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MESSAGE FROM THE PATRON-IN-CHIEF

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Dt: 8th August, 2016

MESSAGE

It gives me immense pleasure that the National Law Institute University, Bhopal is publishing the next issue of the ***NILU Law Review (Volume V, Issue II).***

The NLIU Law Review has served as a worthy platform for the dissemination of legal research which fosters academic discourse. The dissemination of this knowledge helps policy makers, judges, lawyers, researchers, social scientists, social activists and other readers to grasp and understand the complexities of socio-legal issues and problems, thereby pioneering legal reforms. It also inspires students of law to imbibe legal articulation skills and aspire for scholarly excellence.

I am confident that the Law Review will achieve more acclaim in the years to come and prove to be an indispensable legal resource for the legal fraternity. I extend my best wishes to the Law Review Team and hope that the upcoming issues are also equally engaging and insightful.

(RAJENDRA MENON)

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MESSAGE FROM THE PATRON

It gives me great delight to present Volume V Issue II of the NLIU Law Review to our readers. This Issue offers profound and refreshing perspectives on several disputed points of national and international legal importance, serving as a valuable addition to the repertoire of socio-legal literature. I sincerely hope that the readers would find this Issue informative and thought-provoking,

The NLIU Law Review is the flagship publication of National Law Institute University, Bhopal and provides a platform that promotes innovation, originality and ingenuity through legal research in keeping with our avowed objectives. The Journal accepts submissions from students, lawyers, academicians and scholars in the form of well-researched and insightful articles, book reviews and case comments. These submissions go through a rigorous and intensive selection process wherein they are evaluated on grounds of technical accuracy and argumentation skills.

I would like to thank the Patron-in-Chief of the Law Review, Hon'ble Shri Justice Ajay Manik Rao Khanwilkar, Chief Justice, High Court of Madhya Pradesh for his valuable guidance in this endeavor. I extend my congratulations to Prof. Ghayur Alam for assisting with the production of the journal and guiding the student editors with his erudite inputs. I congratulate the Editorial Team for bringing out this Issue which is contemporary in its context and insight and wish them all the success for the upcoming issues. We look forward to your valuable comments and feedback.

Prof. (Dr.) S.S. Singh
Director
National Law Institute University
Bhopal

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MESSAGE FROM THE FACULTY ADVISOR

The focus of this Issue is to create dialogue on relatively less explored areas in legal scholarship. The ideas that this Issue brings forth seeks to provide an insight into the socio-legal and political dimensions of contemporary relevance relating to national and international law.

In TWAIL and Investment Law – The Perpetual Struggle the author seeks to trace the development of the 'Third World Approach to International Law' and identifies the threats to global financial markets and its impact on third world countries. In Multimodal Transportation Law in India the author seeks to make a comparison of the provisions relating to multi-modal transportation of goods under the United Nations Convention on Trade and Development, with the provisions of the Multimodal Transport of Goods Act, 1993 of India.

A Constitutional Analysis of the Idea of Affirmative Action: Exploring New Standards with special reference to the Gujjar Reservation in Rajasthan seeks to analyze and compare the standards of affirmative action with respect to reservation for Gujjars in Rajasthan with the standards of Tamil Nadu and Andhra Pradesh. The author also analyses the ambit of Article 15 with reference to the cap for OBC and Special Classes reservation.

In Judicial Pronouncement and Social Movements: Reconciling Rights, Gender Discrimination and Religion the author questions the classic triadic relationship between the three organs and the impact of the judiciary on social movements by analyzing three landmark judgements of socio-legal importance namely the Aruna Shanbaug case, the Shah Bano case and the Naz Foundation case.

The NSEL Scam: Bridging the Regulatory Hiatus and its Fallout on the Corporate Sector in India the author examines the reasons and impact of the controversy, subsequently analyzing the legality of an NSEL-FTIL merger and its implications on the financial prospects of India Inc.

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This Issue includes two case comments. One, Rajbala v. State of Haryana: Panchayati Democracy v. Imperatives of Executive Policy the author analyses the nature of the right to vote and right to contest elections by applying the test of reasonable classification. Two, case comments on Harshad Govardhan case in light of the rights of tenants in a mortgaged property and its implications in the secured creditor's right to enforcement of security interest under the SARFAESI Act, 2002.

The student body of the Journal has done a tremendous job in screening and evaluating the papers. It would not have been possible for us to bring out this Journal without the support of our students.

We take this opportunity to thank the Patron-in-Chief of the Journal and Chief Justice of the Madhya Pradesh High Court, Hon'ble Justice Rajendra Menon, for his continuous encouragement. We are thankful to the Patron, Prof. (Dr.) S.S. Singh, the Director of National Law Institute University, Bhopal for his guidance and support. All the contributors to this Journal deserve special thanks for they made this endeavour a success.

We invite comments and criticism on the Articles and Case Comments published herein. Kindly feel free to make suggestions and comments for improving the quality of this Journal.

Prof. (Dr.) Ghayur Alam
Professor in Business Laws & Intellectual Property
(Ministry of HRD Chair on IPR)
National Law Institute University, Bhopal

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EDITORIAL NOTE

In this issue, the NLIU Law Review attempts to create academic discourse on less explored areas of national and international law. The myriad ideas that this Issue compiles provide a fascinating insight into the socio-legal as well as political aspects of contemporary controversies, judgements and statutes.

In the article 'TWAIL and Investment Law – The perpetual struggle', the author has traced the development of the 'Third World approach to international law' as a solution to tackle the growing threats to global financial markets. The article also analyses the impact on third world countries and its political dimensions through the string of decisions that rely on this approach. In another article, the author has delved into the historical evolution of Multi-Modal transportation of goods under the United Nations Convention on Trade and Development, comparing the technical nuances of such contracts and the prescribed remedies with the Indian position elucidated in the Multimodal Transport of Goods Act, 1993.

Pertaining to constitutional law, this issue also hosts a case comment of Rajbala v. State of Haryana wherein the Supreme Court upheld the constitutionality of the amendments to the Haryana Panchayati Raj Act, 199. The author analyses the nature of the right to vote and contest elections by applying the classification and arbitrariness tests provided by Article 14 of the Constitution. Further, there is the piece analyzing the standards of affirmative action with respect to reservation for Gujjars in Rajasthan, which compares the Rajasthan model to the reservation systems followed in Tamil Nadu and Andhra Pradesh. The author also analyses the ambit of Article 15 and the situations where the cap for OBC and Special Classes reservation may be extended.

In another piece, the author has questioned the classic triadic relationship between the three organs and the impact of the

judiciary on social movements by analyzing three landmark judgements of socio-legal importance namely the Aruna Shanbaug case, the Shah Bano case and the Naz Foundation case. The paper also stresses on the jurisprudential peculiarities of these cases in terms of community interest and public perception that largely shaped the course of the social movements.

Readers will also find, in this issue, an insightful article on the 2008 NSEL scam and the lacunae in the regulatory framework set up under the aegis of the Ministry of Corporate Affairs and the Forward Markets Commission. The author has examined the reasons and impact of the controversy, subsequently analyzing the legality of an NSEL-FTIL merger and its implications on the financial prospects of India Inc. The Issue also hosts a case analysis of the Harshad Govardhan case in light of the rights of tenants in a mortgaged property and its implications in the secured creditor's right to enforcement of security interest under the SARFAESI Act, 2002. The author has particularly focused on the remedies from the order of the Magistrate and the enlargement of the powers of the magistrate under Section 14 of the Act.

The Law Review Team wishes that the present issue is successful for all the readers and hopes that the collection of articles on various contemporary issues proves to be both useful and appreciable. We welcome any suggestions to improve the same.

Editorial Board

TWAIL AND INVESTMENT LAW – THE PERPETUAL STRUGGLE

Enakshi Jha[*]

Abstract

Investment Arbitration has acquired the center stage in the recent past with the emergence of investment opportunities internationally. Accompanying the growth of investment opportunities is the equally distressing reality of investment protection. In light of the Argentinian crisis and the growing voice of Investment Arbitration Tribunals it is essential to recognize the existence of threats to the Global Financial Market, which poses an obstacle to International Investment law and arbitration. The 'Third World' Approach to International Law ("TWAIL") has proposed to ease this situation by promulgating approaches that resonate the developing world's take on International law regimes and this has found its way to International Investment law via the route of arbitration. Disputes arising between investor states and the Third World propose a new set of opportunities and obstacles and this paper attempts to decipher this journey. Judgments of Arbitral Tribunals often turn a blind eye to the existing realities of such countries, further deepening the divide and continuing to promote the interests of the Imperial West. This paper has analyzed TWAIL and its relationship with International Investment Law to put forward both sides of the story and stresses upon the need to appreciate differences in Investment climates across the world, while celebrating the recent success of decisions aimed at doing the same.

I. Introduction

International law is unquestionably law seen in facets of not only global governance of international relations but is also the adhesive that

[*] Student of NALSAR University of Law, Hyderabad.

binds people of different jurisdictions together in order to enable an efficient exchange of capital, thoughts and ideas. This capital may not always be financial in nature, and encompasses in its ambit cultural, religious and linguistic discourses. However, this paper focuses only on the financial interface that International law has and analyses its effects and impact on the objectives of the Third World. International law has been studied through various lenses, and including schools such as the feminist study of International Law and a communist perspective to international law.[1] While it may not be appropriate to term TWAIL a school of thought, it is essential to recognize that it is a counter-hegemonic discourse that attempts to break the perception International Law as is often promulgated by Western Countries, often the promulgators of International Doctrines.

TWAIL is sensitive to the ideological struggles faced by people of the third world, which comprises of developing as well as less-developed countries.[2] James Gathii, one of TWAIL's most celebrated advocates rightly declares this third world perspective of international law to be a limitation on the 'universalization' of international Law.[3] Makau Mutua's idea of TWAIL opposing an unjust global order further cements Gathii's declaration and elucidates the long struggle that third world nations have united and put forth to fight the hierarchy in the so called neutral and equal sphere of International Law.[4]

TWAIL's objective can be summarized as an attempt to counter the hegemony of the Westphalian understanding of International law impacts Human rights, cultural identities, sovereignty of states, Taxation policies and Diplomatic protection between States. Further TWAIL's interaction with investment law has exposed the fallacies in this Westphalian understanding of International law, illuminating the domination of the Third World both directly and indirectly through economically unjust policies imposed by 'neo-liberalism of the West.

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1 Nesiah, Vasuki, *The Ground Beneath Her Feet: "Third World" Feminisms*, *Journal of International Women's Studies*, 4(3), 30-38, (2003).

2 Upendra Baxi, *What may the third world expect from International Law,* Third World Quarterly, Volume 27, Np. 5, 135, (2006).

3 James Thuo, *Rejoinder: Twailing International* Law, Michigan Law Review, Volume 908, 2066-2067, (2000).

4 W. Mutua Makau, *What is Twail?*, American Society of International Law, Proceedings of the 94th Annual Meeting, 31-39, (2000).

Investment enables the infusion of capital and technology to developing countries, providing them with a chance of robust economic growth and employment opportunities and is often pivotal to such countries due to their inability to invest due to a lack of capital and limited technology research and development.

This limitation is most often exploited by developed nations, empowered by both technology and capital who rely on the natural resources of developing nations and impose unfair investment terms and conditions on their Host state.[5] This not only presents the unequal negotiating power between two so called equals as broadcasted by International Law, but also strengthens the hierarchy in ideologies and objectives of States impacting not only economic policies but also environment, labor and financial policies. It is this hegemony that TWAIL attempts to counter in presenting the third world perspective vis a vis investment law, most often regulated by Bilateral Investment Treaties in our modern world.[6]

This paper attempts to unravel the ideology of TWAIL while focusing on the differences between nations and noting the essentiality in recognizing differences instead of merely universalizing to enable a fairer world order. The Author recognizes and is in complete consonance with Upendra Baxi's understanding that the third world in itself is composed of multiple identities and histories that impact their objectives, but realizes the need to counter the present hegemony in International Investment law by analyzing TWAIL as a united ideological resistance to the present international law apparatus.[7] Discerning the centrality of investment in today's world, it is only fair to focus and extend this resistance of the Third World and study the hierarchy in International Investment law and critique it to narrow the lacunae in this international gradation of countries. However, it is essential to remember that the interaction of International and Investment Law have their equal share of positives and have undeniably strengthened the global economy.

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5 M. Sornarajah, *Mutations of Neo-Liberalism in International Investment Law*, Trade Law and Development Journal, Volume 3, No. 1, 203, (2011).

6 Jesswald W. Salacuse, *The Emerging Global Regime for Investment,* Harvard International Law Journal, Volume 51, No 2, (427, (2010).

7 BAXI, *Supra* n. 3, at 137.

II. Why Do We Need TWAIL?

To truly appreciate TWAIL's contribution it is important to understand the contribution of the Westphalian System. This focus on Europe and the writings from a Euro centric perspective is fundamentally opposed by TWAIL scholars as it does not acknowledge the existence of a third world that has had different cultural, historical experiences and therefore has different expectation from International law[8] the need to respect sovereignty of States emerged as a means of controlling War. To control the rise of wars such as World War II in the future, the European nations came together to decide upon principles that would control and protect the interaction and recognition of sovereign states.[9]

In 1648 the Peace of Westphalia for the first time came up with the idea of what has evolved to today's international law by ending the Thirty Years' War between Catholics and Protestants in Europe. It laid on the essential principle of non-intervention of states in the domestic order of other states and by the Seventeenth century evolved to a system of tolerance between European states irrespective of the differences in other state's domestic and legal setups. Unfortunately, World War I followed this development as Euro states once again became intolerant of domestic differences.[10]

World War II on the other hand saw the Soviet Union materializing to be a power that countered Europe and the West's liberal capitalistic approach of expanding to colonies and territories. Further, countries emerging from their imperial past became new actors in International law in this period, leading to a "Revolt against the West", which first marked the existence of the Third World and in true terms broadened the scope of International Law.[11] These newly sovereign states exercised International law by entering contracts and creating customs and later in

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8 http://www.jstor.org/stable/25659346

9 avid P. Fidler, *Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law*, Chinese Journal of International Law, Volume 29, (2003).

10 "The name is derived from the Peace of Westphalia (1648), which contains an early official statement of the core principles that came to dominate world affairs during the subsequent three hundred years." *See* JAN AART SCHOLTE, THE GLOBALIZATION OF WORLD POLITICS, IN: THE GLOBALIZATION OF WORLD POLITICS, Page 19-23, (1997 ed.).

11 FIDDLER, *Supra* n.10.

joining the United Nations ensured that their voices were heard so that prejudices of the West could no longer prevail to further their economic interests.

These voices against domination formed the roots of TWAIL and are today applicable to Investment Law that is most often critical in analyzing economically mutual relationships between Sates. In this understanding of investment law, institutions are placed in the context of a formal mechanism without analyzing the effect that global power dynamics have on the negotiating power between nations and their nexus with investment law.[12] Hence institutions spoke to language of powerful States and only accommodated their interests and development.

However with the increase in awareness and legal scholarship in TWAIL, the voices and interests of the third world are being heard, as can be seen in the third world pressure on institutions like the World Bank and the World Trade Organization to address the grievances and aims of third world development via investment.[13] This is fueled by the adverse effects of unfair investment law regimes that often leave third world nations grappling with unsustainable environmental damage, massive unemployment, exploitation of limited natural resources and an ever-increasing spiral of corruption.[14]

Global governance norms such as those imposed by TRIPS force nations to mold their domestic laws to align with such international policies, thereby bringing into doubt the nature of sovereignty these states actually possess.[15] Transnational corporations that control the flow of capital to and from developing nations always lie outside the control of these nations who are forced to change their policies, raising issues on the self-determination of these sovereign states.[16] Further a uniform view of all nations and attempt to standardize trade and investment practices via international institutions ignores the differences that the third world

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12 B. S. Chimni, *The World of TWAIL:Introduction to the Special Issue*, Trade Law and Development Journal Volume 3 No. 1, 11-15, (2011).

13 *Id.*, at 14-15.

14 *Id.*, at 20.

15 Jan Wouters, Philip De Man and Leen Chanet, *The long and winding road of International Investment Agreements: Towards a coherent framework for reconciling the interests of developed and developing countries,* Human Rights and International Legal Discourse, Volume 3, 263-264, (2009).

16 *See* JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEWSTATES IN POST-COLD WAR PRACTICE, (2013 ed.)

advocates, leaving developing nations with the unenviable option of choosing between isolation or compromise, furthering the questions on self-determination of sovereign third world states.[17]

Customary International Law when analyzed in its own plane also impedes fairness in investment policies as, traditional international law does not recognize individual investors or parties and they are then left with no option but to espouse their grievances through their home State. This Investor State dispute is often weighed on the power yielded by the Investing State, ultimately leaving growing economies worse off.[18] Yet, customary international law's interaction with investment law and disputes occurs only on the concurrence of the breach of the BIT being a breach of the international law standard and does not extend to mere contractual disputes arising from the BIT. Aggrieved individual investors approach their home states (States are traditional actors in International law) to protect their investment claim.

However to ease the situation home states of investors often indulge in 'gunboat diplomacy' with the Host state. This is a form of diplomatic protection that is exercised with respect to investment claims and is made possible due to the international law obligation imposed upon Host states to protect the property of Aliens' when they are set up in the Host state in furtherance of development and trade. Hence it the home state espousing the investment claims of investors from the Host state and is most frequently used by the first world in cases of expropriation.[19] This form of diplomacy can extend to the use force and is a weapon of domination of the first world as there is no level negotiating power and the repercussions in case Host state fails to address investment claims are appalling and range from economic sanctions by the international community to strained international relationships that limit the flow and exchange of goods and services.

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17 B.S. Chimni, *Capitalism, Imperialism and International Law in the Twenty First Century,* Oregon Review of International Law, Volume 14, 19-21, (2012).

18 Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World,* International and Comparative Law Quarterly, Volume 36, 58-59, (1987).

19 Felix O. Okpe, *Engangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment and the promise of Economic Development of Host States,* Volume 13, Richmond Journal Global Law and Business Review, 217-218, (2014).

Hence the need for TWAIL is essential in understanding investment law which is bilateral or multilateral in its nature and must give equal protection to not only the capital exporting, but also the capital importing 'Third World' states.

III. The Tale of TWAIL and Rise of Neo-Liberal Investment Policies

The 21st century has seen the catalyzing impact of neo liberalism and this has been resonated in investment policies and laws across the world. This is true not only in the interaction of the developed and developing states, but also between investment agreements (most often in the form of BIT's) between developing nations themselves. Trade and financial intuitions like the WTO, TRIPS and World Bank advocate for the same and are powerful tools in accomplishing the economic objectives of the West.[20]

Further the emergence of transnational corporations has made matters worse and they find legitimacy in the espousal of their objectives by States in the name of promotion of national interest and global development.[21] Neo Liberal Economic Policies and their impact on investment law are best illustrated by international law's attempt to control and regulate property rights. This attempt is a puppet controlled by the powerful Western States and is insensitive to the resistance of the Third World.

Intellectual Property forms a major stake of gross property value in the World and the centrality of TRIPS in regulating such IP is pivotal of the role of international law in determining the scope and direction of investment policies. TWAIL analyses this internationalization of property in its critique of the impacts of TRIPS policies. India, for instance in its landmark decision on the patentability of the Cancer Drug Glivec by Novartis acknowledged the impact of TRIPS on drug patents and the consequent multiplication in drug prices had the patent been granted to Novartis. Investment, here in terms of pharmaceutical giants investing in India, that helped research and development while setting up

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20 James T. Gatthi, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, Michigan Law Review, Volume 98, (1999).

21 CHIMNI, *Supra* n.13, at 18.

industries was seen as the perfect path to development, was emphasizing on the relevance of investment protection extending to patent protection in this context.[22]

This policy of the TRIPS exemplifies the indifference of international institutes and their developed nation partners who control policy regulation while eyeing the sole objective of neo liberal capitalism and turning a blind eye to the grievances of poverty, health endemics and unaffordability of drugs by the poor masses in the developing nations. The indifference of both developing nations and international institutions in addressing third world grievances and objectives while furthering their neo liberal economic and trade policies is made clear through examples such as this. TWAIL questions this application of international law not only due to its unfairness but also because third world states did not have a say and equal platform to raise their concerns in the making of such laws.[23]

While presenting the grievances of the third world, the Author also wishes to celebrate the small yet relevant changes that TWAIL is bringing about in investment law's neo liberal approach. This counter hegemony has led to questions on the application of absolute protection of investment in foreign countries as this absolute protection is extreme and leaves third world nations vulnerable to claims ranging from expropriation to denial of justice. However, in 2004 when the United States of America (USA has been a great advocate of absolute protection in its promotion of its neo liberal economic policies), amended its Model BIT diluting the absolute standard it had maintained in its previous BIT's with developing nations. This symbolizes a thawing of the hegemony in investment law and must be celebrated.[24]

IV. The Latin American Struggle and its Relevance to Investment Law

Another victory of TWAIL centered on the Latin American countries has been their resistance to the American views on investment

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22 Leena Menghaney, *The Glivec Precedent: Drop the Case*, Economic and Political Weekly, Vol - XLVIII No. 32, August 10, 2013.

23 SORNARAJAH, *Supra* n. 6, at 203.

24 KENNETH VANDEVELDE, A COMPARISON OF THE 2004 AND 1994 US MODEL BITS: REBALANCING INVESTOR AND HOST COUNTRY INTERESTS: YEAR BOOK OF INTERNATIONAL INVESTMENT LAW, Page 212, (2009).

dispute resolution. USA insisted upon the application of an International Minimum Standard of Protection to investments, which includes equal protection to the investor and the right to be governed by equal laws and access to justice in the host state.[25] This International minimum standard was an external standard that was not sensitive to the struggles the third world faces and subjects dispute resolution to this absolute standard that is determined by an arbitral tribunal.

First world countries insisted that this standard was maintained by International Law alone and as third world states were also subject to the same International Law, they were bound by it. Latin American nations rejected this requirement, reiterating the need to recognize differences between the Host and Investor states and endorsed the application of a National Treatment Standard, giving domestic courts the right to adjudicate upon investment disputes by applying the law of the land and not international law principles that Arbitral tribunal relied upon.[26] This standard has been termed the Calvo Doctrine, after Carlo Calvo a Latin American jurist. This doctrine promises the application of the same domestic law on both the host states and investors but has been criticized by the West for being unfair as they believe domestic courts would be prejudiced to support the host nation and sufficient protection would not be accorded to the investor.[27]

Latin American nations were not alone in this struggle and were backed by new states emerging from decades of imperialism in both Africa and Asia and together advanced their New International Economic Order (NIEO) to counter the West's unfair neo-liberal economic model. They agreed upon the universalization of the Calvo Doctrine as it promoted Host States' interests from the might of investors. Further, Third World States demanded complete ownership of their natural resources which developed nations[28] were trying to exploit and gain control of via the internationalization of property law as discussed earlier in this section. In

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[25] R. DOAK BISHOP, JAMES CRAWFORD & W. MICHAEL REISMAN, FOREIGN INVESTMENT DISPUTES, 9-17, (2005).

[26] CHIMNI, *Supra* n. 13, at 20.

[27] Alwyn Freeman, *Recent Aspects of the Calvo Doctrine and Challenges to International Law,* Volume 40, American Jorunal of International Law, 121-123, (1946).

[28] Aditya Kutty & Sindhura Chakravarty, *A Mutlilateral Investment Agreement: A Poison or an Antidote,* Sri Lankan Journal of International Law, Volume 22, No. 1, 89, (2010).

order to maintain the hegemony most developed nations stressed upon the importance of previous arbitral awards and writings of Eminent Jurists. We must note that arbitral awards are not binding upon the world at large, as they have no *stare decisis* value and bind only the parties consenting to the dispute resolution.[29]

Dissenting opinions of arbitral values weigh equally to the majority opinion and form only a weaker source of International Law, thereby exposing the desperate but weak argument of the West to control investment laws.[30]

V. ICSID and The Third World Brutality

The World Bank was formed after World War II to aid in post war reconstruction of development. It then gradually increased its ambit and began aiding development projects across the world and went beyond being a mere monetary institution. Poverty of the Third World often featured in such policies and investment was endorsed by the World Bank to help this situation as investment in developing nations catalyzed economic growth.[31] This was coupled with a gradual rise in investment disputes that the World Bank was not granted authority to mediate.

In light of this a dispute settlement mechanism was established and is known as the International Convention for the Settlement of Investment Disputes (ICSID) and is composed of a permanent arbitral tribunal that adjudicates upon investment disputes.[32] Parties ratify this Convention and it has been argued by TWAIL Scholars like Sornarajah that the Third World's desire to develop economies has left them with no option but to ratify the ICSID Convention, as it is an incentive for developed nations to invest. Further it also ensures financial aid and loans from the World Bank, as ICSID is merely its arm.[33] Further, ICSID

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29 Gilbert Gulillaume, *The Use of Precedents by International Judges and Arbitrators,* Journal of International Dispute Settlement, Volume 2 Issue 1, 5-23, (2011).

30 Frederick D. Sourgens, *Law's Laboratory: Developing International Law on Investment Protection as Common Law*, Northwestern Journal of International Law and Business, Volume 34, Issue 2, 184-185, (2014).

31 FELIX, *Supra* n. 20, at 217.

32 Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, Volume 8 San Diego Journal of International Law, Volume 8, 245, (2006-07).

33 SORNARAJAH, *Supra* n. 6, at 205.

elevates political impacts on the economy to the international legal sphere to enable dispute resolution.

This is counter-productive to the Third World whose economy is dominated by its Government's policy actions and policies and the ICSID catalyze their economic burden in course of the advancement of neoliberal investment protection.[34] Hence the impact of the establishment of ICSID is not only limited to dispute resolution but also influences Third World nations by the indirect impact discussed in this section. Countries like Pakistan who faced bitter experiences at the dispute resolution forum of arbitration have the same displeasure for investment laws and their resolution mechanism that is heavily titled towards favoring Western Nations. Countries like Australia that are not in the truest sense third world have more openly criticized such BIT's and their dispute resolution clauses.[35]

VI. Bit's and the Third World: Boon or Bane?

Bilateral Investment Treaties today have the obligation of ensuring "Fair and Equitable treatment". As discussed in the previous section, this standard has not been defined in absolute terms but is an absolute standard that cannot be breached. This is best understood by through differentiation from National Treatment as espoused by the Calvo Doctrine and it is deciphered according to the circumstances in which it is applied and this must always be done in good faith. The meaning of what is 'Fair and Equitable' is seen in the context of the treaty between the Host and Investor State, in light of the object and purpose of the investment treaty.[36]

This position of the FET has lead to many a disputes and has gained prominence in the TWAIL discourse. While National Treatment doctrines are determined relatively; i.e. The application of domestic law applied to the host state and the investor is contrasted in determining the dispute), FET is absolute and is not dependent on the treatment that other

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[34] ODUMOSU, *Supra* n. 33, at 358.

[35] In 2010 the Australian Government announced that it would not grant any foreign investor more protection than the local investors are given, thereby challenging the roots of investment law, as we know it. *See* SORNARAJAH, *Supra* n. 6, at 203.

[36] Astha Mishra and Anand Mishra, *Fair and Equitable Treatment Standard in International Investment Law: An Analysis vis-à-vis Public International Law,* Korean University Law Review, Volume 11, 107, (2012).

investments are accorded by the host state. Investing states gain an upper hand in this process as host states cannot rely upon a pre-determined standard.[37] FET therefore is also called the "Objective Rule" as it ensures the investor a fixed standard of protection that is independent of the circumstances surrounding the investment and it does not take into consideration the position of the Host state.[38]

This inability to acknowledge the difficulties that may be faced by the Host State in the future has troubled TWAIL scholars as in its purest form the FET standard universalizes international law protection without seeing the third world perspective. This stricter form of investment protection also acts as an incentive for other investors to invest in the Host state and spreads the word in a global community. The first world offers an alternative view suggesting that FET ensures transparency in the market and helps economies of both states develop.[39] A lower standard of protection would not provide an incentive to invest nor would it help in maintain a healthy relationship between two states interacting in a commercial capacity often through individual investors whose claims are embraced by their state.[40]

The threat Third World nations face is in the interpretation of this standard being left to arbitrators who view investment arbitration similarly to commercial arbitration, ignoring the plight of the Host state in times of breach of the protection standard as set in the treaty. Further, due to the inconsistencies and non-binding nature of arbitration Host countries continue to feel vulnerable while exploring dispute resolution which often leaves them at the losing end with the burden of paying hefty amounts to investors of the Investing State as has been seen in the most recent Argentinean award.[41]

To allay this predicament Thomas Walde, a renowned investment

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37 A. NEWCOMBE & L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, Page 47-57 (2009 ed.).

38 A.A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS,135-41; 214-15 (Columbia University Press 1962 edition).

39 Maupin, Julie A., *Transparency in International Investment Law: The Good, the Bad, and the Murky (April 16, 2013)*, Transparency in International Law, Andrea Bianchi and Anne Peters, (Cambridge University Press, 2013)

40 ALSCHNER WOLFGANG, THE RETURN OF THE HOME STATE AND THE RISE OF 'EMBEDDED' INVESTOR-STATE ARBITRATION: THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION (Martinus Nijhoff/BRILL, 2014).

41 ODUMOSU, *Supra* n.33, at 251.

arbitrator suggested the application of Comparative Public law in investment arbitration. Comparative public law attempts to apply principles of international law in the light of the space and time of the state, thereby combining Public International Law and Administrative Law. This limits the discretion of arbitrators in interpreting the FET standard as they apply international law concepts in the lights of other international regimes like the WTO and the ECHR.[42] This further ensures a higher level of consistency in deterring investor disputes and opens the possibility of more bilaterally acceptable solutions in cases of breaches by the Third World.

