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EDITORIAL

"I find the great thing in this world is not so much where we stand, as in what direction we are moving: To reach the port of heaven, we must sail sometimes with the wind and sometimes against it- but we must sail, and not drift, nor lie at anchor."

- Oliver Wendall Holmes Sr.

The life of a student of law and society is one filled with a new lesson every day. In this ever changing social setting, new avenues for learning are opening up constantly. Critical and analytical thinking elevates one to a higher position of knowledge and awareness. In a country like India, we are at a juncture where we need critical and objective thinkers to pave the way ahead. The onus is on the lawyers, policy makers and politicians of tomorrow to lead the path ahead.

An academic article looks at how things stand today and places it on a scale against the ideal. It then takes up the lapses and in an objective manner draws conclusions that either concur or dissent with status quo. The primary purpose of the NUALS Law Journal is to provide a platform for free flow of structured, original and well researched thinking. Every article is relevant,

objective as much as possible, and reliable. We try to publish articles from diverse themes to increase the learning of an interested reader.

The process of evaluation that every article goes through before publication is tedious, thus ensuring high standards. It aims to initiate conversations that are relevant and looks at the impact even the smallest of changes of policy has on a person. The sheer awe of grasping new concepts, or trying to answer questions that lie in the 'grey area' help the editors and the readers grow organically.

We strive to stick to the core of the journals principles- diversity and open discussion from all aspects of law, whether of national or international importance while maintaining highest standard of professional integrity. The journal is the result of the concerted effort by the editors, other peer reviewers, faculty at NUALS and the authors. At the end of it, the finished product is a source of pride for everyone who has worked for it.

I would like to thank the members of the Editorial Board, who have devoted valuable time for the journal throughout the rigorous review process. It is indeed our greatest pleasure to have Mr. Hari S Nayar as our faculty advisor. He has always been a source of motivation and support and encouraged everyone to take initiative. I also thank Sheeba S Dhar and Hari S Nayar for

peer reviewing the articles for the journals. I also thank our advisory board and the Vice Chancellor for their continued guidance and support.

Karthik V Venkatesh

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CONTENTS

Tax, Antitrust and Cross Border Mergers: An Interdisciplinary Perspective

-Saurav Agarwala & Navaneet Desai[*]

Abstract

The Ministry of Corporate Affairs through a notification dated April 13, 2017 validated cross-border mergers. This breakthrough was followed by the RBI notifying the Foreign Exchange Management (Cross Border Merger) Regulations, 2017 on 20th March, 2018. Through both these decisions, the Government's steps to relax the conditions in relation to inbound mergers and sanction the creation of outbound mergers, have created a butterfly effect that is no longer restricted to just mergers as a study, but will also affect the study of competition policy and the tax scheme of the country. This paper, firstly, attempts to discern the antitrust ramifications of such relaxations in cross border mergers, and in particular, the outbound ones by highlighting certain nascent yet potentially complex issues, such as extra-territorial jurisdiction, that these mergers might encounter and endeavours to suggest certain remedies to overcome them. Secondly, on the taxation front, this paper deals with the consequences that these cross-border mergers will have on the tax liabilities of the merged company and the shareholders involved with it. Moreover, it points out the other nemeses which would make outbound mergers a nightmare from the tax perspective. Finally, it also suggests necessary amendments which would be required to make outbound mergers tax neutral under this new regime.

Keywords: Cross-border mergers, antitrust, jurisdiction, tax neutral, implementation.

[*]Fifth Year Students at Symbiosis Law School, Pune. The authors can be contacted at srvagarwala@gmail.com

I. Introduction

The recent notification[1] of Section 234 of the Companies Act, 2013 along with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018[2] (*hereinafter* "Cross Border Merger Regulations"), which was cheered on by India Inc., opened the gateway to outbound mergers (i.e., a merger of an Indian company into a foreign company situated in certain permitted jurisdictions with such foreign entity as the surviving entity) and relaxed inbound mergers[3](i.e., a merger of a foreign company into an Indian company with the Indian company as the surviving entity) in India. At that time, little did these companies know about the Pandora's box which lay ahead, waiting for them to open it. This paper attempts to gauge the scale of a select few troubles (in the form of Tax and Antitrust) that might hound any merger (read adventure) seekers that might unsuspectingly wander into the dense regulatory jungle that is India.

II. Outbound Mergers and Antitrust – Unchartered Indian Waters

In the world of cross border mergers, the Indian waters, till now, have remained densely murky with a few inbound mergers executed under the

[1]*Enforcement date of Section 234 of Companies Act, 2013*, MCA Notification No.SO1182(E) (13/04/2017), available athttp://www.mca.gov.in/Ministry/pdf/section234Notification_14042017.pdf , last seen on 21/12/2017.
[2]*Foreign Exchange Management (Cross Border Merger) Regulations, 2018*, RBI Notification No. FEMA.389/2018-RB (20/03/2018), available at https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11235&Mode=0, last seen on 02/08/2018.
[3]Ibid

watchful, all-seeing lidless eye of the Government.[4] Now, it would be a folly to assume that with the opening of the outbound merger gates, the mist would clear. Even if it did, antitrust would be one of the first creatures that it would need to face off everywhere against, as such is the nature of the beast that it would hound the merger across all the continents that the latter "effects"[5]. And the credit for unleashing the beast goes to none other than Section 234, under which, one would have to meet the compliance requirements under Sections 230-232, such as notifying sectoral regulators including the CCI. Though recently, the government, through another notification[6], waived off the 30 day notification trigger deadline for reporting a proposed "combination", which it had earlier strictly enforced as seen in the Jet/Etihad case[7], which had caused increasing gun jumping panic attacks, earning it considerable flak and thereby, rubbed off a target on its back.

Host Country Criteria

The pre-requisite for such hounding, according to the new Rules[8] notified by the government, is that the host jurisdiction of such a foreign company permits such schemes with an Indian company. Also, only those host countries would be allowed:

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[4]*Outbound Acquisitions by India Inc*., Nishith Desai Associates, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Outbound_Acquisitions_by_India_Inc.pdf , last seen on 23/12/2017.

[5] V.Dhall,*The Indian Competition Act*, 530-31 in *Competition Law Today: Concepts, Issues, and the Law in Practice* (Vinod Dhall, 1st ed., 2007).

[6]*Notification regarding exemption from notifying a combination within thirty days mentioned in Section 6(2) of the Competition Act, 2002*, MCA Notification S.O. 2039 (E) (29/06/2017), available at http://www.cci.gov.in/sites/default/files/notification/S.O.%202039%20%28E%29%20-%2029th%20June%202017.pdf , last seen on 21/12/2017.

[7] Etihad Airways PJSC/Jet Airways (India) Limited, Combination Registration No. C-2013/12/144, (Competition Commission of India, 05/02/2014).

[8]Rule 25A, Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

(i) whose securities regulator is a member of the International Organization of Securities Commission's Multilateral Memorandum of Understanding (or a signatory to bilateral Memorandum of Understanding with Securities Exchange of India); or

(ii) whose central bank is a member of the Bank for International Settlements (BIS); and

(iii) identified in the public statement of the Financial Action Task Force (FATF) as regards certain specified matters.

Generally, the provision encompasses a scheme of merger providing for, *inter alia*, payment of consideration, including by way of cash or country specific/ global depository receipts or a combination of those which gives rise to the Tax trouble discussed later on.

Cross Border Mergers and Jurisdiction of Antitrust Authorities

A fundamental issue arising as a result of cross-border mergers is the fact that the merger must be reported to, and approved by, the authorities in more than one country and, as a result, a possibility of inconsistent decisions in different jurisdictions arises.

Cross-border mergers can be defined either on the basis of the "structure" or the "effect" of the merger.[9] A merger can be construed to be a "cross-border" one in structure if it pertains to companies established in more than one jurisdiction.[10]An "effect" merger is one where, regardless of where the

[9]*Cross-Border Merger Control: Challenges for Developing and Emerging Economies*, Organisation on Economic Co-operation and Development, available at http://www.oecd.org/competition/mergers/50114086.pdf, last seen on 23/12/2017.
[10]Ibid.

merging companies were incorporated, the merger affects the markets in more than one jurisdiction.

The Draft FEMA Regulations[11] define 'Cross border merger' as "*any merger, demerger, amalgamation or arrangement between Indian company(ies) and foreign company(ies) in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013"*.Thus, these regulations envisage a cross-border merger both on basis of structure and effect.

As per the theory of harm, it is generally accepted that two dimensions relating to an amalgamation need to be reviewed by the Competition/Anti-trust Authorities[12]:

i. whether the amalgamation leads the merged firm to *unilaterally* exercise market power and raise prices (i.e., leading to *single firm dominance) (i.e., the unilateral effects))*, and
ii. where though the amalgamated firm may not unilaterally increase prices, whether the amalgamation leads to such industry conditions where the scope of collusion (called *coordinated effects*) between the remaining firms in the market increases *(*i.e., leading to *joint/collective dominance) (the pro-collusive effects)).*

Now, the objective of the Competition Act, 2002 ("Act"), *inter alia*, is to regulate mergers& acquisitions activity in India in order to protect, enhance

[11]Supra 2.
[12] M. Motta, *Competition Policy: Theory and Practice*, 39 (2004).

and preserve competition in the markets and prevent creation of monopolies that are detrimental to the consumers.[13]

The Act provides for a compulsory, ex ante, suspensory regime, which needs combinations breaking the prescribed thresholds of assets or turnover ("Jurisdictional Thresholds") under the Act, to be notified to the CCI for its approval.[14] Based on the threshold trigger, the CCI commences an investigation of whether a potential merger is likely to cause an 'appreciable adverse effect on competition ("AAEC") within the relevant market in India'.[15]

Furthermore, the Act[16] confers upon the CCI extra-territorial jurisdictional power to render the Act applicable to Combinations taking place outside India and to parties located outside India, if such mergers have or are likely to have, an appreciable adverse effect on competition in the relevant market in India. Earlier, Schedule I of the Combination Regulations exempted those mergers from notification requirement, which took place entirely outside India with negligible local nexus and effect on markets in India ("Offshore Exemption"). However, by way of amendments[17] to the Combination, the said exemption has been omitted and the criteria for notification of offshore transactions is based on the Jurisdictional Thresholds being met. However,

[13] Preamble, The Competition Act, 2002.
[14] S. 5, The Competition Act, 2002.
[15] S. 6, The Competition Act, 2002.
[16] S. 32, The Competition Act, 2002.
[17] *The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2014*, MCA Notification No.CCI/CD/Amend/Comb.Regl./2014 (28/03/2014), available at http://www.cci.gov.in/sites/default/files/regulation_pdf/march%202014_0.pdf , last seen on 28/12/2017.

Section 32 has rarely been invoked by the CCI, with the Titan case[18] being the only prominent case seeing the former's application.

Co-operation in Antitrust Investigations

But what happens when the criteria for determining whether a merger is hit by antitrust scrutiny itself is different?

"Like other antitrust agencies we make our assessment of a merger or antitrust case based on its impact on our jurisdiction, and not on the nationality of the companies. This is exactly what the U.S. antitrust agencies, the Justice Department and the FTC, do."

- Mario Monti

It should be noted that as per European Union Merger Regulations[19] ("EUMR"), transactions which may result in concentrations with a community dimension, would result in the European Commission having the exclusive jurisdiction to investigate and recommend action under the EUMR. A 'community dimension' here is a broad criterion which is generally understood to mean if such a transaction may raise competition concern thatmay have an impact on the European community. Now what if its decision differs from that of the CCI?

The principal anti-trust law in the United States is under the Hart-Scott-Rodino Act (HSR Act), wherein certain combinations are subject to prior

[18]Titan International Inc./Titan Europe Plc, Combination Registration No. C-2013/02/109, (Competition Commission of India, 02/04/2013).
In Titan International Inc./Titan Europe Plc ("Titan International Case"), the transaction required notification to the CCI since Titan International Inc.'s ("Titan") acquisition of the entire share capital of Titan Europe Plc ("Titan Europe") led to an indirect acquisition by Titan of Titan Europe's 35.91 per cent stake in Wheels India Limited.

[19]*Control Of Concentrations Between Undertakings*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN , last seen on 29/12/2017

approval if they fall within certain predefined threshold levels based on the revenue of the parties involved and size of the transaction.[20] The rules prescribed under the HSR Act also provide certain exemptions which may be available depending on the specifics of the transaction. The key administrative watchdogs responsible for administering the abovementioned Act are the US Federal Trade Commission ("FTC") and the US Department of Justice ("DOJ"). So, its laws and criteria to judge a combination affecting competition, vary to a certain extent when compared to India.

Thus, another fundamental area of concern with respect to cross-border combinations is the potential for conflict in antitrust regimes of various jurisdictions. A common problem of multiplicity of jurisdictions is the possibility of inconsistent decisions by two different antitrust authorities when investigating the same combination transaction. For example, the CCI is supposed to have due regard to the factors listed out under section 20(4) of the Act. There may be instances where the CCI may even permit cross-border combinations affecting competition, when the pro-competitive effects to the economy outweigh the negative ones, if any. However, the same transaction may not be allowed by the corresponding competition authority under whose jurisdiction the foreign company falls. What may thus be regarded as anti-competitive and illegal in one jurisdiction may not be regarded the same in another jurisdiction.

The answer to all these problems is one – Co-operation between the agencies.

