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18 J. Democracy 70 (2007).

5 Bhuwania, *supra* note 1, at 106.

6 Bhuwania, *supra* note 1, at 12 ("[P]IL was a tragedy to begin with and has over time become a dangerous farce.").

7 Bhuwania, *supra* note 1, at 39.

8 Bhuwania, *supra* note 1, at 42-43.

9 Bhuwania, *supra* note 1, at 120.

10 Bhuwania, *supra* note 1, at 120.

Indeed, Bhuwania is selective in his method and has picked cases which prove the pathologies of PIL, and not those countering his hypotheses.[11] Certainly, the cases are concerned with Delhi, which should not be taken as a microcosm of India.[12] However, it is best to keep the 'cherry-picking' arguments at bay while examining these cases[13] for they throw light on the perils inherent in the PIL process. Having said that, the case studies do leave us wondering if other High Courts in similar situations have adopted any different approaches with PIL powers.[14] One such account from the High Court of Gujarat is found in the book, where it exercised restraint on 'old-fashioned' procedural grounds such as non-joinder of necessary parties.[15]

This review reflects on Bhuwania's account of the process of PIL, which started with a choice of participation over procedure and ended up with neither. Further, the review includes thoughts on whether the time has come to say good bye to PIL and on the need for rethinking access to justice and legal aid.

I. AND, THEN, THERE WERE NONE

"*It is not too much of an exaggeration to say that PIL procedure can be just what the judge wishes it to be.*"[16]

11 Baxi, *supra* note 2, at 6.

12 Baxi, *supra* note 2, at 5.

13 Bhuwania, *supra* note 1 [Bhuwania primarily focuses on M.C. Mehta v. Union of India, W.P. (C) 13029 of 1985 (Supreme Court) ('CNG Case'); M.C. Mehta v. Union of India, W.P. (C) 4677 of 1985 (Supreme Court) ('Sealing Case'); Pitampura Sudhar Samiti, Civil Writ Petition No. 4215 of 1995 (Delhi High Court), Okhla Factory Owners Association, 108 (2002) DLT 517, Court on its Own Motion v Union of India, Civil Writ Petition 689 of 2004 (Delhi High Court) and Kalyan Sanstha v. Union of India, Civil Writ Petition 4582 of 2002 (Delhi High Court) (together, 'Slum Demolition Cases')].

14 Baxi, *supra* note 2, at 5, 10.

15 Bhuwania, *supra* note 1, at 85.

16 James Fowkes, *Civil Procedure in Public Interest Litigation: Tradition, Collaboration and Managerial Judge*, 1(3) Cambridge J. Int'l & Comp. L. 235, 238 (2012).

In his revisionist account of the origins of PIL,[17] Bhuwania traces the birth of PIL in the competing populism between the judiciary and political class.[18] Propelled by the desire to enhance its role and popular authority, the judiciary chose "*participation over procedure.*"[19] *Locus standi* was relaxed to give voice to the "*oppressed and bewildered.*"[20] The goal resonates with Ely's *representative-reinforcing* role of the Court.[21] However, as Bhuwania illustrates through his case studies, *locus standi* was not the "*only significant attribute*"[22] of PIL, but also there were other significant procedural departures (or 'innovations')[23] which made PIL proceedings anything but *litigation*. As a result, PIL contained neither guaranteed participation, nor any procedures guarding against it.

Bhuwania points to the 'non-procedural' nature of PIL. In his review, Baxi argues that it would be incorrect to say that all social action litigation (SAL) / PIL lack any semblance of procedure. He points towards special procedures developed by the Court for "*filing, listing, hearing and disposal*"[24] of such cases. The other meanings of 'procedure' in SAL / PIL, as Baxi puts it, could be the

17 Bhuwania, *supra* note 1, at 16.

18 Bhuwania, *supra* note 1, at 25.

19 Bhuwania, *supra* note 1, at 31; *see* O. Chinnappa Reddy, *The Garden is Open to the Public: Public Interest Litigation*, *in* The Court and the Constitution of India 261, 261-263 (2008).