This can be done with the aid of General Principles of International Law under Article 38(1)(c) of the ICJ Statute that is referred to in the interpretation of investment treaties as specified in the Vienna Convention on the law of Treaties under Article 31 (3)(c).Considering domestic law and international law regimes in this method can alleviate some grievances of the third world as their context and differences can be accommodated in the various systems studied in dispute resolution.[43] Secondly, on a broader horizon ICSID has only concentrated on dispute resolution while ignoring the social context of investment, ignoring humanitarian and environmental impacts. This restrictive commercial approach is reflective only of economic maximization of the West as witnessed in the era of colonialism. It also suggests the universal application of a set outlook towards protecting investment while ignoring its impacts in the Host state, as this does not disturb the growth and status quo of the Investing First world.[44]

In light of this series of unfortunate events, the end of the 19th century saw a rise in the outcry against unjust investment laws by third world people, mostly through the voices of Non Governmental Organizations (NGO's) and their resistance at the domestic level. This has even had the positive impact of forcing Tribunals to consider the voices of the Third world people as was seen in the *Aguas Del Tunari*[45] investment arbitration around the water wars in Bolivia.

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42 ASTHA, *Supra* n.37, at 107.

43 M. PERKAMS, THE CONCEPT OF INDIRECT EXPROPRIATION IN COMPARATIVE PUBLIC LAW - SEARCHING FOR LIGHT IN THE DARK: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, Page 794- 798 (2011 ed.).

44 WOUTERS, *Supra* n.16, at 263.

45 *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3.

On the other hand in *Tecmed v. Mexico*,[46] the ICSID truly balanced public interest of those in the Host sates and the commercial interests of the investors while studying the landfill in the middle of the city that had been an investment made by a Spanish company in Mexico. This note of social conditions by the Tribunal shows that ICSID has a silver lining and can accommodate social interests of the Third World and truly symbolizes that legal norms cannot be created in a vacuum but must be in the light of the social and political context of the States, here the Third World and only when this occurs can international law truly succeed.[47]

However we must recognize that by its very nature arbitration only occurs between interested parties when a dispute arises and NGO's and people protest groups do not have a legitimate voice as they are still considered to be non traditional actors and therefore limit the voice of the Third World in the ICSID, leaving the Third World as vulnerable to the impacts of investment laws.[48]

VII. Conclusion

Investment law has always had the potential of transforming the economies of weaker Host States by importing not only investment capital but also by pumping in talent in resource and labor management, providing vocational training and employment in the investor. However it is unfortunate that these positives of investment law are often balanced or overweighed by the side effects of the same. International law has facilitated both sides of this debate and continues to remain pivotal in global governance. International law is not a sacrosanct medium of governance and is often seen as a vessel of dominance of the more developed and economically, politically and socially more powerful nations.[49]

The internationalization of property and aggressive push for establishing a universal neo liberal economic policy across the globes show the failure of International law in treating every citizen as the same. International institutions like the WTO and World Bank camouflage the

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[46] *Tecmed v. Mexico*, ICSID Case No.ARB (AF)/00/2.

[47] CECILIA LYNCH, POLITICAL ACTIVISM AND THE SOCIAL ORIGINS OF INTERNATIONAL LEGAL NORMS, IN LAW AND MORAL ACTION IN WORLD POLITICS, Page 140-142 (2000 ed).

[48] ODUMOSU, *Supra* n.33, at 252.

[49] BAXI, *Supra* n.3, at 139.

economic interests of the First world in their policies and enforce either directly or through indirect pressure Third world nations to ratify or apply the standard principles. It is in this light that the emergence of TWAIL is necessitated. TWAIL attempts to counter the present hegemony and make space to accommodate third world grievances and interests while adopting global policies, especially in the context of investment law.[50] TWAIL argues has been successful in its primitive attempts as the Third World is acknowledged now unlike in the colonial past.

Hence the Author celebrates the small victories of the TWAIL discourse while reiterating that there is a long and demanding struggle ahead of the Third World that wishes to voice the adverse effects of exclusion that Investment polices and International Law have not only economically but also in their environmental impacts, labor dynamics. International Law must independently attempt to move beyond protecting the First World interests instead focus upon the unity in diversity in the World and recognize differences in terms of stages of development, social and political histories and objective for the future of countries of the First and Third world and harmonize such interests by reaching a middle ground through mutual negotiations.[51]

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50 CHIMNI, *Supra* n. 13, at 11.

51 Oloka-Onyango and D. Udigama, *The Realization of Economic, Social and Cultural Rights:Globalization and its Impact on the Full Enjoyment of Human Rights Rights*, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Second session, ¶34, (June 15, 2000).

MULTIMODAL TRANSPORTATION LAW IN INDIA

Chiranjeev Gogoi[*]

Abstract

Multimodal transportation of goods is a phenomenon that is quintessential to the advent of the container system to facilitate trade across seas and national boundaries. It primarily deals with the transportation of goods which use more than one form of transportation. Though attempts had already been made in Europe to form concrete rules to govern this form of trade but there was a paucity of approving countries and the number of countries subscribing to the rules were few and far in between. But on the international forum, under the auspices of the United Nations, the UNCTAD was formed mostly due to the efforts of the under-developed countries. During the process of deliberation, the fact that the participating member countries were divided into four-groups highlighted the nature and the degree of conflict of interests of the countries. We can imply from the diverse and conflicting interests of the countries that settling on an amicable proposition proved difficult. The Government of India was also advised of the growing impact of multimodal transportation of goods in international trade and it realised the importance to codify certain rules to facilitate smoother functioning of the system and to keep up with the global market. Subsequently, the Multimodal Transportation of Goods Act, 1993 came into effect but this does not serve the issue of multiple legal regimes governing multimodal trade but only adds to it.

The parties to a multimodal transport contract are namely; the consignor, the multimodal transport operator and the

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consignee. A multimodal transport contract is drafted between these parties based on a multimodal transport document. An important aspect of multimodal transportation is the multimodal transport document which serves as a title document and also holds evidentiary value under the multimodal transport contract. In order to provide a platform for the seamless flow of business, it was pertinent that the interests of the above-mentioned parties be satisfied. With the recent surge in global trade, the countries must come to an amicable understanding to solve the problem of multiple legal regimes covering the aspect of multimodal transportation of goods which forms the most essential part of international trade and commerce. In these times of multifaceted economy, trade plays the most crucial role in defining the economic power of a country. Therefore, in order to establish a stable and reliable system to ease trade flow across seas, universally accepted multimodal transportation of goods rules must be drafted and the countries must adopt the same in the international forum.

1.0 Introduction

International Multimodal Transportation of Goods means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.[1] Herein, the goods to be transported are taken in charge by the multimodal transport operator in one country and then delivered to another country on the basis of a multi-modal transport of goods contract which consists of at least two different modes of transportation. Since, international transportation of goods fall under the jurisdiction of different legal systems there is an urgent need for a uniform system of laws that shall apply to multimodal transport contracts notwithstanding the domestic laws of the country to which the parties may belong. But due to the disparity in the economic conditions and the differences in domestic laws and economic policies of different countries, such private international law is difficult to apply in a

[1] Draft United Nations Convention on International Multimodal Transport of Goods, art 1(1), (1980) U.N. Doc. TD/MT/CONF/16.

uniform manner. In addition to this, there has been gradual upsurge in international trade since the 1950s with the advent of containers and containerization of goods. Due to this factor, it is most pertinent that uniform rules governing the regulation of multimodal transportation of goods be brought under a uniform system of rules. Thus, in this research paper the researcher seeks to elucidate upon the historical development of Multimodal Transportation of Goods under the United Nations Convention on Trade and Development and the present legal provisions of India under the Multi-Modal Transport of Goods Act, 1993. The study also includes the present legal scenario supplemented with the instruments of an International multi-modal transportation contract along with the aspects of liabilities, claims and defences of multimodal transport operator under international transport of goods contract.

The parties in a multi-modal transport are *firstly*, the consignor who is any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the Multimodal transport contract and *secondly,* the consignee means the person entitled to take delivery of the goods. But, in cases comprising of operations of pick-up and delivery of goods carried out during the performance of a Uni-modal transport contract, as defined in such contract, shall not be considered as international Multimodal transport.[2]

1.1. Historical Development of Multi-Modal Transportation of Goods

Multi-Modal Transportation is a system of transportation which consists of more than one mode of transportation. The seventh session of the Commission on Enterprise, Business Facilitation and Development, held in Geneva from 24 to 27 February 2003, agreed on development of multimodal transport and logistics services as a topic to be studied at an Expert Meeting. Multimodal transport and logistics services are essential for the development of international trade. These services are not, however, widely available in developing countries, because local service

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[2] United Nations Conference on a Convention on International Multimodal Transport, & United Nations Conference on Trade and Development. (1980). Report of the United Nations Conference on a Convention on International Multimodal Transport.

providers tend to lack the capacity to reach overseas markets, and because existing infrastructure, technologies, and the institutional and legal frameworks are often inadequate to allow efficient linkages with global operators. This document provides background information for the Expert Meeting, which will review and explore the impact of the latest developments in multimodal transport and logistics and the challenges and opportunities that these developments provide for developing countries, including small islands, landlocked and least developed countries.[3] In the General Agreement on Trade and Services negotiations, multimodal transportation of goods was described essentially as door-to-door services that include international shipping.[4] It consists of a multimodal transport operator which refers to any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract. The transportation of goods[5] is based on a multimodal transport contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.[6] The United Nations in its conference on the convention on multi-modal transportation of goods recognized the need for an orderly expansion of world trade but keeping in mind the special interest and problems of developing countries. In this era of rapid economic growth there is a need to stimulate the development of economic and efficient multi-modal transport services which serve the requirements of the trade concerned. In order to ensure smooth flow of trade and services, it was necessary to determine certain rules and liabilities relating to the carriage of goods under international multi-modal transport contracts. The institutional arrangements presently governing the trade of international carriage of goods lacks uniformity and are less than perfectly efficient as the tools governing the trade are more or less the same that it has used since the 1950s.

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3 Draft United Nations Convention on International Multimodal Transport of Goods, 15 July 2003, U.N. Doc. TD/B/COM.3/EM.20/2.

4 UN Glossary, available at https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm accessed on 21/09/15.

5 *Supra* n.2.

6 Draft United Nations Convention on International Multimodal Transport of Goods, art 1(3), U.N. Doc. TD/MT/CONF/16 (1980).

The aim of the UN was to establish a fair balance of interests between developed and developing countries and to establish an equitable distribution of trade related activities between these groups of countries in the arena of international multi-modal transportation of goods. The parties at the conference agreed that the liability of the multi-modal transport operator under this convention should be based on the principle of presumed fault or neglect and that the shippers shall have the freedom to choose between multi-modal transport and segmented transport services. The UN convention was developed as an integral part of a long-term strategy on the part of the developing countries to realize maximum economic benefits from the international transport sector.[7] Until the late 1950s, rules governing international carriage of goods were not a necessity. By the late 1950's, there was an explosive increase in the use of intermodal containers which was beginning to revolutionize ocean shipping.[8] Increased containerization had resulted in multimodal transport of goods under a single transport document covering all modes of transport from the exporter's premises to the consignee's premises. Such multimodal transportation under a single document had a number of advantages like reduction in overall transport cost, reduction in delays, smoother and quicker movement of goods and improvement in quality of services.[9]

2.0 Introduction to the UNCTAD

The United Nations adopted the Convention on International Multi-modal Transport of Goods in May, 1980[10] after much debate and deliberation. The UN General Assembly Resolution 1915 (XIX) established United Nations Convention on Trade and Development (UNCTAD) and its permanent organ, the Trade and Development Board (TDB). The resolution prescribed that a certain number of States from described groups of countries should be represented on the TDB. These groups, in a modified form, have become the negotiating blocks in UNCTAD. They are Group B (Developed countries), Group D (Socialist

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7 New International Economic Order (NIEO), 6 GAOR (Special Session) Supp. (No.1) (1974) U.N. Doc. A/9559 at 5.

8 *Id*, at 195.

9 Multi-Modal Transportation Of Goods Act, 1993 & Multimodal Transport Document (Mtd) And His Implementation In India, Director-General Of Shipping, Ministry Of Shipping, Government Of India, Chapter 23.

10 Draft United Nations Convention on International Multimodal Transport of Goods, (1980), U.N. Doc. TD/MT/CONF/16.

Bloc), and the Group of 77 (Developing Countries). In regards to control and regulation of Multi-modal transportation under United Nations Convention on Trade and Development, the Convention shall not affect the application of any international convention or national law relating to the regulation and control of transport operations. It will not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators. Further, the multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.

2.1. UNCTAD and Need for Multimodal Transport

The Group of 77: The Developing Countries: UNCTAD was created within the United Nations as a result of the developing countries demands for an organ that would be responsive to their desires to increase their share of industrial and commercial advances taking place throughout the world.[11] With respect to the principle features of the Convention, the developing countries' opposition to the network system and their early support of a uniform system of liability reflected a belief that the traditional principles of division of responsibility for cargo loss and damage were disadvantageous to their essentially shipper nature.[12]

Group B: The Developed Countries: Although the countries of Group B were all "developed market economy" countries in UNCTAD, an inescapable fact bearing significantly on UNCTAD negotiations was the great diversity within the group. The spectrum of countries within the group extended from countries which were essentially shippers (Canada, Australia, New Zealand) to those that were traditionally heavy suppliers of shipping services (UK, Japan, and the Netherlands). The U.S was probably unique within the group because it was concurrently the world's largest international trader and a large supplier of shipping services. The principal effects of the economic and trading differences within Group B were of two kinds; with respect to the treaty negotiating process, long and difficult negotiations often were required within Group B to maintain as much unity as possible. From a substantive point of

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[11] UNCTAD, Establishment of Multimodal transport operators in Developing Countries, (1979), U.N. Doc. TD/B/C.4/183 at 16-27.

[12] Preparation and Adoption, for the Governments' comments on articles 9 and 13, (1979), U.N. Doc. TDIMT/CONF/4 and Add.1.

view, a clear-cut and permanent division existed as to the preferred liability regime for concealed damages and, to a lesser extent, with respect to such things as the scope of application and the mandatory/optional nature of the instrument.

Group D: The Socialist Bloc and the People's Republic of China: The attitude of the Socialist bloc countries of Group D must be reviewed from two perspectives. In terms of economic and organization of multimodal transport service, the Soviet Union and its allies often tended to hold positions similar to those of the developed countries of Group B. Existing legal scenarios led them to differing views on certain aspects of claims and actions. On the other hand, on those issues on which they had not fixed positions, they acted predictably in aligning themselves with the Group of 77 to obtain whatever political advantages might flow therefrom.

The United Nations Conference on a Convention on International Multimodal Transport was held at Geneva from 12th to 30th November 1979 (first part of the session) and again from 8th to 24th May 1980 (resumed session). The United Nations adopted the Convention on International Multi-modal Transport of Goods in May, 1980.[13] The United Nations Multi-Modal Transport of Goods convention is the first convention to be brought under the auspices of UNCTAD. While the convention primarily deals with a kind of transportation supplied principally by developed market economy countries, many of the most significant provisions were crafted by shipper countries, pre-dominantly the third-world developing countries. Therefore, the convention helps to resolve several fundamental legal uncertainties in the area of liability, even though these uncertainties have not arrested the growth and development of multi-modal transportation. Interestingly, the convention represents a distinct departure from the earlier transportation liability conventions,[14] which were basically general and technical documents.

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[13] Draft United Nations Convention on International Multimodal Transport of Goods, (1980) U.N. Doc. TD/MT/CONF/16.

[14] Other conventions are:

a. International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155 [hereinafter cited as Hague Rules].

b. United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), Mar. 30, 1978, /CONF.89/13, - U.N.T.S. -, U.N. Doc. 1978

The initial steps towards the development of this private international law treaty addressing the liabilities and documentation aspects of multi-modal transport were taken by the International Institute for the Unification of Private Law (hereinafter, UNDROIT).[15] Subsequently, the Comite Maritime International (hereinafter, CMI) began examining the maritime aspects of combined transport, emphasizing the problem of damage that could not be traced to a particular mode of transport. At present there existed two-sets of rules: UNIDROIT draft, CMI's "Tokyo Rules", focusing on the model of the 1924 Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules). After further negotiations in the United Nations, a diplomatic conference was convened and the Convention on International Multi-Modal Transport of Goods was adapted on 1980 which came into force after the ratification by the governments of thirty states.[16]

The need for multi-modal transport of goods extends back to the point when containerized transportation of goods became a reality. In the 1950s, there was an explosive increase in the use of inter-modal containers and at an early age users and suppliers of those services recognized that the application of a variety of documentation and liability rules to the uninterrupted movement of goods across international borders was likely to hamper the natural growth of this new kind of service.[17] In this era of globalisation and trans-border business there is an

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[hereinafter cited as Hamburg Rules].

c. Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

d. Montreal Protocol No. 4, Oct. 16, 1974, - U.N.T.S. -, ICAO Doc. 9148 (1975) [hereinafter cited as Montreal Protocol].

e. Convention Concerning International Carriage by Rail, May 9, 1980, Appendix B: Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), - U.N.T.S. -, Her Majesty's Stationery Office (Cmd. 8535), London, 1982 [hereinafter cited as CIM Convention].

f. Convention on the Contract for International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189 [hereinafter cited as CMR Convention].

15 International institute for the Unification of Private Law, Doc. U.D>P. 1970. ETUDES: XLII, Transport-Combine. Doc.39, January 1970.

16 http://unctad.org/en/Docs/tdbc4315rev1_en.pdf.

17 Maritime Admin., Dep't of Transp., Inventory of American Intermodal Equip. (1982) 42-49

increased level of competition at the domestic as well as international level which means that the quality and profitability of trade must be preserved. We live in a constantly evolving world where harmonization is extremely important and the trade desperately requires an efficient and simple door to door liability system. This was one of the reasons why ICC and UNCTAD developed the new UNCTAD/ICC Rules for Multimodal Transport Documents.[18] A working ground was accordingly set up to examine the prevalent situation and to recommend a law which should clearly determine the responsibilities and liabilities of multimodal transport operators for loss or damage. In India, the new law on multimodal transport was enacted by issue of an ordinance in October 1992 and was later on replaced by the Multimodal Transportation of Goods Act 1993.[19] Yet, the Multimodal transport continues to operate in a climate which is characterized by multiple liability regimes with liability depending upon the leg of the journey in which the loss or damage occurs. In cases of dispute or uncertainty, the resolution of financial responsibility for loss generally will become a matter for negotiation and settlement between the underwriters involved in a particular occurrence. These rules were based on the principles contained in the TCM convention, 1970 and subsequently were adopted by certain steamship conferences and trade associations. However, the adoption of a standard bill was far from uniform. To date, a thorough document for the multi-modal carriage of goods has not been accorded formal inter-governmental recognition.[20] In November 1980, the UN Diplomatic conference began its work under a certain amount of pressure, not because of any commercial urgency for the solution, but because UNCTAD believed it was important for institutional reasons to conclude the Convention.[21]

2.3. Bill of Lading

The bill of lading is a document of title of goods which is transferable by endorsement and is a receipt of shipping on the number of packages of a weight and particular brands and a contract to transport

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18 *Supra* n.2.

19 *Id.*

20 Srinivasan V. And Thompson G. L., Determining Cost vs. Time Pareto-Optimal Frontiers in Multi-Modal Transportation Problems, Transportation Science, Vol. 11, No. 1 (February 1977) at 1-19.

21 *Id.*

them to a port of destination mentioned in the same. Firstly, a bill of lading is a document generated by a shipping company or its agent, giving details of a shipment of merchandise. Alongside this main goal, the bill of lading also certify that the goods have been loaded on board a ship, assigns ownership of the goods, and requires the carrier to deliver the goods to the holder of the title or a named party in the destination port. In the case of, *Coventry v Gladstone,* Lord Justice Blackburn defined a bill of lading as "a writing signed on behalf of the owner of the ship on which the goods were shipped, acknowledging receipt of the goods, and pledging to deliver it end of the voyage, subject to the conditions mentioned in the bill of lading. The bill of lading is a key document used in the transport of goods; it a document of title and, it is also an important financial instrument.

An inland bill of lading is a document establishing an agreement between a shipper and a carrier for the transport of goods by land. Ocean bills of lading specify the terms between exporters and international carriers the freight for shipping to overseas locations. An air transport document is a bill of lading which establishes the terms of flights carrying freight. Goods may be transported, whether national or international. This document also serves as a receipt for the charger, demonstrating acceptance of haulage charger and agreement to bring these products to a specific airport. Inland and ocean bills of lading may be negotiable or non-negotiable. If the bill of lading is not negotiable, it is required that the transport vehicle to provide only the consignee named delivery in the document. If the bill of lading is negotiable, the person who owns the bill of lading has the right to ownership of property and the right to re-route shipping. This is sometimes called a bearer bill of lading.

Purposes of a bill of lading are:

- It serves as evidence of a valid contract of carriage, and may incorporate the full terms of the contract between the shipper and the carrier which may include payment terms, rates, description of the concerned products as well as other rights and obligations.
- This is a receipt signed by the carrier confirming whether goods matching the described in the contract have been received in good condition (see SLC below). The information could include pallet and / or number of pieces, weight, product description and classification.

- Once signed by the recipient, is a receipt of the goods received to provide final confirmation of the quantity and condition of the product received. A signature by the recipient is required on the examination of the goods after it is received as described in the Bill of Lading unless otherwise noted discrepancies at the time of Bill of Lading is signed.

A through bill of lading is a contract that covers the specific terms agreed between a shipper and the carrier when using more than one type of transport. This document may cover national and international transportation of export goods. It provides details of the agreed modes of transport between specific locations for a set monetary amount. Similar to this is the combined bill of lading. When a draft law combined shipping is issued as a Bill of Lading Combined Transport, it is multiple modes of transport from the place of receipt of delivery place and all these movements are carried out as a single contract various service providers on the use of the carrier. Carrier assumes no responsibility for any loss or damage to all transportation including the sea and the other mode of transport. This is the same as Bill Multimodal laws and regulations relating to Bills of Lading. In India is governed by Indian Law Bills of Lading 1856.

2.4. Liabilities Under the UN Multimodal Convention

2.4.1. Basis of Operator's Liability

The three groups (Group B, Group D and The Group of 77) agreed that liability should be based on the MTO's fault, and that the burden of proof would rest on him to prove that he had not been at fault in causing loss, damage or delay (reverse burden of proof). This regime followed the Hamburg Rule[22] and the 1929 Warsaw Convention, which provided the familiar phasing that the MTO shall be liable for loss, damage or delay while he is in charge of the goods unless he proves that he took all measures that could reasonably be required to avoid the occurrence and its consequences.[23] The preamble to the Multimodal Convention further clarifies that the MTO's liability "should be based on the principle of

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[22] United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), art 10, Mar. 30, 1978, A/CONF.89/13, - U.N.T.S. -, U.N. Doc. 1978.

[23] Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), art.20(1), Oct. 12, 1929, 49 Stat.3000, T.S. No. 876, 137 L.N.T.S. 11.

presumed fault or neglect". Alternatively, the MTO may defend himself by proving that the consignor or the consignee caused the loss, damage or delay to the goods.[24] A very important safeguard for the application of modal regimes is found in the Convention's pickup and delivery exception to the definition of international multimodal transport. The exception provides in part that "[t]he operations of pickup and delivery of goods carried out in the performance of a uni-modal transport contract, as defined in such contract, shall not be considered as international multimodal transport.[25] The question in regards to the imposition of liability in multimodal contracts was whether to hold the multimodal operator liable for all loss and damage to the goods while it's in his custody. For damage however caused, or to impose liability only for preventable loss or damage resulting from his lack of care and attention. In practise all regimes of strict liability excuse the carrier or the operator for a few uncontrollable causes of loss such as force majeure (Act of God) and inherent vice or defects of the goods themselves. The alternative standard of fault liability allocates to the operator only those risks associated with its own actions, leaving losses that arise from other sources to fall on the cargo owner. In practise, fault liability usually means the operator is only responsible for the consequences of negligent acts and omissions that are committed by itself or its employees and agents. The complementary element in ascertaining liability in cases of loss is the issue of burden of proof. If the operator is called upon to bear this onus, he must disprove his liability for the loss. If the cargo owner is made to do so, it must prove the operator's liability or it will have to absorb the loss itself. When the source of loss or damage is uncertain or the evidence is weak, the party that bears the burden of proof is unlikely to satisfy it and so will also bear the risk of the loss. If there was a negligent in some respect, it must go further in its proof and show that its negligence was not the cause of the loss or damage in order to be exonerated from liability.[26] The fundamental decision to be taken on the measure of compensation payable is whether the operator's liability shall extend to the full loss or in some manner limited. Typically, national law leaves this issue to the contracting parties. The law shall grant full

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[24] Draft United Nations Convention on International Multimodal Transport of Goods, arts. 16-17, (1980), U.N. Doc. TD/MT/CONF/16 .

[25] Draft United Nations Convention on International Multimodal Transport of Goods, art 1(1), (1980), U.N. Doc. TD/MT/CONF/16.

[26] Ld. Atkin's opinion in the Ruapeha (1925), 21 LI. L.R. 310, at 315 (C.A).

compensation unless the parties exercise their freedom to contract otherwise. The parties frequently include clauses in their agreement to disclaim liability or limit liability, or both.

2.4.3. Quantum Corporation Ltd v. Plane Trucking Ltd And Air France, DMC/Sandt/03/02

In September 1998 Air France issued to the claimants, Quantum Corporation, an air waybill in Singapore, providing for the carriage of hard disk drives – to the claimed value of US$1.5 million – from Singapore to Dublin. The intended routeing was by air from Singapore to Paris and then from Paris to Dublin by road and sea over the Irish Sea. This was recorded in the master air waybill. A large number of similar consignments involving the same parties had been carried in this way previously.

For the trucking leg, the carriage was performed by regular contractors of Air France, Plane Trucking. Whilst the cargo was in the UK, in the custody of Plane Trucking, it was stolen by their employees. Plane Trucking admitted liability for the theft but was in liquidation at the time of the proceedings. Plane Trucking's liability insurers had purported to avoid the policy. Air France also accepted liability.

Air France maintained that its General Conditions were incorporated into the contract of carriage by means of terms in the air waybill. Under Article 11.7 of the Air France conditions, its liability was limited to the amount of SDRs 17 per kilo. Unlike the Warsaw Convention, the conditions did not disentitle Air France from relying on the per kilo limitation in the event that the loss 'resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

Claimants maintained that Air France's liability, in relation to the Paris-Dublin leg, was subject to the Convention on the Contract for the International Carriage of Goods by Road ('CMR'). Article 1 of that Convention provided that the Convention applied to

"Every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a Contracting country."

France is a contracting country to the CMR Convention

For the purposes of Article 6(1)(d)) of the Convention, "The consignment note shall contain the following particulars... the place and date of taking over delivery....", the claimants submitted that the goods were taken over in Paris. Under Article 23 of the Convention, the carrier may limit its liability to SDRs 8.33 per kilo of the goods lost or damaged. Under Article 29 of the Convention, however, the carrier is not entitled to take advantage of the limit set out in Article 23, where the loss or damage was caused by its wilful misconduct or that of 'the agents or servants of the carrier, or [of] any other persons of whose services [the carrier] makes use for the performance of the carriage'. Mance LJ delivered the judgment of the court. He defined the issue to be addressed as "What constitutes a 'contract for the carriage of goods by road' within the meaning of Art.1 of CMR." He accepted that the issue could be approached on the assumption that although carriage by road from Paris to Dublin was Air France's intended mode of performance, Air France was not contractually obliged to carry the goods in that manner and, might, if they had so wished, have carried the goods on that leg by air. The contract recorded in the air waybill was clearly for two legs, the first to be performed by air, the second a trucking leg, unless Air France elected to substitute some other means of transport, as their Conditions permitted.

Differences in opinion between the German, Dutch and English courts of law, and even between the courts of these countries among themselves, underline that the law which is applied to a multimodal contract is uncertain at the outset; it depends on which court is addressed and how the scope of application rules of the potentially applicable regimes are interpreted by said court. Two questions arose for decision:

1. To what extent the application of CMR depends upon a carrier having obliged itself contractually to carry goods by road (and by no other means). This depends upon the force, in context, of the word 'for' in the reference to a 'contract <u>for</u> the carriage of goods by road';

2. To what extent (if at all) a contract can be both for the carriage of goods by road, within Art.1 <u>and</u> for some other means of carriage, to which CMR does not apply?

2.4.4. Period of Responsibility

Liability upon loss or damage to goods during carriage is based on the period for which the operator is responsible. In general practise, the operator is considered to be responsible for the safekeeping of the goods till the time it is in their possession. This principle is spelled out in Article 14 of the Convention.[27] Therefore, the period of responsibility for the operator is considered to be between 'the time of taking in charge' of the goods from the shipper or person acting for the shipper until the 'time of delivery' to the consignee according to the local commercial usage, or as required by local law.[28] Acts of the MTO includes the acts of his servants or agents "or any other person of whose services he makes use for the performance of the multimodal transport contract."[29] Consequently, article 15 provides that the MTO is liable for the acts or missions of his servants, agents and other person whose services the MTO uses for the performance of the contract, whenever they are acting within the scope of their employment or in the performance of their contracts with the MTO. However, this principle is subject to the possible loss of the right to limit liability under Article 21 of the Convention. Article 21(1) provides that the MTO may lose the right to limit the liability if it is proved that loss, damage, or delay was caused by an act or omission by the MTO done intentionally or recklessly and knowing that the loss, damage, or delay would likely result. Moreover, Article 21(2) provides that the MTO's servants, agents, and subcontractors may lose their right to benefit from the Convention's liability limits if it is proved that loss, damage, or delay was done by their acts or omission when done intentionally or recklessly and knowing that the loss, damage, or delay would likely result.[30] The relationship between article 15 and article 21 is not clearly expressed in the language of the two articles. It may be argued that a person of whose services the MTO makes use in performing the multimodal contract could lose the right to limit his liability when he causes loss or damage by his intentional or reckless acts, whereas the MTO's liability limit might prevail. Suppose deliberate or reckless loss or damage was caused by an

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27 Draft United Nations Convention on International Multimodal Transport of Goods, art. 14(1), (1980), U.N. Doc. TD/MT/CONF/16.

28 International Chamber of Commerce Rules, rule 5(e), (1975).

29 Draft United Nations Convention on International Multimodal Transport of Goods, art. 15, (1980), U.N. Doc. TD/MT/CONF/16.