[20]Supra 4.

"In today's world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day."[21]

One proposal to resolve this issue is adopting a "Coordinating Agency Model"[22] wherein the various antitrust authorities involved in a particular cross-border transaction cede jurisdiction to an international agency and this has worked to a certain extent when analysing certain blocks such as ASEAN, COMESA, MERCORSUR, EU, etc. Such an agency would undertake a scrutiny and submit its findings and recommendations to the various local authorities involved. Such a model would not only prevent divergent decisions but would also lay down a harmonizing standard to circumvent the shortcomings in various antitrust laws.

It is also proposed that to enforce Indian competition law effectively in case of cross-border combinations, the CCI should enter into bilateral agreements and treaties with other jurisdiction authorities keeping in line with its power to do so under the proviso to section 18 of the Act. The objective of such agreements is to promote, preserve and protect inter agency cooperation and exchange of information between concurrently reviewing antitrust agencies. It would also serve to lessen the possibility of differences between them in the application of their competition laws. The US-EU Merger Working Group[23] is one of many such examples of a bilateral agreement wherein the major terms of this agreement deal with the timing of the scrutiny by the US

[21]C. A. Varney, *International Cooperation: Preparing for the Future*, Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (21/09/2010).
[22]Supra 9.
[23]*Best Practices on Cooperation in Merger Investigations*, available at http://ec.europa.eu/competition/international/bilateral/eu_us.pdf , last seen on 31/12/2017.

and EU anti-trust agencies, collection and evaluation of evidence, discussing their respective analyses at various stages of investigation, etc.

It is also key to note that confidentiality would be the cornerstone of such agreements and utmost care must be taken while investigating these companies and keep a lid on unwanted leaks which might put a thaw in the potential merger

Merger Remedies

Another aspect in merger control concerns "merger remedies". It is arguable, that despite certain apprehensions about the effects of a combination on competition, the antitrust authorities may approve certain mergers, if the remedies offered by the parties are found acceptable by the concerned anti-trust authority.[24]The US and European Competition Authorities explicitly incorporate many of these aspects in their Merger Review Guidelines[25].

Remedies may be either structural (i.e. some form of divestiture) or behavioural (i.e. which may include licensing of intellectual property rights, removal of exclusivity clauses in contracts with customers or price regulation measures) in nature. Competition authorities overwhelmingly prefer structural remedies over behavioural ones. Structural remedies are considered to have greater effectiveness than behavioural remedies in addressing the competition problems identified during merger appraisal. But it is also true that most countries, especially developing nations, find it practically difficult to implement and enforce such remedies due to lack of

[24]Supra 12.
[25]A. Goldberg, *Merger Control in Competition Law Today*, 93in *Competition Law Today: Concepts, Issues, and the Law in Practice* (VinodDhall,1st ed., 2007).

availability of funds. India, in this regard is lucky to have a comparatively strong framework to address these issues.

III. Outbound Mergers and the Present Tax Structure- Need for Immediate Reforms

A wide range of tax critters have also been unleashed as a result of this notification. In furtherance of this notification, any outbound merger would involve unfavorable tax liabilities on the transferor company and its shareholders. This necessitates, according to the authors, an amendment to the income tax scheme of the country so as to align itself with the decision of encouraging outbound mergers.

Capital gains, being one of the sources of tax, are applicable on all transactions that lead to any profits or gains arising from the transfer of a capital asset.[26] This source of income is backed by Section 45 of the Income Tax Act, 1961 (*hereinafter* "Act").[27] Since most amalgamations schemes involve transfer of capital assets and shares from the transferor company to the transferee company, it is obvious that capital gains tax would thus, be attracted under the Act for any merger deal.[28] However, under international jurisprudence and international practice,[29]tax on national and international

[26] S. 45, The Income Tax Act, 1961.
[27]Ibid.
[28]Kusum, *Tax Implications on Mergers and Acquisitions Process*, 3 Journal of Business Management & Social Sciences Research (JBM&SSR) 62,62 (2014)available at https://www.borjournals.com/a/index.php/jbmssr/article/download/1703/1064, last seen on 01/01/2018.
[29]Korea, for example, enacted several measures which permit capital gains taxes to be deferred and has reduced registration taxes. Japan introduced deferrals of capital gains taxes applied to stock exchanges, stock transfers and corporate de-mergers. The United States has a "tax-free" corporate reorganisation system which does not recognise gains or losses in the process of corporate reorganisations, as long as certain conditions are met. Germany

mergers are generally waived off. Following the same, Section 47 of the Indian Act[30] provides mergers resulting in the formation of an 'Indian Company' as an exception to tax on capital gains. Clauses (vi) and (vii) under Section 47 of the Act, deal with mergers and make transfer of capital assets and shares as an exception to capital gains tax. However, this exception is given only if the following conditions are fulfilled:

i. Firstly, the amalgamated company should be an Indian company.

ii. Secondly, it is essential that the merger falls within the definition of 'amalgamation' described under the Act.[31]

Thus, if the resulting company of a merger is an 'Indian Company' then, Capital Gains tax would not be charged upon the transfer of assets and shares, provided the other conditions required under the definition of "amalgamation" are complied with by the merging and the merged entity.[32] Thus, it is clear through the reading of the Section that such an exception is not available to mergers which result in the formation of a 'Foreign Company'. As a necessary conclusion, since inbound mergers involve formation of an Indian Company, the same would be covered by the

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introduced a comprehensive "tax-neutral" corporate restructuring system in1995. Under the Business Reorganisation Act, certain types of corporate restructuring, including mergers and de-mergers (spin-offs, split-offs and split-ups), are simplified. A complementary Business Reorganisation Tax Act enables qualifying firms to defer capital gains taxes when they combine or divide. Germany also eliminated, as from 2002, corporate taxes on capital gains when stocks of subsidiaries are sold, provided the shares are retained for more than one year (German Federal Ministry of Finance, 2000); *OECD Business and Industry Policy Forum Reports on Proceedings*, available at https://www.oecd.org/sti/ind/2731209.pdf , last seen on 25/12/2017.

[30] S. 47, The Income Tax Act, 1961.

[31] S. 2(1B), The Income Tax Act, 1961.

[32] *Mergers & Acquisitions in India*, Nishith Desai Associates, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf, last seen on 31/12/2017.

exception under Section 47 and no tax on capital gains would be imposed upon it.[33] Favorable treatment 'only' in cases of resulting Indian Companies was not a problem until recently, since cross border mergers resulting in the formation of a foreign company or an Outbound Merger was not allowed under the Act.[34] Since, such reorganizations were not allowed; any taxation issues related to the same were not a concern.

Bone of Contention - Tax Neutrality

However, after the recent notification, the law needs to be modified in order to make cross border outbound mergers, tax neutral. As mentioned earlier, under an outbound merger, assets and shares are transferred from the Indian Company to a Foreign Company and hence as a consequence, capital gains would arise on the part of the Indian Company i.e. the transferor company. This income is not provided as an exception under Section 47 and tax would be applicable at the requisite rate.[35] Consequently, the capital gains arising from these mergers may result in tax liabilities in the hands of the shareholders of the transferor company as well as at the corporate level. This lack of tax neutrality may limit the attractiveness of outbound mergers in India, despite the Act now allowing such mergers.

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[33] R. Begur and A.Karmakar, *Taxation Aspects In Cross Border Mergers*, Mondaq, http://www.mondaq.com/india/x/540748/Corporate+Commercial+Law/Taxation+Aspects+In+Cross+Border+Mergers,last seen on 25/12/2017.

[34] R. Shroff & M. Varghese, *A New Dawn for India's Cross Border Merger Regime*, India Corporate Law, available at https://corporate.cyrilamarchandblogs.com/2017/05/new-dawn-indias-cross-border-merger-regime/ , last seen on 26/12/2017.

[35] *Provision Enabling Cross-Border Mergers Notified: India Further Integrates Into The Stream Of Globalization*, Nishith Desai Associates, available at http://www.nishithdesai.com/information/news-storage/news-details/article/provision-enabling-cross-border-mergers-notified-india-further-integrates-into-the-stream-of-global.html , last seen on 26/12/2017.

Further, the problems would add up since the Indian tax authorities may be concerned at what they may perceive to be an erosion of the Indian tax base as a result of outbound mergers. This may encourage the tax authorities to raise a high number of objections against sanction to such mergers. India, in the year 2017, saw the onset of the General Anti-Avoidance Rule ("GAAR") regime, which has been implemented from April 1, 2017.[36] Under the GAAR, tax authorities have been given the power to scrutinize arrangements and invalidate them as an 'Impermissible Avoidance Agreement' ("IAA") where they lack commercial substance, thus resulting in denial of the tax benefit under the provisions of the Act or tax treaty.[37] Under the Income Tax Act, the GAAR authorities have been empowered to regularize mergers and amalgamations irrespective of their residential or legal status (i.e. resident or non-resident, corporate entity or non-corporate entity).[38] Further, the provisions of GAAR can be invoked only if tax benefit arising to all parties to the arrangement exceeds Rs. 30 million in the relevant financial year.[39]

The recent signing of the Multilateral Tax Instrument (MLI)[40] may force India to replace its preamble in every Double Taxation Avoidance Agreement ("DTAA") and make 'Treaty Abuse' a part of the preamble.[41]Thus, along with the problem of not getting tax neutral treatment,

[36]*GAAR, POEM to come into effect from April 1: Government*, The Indian Express (02/02/2017), available at http://indianexpress.com/article/business/economy/gaar-poem-to-come-into-effect-from-april-1-govt-4504696/ , last seen on 26/12/2017.
[37] S. 96, The Income Tax Act, 1961.
[38]Supra 33.
[39]Rule 10U, Income Tax Rules, 1962.
[40]*India, 66 other nations sign multilateral BEPS convention*, The Financial Express (09/06/2017), available at http://www.financialexpress.com/economy/india-66-other-nations-sign-multilateral-beps-convention/709002/ , last seen on 26/12/2017.
[41]Article 6, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, available at https://www.oecd.org/tax/treaties/multilateral-

the problem of getting multiple scrutinizes would also come up as a problem to the companies going for outbound mergers.

Compliances Galore

Section 230(5) of the Companies Act, 2013, as stated earlier, requires sanctions from various authorities before a merger deal is sanctioned by the National Company Law Tribunal ("NCLT").[42] This Section also requires the scheme to be sent to the Income Tax Authorities for review. The tax authorities under this section have to raise their objections/ comments within the period of next 30 days.[43] After which, the NCLT may sanction the merger. A recent notification by the CBDT clarified that where any court or authority such as the NCLT has "*explicitly and adequately*" considered the tax implication of an arrangement, the GAAR will not apply to such an arrangement.[44] It may seem as a notification in favour of merging companies, however deep within it may backfire the merging entities. This is because, very often NCLT does not specifically address the question of tax implications in case of a merger and generally calls the merger to be appropriate. In a circumstance wherein a merger of an outbound company leads to a tax benefit of more than 30 million and the merger order does not specifically answer the tax liabilities, then the Income Tax Authorities can invoke the GAAR provisions even after the merger has been sanctioned by

convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf , last seen on 28/12/2017.

[42]S. 230(5), The Companies Act, 2013.

[43]Ibid.

[44] *Clarification on implementation of GAAR provisions under the Income Tax Act, 1961*, MOF Circular No. 7 (27/01/2017), available at http://www.incometaxindia.gov.in/communications/circular/circular7_2017.pdf, last seen on 28/12/2017.

the NCLT. Though this will remain to be a general problem for mergers of all types, the fact that it is an outbound merger (higher chances of base erosion and profit shifting) would call upon the GAAR authorities to raise frivolous objections to the merger, further discouraging any outbound merger.

Tax Issues Post Amalgamation and Payment of Taxes

The next concern which appears is, where will the activities of the former Indian Company be taxed after the Company is merged into a foreign entity. Under the Indian Income Tax Act, two entities are charges to tax- i. residents and ii. non-residents till the limit of activities that are conducted in India.[45] The recently applied Place of Effective Management ("POEM") test is used to determine whether the particular company is a resident company or a non-resident company. For an outbound merger, it is critical to see that the organization in India doesn't fulfill the POEM test so that the "foreign" amalgamated company is not called a "resident" company for Indian Income Tax purposes.

As mentioned earlier, India has recently signed MLI. Though the Instrument would not be applicable in the recent times due to the lack of ratification and the number of safeguards provided within the Treaty, the same would definitely affect all the DTAA's in the long run. As a consequence, it will also affect the tax liability of multinational companies. Under the MLI, Article 4 provides that in case of dual resident entities, the competent authorities of the competing jurisdictions shall endeavor to determine by mutual agreement the residency of such person for the purposes of the

[45] S. 9, The Income Tax Act, 1961.

Covered Tax Agreements.[46] Thus, under the new regime of MLI, both the countries can sit together to determine whether the enterprises can be considered to be a resident of a particular country and taxed in that country. Though the authorities from all the relevant countries would be bound to sit and decide whether the particular organization is a resident or not, the company involved would not have any right to present its own case and defenses.[47] This may lead to unfavorable decisions wherein the company might be forced to pay the tax in a place that has a higher tax rate.