20 Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 (1) Third World Legal Stud. 107 (1985); *see* Suhrith Parthasarathy, *ICLP Book Discussion: Anuj Bhuwania's 'Courting the People'- IV: Suhrith Parthasarathy on the Case for the Defence*, Indian Const. L. & Phil. (Jan. 29, 2017), https://indconlawphil.wordpress.com/2017/01/29/book-discussion-anuj-bhuwanias-courtingthe-people-iv-suhrith-parthasarathy-on-the-case-for-the-defence/ (last visited Apr. 1, 2017) (where he provides a textual basis for the relaxation of *locus standi* of PIL in India Const. arts. 32 and 226).

21 John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451 (1978).

22 Bhuwania, *supra* note 1, at 81.

23 *See supra* notes 7-9.

24 Baxi, *supra* note 2, at 9; *see* Supreme Court of India, Handbook on Practice and Procedure and OfficeProcedure(2017),https://www.sci.gov.in/sites/default/files/Practice%20&%20Procedure%20and%20Office%20Procedure%202017%20(FINAL).pdf (last visited Apr. 2, 2018).

new procedures evolved by judges in each case (either new or derived from existing provisions) or procedures laid down by apex Judges for specific category of cases. Although not explicitly defined, it is clear[25] that Bhuwania refers to the absence of or departures from basic procedures of adversarial litigation in the cases studied to depict the incoherence in the procedures adopted by the Courts and opacity of the ways in which they design and manoeuvre them under the PIL jurisdiction, disregarding principles of natural justice.[26] The procedural flexibility of PIL includes stripping off all elements of adversarial litigation, which then makes PIL inherently 'non-procedural.'[27]

It may be recalled that all attempts at designing a PIL procedure have been met with institutional inertia.[28] From Bhuwania's account, it is evident that even the efforts that have been made have been towards docket management of epistolary jurisdiction, rather than for procedural safeguards or due to regard for any form of separation of powers.[29]

Bhuwania makes a strong case of how PIL provided the space for arbitrary exercise of judicial power, thus prohibiting participation in democratic process, rather than facilitating it.[30] The foremost was reduction of PIL petitioner to mere informant and gradually replacing her with Court's chosen *amici.*[31] *With*

25 Baxi, *supra* note 2, at 8; *see* Bhuwania, *supra* note 1, at 12, 33-34, 39, 123 (Bhuwania uses 'procedure' to denote "basic legal procedure," "the standard adversarial nature of legal proceedings," requirement of representative petitioner and cross-examination of evidence).

26 Bhuwania, *supra* note 1, at 36.

27 Bhuwania, *supra* note 1, at 35-36 (discussing Bhagwati J. approach while hearing the PIL filed in Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802, doing away with observance of adversarial procedures in PILs, given the restrictions on access to justice resulting from the poor socio-economic conditions in India).

28 Bhuwania, *supra* note 1, at 121.

29 Bhuwania, *supra* note 1, at 121-127; *see supra* note 24.

30 Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible*?, 37 Am. J. Comp. L. 495 (1989) (noting that the concerns with non-adversarial nature of PIL are often exaggerated because the facts upon which the Courts rely are made available to the concerned parties and an opportunity is given to respond).

31 A.M. Sood, *Gender Justice Through Public Interest Litigation: Case Studies from India*, 41

suo motu actions, the Court bid farewell to the petitioner and proceeded with unmediated PILs. Finally, with non-inclusion of affected parties, the judiciary and the State now claimed to speak for all. Bhuwania rightly argues that many of the processual problems are rooted in such approach which severely restricts the parties who can be part of the "*space for conversation.*"[32] At this point, one may recall Waldron's emphasis on the procedural values of democratic decision-making that render it legitimate.[33]

While in circumstances of deteriorating political institutions and failing executive, an argument could be made for departure from a 'necessarily reactive' to a more 'dynamic' role for the judiciary.[34] However, judicial despotism in such manner would be unjustified. Bhuwania's account of omnibus PILs resulting from *suo motu* actions necessitates the need for laying down basic rules for exercise of such jurisdiction.[35]

While critique of legal formalism is well known, and it is acknowledged that the judiciary cannot function in a 'mechanical' way,[36] it is crucial to read

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V and. J. Transnat'l L. 833 (2008) (Sood's interviews with Justice D.Y. Chandrachud, Justice S.N. Krishna and Justice Verma show how the judiciary conceptualised the role of *amici* (fact digger, remedy innovator, crusader of PIL once the petitioner loses interest). Meanwhile, her interviews with court clerks and Usha Ramanathan show the other side of the story (ad hoc appointments, patchy interventions, over-dependence on amici resulting in shrinking of democratic space)).