30 Draft United Nations Convention on International Multimodal Transport of Goods, art. 21, (1980), U.N. Doc. TD/MT/CONF/16.

underlying carrier but could not be imputed to the MTO because the MTO himself at all times acted prudently in accordance with article 21(1). In that case, it might be argued that the MTO's subcontractor would not have the benefit of limited liability under article 21(2), whereas the MTO's liability would be limited because it could not be proved that loss, damage, or delay resulted from an act of the MTO "done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result."[31] Consequently, if the subcontractor's wilful or reckless act cannot be imputed to the MTO, the subcontractor might be liable for the difference between the limited recovery allowed by articles 18 and 19 of the Convention and unlimited recovery. The question of liability of other parties carrying business upon receipt but before loading or after reaching the destination but prior to actual delivery is often widely debated. Therefore, the Convention has made an ardent effort to address the legal effect of the phrases such as 'taking in charge' by the operator and when they are to be treated as 'delivered' to the consignee.[32] Due to the absence of concrete definitions to establish the exact legal effect of the actions of the parties, the application of the provisions and allocation of liability becomes difficult.

3.0 Multimodal Transport of Goods

3.1. Multimodal Transport of Goods in India

The Multimodal Transportation of Goods Act came into effect on the 2nd day of April, 1993. It provides for the rules and regulations governing transportation of goods of one place in India to any place outside India, such transportation of goods must involve at least two or more modes of transportation on the basis of a single multimodal transport document. The provisions of the Act further provide that Multimodal Transportation of goods can be carried out only by person(s) registered under as a Multimodal transport operator (hereinafter, MTO) under the Multimodal Transport of Goods Act, 1993 and such registration as a MTO is valid for a period of 1 year and

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31 Larsen and Dielmann Die, Multimodal Konvention, Versicherungsrecht, at 33 417, 422 (1982).

32 Multimodal Transport Convention,1980, art. 14(2); rules 2.7, 2.8, UNCTAD/ICC 1992.

maybe renewed for further period of 1 year on time to time basis. The Association of Multimodal Transport Operators of India (AMTOI) represents the interests of the MTOs in India and ensures that there is a constructive dialogue between the authorities and the MTOs to further evolve Multimodal Transportation in India. It has been estimated that Indian Logistics sector will generate revenues amounting USD 200 billion by the year 2020. In order to realize this potential, the country will need to make effective use of its strengths in IT and look out for collaborations with experts in this field. In addition, the Director General of Shipping has the authority to prescribe a Multimodal Transport Document under Rule 3 of the Multimodal Transport Document Rules, 1994 after receiving prior approval from the Ministry of Surface Transport. It states that in a contract for Multimodal Transportation wherein, the Consignor and the Multimodal transport operator have entered into a contract for the Multimodal Transportation and the Multimodal transport operator has taken charge of the goods, he shall issue a document, a model of which may be prescribed by the competent authority by a Special or General Order, with the approval of the Central Government.[33]

3.2. Multimodal Transport Document as an Instrument of Exchange

A person who has a document of title can lawfully transfer the goods covered by the offer or agreed to another person without any actual movement of goods. Once the multimodal transport operator assumes the role of the owner of the goods, the Principle in the process authorizes the MTO to exercise the rights as that of the owner for claiming damages etc. and for other purposes, whichever necessary. The issuance of a multimodal transport document confers and imposes on all interested parties the rights, obligations and defences set out in the Act. In this case, a document of title bill is a negotiable instrument because it only their delivery or endorsement can transfer the ownership of the goods from one person to another legitimately. The document is negotiable if the terms of the document state that the title of goods are to be transferred to the bearer, the holder of the document, to the order of the named party, or, where recognized in overseas trade, to named person or his or her assigns. The negotiability of MT Document was a major bone of

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[33] Multimodal Transport Document Rules, Multimodal Transport Document (Mtd) And His Implementation In India, , (1994), Rule 3.

contention during the discussions as the carriers did not want the burden of having to hold onto the goods while the MT Document is processed through banks.[34]

3.3 Liabilities and Dispute Settlement Under the Act

In cases of disputes arising out of breach of multimodal transport contract, any party to a multimodal transport contract may institute an action in a court which has jurisdiction and the competency to hear the matter. In the given instance, a suit maybe filed in the a court having jurisdiction in the following places, namely:

a. the principal place of business, or, in the absence thereof, the habitual residence, of the defendant; or

b. the place where the multimodal transport contract was made, provided that the defendant has a place of business, branch or agency at such place; or

c. the place of taking charge of the goods for Multimodal Transportation or the place of delivery thereof.

d. Or, the case maybe filed in any other place specified in the multimodal transport contract and evidenced in the multimodal transport document.[35]

The parties also have the option to choose to use an alternate dispute settlement system. If the parties to a multimodal transport contract choose to provide that any dispute which arises out of such contract under the provisions of the Act maybe referred to arbitration.[36] The arbitration proceedings may be filed in any place as specified in the multimodal transport document and according to the procedure established therein.

3.3.1. Liabilities of the Multimodal transport operator under ordinary circumstances:

Under the provision of this Act, the multimodal transport operator

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[34] Preparation and Adoption, (1980), U.N. Doc. TD/MT/CONF/NGO/4 (1979) and U.N. Doc. TD/MT/CONFNGOI7.

[35] Multimodal Transportation of Goods Act, 1993, S.25.

[36] Multimodal Transportation of Goods Act, 1993, S.26.

shall be liable for loss resulting from any loss of or damage to the consignment. Section 13 states that any delay in the delivery of the consignment and any consequential loss or damage arising out of such delay while the multimodal transport operator was in charge of the consignment. But under the given circumstances, the multimodal transport operator can take up the defence that he exercised reasonable care and caution if he can prove that the loss, damage or delay in delivery did not occur due to any fault on his part or on the part of his servants or agents. Further, in the course of ordinary business, any delay in delivery has to be subject to the time expressly agreed upon or else within a reasonable period of time and any liability for damage or loss arising out of a delay in delivery cannot be attributed to the operator unless the consignor can a declaration of interest in timely delivery which has to be accepted by the operator. A period of ninety days has been stipulated as the maximum limit of deference from the time agreed upon or reasonable time period of delivery.[37] Moreover, under extraordinary circumstances the liability of a multimodal transport operator shall be limited to the freight payable for the consignment so delayed. Lastly, any contract for Multimodal Transportation of goods entered upon by a multimodal transport operator has to be in accordance with the provisions of the Multimodal Transportation of Goods Act, 1993 and Section 28 of the Act states that any inconsistency with the said provisions of the Act will render such a contract to be void and unenforceable.[38] The period of responsibility of the multimodal transport operator for the goods under this Act shall cover the period from the time he has taken the goods in his charge to the time of their delivery.[39] In case of the consignor, Section 12 of the Act provides that multimodal transport operator shall be guaranteed against the adequacy and accuracy of the consignment at the time when the multimodal operator takes charge of the goods. Further, the consignor shall indemnify the multimodal transport operator from any inadequacy or inaccuracy but the proviso does not limit the liability of the multimodal transport Operator under any multimodal transport contract to any person other than the consignor.[40]

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37 Multimodal Transportation of Goods Act, 1993, S.13(2).
38 Multimodal Transportation of Goods Act, 1993, S.14.
39 Multimodal Transportation of Goods Act, 1993, S.20(4).
40 Multimodal Transportation of Goods Act, 1993, S.13.

3.4 Defences to Liability

3.4.1 Limitation to Liability of Multimodal transport operator

Firstly, the liability of multimodal transport operator under the MMTG Act is not extensive in nature but rather it has been made subject to certain conditions and limitations. The operator's liability to pay compensation in cases where in the nature and value of the consignment has not been declared along and in situations, in which the stage of transport where the loss or damage occurred is unknown, shall not exceed two Special Drawing Rights per kilogram of the gross weight of the consignment lost or damaged or 666.67 Special Drawing Rights per package or unit lost or damaged, whichever is higher. *Secondly,* if the multimodal transport contract does not include any carriage of goods by sea or by inland waterways, the liability of the operator shall be subject to 8.33 Special drawing rights per Kilogram of the gross weight of the goods lost or damaged. Thirdly, if the nature and value of the goods has not been declared beforehand by the consignor but the stage at which the loss or damaged occurred is known then the limit of the liability of the multimodal transport operator for such loss or damage shall be determined in accordance with the provisions of the relevant law applicable in relation to the mode of transport during the course of which the loss or damage occurred and any stipulation in the multimodal transport contract to the contrary shall be void and unenforceable.[41] Further, the liability of the operator in cases of total loss of goods shall not be greater than the amount greater than the amount for which a person can make a claim under the said Act.[42]

But, if there is an omission or an act on the part of the multimodal transport operator with the intent to cause such loss, damage or delay recklessly and with the knowledge that a loss, damage or delay would result in the process.[43] Under the laws on limitation, the multimodal transport operator shall not be liable under any of the provisions of this Act unless action is brought against him within nine months of the date of delivery of the goods, or the date on which the goods should have been delivered, or from the date on which the period of ninety days has passed on which the party entitled to receive delivery of the goods has

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41 Multimodal Transportation of Goods Act, 1993, S.15.
42 Multimodal Transportation of Goods Act, 1993, S.19.
43 Multimodal Transportation of Goods Act, 1993, S.18.

the right to treat the goods as lost.[44]

Conclusion

Multimodal transportation of goods is a phenomenon that is quintessential to teh advent of the container system to facilitate trade across seas and national boundaries. It primarily deals with the transportation of goods which use more than one form of transportation. Though attempts had already been made in Europe to form concrete rules to govern this form of trade but there was a paucity of approving countries and the number of countries subscribing to the rules were few and far in between. But on the international forum, under the auspices of the United Nations, the UNCTAD was formed mostly due to the efforts of the under-developed countries. During the process of deliberation, the fact that the participating member countries were divided into four-groups highlighted the nature and the degree of conflict of interests of the countries. We can imply from the diverse and conflicting interests of the countries that settling on an amicable proposition proved difficult. The Government of India was also advised of the growing impact of multimodal transportation of goods in international trade and it realised the importance to codify certain rules to facilitate smoother functioning of the system and to keep up with the global market. Subsequently, the Multimodal Transportation of Goods Act, 1993 came into effect but this does not serve the issue of multiple legal regimes governing multimodal trade only adds to it.

The parties to a multimodal transport contract are namely; the consignor, the multimodal transport operator and the consignee. A multimodal transport contract is drafted between these parties based on a multimodal transport document. An important aspect of multimodal transportation is the multimodal transport document which serves as a title document and also holds evidentiary value under the multimodal transport contract. In order to provide a platform for the seamless flow of business, it was pertinent that the interests of the above-mentioned parties be satisfied. With the recent surge in global trade, the countries must come to an amicable understanding to solve the problem of multiple legal regimes covering the aspect of multimodal transportation of goods which forms the most essential part of international trade and commerce.

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[44] Multimodal Transportation of Goods Act, 1993, S.24.

In these times of multifaceted economy, trade plays the most crucial role in defining the economic power of a country. Therefore, in order to establish a stable and reliable system to ease trade flow across seas, universally accepted multimodal transportation of goods rules must be drafted and the countries must adopt the same in the international forum.

JUDICIAL PRONOUNCEMENT AND SOCIAL MOVEMENTS: RECONCILING RIGHTS, GENDER DISCRIMINATION AND RELIGION

*Aishwarya Narayanan**

Abstract

In modern democratic systems that follow the Montesquieuan notion of separation of powers, Courts have traditionally been considered aseutral interpreters of the law and arbiters of disputes. However, with the passage of time, Courts have played an increasingly important role in shaping social movements, particularly when important and complex questions involving rights, gender identity and religion have been involved. The interaction between the society, the judiciary and the legislature has not always been uniform, with each of the three drawing from and influencing the other – the relationship to this extent can be termed reflexive. The ability of Courts to both influence and respond to social movements has been analysed by using three landmark cases: the Shah Bano case, the Aruna Shanbaug case and the Naz Foundation case. These three cases illustrate the various ways in which judicial pronouncements affect social movements. Both action and inaction on the part of the judiciary might give rise to social movements, which in turn might provide an impetus for progressive (or, in certain cases, regressive) law-making. However, this interaction is not always a two-way interaction, and is often influenced and shaped by external factors, most prominently the media which plays the role of the intermediary in this triadic relationship.

I. Introduction

Most contemporary democracies follow a model of government

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based on the Montesquieuan notion of separation of powers.[1] This model envisages a three-fold horizontal separation of powers between co-extensive organs of the State. The functional division of powers as envisaged by Montesquieu did not comprise of a hierarchy of powers but instead aimed at creating a system of restrains, *i.e.*, a system of checks and balances, wherein each organ would keep a check on the exercise of powers by the other two.[2] In this tripartite division of powers, the Legislature was granted the power of enactment of laws, the Executive that of implementation while the Judiciary was conferred the power of interpretation.[3] Since its adoption by the Cromwellian Constitution[4] of 1653, the doctrine of separation of powers has become an integral attribute of modern democracies. It was under this articulation of the doctrine of separation of powers that the Courts derived their role as interpreters of law, as neutral and impartial arbiters of disputes and as the final settlers of disputes between contesting parties.

This idea of Courts as apolitical organs and neutral interpreters of law began to undergo a change with the realization that Courts, while justifiably required to be apolitical, cannot and should not stay out of tune with political reality.[5] Present-day Courts are required to grapple with a multitude of issues that might have a direct or indirect bearing on social policy. If the past few decades have been any indication, Courts have shown themselves willing to take up the mantle to decide issues that could, and at

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1 Robert G. Hazo, *Montesquieu and the Separation of Powers*, 54 AMERICAN BAR ASSOCIATION JOURNAL 665 (1968).

2 *Ibid.*

3 *Ibid.*

4 In the *Instrument of Government* (1653) – which constituted England's first written constitution – we can locate the first instance of the embodiment of the classical doctrine of separation of powers. The legislative authority of the State was vested in the Lord Proctor along with the Parliament, the executive authority was vested in the Lord Proctor and the judicial authority was vested in the Lord Proctor along with his council. Thus, at least in theory, there can be seen a manifestation of the doctrine of separation of powers in its most elementary form. For details, see M.J.C. VILE, *Foundations of the Doctrine*, in CONSTITUTIONALISM AND THE SEPARATION OF POWERS 17 (1967).

5 *See* SOTIRIOS A. BARBER, *Constitutional Failure: Ultimately Attitudinal*, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 1 (2010). Professor Barber acknowledges the unavoidable link between law and politics and elucidates the role of each in shaping the other. Courts, as interpreters of law in a necessarily political environment, must not be ignorant of present-day political demands and policy. However, this does not take away from the fact that they continue to remain neutral arbiters of disputes and impartial interpreters of law.

many times did, have tremendous social impact. This is particularly true when matters relating to sensitive issues intertwining rights, gender and religion have presented themselves for resolution. Judicial engagement at such times has presented opportunity for wide-ranging public debate. Further, the power of the Constitutional Courts to regulate the functions of the other branches of the government by way of the exercise of its power of judicial review is often manifested in the form of either providing an impetus for legislative consideration of important issues that would otherwise fall by the wayside, or as a way to resolve difficult conflicts that legislators loathe to decide.[6] When considering this larger picture, Courts often tend to become engineers of social change, by inadvertently providing direction to both legislative policy and social movements.

This paper attempts to analyze the social impact of judicial movements. Judges, via the form and content of their judgements are capable of initiating social movements that have far-reaching consequences for society. It could be the choice of words or the approach adopted by the Court that causes uproar or the nature of the decision itself that accords it a monumental status. The impact of judgements on society is not restricted to merely the affected groups or 'people at large', but also to the Parliament which has at times been arm-twisted into taking action because of judicial pressure. Landmark judgements from Courts have often sparked public debate with vehement support and opposition flowing in from interested parties. These judgements have often been the stepping stone for social movements, providing direction to public opinion[7] and initiating social change.

To support this argument, this paper analyzes three important cases to illustrate the social impact of judicial pronouncements. First, the paper discusses the *Shah Bano*[8] judgement in light of the reactions it elicited from both the affected groups as well as Parliament. *Shah Bano* is one glaring instance of a situation where a progressive judicial decision acted as a catalyst for regressive legislative action. The case possibly marks a low-point in judicial authority where a pro-rights approach adopted by

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6 DANIEL A. FARBER & SUZANNA SHERRY, *The Democracy Worry*, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 4 (2009).

7 The question of public opinion is one that has been subject to much study and discussion. The impact of judgements on public opinions presents an independent area of research and is beyond the scope of this paper.

8 *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

the Court was overturned by political decision-making. Next, the paper discusses the *Aruna Shanbaug*[9] judgement where the Court permitted passive euthanasia for persons who are in a persistent vegetative state. Analysis focuses on the response it evoked from religious groups and the medical fraternity. Lastly, the decision of the Supreme Court in *Naz Foundation*[10] has been discussed. For a comprehensive analysis of the same, the decision of the Delhi High Court and the reactions it evoked are dealt with before considering the final settlement of the matter by the Supreme Court. The ruling of the Court against gay rights by shifting the burden to the Parliament to take necessary steps shows an attitudinal shift from *Shah Bano*.

These cases have been chosen for three reasons: first, all three of them have an underlying theme of placing individual rights against public interests; second, they are all landmark Supreme Court judgements that have elicited varied and emotional reactions from across the sections of Indian society; and third, , the manner in which they have been decided has led to vastly different types of social and legislative responses. The selected cases provide the scope to study the diverse types of responses that judicial decisions can elicit.

II. The *Shah Bano* Case

The paper begins with an analysis of the *Shah Bano* judgement, which is believed to have created a furore unequalled since the 'great upheaval of 1857'.[11] What started as an innocuous incident of an old, destitute Muslim woman appealing for maintenance from her divorced husband, snowballed into a controversy that had more ramifications than could have been anticipated.[12] The story of Shah Bano has been re-written time and time again, with each new author adding another dimension to the story. The social impact of the judgement has often been commented upon, and can hardly be denied. The following discussion draws upon this vast body of literature to describe the sort of reactions the judgement elicited, the reason for such reactions and the unfortunate series of events that followed the decision.

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9 *Aruna Ramchandra Shanbaug v. Union of India*, AIR 2011 SC 1290.

10 *Suresh Kumar Koushal v. Naz Foundation*, AIR 2014 SC 563.

11 Shekhar Gupta et al., *The Muslims, a Community in Turmoil*, India Today, Jan. 31, 1986 at 90.

12 Rajashri Dasgupta, *Historic Judgment and After* 22, E.P.W. 748 (1987).

In 1985, the Supreme Court heard an appeal against a decision of the Madhya Pradesh High Court granting maintenance to Shah Bano from Mohd. Ahmed Khan, her husband of 40 years, under Section125 of the Code of Criminal Procedure. In a landmark judgement, the Supreme Court upheld the decision of the High Court, sparking a raging controversy that would engulf the whole nation in the years to follow.[13] Reactions to the judgement were varied and wide-ranging. From feminists to conservatives, people from all sections of society responded to the judgement in a passionate and emotive way.

At the forefront of the supporters of the judgment were the feminist groups. They saw the judgement as indicting the high-watermark of women's rights in India. The Court had chosen to respect the individual rights of the woman over the group rights of Muslims. What was hitherto considered as unknown territory became a new avenue for Muslim women to enforce their rights.[14] Women and human rights workers from across the spectrum of society joined hands to applaud the judgement and celebrate the victory that female-kind had secured.

However, this joy was short lived as the judgement faced severe criticism from many parts of the Muslim community. Sections of the Muslim community launched the biggest-ever agitation in the post-independence era, accusing the Supreme Court of interfering in Muslim Personal Laws.[15] Muslim fundamentalists went up in arms against the judgement, raising cries of "Hindu men are saving Muslim women from Muslim men" and "Islam is in danger".[16] The Muslim critique of the judgement focussed on four distinctive but interrelated points: the interpretation of §125 of the CrPC by the Supreme Court; the Court's interpretation of Muslim Personal Law; the Court's allegedly disparaging remarks about the degradation of women in Islam and the Muslim husband's unfettered right of divorce; and, the *obiter dictum* of the judgement recommending the speedy promulgation of a uniform civil code.[17] Thus, what actually is and should have been treated as a

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13 Nawaz B. Mody, *The Press in India: The Shah Bano Judgment and Its Aftermath*, 27 ASIAN SURVEY 935 (1987).

14 Siobhan Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD JOURNAL OF LEGAL STUDIES 671 (2004).

15 Dasgupta, *Supra* n.13.

16 Zakia Pathak & Rajeswari Sunder Rajan, *"Shahbano"*, 14 SIGNS 558 (1989).

17 Mody, *Supra* n. 14

women's cause became submerged in communal and political manoeuvrings at the cost of justice to women.[18] The focus was shifted from women's rights to communalization of politics and marginalization of religious communities.[19]

Such wide ranging criticism must necessarily have been provoked by some cause. Ironically, the Constitutional Bench deciding the case felt that it presented "no issue of constitutional importance". The Court could have hardly fathomed that the judgement would cause the sort of uproar that it did. The Supreme Court had on previous occasions held that a Muslim woman is entitled to maintenance under §125.[20] The problem, then, was not with the content, but with the form of the judgement. Instead of adopting a 'social justice' approach or 'equality before law' approach or proclaiming §125 as part of civil law to be equally applicable to all religions, the Court sought to interpret the Quran and various provisions of Muslim Personal Laws to conclude that granting maintenance under §125 does not violate Muslim law.[21] In interpreting the Quran, not only did the Supreme Court overstretch its boundaries and enter into the field of theologians and religious jurists, but also imposed on Muslim men an obligation unrecognized by Islamic jurisprudence.[22] The interpretation of Muslim law proposed by Justice Chandrachud was seen by the Muslim *ulema* as an attempt by the Court to undermine the Personal Laws of the Muslims.[23] The spectre of an exclusively Hindu Court choosing between competing interpretations of Islam and pronouncing on the appropriate interpretation of the Quran provided sufficient ground for conservative Muslims to raise a furious outcry against the judgement.[24] This was compounded by observations by Justice Chandrachud to the tune of "*it is alleged that the fatal point in Islam is the degradation of women*"[25] and "*the Muslim husband enjoys the privilege of being able to discard*

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18 Dasgupta, *Supra* n. 13.

19 Mullally, *Supra* n. 15.

20 *Bai Tahira v. Ali Hussain Fidaalli Chothia*, (1979) 2 SCC 316; *Fazlunbi v. K Khader Vali*, (1980) 4 SCC 125.

21 Sara Ahmad, *Judicial Complicity with Communal Violence in India*, 17 NW. J. INT'L L. & BUS. 320 (1996).

22 *Ibid.*

23 Zoya Hasan, *Minority Identity, Muslim Women Bill Campaign and the Political Process*, 24 E.P.W. 44 (1989).

24 Mullally, *Supra* n. 15.

25 *Shah Bano* at ¶1.

his wife... for no reason at all".[26] It is this callous treatment of Muslim law and practices that enraged the community. The recommendations for a Uniform Civil Code were also met with scepticism from the Muslim community. Many amongst the community felt that a Uniform Civil Code, if promulgated would either reflect the views of the majority or reflect some form of Westernized values.[27] The fear among the Muslims was that a Uniform Code would necessarily be predominantly Hindu and thereby lead to suppression of their Personal Laws.[28]

What is truly disheartening about this controversy is the adverse effect that it had on Shah Bano. Caught in the furore caused by the judgement, which had been passed in her favour, Shah Bano was trapped in a position which required her to choose between her individual identity and religious identity. She eventually rejected the judgement and dissociated herself from "*every judgement that is contrary to the Islamic Shariat*"[29]. Thus, despite being granted her rights, she was coerced by unscrupulous social forces into abandoning them and publicly proclaiming her allegiance towards the Muslim community.

If the response of conservative Muslims is seen as antithetical to the judgement, the political response it generated is particularly reprehensible. The Congress party, which initially supported the judgement, was caught unaware by the scale of the protests that it generated.[30] Its defeat in some by-elections in December 1985[31] coupled with the rapid growth of the BJP indicated a sharp decline in its popularity among Muslim voters.[32] The Congress responded to the rising communal tensions by passing the Muslim Women's (Protection on Divorce) Act 1986. In doing so, the Congress yielded to the claims of cultural conservatives within the Muslim community[33] while also trying to recover its lost Muslim votebank by reversing the impact of the *Shah Bano* judgement.[34] The decision to introduce the Act was part

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26 *Shah Bano* at ¶3.
27 Pathak & Rajan, *Supra*, n.17.
28 Ahmad, *Supra*, n.22.
29 Pathak & Rajan, *Supra*, n.17.
30 *Ibid.*
31 *Ibid.*
32 Mullally, *Supra* n.15.
33 *Ibid.*
34 Hasan, *Supra* n.24.

of the strategy to reverse the 'rising tide against the Congress party's efforts to woo the Muslims'.[35] Rajiv Gandhi's decision to bulldoze the Bill through Parliament remains one of the starkest reminders of his tenure.[36] In this way, the Indian state performed a balancing act of accommodating and according protection to all religions and religious sentiments under the umbrella of multi-theocratic pluralism and an ideology of secularism that encourages and protects all religions.[37] The Act relegated Muslim women to the category of secondary citizens, left without the right to claim maintenance against the husband under secular law and forced to resort to her paternal family in case of divorce.[38]

The *Shah Bano* case is one extreme example of how judicial decisions can act as acatalysts for regressive legislation. The sequence of events that followed the decision – the controversy and its attempted rectification by the Congress – reflects a conscious choice made by the Government in favour of group identity. This is but another example of a situation where individual rights are compromised in the name of preservation of group identity.[39] The affected party – Shah Bano – was somehow lost in the melee that followed the decision.[40] The campaign initiated by Muslim conservatives and accommodated by the Congress Government turned the issue into a purely political and communal matter while the real stakeholder lay completely ignored. This judgement and the sequence of events that followed it reflect the absolute low point of judicial independence and authority. The ease with which a settled legal matter was overturned by the Government to meet its own political ends serves to show the fallibility of judicial pronouncements. A natural inference is that while the judiciary as an institution is independent, the authority of its judgements are still subject to the satisfaction of the Government which retains the power to overturn any judgement that threatens its political interests. Thus, judgements while provoking public reaction, can also lead to legislative action that destroys the very basis of the judgement.

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35 *Ibid.*
36 Mody, *supra*, 14.
37 Hasan, *Supra*, n.24.
38 *Ibid.*
39 Mullally, *Supra*, n.15.
40 *Ibid.*

III. The Aruna Shanbaug Case

The story of a 24-year old nurse who was sodomized and strangled with a dog-chain by a ward-worker in her hospital made headlines in March 2011 when the Supreme Court pronounced judgement on a plea made before it to discontinue force-feeding her and allow her to die a dignified death. While denying her plea, the Court permitted passive euthanasia in cases of persons rendered to a persistent vegetative state.[41] The irony of the situation is most eloquently highlighted by Justice Katju's opening quote from Ghalib: *Marte hain aarzoo mein marne ki, Maut aati hai par nahi aati.*[42] Aruna Shanbaug, after 37 years of being rendered bed-ridden, and confined to a small dark hospital room, found herself evading death yet again while many in the country applauded the Court's decision.[43]

Most discussion generated by the decision is on the subject of euthanasia in general and passive euthanasia in particular, and originates from the medical fraternity. Most supporters of the Supreme Court's decision come from the field of medicine and laud not just the permission to perform passive euthanasia but also the responsibility placed upon doctors (with approval from the High Court) to determine which cases are fit for passive euthanasia.[44] The judgement has been hailed as 'progressive' with 'far-reaching implications for end-of-life care and medical practice'.[45] The reluctance shown by the Union of India to positively engage in the debate and consider the possibility of legalizing euthanasia[46] has led to one author commenting that "*it is now becoming obvious that our legislative leadership believes in ducking all socially important issues awaiting recognition and perhaps closure unless they*

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41 *Passive Euthanasia Possible But No Mercy Killing: SC*, OUTLOOK,Mar. 7, 2011, *available at* http://www.outlookindia.com/news/article/Passive-Euthanisia-Possible-But-No-Mercy-Killing-SC/714143 (last visited Mar. 21, 2015).

42 *Judge Quotes Ghalib in Aruna Mercy Killing Judgement*, OUTLOOK, Mar. 7, 2011, *available at* http://www.outlookindia.com/news/article/Judge-Quotes-Ghalib-in-Aruna-Mercy-Killing-Judgement/714202 (last visited Mar. 21, 2015). The quote translates to One dies longing for death but death, despite being around, is elusive.

43 *Medical Fraternity Hails SC Verdict on Euthanasia*, OUTLOOK, Mar. 7, 2011, *available at* http://www.outlookindia.com/news/article/Medical-Fraternity-Hails-SC-Verdict-On-Euthanasia/714168 (last visited Mar. 21, 2015).

44 *Ibid.*

45 Roop Gursahani, *Life and death after Aruna Shanbaug*, 8 INDIAN JOURNAL OF MEDICAL ETHICS 68 (2011).

46 *Aruna Ramchandra Shanbaig v. Union of India*, AIR 2011 SC 1290 at ¶22.

are of immediate political significance".[47] The observations made by the Court regarding the low ethical levels and rampant corruption prevailing in the country have also been acknowledged by the medical fraternity.[48]

Opposition to the judgement has come from two main groups: religious groups advocating the sanctity of life and disbelievers in the ethicality of our medical system. The opposition from religious groups comes on predictable grounds. The sanctity of life argument finds its genesis in what has been called 'eclectic religious authorities'[49] which propound the sacrosanct nature and inherent inviolability of human life.[50] It is argued that there is inherent value to human life and it is morally reprehensible to take away such value either forcefully or by choice.[51] It is believed that destroying life because of its supposed worthlessness is a violation since human life in and of itself cannot be worthless.[52] Opponents of euthanasia are also suspecting of the standard of 'suffering' which justifies the taking of one human's life by another even if it is at his own instance.[53] Legal arguments against euthanasia come from the reading of the right to life under Article 21 as an inherent natural right whereas suicide or euthanasia is an unnatural termination or extinction of life and, therefore, incompatible and inconsistent with the concept of right to life.[54] This is a natural continuation of the debate regarding whether the 'right to life' includes the 'right to die' thereby bringing it within the ambit of fundamental rights. This question has previously been answered in the negative by the Supreme Court.[55] Another argument raised by opponents of the judgement is the possibility

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47 Gursahani, *Supra*, n.46.