The residential status of Permanent Establishment ("PE") is also a problem since once such an outbound merger is completed; the operations of the Indian transferor company will be carried out by the surviving foreign entity, either directly or through a branch. In India, a non-resident is also taxed if the same constitutes as a Permanent establishment in India. However, the tax liability of the Company would be limited to the activities of the PE. If the organization fulfills the Permanent Establishment test, then the activities of the PE would be charged to taxes in India as well as the other country and if a DTAA exists, then the company would receive a credit for the same. So, for example if the Company is based in Mauritius, then the company would be taxed in Mauritius for its global activities and would be taxed in India for its activities conducted in India. Mauritius under the DTAA would then give credit to the company of the amount it has paid as tax in India. But however, if the merged company is based in a country with whom India does not have a DTAA, then it may happen that the Company's activities would be taxed in

[46]Article 4, Supra 41

[47]*India's MLI Positions*, Nishith Desai Associates, available athttp://www.nishithdesai.com/fileadmin /user_upload/pdfs/Research_Papers/India_s_MLI_Positions.pdf , last seen on 29/12/2017.

India as well as the other country. Consequently, there is a significant risk that the tax authorities may characterize the India presence of the surviving foreign entity as constituting a PE in India. If the surviving entity in India is declared as a PE, the organization would be charged at a rate of 40% tax.

Further, Article 10 of MLI provides for triangular PE's wherein the provision prevents company from using another PE established in a favorable tax country from being used as a tool to prevent the PE in the residence country to be considered as a PE. This may allow the authorities to further question any arrangement and declare surviving entities as PE.

Moreover, a perusal of the recently notified Cross Border Merger Regulations leads one to infer that in case of outbound mergers, any office of the Indian company in India may be deemed to be a branch office of the foreign company[48] and thus it is more vulnerable to be considered as a Permanent Establishment/ business connection of the foreign company, in which case, the profits attributable to such PE / business connection may be taxable at a higher rate of 40 %, increased by applicable surcharge and cess.

IV. Conclusion

The Government still needs to cover more than a mile when it comes to encouraging outbound mergers within the present Indian regime. Though the steps taken are in consonance with the recommendations of the Dr. Jamshed J. Irani Expert Committee on Company Law, which first suggested implementation of cross-border mergers in India, further steps of amending other contemporary laws are *condiciones sine quibus non* in encouraging any

[48]Regulation 5 (3), Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

such reforms. Since these steps involve international measures and relate with the legal system of other countries, it is expected that the Government should take the initiative to collect consensus on the formation of various international bodies, agencies and treaties, thereby addressing the concerns hereinabove mentioned. It is also recommended that the *Organisation for Economic Co-operation and Development* which is responsible for forming consensus on various Competition policies and which was also instrumental in passing the Multilateral Tax Instrument, should address the concerns mentioned in this article. It is the authors' opinion that global co-operation and effective synergies are the key solutions to the complex problems that arise from a cross border merger and any government that understands this, unlocks the Pandora's box again to salvage the only content left inside after the box was first opened-Hope!

Sports Law in India– An Evolving Discourse or a Need for Paradigm Shift?

-Mani Yadav, Abhinav Singh Chandel*

"Given the specificities of sport, the law must be applied with sufficient flexibility to take account of the unique features inherent in sports that distinguish it from other sectors."

Dhanraj Pillay v. Hockey India[1]

Abstract

The inclusion of sports as a subject matter of legislation and policy is a relatively recent development in India. Unlike Europe or America, sports law jurisprudence in India has not been a matter of review and the provisions related to it, therefore, are minimal. The past decade has seen a monumental escalation in the commercialization of sports and related spheres, which although predominantly commercial, also has a substantial socio-cultural significance.This makes it evident that the laws pertaining to its regulation must consistently be updated, for which, a constant appraisal is required. This further makes it imperative to analyze the current scenario of sports regulation in India and enquire the adequacy of it in broader social, cultural and legal spheres, which more than often in a country like India are inter-related. This forms the primary objective of this study. The present study is a succinct analysis of such law(s) and nuances thereto, with an object of throwing light on some of the multifarious convolutions arising in the present system of regulation, and the approach of courts in handling them. The study further tries to highlight the lacunae therein, by comparing them with developments and approaches in other legal systems of the world.

*Third year Students, B.A, LL.B.(Hons.),Hidayatullah National Law University, Raipur.
The authors can be contacted at: abhinavschandel1@gmail.com

[1]Sh. DhanrajPillay&Ors v. Hockey India, Case No. 73 of 2011 (Competition Commission of India, 31/05/2013).

Additionally, the authors have made an attempt to briefly discuss some of the contemporary issues that have arisen in Indian courts of law, with the advent of modern day commercial sport(s) leagues.

I. Introduction

Sports Law, as a discipline, consists of a sundry of rules, regulations, and laws which generally, are not only confined to sports but are also linked to a number of distinct spheres adherent to it. These can range from mainstream spheres like advertisement, mass-media, promotion etc. to characteristic ones like mergers, acquisitions, capital-building *etc.* that in turn, very often have their own set of comprehensive regulations. This makes it evident that with the increase in the number of sports, there is an increase in the number of associated laws. It is submitted that this increase can be both linear and non-linear depending on a number of factors, most important of which is the reception of any sport by its chief keyholder – the audience. With variation in such reception, both qualitatively and quantitatively, there arise a number of occasions that require very specific regulations catering to them. For instance, with the advent of commercial sports leagues like the Indian Premiere League, a need for a particular regulation of the sphere of team sponsorship has been felt. It is, therefore, submitted that it can be inferred that there cannot be a unitary sports law in a nation such as India where this reception varies substantially.

Owing to the presence of a rather vast gap between reception of mainstream sports like Cricket, Soccer etc. and lesser-known sports like Handball, Surfing etc., supplemented by the presence of a number of recognised and non-recognised indigenous sports like *Gella-Chhut, Buffallo Race, Naga*

Wrestling etc. it is apparent that it can be very hard to develop regulations. This is not necessarily true in the international context. Smaller nations such as Italy, Hungary and Latvia have a set of well-defined sports legislations constituting a single sphere of sports law, which the courts keep updating into proper codes. It must be noted that this however, does not mean that larger countries cannot have an effective or efficient sports law at all, as can be observed in many nations of the world. For instance, the Chinese sports law model has so far proven to be quite efficient, and pervasive. It consists of a very detailed national legislation that was designed keeping in mind, the needs of the present as well as future generations. On the other hand, the Australian and Japanese models of sports regulation have also proven to be very effective even though their regulations are not as intricate. This is owing to the fact that they consist not only of laws and regulations but also of a number of social rules and norms, free from any repercussions, followed morally/ethically.

As far as the Indian model is considered, there is an entirely distinct system of regulation. In a model of governance inspired by the USSR, concomitant to a justice system aiming to serve equality to the masses, and a political system that constantly tries to promote welfare based on the democratic socialist pattern,[2] the Indian model has largely been based on an approach that allows substantial freedom of sports. It is submitted that although it may *prima facie* seem uninvolved; the model has a number of issues associated with it. Before discussing them, it is imperative that the major model and approaches of sports governance be dealt with, so that it may be possible to associate various regulations and systems to them.

[2] M. Laxmikanth, *Indian Polity*,121 (4th ed., 2015).

II. Policy Approaches: Interventionism and Non-Interventionism

There are essentially two stances that dictate the extent of government presence in the field of sports and the law related to it. The first is interventionism, which literally is an adjective connoting a favoring intervention, especially by a government in its domestic economy. Thus, in the interventionist approach, the conduct of sports and related activities is considered a public function and the state has a right and more importantly, the responsibility to deliver. It is achieved by implementing specific legislation on the structure and mandate of a significant part of the nation's sports movement.[3] Many southern and eastern European countries like Italy, Hungary, Latvia etc. favor this stance.[4] The social perception of sports as public good makes it the liability of the state to conduct and regulate them responsibly. Most substantially, it tends to do so by intervening in the chief economic function of sport – revenue collection, by designating a structure of taxation for various sports, sports-persons,and sporting entities by passing adequate legislation(s). Further, it must be noted that there are legislations governing specific sports such as boxing in some jurisdictions, whereas some have discrete regulations for specific activities like drug use, fund allocation *etc*. This is essentially, how the field is regulated. In case of want of legislation, the courts are considered responsible and free to interpret or form appropriate laws by passing judgements. For instance, in the landmark English case of *Regina v. Coney*[5], the court held unregulated prizefights to be inimical to public interest in maintenance of good order.

[3] Adam Lewis & Jonathan Taylor, *Sport: Law and Practice*, 76 (2008).
[4] Ibid.
[5] Regina v. Coney 8 CCR 534 (1882, Queens Bench DivisionUnited Kingdom).

It is significant to note that this does not mean the approach shifts to a non-interventionist one in such cases, but rather that the dominant approach remains the same, except for that specific activity. This in turn paves the path for further legislation. Once the court passes a ruling, the government may pass a legislation to that effect or against it, based on its own ideals.[6]

Thus, the role in its essence, remains the same and merely limits itself to specifically shielding indurate or callous behavior in pertinent sphere(s) which causes it to lose its pervasiveness. It is therefore essential to note that such instances occur in interventionism because the law often becomes handy to guard and uphold one of the primary functions of the state - prevention of breaches of peace. For instance, wagering and betting statutes affect all types of sports with which gambling is associated. Therefore, a contrast in practice can be seen in various parts of the world. For instance, in Canada, it is illegal to own a common betting house without the government's permit but nothing makes it explicit that betting as an individual on a sport is illegal (there being no reference to online betting). In the UK however, various forms of gambling are legalized, including online sports betting.[7] Thus, it is submitted that even though the stance of the state in some nations may not strictly adhere to it, interventionism is highly efficient in the short term, and mediocrely so in the medium term in regulating the sports sector, chiefly because the sector keeps evolving. It would be highly idealistic to presume that a state could actually foresee issues, needs and potential challenges in the long term in such a rapid

[6] For instance, in Australia The Boxing and Wrestling Control Act of New South Wales 1986, was passed after the courts highlighted the want of such regulation posing hindrance to social justice.

[7] Governed by The Gambling [Licensing and Advertising] Act 2014 (United Kingdom).

growing sector, and doubly so, if it were to be presumed that it could formulate policies that could function effectively for a term more than a decade, or two. Therefore, it is submitted that the stance of states should instead be focused on creating specific short- term policies under the aegis of a larger, more general sports code.

On the other hand, there are certain countries which have taken a distinct stance than interventionism because it often poses to be an unstable policy as it leads to the creation of new hindrances that force further interventions, creating a cycle which certainly does not help in problem-solving. Each time the state intervenes, majorly the action in itself causes a number of constraints requiring additional attention. For instance, the creation of laws restraining doping in competitive sports would require the creation of additional regulations for proper accessibility of healthcare units, doctors *etc.* for conducting tests without any discrepancies. In non-interventionist countries such as Germany and the Netherlands, sports regulations have not been regarded as a public service responsibility of the government. This is due to a number of reasons, discussing all of which would require a more detailed analysis. Primarily it has been done so because of policy reasons depending on the approach of the ruling political party, which is often decided by social needs. Thus, no general 'law of sport' has been enacted to regulate activity in this sector. Rather, legislation or other intervention is generally countenanced only as a measure of last resort, in response to a pressing public interest requirement. The current structure in India follows an approach that falls on similar lines. Although largely non-interventionist, there have been some instances of courts favoring intervention.

III. Present Structure of Sports Governance in India

The present-day structure of sports governance and regulations in India can be best characterized as nascent. As the government follows a predominantly non-interventionist approach, the part it plays in the system is merely supportive as it cardinally operates to either provide financial assistance or infrastructure to various sports regulatory bodies operating, independently of the state. It essentially consists of two dissociated but interdependent wings under which various stakeholders operate. The first part corresponds to the broad regulation of sports through bodies and federations at the National and International Levels whereas the second part co-relates to the state's role in the regulation of sports and the various governmental agencies associated with it.

The current model can be referred to as the 'pyramid' structure of regulation. Owing its genesis to Europe[8], the model essentially entails the organization of various sports and the regulatory bodies associated with them in a Three or a Four Tier system. On top of this system is the International Federations concomitant to each individual sport. These serve as the chief regulatory bodies that formulate pertinent rules, guidelines, and mandates relating to that sport.[9] These are also responsible for framing policies and deciding on important requirements and essential conditions which must be followed by other bodies in the system falling under them.

[8] Also known as the *European Model of Sport*, ECDG.
[9] For instance, the International Cricket Council(ICC), International Olympic Committee(IOC).

These are also generally responsible for deciding the eligibility criteria, playing rules, penalties etc. and organizing championships at the world/international level. Under the International Federations (IFs) fall the National Federations of Sports. Their number varies with each country and sport. These are strictly bound by the IFs and their direction. The National Sporting Federations (NSFs) govern the sports at the national level and are responsible for organizing events, deciding fines, promotion, and development of the sport domestically. This gives them a fair share of power and independence. Moreover, it is important to note that as the number of these all over the world is quite high, the IFs find it hard to verify if their guidelines are being followed unless there is an explicit breach. NSFs normally also undertake advertising, domestic management and revenue collection. Under these, come the State Federations (SFs) responsible for managing, regulating, governing and promoting sports in the State Level, followed by District/Local Federations (DSFs) affiliated to them, which are responsible for ensuring efficiency and efficacy of these policies. It is submitted that in India, the promotion of sports is the most important function of SFs as they are in the position of best understanding the needs of the people in their state. These also negotiate and request small funds for the same and manage them.