32 Sandra Fredman, *Restructuring the Courts: Public Interest Litigations in the Indian Court*, in Human Rights Transformed 124, 125(2008).

33 Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115Yale L.J. 1346, 1386-1395 (2006).

34 Mark Tushnet, *The Indian Constitution Seen from Outside*, *in* The Oxford Handbook of the Indian Constitution 1019, 1025-1027 (Sujit Choudhry et al. eds., 2016).

35 Anuj Bhuwania, *ICLP Book Discussion: Anuj Bhuwania's 'Courting the People' – V: The Author Responds*, Indian Const.L.& Phil. (Feb. 1, 2017), https://indconlawphil.wordpress.com/2017/02/01/iclp-book-discussion-anuj-bhuwanias-courting-the-people-v-the-author-responds/ (last visited Apr. 1, 2018) (arguing for doing away with citizen standing and reverting to representative standing (class member/non-class member with class members as co-petitioners) as it facilitates reduction of the petitioner to an informant).

36 S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 Wash. U.J.L. & Pol'y 29, 30-37 (2001).

Bhuwania's work as an argument against *complete* removal of procedural rules, rather than as a case for complete reversion to formalism. A focus on the outcomes of PIL cases blurs the latent injustices propagated through (or in the absence of) procedures, so long as 'good outcomes' are reached. Bhuwania's book clears the vision to show the ramifications of overlooking the potential of PIL to turn into a monster, much like the *Lernean* hydra. As Baxi noted in *Taking Suffering Seriously*, innovations in law are "*noteworthy, only so long as the underlying constitutional issues of citizen's rights against the state for violation of fundamental rights are faced and resolved,*"[37] and not if they result in further violation of fundamental rights.

II. OBITUARY OF PIL?

As Baxi puts it, an obituary of PIL would be premature.[38] To be fair to Bhuwania, in his portrayal of monstrosity inherent in PIL, he does not explicitly call for its demise. In this rather dismal account of PIL, Bhuwania sees a 'way forward' in the procedural criticism offered by institutional critique for mitigating the pathologies of PIL.[39]

It is pertinent to note that case studies in this book belong to the third functional phase of PIL, where the Court took over the role of a "*super-executive*" to "*run the nation from its headquarters in New Delhi.*"[40] In the other roles, the judiciary has caused an expansion of fundamental rights, undertaken a 'parliamentarian' role for filling deliberative gaps or simply acted as 'an alarm clock' waking up the government to fulfil their obligations.[41] Arguments of legitimacy, competence

37 Baxi, *supra* note 20, at 123.

38 Baxi, *supra* note 2, at 1.

39 Bhuwania, *supra* note 1, at 120.

40 Shubhankar Dam, *Lawmaking beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analysing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)* 13 Tul. J. Int'l & Comp. L. 109, 118 (2005) (dividing the PIL into three functional phases: (i) fundamental rights phase; (ii) parliamentarian court phase; and (iii) executive court phase).

41 Sood, *supra* note 31, at 846.

and accountability can be advanced against each of these roles, as there exist arguments in support.[42]

Indian PIL's departures from Lon Fuller's notion of judicial proprieties have been acknowledged as part of judicial role.[43] This trend is not exclusive to PIL jurisdiction.[44] In fact, these departures are gaining wider acceptance as 'good governance' courts are being imagined in the backdrop of Indian PIL experience.[45] Justifications for such a role are grounded in absence of robust constitutional culture and well-functioning political institutions,[46] which render approaching elected representatives or public officials for governance reforms complicated, expensive and prolonged.[47] Further, as Bhuwania notes, PIL is omnipresent in contemporary Indian life[48] and has attained stability and acceptance over time. Therefore, as Baxi has professed long ago, it is doubtful if we would revert back to the non-PIL Courts.[49]

As PIL is here to stay, it is important to then shift focus from a consequentialist critique of PIL, and Bhuwania shows us how to. Additionally, it is necessary to avoid making a case for PIL based on assumptions such as "*judicial action[s]*

42 *See generally* Sood *supra* note 31; Dam, *supra* note 40.

43 Tushnet, *supra* note 34, at 1025-1026 (arguing that departures from judicial propriety happen when the Court "engages in ex-parte contacts, calls on outsiders to supply them with institutions, experiment with solutions, and revise them in the light of experience").