48 *Ibid.*

49 Sushila Rao, *India and Euthanasia: The Poignant Case of Aruna Shanbaug*, 19 MED. LAW REV. 646 (2011).

50 An interesting overview of the manner in which some religions address the question of suicide and euthanasia can be found at http://www.religionfacts.com/search.htm?cx=partner-pub-8652540295258724%3A2xolkp-sukm&cof=FORID%3A10&ie=ISO-8859-1&q=euthanasia+and+suicide+&sa=Google+Site+Search (last visited Mar. 21, 2015).

51 Anuj Shaha, *Legalizing Euthanasia – Issues and Challenges*, SAVITRIBAI PHULE PUNE UNIVERSITY *available at* http://www.academia.edu/9440185/Legalizing_Euthanasia_-_Issues_and_Challenges (last visited Mar. 21, 2015).

52 *Ibid.*

53 *Ibid.*

54 Suresh Bada Math & Santosh K. Chaturvedi, *Euthanasia: Right to life vs right to die*, 136 INDIAN J. MED. RES. 899 (2012).

55 *Gian Kaur v. State of Punjab*, 1996(2) SCC 648.

of malafide intentions and medical practices which are rampant in the country. Many fear that the judgement would allow for factors like unavailability of health facilities and the patient's lack of resources to take precedence while permitting passive euthanasia.[56] While these concerns regarding the condition of our health infrastructure are valid, they cannot be the overarching factors to determine whether euthanasia should be allowed. In any case, the Court has tried to incorporate sufficient safeguard against this by mandating the approval of the High Court on a case-by-case basis before allowing passive euthanasia.

The decision of the Supreme Court in the *Aruna Shanbaug* case brought back into the limelight an issue which has been at the centre of a long and protracted debate.[57] At the time when the judgement was delivered, it was hoped that public reaction and the Court's pleas for legislation, would bear fruit in the form of a nuanced and deliberated law.[58] In its judgement, the Court recommended to the Parliament to consider the feasibility of deleting §309 (attempt to suicide) from the Indian Penal Code, saying that it had become 'anachronistic though it is constitutionally valid'.[59] The Court further elaborated that "a person attempts suicide in a depression; and hence he needs help, rather than punishment".[60] After taking into consideration the view of the Supreme Court as well as the recommendations of the Law Commission in its 210th Report,[61] the Government has finally decided to repeal §309.[62] The

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56 Math & Chaturvedi, *Supra*, n.55.

57 Rao, *Supra*, n.50.

58 *Ibid.*

59 *Aruna Shanbaug* at ¶100.

60 *Ibid.*

61 The Law Commission, in its 210th report submitted in 2008, had noted that attempt to suicide may be regarded more as a manifestation of a diseased condition of mind, deserving treatment and care rather than punishment, and accordingly recommended to the government to initiate the process for repeal of the "anachronistic" Section 309. It called Section 309 a "stumbling block in prevention of suicides and improving the access of medical care to those who have attempted suicide."

62 In a reply in the Rajya Sabha, Minister of State for home Haribhai Parathibhai Chaudhary said that the Government had decided to drop §309 from the IPC after 18 states and 4 Union Territories backed the recommendation of the law commission. As of December 10, 2014, a Cabinet note on the proposed amendment had been circulated by the Home Ministry among other Ministries. See Bharti Jain, *Government decriminalizes attempt to commit suicide, removes section 309*, TIMES OF INDIA, Dec. 10, 2014, *available at* http://timesofindia.indiatimes.com/india/Government-decriminalizes-attempt-to-commit-suicide-removes-section-309/articleshow/45452253.cms (last visited Mar. 21, 2015).

positive approach taken by the Government instils hope that 'a ritualistic burial will finally be given to this anachronistic law'.[63] It is hoped that the proposed amendment will soon be laid before Parliament and enacted into law. This will be one example of an instance where judicial pronouncement has laid the foundation for progressive legislation. The decision brought the issue into the limelight, opening it to public scrutiny and recommending legislative intervention. This recommendation seems to have had an impact with the Government finally deciding to take up the mantle and proposing action.

This is one clear instance of how the judiciary not just influences social movements but also provides impetus for legislative action. In this particular case, the proposed legislative reform cannot be credited to the judiciary alone. The process began with the Law Commission's Report in 2008. The Supreme Court brought the debate back into the public domain in 2011. The decision to repeal §309 came to light in 2014. This decision has come as a result of a long-drawn process. However, the role of the judiciary in re-igniting public debate on a contentious issue and recommending specific legislative action cannot be overlooked. This is one instance where Courts facilitate legislative action by deciding sensitive issues that a politically-minded Parliament would loathe to resolve. By pronouncing authoritatively on the issue, the Court provided direction to social policy, giving the government a necessary push. Thus, in contrast to *Shah Bano*, this is a case where judicial decision-making resulted in positive legislation and legal reform. This decision clearly highlights the key role that Courts play in guiding and directing social policy.

IV. The Naz Foundation Case

In 2009, the Delhi High Court delivered a judgement that is considered a landmark moment in Indian judicial history.[64] Reading down §377 of the Indian Penal Code, the Court decriminalized consensual sexual acts between adults in private. This judgement was hailed by the LGBT community as paving the way towards equal sexual citizenship and empowering a community that has been historically

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[63] *A step toward humanisation*, The Hindu, Dec. 15, 2014, *available at* http://www.thehindu.com/opinion/editorial/editorial-a-step-toward-humanisation/article6691224.ece (last visited Mar. 21, 2015).

[64] Danish Sheikh, *The Road to Decriminalization: Litigating India's Anti-Sodomy Law*, 16 Yale Hum. Rts. & Dev. L.J. 106 (2013).

marginalized.[65] It pushed towards a new discourse, away from the medicalized idea of homosexuality and towards a vocabulary of inclusiveness and tolerance. The high points of the judgement come in the form of the expansive interpretation of Article 15 of the Constitution,[66] the importance placed on the right to dignity[67] and the crucial distinction drawn between the concept of public morality and constitutional morality.[68] One of the most remarkable aspects of the case was the diametrically opposite stands taken by different ministries of the Union Government. The Home Ministry filed an affidavit saying that legalizing homosexuality would hurt public morality whereas the Health Ministry through the National AIDS Control Organization (NACO) stated that criminalization of homosexuality has hampered AIDS prevention efforts by driving homosexuals underground and away from legal and medical protection.[69] Thus, the fractured approach of the State was noticeable at this point itself. While the LGBT community, supporters of gay rights, international human rights organizations and AIDS control organizations celebrated across the country,[70] it attracted

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65 *Ibid.*

66 The Court interpreted the term 'sex' in Article 15 to include discrimination based on sexual orientation, thereby making any form of discrimination based on sexual orientation.

67 The Court placed heavy reliance on the principles of inclusiveness, dignity and privacy, which it claimed form the basic tenets of the Indian constitution.

68 The Court drew an interesting difference between public morality and constitutional morality. Public morality, it held, was short-lived and based on shifting and subjective notions of right and wrong. Constitutional morality, on the other hand, is drawn from constitutional values and is a cultivated standard. The test of 'compelling state interest' can be met only by demonstrating the standard of constitutional morality and not mere public morality. Thus, the enforcement of public morality cannot be used as a justification for infringing personal liberty since constitutional morality must outweigh the argument of public morality, even if it be of the majoritarian view. The essence of the distinction between public and constitutional morality is that public morality is merely a reflection of the moral and normative values of the majority of the population (as expressed by the legislature), while Constitutional morality not only reflects the majority's values, but also shapes and changes them as part of the social engineering aspect of our Constitution. For a detailed discussion, *see* Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Nza Foundation Judgment*, 2 NUJS L. REV. 445 (2009).

69 Bret Boyce, *Sexuality and Gender Identity Under the Constitution of India*, 18 J. GENDER RACE & JUST. 1 (2015).

70 Aarti Dhar, *Judgment on Section 377 Welcomed*, THE HINDU, Jul. 3, 2009, *available at* http://www.hindu.com/2009/07/03/stories/ 2009070361381800.htm (last visited Mar. 21, 2015); *Gay Sex Judgment Greeted with Delight, Jubilation,* THE HINDU, Jul. 4, 2009, *available at* http://www.hindu.com/2009/07/04/stories/ 2009070451260300.htm (last visited Mar. 21, 2015).

opposition from a variety of religious groups.[71] While the State decided against filing an appeal, several other actors took up the mantle, the first among who was an astrologer named Suresh Kumar Koushal.[72]

After being reserved for judgement for nearly an year and a half, the Division Bench of the Supreme Court finally pronounced its verdict in *Koushal v. The Naz Foundation*, holding §377 of the IPC to be constitutionally valid and reversing the judgement of the High Court. While the judgement was welcomed by some religious leaders,[73] most reactions towards the judgement were those of shock, disbelief and disappointment.[74] The decision of the Supreme Court has been criticized as being 'remarkably thin in legal analysis' while placing excessive focus on what acts constitute 'unnatural sex'.[75] The Court swept aside the entire discrimination argument articulated by the High Court to hold that §377 only describes certain acts and not categories of persons and is therefore not discriminatory.[76] The Court further observed that the LGBT community formed only a 'miniscule fraction' of the population of the country, and over the course of 150 years, not even 200 individuals have been prosecuted under §377.[77] While enunciating the principle of judicial restraint, the Court pointed out that the possibility of misuse could be a relevant factor for the Legislature to consider while judging the desirability of amending §377.[78] While presenting a clear case of judicial abdication, commentators feel that this decision is one of the most poorly-reasoned decisions ever handed down by the Supreme Court of India.[79] The judgement has been written in a callous and insensitive

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71 Sheikh, *Supra*, n.65.

72 *Ibid.*

73 *See* Amrita Madhukalya, *Rare Unity: Religious Leaders Come Out in Support of Section 377*, DNA INDIA, Dec. 12, 2013, *available at* http://www.dnaindia.com/india/report-rare-unity-religious-leaders-come-out-in-support-of-section-377-1933612 (last visited Mar. 21, 2015).

74 *See,* Shreya Atrey, *of* Koushal v. Naz Foundation's *Several Travesties: Discrimination and Democracy,* OXFORD HUM. RTS. HUB, Dec. 12, 2013 *available at* http://ohrh.law.ox.ac.uk /?p=3702 (last visited Mar. 21, 2015); *The Unbearable Wrongness of Koushal v. Naz Foundation*, INDIAN CONST. L. & PHIL. BLOG, Dec. 11, 2013 *available at* http://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation (last visited Mar. 21, 2015).

75 Boyce, *Supra*, n.70.

76 *Suresh Kumar Koushal v. Naz Foundation*, AIR 2014 SC 563 at ¶42.

77 *Id.* at ¶43.

78 *Id.* at ¶51.

79 Boyce, *Supra* n.70.

manner, betraying that the judges did not consider the matter to be of particular importance.[80] The use of phrases like "miniscule fraction" and "so-called rights"[81] of the LGBT people, reflect a drastic change in attitude from the approach of inclusiveness adopted by the Delhi High Court. The anxious wait for the LGBT community[82] has ended in deep disappointment with the Court refusing to take the initiative to recognize gay rights and instead transferring the burden onto the Parliament, which will have to account for multiple political considerations. Further, the refusal of the Court to look to foreign judgements and jurisprudence for guidance is also a step back from recent practice adopted by the Court.[83]

One of the most remarkable aspects of this decision is the stance adopted by the State during the hearing before the Supreme Court. At the first instance, the Union of India refused to file an appeal since it did not find any error of law in the decision of the High Court.[84] In fact, the Attorney-General even traced the history of the practice of homosexuality in the Indian context, explaining that it was an accepted practice in ancient India and its criminalization was a colonial imposition to preserve British morality.[85] Given the backing of the State to the High Court's judgement, it is hard to determine why the Supreme Court decided to even entertain the appeal.[86] With both the primary affected parties – *i.e.*, the State and Naz Foundation – in agreement, it is hard to understand why the Court felt the need to overturn the High Court's decision without giving much in the name of reasons. An easier and fairer route for the Court would have been for it to declare §377 unconstitutional to the extent that it criminalizes private sexual intercourse between consenting adults and directing the Parliament to make amendments to that effect. What the Court has done though is completely left the matter in the hands of the Parliament. The Parliament

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80 *Ibid.*

81 *Naz Foundation* at ¶52.

82 Sheikh, *Supra*, n.65.

83 Rehan Abeyratne & Nilesh Sinha, Insular *and Inconsistent: India's Naz Foundation Judgment in Comparative Perspective*, 39 YALE J. INT'L L. ONLINE 74 (2014).

84 Sheikh, *Supra*, n.65.

85 *Ibid.*

86 None of the appellants were party to the suit before the High Court, and if thoroughly examined, might not have had standing to raise the appeal. However, the Court took an extremely relaxed view on standing, thus allowing the appeal without much ado.

has been given complete discretion to decide if and when the law should be changed, and how. Any action taken by the Parliament must necessarily have political backing. Given the highly sensitive and controversial nature of the issue of gay rights, it is unlikely that the Parliament will take the initiative in the near future to make suitable amends to §377. The very idea of independence of the judiciary takes a back-seat when the Court decides to exercise 'judicial restraint' in a matter involving issues of great social import.

The first two cases which have been discussed illustrated the social impact that Courts can generate by adopting a pro-rights discourse and acting as a catalyst for public debate and giving direction to social policy. *Naz Foundation*, on the other hand, has generated debate by the Court's refusal to adopt the pro-rights approach that it has come to be associated with. The judgement in *Naz Foundation* is seen as regressive and a major setback to gay rights after the positive signals sent by the High Court's decision. However, this has only increased the demand for legislative action to secure equal rights. Whatever be the final judgement, the decision has brought the question of gay rights squarely into the limelight and opened it to public debate. Thus, a negative judgment from the Court can also act as a catalyst for public debate. The debate generated in this case stretches beyond the issue at hand into the wider realm of the role of the judiciary[87] and the duty of the State.[88] The abdication of responsibility by the Court has opened to scrutiny the very means by which it reached its decision. Not only have we seen widespread support for the LGBT movement,[89] the decision has also shaken the faith of the people in the judiciary as a protector of citizen's rights.[90] Whether the Parliament will take the initiative to complete the process initiated by the Delhi High Court is a political question, the answer to which can at best be termed uncertain. After a prolonged period of judicial activism, the Court seems to have reverted to the initial Montesquieuan idea of separation of powers where the three organs of government have distinct well-defined powers. However, in an era where Courts have come to influence and guide social policy, adopting such a straitjacket formula is both impractical and

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87 Alika R.S., *Section 377: The way forward*, THE HINDU, Mar. 1, 2014, *available at* http://www.thehindu.com/features/magazine/section-377-the-way-forward/article5740242.ece (last visited Mar. 21, 2015).

88 *Ibid.*

89 *Ibid.*

90 *Ibid.*

undesirable. There is a need for the Courts to be socially responsible and understand their role as proponents of social policy. Their very impartiality and neutrality is the source of the trust and legitimate expectations reposed by the people in the institution. In such a scenario, the decisions taken by the Court have enormous significance in determining social policy and driving legislative reform.

A more recent example that represents the relationship between judicial decisions and social movements comes from the debates surrounding the amendments to the Juvenile Justice Act that permit a person below the age of 18 years to be punished as an adult in certain cases.[91] The immediate aftermath of the *Nirbhaya* rape case,[92] witnessed public fury over the possibility of the youngest offender receiving a light punishment because the law explicitly provides the manner in which juveniles must be punished. The Supreme Court, while expressing its sympathies with the public outrage surrounding the release of the juvenile, highlighted its inability to take further action in the absence of any law in this respect.[93] This is perhaps an example of how law and morality, despite their many interconnections, are distinct and separate concepts. The Supreme Court's refusal to deviate from the law shows both the strengths and weaknesses of the Indian legal system. At the level of theoretical discussion, it reflects an adherence to the notion of separation of powers and the limits within which the judiciary is permitted to act. At a more practical level, it indicates the power of the judiciary to take clear stances and thereby fuel progressive law-making. Despite rendering a negative decision, the judiciary succeeded in moulding and legitimizing public opinion – a fact which has been implicitly recognized by the legislature while amending the law

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91 Kiran Bedi, *'Amended Juvenile Justice Act is a message for society'*, HINDUSTAN TIMES, Dec. 24, 2015, *available at* http://www.hindustantimes.com/punjab/amended-juvenile-justice-act-is-a-message-for-society/story-MJEUTpHKthryaLFkndJUpL.html (last visited Jan. 15, 2016). The Act provides for punishment of persons aged between 16 to 18 years for certain heinous adult crimes and also enunciates the principle of family responsibility, amongst others.

92 Tanima Biswas, *Delhi gang-rape case: What happened that night*, NDTV, Dec. 23, 2012, *available at* http://www.ndtv.com/delhi-news/delhi-gang-rape-case-what-happened-that-night-508293 (last visited Jan. 16, 2016).

93 Amit Anand Choudhary & Dhananjay Mahapatra, *SC says hands tied by law, can't stall juvenile release*, TIMES OF INDIA, Dec. 22, 2015 *available at* http://timesofindia.indiatimes.com/india/SC-says-hands-tied-by-law-cant-stall-juvenile-release/articleshow/50275193.cms (last visited Jan. 16, 2016).

governing juveniles. This represents yet another manner in which the public, the judiciary and the legislature interact with each other.

V. Conclusion

As stated in the beginning of this paper, we have come a long way from the Montesquieuan idea of the judiciary which envisaged Courts merely as neutral settlers of dispute. With changes in political circumstances, the role of the Court has also evolved to meet social needs. This conception of the Courts as having a say in matters relating to social movements and social policy is largely self-imposed. With the emergence of judicial activism and the dawn of the PIL-era, Courts have become increasingly willing to tackle issues of great social import.[94] The role of Courts as not just interpreters of the law but also substantive law makers comes from political practice rather than constitutional norms.[95] This paper has discussed three cases illustrating the types of impact that judicial pronouncements can have on society. Courts, by identifying and ruling on an issue, act as a medium to generate public debate. Sometimes, as the *Shah Bano* case shows, this debate can take unexpected turns and result in regressive law-making. However, for the most part, as the *Aruna Shanbaug* case indicates, positive action taken by the Court is welcomed by society and acts as impetus for progressive legislation. The *Naz Foundation* judgement reflects a situation where the failure of the Court to adopt a pro-rights approach acted as a catalyst for a rights-based discourse amongst the populace. Whatever be the content of the judgement, by its very nature and authority, the word of the Supreme Court is capable of highlighting important social issues, providing a background and support for the identified issues and suggesting possible policy changes. It serves as the bedrock for public demand for change and the incorporation of such change by legislative intervention.

Apart from being landmark judgements and generating immense public response, there is another important factor which is common to all three cases. This factor is the complete absence of the protagonist from

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[94] As an example, we can take the judgement in *PUCL v. Union of India*, 2013 (2) SCC 633 where the Supreme Court laid down directions for the allocation of funds to implement the Right to Food.

[95] Farber & Sherry, *Supra*, n.7.

the story that unwinds after the judgement is pronounced.[96] In all three cases, the individual lays forgotten, swept aside by the waves of the controversy that rages on. The individual is compromised for the good of the community; group interests prevail over those of the person.[97] Consider the cases individually. The *Shah Bano* controversy was raked up by the Muslim conservatives who felt their religious identity was under threat. The Government, in fear of losing its votebank passed the Muslim Women's Act. Where did Shah Bano find herself in this quagmire? Sidelined by the masses and sacrificed for a greater cause, she was coerced into rejecting the judgement which was passed in her favour. The *Aruna Shanbaug* case drew much applause from the medical fraternity who welcomed the decision to permit passive euthanasia. However, the woman herself was denied her plea because of the refusal of the hospital staff. The discussion that followed the case definitely started with her story, but gradually the attention shifted to 'larger matters', those which would have long-lasting consequences.[98] As with Shah Bano, Aruna Shanbaug the woman lies forgotten as the world moves on. The *Naz Foundation* judgement was expected to be the harbinger of hope for the LGBT community, opening up a new bright future that promised equal citizenship and rights. By adopting an anti-rights approach, the Court effectively drew attention away from the cause to its own role, particularly because of the deference shown by the Court towards the Parliament in initiating progressive reform.[99] The discussion that followed the *Naz* judgment represents yet another instance of where the original cause of the petitioner becomes secondary to the overarching issue, which thereafter becomes the subject of public debate and discussion. Thus, in all three cases, there is seen a shift away from the individual, where the main cause is forgotten in the debate that follows the judgement. Opinions of interested parties dominate the public forum, drawing attention away from the judgement towards the larger causes that it espouses.

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[96] Pathak & Rajan, *Supra* n. 17 – Refer to the discussion on discursive displacement.

[97] Mullally, *Supra*, n. 15.

[98] Pinky Virani, *The unbearable agony of being Aruna Shanbaug: A great injustice*, FIRSTPOST, JUN. 4, 2012 *available at* http://www.firstpost.com/living/the-unbearable-agony-of-being-aruna-shanbaug-a-great-injustice-331622.html (last visited Mar. 21, 2015).

[99] Indulekha Aravind & Ritika Bhatia, *Weapon 377*, THE BUSINESS STANDARD, Dec. 13, 2014, *available at* http://www.business-standard.com/article/beyond-business/weapon-377-114121201179_1.html (last visited Mar. 21, 2015).

Despite these flaws, these debates make an important contribution to the very sustenance of democracy. One of the most important aspects of democracy is the free and open exchange of ideas in a public sphere.[100] The proper functioning of a modern democracy requires informed debate and participation by the citizens.[101] Participatory decision-making is seen as a hallmark of a true democracy.[102] Social movements are one of the ways in which popular participation in the decision-making process is ensured.[103] These present an opportunity for the voice of the public to be heard and considered while formulating legislative policy. The role of the Courts in shaping public movements has been discussed in this paper. By bringing issues into the public domain, Courts initiate debate and act as catalysts for informed debate. This serves the larger ends of democracy by providing the citizens a chance to be part of the decision-making process and generate a feeling of inclusiveness, which is essential for the functioning of any modern democracy.

On a concluding note, it is important to keep in mind the role of the media as the self-appointed conduit between the public and the judiciary. American humourist Will Rogers' iconic starting line "*All I know is what I read in the papers*" succinctly summarizes the position that most people find themselves in.[104] The observation holds ground even today, one hundred years after it was first made in 1915.[105] While the means of communication have undergone a sea change, the general public still depends on mass media for knowledge and information regarding public affairs.[106] Most of the issues that engage our attention are not amenable to personal experience.[107] Thus, for all concerns on the public agenda, citizens deal with a 'second-hand reality', a reality that is constructed by journalists' reports about events and situations.[108] This is particularly true

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100 Nancy Rennau Tumposky, *The Debate Debate*, 78 THE CLEARING HOUSE 52 (2004).

101 James Mumm, *Democracy Needs Direct Participation*, 7 THE GOOD SOCIETY 32 (1997).

102 *Ibid.*.

103 *Ibid.*

104 MAXWELL MCCOMB, SETTING THE AGENDA: THE MASS MEDIA AND PUBLIC 1 (2004).

105 Rogers would start his live stage performances in poked fun at politicians and other new events with this opener. For more on this, *see* http://www.thisdayinquotes.com/2010/09/well-all-i-know-is-what-i-read-in.html.

106 McComb, *Supra*, n. 105.

107 *Ibid.*

108 *Ibid.*

of Court judgements which despite being in the public domain are not accessible to most members of the populace. Judgements are read and circulated among the niche members of the legal fraternity and perhaps the odd adventurous journalist who dares to wade through a plethora of legalese to find a breaking story. The mass media is often the sole medium through which the public gains access to judicial pronouncements. Thus, the manner in which judgements are reported by the Press also goes a long way in influencing and shaping public reaction.[109] It is therefore important to acknowledge the role of the media in gauging the way in which people respond to judgements and the manner in which it shapes social movements. However, a detailed study on this matter must be the subject of another paper.

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[109] An example is the case of Shah Bano. The coverage of the judgement and the subsequent controversy varied markedly among Urdu (who supported the Muslims), Marathi (who supported the Hindus) and English papers (who remained neutral). See Pathak & Rajan, *Supra*, n. 17.

RAJBALA v. STATE OF HARYANA: PANCHAYATI DEMOCRACY v. IMPERATIVES OF EXECUTIVE POLICY

Aishwarya Singh & Meenakshi Ramkumar[*]

ABSTRACT

The right to vote and the right to contest elections form the basis of any democratic institution. Restricting the right to contest elections on irrational classifications and arbitrary criteria defeats provisions of both democracy and rule of law. Amendments made to the Haryana Panchayati Raj Act, 1994 exclude a large section of the population based on discriminatory qualifications from contesting the Panchayat elections. The constitutionality of these amendments was challenged in Rajbala v. State of Haryana, where the Supreme Court upheld its constitutionality proposing that amendments satisfied the 'Classification' test. In this case comment, the objective is to examine the judgement and conclude that the amendments violate Article 14 of the Constitution. While doing so, we shall also critically evaluate two tests that determine a provision's constitutional validity viz. (i) the arbitrariness test (substantive due process) and (ii) classification test.

Introduction

Following the dictum of ***Javed v. State of Haryana***,[1] a Division Bench Judgement of the Apex Court in ***Rajbala v. State of Haryana***[2] illustrates the Indian judiciary's distrust in civil society's ability to determine their own future. Along with the recent judgement in ***The***

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1 *Javed v. State of Haryana,* (2003) 8 SCC 369, the Supreme Court ruled that the amendment to the Haryana Panchayati Raj Act 1994, disqualifying a person from contesting Panchayat elections if he/she has more than two living children is constitutional.

2 *Rajbala v. State of Haryana,* (2015) SCC OnLine SC 1306.

Kerala Bar Hotels Association v. State Of Kerala And Ors,[3] which upheld the exemption of five star hotels from a general ban on liquor sale in Kerala, these decisions further reflect the judiciary's association of the socio-economic status of individuals to their maturity and decision making. In this case comment we aim to elucidate that the court has erred in upholding the constitutionality of the amendments to the Haryana Panchayati Raj Act, 1994. In doing so we examine two tests that determine the constitutionality of a legislative provision; the substantive due process test and the classification test.

I. Background

The Haryana Panchayati Raj Act, 1994 was passed to comply with the 73rd Amendment to the Constitution. Certain conditions were listed under section 175 of the abovementioned act, which would disqualify a person from contesting in village Panchayat elections. The composition of the Panchayats can be determined by the State legislature subject to the provisions of Part IX of the Constitution.

The Haryana Panchayati Raj (Amendment) Act, 2015 (hereafter referred as the Act), amended section 175 and added five new stipulations which would have the effect of disqualifying candidature. Out of these new qualifications, Clauses (t), (u), (v) and (w) of Section 175(1) (hereafter referred as the impugned clauses) were challenged as unconstitutional. These stipulations broadly state that a person will not be eligible to contest elections if he/she (1) fails to pay arrears of certain cooperative banks and electricity bills, (2) does not have the necessary educational qualifications as listed under the section and (3) doesn't have a functional toilet in his/her house.

Three political activists were disqualified from contesting elections on the ground of educational requirement, and consequently petitioned the Supreme Court under Article 32 of the Constitution. It was argued that:

1. The qualifications created by the Act were arbitrary and inconsistent with the basic structure of the Constitution, hence such provisions violated Article 14 of the Constitution.

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[3] *The Kerala Bar Hotels Association v. State Of Kerala And Ors.*, (2015) SCC OnLine SC 1385.

2. The qualifications stated under section 175 creates a classification among a homogenous set of people, which is not based on intelligible differentia and doesn't have a rational nexus with the object sought to be achieved by the Act.

3. Whether right to vote or right to contest are constitutional rights and whether there is a legal distinction between the words qualification and disqualification under the Constitution.

The matter was heard by the Division Bench of the Supreme Court, comprising of Justice Jasti Chelameswar and Justice Abhay Manohar Sapre. In its judgment, the Supreme Court laid down that right to vote and right to contest are constitutional rights. The court also clarified that there is no legal discernment between the terms 'qualification' and 'disqualification'. On the two principal grounds raised by the petitioners, the Division Bench favoring the arguments presented by the Attorney General, on behalf of the respondent, held that a statute cannot be struck down merely on the ground of arbitrariness. Secondly, the qualifications introduced under the Act create a classification based on intelligible differentia and the classification created has a rational nexus to the object sought to be achieved by the Act, which is "to have model representatives for local self-government and better administrative efficiency". Hence, the court concluded that section 175 of the Act did not suffer from any constitutional infirmity.

II. Analysis

1. Arbitrariness'

The Division Bench of the Supreme Court first dealt with the proposition whether a statute can be struck down as unconstitutional on the ground of arbitrariness. The counsel for the petitioner's had pleaded that the Preamble of the Constitution envisages a democratic republic and this constitutes as a basic feature of the Constitution. Any statute which is inconsistent with these principles is irrational, and hence arbitrary. The Attorney General, arguing on behalf of the respondents asserted that it's not under the ambit of the court to review the impugned qualifications and judge them as arbitrary, since the enactment of such qualifications come under the "legislative wisdom."

Justice Chelameshwar dismissed the judgements presented by the petitioners in favour of the proposition that a statute can be struck down

on the basis of arbitrariness. Justice Chelameshwar dismissed the authority of Justice A.K. Gupta in the case of ***R.K. Garg v. Union of India,***[4] where he had held that arbitrariness test is relevant for deciding the constitutionality of the statute. One of these cases brought before the Court was ***Subramanian Swamy v. Director, Central Bureau of Investigation and Anr.,***[5] where the Bench had referred the question of validity of arbitrariness test while examining the constitutionality of a legislation to a Constitutional Bench.

Relying heavily on the judgement of a Division Bench in ***State of Andhra Pradesh v. McDowell,***[6] Justice Chelameshwar held that the a statute cannot be declared as unconstitutional on the ground that it's arbitrary unless it violates any express constitutional provision, because such an exercise involves a value judgment of legislative wisdom He also stated that the adoption of the "arbitrariness test" means importing the doctrine of substantive due process from the courts of United States.