This seemingly simple model actually has a lot of practical complications linked to various issues, like abuse of power and autonomy and occurrence of unethical practices. It is submitted that as these federations have some financial autonomy, it would be highly idealistic to assume that these funds would be utilised rationally without any embezzlement. This poses the

question that if they do have such autonomy, why are they not governed like body corporates are?

The 'Pierre De Coubertin' action plan[10] adopted by the European Commission in 2007 contains a number of provisions of proposed actions to be implemented to avoid malpractices. It is a line-up to the commission's Helsinki Report on Sports, 1997, in which the possibility of such practices was formally acknowledged for the first time.[11] There has not been any such development in India. Such a model as incorporated in India in the forms of NSFs, SFs and DSFs has led to emergence of multiple issues.

One of the major issues that have emerged with this model is of the accountability of these federations. They have been considered private in nature and therefore have often escaped liability and have operated in an arbitrary manner without facing any consequences. There is no system of checks and balances available and therefore, problems of unfairness and inequality often arise. The question as to whether or not these bodies are subordinate to any law or authority is again a matter of discourse, which also leads to the problem(s) of jurisdiction and transparency of procedure. Matters pertaining to assurance of jurisdiction have not been new in the International scenario either, with a number of cases being filed up all over.

In *Union Royale de Football Association v. Jean-Marc Bosman*[12], in which a Belgian Footballer had filed a case against his club, for restraint of trade and

[10] Also referred to as the *White Paper on Sports*, UK Parliament, available at: https://publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/347/347.pdf, last seen on 20/06/2018.
[11] *Commission of the European Communities*, European Council, available at: www.eurlex.europa.eu/LexUriServ, last seen on 20/06/2018.
[12] ECR I-4921 (1995, European Court of Justice).

arbitrary action in the European Court of Justice, it was held that the scope of his rights was limited to his fundamental and contractual rights, and nothing more than that. It was further held that the Federation (UEFA) was not liable for the acts it did in pursuance of its organizational duty.

Similarly, a question of jurisdiction arose in the *United States v. Webb &Ors.*[13], filed in the U.S. District Court - Brooklyn, in which in pursuance of accusations of corruption in the administration of FIFA, the chief regulating body of football, it was the United States of America which investigated into the matters of racketeering, wire fraud etc. wherein FIFA actually was an association established under the laws of Switzerland.

In India, there hasn't been any significant development pertaining to this issue. This means that unless and until the territorial jurisdiction of these federations is not decided, there will always be an occurrence of inordinate delay in deciding issues related to these. This could also mean that leaving the interpretation to the courts of law may lead to an inconsistency in decisions, which might often pave the way for appeals at the apex court. It is suggested that a sports code which could entail provisions determining the same would substantially reduce such possibilities. The National Sports Development Code of India (NSDCI), 2011 laid down that these federations fall under the jurisdiction of High Courts under Article 226 of the Constitution of India because they perform state-like functions. The code however, has not yet been passed. This poses the question of their amenability to domestic courts of law, and judicial review. A number of cases, both nationally and internationally have maintained that although

[13] United States v. Webbs, 15-CR-252 (2015, United States District Court, Eastern District of New York).

autonomous, these federations must be compliant to judicial review as they exist to serve the public at large.

In *Finnigan v. New Zealand Rugby Football Union Inc.*[14], it was held that a decision by the Rugby Union affected the entirety of New Zealand, and as it affected the public, although being a private body, it lay in an intersection between public and private law. It was held to be accountable to the public, unlike a club, as its decision would not be binding on the public in general.

On the national level, the instance has been similar. In *Mehra v.Union of India*[15], it was held that held that the actions of Board of Control for Cricket in India (BCCI)in the area of public law would be subject to judicial review.

Similarly, in *Cricket Association of Bihar v. Board of Control for Cricket in India*[16], the Supreme Court of India held that even though the BCCI is not a public body, it performs a public duty by controlling and regulating the sports of Cricket in India and therefore they could not escape accountability under judicial review of state action under Article 13 of the Constitution. It was observed that 'although BCCI may not be a state under Article 12 of the Constitution, it is certainly amenable to writ jurisdiction under Article 226 of the Constitution.'

This overruled the previous decision of the Supreme Court in *Zee Telefilms v. Union of India* (2005)[17], where the BCCI was not held to be a part of the state. Therefore, now the BCCI can be held liable for its actions.

[14] 2 NZLR 159 (CA) (1985) (Appellate Court of New Zealand).
[15] 4 Comp LJ 268 Del (2004).
[16] AIR 1995 SC 1236.
[17] (2005) 4 SCC 649.

This clearly shows that the non-interventionist approach of the government made it the duty of the courts to take pertinent action. It is submitted that it can be safely presumed that in the mere amount of time that these cases were pending in the court, a number of cases of malpractices can reasonably be presumed to have occurred. If there had been a sports code in India, even an incomplete one at that, the courts could have referred to the same in interpreting and formulating laws.

In *Kirandeep v. Chandigarh Rowing Association*[18], it was observed that arbitrary guidelines by sporting bodies could be struck down. It was even held by the Punjab-Haryana High Court that courts were in fact obliged to grant relief in such cases of arbitrariness by Sports Bodies. Although such decisions by the courts in India are welcome, they do not completely eliminate the possibility of injustice and unfairness. As stated earlier, often at times there is a delay in delivery of judgments in pursuance of judicial review, as can be observed in *Kirandeep*[19], where the decision was delivered too late for the athletes to have any real relief. This has been brought to the court's attention in various cases and writ petitions as well. [20]

Therefore, it is suggested that arbitration and separate judicial tribunals can serve as an alternate and faster source of relief in such cases if the state still is to pursue a non-interventionist approach.

[18] AIR 2004 PH 278.
[19] Ibid.
[20] See Dhankhar v. Union of India, Writ Petition No. 3914 of 2014, (Delhi High Court, 03/07/2014);
Kerala Cycle Polo Ass'n v. Cycle Polo Federation of India, Writ Petition No.186 of 2014, (Kerala High Court, 13/02/2015).

The second wing of the structure predominantly consists of governmental bodies and functionaries who predominantly fulfill two functions – providing financial assistance and infrastructure and promoting capacity building. They chiefly consist of the Ministry of Youth Affairs & Sports (MSYA) and Sports Authority of India (SAI) along with various institutes and training centers established by the Government. There is an absence of any legislation in this regard, both at the state as well as the central level even though the ministry was set up by the Government of India to fulfill the above-stated functions. It functions by providing funds, aids, and grants to various federations and organizers for sporting events, promotion and advertising. It further provides the required infrastructure for conducting sports but does not regulate the usage of it. This means that from the price of tickets to the broadcasting of matches, everything is decided by the federations with complete autonomy, promoting the possibility of arbitrariness and abuse of power.

National Sports Policy[21] was originally laid down in 1984 for the promotion of sports and later revised in 2001 to further accommodate provisions of standardization and increasing the quality of sports in India. It aimed to define the areas of responsibility of various agencies of sports as well as to deal with the Sports federations in two ways – by providing an eligibility criterion for grants and funds, and to identify the NSFs formally that would be guided by such policy. National Sports Development Bill was laid down in the Parliament in 2013 to further accommodate and establish institutions

[21] *National Sports Policy*, , Shodhganga, available at: http://shodhganga.inflibnet.ac.in/bitstream/10603/39215/12/12_appendix.pdf last seen on 20/06/2018.

and agencies for better and more diverse governance and regulation of sports; however, it is yet to be passed.[22]

Sports Authority of India, which was supposed to be the apex body in sports has also been established by the govt. to regulate the sector, however, it is not a part of the government and does not have any system that ensures checks and balances in arbitrary use of power by the NSFs. The body has time and again been accused of corruption, mismanagement, scams, scandals and even harassment.[23]

Some other non-governmental bodies have also been working in this sector like the Sports Law and Welfare Association of India (SLWAI), a non-profit organization that works to ensure ethics, better governance and welfare in sports. However, it is submitted it hasn't been able to play a vital role in the system.

The above make up the regulatory model of sports in India, which is governed by a cohesive structure that is based on a non-interventionist approach, thus leading to the complications and problems discussed so far.

[22]*Draft National Sports Development Bill,2013*, Ministry of Youth and Sports, available at: https://yas.nic.in/sites/default/files/File921.pdf, last seen on 20/06/2017.

23See: SanjeevVerma, *SAI scam: CBI team raids SAI's Sonepat centre*, Hindustan Times (18/11/2011) available at: https://www.hindustantimes.com/india/sai-scam-cbi-team-raids-sai-s-sonepat-centre/story-2uPcX1iCp1OOWjXsgxxexJ.html, last seen on 20/06/2018;Vikram Chowdhry, *Exposing corruption in Sports Authority of India*, NDTV Online (24/09/2012), available at: https://www.ndtv.com/india-news/whistleblower-alleges-harassment-after-exposing-corruption-in-sports-authority-of-india-500084, last seen on 20/06/2018.

The courts of law are therefore burdened with the responsibility to come-up with decisions and relief.

This is in contrast to the developed and interventionist American model of governance wherein sport itself has been divided into three types – Amateur, Professional, and International. Each one of these segments has its own legislation and regulations in which the relevant federations fall under. The relevant jurisdiction has also been provided for. Each segment has a distinct code, as well as set of rules and legislation to which, in order to operate, the federations must adhere. USA also has a system of checks and balances incorporated in its model, with the state playing a major role in it. The model has proven to be substantially successful so far and it is therefore suggested that a well-planned strategy with checks and balances can be devised in India as well taking inspiration from their model.

IV. Issues and Challenges

Sports law overlaps substantially with a number of other laws inclusive ofcontracts, torts, intellectual property, criminal and even competition laws, among others.

As the domain of sports has become more commercialized, the use of contracts by Sports associations has become ever more frequent, not only in conducting traditional business affairs but also in areas of employment, programming and even commercial acquisitions. For instance, coaches sign employment contracts; athletes sign participation contracts with the sports association as well as with major Games organizations; organizations, suppliers, and athletes sign sponsorship agreements; and participants in recreational sport sign waivers. These contracts cover everything from

conduct and discipline to selection processes and money issues. Contracts in sports are subject to the same principles of contract formation as any other form of the employment agreement. Professional sports services contract means an agreement under which an individual is employed, or agrees to render services, as a player on a professional sports team, with a professional sports organization or as a professional athlete. It must be noted that the want of legislation poses issues here as well. One such major issue is the question of interference by courts, particularly in rule-making.

In *R v. Appeal Board of the Jockey Club*[24], the High Court decided that decisions made by the Appeal Board of the Jockey Club were not amenable to judicial review. This made it clear that the Court's approach was that the 'rules of the game' were contractual matters between clubs and their members and not issues with which the Courts should interfere, thus providing immense autonomy to sports agencies and federations.In *Kirandeep*[25], this approach, however, has been rejected.

In *Indian Football Association v. Mohan Bagan Athletic Club*.[26], the Calcutta High Court went on to interpret and even over-write rules made by the Indian football Association marking that although the current approach promotes freedom, it does not promote arbitrary autonomy without any repercussions. This approach has been followed by other courts as well. However, a lot of incidents don't go to court as there is a lack of awareness and thus, this is where a set of rules and regulations would prove to be beneficial.

[24] R v. Appeal Board of Jockey Club, 2 EWHC 2197 (2005, High Court of Justice, Wales).
[25] AIR 2004 PH 278.
[26] AIR 1988 Cal 217.

Another area of law in which issues often arise is torts i.e. civil wrongs whereby one person is liable for his acts violating the legal rights of the other in some or the other way and is supposed to compensate the aggrieved party.[27]Such claims have been on a steady rise in the western and southeasterncountries,unlike India. Majorly, three aspects of the law are addressed in the context of sports-based injuries: Negligence, Intentional Torts(Assault) and Recklessness. A negligent tort can be summed up as an individual's failure to reasonably exercise logical or caring actions. But a mere lapse of judgment can't be regarded as negligence.[28]*Condon v. Basi*[29],however, is a landmark case where it was concluded that players are under a duty to take all reasonable care taking account of the circumstances in which they are placed. In *Woodbridge v. Sumner*[30], the Court of Appeal held that sportsmen would only be liable to spectators if they showed "reckless disregard" for their safety. No such landmark case has been dealt in India.

Unlike these, the domain of intellectual property (IP)is protected by a well-defined set of legislation. By striking the right balance between the interests of innovators and the wider public interest, it aims to foster an atmosphere conducive to creativity and innovation. Popular games such as football, basketball, cricket have evolved into huge events and have an international following making it rather discernible that a lot of stakeholders capitalize on the intellectual property associated with them.Thus, there have been a number of issues which have occurred. In *National Basketball Association v*

[27]*Ratanlal&&Dhirajlal's Law of Torts* (Justice G.P.Singh, 26th ed., 2010).
[28]**2 EWCA Civ 1054 (2001, England & Wales Court of Appeals, UK).**
[29] 2 All ER 253 (1985, Court of Appeals, UK).
[30] 2 QB 1, 43 (1963, Queen's Bench Division).

Motorola and STATS[31] The American National Basketball Association (NBA) sued Motorola for transmitting real-time information about basketball matches with a two-minute delay to users of Motorola's "Sports Trax" device, a hand-held pager that displayed updated scores and statistics of NBA games as they were played causing them a loss. India also has a number of legislations following TRIPS/WTO agreement.