44 *See generally* Gautam Bhatia, *ICLP Book Discussion: Anuj Bhuwania's 'Courting the People' – II: Shields, Swords, and Where do we go from here?* Indian Const. L. & Phil. (Jan. 23, 2017), https://indconlawphil.wordpress.com/2017/01/23/iclp-book-discussion-anuj-bhuwanias-courting-the-people-ii-shields-swords-and-where-do-we-go-from-here/ (last visited Apr. 1, 2018).

45 Nick Robinson, *Expanding Judiciaries: India and the Rise of Good Governance Courts*, 8 Wash.U. Global Stud.L.Rev. 1, 3-8 (2009).

46 David E. Landau, *A Dynamic Theory of Judicial Role*, 55 Bos. C.L. Rev. 1501, 1501-1503 (2014).

47 Shyam Divan, *Public Interest Litigation*, *in* The Oxford Handbook of the Indian Constitution, *supra* note 34, at 662, 663-664 (Sujit Choudhry et al. eds., 2016).

48 Bhuwania, *supra* note 1, at 1.

49 Baxi, *supra* note 20, at 122.

[are] in the realm of constitutional gains"[50] or that the "*judiciary would descend from its ivory towers to the crowded mud huts and littered pavements.*"[51] Bhuwania's case studies[52] provide strong evidence against it. It is essential to be cognizant of that fact that judiciary's activism is shaped by "*broader meta-regimes*" of political, professional and intellectual elite worldviews,[53] and that judges are continuously aligning themselves in the democratic politics.[54] It would be naïve to assume that all judges would be 'good' judges and would protect liberties.[55]

In this backdrop, an institutionalist critique of PIL is necessary for a nuanced and sophisticated conceptualisation of judiciary's role,[56] assuring minimum safeguards to constrain the judges' own ideological predilections from driving the adjudication process, as well as to infuse the democratic and deliberative elements into PIL.

To start off, it would be fruitful to look for the 'good processes,' which have been adopted by the Supreme Court and various High Courts. This is where ethnographical accounts, like Bhuwania's, would be useful.[57] Thiruvengadam has argued for a shift from a 'command and control' role to a more 'facilitative' role

50 Baxi, *supra* note 2, at 9.

51 Reddy, *supra* note 19, at 262.

52 Bhuwania, *supra* note 6.

53 Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India,* 33 Bos. U. Int'l L.J. 102, 106 (2015).

54 Pratap Bhanu Mehta, *Indian Supreme Court and the Art of Democratic Positioning*, *in* Unstable Constitutionalism: Law and Politics in South Asia 233, 233-234, 258-260 (Mark Tushnet & Madhav Khosla eds., 2015).

55 Mehta, *supra* note 4, at 80 (much like Bhuwania, Mehta also alludes to 'modus vivendi' adopted by the Courts instead of taking positions on principles).

56 Arun K. Thiruvengadam, *Revisiting the Role of the Judiciary in Plural Societies (1987)*, in Comparative Constitutionalism in South Asia 341, 357-366 (Sunil Khilnani et al. eds., 2013).

57 Baxi, *supra* note 2, at 18-19 (as Baxi aptly puts it, "the task of critique is to engage fairy tales as well as horror stories and provide a reconstruction and true pathway of thought, deliberation, and constitutional action").

of the judiciary[58] and illustrates this using *Prakash Singh* v. *Union of India*[59] as an example. As Thiruvengadam notes, the Court in this case made extensive use of print media (such as full-page advertisements) for disseminating information about the PIL and for getting all stakeholders on board, and then facilitated negotiations between them.[60] Thiruvengadam has called for curtailment of peremptory role of amici,[61] transparency and assignment of responsibility in interim orders, and wise use of continuing mandamus and contempt powers.[62] Evidence from Bhuwania's work usefully augments his arguments.

In the concluding part of his book, Bhuwania outlines Ely's formulation of *representation reinforcing* judicial function. He argues elsewhere that the Ely's model applies to India and is, in fact, necessary to restrain judicial populism which has replaced judicial review.[63] While his argument is forceful, such a role may run counter to the scheme of the Indian Constitution, which envisages a greater role for the judiciary.[64] As Bhuwania notes,[65] Ely's model was developed in the context of the U.S. Constitution, which is primarily procedural. Ely clearly stipulated that substantive decisions fall within the realm of the legislature.[66] This is not the case with Indian Constitution which deals with substantive rights.[67]

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58 *See also* Fredman, *supra* note 32, at 125.