The conclusion arrived by the Supreme Court in the present case on the applicability of the substantive due process or the arbitrariness test while examining the constitutionality of a legislation is surprising, since the trend of the earlier judgements have been to the contrary. Substantive rights are those rights which an individual possesses according to the law of the land including the natural law. According to the substantive due process test, these rights cannot be taken away by the state without any reasonable justification. The word "due" has been interpreted as 'just, reasonable and proper' in the United States of America.[7]

It's true that the founders of the Indian Constitution were opposed to the inclusion of the doctrine of substantive due process in the constitution, hence there is no explicit mention of it. However, the arbitrariness test seeped into the Indian Constitution through the equality clause of Article 14 of the Constitution.[8] In ***Royappa v. State of T.N,***[9]

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4 *R.K. Garg v. Union of India*, (1981) 4 SCC 675.

5 *Subramanian Swamy v.Director, Central Bureau of Investigation and Anr.*, (2014) 8 SCC 682

6 *State of Andhra Pradesh v. McDowell*, (1996) 3 SCC 709.

7 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1080 (5th ed. 2005).

8 Abhinav Chadrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*, 6 INDIAN J. OF CONST. L. 179-191 p.183,184 (2008).

9 *Royappa v. State of T.N*, (1974) 4 SCC 3.

Justice Bhagwati held that arbitrariness is antithetical to the concept of equality. It is to be noted that the state action can be both legislative and executive, it was not open to the Division Bench in the present case to limit the applicability of the arbitrariness test to executive actions, when such a distinction was not made in the ***Royappa***[10] judgement. In the landmark case of ***Maneka Gandhi v. Union of India***[11] the Constitutional Bench had explicitly ruled in favour of due process, albeit procedural, wherein it was held that the procedure established by law should be reasonable, just and fair. Admittedly, both these cases did not involve the question of constitutionality of a statute, but expanded the meaning of equality under Article 14 of the Constitution. Unfortunately, the Bench in this case elevated the classification test as the "para phrase" and "objective end" of Article 14, when it's "merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality."[12]

There have been two specific Supreme Court cases ***Malpe Vishwanath Acharya v. State of Maharashtra***[13] and ***Mardia Chemicals v. Union of India (three judge Bench),***[14] where it was held that the statutes can be struck down because of their arbitrariness. In the former case, a Division Bench of the Supreme Court held that certain provisions of the Bombay Rent Act, 1938 which were initially reasonable had become arbitrary with the passage of time, and violated Article 14. In the latter case, section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was struck down, since the right of appeal granted by it was illusory, rendering it arbitrary. It's evident that no classification test came into picture in both these judgements. However, the Supreme Court in the present judgement failed to consider its own precedents.

In ***Selvi & Ors v. State Of Karnataka***,[15] a three judge Bench for the first time explicitly stated that substantive due process is guaranteed under Article 21, while adding to the case law on constitutional right to privacy vis-à-vis narco-analysis test. It has to be borne in mind that due

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10 *Id* at 12.
11 *Maneka Gandhi v. Union of India,* (1978) 1 SCC 248.
12 *Ajay Hasia Etc v. Khalid Mujib Sehravardi,* (1981)1 SCC 722.
13 *Malpe Vishwanath Acharya v. State of Maharashtra,* (1998) 2 SCC 1.
14 *Mardia Chemicals v. Union of India,* (2004) 4 SCC 311.
15 *Selvi & Ors v. State Of Karnataka,* (2010) 7 SCC 263.

process threshold has been added to Article 21 through the equality clause of Article 14.[16] While citing a 1957 judgement of the Supreme Court, ***A.S. Krishna v. State of Madras***,[17] Justice Chelameshwar chose to negate the recent jurisprudence on due process doctrine and maintained that it cannot be applied under the Indian Constitution.

In ***Union of India v. R. Gandhi***,[18] a four judge Bench had held that even ordinary legislation can be subject to the test of basic structure doctrine, apart from the constitutional amendments as long as the violation is relatable to one or more express provisions of the Constitution. In this case the court was adjudicating on certain provisions regarding the appointments of members to National Company Law Tribunal. These provisions were held as unconstitutional as they violated the principle of independence of judiciary.

2. Classification'

In the present case, the Supreme Court also failed to discuss whether the present statute violates the basic structure of the Constitution. Democratic elections are an integral part of the basic structure.[19] The importance of the arbitrariness test can be illustrated in context of the basic structure doctrine. Justice Chelameshwar is correct when he says that even in the Constitution there are certain eligibility requirements for contesting elections, however the qualifications under section 175 of the Act cannot be located within the Constitution, and they are extraneous requirements without any constitutionally valid basis. The legislature cannot be allowed to determine who is entitled to participate in a democracy on the basis of certain social indicators which show the failure of the government rather than the people. However, all these arguments became futile as the Bench held that the arbitrariness test is not applicable.

The Bench, further considered the classification test. The petitioners' counsel argued that the amendments to the Act create an artificial classification among voters by prescribing certain criteria for participating in the elections, namely, the individuals who are eligible

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16 *Supra* note, 14.

17 *A.S. Krishna v. State of Madras,* AIR1957 SC 297.

18 *Union of India v. R. Gandhi,* (2010) 11 SCC 1.

19 *Kesavananda Bharti v. State of Kerala,* (1973) 4 SCC 225; *Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299.

and the ones who are not. The petitioners' counsel also contended that the impugned clauses create an unreasonable classification whereby people who but for the Act form one class, have been classified without any intelligible differentia between the classes. The respondent's counsel purported that the object of the Act was to enable the functioning of local self-governments with better administrative efficiency. The Supreme Court evaluated each of the impugned clauses and in doing so arrived at the conclusion that the classification was based on intelligible differentia and that the classification had a reasonable nexus with the object of the Act. At the outset, Justice Chelameshwar states that the right to contest elections is a constitutional right and that reasonable regulations may be imposed upon it. While doing so he drew an analogy with the restrictions to participate in the General Elections. However, this argument seems misplaced, since the authority of the State to stipulate qualifications was not questioned. The contention is that such qualifications position a group of people at a disadvantage and exploits their socio-economic status to disqualify them from participating in local governance.[20]

In order to assess the impugned clauses, the court then employed the classification test. Equality as enshrined in the Preamble and Article 14 of the Constitution of India envisages that citizens are provided with equal opportunities without discrimination. The classification test was upheld as a valid test by a Constitutional Bench in ***The State of West Bengal v. Anwar Ali Sarkar.***[21] Any legislative classification will be held unconstitutional unless it satisfies the test laid out in the above judgment by Justice S.K. Das as:

> (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and;
>
> (ii) That that differentia must have a rational relation to the object sought to be achieved by the Act."[22]

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[20] Gautam Bhatia, *Paragraph 85 of Justice Chelameshwar's Dissenting Opinion in the NJAC Case, INDIAN CONST. L. & PHIL.*, Oct. 19, 2015 *available at* https://indconlawphil.wordpress.com/2015/10/19/paragraph-85-of-justice-chelameshwars-dissenting-opinion-in-the-njac-case/.

[21] *The State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75, See also *D.D. Joshi and Others v. Union of India and Others*, (1983) 2 SCC 235, *S.K. Chakraborty and Others v. Union of India and Others*, (1988) 3 SCC 575.

[22] *Id* at 27.

The Supreme Court in the present case examined clause (v) of section 175(1) of the Act first. Clause (v) stipulates a minimum educational qualification of matriculation for anybody contesting an election to any of the offices mentioned in section 175 (1). The Bench has also acknowledged that the minimum educational qualification has been lowered for potential candidates who are women and candidates who belong to the scheduled castes. The petitioners' counsel argued that such a stipulation would result in the disqualification of more than 50% of individuals who would otherwise be eligible. It was also submitted that certain sections of the society like the poor, scheduled castes and women would be the most adversely affected sections once the Act is enacted. The statistics submitted by the respondent's counsel also revealed that only less than 50% of the women who were eligible prior to the amendments would be eligible once the amendments are enacted, similar to the plight of the scheduled castes.

The Bench was faced with the issue whether clause (v) which disqualifies a large number of voters from contesting the elections based on a classification, violated Article 14. The court held that the objective of the classification was to ensure that those who contest in the elections to the panchayats have minimum educational qualification which results in efficient administration and discharge of duties. The court further holds that such an objective is neither irrational nor unconnected with the purpose of the Act or Part IX of the Constitution. Justice Chelameshwar also states that it is only education which enables individuals to differentiate right from wrong, a proposition which is highly debatable.

Clause (v) establishes an aberrant requirement as an individual who is disqualified to contest in the Panchayat elections may be eligible to contest MLA and MP elections. The clause is contrary to the Supreme Court Judgment in ***Union of India v. Association for Democratic Reforms***[23] of 2002where it was held that no legislative provision could curtail a voter's right to determine whether the education of the candidate is significant. Further, India being a signatory of the United Nations Covenant on Civil and Political Rights ("**ICCPR**"), the court could not ignore Article 25 of the ICCPR, which holds that if a candidate is eligible to contest elections he/she cannot be disqualified based on discriminatory criteria such as educational qualification. Justice

[23] *Union of India v. Association for Democratic Reforms,* (2002) 5 SCC 294.

Chelameshwar draws a similarity of the educational qualification requirement to the persons of unsound mind disqualification. However it must be noted that the class of mentally challenged persons are different from educationally disenfranchised persons.[24] The difference being that the enfranchised possess certain privileges vis-à-vis their political and socio-economic status. Thereby the intelligible differentia principle remains unsatisfied.

The Bench then examined Clauses (t) and (u) of section 175(1) of the Act. The aforementioned clauses disqualify persons who have not cleared their debts or are in arrears of amounts to cooperative banks and electricity bills. It was contended by the petitioners' counsel that this provision bears no nexus whatsoever with the object of the Act. The court while drawing an analogy with the insolvency disqualification with reference to members of Parliament and State Legislatures upheld the constitutionality of this provision.

It is pertinent to note that insolvency and indebtedness must be differentiated. There exists a procedure of law to declare an individual as an insolvent. This procedure evaluates the individual's inability to pay off his/her debts. In ***Thampanoor Ravi v. Charupara Ravi***[25] the Supreme Court held that an MLA may not be disqualified on the grounds of being an insolvent unless he/she is declared an insolvent by a competent court. Merely disqualifying a person without examining his/her inability and sidelining any disputed debts would create an irrational classification. The Court had accepted on record the problems of indebtedness in rural India and neglected the same. Suggesting that an indebted individual may pay off the debt and litigate further to be qualified for the elections flouts reality. The classification of persons with debt and those without, is not based on intelligible differentia. In examining Clause (w) of the Section 175(1) of the Act which disqualifies an individual from contesting the election if he/she does not have a functional toilet at their residence, the Court unequivocally accepted that health and sanitation are important goals that need to be implemented for public good. However clause (w) shifts the burden of providing such toilets from the State and imposes a duty on the citizens.

Such classifications have no rational nexus with the objective

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[24] Editorial, *Disenfranchising the Deprived*, 50E.P.W. 7-8 (2015).

[25] *Thampanoor Ravi v. Charupara Ravi*, (1999) 8 SCC 74.

sought to be achieved under Part IX of the Constitution, from which the legislature's right to make laws for Panchayats emanates. In ***Village Panchayat, Calangute v. Additional Director of Panchayat II and Others***,[26] Justice G S Singhvi discussed the role of Panchayati Raj institutions as enshrined in the Preamble, Part IV and Part IX of the Constitution. He further stated that the goal of Village Panchayat is "to promote social justice and economic development and as a representative of the people within its jurisdiction [and this] must be borne in mind while interpreting the laws enacted by the State which seek to define the ambit and scope of the powers and the functions of Panchayats at various levels." The objective does not envision any model representatives, but seeks to facilitate participatory democracy. But the disqualification of a large population does not have any rational nexus with the objective of the Act or Part IX of the Constitution. In ***A.T. Zambre and Ors.v. Kartar Krishna Shashtri***[27] the Supreme Court held that the objective of the Act must be kept in mind while interpreting the validity of a legislative provision.

The Court seems to have erred in upholding the constitutionality of the impugned clauses. The clauses create a classification not based on intelligible differentia and does not have a rational nexus with the object of the Act.

III. Conclusion

The Supreme Court criticized the arbitrariness test because it involves value judgement, however in its judgement while using the classification test, it employed subjective reasoning to justify that the classifications created fulfill the object of the Act. It is tenuous to argue that education, freedom from debt and having functional toilets will make a person a model representative and a better administrator. The classification created by the amendments to the Haryana Panchayati Raj Act, 1994, which was upheld by the Supreme Court violates Article 14 of the Indian Constitution by discriminating against marginalized individuals who would otherwise be eligible to contest the Panchayat elections. Universal adult franchise as envisaged in Article 326 of the

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[26] *Village Panchayat, Calangute v. Additional Director of Panchayat II and Others*, (2012) 7 SCC 550.

[27] *A.T. Zambre and Ors.v. Kartar Krishna Shashtri*, (1981) 1 SCC 561.

Constitution has been the cornerstone of democracy in the Indian State. Unfortunately, the Supreme Court as the guardian of the Constitution subordinated democracy to the state's policy goals and took away the political rights of those, who are already socially and economically subjugated. This judgment may give rise to a domino effect, where the legislatures of several states shall be empowered to lay down similarly disenfranchising classifications.

THE NSEL SCAM: BRIDGING THE REGULATORY HIATUS AND ITS FALLOUT ON THE CORPORATE SECTOR IN INDIA

Drushan Engineer and Charu Singh[*]

Abstract

The 5,400 crore NSEL scamexposed multiple chinks in our securities regulatory system. When it was brought to light in 2012, investors who had lost their money wanted to be reimbursed were hindered by a lack of laws enabling speedy restitution. What set this scam apart from others is that in this case, the scam was perpetrated by an Exchange as against individuals. Such a massive regulatory failure provided an impetus to the government to overhaul major portions of the securities framework by merging the Forward Markets Commission with the Securities and Exchanges Board of India, amending the Forwards Contract (Regulation) Act, 1952 and the Prevention of Money Laundering Act, 2002. The Central Government subsequently announced the forced amalgamation of the NSEL with its parent company, FTIL thereby breaking the corporate shell and holding FTIL responsible for the legal liabilities of its subsidy. This has been contested as being illegal and arbitrary, and against the principles of limited liability and separate corporate identity. Since this scam was executed by the Exchange itself, the importance of demutualization as a principle that ensures greater transparency, and reduces the risk for such irregularities is increasingly being viewed as a way forward for stock exchanges around the world. This paper will analyse the features of the scam, the lack of regulation that allowed it to take place, the efforts taken to minimise the losses incurred through the scam and it will

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also address the regulatory and structural changes that the scam induced in our laws.

I. Introduction

The National Spot Exchange Limited (NSEL) went live in India on 15th October, 2008,[1] as a subsidy of the Jignesh Shah-promoted Financial Technologies (India) Limited (FTIL). The NSEL was designed to be an electronic trading platform providing spot exchange services for trading in commodities. It claimed that it would offer trading in varied commodity spot contracts across segments including bullion, metals and agricultural commodities to its registered trading members i.e. its brokers who executed the trades on behalf of their clients.[2] The stated mission of the NSEL was to connect farmers to buyers, ensure price discovery for farmers, and to introduce a measure of synergy in India's commodity sector. This electronic spot exchange was poised to transform the rural economy by allowing farmers/sellers and processors/exporters/traders to trade their commodities electronically. The NSEL would thus try and reduce the cost of intermediation and improve market efficiency, thereby helping farmers realize an equitable value without increasing the consumer's price.[3] It was intended to be regulated by the Forward Markets Commission (FMC)[4] and had, at its peak, more than 2000 members with about 4.5 lakh trading terminals spread across 1500 cities and towns with an average daily trading to the tune of Rs. 500 billion.[5]

Such success was however, short-lived with massive lapses and irregularities in warehousing and trading structures having resulted in an ideal arrangement ending up becoming one of the largest market catastrophes in the past decade with a financial burden of Rs. 5,600

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1 Press Release, *National Spot Exchange Ltd. (NSEL) goes live today*, NATIONAL SPOT EXCHANGE (2008), http://www.nationalspotexchange.com//NSELUploads/PressReleases/2008/October/English/6/PR_NSEL_15oct08.pdf.

2 *About Us*, NATIONAL SPOT EXCHANGE, http://www.nationalspotexchange.com/abt_us.htm (last visited on Sept., 04, 2015).

3 B.V Pushpa & R. Deepak, *An insight into the NSEL scam*, 3, INTL. ORGANIZATION OF SCIENTIFIC RESEARCH JOURNAL OF BUSINESS AND MANAGEMENT 18, 18-24 (2015).

4 Mr. Ketan Anil Shah v. Forwards Market Commission & Others., Writ Petition (L) No. 2534 of 2013 (Bom.).

5 *The Truth about NSEL*, NATIONAL SPOT EXCHANGE, http://nationalspotexchange.com/Truth_About_NSEL.pdf.

crores, whose comparisons have been drawn to the 1992 Harshad Mehta scam and the 2001 Ketan Parekh scam.[6]

This paper is divided into five parts. The first part discusses the various facets of the scam, and highlights the laws flouted in furtherance of the scam. The second part will outline the regulatory system that was present, and its failures in doing so. The third part will enunciate the effects of the scam and the corrective steps taken by the government. The fourth part will discuss the NSEL-FTIL merger, its legality and its consequences for India Inc. and the fifth part will conclude the paper.

II. Genesis of the Scam

The NSEL was given permission to engage in spot contracts or ready delivery contracts only,[7] defined as *'a contract that provides for the delivery of goods and the payment of a price therefor, either immediately or within such period not exceeding eleven days after the date of the contract.'*[8] It was later discovered that massive and guaranteed profits were being generated by certain trading members, who falsely interpreted such permission as a lack of complete regulation by the Government and the complicity of the Exchange itself. There were discrepancies found in the professed stock available at the warehouses (commodities like sugar, rice, jute) which were found to be empty or even non-existent, which meant that the stock being traded on the exchange floor did not exist. These irregularities ended up snowballing into a Rs. 5,600 crore default (according to conservative estimates). This section will discuss the facets of the scam in detail.

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6 *NSEL's warehousing receipts similar to banker's receipts of Harshad Mehta scam?*, MONEYLIFE, Aug. 27, 2013, http://www.moneylife.in/article/nsels-warehousing-receipts-similar-to-bankers-receipts-of-harshad-mehta-scam/34239.html; JoydeepGhosh, *From Harshad Mehta to NSEL*, BUSINESS STANDARD, Sept. 5, 2013, http://www.business-standard.com/article/markets/from-harshad-mehta-to-nsel-113090500472_1.html.

7 *Exemption of forward contracts traded on NSEL-MCA Notification No. 12/3/2003-IT (Pt.)*, Forward Market Commission, http://www.fmc.gov.in/show_file.aspx?linkid=gazette_notification_fcra-2007-506708308.pdf [hereinafter MCA Notification].

8 S. 2(i), Forward Contracts (Regulation) Act, 1952 [hereinafter FCRA].

A. Modus Operandi

1) Illegal Contracts Being Traded

The most prominent feature of this scam was the illegal and unregulated contracts up for trading. The NSEL was only given assent by the government to engage in spot trades. It was allowed to offer one-day forward contracts as per an exemption granted by the Forward Markets Commission provided that members would not resort to short sales and that outstanding positions at the end of the trading day would result in delivery.[9]

The allegation made against the NSEL is that despite knowing the law, they sold illegal forward contracts that were executed anytime between 30-35 days.[10] These contracts were known as *paired contracts,* where two simultaneous trades were being made on the same security (buying and selling), with a gap in the settlement period. Therefore, the same commodity was involved in two trade cycles; a 3-day buy contract (T+3) and a 35-day sell contract (T+35), or *vice-versa.* The peculiar thing about the paired contracts was that the second leg of the contract (which was always beyond the 11 day limit imposed by the FMC) was always higher than the first contract. This assured the investors of a steady 15%-16% profit each time they traded on the exchange. The contracts settled within T+10 days were defined as 'spot', but could be carried forward, dodging FMC regulations.[11] As a result, certain investors lined their pockets and due to the surge in trading volumes on the NSEL, the company made massive profits. The average monthly trading volume rose to Rs. 28,000 crores, with its turnover increasing by 227% in 2011-12.[12] During the execution of the trades, the commodities stayed in the warehouse, with no actual delivery taking place, which was

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9 MCA Notification, *Supra* n.8, at 2.

10 Clifford Alvarez &Dev Chatterjee, *NSEL: Anatomy of a trade gone sour*, BUSINESS STANDARD, Aug. 26, 2013, http://www.business-standard.com/article markets/nsel-anatomy-of-a-trade-gone-sour-113082600402_1.html.

11 Neeraj Mahajan & Anil Tyagi, *The NSEL Payment Crisis: The Price of Poor Regulation and Supervision*, MADHYAM BRIEFING PAPERS (2013), http://www.madhyam.org.in/the-nsel-payment-crisis-the-price-of-poor-regulation-and-supervision/.

12 *Annual Report 2011-12*, FINANCIAL TECHNOLOGIES (INDIA) LIMITED, http://www.ftindia.com/investors/pdf/FTIL_AR_2011-12.pdf, last visited on Nov. 04, 2015.

illegal as per the FMC guidelines that were provided along with the exemption.[13] The trades were happening without any physical verification of the goods, which indicated that *most of the trades* happening were short term *two legged* trades, with the buyer simply not bothering to verify the stock, as he had already commenced the trade to sell it. Therefore, short selling (a sale of a security that a seller does not own or has not contracted for at the time of sale, and that the seller must borrow to make delivery)[14] which was the antithesis of a spot trade, became prevalent. With this, the NSEL's stated mission of connecting buyers and sellers was undone, with brokers and High Net Worth investors making fortunes hedging crores of rupees on commodities like castor seed.

2) Forged Warehouse Receipts

Callous buying of commodities and a complete lack of regulation of the trading floor resulted in sales being made on a daily basis of commodities whose physical existence was not verified. The exchange allowed members to trade without any verification of the actual goods, and this, coupled with a lack of regulation by the government led to forged invoices, etc., with no surety of the stock being held at the warehouses. The FMC found out that the NSEL failed to carry out any diligence on the offer letter from the seller or maintain adequate documentation to support the existence of the stock at the designated warehouses. There was an absence of documentation for proof of any inward or outward movement of the stocks from the warehouses, which raised doubts on the very existence of the stocks that were the collateral to the trades being executed at the NSEL.[15] Furthermore, none of the 79 warehouses associated with the NSEL had been accredited by the national warehousing regulator, the Warehousing Development & Regulatory Authority (WDRA).[16]

The real shock to the investor community were the findings of an audit

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13 *Order in the matter of "Fit & Proper Person", FMC order no. 4/5/2013-MKT-1/B*, http://fmc.gov.in/show_file.aspx?linkid=Order%20dated%2017-12-2013%20in%20case%20of%20Fit%20and%20Proper%20Status-185672116.pdf.

14 BRYAN GARNER, BLACK'S LAW DICTIONARY 1456 (9th ed., 2009).

15 Fit &Proper, *Supra* n.14.

16 Sugata Ghosh, *E&Y may be roped in the NSEL probe over a warehouse report, firm says it had flagged risks*, THE ECONOMIC TIMES, Oct. 16, 2013, http://articles.economictimes.indiatimes.com/2013-10-16/news/43107157_1_nsel-probe-national-spot-exchange-ltd-ey-report.

of the warehouses by the Swiss regulatory firm SGS.[17] Widespread discrepancies were found between what was supposed to be stored in those warehouses and what was present.[18] In most cases, actual stocks did not tally with the quantities mentioned in the warehouse receipts.[19] This implies that fake warehouse receipts were being used. For instance, one of the NSEL's stock position misleadingly showed, 11190.5 tonnes of raw wool — almost a quarter of India's annual wool production, stored in the warehouse of ARK Imports in Ludhiana, which was far from the truth.[20] This meant that the commodities being traded by the exchange existed only on paper, and the all the trades being executed weren't backed by securities.

3) No Risk Management System & Poor Managerial Standards

The FMC in its order regarding the 'fit and proper' status of Key Management Personnel of the NSEL said that the NSEL failed to provide for a sound risk management system, effective audit of the internal control process, warehouses, accounts and other business of the Company and showed total apathy to take follow-up action to address concerns raised in these areas. There was no self-regulation or internal checks and balances on the part of the NSEL, despite it being responsible to the investors trading on its floor. Normally in exchanges, if a trader cannot meet his commitments he is debarred from the trading floor unless his encumbrances are cleared. However, a company called NK Proteins, run by the son-in-law of the then-Chairman of the Board of the NSEL, Shanker Lal Guru,[21] kept defaulting on certain payments, but the authorities turned a blind eye to it, allowing it to continue trading in contravention to the bye-laws of the NSEL.[22] It has now become the largest single defaulter of the scam, with a total liability of Rs. 930

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17 S. Sunil, *NSEL defaults again, starts warehouse audits*, LIVEMINT, Sept. 10, 2013, http://www.livemint.com/Money/Z55xjDKN7XcRrMm1sEEU7N/NSEL-defaults-again-starts-warehouse-audits.html?ref=dd.

18 *SGS Audit Progress Report*, NATIONAL SPOT EXCHANGE, http://www.nationalspotexchange.com/nseluploads/pdf/sgs_audit_progress_report.pdf.

19 Ashish Rukhaiyar, *Raids reveal empty warehouses; EOW summons Shah*, THE FINANCIAL EXPRESS, Oct. 5, 2013, http://archive.financialexpress.com/news/raids-reveal-empty-warehouses-eow-summons-shah-others/1178480.

20 MADHYAM, *Supra* n.12.

21 *EOW arrests N.K. Proteins' MD in NSEL scam*, BUSINESS STANDARD, Nov. 23, 2013, http://www.business-standard.com/article/markets/eow-arrests-n-k-proteins-md-in-nsel-scam-113102200893_1.html.

22 *Bye-Laws of National Spot Exchange Limited*, NATIONAL SPOT EXCHANGE, http://www.nationalspotexchange.com/pdf/byelaws.pdf.

crore.[23] When companies like NK Proteins started defaulting, the NSEL, instead of taking stock of the situation, provided them with extended lines of credit without verifying if the companies had the assets to back up the money they were borrowing.

B. The Scam Unmasked, and Government's Response

Soon, rumors regarding the NSEL's malpractices resulted in the FMC serving a show-cause notice to the NSEL, seeking clarifications about their methods of operation.[24] This was followed up on July 13, 2013, when the Ministry of Consumer Affairs, Food and Public Distribution (MCA) ordered the NSEL to settle all existing contracts by their due dates and not issue any further contracts, ensuring that all the settlements take place within the 11-day period under the ambit of the Forwards Contract (Regulation) Act, 1952 (FCRA).[25] When the NSEL announced that all contracts will be restricted to an 11-day settlement structure, with all the trades being settled on a day-to-day basis and payments being made on delivery, the market ended up collapsing since the forward traders did not want the possession of the commodities and demanded immediate settlement of their dues.[26] That's how a Rs. 5,600 crore crisis emerged, simply because there were no reserves backing up the two-legged trades. The members refused to settle their obligations under the short leg of the contract due to the longer leg being rescinded, removing its profitability. No attempt was made by the exchange to verify the financial conditions of the traders, and measure their credit-worthiness. This introduced disequilibrium in the market, and the NSEL had to eventually suspend trading.[27]

The NSEL had a Settlement Guarantee Fund (SGF) of Rs. 839 crore as of 29th July 2013,[28] which worked on the principle of self-insurance, being

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23 *N. K. Protiens Ltd.*, NSEL RECOVERY GROUP, http://www.nselrecoverygroup.com/defaulters/n_k_proteins_ltd.htm (last visited on Nov. 16, 2015).

24 The Truth about NSEL, *Supra* n.6.

25 MADHYAM, *Supra* n.12.

26 G. Chandrashekhar, *Getting to the bottom of the NSEL crisis*, THE HINDU BUSINESS LINE, Oct. 03, 2013, http://www.thehindubusinessline.com/opinion/columns/g-chandrashekhar/getting-to-the-bottom-of-the-nsel-crisis/article4985927.ece.

27 *NSEL suspends trading in all one-day forward contracts*, BUSINESS STANDARD, Oct. 1, 2013, http://www.business-standard.com/article/markets/nsel-suspends-trading-in-all-one-day-forward-contracts-113080100013_1.html.

put in place to provide a cushion for any residual risks.[29] This fund, which is a Securities and Exchange Board of India (SEBI)-mandated statutory requirement,[30] was designed to be used as a contingency to settle a contract in case of default. It was supposed to minimize the risk of trading on credit. However, the exchange made the pay-out obligations against the pay-in shortage of paired contracts out of the available SGF cash balances, and it soon reduced to a paltry Rs. 88 lac.[31] When the defaults began *en masse,* it was realized that there is no money left to further indemnify the defaults, and the subsequent defaults spiraled into the current crisis.

III. Regulatory Framework for the Exchange

India's regulatory framework under the FCRA when the NSEL scam took place envisaged a three-tier regulatory framework for commodities exchanges: (i) the Central Government through Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution (MCA) being the ultimate authority; (ii) The Forward Markets Commission (FMC) providing regulatory oversight that has been delegated by the Central Government; and (iii) The exchanges/associations that shall regulate the business on a day-to-day basis, in the spirit of self-regulation.[32] The NSEL's warehousing structure stood unregulated which was unearthed in subsequent investigation. This section will discuss the three tier regulatory structure that was in place when the scam took place along with other factors involved like warehousing and investigation.

A. Antecedent Regulatory Structure

1) Ministry of Consumer Affairs, Food and Public Distribution

The Ministry of Consumer Affairs, Food and Public Distribution

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28 Sundaresha Subramanian, *NSEL's settlement guarantee fund stood at only Rs 85 lakh*, BUSINESS STANDARD, Oct. 28, 2013, http://www.business-standard.com/article/markets/nsel-s-settlement-guarantee-fund-stood-at-only-rs-85-lakh-113082700914_1.html.

29 *Guarantee,* NATIONAL STOCK EXCHANGE, http://www.nseindia.com/Supra_global/content/nsccl/guarantee.htm (last visited on Nov. 04, 2015).

30 SEBI, *Model Bye-Laws of Stock Exchanges*(CircularSEBI/MRD/SE/SK/Cir- 41 /2003 dated Oct.28, 2003).

31 *NSEL's settlement guarantee fund stood at only Rs 85 lakh, Supra* n.29.