In *Followon Interactive Media v. Ashok Kumar&Ors.*[32]an injunction suit was filed against 37 network companies for broadcasting cricket matches without any permission from the plaintiffs. The suit was subsequently followed by a copyright claim, making it evident that the IP regime in India is pervasive even in sports. A similar case came up in the Delhi High Court in 2014.[33]

As far as crimes are considered, there have been legislations passed that ensure that specific sports related crimes are not committed. Doping is one such instance where a clearly defined set of provision has proved to be helpful in administering justice.

Currently, substances and methods on the Prohibited List are classified by categories and divided into four groups viz. substances and methods prohibited at all times which contain anabolic agents, hormones and related substances; substances and methods prohibited in-competition such as stimulants, narcotics and cannabinoids and substances prohibited in

[31] 480 US 941 (1987, New York Second Circuit Court of Appeals).
[32] Civil Appeal No. 95 of 2017 (Supreme Court, 22/09/2017).
[33]Civil Appeal No. 2722 of 2012 (Delhi High Court, 2014).

particular sports which contains alcohol and beta-blockers and specific substances.[34]

In principle, the positive result of a doping control normally allows the conclusion to be drawn that the athlete tested has applied the prohibited substance to himself and has committed a culpable act.[35]

Only in particular exceptional situations of ignorance as to the administration of unknown substances (e.g. the forced administration of medicaments, loss of consciousness by the player), the occurrence of which is proved, does the fault of the player disappear. In *Katrin Zimmerman Krabbe vs. Deutscher Leichtathletik Verband (DLV)*[36] *and International Amateur Athletic Federation (IAAF)*Krabbe a German athlete and member of the German Athletics Federation (DLV) in her urine sample she gave in a drug test revealed the presence of clenbuterol. The Court ruled that the DLV was obliged to apply the IAAF sanction because it was bound by the decisions of the International Federation under threat of sanctions.

A need for such regulation was observed by the court in *Rampal Sharma vs Raj Cricket Association.*[37]

It held that Sports Council should constantly monitor/check, the associations who are not following norms and not holding requisite tournaments in time and action should be taken against them, including suspending them or appointing an Administrator/ad-hoc committee to run them so as to reform games activities.

[34]For Full List: *Prohibition List*, available http://www.doping-prevention.com/doping-in-general/prohibited-list.html, last seen 20/06/2018.
[35] Case Z. v. DFB (German Football Federation), DFB Sports Tribunal, 1999.
[36] Case 344(Munich Court of Appeal, Germany, 28 March 1996).
[37] Civil Writ Petition No. 6635 of 2017 (Rajasthan High Court, 31/06/2017).

From the succinct analysis so far of the distinct issues arising in sports and related segments, it can very well be commented that anti-trust and competition law has a very big role in all of them. This can be seen in various cases[38] that the Competition Commission of India (CCI) has dealt with, as well as, by referring to cases not only in the common law but also in the American jurisprudence. [39]

With increased commercialization of sports, particularly cricket, hockey, badminton and football, the sports law in India can be far more characterizedas a component of commercial laws including competition laws. As discussed before, the regulations in sports and laws related to it are minimal in India making the occurrence of instances of competition issues even higher. [40] In India, such cases are regulated by the Competition Act 2002, which was formulated by revamping previous policies on the recommendations of the SVS Raghavan Committee. [41] This act led to the formation of the CCI to prevent such practices and thus ensure the freedom of trade. The act has provisions that co-relate to the prevention of Anti-Competitive agreements. Section 3 of the Competition Act, 2002 provides for prevention of anti-competitive practices. Section 3(3) of the Act provides for types of agreements like price fixing, limiting or controlling production, supply or technical development, sharing of the market, indulging in bid

[38]Surinder Singh Barmi v. BCCI, Case no. 61 of 2010 (Competition Commission of India, 08/02/2013).
[39] For instance, United States v. International Harvester, 274 US 693 (1927, Supreme Court of the United States).
[40] For instance, a number of players were heavily underpaid in the recently organised Badminton Premier League in India. Source available and accessible at: www.sportskeeda.com/badminton/ pay- grievance-over-pbl-auction.html, last seen on 23/12.2017.
[41] This replaced the MRTP Act, 1969, available at: www.indiankanoon.com/bare_acts?=34221.php, last seen on 23/12.2017.

rigging as presumed to have an AAEC including cartels. Section 3(4) of the Act provides for types of agreements in which AAEC is required to be proved like tie-inarrangement, exclusive supply agreement, exclusive distribution agreement, exclusive supply agreement, refusal to deal and resale price maintenance.

The act further has provisions for restraint of dominant position in order to prevent monopolies. A dominant position is said to be acquired when an enterprise is able to operate independent of competitive forces and affect its competitors or consumers in its favor.[42]

Abuse can occur in various forms and can be related to prices which includes predatory pricing, limiting and restricting production or even making the conclusion of contracts subject to supplementary obligations or uses its dominant position in one market to enter into another market.

Furthermore, one of the important functions of the Commission is to promote 'competition culture' and also to advise the government on issues relating to competition law and policy whenever requested under Section 49 of the Act.

The competition since its inception has had an active role in adjudicating such cases and has dealt with various issues arising as can be seen in *Surinder Singh Barmi v. BCCI*[43], in which the commission regulated and brought down the immense power that the Board of Cricket Control held. It noted that "BCCI's economic power is enormous as a regulator that enables it to pick winners. BCCI has gained tremendously from IPL format of the

[42] Explanation to Section 4,The Competition Act,2012.
[43] Case no. 61 of 2010 (Competition Commission of India, 29/11/2017).

cricket in financial terms. Virtually, there is no other competitor in the market nor was anyone allowed to emerge due to BCCI's strategy of monopolizing the entire market. The policy of BCCI to keep out other competitors and to use their position as a de-facto regulatory body has prevented many players who could have opted for the competitive league."

The commission in the Hockey India case has also dealt with antitrust practices and their prevention by regulating the Hockey India League's authority. Although it dismissed the appeal it opined that "it would be appropriate if it were to put in place an effective internal control system to its own satisfaction, in good faith, and after due diligence, to ensure that its regulatory powers are not used in any way in the process of considering and deciding on any matters relating to its commercial activities."

Similarly, in *Hemant Sharma*[44], it answered a reference that came up in Delhi High Court that the All India Chess Federation prohibited its members from participating in events organized by other federations rival to it, accordingly the matter was taken up by CCI and investigation was ordered. DG investigated the matter and submitted its report to the Commission.

Thus, it can be safely concluded that the cases before the Commission have most definitely brought the issue of monopolistic positions exercised by the sports federation and need for fairness in their dealings to a progress. However, as long as there is a want of regulations, much like a judicial review, the commission also is just an instrument of justice and not an enforcer of it. Therefore, regulations and laws are much needed.

[44] Writ Petition No.34039 of 2012 (Delhi High Court, 04/11/2011).

Issues pertaining to abuse of power have also occurred since the advent of sporting leagues in India. They are practically unregulated as there is a lack of national sports code, making the possibility of malpractices higher. For instance, in *Lalit Kumar Modi v. BCCI*[45] the petitioner who happened to be the chairman of Indian Premiere League was accused of accepting a multi-million dollar kickback while giving away the telecasting rights for matches; attempting to rig the bids for the two new IPL teams-that were auctioned; having proxy stakes in IPL teams; entering into transactions with rank strangers against the mandate of the Governing Council of the IPL and helping family members in benefiting from the IPL contracts.

Global broadcasting rights of the league, worth US $ 1 billion, have also been looked up by the Bombay High Court in case where World Sports Group Pvt. Ltd. was in a dispute with BCCI.[46]

Image of IPL was also tarnished when FIR No.20.2013 was registered by the Special Cell, Delhi Police in 2013 which stated that there were reports of match fixing and involvement of underworld which aimed to make some windfall gains with the help of bookies based in Delhi.[47]

BCCI also undermined the authority of RBI during IPL when it appointed a consultancy firm named International Management group (UK) Ltd. and had payments of Rs. 30 crores. Since, consultancy services were procured from outside India, it required prior approval of the RBI under section 5 of the Act read with rule 5 of the Foreign Exchange Management (Current Account

[45] SLP No. 27157 of 2010 (Supreme Court, 26/09/2011).
[46] World Sport Group (India) Private Limited v. BCCI, Appeal No. 30 of 2011 in Arbitration Petition No. 978 of 2010.
[47] Cricket Association of Bihar v. BCCI, PIL NO.55 of 2013 (Bombay High Court, 30/07/2013).

Transactions) Rules, 2000. However, BCCI had not made any application to the RBI in relation to procuring the consultancy services from IMG.[48]

Such instances of abuse of authority by federations are not isolated ones, restricted to Cricket or the BCCI. In *Indian National Football Club v. Delhi Soccer Association*[49], issue arose when without taking permission from the Delhi Soccer Association, the players agreed to participate in Hero I-League, a major soccer sporting league in India. Relevant contention was the authority of federations over such leagues. The court observed that the players had the right to choose any clubs and granted the sought interim injunction.

As there is no regulation of powers and authority over federations, in *Joachim Carvalhovs Union Of India &Ors*[50], a conflict was observed between the International Hockey Federation (FHI), and World Series Hockey, a sporting league revolving around authority and jurisdiction.

As the sporting league industry grows, which it is, the legal issues would also grow to be more complex and would involve greater economic and social stakes, the regulation of which should start as soon as possible. It is therefore suggested that the integration of such leagues must also be kept in mind while policymaking.

V. Conclusion

[48] Son of Mr.K.K. Modi v. Special Director, WP No. 1703 of 2013 (Bombay High Court, 06/02/2014).
[49] Appeal No. 14896 of 2007 (Delhi High Court,18/01/2008).
[50] Writ Petition (Civil) No. 8422 of 2011 (Delhi High Court, 13/02/2012).

From the above analysis, it can be observed that the present model of sports policy, governance, and regulation in India is not only insufficient but also fails at execution.

As a sport is more than just a social activity, it is imperative that the government understands the needs of its intervention and learns from the western models as discussed in the paper.

It can also be concluded that an interventionist stance, unlike the current non-interventionist one, is required to fully disseminate the doctrine of welfare that the government so vociferously abides by, to sports - a segment that plays a huge part in the lives of individuals.

It is entirely up to the government to choose the model of intervention, taking cue either from the European judicial model or the Chinese policy-oriented model. It could also create its own, but one thing is definite - It must take a stance. As long as it does, progress in one form or the other would occur, which is desperately needed.

Regards must be given that such a model provides a structure that provides a transparent process of redressal, an accountable body and is subject to public scrutiny. Apart from this, in the meantime, although judicial review has been a very important tool to solve such issues, it is imperative that arbitration tribunals be setup for a fast and effective disposal of cases.

Extreme importance must be given to the fact that the sporting industry is evolving and as it does so, the mediums related to it are too. This means that the legal complexities that so far have occurred are going to multiply as well – in multiple ways. Not only would a need for an umbrella legislation be felt, but a number of distinct provisions for specific activities would be felt too.

For instance, as the competitive gaming industry creates a niche for itself in India, the regulations pertaining to it must be drafted in a way that covers Information Technology, International Law, Privacy Law, IP law among others, apart from sports laws.

Apart from these changes, there is also a need to acknowledge social changes like gender discrimination in sports which in itself form a major predicament, that must be solved imminently. On the policy side, apart from laws to counter competition and criminal issues, attention must be given towards promoting it in the society as a moral and ethical principle, much like in China and Australia.

Thus, it can safely be concluded that sports law in India although is wanting in a multitude of ways currently, has a lot of scope to accommodate changes, which must be seen as an opportunity of bringing justice and change for not only the current but also the future generations. A policy must now be drafted that takes inspiration from successful sports codes all over, and lessons from failed ones too. The policy must accommodate the possibility of future changes, as the need be and must also acknowledge social issues that have emerged as well as transitional issues that will emerge in the reasonable future, as sports evolve.

Withdrawal of Open Offer: A Shift from Permitting it in Cases of Virtual Impossibility to Making it Virtually Impossible to Withdraw?

-AnirudhPratap Singh &AnkitYadav*

Abstract

According to the Supreme Court an open offer once made to the shareholders of a listed company in terms of Takeover Regulations cannot be withdrawn except in circumstances that render the completion of the offer impossible. The Court has come to such conclusion after reading the term "such circumstances" as contained in Regulation 27(1)(d) of Takeover Code, 1997 ***ejusdem generis*** *with Regulation 27(1)(b) &(c). This article contends that the Regulation 27(1)(d) confers wide powers on SEBI to allow withdrawal of an open offer even in cases where it is not impossible to complete the offer. It is further submitted that under the Takeover Code, 2011, it becomes even more patent that SEBI has wide discretionary powers in such cases. Lastly, the authors discuss few important factors that ought to be considered under the general term "such circumstances" while deciding an application for the withdrawal of an open offer.*

I. Introduction

On November 7, 2016 the Supreme Court of India in *Pramod Jain* v. *SEBI*[1] reaffirmed its previous decisions in *Nirma Industries Ltd v. SEBI*,[2] and *SEBI v. Akshya Infrastructure (P) Ltd*,[3] making it clear that the term "such circumstances" in clause (d) of Regulation 27(1) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 (Hereinafter *Takeover Code, 1997*) will be read *ejusdem generis* with clauses (b) and (c) of Regulation 27(1).