59 (2006) 8 SCC 1.

60 Thiruvengadam, *supra* note 56, at 362-364.

61 Thiruvengadam, *supra* note 56, at 365; *see also* Sood, *supra* note 31.

62 Thiruvengadam, *supra* note 56, at 364-366.

63 Bhuwania, *supra* note 35 (referring to the decision in *Suresh Kumar Koushal* v. *Naz Foundation*, Civil Appeal 10972 of 2013, as an instance where the court abandoned its counter-majoritarian function).

64 Bhuwania, *supra* note 1, at 18-20 (Bhuwania refers to the constitutional assembly debates, where Pandit Thakur Das Bhargava placed the Supreme Court 'above the law.' In any case, the wider powers of review are based in India Const. arts. 32, 142, 131, 136, as Bhuwania recounts.)

65 Bhuwania, *supra* note 1, at 18.

66 Ely, *supra* note 21, at 470.

67 Bhuwania, *supra* note 1, at 18.

Bhuwania leaves us seeking a normative critique of Indian PIL which does not solely celebrate its departures from the Anglo-Saxon jurisprudence. As Chandra has stated,[68] it may be fruitful to draw from practices of activist Courts in the Global South.[69] It is useful to refer to James Fowkes, who explores the traditional common law and continental models and models developed in the Global South for 'introducing procedure' into the Indian PIL without "*crippling its ability*" to respond to issues of public interest.[70] He states that public interest litigation is not a 'monolith' and would need "*multiple procedural tools and approaches*" for the range of roles played by the Court.[71] Insights from similar works would be of aid in mitigating the pathologies of PIL.

III. RETHINKING ACCESS TO JUSTICE

Bhuwania's work fills in the gaps in the understanding of PIL by highlighting the everyday Courtroom realities, their impact and the role of various actors (including outsiders)[72] in determining the operation of PIL. It necessitates the need to democratise PIL by redesigning or introducing court procedures to

68 Aparna Chandra, *ICLP Book Discussion: Anuj Bhuwania's 'Courting the People' – III: Aparna Chandra on Substance and Process,* Indian Const. L. & Phil. (Jan. 26, 2017), https://indconlawphil.wordpress.com/2017/01/26/iclp-book-discussion-anuj-bhuwanias-courting-the-people-iii-aparna-chandra-on-substance-and-process/ (last visited Apr. 1, 2018).

69 *See generally* Menaka Guruswamy & Bipin Aspatwar, *Access to Justice in India: The Jurisprudence and Self-Perception of the Supreme Court*, *in* Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Columbia 329 (Daniel Bonilla Maldonado ed., 2013); *see also* Landau, *supra* note 46.

70 Fowkes, *supra* note 16, at 236.

71 Fowkes, *supra* note 16, at 235-237 (Fowkes engages with three models: (i) collaborative-problem solving complete justice model; (ii) managerial judge; (iii) continental model. In doing so, he looks at traditional practices in common law and continental procedure, and practices developed by the South African Constitutional Court in *Mazibuko* (2010 (4) SA 1 (CC)), and the Columbian Constitutional Court's use of *tutelas*. It may also be beneficial to look at the use of *recurso de amparo* by Constitutional Court of Costa Rica.)

72 Bhuwania, *supra* note 1, at 64, 91 (Bhuwania writes that a notable presence in the PIL cases was that of Jagmohan, the "principal architect" of emergency era demolitions, whose position at the helm of affairs augmented the Court's powers.)

ensure that "*wisdom of the people*" informs law-making in the democracy,[73] and Courts gain democratic authority as participants within the democratic debate.

At the same time, it is also essential to devise other means of courting the people. While access to justice through state borne legal aid has so far been neglected with PIL's adoption, it is crucial to mobilize the executive and the legislature to put their forces behind it.[74] Additionally, the focus of legal aid should also be to develop institutional mechanisms for long-term support of lawyers[75] to the litigants.[76]

Lastly, there is a need for decentralisation of PIL jurisdiction.[77] In Bhuwania's account of the Sealing Case, an exasperated Delhi High Court finally resorted to transferring load to lower judiciary. Even though PIL cases constitute less than 1% of the cases filed at the Supreme Court,[78] they constitute a heavy burden on the Court's time and resources (especially, the hydra-headed or 'omnibus' PILs). There is a need for the higher courts to oversee and take responsibility for the 'chronically ill' lower judiciary[79] and equip it to deal with PILs. This is essential for a long-term solution to problems of access to justice.