32 *Regulation,* FORWARD MARKETS COMMISSION, http://www.fmc.gov.in/index2.aspx?slid=143&sublinkid=685&langid=2; P. RAJIB, COMMODITY DERIVATIVES AND RISK MANAGEMENT44 (1st ed., 2014).

(MCA) had the power to grant or withdraw recognition of the exchange, and the power to supersede the governing body of recognized association or exchange.[33] On June 5, 2007 the MCA published a gazette notification that exempted the NSEL from FCRA provided that a set of conditions are met by NSEL.[34] The MCA issued a show cause notice on April 27, 2012 to the NSEL asking why it shouldn't be brought under the FCRA Act, to which the NSEL claimed that the 2007 notification provided a general exemption from FCRA.[35] On July 12, 2013 the MCA ordered the NSEL to not launch fresh contracts and settle existing contracts on due dates.[36] A fifteen-month gap taken by the MCA before halting the exchange raises questions on the ministry's promptness in ensuring consumer protection amongst other objectives. A better approach would have been temporary suspension of the exchange and issuance of an expeditious order of investigation.

2) Forward Markets Commission

The second tier was the Forward Markets Commission (FMC), which was a statutory body set up under the FCRA,[37] as a part of the MCA.[38] Its functions included advising Central Government in respect of grant or withdrawal of recognition of any association, observing forward markets, publishing essential information regarding such markets, inspecting books of associations and making recommendations for improving organization of forward markets.[39] The Commission had the power of a civil court.[40] It has been observed that the FMC was dependent on the government for finances and was under-staffed and

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33 FCRA, *Supra* note 8, at S. 6, S. 15 & S. 13.

34 *MCA Notification No. 12/3/2003-1T (Vol. II)*, FORWARD MARKET COMMISSION, http://www.fmc.gov.in/show_file.aspx?linkid=Notification%20Dated%2007082013-501406145.pdf.

35 MCA Notification, *Supra* n.8, at 2.

36 *MCA Notification No. 12/3/2003-1T (Vol. II)*, FORWARD MARKET COMMISSION, http://www.fmc.gov.in/show_file.aspx?linkid=Notification%20Dated%2007082013-501406145.pdf.

37 FCRA, *Supra* n.9, at S. 3.

38 Geevan Parsai, *Forward Markets Commission comes under Finance Ministry*, THE HINDU, Sept. 09, http://www.thehindu.com/business/Industry/forward-markets-commission-comes-under-finance-ministry/article5110111.ece?homepage=true.

39 FCRA, *Supra* n.9, at S. 4.

40 FCRA, *Supra* n.9, at S. 4A.

technologically constrained to regulate and monitor the markets.[41] Owing to it being a part of a three-tier system, the Commission was almost toothless, for its powers were overshadowed by the Central Government as the Commission had to mandatorily seek governmental approval before punishing violators.[42] In the aftermath of the irregularities found, the FMC wanted to limit its exposure to the scam citing a gazette notification[43] by the MCA that exempted the NSEL from the FCRA. However, the introduction of coupled contracts brought the transaction under the FMC's ambit.

Since the FMC was a part of the regulatory system supervising future trading contracts, it should have had a mechanism to keep a closer watch on suspicious activities in the market and be expeditious in detecting such anomalies in the market.

3) Commodities Exchange

The third tier was the commodities exchanges that were granted self-regulatory authority to ensure that their actions are in consonance with the FCR Act and Regulations. It was found that the NSEL did not carry out any diligence on offer letter from the seller or maintain adequate documentation to support the existence of the stock at the designated warehouses or their inward or outward movement.[44] It was also later discovered that the NSEL had no mechanism to check whether the underlying stocks had been pledged to a bank to ensure unencumbered title of obligations to meet its obligations.[45]

B. Warehousing

An important facet of the crisis and a hole that must be filled by the administration is the lack of regulation of warehouses that resulted in empty warehouses and the forged warehouse receipts, which meant that

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41 Rajesh Bhaiyani, *Sebi-FMC merger: Soon, commexes may start equity trading*, BUSINESS STANDARD, Mar. 2, 2013, http://www.business-standard.com/budget/article/sebi-fmc-merger-soon-commexes-may-start-equity-trading-115030100548_1.html.

42 FCRA, *Supra* note9, at S. 21.

43 *FMC keen on washing hands off NSEL saga: Bombay HC*, MONEY CONTROL, Nov. 10, 2013, http://www.moneycontrol.com/news/business/fmc-keenwashing-hands-off-nsel-saga-bombay-hc_973555.html.

44 FCRA, *Supra* n.14, at 13.

45 FCRA, *Supra* n.14, at 14.

there was no stock backing up the trades that were being executed.[46] This happened despite the formation of WDRA in 2010,[47] which has the responsibility of the inspection and accreditation of warehouses[48] and also has the power to inspect warehouses where errant practices are suspected.[49] Forging warehouse receipts is a separate offence under the act,[50] yet irregularities regarding forged receipts have been unearthed. Since the NSEL used the warehouse receipts as proof of ownership, the onus was on the WDRA to inspect and regulate the warehousing structure of the NSEL, but it categorically failed to do so, increasing the investor's exposure to the scam.[51]

Recently, SEBI has proposed new rules for the country's warehouse service providers ("WSP") in a consultation paper suggesting that exchanges should carry out the accreditation of warehouses more transparently and only with the approval of the exchange's risk management committee.[42] Such accreditation will be subject to renewal every three years, the paper added. The paper lists eligibility criteria for a WSP: it has to be a corporate body, whose promoters have sufficient credibility, and have been in the business of public warehousing for at least three years. Furthermore, all exchanges will need to ensure that warehouses, which aren't registered with the WDRA, are registered by WDRA within six months from the date of accreditation.[53]

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46 Sugata Ghosh& Ram Sahgal, *NSEL saga: Audit by Swiss firm SGS reveals missing stocks amid fears of forged receipts*, THE ECONOMIC TIMES, Sept. 2, 2013, http://economictimes.indiatimes.com/markets/stocks/nsel-saga-audit-by-swiss-firm-sgs-reveals-missing-stocks-amid-fears-of-forged-receipts/articleshow/22215415.cms.

47 Shrimi Mukherjee, *Q&A: Dinesh Rai, Chairman, WDRA*, BUSINESS STANDARD, May 10, 2011, http://www.business-standard.com/article/economy-policy/q-a-dinesh-rai-chairman-wdra-111051000035_1.html.

48 S. 35, Warehousing Development and Regulation Act, 2006.

49 *Id.*, at Chapter VI.

50 *Id.*, at S. 43.

51 Sucheta Dalal, *NSEL: Poor Regulation was not by chance*, MONEY LIFE, Sept. 2, 2013, http://www.moneylife.in/article/nsel-poor-regulation-was-not-by-chance/34294.html.

52 *Annexure A*, CONSULTATIVE PAPER ON WAREHOUSING NORMS FOR AGRICULTURAL & AGRI-PROCESSED COMMODITIES TRADED ON NATIONAL COMMODITY DERIVATIVES EXCHANGES (Securities & Exchange Board of India, 2016) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464860526503.pdf.

53 *J(a), Annexure A*, CONSULTATIVE PAPER ON WAREHOUSING NORMS FOR AGRICULTURAL & AGRI-PROCESSED COMMODITIES TRADED ON NATIONAL COMMODITY DERIVATIVES EXCHANGES (Securities & Exchange Board of India, 2016) http://www.sebi.gov.in/cms/sebi_data/attachdocs/1464860526503.pdf.

C. Investigation

In the aftermath of the scam, the investigation that was to be carried out against the defaulters and the exchange itself was initiated by the Economic Offences Wing (EOW).[54] Aggrieved investors filed a petition before the Bombay High Court,[55] demanding a probe by the CBI alleging that the investigation by the EOW is turning into a "farce and a sick joke on 13,000 helpless families" alleging a breach in investigation.[56] It was also alleged that the EOW was going slow on Jignesh Shah, the promoter of FTIL.[57] On March 30, 2015, the Enforcement Directorate undertook prosecution against the NSEL officials and defaulters under Prevention of Money Laundering Act, 2002 (PMLA).[58] The NSEL Investors' Action Group, which was an umbrella organization set up by and for the aggrieved investors demanded that the probe should be conducted by a joint investigation team of the EOW, Central Bureau of Investigation and Enforcement Directorate.[59]

Involvement of more than one investigative agency has proved to result in more banes than boons, resulting in shoddy probes and problems on the demarcation of jurisdiction. An appropriate mechanism would be incorporation of an experienced team of experts under the FMC to look into investigations relating to commodity exchanges exclusively.

IV. Fallout of the Scam

The Rs. 5,600-crore crisis has triggered widespread dialogue, often

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54 Aneesha Mathur, *Delhi, Mumbai cops engaged in turf war over NSEL scam*, THE INDIAN EXPRESS, July 29, 2013, http://indianexpress.com/article/business/business-others/delhi-mumbai-cops-engaged-in-turf-war-over-nsel-scam/.

55 *NSEL investors sue govt agencies, allege shoddy investigation*, BUSINESS STANDARD, Apr. 18, 2015, http://www.business-standard.com/article/markets/nsel-investors-sue-govt-agencies-alleging-shoddy-investigation-115041800490_1.html.

56 Purba Das, *NSEL Investors Allege Foul Play, Seek Clarification*, BUSINESS INSIDER INDIA (03/11/2013), http://www.businessinsider.in/NSEL-Investors-Allege-Foul-Play-Seek-Clarification/articleshow/45022087.cms.

57 *NSEL investors demand speedy probe in Rs 5,600-cr scam*, BUSINESS STANDARD, Mar. 25, 2015, http://www.business-standard.com/article/companies/nsel-investors-demand-speedy-investigation-in-rs-5-600-cr-scam-115032500765_1.html.

58 Shrimi Choudhary, *Enforcement Directorate starts prosecution in NSEL scam today*, DNA INDIA, Mar. 30, 2015, http://www.dnaindia.com/money/report-enforcement-directorate-starts-prosecution-in-nsel-scam-today-2073019.

59 Purba Das, *Supra* n.57.

pointing out the government's incapability towards providing assurances to the 13,000 investors who have been impacted. On the regulatory front, the government's inability to form a sound structural framework to regulate the extensive network of the commodities market has been widely condemned. In response, the legislature has come up with a committed structure proposing a complete overhaul in the financial services sector. Such actions have been undertaken in the wake of the NSEL scam that highlights a serious breach of regulations.

Firstly, the FMC was transferred from the MCA to the Finance Ministry. *Secondly,* the Government announced the merger of the FMC with SEBI on 28th September, 2015 to plug regulatory loopholes and extend the scope of the financial market. Thirdly, the Central Government announced the NSEL-FTIL amalgamation under Section 396, The Companies Act, 1956. These steps shall be discussed in this section of the paper.

A. Transfer of FMC from MCA to Finance Ministry

In the wake of the scam, the Minister of Consumer Affairs, K.V. Thomas expressed the inability of the MCA to efficiently probe the scam due to a lack of investigative power and expertise, and handed over its responsibility to the Finance Ministry.[60] Subsequently, the FMC was transferred to the Ministry of Finance for a more 'coordinated action'[61] and with the hope to strengthen the regulatory structure so that such a scam will not reoccur.[62]

B. Finance Act, 2015

The 'minor systemic failure'[63] induced legislators into adopting

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60 *NSEL issue now responsibility of Fin Min: KV Thomas*, MONEYCONTROL, Oct. 22, 2013, http://www.moneycontrol.com/news/current-affairs/nsel-issue-now-responsibilityfin-min-kv-thomas_974414.html.

61 Rajesh Bhayani, *FMC moves to the Ministry of Finance*, BUSINESS STANDARD, Sept. 13, 2013, http://www.business-standard.com/article/economy-policy/fmc-moves-to-the-ministry-of-finance-113091300836_1.html.

62 Shishir Sinha, *Finance Ministry to oversee Forward Markets Commission*, THE HINDU BUSINESS LINE, Sept. 10, 2013, http://www.thehindubusinessline.com/markets/commodities/finance-ministry-to-oversee-forward-markets-commission/article5111389.ece.

63 *Government panel finds 'minor systemic failure' at NSEL*, THE ECONOMIC TIMES, Sept. 20, 2013, http://economictimes.indiatimes.com/markets/stocks/government-panel-finds-minor-systemic-failure-at-nsel/articleshow/22819257.cms.

regulatory convergence as a principle in the financial services sector.[64] In 2015, a merger between FMC and SEBI was announced in the Finance Bill, 2015 in an amendment to the FCRA[65] which was concluded on the 28th of September[66] with the hope to put end to "wild speculation" in the market structure.[67] The merger is being regarded as a step closer to a single regulator for all securities and derivatives.[68] On the legislative front, the FCRA was repealed and the FMC was absorbed into the SEBI.[69]

1. Fmc-sebi Merger

It was after the Asian Currency scam of 1997 that the idea of a unified regulator was floated by the Government. In 2003, the Wajahat Habibullah report proposed the merger suggesting regulatory convergence.[70] However, the idea was shelved for over a decade.[71] Meanwhile, the Financial Sector Legislative Reforms Commission whose purpose was suggesting ways to reform the unwieldy institutional framework governing the financial sector recommended unifying SEBI, Insurance Regulatory and Developmental Authority (IRDA) and Pension Fund Regulatory and Developmental Authority (PFRDA) observing that sectorial regulation tends to ignore worldview of their regulated entities. The idea was based on the view that mitigating

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64 REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION (Government of India, 2013) http://finmin.nic.in/fslrc/fslrc_report_vol1.pdf.

65 FCRA, *Supra* n.9, at S. 28A.

66 *Press Release, Finance Minister unveils merger of FMC with SEBI (Sept. 8, 2015)*, SECURITIES EXCHANGE BOARD OF INDIA, http://www.sebi.gov.in/sebiweb/home/document_detail.jsp?link=http://www.sebi.gov.in/cms/sebi_data/docfiles/32029_t.html.

67 Reena Zachariah & Ram Sahgal, *Budget 2015: Proposal to merge Forward Markets Commission with Sebi to add teeth to commodities market regulation*, THE ECONOMIC TIMES, Mar. 1, 2015, http://articles.economictimes.indiatimes.com/2015-03-01/news/59642345_1_forward-markets-commission-fmc-ramesh-abhishek.

68 Dinesh Narayanan, *How the 12-yr-old idea of SEBI-FMC merger is finally becoming a reality this September*, THE ECONOMIC TIMES, June 30, 2015, http://economictimes.indiatimes.com/markets/stocks/policy/how-the-12-yr-old-idea-of-sebi-fmc-merger-is-finally-becoming-a-reality-this-september/articleshow/47873835.cms.

69 Shyamlal Banerjee, *More power for SEBI is good; but some checks are needed*, LIVEMINT, Mar. 2, 2015, http://www.livemint.com/Money/APHhcGaWXg9XyqtWwrzk3M/More-power-for-Sebi-is-good-but-some-checks-are-needed.html.

70 REPORT OF THE INTER-MINISTERIAL TASK FORCE ON CONVERGENCE OF SECURITIES AND COMMODITY DERIVATIVE MARKETS (GOVERNMENT OF INDIA, 2003) http://fmc.gov.in/writereaddata/Links/report2-3783547565427437958.pdf.

71 *Sebi-FMC merger: Soon, commexes may start equity trading*, *Supra* n.42

systemic risk is avoiding the worldview of any one sector, and understanding the overall financial system.[72] In pursuance of regulatory convergence, FMC was merged with SEBI.

2. *Plugging the Legal Loopholes*

The Finance Act 2015 stated that all recognized associations under the FCRA will be deemed to be recognized stock exchanges under the Securities Contracts (Regulation) Act, 1956.[73] This shall allow a commodity exchange to expand in segments permitted under a stock exchange and vice versa.[74] Stock exchanges will be able to become universal exchanges wherein equities, debt instruments and currencies are traded under the same roof as commodity derivatives. The need for new infrastructure will be eliminated, as Stock Exchanges already have depositories and clearing corporations that will cater to the needs of commodity traders.[75] The Act introduces financial derivatives including commodities derivatives and any other financial instrument as may be defined by the government.[76] Such a move, in accordance with Section 28A of the SEBI Act shall give exchanges the fungibility in penetrating each other's market segment. This means a commodity exchange can start currency derivatives and equity trading or, a stock exchange can launch commodity trading.[77]

3. *Amending Prevention of Money Laundering Act, 2002*

Another realization that the NSEL scam caused was the need to change our laws dealing with financial crimes in a way that facilitates solving the problems on the ground. The investors had considerable difficulty in recovering the money due to them,[78] and it was observed that this was heightened as the assets of the defaulters were seized by the

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72 REPORT OF THE INTER-MINISTERIAL TASK FORCE ON CONVERGENCE OF SECURITIES AND COMMODITY DERIVATIVE MARKETS, *Supra* n. 71, at 25.

73 S. 28 (a), Securities Contracts (Regulation) Act, 1956.

74 *Sebi-FMC merger: Soon, commexes may start equity trading*, *Supra* note42.

75 Rajesh Bhayani, *Two sides of the Sebi-FMC merger*, BUSINESS STANDARD, Mar. 24, 2015, http://www.business-standard.com/article/markets/two-sides-of-the-sebi-fmc-merger-115032401103_1.html.

76 Section 133B, Securities and Exchange Board of India Act, 1992.

77 *Sebi-FMC merger: Soon, commexes may start equity trading*, *Supra* n. 42.

78 *Negligible progress in dues recovery from NSEL defaulters: FMC*, LIVEMINT, Sept. 8, 2014, http://www.livemint.com/Money/fSwdsoW5UihyRDvTs6kltI/Negligible-progress-in-dues-recovery-from-NSEL-defaulters-F.html.

government[79] and there was a delay in putting forward the government's stand on the issue. The Prevention of Money Laundering Act, 2002, under which the assets were seized had no clause in it to ensure that duped people are repaid their dues, and there was no framework for allowing the government to sell the assets and use the proceeds to pay back the investors,[80] and as a result, in two years, only approximately 10% of the dues were cleared,[81] resulting in a large section of the duped investors,[82] and the NSEL itself[83] calling for the amendment in the PMLA that would allow the sale of the confiscated assets so that timely restitution can be made to the aggrieved investors.

Due to this, the government has decided to amend the PML Act in a positive manner in 2015 to the effect of - "(8) Where a property stands confiscated to the Central Government under sub-section (5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of money laundering."[84] This clause will ensure that the attached assets can be liquidated and that the proceeds from it can go to the aggrieved investors, and that the time-frame in doing so gets significantly reduced.

C. Proposed Nsel-Ftil Merger

The Central Government, with the intention of minimizing the fallout of the scam has proposed the amalgamation of the NSEL with its parent company, FTIL, introducing a share swap ratio (ratio in which an

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79 *ED attaches assets worth R75 crore in NSEL crisis*, THE INDIAN EXPRESS, Dec. 2, 2013, http://indianexpress.com/article/news-archive/web/ed-attaches-assets-worth-r75-crore-in-nsel-crisis/.

80 Virendrasingh Ghunawat, *NSEL scam: After a year, aggrieved investors write to PM, seek quick recovery*, INDIA TODAY, Aug. 8, 2014, http://indiatoday.intoday.in/story/nsel-scam-narendra-modi-arun-dalmia-eow-ed-finance-ministry-corporate-affairs-ministry/1/375321.html.

81 Rajesh Bhayani, *Two years of blame game, legal tangles*, BUSINESS STANDARD, July 30, 2015, http://www.business-standard.com/article/markets/two-years-of-blame-game-legal-tangles-115073001808_1.html.

82 Virendrasingh Ghunawat, *NSEL scam: To recover lost money, investors want change in money laundering Act*, INDIA TODAY, Mar. 20, 2014, http://indiatoday.intoday.in/story/nsel-scam-nsel-investors-enforcement-directorate-eow-money-laundering-gagan-suri-yathuri-associates/1/350402.html.

83 *Truth about NSEL*, *Supra* n.6.

84 S.8, Prevention of Money Laundering Act, 2002.

acquiring company will offer its own shares in exchange for the target company's shares during a merger or acquisition) after assessment. Three fully paid-up equity shares of Rs. 2 each of FTIL will be issued in exchange of eight fully paid-up equity shares of Rs 10 each of NSEL. The objective is to make FTIL liable for the scam at the NSEL, and to ensure that it has a statutory duty to pay back its dues.[85]

The NSEL-FTIL merger was first recommended by the FMC, as it would help expedite the recovery of the defaults.[86] This was largely seen to be against the concept of limited liability and distinct legal identity of companies. The FMC countered this by saying that FTIL, along with its nominees held 99.9998% of paid up capital of the NSEL.[87] Another significant fact is that boosting trading volumes (via the introduction of coupled contracts promising guaranteed returns) would eventually lead to the NSEL making more profits, thereby benefiting FTIL, resulting in the NSEL recording a mammoth 277% increase in its turnover in 2011-2012.[88] Since, FTIL was almost the sole shareholder of the NSEL, the constitution of the Board of Directors was entirely under its control.[89] Jignesh Shah, who was the managing director-cum-promoter of FTIL formed a part of the Board of NSEL as the vice-chairman. There were two other common members present on both, the boards of NSEL and FTIL. It is also a fact that minutes of board meetings of the NSEL were tabled before the board meetings of FTIL.[90] FTIL controlled, supervised and governed the NSEL. The events imply how the acts undertaken by the NSEL in floating coupled contracts were ignored, if not initiated by FTIL. The illegal contracts that promised assured returns boosted the volumes being traded on the exchange, which resulted in higher profits

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85 Tarun Nangia, *Did FMC bosses go out of their way in recommending merger of NSEL-FTIL?*, DNA, Feb. 7, 2015, http://www.dnaindia.com/money/report-did-fmc-bosses-go-out-of-their-way-in-recommending-merger-of-nsel-ftil-2058730.

86 Rajesh Bhayani, *FMC wants NSEL to be merged with FTIL, latter's management changed*, BUSINESS STANDARD Aug. 19, 2014, http://www.business-standard.com/article/specials/fmc-recommends-govt-get-ftil-mgmt-changed-114081901087_1.html.

87 *Draft Order of Amalgamation of National Spot Exchange Limited (Dissolved Company) with Financial Technologies India Limited (Transfer Company) Under Section 396 of the Companies Act, 1956,* MINISTRY OF CORPORATE AFFAIRS, http://www.mca.gov.in/Ministry/pdf/Draft_Order_of_Merger.pdf [herinafter Draft Order].

88 *Annual Report 2011-12, Supra* n. 13.

89 Draft Order, *Supra* n. 88.

90 Draft Order, *Supra* n. 88.

for the NSEL. This points out to the fact that the FTIL had a hand to play in the fraud that was being perpetrated by the NSEL.

The Central Government has been empowered to do so by the Companies Act, 1956 under Section 396 which states that *"the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution; with such property, powers, rights, interests, authorities and privileges; and with such liabilities, duties, and obligations; as may be specified in the order".*[91] The initial step towards such an amalgamation involves issuance of a proposed order for merger that is sent to each of the companies concerned.[92] The companies may send back suggestions and objections within a period as the Central Government may fix in that behalf which cannot be less than two months from the date on which the copy is received by that company, shareholders or creditors.[93] The Central Government is also responsible for ensuring that each member, creditor (including a debenture holder) is having nearly the same interest or rights in the company resulting from the amalgamation as he had in the company of which he was a member or creditor of. If an imbalance exists, he shall be entitled to compensation, which shall be assessed by the prescribed authority. The amalgamated company shall provide the compensation.[94] Any person aggrieved by the compensation or assessment can make an appeal to the Company Law Board within thirty days of publication of the Official Gazette.[95] All orders passed under Section 396 will have to be laid before both the houses of the Parliament.[96]

So far the Centre has invoked Section 396 four times in the past three decades. They were: Hatti Gold Mines, Chitradurga Copper with Karnataka Copper Consortium Ltd (1985); Chandpur Sugar Company with UP State Sugar Corporation Ltd (1989); Internal Aluminum Products with National Aluminum Company (2000); and Air India-Indian Airlines merger (2007).[97] What is worth observing is that all these

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91 S. 396, Companies Act, 1956.

92 *Id.* at S. 396(1).

93 *Id.*, at S. 396(4)(b).

94 *Id.*, at S. 396 (3).

95 *Id.*, at S. 396 (3A).

96 *Id.*, at S. 396(5).

97 K.R. Srivats, *NSEL-FTIL: A Sec 396 first for a private sector merge*, BUSINESS STANDARD, Oct. 21, 2014, http://www.thehindubusinessline.com/markets/nselftil-merger/article6524212.ece.

companies were public companies. The merger between NSEL-FTIL is unique in the sense that this is the first instance of Section 396 of the Companies Act, 1956 being utilized to merge two private companies.[98]

FTIL had filed a writ petition before the Bombay High Court, challenging the constitutional validity of Section 396 of the Companies Act, 1956 and praying for quashing of the draft merger order[99] contesting a gamut of violations, which will be discussed below.

I) Is the Amalgamation in Violation of Article 14?

According to FTIL, Section 396 of the Companies Act, 1956 violates Article 14 of the Constitution, which espouses equality before the law. It suffers from excessive delegation, as there are no guidelines for the exercise of power by the Central Government under this section.[100]

The MCA in a circular dated April 10, 2011 set out guidelines for amalgamation of two government companies: consent of 100% shareholders and 90% creditors is required.[101] The NSEL and FTIL have been divested of such an opportunity owing to them being companies not owned by the government. According to FTIL, this clearly violates Article 14.[102] In the Report of the Expert Committee on Company Law, it was suggested that the amalgamation should be allowed only through a process overseen by the Courts/Tribunals; therefore, instead of existing provisions of Section 396, provisions should be made to empower the Central Government to approach the Court/Tribunal for approval for amalgamation of two or more companies.[103] This is so, because even though the piercing of the corporate veil may be justified in this instance, guidelines/protocols must be put in place to ensure that the usage of a law

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98 *Id.*

99 K. R. Srivats, *Can't specify timeframe for NSEL-FTIL merger: Jaitley*, THE HINDU BUSINESS LINE, Aug. 16, 2015, http://www.thehindubusinessline.com/todays-paper/tp-news/cant-specify-timeframe-for-nselftil-merger-jaitley/article7547897.ece; Financial Technologies (India) Ltd. v. Union of India, Writ Petition No. 2743 of 2014.

100 *United Against The Proposed Forced Amalgamation Of NSEL With FTIL*, FINANCIAL TECHNOLOGIES, http://www.ftindia.com/SHARE-HOLDER-LETTER-WITH-ANNEXURES.pdf.

101 *Amalgamation of Government Companies*, MCA Notification No. 51/16/2011/CL-III, http://www.mca.gov.in/Ministry/pdf/Circular_16-2011_20apr2011.pdf.

102 *Id.*

103 *Mergers and Acquisitions*, MINISTRY OF CORPORATE AFFAIRS, http://www.mca.gov.in/MinistryV2/chapter10.html.

as wide ranging and potentially powerful as Section 396 furthers the 'public interest' and is not misused by the government to further its own interest.

The Court should come up with guidelines regarding amalgamations of companies under this section. Since, no two private companies have ever been forcibly merged before; the Court's decision here will set a precedent that may have a major impact in the near future.

2) Does the Merger Lead to Erosion of Corporate Law Principles?

FTIL alleges that a forced merger will erode the elementary principles of limited liability and corporate identity, implicitly making it responsible and legally liable for the scam, when such allegations are presently *sub judice* before the Bombay High Court.[104] However, under Section 396 of the Companies Act, 1956 the Central Government can *suo motu* merge companies in public interest. The public interest here is the interest of the investors who have been defrauded wherein such fraud was at least facilitated by the exchange. If we were to look into a situation where the Court is to adjudge lifting of corporate veil and ignore the NSEL's distinct legal identity, the parties will have to fulfill the statutory or judicial circumstances that allow such breaking of the corporate shell.

This merger will end up circumventing the principle of limited liability, which is defined as *"the legal protection limiting each shareholder to the par value of fully paid-up company shares to cover the financial liability of the company's debts and obligations in a privately or publicly owned corporation. As a legal entity, the company itself is liable for the rest."*[105] Also, though the concepts of Corporate Personality and Limited Liability are distinct they operate in tandem and their impact is most evident when considered together.[106] The principle of limited liability is imperative to ensure a positive corporate atmosphere and build the investor's confidence through diversification of assets.[107]

It is well discussed that it is not possible to evolve a consistent and

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104 *Id.*

105 BRYAN GARNER, BLACK'S LAW DICTIONARY 997 (9th ed., 2009).

106 Alex Magaisa, *Corporate Groups and Victims of Corporate Torts - Towards a New Architecture of Corporate Law in a Dynamic Marketplace*, 1 LAW, SOCIAL JUSTICE & GLOBAL DEVELOPMENT JOURNAL 1, 8 (2002).

107 Judith Freedman, *Limited Liability: Large Company Theory and Small Firms*, 63 THE MODERN L. REV. 317, 328 (2000).

inflexible set of rules which can be invoked in determining the question as to whether the veil of the corporation should be lifted or not.[108] However, it is noted that the veil on corporate personality, even though not always lifted, is becoming increasingly transparent in modern corporate jurisprudence. The ghost of the *Saloman*[109] case which upheld the doctrine of corporate personality still frequently appears in Company Law, however, now the veil has been pierced in many cases across jurisdictions.[110] *Palmer* in his *Company Law Precedents* has categorized five categories of cases where the Courts have lifted the corporate veil and considered the merits of the case. They are: involving the relationship of holding company and its subsidiaries, ascertaining the controlling interest in matters relating to taxes, duties and the like, ascertaining the controlling interest where trading with the enemy is involved, in the law relating to exchange control and where shareholders are liable to creditors when the number of members of a company is reduced below the legal minimum. Mostly economic matters, especially those pertaining to tax evasion and circumvention of tax obligations, perpetuation of fraud and public interest doctrine have called for lifting the veil in decided Court cases.[111] The courts have enunciated that whenever the medium of a company is used for committing fraud[112] or economic offences,[113] courts have lifted the veil and looked into the realities behind the legal façade. It is settled law that the corporate veil can be pierced when it is found to be opposed to justice, against public interest and good conscience.[114]

The FTIL's control over NSEL implied a subsidiary-holding company relationship. The Hon'ble Supreme Court has enunciated that when a holding company owns enough voting stock in a subsidiary, it can control management and operation by influencing or electing the Board of Directors and be considered as a single economic entity,[115]

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108 P.C. Agarwala v. Payment of Wages Inspector, M.P. and Others, (2005) 8 S.C.C. 104 (India).