*Fifth year students at Dr. Ram Manohar Lohiya National Law University, Lucknow. The authors can be reached at: ativdan@gmail.com

[1]Pramod Jain v. SEBI, (2016) 10 SCC 243.

[2]Nirma Industries Ltd. v. SEBI, (2013) 8 SCC 20.

[3]SEBI v. Akshya Infrastructure (P) Ltd., (2014) 11 SCC 112.

Ejusdem generis is "a cannon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as listed."[4] The expression means "of the same kind or nature". Thus, according to this principle, "when general words in a statutory text are followed by restricted words, the meaning of general words are taken to be restricted by implication with the meaning of restricted words."[5]

Supreme Court, in the aforementioned cases, has been of the opinion that Regulation 27(1)(b) and 27(1)(c) that allow the withdrawal of an open offer in cases of refusal of statutory approval and death of the acquirer respectively, constitute a specific class: circumstances rendering the completion of the open offer impossible. Therefore, Regulation 27(1)(d) that allows the withdrawal of the open offer in "such circumstances as in the opinion of the Board, merit withdrawal" shall be given a restricted interpretation, and shall be meant to include only those circumstances that render the completion of the open offer impossible.

This article, with the aid of principles of statutory interpretation, case laws andthe Takeover Regulations Advisory Committee Report (Hereinafter *TRAC Report*),[6] contends that the application of *ejusdem generis* to Regulation 27(1)(d) of Takeover Code, 1997 is erroneous in law. The discussion is then taken to the philosophy and withdrawal provisions of the

[4]B.A. Garner, *Black's Law Dictionary*, 594 (9th ed., 2009).
[5]Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal, (2010) 3 SCC 786, 791.
[6]*Report of the Takeover Regulations Advisory Committee under the Chairmanship of Mr. C. Achuthan*, SEBI, available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1287826537018.pdf, last seen on 03/01/2018.

Takeover Code, 2011, thereby, it is demonstrated that under the new Takeover regime, it becomes even more patent that SEBI has wide powers to allow withdrawal of an open offer. Lastly, the authors discuss few important factors that ought to be considered under the general term "such circumstances" while deciding an application for the withdrawal of an open offer.

II. Withdrawal of Open Offer under Takeover Code, 1997

It has been clearly laid down by decided cases of the Supreme Court that for the application of the principle of *ejusdem generis* the specific words must form a distinct genus or category.[7]The rule is neither unassailable, nor can it be applied in cases where exists an intention to the contrary.[8] The application of the rule of *ejusdem generis*, thus, shall not be resorted to without the exercise of proper caution.[9] Hence, where the context of a provision indicates that there is no requirement to interpret the general words contained therein restrictively, such words shall be given their plain and ordinary meaning.[10]

This rule can only be applied when the following requirements are satisfied: (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent.[11]In the context of Regulation 27(1)(d), even if the first four

[7]Kavalappara Kottarathil Kochuni v. State of Madras, AIR 1960 SC 1080, 1115.
[8]Grasim Industries Ltd. v. Collector of Customs, Bombay, (2002) 4 SCC 297, 304.
[9]G.P. Singh, *Principles Of Statutory Interpretation*, 463 (12th ed., 2011).
[10]BHEL v. Globe Hi-Fabs Ltd., (2015) 5 SCC 718, 722.
[11]CIT v. MCdowell and Co. Ltd., (2009) 10 SCC 755, 763.

requirements are satisfied, the fifth condition i.e. "there should not be any indication of a different legislative intent", doesn't seem to be satisfied.

The principle of *ejusdem generis* shall not be applied for the purpose of interpreting Regulation 27(1)(d) of the Takeover Code, 1997, as it gives it a narrow and restrictive interpretation, thereby curtailing the wide powers conferred on the Board. The intention of the legislature to confer wide powers on the Board to allow withdrawal of an open offer can be inferred, owing to the following:

Intention of the Legislature can be inferred by the Legislative History

The legislative history of a statutory enactment may be looked into for the purpose of interpreting an expression in any statute, if the statutory provision is ambiguous.[12] In a number of cases such as *Shri Ram Labhaya v. Municipal Co. of Delhi,*[13]*Vishesh Kumar v. Shanti Prasad,*[14]*Iridium India Telecom Ltd. v. Motorola Inc,*[15] the Supreme Court has delved into the legislative history to crack the intention of the legislature. In *Oriental Insurance Co. Ltd. v. Hansrajbhai v. Kodala,*[16] while interpreting Sec 163-A of the Motor Vehicles Act, 1988, the court observed that: *"…. for arriving at the proper conclusion, it would be necessary to cull out legislative intent by referring to the legislative history as well as objects and reasons for inserting the said provision."*

Amendment of 2002 left 27 (1)(d) Untouched

[12]Jai Prakash v. State of U.P., (2004) 13 SCC 390, 398.
[13]Shri Ram Labhaya v. Municipal Corp of Delhi, (1974) 4 SCC 491, 493.
[14]Vishesh Kumar v. Shanti Prasad, (1980) 2 SCC 378, 384.
[15]Iridium India Telecom Ltd. v. Motorola Inc., (2005) 2 SCC 145.
[16]Oriental Insurance Co. Ltd. v. Hansrajbhai Kodala, (2001) 5 SCC 175, 184.

Prior to the amendment of the Takeover Code, 1997 in 2002, Regulation 27(1) along-with sub-clauses (b), (c) and (d), also incorporated sub-clause (a) which read as: "the withdrawal is consequent upon any competitive bid". Regulation 27(1)(b) & (c) deal with refusal of statutory approval and death of the acquirer, respectively, and therefore, it may appear that they form a common genus of impossibility. However, a perusal of the omitted sub-clause (a) of Regulation 27(1) would illustrate that the above approach for interpreting Regulation 27(1)(d) is flawed. Prior to the 2002 amendment, the principle of *ejusdem generis* couldn't have been applied to Regulation 27(1)(d) for want of a common genus, as 27(1)(a) doesn't incorporate a condition for withdrawal which is based on the ground that the open offer is impossible to consummate. In other words, there would have been no common genus of impossibility between sub-clauses (a), (b) and (c), and for this reason Regulation 27(1)(d) would be construed to confer wide powers on the Board to permit withdrawal of an open offer.

The case of *Luxottica Group SpA v. SEBI*[17] demonstrates that prior to the amendment of 2002 it was undisputed that SEBI has been conferred wide powers by way of Regulation 27(1)(d) to permit withdrawal of an open offer. Now, even though by way of an amendment, 27(1)(a) has been omitted, it cannot be said that the nature of 27(1)(d) has changed, as the amendment has left sub-clause (d) untouched.

Purpose behind the omission of 27 (1) (a)

It would also be pertinent to note that 27(1)(a) was not omitted to restrict or change the meaning of Regulation 27(1)(d). Rather, the object behind the

[17]Luxottica Group SpA v. Securities & Exchange Board of India, 2003 SCCOnLine SAT 25.

omission was to provide the shareholders of the Target Company an option to choose from both the offers. The Takeover Regulations Advisory Committee Report, 2010, which became the basis of the Takeover Code, 2011, may be relied upon to demonstrate the purpose of the omission of 27(1)(a). Para 7.7 of the TRAC Report, 2010 states that it would be in the "best interests of the shareholders of the Target Company that they get to decide the controlling acquirer from amongst the competing acquirers."[18] Therefore, it can be inferred that the purpose of the legislature in omitting Regulation 27(1)(a) was not to restrict the powers vested in SEBI under 27(1)(d) to allow withdrawal of an open offer.

III. Withdrawal of Open Offer under Takeover Code, 2011

The Takeover Regulations Advisory Committee examined regulations in other jurisdictions and found that in certain jurisdictions the acquirers are allowed to clearly specify conditions in the form of a 'Material Adverse Change Clause' to the offer, and to withdraw the offer if these conditions are not met. It concluded that, it is important to permit withdrawal of the open offer in such circumstances.

Material Adverse Change Clause:A material adverse change clause permits an acquirer to refuse to complete an M&A transaction if there has been a materially adverse change at the target prior to closing; such clauses have been recognized in several jurisdictions.In the case of *In Re: IBP Inc. Shareholders Litigation*[19], the Delaware Chancery Court recognized the validity of an MAC clause. In the United Kingdom, Rule 13.5 (a) of the City

[18] Supra 6.
[19] *In re* I.B.P. Inc. Shareholders Litigation, 789 A.2d 14 (2011, Chancery Court of Delaware).

Code on Takeovers and Mergers, 2009 states that an offeror can invoke conditions or pre-conditions for withdrawing an offer the circumstances which give rise to the right to invoke the condition or pre-condition are of material significance to the offeror in the context of the offer. The Australian Takeovers Panel has also recognized the validity of an MAC clause: *"Conditions like the FM Condition and the MAC Condition are common in bids and, if properly drafted, are not unacceptable."*[20] Similarly, the Rule 4 of the Singapore Code on Takeover and Mergers also provides that an offer can be withdrawn if it was made subject to the prior fulfillment of a specific condition and that condition has not been met.

Under the Takeover Code, 2011, Regulation 23(1) deals with the withdrawal of an open offer which is more or less similar to the withdrawal provision of Takeover Code, 1997 (Regulation 27), except for the newly added Regulation 23(1)(c). As a result of the aforesaid deliberation of TRAC Report, wherein it also considered the provisions pertinent to withdrawal of open offer in the aforementioned jurisdictions, Regulation 23(1)(c) was incorporated in the Takeover Code, 2011 so as to facilitate the incorporation of MAC Clauses in acquirers' Letter of Offers. As already explained, such a MAC clause would allow the withdrawal of an open offer, if any condition that had been stipulated therein is not met for reasons outside the reasonable control of the acquirer.

Pursuant to the introduction of Regulation 23(1)(c) in Takeover Code, 2011 acquirers have not shied away from including certain conditions in their Letter of Offer, in the event of non-fulfilment of which they reserve the right

[20] NGM Resources Limited, [2010] ATP 11.

to withdraw the offer. The acquirers have laid down conditions such as, release of the existing encumbrance/pledge on the shares have to be procured by the buyer[21]; if the statutory approvals are not met for certain reasons, which were outside the control of the acquirer[22]; if any term mentioned in the Share Purchase Agreement is not satisfactorily complied with, or the SPA is rescinded,[23] then the offer stands withdrawn.

Takeover Code, 2011, with the introduction of Regulation 23(1)(c), has undoubtedly provided a great relief and advantage to the acquirers. More importantly, Regulation 23(1)(c) poses significant implications on the interpretation of Regulation 23(1)(d) of the Takeover Code, 2011 as well, which has been lifted as it is from Regulation 27(1)(d) of Takeover Code, 1997.

Application of Ejusdem Generis to Regulation 23(1), Takeover Code,2011?

Recently, in the matter of open offer of *M/s Jyoti Limited*[24] where the Acquirers had applied for the withdrawal of the open offer contending that the BIFR proceedings were inordinately delayed and the SEBI had failed to clear the draft letter of offer in due time, SEBI noted that the provisions of Regulation 23(1) of the Takeover Code, 2011, were similar to the provisions of Regulation 27(1) of the Takeover Code, 1997 and consequently, the ratio

[21]*Letter of Offer: Gokaldas Exports Limited*, SEBI, available at https://www.sebi.gov.in/sebi_data/commondocs/jun-2017/gokaldasloffer_p.pdf, last seen on 14/06/2018.
[22]*Letter of Offer: Amarnath Securities Limited*, SEBI, available at https://www.sebi.gov.in/sebi_data/commondocs/asldlof_p.pdf, last seen on 14/06/2018.
[23]*Letter of Offer: Indrayani Biotech Limited*, SEBI, available at https://www.sebi.gov.in/sebi_data/commondocs/jan-2018/IndrayaniBiotech-draftlof_p.pdf, last seen on 14/06/2018.
[24]*In re* Jyoti Limited, 2016 SCC Online SEBI 204.

laid down by the Supreme Court in the matters of *Nirma Industries Limited*[25]and *Akshya Infrastructure Private Limited*[26] with respect to Regulations 27(1) of Takeover Code, 1997 would also be applicable to the provisions of Regulation 23(1) of Takeover Code, 2011. It, thus, concluded that even under the new Takeover regime, an open offer can be withdrawn only in circumstances where it is rendered impossible for such open offer to continue, or in cases of non-attainment of any condition stipulated in the agreement that attracted the open offer obligation.

The flaw in the argument of SEBI is quite obvious. The rule of *ejusdem generis* cannot be applied to Regulation 23(1)(d) of Takeover Code, 2011, because Regulation 23(1)(c) enlists a circumstance where an open offer can be withdrawn even if it is not impossible to complete it: if a condition stipulated in the agreement for acquisition is not met. With the introduction of the Regulation 23(1)(c), Regulation 23(1)(d) cannot be read *ejusdem generis* with the Regulation 23(1)(a)(b)&(c) since they don't constitute a common genus of cases where it is impossible to complete an open offer. Though unlikely, it is still anticipated that when the question of application of *ejusdem generis* to the Regulation 23(1)(d) of Takeover Code, 2011 would reach SAT or Supreme Court, this obvious mistake would be corrected.

Assistance of Takeover Code, 2011 in interpreting Takeover Code, 2011.