CONCLUSION

Bhuwania leaves the reader convinced about the potential of PIL in giving a "*free rein*" to "*mercurial judges*"[80] and the need for re-assessing the legitimacy,

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73 Upendra Baxi, *Demosprudence versus Jurisprudence: The Indian Judicial Experience in the Context of Comparative Constitutional Studies*, 14 Macquarie L.J. 3, 8 (2014).

74 Bhuwania, *supra* note 1, at 33.

75 Jeremy Cooper, *Public Interest Law Revisited*, 25 Commonwealth L. Bull. 135, 136-137 (1999).

76 Charles Epp, *India's Weak Rights Revolution and its Handicap*, *in* The Rights Revolution 90, 95-102 (1998).

77 Aparna Chandra, Remarks at the Seminar on Constitutional Theory (Mar. 15, 2018).

78 Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?* 14 (World Bank, Policy Research Working Paper No. WPS 5109, 2009), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/11/03/000158349_20091103104346/Rendered/PDF/WPS5109.pdf (last visited Mar. 25, 2018)

79 Bhuwania, *supra* note 1, at 1-3.

80 Bhuwania, *supra* note 1, at 130; Baxi, *supra* note 2, at 8.

competency and accountability of PIL Courts. While the purpose of PIL was to provide an equal space to the marginalised for conversations with the government, it has in turn pushed them out of it.[81] The State, the Court, and the constituency of Court's own appointees (and its own outsiders) remain the participants in the deliberative exercise. Bhuwania shows how PIL becomes a Judge's echo chamber, where he initiates the debate and ends it, too.

However, as indicated earlier, it may not be the time to bid adieu to adjudicatory leadership under PIL in a democracy. Even otherwise, PIL's omnipresence in Indian thought is likely to stay. It is therefore necessary to work towards assigning a more democratic role to the Court, which ensures accountability, democratic deliberation, equality and access to justice to the marginalised.[82] For the institutional critique from within the Courts, it would mean to take Pathak J. seriously and works towards its accountability and transparency, rather than only focus on frivolous PILs and docket management.[83]

As an aside, it would be useful to assess the PIL processes in the 'good PILs.'[84] Further, if the higher judiciary has to transform into 'good governance courts,' it would be fruitful to study when the other branches show unusual deference to the Court and when not, and the impact of Court's order in ensuring long-term overhaul of the *status quo*.[85]

To conclude, while Baxi's distinction between SAL and PIL is instructive in rethinking the aims and processes of PIL,[86] there is a need to avoid putting all

81 Bhuwania, *supra* note 1.

82 Fredman, *supra* note 32, at 125; Guruswamy & Aspatwar, *supra* note 68, at 330 (adding a fourth marker, 'access to justice to the marginalised' to Fredman's conceptualisation of the democratic role of the Court).

83 Bhuwania, *supra* note 1, at 121-122 (noting Justice Pathak's attempts, Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 to formulate an "institutional response" to concerns with PIL jurisdiction); *see generally* Surya Deva, *Public Interest Litigation in India: A Critical Review*, 1 Civ.Just.Q. 19 (2009).

84 *See, e.g.*, Right to Food Case, W.P. (C) No 196 of 2001 (Supreme Court).

85 Sathe, *supra* note 36, at 89.

86 Baxi, *supra* note 2, 16-17 (arguing that "the emphasis of SAL is on the petitioner and

our hopes at the feet of judicial self-discipline. If the "*rights of the rightless*"[87] are indeed paramount, there is a need for re-introducing certain procedural safeguards of adversarial adjudication in PIL. It is acknowledged that procedures may, too, fall victim to the political ideologies of the Judges; however, as Bhuwania shows us, it still does not make a case for complete informalization of PIL.

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the other regarding cause of the petitioner…The Court here acts as a trustee of people's rights...Its methods of fact finding…take the form of a multidisciplinary group often called socio-legal commissions...[F]rom being judge-led, petitions have very often met with strict scrutiny...").

87 Baxi, *supra* note 2, at 17.

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