109 *Salomon v. Salomon*, (1897) Eng. Rep. 33 (H.L.).

110 *State of UP v. Renusagar Power Co.*, A.I.R. 1988 S.C. 1737 (India).

111 SIR FRANCIS BEAUFORT PALMER & GEOFFREY MORSE, PALMER'S COMPANY LAW 215 (24th ed., 1987).

112 Gilford Motor Company v. Horne, (1933) Eng. Rep. 109 (C.A.).

113 Santanu Ray v. Union of India, [1989] 65 Comp. Cas. 196 (Delhi)

114 Workmen Employed in Assn. Rubber Industry Ltd., Bhavnagar v. Associated Rubber Industry Ltd., (1985) 4 S.C.C. 114 (India).

115 *Vodafone International Holdings BV v. Union of India*, (2012) 6 S.C.C. 613 (India).

strengthening the arguments in favor of pushing through a merger between NSEL and FTIL, making FTIL liable for the NSEL's debts.

Thus, the lifting of corporate veil shall go on to reveal the true nature of the affairs between the NSEL and FTIL, and will expedite the repayment of the claims, justifying the FMC's suggestion to merge the companies in public interest. The concept of Limited Liability should not be used to shield parent companies from the liabilities it may incur due to fraudulent practices, and prevent compensation from reaching the people who have lost their money due to such activities.

V. The Way Forward

One of the marked differences of the NSEL scam with other scams like the Harshad Mehta or Ketan Parekh scam is that the exchange itself was at fault and it was against the exchange that the allegations of impropriety were leveled. An exchange can only work if the investor's confidence in the system is absolute, and the NSEL scam has created a massive trust deficit.[116] Generally, exchanges were owned and operated by the brokers that trade on it, as a not-for-profit body as a "club of brokers" offering services as monopoly operators operating under a mutual governance structure, as a co-operative.[117] It was observed that such a system opens the doors for conflict of interests, and from this, the idea of demutualization was developed. This means, that the exchange would become a corporate entity with its own objectives.[118] Moreover, it transforms from a non-profit organization into a profit-making company like any other corporate entity, with shares of its own that could be sold to or distributed to the stakeholders, with ownership and management differentiated from each other.[119] The incontrovertible advantage of demutualization is that the chances of a scam like this will be minimized if direct stakeholders

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116 *FMC takes steps to restore investor confidence in commodities market*, THE ECONOMIC TIMES, Jun. 8, 2014, http://articles.economictimes.indiatimes.com/2014-06-08/news/50421071_1_nsel-crisis-investor-confidence-trading-volumes.

117 SHAMSHADAKHTAR, DEMUTUALIZATION OF STOCK EXCHANGES: PROBLEMS, SOLUTIONS AND CASE STUDIES 36 (1st ed., 2002).

118 *What exactly is demutualization?*, THE ECONOMIC TIMES, Jan. 21, 2002, http://articles.economictimes.indiatimes.com/2002-01-21/news/27334241_1_demutualisation-trading-rights-brokers.

119 United Nations Conference on Trade and Development, *Overview of the world's commodity exchanges – 2007*, UNCTAD/DITC/COM/2008/4, 6.

in the market and its fluctuations are kept separate from its management. It will result in a large inflow of funds which can be used to modernize the exchange.[120] The governance and management will also be streamlined, as it will be in the hands of professionals with no conflicting interests, and not the brokers who used the system.[121]

In the NSEL's case, however, FTIL owned around 99.99% of NSEL and was active in the management and operation of the company,[122] with no real distinction between the management and the ownership. The RBI in its Financial Stability Report of 2013 has stressed on the need to separate the two, stating that "The (NSEL) episode has emphasized the need for ensuring that no single shareholder or a group of shareholders is permitted to dominate the functioning of the exchange or exercise managerial control"[123] and it has observed that stricter regulatory control is necessary to protect public interest,[124] and attract more investment towards the sector.

Even though, in the aftermath of the NSEL scam the government has come under severe criticism for the lack of regulation, one must also look into the actions of the individual investors and brokers. No questions were asked before buying these products, and the investors (many of who were High Net Worth Individuals who have been active in the financial markets for years) did not try to understand how they were reaping such high fixed annual profits. There should be a higher level of investor scrutiny, and the fundamentals of the product, market, broker and regulator must be taken into account to assess the veracity of the product being invested in.

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120 *Indian Exchanges: The Final Countdown*, IDFC, http://www.idfc.com/pdf/white_papers/indian_exchanges.pdf (last visited on Nov. 09, 2015).

121 *Demutualization - Implications for the Regulation and Governance of Securities Exchanges*, INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, http://www.iosco.org/library/annual_conferences/pdf/ac25-23.pdf.

122 Anirudh Laskar& B.S. Sunil, *NSEL must separate ownership from management: Report*, LIVEMINT, Sept. 21, 2013, http://www.livemint.com/Politics/vsFz2hekIIsPqvzbWQ8eIM/NSEL-must-separate-ownership-from-management-report.html.

123 RESERVE BANK OF INDIA, FINANCIAL SECTOR REGULATION AND INFRASTRUCTURE (2013).

124 *No promoter should control any exchange: RBI*, THE HINDU, Dec. 30, 2013, http://www.thehindu.com/business/markets/no-promoter-should-control-any-exchange-rbi/article5518852.ece.

VI. Conclusion

In conclusion, the importance of a stringent regulatory structure cannot be overlooked. A strong regulatory structure minimizes risks of impropriety and induces investor's confidence, resulting in higher trading volumes, which are beneficial for the financial health of the country. The Maharashtra Government has decided to set up a special court to expedite the proceedings,[125] but still, no relief has been provided to the aggrieved investors. Recent changes, like the amendment of the PML Act to ensure that victims get their money back are a welcome sign, and victims must be spared from long, tedious litigation to get back the money due to them. Section 396 of the Companies' Act, which has not been used before to merge two privately-owned companies before must also be clarified, and a system of checks and balances must be formulated to ensure that such wide-ranging powers aren't misused by the government. The government must continue taking tough and contentious decisions like the NSEL-FTIL merger to ensure that the investors get back their dues and that confidence in the regulatory mechanism of commodities exchanges gets instilled amongst investor.

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[125] Ashish Rukhaiyar & Makarand Gadgil, *Maharashtra to set up special court to hear NSEL matters*, LIVEMINT, July 7, 2015, http://www.livemint.com/Politics/5VbhwBq2L6Xouit8C1MkvO/Maharashtra-to-set-up-special-court-to-hear-NSEL-matters.html.

A CONSTITUTIONAL ANALYSIS OF THE IDEA OF AFFIRMATIVE ACTION: EXPLORING NEW STANDARDS IN LIGHT OF THE GUJJAR RESERVATION IN RAJASTHAN

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Abstract

The Rajasthan government recently enacted two legislations guaranteeing reservations to Economically Backward Classes and Special Backward Classes, primarily Gujjars. The said reservation includes quotas in various spheres including education, public employment etc. Article 15 and 16(1) of the Indian Constitution guarantees equality of opportunity to all citizens in matters relating to employment. However, such equality is not absolute as the Article itself allows for reservation of certain portion of seats for the backward classes. The Apex Court on this point has held that the straitjacket rule for reservation is 50%, a cap which can only be exceeded in extra ordinary situations. The basic idea behind reservation was to do justice to the downtrodden. However, the allegations that government activities of reservation are targeted at creating a vote bank have emerged too and Rajasthan government's present act of granting reservation is attacked with the same. The justification given by the parliamentary affairs minister Rajendra Rathore, was the existence of similar reservation in Karnataka, Andhra Pradesh and Odisha. Similar actions have led to the emergence of the question of the motive behind such reservation and the aptness of the same. This paper aims to decipher the above questions while also throwing light on the validity of reservations in the

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aforementioned states. It discusses the Rajasthan model of reservation in depth, comparing it with that of Tamil Nadu and Andhra Pradesh while determining its validity. It also aims to fathom whether the idea behind the concept of reservation is being achieved or not.

Introduction

Affirmative action has been described as a tool that is used to eliminate both past and present discrimination, to remedy the effects of the same and to keep a check on any future discrimination.[1] In other words, it includes every positive mechanism undertaken to increase the representation of the underprivileged or backward classes in areas of employment, education, and culture etc. from which they have been historically excluded.[2] Hence, the basic idea behind affirmative action is providing a platform to the unequal so that they can come up and compete with the equals.

India as a country has experienced the wrath of inequality since time immemorial, so much so that the earlier caste system acts as a testament to that fact. The bifurcation had the Shudras, which constituted the depressed class, encompassing a tremendous number of people. It is for their upliftment that affirmative action was introduced in India and is still prevalent. India has considerable experience with implementing affirmative action programs.[3] Recently, the Rajasthan Assembly passed two legislations to provide reservation to the backward class of Gujjars. Since this reservation comes after a long standing agitation against the same, its grant raises a lot of questions. Contentions have been made that these Acts are aimed at capturing vote banks by the leaders rather than upliftment of the Gujjars. Another related controversy, is the fact that the said grant exceeds the cap of 50%,which is against the Supreme Court guidelines. The government has cited the examples of Tamil Nadu, Telangana and Karnataka to justify their model. Hence, the purpose of

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1 BRYAN A GARNER, BLACK'S LAW DICTIONARY, 64, (8th e.d., 2004).

2 Robert Fullinwider, *Affirmative Action,* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2014 Edition) available athttp://plato.stanford.edu/entries/affirmative-action/

3 Siely Joshi, *The Constitutional Flaws of India's attempt to promote equality and a look at the United States constitution as a solution,* 32 Wis. Int'l L.J. 195 (2014).

this paper is to analyse the said model of reservation and decide whether such a reservation is constitutionally permissible.

Part I of the paper would explore the advent of affirmative action and its existence in India. Part II would discuss the present Acts of the Rajasthan Government granting the said reservation and the circumstances which gave rise to them. Part III would constitutionally analyse the Acts and compare them with the model of reservations prevalent in Tamil Nadu and Karnataka. Part IV will highlight the flaws in the existing model of reservation granted by the said Acts. Part V will provide suggestions for its improvement.

Part I: India and Affirmative Action

'Affirmative Action', also called reservation in India, has a deep rooted existence. Its history goes back to the caste system, wherein the ancient Indian society was divided into four castes, i.e. Brahmin, Kshatriya, Vaishya and Shudra (the lowest of all).[4] It was the Shudras constituting the lowest category in the society, subjected to ill-treatment leading to their backwardness. It is the majority of members of this caste today that are entitled to reservation. The first formal instance of the same was in 1882, when during the Hunter Commission, Jyotirao Phule demanded free and compulsory education for the Smritis and also demanded representation for them in the government.[5] Further, in the year 1901 reservations were introduced in Maharashtra in the Princely State of Kolhapur by Shahu ji Maharaja.[6] This policy became so important that provisions for the same were also incorporated made in the Government of India Act, 1919.

Reservation became such a pivotal part of the society that when the Constitution of India was drafted, the makers for the implementation of the backward classes, enshrined this concept into the text of the Constitution, in form of Article 16(4). This Article, gave the State the power to make specific provisions for reserving certain posts for the

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4 SMITH, BRIAN, VARNA AND JATI', ENCYCLOPAEDIA OF RELIGION, 79 (2nd ed., 2005).

5 Mehbubul Hassan Laskar, *Rethinking reservation in higher education in India*, ILI Law Review 25 available at https://web.archive.org/web/20120425081633/http://www.ili.ac.in/pdf/article_2.pdf

6 *Chatrapati Sahu Ji* ,(Dec. 02, 2015, 3:35:23 PM) available at http://dalitvision.blogspot.in/2012/04/chhatrapati-shahu-ji-maharaj-1874-1922.html

backward classes in the government sector.

Sixty five years since its introduction, the current scenario is that the central government has a reservation policy of 49.5% wherein 15% for the Scheduled Caste ("SC"), 7.5% for the Scheduled Tribe ("ST") and 27% for the Other Backward Classes ("OBC").[7] The Hon'ble Supreme Court in the landmark case of *Indira Sawhney* v. *Union of India,*[8] stated that a cap of 50% should not be crossed while reserving seats in any case unless an extraordinary situation prevails. However, there are states that have exceeded it, namely, Tamil Nadu which has 69% reservation (OBC 50%, SC 18% and ST 1%)[9] and Karnataka having 66.5% reservation (22.5 SC& ST, 27.5 OBC and 15% and 5% in favour of rural candidates and students from Kannada medium and 1% for J&K). A similar model has been adopted by the Rajasthan government that has been discussed in Part II of the paper.

Part II: The Rajasthan Government and the Acts

The Rajasthan Government recently passed two bills in its Legislative Assembly which grants reservation to the Gujjars of the state terming them as 'backward'. The Acts, namely the Rajasthan Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015, (hereinafter "Act One") and the Rajasthan Special Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015 (hereinafter "Act Two").[10]

Act One provides 5% quotas in jobs and education to the Gujjars under a new category of "special backward classes"[11] and Act Two provides 14% quota for the economically weaker sections of upper

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7 *Critical Analysis on Reservation Policy in India,* (Nov. 22, 2015, 4:30:29 PM) available at http://www.legalservicesindia.com/article/article/critical-analysis-on-reservation-policy-in-india-1331-1.html

8 Indira Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (India).

9 http://www.tn.gov.in/acts-rules/law/act_10to12_131_07jun06.pdf

10 *Why Rajasthan reservation may run foul of constitution,* (Nov. 13, 2015, 1:20:23 PM) available at http://indianexpress.com/article/explained/why-rajasthan-reservation-may-run-afoul-of-constitution/#sthash.KFcepm9p.dpuf

11 Section 4, Rajasthan Economically Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015. (India).

castes families with annual incomes up to Rs 2.50 lakh.[12] Put together, the two sections i.e. the economically backward classes and the special backward classes will avail total reservation of upto 68 per cent.

This reservation comes in light of the Gujjar agitation. On 23rd May, 2008 a protest group of Gujjars demanding reservation for them, was fired upon by the police leaving few certain dead and many injured. This was the starting point of a wide spread movement by the Gujjars demanding reservation for them in the state.[13] Initially, the government appeared adamant against giving in to the demands but finally succumbed to the pressure and passed the two bills in the state legislature granting reservation to the group.

Since this reservation comes in light of the Gujjar agitation a pertinent question arises as to whether such a reservation is targeted at the need of the Gujjars or the need of the leaders? The next part of the paper, delves into the same and analyses the two Acts attempting to deduce whether the Gujjars satisfy the constitutional requirements of availing the reservation or not.

Part III: Constitutional Analysis of the Acts

Article 15(4) of the Indian Constitution deals with the issue of backward classes. The Constitution of India being silent on who falls within the category of backward classes, leaves the matter to the states to specify backward classes.[14] The courts in the past have taken various stances while defining backward classes. In *M.R Balaji v. State of Mysore*[15] the Honourable Supreme Court stated that for a class to be identified as 'backward', it should be both 'educationally' and 'socially' backward. Further, it enumerated various other criteria in determining backwardness. For instance, 'poverty' as the sole criteria for backwardness was not allowed, however clubbed with occupations, place of habitation was made a permissible form of criteria..

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12 Section 4, Rajasthan Special Backward Classes (Reservation of Seats in Educational Institutions in the State and of Appointments and Posts in Services under the State) Act, 2015. (India).

13 *Gujjars revive agitation for uota in Rajasthan government*, (Dec. 2, 2015, 7:40:23 PM) available at http://news.biharprabha.com/2015/05/gujjars-revive-agitation-for-quota-in-rajasthan-govt-institutions-hit-rail-services/

14 M.P JAIN, INDIAN CONSTITUTIONAL LAW, 943(Lexis Nexis 7th e.d, 2014).

15 M.R. Balaji v. State of Mysore, AIR 1963 SC 649 (India).

Additionally in *Chitralekha* v. *State of Mysore,* the Honourable Supreme Court further laid down certain occupations which would be treated as backward including agriculture, pretty business, inferior services, crafts etc.[16]

Gujjars constitute around 7-8 % of the population of Rajasthan[17] and have a literacy rate of 18% as compared to the 74% of the entire country.[18] Further, they are a class backward both economically and socially and have been cowherds graziers[19] and a nomadic community residing in forests and hills, hence being a community cut off from the main society.[20] Even their poverty ratio is very high and 94% of their income comes from animal husbandry.

In every determinant of backwardness the Gujjars of the State as per the data presented above satisfy all of the criteria of backwardness as contemplated by the Honourable Supreme Court. It also shows that the plight of the Gujjars is worse than the communities that have been granted reservation in the state (namely Jats).[21]

Rajasthan Model Vis-à-Vis Tamil Nadu and Karnataka.

To analyse as to whether the situation of Rajasthan is similar to those of Karnataka and Tamil Nadu, a study of both the models is required. Since the latest instance of grant of reservation has been with respect to Muslims in the above two states, Gujjars are being compared to them.

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16 Chitralekha v. State of Mysore, AIR 1964 SC 1823 (India).

17 *Gurjar agitation on the reservation,* (Dec.1, 2015, 2:20:12PM) available at http://indiatoday.intoday.in/story/gurjar-agitation-on-the-reservation-issue-in-rajasthan-2007/1/155654.html ; http://www.frontline.in/static/html/fl2411/stories/20070615003612600.htm

18 T.K Rajalakshmi, *Gurjars agitation,* (Dec2, 2015, 2:20:12PM) http://indianresearchjournals.com/pdf/IJMFSMR/2012/August/16.pdf, International Journal of Marketing, Financial Services & Management Research Vol.1 Issue 8, August 2012, ISSN 2277 3622

19 Kelkar Committee Report on High Level Committee on Socioeconomic, Health and Educational Status of Tribal Communities, 2014 available at http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report,%20May-June%202014.pdf

20 Lokur Committee Report on Revision of backward classes, available at http://hlc.tribal.nic.in/WriteReadData/userfiles/file/Lokur%20Committee%20Report.pdf

21 See Jat representation vis-à-vis the Gujjars at http://indiatoday.intoday.in/story/gurjar-agitation-on-the-reservation-issue-in-rajasthan-2007/1/155654.html

A comparative analysis of the models of the three states presents the following picture. First in Karnataka and Tamil Nadu, Muslims constitute 8.5 %[22] and 5.561% respectively as compared to 11% Gujjars in Rajasthan.[23] Second, in Tamil Nadu the poverty ratio is less than 10% for the Muslims, which is very much similar to the plight of Gujjars in Rajasthan.[24] Third, literacy rate of Gujjars in Rajasthan is 18%[25] as compared to 70.1% and 82.9% respectively of the Muslims in Karnataka and Tamil Nadu.[26] Fourth, if we focus on the representation in government jobs the situation is even worse, as Rajasthan has merely 4% representation of Gujjars as compared to 8.5% in Karnataka and 3.2 %in Tamil Nadu of the Muslims. Therefore, the situation of Rajasthan is not similar but even worse as compared to Tamil Nadu and Karnataka. Thereby, the government is correct on adopting the model of Tamil Nadu and Karnataka for justifying its grant of reservation.

It is established by now that the action of the Rajasthan government is justified as Gujjars are indeed backward, thereby deserving the said reservation. However, the granting Acts still consists certain flaws with respect to the way they grant the reservation. The next part of the paper deals with the flaws in the Acts.

Part IV: Flaws with the Acts

1. No Obligation to Accept the Proposal.

The Honourable Supreme Court of India, in *Kumar Singhania* v. *Union of India* held that Article 16(4) neither imposes any constitutional duty nor confers any Fundamental Right on any individual or state to claim reservation.[27] Hence, the state of Rajasthan was under no obligation to grant reservation to the Gujjars and could have instead chosen to resort

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22 *Population by Religious Communities* (Nov. 15, 2015, 10:30:16 PM) http://demotemp257.nic.in/httpdoc/Census_Data_2001/Census_data_finder/C_Series/Population_by_religious_communities.htm

23 http://www.achrweb.org/Review/2008/217-08.html

24 *Sachchar Committee Report,* (Nov. 7, 2015, 9:37:15 PM) http://indianeconomy.columbia.edu/sites/default/files/working_papers/working_paper_2013-02-final.pdf

25 T.K. Rajalakshmi, *Supra* note 18.

26 *Sachchar Committee Report,* (Nov. 7, 2015, 9:37:21 PM) http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf

27 Kumar Singhania v. Union of India, 1991 S.C.R. Supl. (1) 46 (India).

to other means aiming towards their upliftment, an option it did not exercise. It needs to be noted that affirmative action is not the only recommended step to uplift the unequals as India is a country with a major chunk of its population backward and if reservation is seen as the only step to uplift them, then the percentage of reservation might go even beyond the 68%, as it stands today. Hence, causing serious prejudice to the general meritorious classes. Regardless, the state legislature still went ahead with its proposed reservation.

An alternative could have been the introduction of various schemes or setting up of infrastructure for the upliftment of Gujjars. It is trite knowledge that providing reservation is a less cumbersome option for the legislature rather than providing a pedestal wherein the unequals get the said infrastructure to improve themselves, where the benefits are not spoon-fed but given to the ones who deserve. The primary flaw with every state granting reservation is that the states forget that the idea of 50% being the cap for reservation was introduced keeping in mind the welfare of the general classes too. The Court along with providing for situations where the cap could be exceeded, deemed such situations *'exceptional', so as to avoid its regular usage*. Hence, if a mere uproar causes a state to succumb to the demands of the people, it can be used against it to raise demands that are not genuine in nature.

2. The Acts Do Not Provide for Any Minimum Criteria

The basic principle behind introduction of reservation was upliftment of the un-equals and of those who are not represented sufficiently in the public services under the state. However, the Court in its pronouncements has time and again stated that even though the socially backward people may not be able to compete with the open category people, it does not mean that they would not be able to pass the basic minimum criteria laid down thereof.[28] A minimum criterion here denotes the smallest acceptable benchmark that a candidate needs to attain.[29]

For instance, if two candidates A and B appear for an exam, the latter being an OBC has a reserved seat. Candidate A scores a 120/150 and still

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[28] Andhra Pradesh Public Services Commission v. Baloji Badhavath, (2009) 5 S.C.C. 1 (India).

[29] Bryan A, *Supra* note 1 at 1016.

doesn't qualify as someone scores more than him, whereas candidate B scores 32 and still qualifies as he scores the most from his category. Such instances are made permissible as per the present Acts. Hence, the author proposes for a basic minimum criteria for such examinations or position which should be laid down and candidates attaining that minimum limit should only be allowed to avail the reservation.

3. No Check and Balance Procedure I.E. Misuse By The Creamy Layer

The term creamy layer was first coined by Justice Krishna Iyer in *State of Kerela* v. *NM Thomas*,[30] wherein he envisaged a situation where the top layer of the backward society will take away the benefits of reservation thus leaving the others unfortunate. Further, the Court in *Indira Sawhney,*[31] made it mandatory for the state to identify creamy layer and exclude it from reaping the benefits of the reservation.

Despite this being the law, the creamy layer does enjoy the benefits of reservation. The present Acts provide for exclusion of creamy layer but does not provide for a mechanism in case a person from the creamy layer fabricates his income.

These Acts suffer from certain flaws, as stated above. The author in the next part of the paper has provided for suggestions that can be included in the Acts to improve it.

Part Five: Suggestions

Discrimination against minority groups is present in the history of almost every nation. However, what sets nations apart are the mechanisms they implement to overcome this historical oppression.[32] The Rajasthan Government can include the following suggestions in its Acts to improve them aiming for better implementation and result:

1. Time Cap for Reservation.

The Government can include the reservation for Gujjars for a

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30 State of Kerela v. NM Thomas, 1976 SCR (1) 906 (India).

31 Indira Sawhney, *Supra* n.9.

32 Siely Joshi, *The Constitutional Flaws of India's Attempt to Promote Equality and a look at the United States Constitution as a solution,* 32 Wis. Int'l L.J. 195 (2014).

specific time period. It can include a clause wherein only one generation can avail the benefit of reservation. The rationale behind such a clause can be the fact that one generation can be an ample time for bringing a family to a stable existence and at par with other classes. For instance, when a student from a backward class, graduates from a premier institution and starts earning for himself, he is in a position to provide for his family too, and hence is no more economically backward.

Such a move if adopted, will result in the purpose of offering a reservation being fulfilled, i.e. upliftment of the backward classes. Furthermore, this suggestion is a practicable one and can be deduced from the example of Tamil Nadu where, after several years of reservation there came a time when the cut-off marks for both the General category and OBC were same, and the state withdrew the reservation policy.[33]

2. One Step Reservation

The Government can also provide for a stipulation wherein a member of a backward class engaging in higher studies or government employment, will only be entitled to reservation at one level. For instance, if a student gets reservation in his graduation, he will not be entitled for it in his post graduation.

Such a step will ensure that the reservation is not misused, as the person who receives reservation, and benefits out of it at once stage, can now compete with the other in the next one. This view was also suggested by the Supreme Court in the case of *Preeti Srivastava v State of Madhya Pradesh*[34] wherein it held that reservations in promotions should not be allowed keeping in mind the advancement of knowledge. Even though this aspect was just limited to medicine but the idea behind was an efficient and fruitful use of affirmative action.

3. Defining Who is Backward

The Supreme Court, left it to the Centre and State government to define who is backward and hence entitled for reservation. However, in the past the policies intended to assist the disadvantaged, have been corrupted by political elites who manipulate the system to their own

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[33] Shobha Warrier, *Evaluating Tamil Nadu's 69% quota,* (Nov. 19, 2015, 7:30:15 PM) available at http://www.rediff.com/news/2006/may/30spec.htm

[34] Preeti Srivastava v. State of Madhya Pradesh, (1999) 7 SCC 120 (India).

advantage and block any attempts at reform.[35] Therefore, to eradicate this problem the Supreme Court should take upon itself to define who is backward and hence entitled for reservation. This would solve the problem of granting reservation with a view to capture vote banks, as has been alleged against Rajasthan.

4. Checks and Balances

It is an established fact that despite the exclusion of creamy layer from reservation in OBC, the elite class still reap the benefits. The state can come up with a penal provision which provides for a rigid penalty/imprisonment in case of non-compliance. This would deter people from illegally using the benefits of reservation.

Conclusion

The present paper discussed the recent Acts passed by the legislature of Rajasthan which granted reservation to the Gujjars. After this grant, the percentage of reservation in Rajasthan goes over 50%. The settled law is that reservation in a state should not exceed 50% as a general rule, unless exceptional circumstances exist. The Rajashtan government relied on the model of Karnataka and Tamil Nadu to establish an exceptional situation. However, since reservation today has become a tool for capturing vote banks, the author compared the model of Rajasthan to Karnataka and Tamil Nadu to investigate whether the grant of reservation was genuine or not.

The analysis provides a picture in support of the reservation as the situation of Gujjars seems even worse than the two states. Hence, the proposed reservation is valid. However, they do suffer from flaws such as the absence of checks and balances, administrative inefficiency etc. The author also provided for suggestions which can lead to better implementation of the policy. Such suggestions include time cap for reservation, one time reservation, defining who is backward etc.

Affirmative action was never meant to be permanent, even the 'Father of Indian Constitution' suggested a time cap for it. However, its permanency today has brought into question its true purpose i.e.

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[35] Graham K. Brown and Arnim Langer, *Does Affirmative Action Work? Lessons From Around the World*, 94 Foreign Aff. 49 (2015).

upliftment. Therefore, it is high time that states before granting reservation realise the kind of impact it has on the people availing it, as on one hand they get a head start, but on the other its never ending nature makes it an act of benign discrimination. Therefore, the state of Rajasthan and every other state proposing it should consider implementation of the above changes so as to achieve the main purpose of affirmative action and the concept of using it as a tool to target vote banks can be ruled out of the minds of people.

THE HARSHAD GOVARDHAN CASE: PERFORMING THE BALANCING ACT

Siddhant Khetawat & Shivansh Agarwal[*]

Abstract

The issue of recovery of debts in India has been plagued with several institutional hindrances and improperly drafted laws. Though many reforms have been suggested and implemented, most of the reforms have been piecemeal in nature. One such legislation envisaged for the expeditious recovery of debts by excluding court's intervention is the SARFAESI Act, 2002. Though the Act was supposed to improve the debt recovery scenario in India, the legislation is marred with several loopholes and gaps which are subject to widespread abuse. One such gap has been analysed by the Apex Court in the case of Harshad Govardhan Sondagar v. International Asset Reconstruction Company. In the said case, the Supreme Court has critically analysed the issue of third party interests (such as tenants) in a secured asset and the accommodation of these interests vis-à-vis the rights of the secured creditors under the Act. To this end, the authors undertake a critical appraisal of the said judgment and the position of law established therein. Further, the authors have tried to throw light on the implications of the judgment on the existing legal regime. This has been done by highlighting some of the possible inconsistencies which might have crept up as a result of the judgment. Lastly, the authors put forward certain measures which could be implemented in order to remove the potential inconsistencies and make the Act more efficient in nature.

I. Introduction

The banking sector is the foundation of every monetized economy

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in the world and forms the core of the financial sector of an economy. In the post liberalisation era, the Indian banking system has undergone significant transformation following financial sector reforms with an aim to adopt international practices and improve the efficiency of the sector.[1] However, one of the major roadblocks of the Indian banking sector has been its inability to tackle the rapid growth of non-performing assets (NPAs). The proliferation of NPAs has led to inefficiency in the sector by virtue of reduced profit earning capacity of the banks. It has also imposed hidden costs such as cost of legal action for recovery of amount etc. on the banks.

Over the years, various committees have been appointed to review the banking sector in India and suggest possible means to make it more robust and efficient so as to combat the menace of NPAs. Various legislations have been enacted to give effect to their recommendations. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act, 2002") is one such legislation with its object being to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.[3] The Act enables and empowers the secured creditors to take possession of their securities, to deal with them without the intervention of the court and also to authorize any Securitization or Reconstruction Company to acquire financial assets of any Bank or Financial Institution.[4]

Though the purpose of the Act was to ensure speedy recovery of dues without judicial intervention,[5] the Act has been subject to widespread criticism in that it vests unqualified power with the creditors leaving the debtors with little safeguards. The Act has also been denounced for being silent on various aspects and having many loopholes which are exploited both by creditors and borrowers alike. One such issue which has recently come into the limelight pertains to the

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1 Pacha Malyadri & S. Sirisha, *A Comparative Study of Non Performing Assets in Indian Banking Industry*, 1(2) INT'L J. OF ECON. PRACTICES & THEORIES 77 (2011).