If it is established that *ejusdem generis* cannot be applicable to Regulation 23(1)(d) of Takeover Code, 2011, then the argument that the principle does not apply to Regulation 27(1)(d) of the Takeover Code, 1997 as well, would

[25]Supra 2.
[26]Supra 3.

become even more convincing. Since, it is within the authority of the legislature to declare the meaning of an earlier act by enacting a new Act.[27]Moreover, "when an earlier Act is truly ambiguous a later Act may in certain circumstances serve as a parliamentary exposition of the former."[28] Thus, sometimes light may be thrown upon the meaning of an Act by taking into consideration "parliamentary expositions" as revealed by the later Act which amends the earlier one to clear up any doubt or ambiguity.[29] This rule of construction can be best explained by the *Cape Brandy Syndicate* case[30] where it was held that: *"Subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous.... subsequent legislation may fix the proper interpretation which is to be put upon the earlier."*

Considering Regulation 23(1)(c) of the Takeover Code, 2011 it can be deduced that the intention of the Legislature was not to restrict the ambit of Regulation 27(1)(d) of the Takeover Code, 1997, and an open offer can be withdrawn even if it is not impossible to complete it, if circumstances exist which show that the purpose of making the offer has become frustrated. The Takeover Code, 2011 merely made explicit what was previously implicit in the Takeover Code, 1997.

IV. 'Other Circumstances' that can permit withdrawal

According to the preamble of the SEBI Act, the object and purpose of enacting the legislation, and that of establishing SEBI was to protect the

[27]Bibi Shahnaz v. State of Bihar, (1998) 3 P.L.J.R. 932, 942.
[28]G.P. Singh, *Principles Of Statutory Interpretation*, 315 (12th ed. 2011).
[29]Sone Valley Portland Cement v. General Mining Syndicate Pvt. Ltd., (1976) 3 SCC 852, 862.
[30]Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) 2 K.B. 403.

interests of investors in securities and to promote the development of the securities market. Also, the TRAC report declared that the most fundamental objectives of Takeover Code, 2011 were: the balancing of the interests of various stakeholders; the provision of a fair, equitable and transparent regime that addresses the concerns of all stakeholders, and the protection of the interests of investors in the securities market, taking into account that both the acquirer and the other shareholders/investors need a fair, equitable and transparent framework.[31]It also states that the Takeover code shall ensure that the affairs of the Target Company are conducted in the ordinary course when a Target Company is subject matter of an open offer; and fair and accurate disclosure of all material information is made by persons responsible for making them to various stakeholders to enable them to take informed decisions.

The Courts in India have seemed to completely sideline the interests of the acquirers, in a bid to protect the interests of the exiting-shareholders. The insistence on the application of *ejusdem generis* to the withdrawal provisions of the Takeover Codes, i.e. the position of law that allows an open offer to be withdrawn only in circumstances rendering the completion of offer impossible is patently against the interests of the acquirers. At the same time, it is acknowledged that since the market of securities is a volatile market, an extremely liberal approach cannot be adopted while deciding the applications for the withdrawal of open offers. The general rule shall continue to be that an offer once made cannot be withdrawn. However, many a times, circumstances would arise that would frustrate the very purpose of the takeover and thereby warrant the withdrawal of the open offer, provided that

[31]Supra 6.

the interests of other stakeholders of the securities market are not inequitably prejudiced. After an analysis of the existing jurisprudence, it appears that the following factors can be taken into account while answering the question of whether a particular circumstance merits withdrawal.

Delay: SEBI has time and again adopted a lackadaisical approach in issuing observations on the draft letters of offers. Such reckless disregard by SEBI of its statutory obligations not only defeats the Takeover Regulations, but also renders the public offers made by the acquirers infructuous. Inordinate delay often buys the Target Company enough time to sell its *crown jewels*, thereby, defeating the entire purpose of the takeover. In *Akshya case*,[32] there was a delay of thirteen months by the Board, and the Supreme court admitted that: *"Such kind of delay is wholly inexcusable and needs to be avoided…..By adopting such a lackadaisical, if not callous attitude, the very object for which the regulations have been framed is diluted, if not frustrated."* Similarly, in the *Pramod Jain* case, the SAT had observed that: "delay on part of SEBI in approving the draft letter of offer has made mockery of provisions contained in SAST Regulations, 1997".[33]Mr. A.S. Lamba, in his minority opinion, further noted that: *"legislature, while making these regulations, made it clear that every player has to play its part with due solemnness, promptness, efficiency and dedication, so that public offers go through within timelines and nobody acts callously and without meeting timelines…….This understanding of adhering to timelines is most important, if public offers have to succeed."* [34]

[32]SEBI v. Akshya Infrastructure (P) Ltd., (2014) 11 SCC 112, 125.
[33]Pramod Jain v. Securities and Exchange Board of India, 2014 SCCOnLine SAT 128.
[34]Ibid, at para 12.

However, the Supreme Court decision in *Pramod Jain v. SEBI,*[35] overshadowed the aforesaid observations of the SAT. The Court, while imputing the acquirers themselves for the delay caused, categorically held that delay, howsoever inordinate, cannot be considered while deciding an application for withdrawal of an open offer. It would also be pertinent to note that even, in a hypothetical situation where it is established that the acquirer had no role, and the delay was entirely the Board's fault, the present position of law would not allow the withdrawal of the open offer on that ground, since, the delay would not render the completion of the open offer impossible. It is the hypocritical side of the current interpretation of the law that acknowledges the volatile nature of the securities market, at the same time, exposes the acquirers to undeserved fluctuations of the market.

Due Diligence: Moreover, the acquirer company remains toothless even in situations where the promoters or Board of Directors of the Target Company have siphoned off funds of the company or engaged in deliberate fraud. Courts, in such cases, reprimand the Acquirer Company for failing to exercise proper due diligence. The investigations of the Courts as to whether the acquirers have exercised proper due diligence prior to announcement of the open offer is a superfluous exercise. Because, even if it is established that the acquirer had exercised proper due diligence, and it was impossible for them, at the time of the open offer announcement, to uncover the fraud or irregularities of the Target Company, no relief could be provided to the acquirer as per the present position of law. Like inordinate delay, discovery of fraud and irregularities in the Target Company doesn't technically render the completion of the open offer impossible. The Supreme Court fails to

[35]Supra 1.

appreciate the detrimental consequences that inordinate delay or discovery of irregularities brings forth for the acquirer and has tagged the same as a *bad bargain*[36] and *sheer business misfortune*.[37]

It is hereby concluded that inordinate delay, sale of *crown jewels*, exercise of proper due diligence, discovery of fraud and irregularities, etc. shall be considered as relevant factors while deciding an application for withdrawal of an open offer. However, it is not being submitted that these factors shall function as conditions. Rather, the final decision shall be grounded on the facts and circumstances of each case; an attempt shall be made to balance the interests of all stakeholders in an equitable manner. It is further submitted that no hard-and-fast rule can be provided in this regard, and SEBI is expected to use the wide discretion conferred upon it judiciously. The explanation appended to Regulation 23(1) (Takeover Code, 2011) that requires SEBI to pass a reasoned order in case it takes recourse to Regulation 23(1)(d), would further keep a check on SEBI's use of its discretionary powers. Therefore, this regressive and incorrect interpretation of the withdrawal provisions of the Takeover Code shall be corrected at the earliest, especially considering the fact that the Indian government is currently struggling to revive the M&A activity in the country, and to boost investments in the economy.

[36]Supra 3.
[37]Supra 2.

Third Party Funding in International Commercial Arbitration

-Ridhima Sharma[*]

Abstract

International Commercial Arbitration (ICA) as a method of adjudication is gaining foothold primarily due to factors like Confidentiality, Choice of Law, Seat of Arbitration, Choice of Panel/Institution, Pre- decided and customised procedure etc. Arbitration is a recognised adjudication method even in World Trade Organisation. The evolving arbitration practices have attained uniformity worldwide through UNCITRAL model laws. Concepts like Emergency Arbitrators have evolved due to business exigencies and to minimise court interventions.

The Municipal Jurisdictions of the Singapore and the Hong Kong have statutorily recognised third party funding in ICA. However, the issue is in nascent stages and debatable in Indian context. This research paper aims to address issues like Scope of third party Funding, Enforceability of contract of third party funding and its legality, Party autonomy and decision making, Interjections by third party, Effect on settlements, Execution of decrees/awards by or against third party/funder, Necessity for disclosure of third party funding agreement, Disclosure Requirements and Conflict of interest by arbitrators and third party funder, Competition law issues, Comparative analysis with other jurisdictions.

***Keywords**:* International Commercial Arbitration, Third Party Funding, Maintenance, Champerty, Contingency Fees, Institutional Funding.

[*]Author is a third year student at Symbiosis Law School, Noida. She can be reached at: ridhisharma333@yahoo.com.

I. Introduction

International Commercial Arbitration (ICA) as a method of adjudication is gaining foothold primarily due to factors like Confidentiality, Choice of Law, Seat of Arbitration, Choice of Panel/Institution, Pre- decided and customised procedure etc. Although, Arbitration is a resolution system used by the parties to avoid the formalities, procedures and rigidity of the ordinary courts, it shares many aspects with litigation. Arbitration, and in particular international arbitration, can involve damages amounts as high as those commonly seen in court litigation. According to Queen's Mary Arbitration Survey, "Cost" is seen as arbitration's worst feature, followed by "lack of effective sanctions during the arbitral process", "lack of insight into arbitrators' efficiency" and "lack of speed".[1]International arbitration can be expensive, and this may discourage the parties with legitimate claims from initiating proceedings. This has led to an increase in business demands for financing options for dispute resolution. On the supply side, there is a growing body of well-capitalised professional third-party funders to meet this demand.[2]

External or Third Party Funding has become an important feature in the world's most popular seats of international arbitration – London, Paris, Geneva and Hong Kong[3]. Recently, Singapore and Hong Kong have made a major and important change in their alternative dispute resolution

[1]International Arbitration Survey: Improvements and Innovations in International Arbitration, Queen Mary University of London, 14, (2015) available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf, last seen on 21/09/2017.
[2]*6 things you need to know about third-party funding in international arbitration*, Singapore Legal Advice, available at http://singaporelegaladvice.com, last seen on 21/09/2017.
[3] Supra 1.

mechanism by removing the obstructions relating to 'Third Party Funding', putting an important step forward in making their arbitration seats competent in comparison to all the other Asian Arbitration seats. Singapore has enacted a legislation[4] (which came into force on March 2017) and the act has also introduced Civil Law (Third Party Funding) Regulations 2017, which provide a detailed framework for third party funding and Hong Kong has drafted legislation[5] allowing parties involved in arbitration to obtain third party funding, subject to certain safeguards.[6]

What is 'third party funding'?

Third party funding refers to a method of funding where a third party with no connection to the proceedings pays some or all of the costs of the case (the litigation and other expenses) and gets a share of a sum of money awarded in damages, if the case is won by the party for which the funding has been provided. It is available to both the parties. Basically, it is an arrangement where someone who is not directly involved as a party in the process of arbitration agrees to provide funds to a party in exchange for a specific return.

Third party funders in Arbitration agree to finance all or a portion of one party's legal costs and typically earns an agreed percentage of any award or a success fee, or a combination of the two, in the event of a successful arbitration. If the case fails, the funder loses his investment and is not entitled to any payment (recourse funding). The percentage earned by the

[4] The Civil Law (Amendment) Act, 2017.
[5] The Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act, 2017.
[6] S.Sahani and B.Nieuwveld, *Third Party Funding in International Arbitration*, 3-18, (2012).

third-party funder is generally 20%-50% of the amount awarded in a case, although it can also be a multiple of the amount invested by a third-party funder.

II. International Scenario

ICC

International Chamber of Commerce's International Court of Arbitration, founded in 1923 in Paris is the world's oldest and most preferred arbitral institution. ICC Court is actually not a court but an administrative institution that acts in a supervisory capacity under the ICC rules.[7]The Court does not itself resolve disputes, but administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC. It is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules.[8]

The ICC Rules, which govern the conduct of ICC Arbitration proceedings, prescribe that the Arbitrator, in its final award, shall fix the costs of the arbitration and decide in what proportion the parties will bear them (including the legal and other expenses). In making such decisions, the arbitral tribunal must take into account the party's conduct in an expeditious and cost-effective manner.

[7] G.B. Born, *International Commercial Arbitration*, 185, (2009).
[8] *ICC Rules on Arbitration*, International Chambers of Commerce, 2017, available at https://iccwbo.org/dispute-resolution-services/arbitration/icc-international-court-arbitration, last seen on 20/07/2018.

The ICC adopted, on 12 February 2016, a "Guidance Note for the disclosure of conflicts by arbitrators,[9]" containing the inclusion of a reference to third-party funding ("TPF"). The Guidance Note states that arbitrators should consider, when evaluating whether to make a disclosure, "relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award."[10]

A recent ICC Commission Report titled "Decisions on Costs in International Arbitration"[11] found in its survey of 41 jurisdictions that most were broadly accepting of third party funding arrangements and recommended transparency in the dealings of such funded party. These changes have been particularly marked in certain jurisdictions which have, until recently, prohibited its use based on the common law doctrines of maintenance and champerty. IBA's 2014 Guidelines on Conflicts of Interest[12], which require parties to disclose "any relationship, direct or indirect, between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration remain, however, only soft law, but instrumental in recognising Third Party Funding. The ICC Arbitration seated in London, Essar Oilfields Services Limited v

[9] International Chamber of Commerce, *Guidance Note for the disclosure of conflicts by arbitrators,* ICC, 2012.