2 Objectives of SARFAESI Act, *available at* http://www.drat.tn.nic.in/Docu/Securitisation-Act.pdf, last accessed on September 14, 2015.

3 M/S Lakshmi Shankar Mills (P) Ltd v. The Authorised Officer/Chief, AIR 2008 Mad 44.

4 Paam Pharmaceuticals (India) v. India Sme Asset Reconstruction, 2012 VAD Delhi 15.

5 United Bank of India v. Satyawati Tandon, 2010 9 SCR 1.

rights of tenants in a mortgaged property and its implications on the secured creditor's right of enforcement of security interest under the Act. Since the provisions of the Act are silent on this aspect, there have been numerous judgments from different High Courts in this regard.[6] Each High Court has taken a diverse position by interpreting and applying the law distinctly. In the landmark case of Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. & Ors.,[7] the Supreme Court has put to rest conflicting views of various High Courts regarding different issues involving the rights of the tenants and the remedies available to them when the secured creditors exercise their rights under the provisions of the Act.

The Harshad Govardhan Sondagar Case

1. Facts

A group of banks advanced loans to the borrowers and certain premises were kept as securities for the mortgage. When the borrowers defaulted on these loans, the secured creditors classified their accounts as non-performing assets. They were also issued notices under section 13(2)[8] of the Act, giving the borrowers a time period of 60 days to repay their debts. The borrowers failed to repay the debts within 60 days and the secured creditors exercised their right under section 13(4)[9] of the Act to take possession of the borrowers' secured assets. To take possession of the premises, they also filed an assistance application before the Chief

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6 *See* N.P. Pushpangadan & Ors. v. Federal Bank & Ors., AIR 2012 Ker 27; Hutchison Essar South Ltd. v. Union Bank of India, AIR 2008 Kant 14; Trade Well v. Indian Bank, 2007 CriLJ 2544.

7 Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. & Ors., (2014) 6 SCC 1.

8 §13(2), SARFAESI Act, 2002: Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).

9 §13(4), SARFAESI Act, 2002: In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-
(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; □

Metropolitan Magistrate of Mumbai, under section 14(1).[10] But, some people claimed to be the *bona fide* tenants of these properties, and threatened by eviction by the Chief Metropolitan Magistrate, they approached the Bombay High Court.

The petition of the tenants was dismissed by placing reliance on the case of Trade Well and Anr. v. Indian Bank and Anr,[11] wherein a division bench of the Bombay High Court had held that on account of failure of the borrower to repay his liability, when a secured creditor initiates measures under section 13(4) of the Act and approaches the Chief Metropolitan Magistrate for assistance to take possession of the secured assets under section 14, the liability of the borrower crystallizes, and there can be no adjudication by the Chief Metropolitan Magistrate and possession has to be taken by a non-adjudicatory process. At this stage, there is no question of pointing out to the Chief Metropolitan Magistrate that the person who is to be dispossessed is a tenant or not. Aggrieved by this judgment, the tenants filed a Special leave Petition under Article 136 in the Supreme Court.

2. The Decision

The main observations of the Apex Court were:[12]

1. Where the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets "determined".

2. However, section 13(4) of the SARFAESI Act does not mention that a lease made by the borrower in favour of a lessee will stand

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[10] §14(1), SARFAESI Act, 2002: Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—
(a) take possession of such asset and documents relating thereto; and
(b) forward such assets and documents to the secured creditor.

[11] Trade Well and Anr. v. Indian Bank and Anr., 2007 Cri. L.J. 2544.

[12] Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. & Ors, (2014) 6 SCC 1.

determined when the secured creditor decides to take any action under in section 13 of the Act.

The Supreme Court formed 3 categories of tenants in this case: -

1. *Where lease is created by the owner before mortgage of the immovable property*

When before the creation of mortgage, if the property is rented or leased out by the owner or a person competent to do so, the tenant or the lessee will have the right to enjoy the leased property in accordance with the terms and conditions of the original lease, irrespective of whether a subsequent mortgagee of the immovable property or the Bank has knowledge of such a lease or not.[13]

However, by virtue of section 13(4)(d)[14] of the Act, the secured creditor has the right to receive any money due or which may become due, which includes rent payable to the borrower by the lessee.

2. *Where lease is created by the owner after mortgage of the immovable property*

The owner's power to rent out or lease his immovable property comes from section 65A(1)[15] of the Transfer of Property Act, 1882. This can be exercised as long as he is in lawful possession of the property, pursuant to section 65A(2) of the Transfer of Property Act, 1882. Such a lease agreement is binding on the mortgagee or the Bank.

Only after the lease stands determined, under the relevant provisions of section 111 of the Transfer of Property Act, 1882, can the secured creditor proceed against the mortgaged property, for possession etc. It is pertinent to note that a lease doesn't automatically get determined when

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[13] *Id.*

[14] § 13(4), SARFAESI Act, 2002: In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-
(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt. □

[15] § 65A(1), Transfer of Property Act, 1882: Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

the secured creditor initiates action under section 13 of the Transfer of Property Act, 1882. However, section 65A(3)[16] of the Transfer of Property Act, 1882, further provides that the mortgagor has the power to rent out or lease his immovable property, as long as a contrary intention is not expressed in the mortgage-deed.

3. *Where lease created by the owner after receiving notice under section 13(2).*

Section 13(13) of the Act, provides that after receipt of notice pursuant to section 13(2) of the Act, none of the secured assets referred to in the notice, shall be leased or sold by the borrower, without the prior written consent of the secured creditor.[17]

By virtue of section 35 of the Act, section 13(13) overrides the provisions of section 65A of the Transfer of Property Act, 1882 and a lease of a secured asset made by the borrower, after he receives the notice under section 13(2) from the secured creditor intending to enforce that secured asset, will not be a valid lease. This position was reiterated by the Madras High Court in the recent case of Hairoonthai Public School v. The District Collector-cum-Magistrate and Ors.[18]

Hence, in such cases, where the lease is created after receiving the notice under section 13(2), the secured creditor may take over possession of the property from the lessee, as the lease is invalid and void.

The Supreme Court has also held that the Magistrate himself would decide questions like under which category a Tenant falls, or whether the lease/tenancy has been created after the notice under section 13(2) of the Act or whether the lease/tenancy has stood determined according to section 111 of the Transfer of Property Act, 1882 etc. The Magistrate's decision will be binding on the parties and the only remedy for a tenant is to challenge it through a Writ Petition. The Tenants cannot approach the DRT regarding these.

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[16] § 65A(3), Transfer of Property Act, 1882: The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed...

[17] § 13(13), SARFAESI Act, 2002.

[18] Hairoonthai Public School v. The District Collector-cum-Magistrate and Ors, W.P.No. 6857 of 2015 and M.P.No.1 of 2015, Madras High Court.

Issues in Contemporary Scenario

A. Enlargement of Powers of Magistrate Under Sec. 14

The Supreme Court in the Harshad Govardhan case held that under section 14, the Chief Metropolitan Magistrate or District Magistrate will have to deal with questions such as – whether the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with section 111 of the Transfer of Property Act,[19] whether it was one created before or after the mortgage, whether the leases were created after the mortgage and without being against the terms of the mortgage etc. Thus, the effect of the judgment is that what was otherwise a non-adjudicatory process would now partake the character of a quasi-judicial proceeding.[20] This enlargement of powers of the Chief Metropolitan Magistrate or District Magistrate under section 14 poses some difficulty. Section 14(1A) of the Act states that a Chief Metropolitan Magistrate or District Magistrate may delegate his work to a sub-ordinate officer[21] which goes on to show that the Parliament only intended to vest administrative powers with the concerned authorities under the section 14. It is a well settled position of law that though sub delegation of administrative functions is permissible, sub delegation of quasi-judicial functions is impermissible. The apex court has held in numerous instances that there shall be no delegation of judicial or quasi-judicial powers except in cases where there is specific authorisation. Such powers shall not be capable of sub-delegation even if the statute authorises that."[22] So, on a combined reading of the Harshadgovardhan case and section 14(1A), the impression generated is that section 14 of the Act permits delegation of quasi-judicial functions. Though the Supreme Court had the best intentions while delivering the judgment, the interpretation of the Court can potentially lead to a challenge on the constitutional validity of section 14. Therefore, in light of the supposed anomaly, the Parliament should take pre-emptive measures and make suitable amendments in the Act to bring it in conformity with the decision of the Harshad Govardhan case in this regard.

Another criticism is that from a purely legal perspective, the

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19 *Supra* n. 12.

20 M/S. Vision Comptech Integrators v. State Bank Of India & Ors, AIR 2014 Cal 161.

21 § 14(1A), SARFAESI Act, 2002.

22 Regional Director, E.S.I. Corpn. v. Bhaskaran, ILR 1986 (2) Kerala 524.

judgment will have the effect of virtually transforming the Chief Metropolitan Magistrate or District Magistrate into a civil court which goes against the provisions of the Civil Procedure Code, 1908 as it grants no power to a Chief Metropolitan Magistrate or District Magistrate to entertain matters of civil nature. However, such criticism is mostly unfounded as the scope of the function of the authorities is merely extended to quasi-judicial functions and not judicial functions.

B. Remedy From Order of Magistrate

Since the provisions of the Act are silent about the creation of a tenancy in a secured asset, the remedy available to the tenant in case of wrongful action taken by the secured creditor has been a contentious issue. In case the tenants resist attempts of secured creditor to take possession of the secured asset, the secured creditor may file an application under section 14 of the Act. Here, the topic of controversy is whether the remedy from the order of the magistrate lies in front of the DRT under section 17 or in the form of writ under Article 226 before a High Court.

According to the ruling in the Harshad Govardhan case, it was held that the only remedy available to a tenant aggrieved by an order under section 14 was to file a writ under Article 226 before a High Court. The reasoning given was that though a lessee could file an application as an aggrieved under section 17(1),[23] the DRT did not have powers to restore possession to the lessee because section 17(3)[24] only enables the DRT to

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[23] § 17(1), SARFAESI Act, 2002: (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

[24] § 17(3), SARFAESI Act, 2002: If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

restore possession to the borrower and not to any other person. Thus, in effect no remedy was available to the lessee under section 17. On the contrary, it held that though section 14(3) of the Act makes the order of the Chief Metropolitan Magistrate or District Magistrate final, a statutory provision could not take away a power vested by the Constitution.[25] Therefore, any party aggrieved of the order under section 14 could challenge the order under Article 226 of the Constitution.

However, there is an alternate view. Section 17(1) of the Act affords a right to any person who is aggrieved by any of the measures taken by the secured creditor or his authorised officer under section 13(4) to make an application before the DRT. The expression "any person" used in section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under section 13(4) or section 14.[26] Here, it is to be noted that section 14 is merely a continuation of the procedure under section 13 and is on that account impliedly covered under section 17. When an application is made under section 17 of the Act by a person claiming to be a tenant under the borrower or any person under whom the borrower claims title, the DRT has jurisdiction to entertain the application and to enquire into the question as to whether the applicant had any right, title or interest or possession anterior to the creation of the security interest and to what extent such interest could be protected.[27] The Madras High Court has made similar observations on this issue.[28] Further, a combined reading of section 17, section 34[29] and section 35[30] implies that the tenant, if aggrieved by the coercive measures taken by the respondent bank under section 13(4) of the said Act, has the remedy to apply before the DRT.[31]

Further, the fact that specific mention is made for restoration of possession in favour of the borrower does not mean that restoration of possession in favour of a person other than the borrower is impossible

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25 Columbia Sportswear Company v. Director of Income Tax, Bangalore, (2012) 11 SCC 224.

26 United Bank of India v. Satyawati Tondon and Ors., (2010) 8 SCC 110.

27 N.P. Pushpangadan & Ors. v. Federal Bank & Ors, AIR 2012 Ker 27.

28 Sree Lakshmi Products v. State Bank Of India, AIR 2007 Mad 148.

29 § 34, SARFAESI Act, 2002: Civil Court not to have jurisdiction.

30 § 35, SARFAESI Act, 2002: The provisions of this Act to override other laws.

31 Om Prakash Shukla v. State Bank of Bikaner and Jaipur, MANU/RH/0062/2012, S.B. CIVIL W.P. NO. 999/2011, High Court of Rajasthan.

while passing an order under section 17(3).[32] The expressions "pass such order as it may consider appropriate and necessary" in section 17(3) clearly indicates that the DRT' has ample powers to deal with any situation where a recourse taken by the secured creditor under section 13(4) is invalid.[33]

It is submitted that the latter view seems to be more appropriate in light of the objective of establishing DRTs, which was to have a specialised forum for expeditious recovery of debts.[34] Also, a combined reading of section 17(1) and 17(3) leads us to believe that section 17(3) is clearly an instance of casus omissus. A Casus Omissus literally means case omitted. It is basically a situation not provided for by a statute or contract and therefore governed by case law or new-judge made law.[35] Thus, the gap in the provision may be filled by the courts by interpreting the expression "pass such order as it may consider appropriate and necessary" to include restoration of possession to tenants. Though it may be argued that doing so would frustrate the objectives of the Act which was to reduce intervention of courts, it must be borne in mind that the case of tenants is a special one and he/she must be given adequate protection under the law.

Conclusion

The SARFAESI Act, 2002 is a piece of legislation fraught with several gaps which constantly keep on coming up before the courts as a subject matter of interpretation. One of the issues which has recently gained prominence is the status of tenancy created in mortgaged properties. The Supreme Court in the Harshad Govardhan case has brought in much needed clarity in this aspect by clearly laying down the conditions in which a secured creditor cannot dispossess a tenant from the secured asset. Though the decision may prima facie appear to defeat the objectives of the Act, the Supreme Court has taken an even handed approach and tried to bring the creditors and borrowers on a level playing field through this decision. While the ruling has authoritatively laid down

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32 Fakrudheen Haji V.P. v. State Bank of India, ILR 2009 (1) Ker. 357.

33 *Id.*

34 Tripathi, Shivnath, *Debt Recovery Tribunal Vis a Vis Civil Court* (April 17, 2013). Available at SSRN: http://ssrn.com/abstract=2281384 or http://dx.doi.org/10.2139/ssrn.2281384

35 BRYAN A. GARNER, BLACK'S LAW DICTIONARY 247 (9TH ED. W. PUBL'G CO 2009).

the law in various aspects such as requirement of principles of natural justice, categories of tenants who can avail protection etc., the court might have inadvertently created certain absurdities in the law which needs to be addressed. The court's decision is irreconcilable with certain provisions of the Act and is also inappropriate when it comes to the forum of appeal from an order of the Magistrate under section 14. However, on the whole, the decision can undoubtedly be considered as a progressive step towards interpretation of a legislation which has faced scathing criticism for being unduly tilted towards the creditors.

AN OVERVIEW OF ENVIRONMENTAL JURISPRUDENCE IN INDIA

Siddharth Sharma & Suhas K Hosamani[*]

Concern for protection of environment[1] is not a new phenomenon but has existed since the Vedic era. However there has been a trend of unprecedented growth in environmental pollution in the past few decades. This trend has led to a concern that we must not develop industries at the expense of the environment.

The term environment means one's surrounding and includes everything that influences a living being during its life span. The word environment is derived from the French word "Environ" which means "surrounding" or 'en-circle'. Our surroundings include both biotic factors like human beings, plants, animals, and microbes and abiotic factors such as light, air, water, and soil. Thus the environment consists of an indivisible system of physical, chemical, biological, social and cultural elements.

Environmental pollution, undoubtedly, is a wide ranging problem which adversely affects not only human beings, but also other species on the earth. The efforts to curb the rising menace of pollution have been growing worldwide. This paper seeks to present an overview of the environmental protection movement from the British period to the contemporary age.

During the British Period

The early days of British rule in India were days of plunder of natural resources. There was a total indifference to the needs of forest conservation. The onslaught on the forest was primarily due to the increasing demand for supply of teak and sandalwood for export trade. The British Government started exercising control over forests in the year 1806 when they requested the British East India Company, which

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1 The term 'Environment' as defined under section 2(a) of Environment Protection Act 1986 reads as under: "environment" includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property.

already controlled large parts of the coastal regions, to investigate the feasibility of harvesting Malabar teak in Madras to meet the needs of British shipbuilding during the Napoleonic war. The move failed to conserve forests as the appointed Conservator of Forests plundered the forest wealth he was supposed to protect. Consequently, the post of conservator of forest was abolished in the year 1823.

The first step of the British Government concerning the monopoly right over the forest was the Forest Act - 1865. The Act was revised in 1878 and extended to most of the territories under British rule. It also expanded the powers of the State by providing for reserved forest, which were closed to the people, and by empowering the forest administration to impose penalties for any transgression of the provision of Act. The British Government declared its first Forest Policy by a resolution on 9 October 1894.

Besides controlling forest wealth, the British also prescribed various do's and don's in the form of legislative sanctions. Penal laws were enacted making certain acts/omissions offences and prescribing penalties for the same. For example, the *Indian Penal Code, 1860* provided criminal sanctions in the long list of offences which have a direct or indirect bearing on environment. Provisions like Section 268, (public nuisance); Section 269, 284 (Negligence), Section 285 (poisonous substance), Section 286 (Explosive substance), and Section 425-440 (mischief) have an indirect bearing on the environment. Whereas Sections 277 and 278 directly deal with purity of water and air, Section 277 provides that, *"whosoever corrupts or fouls water of any public spring or reservoir so as to render it less fit for which is ordinarily used."* Section 278 makes it an offence for any person to voluntarily vitiate the atmosphere in any place so as to make it noxious.

Besides the criminal law sanctions during the British period, the common law remedies also were internalized like torts of **negligence, nuisance, and strict liability**. It may be further pointed out here that the principle of strict liability imposed a strict and non-delegable duty of a polluter by the Indian Supreme Court.[2]

Though critics point out that the British enacted legislations not with the object of protecting the environment, but with the aim of earning

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[2] *See*, for details, ***M.C.Mehta v. UOI***, AIR 1987 SC 1086.

revenue for themselves it should still be regarded as the first step towards conservation of natural resources.

Post Independence Jurisprudence

Post independent India witnessed a transformation in the policies and attitude of the Government with reference to environmental protectionism. The Constitution of India, which came into force on 26 January 1950, had a few provisions regarding environmental management, particularly under Part IV of the Constitution of India. The most important of all articles is Article 37 which declares that the directive principles contained in Part IV of the Constitution is *"fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"*. Further Article 39(b) provides that "the State shall direct its policy towards securing the ownership and control of the material resources of the community so that they are distributed as to best serve the common good". Article 47 provides 'that the State regard the rising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.' Article 48 directs that 'the State shall endeavor to organize agriculture and animal husbandry along modern and scientific lines and take steps for preserving and improving breeds while prohibiting the slaughter of cows, calves and draught cattle.' Article 49 directs that 'it shall be the obligation of the State to protect every monument or place or object of artistic or historic interest declared to be of national importance from spoliation, disfigurement, destruction, removal, disposal or export as the case may be'.

From the above articles, one may comprehend that the Constitution of India was not environmentally blind as suggested by some eminent jurists like Upendra Baxi. Though the word environment was not expressly used in the Constitution, the objective of the above articles is to conserve natural resources and protect the natural environment[3]

The year 1976 is a milestone in the history of environmental management in India. It was the year in which the Parliament of India, drew upon the commitment made by the then Prime Minister of India, Mrs. Indira Gandhi, at the United Nations Conference on Human

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[3] *Environment Protection Act: An Agenda for Implementation*, (Bombay, N.M. Tripathi) 1987.

Environment held at Stockholm. The views expressed at the Stockholm Conference formed a core part of the basic environmental philosophy of India that found expression in various governmental policy pronouncements in subsequent years. These provisions are as under:-

- Article 48A provides for "Protection and improvement of the environment and safeguarding of forests and wild life. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."[4]
- Inserted the Constitution (forty second amendment) Act, 1976, adding two very important provisions in the Constitution of India i.e. Article 48 A and Part IV A (Fundamental Duties) under Article 51 A(g).

Contemporary Environmental Jurisprudence

The Indian Judiciary, as one of the state organs is charged with the responsibility to protect the Constitution and safeguard the constitutional philosophy. Accordingly, in order to execute its constitutional obligations it has always been prepared to issue 'appropriate' orders, directions and writs against those causing environmental pollution and ecological imbalances. This is obvious in a plethora of cases starting from the **Ratlam Municipality Case.**[5] Environmental values or rights may be constitutionalized either explicitly, by amending the constitution or implicitly by interpreting the existing constitutional language to include environmental protection through judiciary. The Higher Judiciary has interpreted the existing constitutional provision viz., 'the right to life' guaranteed in Article 21 to mean the right to live in a healthy environment.[6] The Court through its various judgments[7] has held that the mandate of right to life includes the right to clean environment, drinking-water and pollution-free atmosphere. The Supreme Court has also made expansive interpretations of Article 48A, 51A(g) read with Article 21 of the Constitution of India.

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4 Inserted by the Constitution (42nd Amendment) Act, 1976.

5 ***Ratlarn Municipality*** v. ***Varchichand***. AIR 1980 SC 1622.

6 Rural Litigation and Entitlement Kendra, ***Dehradun*** v. ***State of U.P.,*** AIR 1988 SC 1037

7 ***Subhash Kumar v. State of Bihar***, AIR 1991 SC 420; v. ***Union of India***. AIR 2000 SC 1997

Protection of Historical Monuments

In the Taj Mahal's case,[8] the Supreme Court issued guidelines that coal and coke based industries in the Taj Trapezium (TTZ) which were detrimental to the Taj should either change to natural gas or be relocated outside TTZ. The Supreme Court also directed that instantaneous steps to supply water to the plants around the Taj be taken by the Forest Department.[9]

In ***Rural Litigation & Entitlement Kendra*** v. ***Slate of U.P.*** case,[10] disorganized limestone quarrying in the Mussorie Hill range of the Himalaya and mine blasting had distressed the hydrological system of the valley. The Supreme Court ordered the closing of limestone quarries in the hills and observed:

> *"This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance".*

Public Health vis-à-vis Right to Life

The Supreme Court has repeatedly emphasized the significance of safeguarding public health. In ***Subba Rao*** v. ***State of Himachal Pradesh,***[11] the Court ordered the shutting of a bone factory which was polluting the environment with its pungent smell upholding the right to health conjunctively with the right to a clean environment. In the landmark case of ***Municipal Council, Ratlam*** v. ***Vardhichand & Others,***[12] the Court condemned the failure of local authorities to provide the essential amenity of public conveniences that drives the miserable slum-dwellers to the streets. Similarly, in 2001, the Supreme Court imposed ban on smoking of tobacco in public places all over the country[13] as it harms not only smokers but also non-smokers.

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8 ***M.C.Mehta v. Union of India,*** AIR 1997 SC 734; *See* also ***M.C.Mehta v. Union of India,*** AIR 1999 S.C. 3192

9 ***M.C.Mehta v. Union of India,*** (2001), 9 SCC 520

10 ***Rural Litigation & Entitlement Kendra v. Slate of U.P.,*** AIR 1985 SC 652; *See* also AIR 1988 SC 2187

11 AIR 1989 SC 171.

12 M.C.Mehta v. Union of India (1996) 4 SCC 351.

13 ***Murli S. Deora*** v. ***Union of India*** (2001) 3 SCC 765.

International Environmental Jurisprudence and the Indian judiciary

The formulation of certain new principles and declaration of new doctrines as part of domestic legal system for the protection of the environment is a remarkable achievement of the Indian judiciary. Some such principles of Indian origin which were later incorporated into the international legal order are:

- Principle of Absolute Liability
- Polluter Pays Principle
- Precautionary Principle
- Doctrine of Public Trust &
- Doctrine of Sustainable Development

Principle of absolute liability

The Supreme Court of India formulated the absolute liability principle for harm caused by hazardous and inherently dangerous industries by re-interpreting the scope of the power under Article 32 of the Constitution of India. Absolute liability is a newly formulated doctrine free from the exceptions to the strict liability rule of the Common Law principle of England. This rule was evolved in the case of ***M.C. Mehta*** v ***Union of India*** which is popularly known as the **'Oleum gas leakage case.'** The Court re-examined and reiterated the principle of absolute liability in the case of Indian Council for ***Enviro Legal Action*** v. ***Union of India.***[14] This case is popularly known as the 'Sludge's Case. The principle of absolute liability has now to some extent, attained the status of a statutory liability. The Public Liabilities Insurance Act, 1991 is one such law, which provides that there is no burden on the claimant to plead and establish that the death, injury or damage in respect of a claim was due to a wrongful act, neglect or default of any person. The National Environment Tribunal Act, 1995 is another significant legislation which provides strict liability for damages arising out of accidents that occur while handling hazardous substance.

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[14] AIR 1996 SC 1466.

Polluter Pays principle

It is now recognized it is necessary to devise various kinds of measures to prevent and minimize industrial pollution. Polluter Pays Principle (PPP) which was originally considered as an economic and administrative measure to restrain and control the pollution problem, has now become a powerful legal tool to combat environmental pollution and associated problems.

The Supreme Court for the first time applied the polluter pays principle explicitly in the case of Indian Council for ***Enviro-Legal Action*** v. ***Union of India***.[15] The Court held that the polluting industries are "absolutely liable to compensate for the harm caused by them to the villagers in the affected area, toe the soil and to the underground water and hence they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas."

In the case of ***Vellore Citizen's Wdfare Forum*** v. ***Union of India***[16] the Court declared that the polluter pays principle is an essential feature of sustainable development. The Court observed that the polluter pays principle ensured that the absolute liability for harm to the environment extents not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. It also observed that the polluter pays principle has been accepted as customary international law and hence it becomes a part of the law of this country.

The Principle was later applied in the case of ***M.C. Mehta*** v. ***Kamalnath***.[17] In this case the Court held that the Span Motel interfered into the natural flow of the river Beas by trying to block the natural relief / spill channel of the river. Hence, the Motel was directed to pay compensation by way of cost for the restitution of the environment and ecology of the area in consonance with the polluter pays principle.

Precautionary Principle

Before 1972, there was a concept of 'assimilative theory' in operation at the international level. It is premised on the understanding that the environment absorbs the shock of pollution but beyond a certain

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15 (1996) 3 SCC 212.
16 (1996) 5 SCC 647.
17 (1997) 1 SCC 388.

limit the pollution may cause damage to the environment requiring efforts to repair it. Thus, according to the assimilative theory, the role of law will begin only when this limit is crossed. However pollution cannot wait for action to be postponed for investigation of its quality, concentration and boundaries. So there was a shift from the principle of assimilative capacity to the precautionary principle. In the case of ***Vellore Citizens Welfare Forum*** v. ***Union of India*** the 'recautionary principle' was declared to be an essential feature of sustainable development. This principle has been incorporated into municipal law to include:

- Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.
- Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- The "onus of proof' is on the actor or the developer / industrialist to show that his action is not dangerous to the environment.

Invoking the principle in the case of ***M.C. Mehta*** **v.** ***Union of India***, the Court observed that "the atmospheric pollution in TTZ has to be eliminated at any cost. Not even 1% chance can be taken when-human life apart-the preservation of a prestigious monument like the Taj is involved." Therefore the industries identified by the Pollution Control Board as potential polluters, had to change over to natural gas as an industrial fuel and those who were not in a position to obtain has connections should stop functioning in TTZ.

Doctrine of Public Trust

The Supreme Court's decision in the case of ***M.C. Mehta*** **v.** ***Kamalnath***[18] is an excellent exposition of the Doctrine of Public Trust. The Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The

[18] (1997) 1 SCC 388.

Doctrine enjoins upon the Government to protect the resources for the enjoyment of the' general public rather than the permit to use for private ownership or commercial ownership.

According to Joseph L Sax, the Public Trust Doctrine imposes the following restrictions on governmental authority:

- Firstly the property subject to the Trust must not only be used for a public purpose, but it must be held available for use by the general public.
- Secondly, the property may not be sold even for a fair cash equivalent and
- Finally, the property must be maintained for particular types of uses.

Doctrine of Sustainable Development

'Sustainable development' means development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.[19]

In the case of **Rural Litigation and Entitlement Kendra v. State of U.P**[20] (Popularly known as Doon Valley case) the Court reaffirmed and reiterated that development is not antithetical to environment. The Court observed that:

> *"we are not oblivious of the fact that natural resources have got to be tapped for the purposes of the social development but one cannot forget at the same time that tapping of resources have to be done with the requisite attention and care so that ecology and environment may not be affected in any serious way, there may not be depletion of water resources and long term planning must be undertaken to keep up the national wealth. It is always to be remembered that these are permanent assets of mankind and or not intended to be exhausted in one generation."*

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19 See, Brundtland Commission Report "Our Common Future", 1987.

20 AIR 1985 SC 652.

In **Indian council for Enviro-Legal Action v Union of India**[21] (popularly known as the Coastal Zone Management case) it was held that:

> *"While economic development should not be allowed to take place at the cost of ecology or by causing wide spread environmental destruction and violation, at the same time, the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice-versa, but there should be development while taking due care and ensuring the protection of environment."*

Critical Analysis and Conclusion

It is noted that the ***"Environment"*** is vast in its meaning and it is very difficult to define it in its final form. Even the great environmentalists who have contributed to the protection of environment have not defined the term environment with required precision. The degradation in environmental quality has been evidenced by enormous pollution, loss of vegetal cover and biological diversity, excessive accumulation of harmful chemicals in the atmosphere and in food chains, growing risks of environmental accidents and threats to life support systems.

The judiciary, particularly the Apex Court has exhibited utmost dynamism and taken proactive steps in safeguarding human lives, plants, forests, wildlife, other natural resources including flora and fauna realizing their significance in sustaining life on the earth. It has used various tools, i.e. Vedic literature, common law principles/directives, constitutional provisions and the principles of doctrines of international environmental law in order to accord an expansive interpretation of various provisions. Nevertheless, the Court's sensitivity towards the protection of the environment has only laid the preliminary foundation for the legal framework to be built.

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[21] (1996) 5 SCC 281.

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