[10] Ibid.

[11] ICC, *Decisions on Costs in International Arbitration,* 2015.

[12] International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration,* IBA,2014.

Norscot Rig Management PVT Limited[13] is a leading example of how the funded party's Third Party Funding costs can be recovered from the losing party based on its conduct during the arbitration proceedings.

Institutional Rules

The creation of institutional Arbitration centres, each of which is endowed with its own set of arbitration rules, has procured the necessary floor for thousands of arbitration. The adoption of special arbitration rules linked to the close supervision by an administering arbitration institution has helped contracting parties in their evaluation of the benefits of arbitration.[14] The rules for regulation of Third Party Funding of the major/ leading[15] institutions have been discussed as follows:

i) LCIA

The London Court of Arbitration, founded in 1892, is the second most popular European seat in the field of International Commercial Arbitration. It is highly desired by the parties who want common law practices (disclosure, security for costs etc.). The continuous spread of English as the language for international business is also a contributing factor in this. The LCIA handles over 100 cases annually and the number is rising every year.[16] The international nature of the LCIA's services is reflected in the fact that, typically, over 80% of parties in pending LCIA cases are not of English

[13][2016] EWHC 2361 (Comm) (Queen's Bench Division).
[14] H.A. Grigera Naón& P.E. Mason, *International Commercial Arbitration Practice: 21st Century* (2010).
[15]Supra 1.
[16] London Court of International Arbitration, *Director General's Report,* 2007.

nationality.[17] The LCIA's administrative fees are calculated on the basis of the time spent by the LCIA personnel.[18]

LCIA is a signatory to the New York Convention, 1958[19], Geneva Convention, 1927[20] and has adopted the UNCITRAL Model Law[21] while making its 1996 Arbitration Act. The National Arbitration legislation in the United Kingdom includes The Arbitration Act, 1996, Arbitration rules, LCIA's arbitration rules 2014 which are applicable to England, Wales and Northern Ireland.

Litigation Funding is not a novice in the English Law and has been prevalent since late 1960s. Although, the Criminal Law Act, 1967 prohibits Maintenance, Champerty and Barratry in situations opposed to public policy. The definition of the public policy concern leading to the prohibition of litigation funding was provided by Lord Denning, who in 1963 stated:

"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champerty maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses".[22]

A funding arrangement deemed to be contrary to public policy can still be found to be illegal on grounds that it constitutes maintenance or champerty, but law on Maintenance and Champerty has been changed according to the

[17] G.B. Born, *International Commercial Arbitration*,185 (Volume I, 2009).
[18] Ibid, at 1.
[19] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[20] Geneva Convention on the execution of Foreign Arbitral Awards, 1927.
[21] UNCITRAL Model Law on International Commercial Arbitration, 1985.
[22] *Re. Trepca Mines* (No 2) [1963] Ch 199(Court of Appeal, England and Wales).

changing scenario. Conditional Fee Arrangements (CFAs) which came up in 1990s and DBAs (Damage Based Agreements) have been made legal subject to various caps. Now, both are quite prevalent in the English Legal Scenario along with Institutional Litigation Funding subject to the Jackson Reforms.

Arbitration Legislation of the U.K[23] provides for power to the Arbitrator for allocation of the costs of Arbitration to either or both of the parties depending on the conduct of the parties during the arbitration proceedings. It covers legal and other costs under Section 59(1)(c)[24] for the purpose of costs in Arbitration proceedings. The new concept of classifying Third Party Funding within the meaning of 'other costs' was iterated by the English court in the appeal received against ICC Arbitration seated in London, Essar Oilfields Services Limited v Norscot Rig Management PVT Limited [2016] EWHC 2361 (Comm)[25], in which 300% of the sums lent or 35% of the damages was to be given to the Third Party Funder, not the lower of the two, but the greater, funder's cost was assigned to be paid by the losing party in the suit and the Third Party Funding costs were recognised as a part of Other Costs under the purview of Section 59(1)(c). The decision was inspired by the principle that the arbitrator must consider the conduct of the parties while allocating the costs and special cost allocation powers must be used by the arbitrator to penalise the dilatory. Another salient feature of the act is that it provides for security of costs which means that costs of arbitration can be reimbursed to the either of the parties depending on the conduct of the parties. The power lies in the hands of the arbitrator depending on the

[23] Arbitration Act, 1996.
[24] S. 59(1)(c), The Arbitration Act, 1996.
[25] [2016] EWHC 2361 (Comm) (Commercial Court, Queen's Bench Division).

conduct of the parties. Though, the court can compel disclosure of identity of the funder for security of costs order.

The LCIA Rules 2014 also provide for an Arbitrator's responsibility to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.[26] The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances.[27] The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party.[28]The Arbitral Tribunal is required to give its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues and any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expenses.[29]

The United Kingdom is the first jurisdiction to have a code of conduct for regulating the Funding Arrangements enforced by the Association of

[26] A.14.4(ii), LCIA Rules of Arbitration ,2014.
[27] LCIA Rules of Arbitration ,2014
[28] Ibid.
[29] Supra 26.

Litigation Funders, a private organisation which handles the third-party funding in the U.K.

ii) SIAC

Singapore is the first Asian jurisdiction to recognise Third Party Funding (TPF) arrangements in international arbitration proceedings. Third Party Funding contracts were previously not allowed in Singapore. Though, the country considers two types of Maintenance and Champerty (i) as a tort, (ii) in contracts which is expressly void (renders a contract unenforceable). While the first was never recognised, the latter is still prohibited under Singapore law. The following changes/amendments have been brought into effect by the jurisdiction to remove the hindrances and facilitate Third Party Funding arrangements.

The Civil Law (Amendment) Act, 2017

Recently, in March 2017, Singapore enacted the Civil Law (Amendment) Act, 2017 after a public consultation from 30 June 2016 to 29 July 2016, paving a base for the further changes. The Amendment Act has added Section 5A and 5B. While Section 5(A) provides for abolishment of Maintenance and Champerty except for contracts (as it is against public policy), Section 5(B) provides that Third Party Funding contract is valid for prescribed dispute resolution mechanisms (described later) and not against public policy. It also provides rights of a funder and exceptions. Rights of a funder are not enforceable in any court or arbitral institutions if:

i) He ceases to qualify as a qualified third party funder.
ii) He fails to comply with the Third Party Funding Regulations and qualifications.

Although it does not affect a third party's right against the third party funder. However, the funder can have recourse from court or arbitral institution under Section 5 B (5) and 5 B (6)[30], if he is able to prove that the event in question was accidental or due to inadvertence or some other sufficient cause; or that on other grounds it is just and equitable to grant relief.

Civil Law (Third Party Funding) Regulations, 2017

These regulations were issued as an ancillary to the Civil Law Amendment. The regulations provide for qualification for a Third Party Funder, the classes of Dispute resolution in which Third Party Funding arrangements can operate and the governing provisions for Third Party Funders to comply with. The rules have confined TPF to international arbitration proceedings and related proceedings, such as court proceedings to enforce the award or mediation proceedings if an Arb-Med dispute resolution process is undertaken. The funder must have as its principal business the funding of costs to dispute resolution proceedings, whether in Singapore or otherwise and must have a paid up share capital of S$5 million or greater; and failure to comply with funder requirements will disallow the funder from enforcing its rights. This will lead to automatic regulation of the market at an introductory level.

Changes in Legal Profession Act

The lawyer is prohibited to receive a direct financial benefit from the introduction or referral. They can advise on or draft a third party funding

[30] Ss. 5(B)(5), 5(B)(6), The Civil Law (Amendment) Act, 2017.

contract for their clients and act for their clients in any dispute arising out of the third party funding agreement.[31]

Changes in LPCR

The amendments to the LPCR concern two key areas:

i) Disclosure: Rule 49A imposes a duty on lawyers to disclose to the tribunal or court and every other party the existence of any third party funding their client is receiving, including the identity and address of the third party funder.

ii) Prohibition against financial interests: Rule 49B prohibits lawyers and law firms from holding directly or indirectly any shares or other interest in the Third Party Funder (i) which the lawyer or law firm has introduced or referred to their clients; or (ii) which has a third party funding contract with a client of the lawyer or law firm.

Furthermore, the Singapore Institute of Arbitrators (SiArb) has also issued guidelines for third-party funders of arbitration proceedings. Among other things, the SiArb guidelines contain instructions on matters that should be covered by a third-party funding contract, such as the amount of funding; authorisation for disclosure of funder's identity, financial obligations undertaken by the funder, confidentiality and privileged nature of information, conflicts of interest and control of proceedings and circumstances for withdrawal of funding.

[31] Legal Profession Act, 1967.

iii) HKIAC

Third Party Funding was previously not permitted in Hong Kong in both Litigation and Arbitration. Maintenance and Champerty were big reasons for not allowing it as being opposed to public policy. The Hong Kong courts have prohibited the doctrines of maintenance and champerty in litigation, with three exceptions:

a. Where the third party establishes it has a legitimate interest in the outcome of the litigation

b. Where a party in the proceedings persuades the Court that it should be permitted to obtain third party funding on the basis of accessibility of justice; and

c. In certain categories of proceedings such as insolvency.

Though, the Hong Kong Court has expressly said in the case Cannonway Consultants Limited v Kenworth Engineering Ltd.[32] that the doctrine of Champerty does not apply to Arbitration matters. In October 2016, the Hong Kong Law Reform Commission published the report 'Third Party Funding for Arbitration', which proposed that Third Party Funding should be allowed in Hong Kong for Arbitration. Sensing the opportunity to bring the Hong Kong International Arbitration Centre in line with the other prominent arbitration seats, Hong Kong has also started to clear the obstacles in the way of Third Party Funding in Arbitration matters. The Hong Kong government introduced the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Act 2017. It ensures third party funding of arbitration, both domestic and international, not prohibited by the common law doctrines of

[32] [1995] 1 HKC 179 (High Court of Hong Kong).

champerty and maintenance, in tort or as an offence and extended this amendment to arbitrations seated outside Hong Kong. The bill also proposed an authorising body to authorise Third party funders and prescribed what all should be included in the third party funding agreement (key features, risks and terms including the degree of control of the third party funder in the arbitration, whether the funder is liable for adverse costs, insurance premiums and securities for costs, and the circumstances where parties to funding agreements may terminate the agreement), the capital requirements for a party to qualify as a Third Party Funder. It also created mandatory disclosure requirements that a funded party must notify the tribunal and every other party of the existence of a funding agreement. The Hong Kong Amendment Act has provided a very good example of regulating third party funding by using a soft touch regulatory approach and stepping into a new sphere to strengthen the position of the HKIAC.

III. Indian Scenario

Arbitration in India is still in its nascent stage. The main reasons for this are the costs of the arbitration proceedings and the public confidence in the courts. Arbitration proceedings are generally technical and involve a considerable amount of expenses. The number of instances where claims do not get pursued or get abandoned is very high. More often than not, advantage of lack of staying power is taken and, in fact, it is standard strategy to wear out the claimant. Arbitration expenses include the Arbitrator's fees, the legal fees, the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the Administrative Fee and expenses of the Institute, and the legal and other costs incurred by the parties in relation to the arbitration, if such costs have been claimed and to the

extent that the arbitral tribunal considers that the amount of such costs is reasonable. Arbitration costs are generally met by the losing party by principle.

The subject of Cost was discussed by the Law Commission in its 246th Report[33]. The Committee found it just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception. The rule is not a punishment for the losing party, but to curb frivolous suits and to further compliance to contractual obligations.

The recent amendment to the Arbitration and Conciliation Act, 1996 added Section 31 A[34] for regime of costs. The Section prescribes the Arbitrator's discretion to award costs including reasonable costs relating to the fees and expenses of the arbitrators, Courts and witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award. It also provides for the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party subject to the success of the claims made by the parties, any frivolous counterclaims and the conduct of the parties.

The main challenges in the path of Third Party Funding in India are as follows:

i) Public Policy

[33] 246th Law Commission of India Report, *Amendments to the Arbitration and Conciliation Act, 1996,* (2014), available at http://lawcommissionofindia.nic.in/reports/report246.pdf .
[34] S. 31 A, The Arbitration and Conciliation Act, 1996.

If a foreign award is in conflict with the "Public Policy" of India, it will not be treated as deemed decree of court and cannot be enforced in India. The expression 'Public Policy' has not been defined in any statute but has been developed case by case.

In the Renusagar Power Plant Ltd. vs. General Electric Co[35], it was held that an award is against public policy if the enforcement of such award would be contrary to (1) fundamental policy of Indian Law; or (2) the interests of India; or (3) justice or morality. The expressions were not defined in the case by the court. In the ONGC v. Saw Pipes Ltd.[36], one more marker of Patent illegality was added to the three already existing markers.

In ONGC vs. Western Geco International Limited[37] and the Associate Builders vs. Delhi Development Authority[38], it was held that the award can be set aside if it is:

a. Contrary to the fundamental policy of Indian law, i.e. it is "arbitrary" or "whimsical", as opposed to being fair, reasonable and objective, or it contains a decision so irrational that no reasonable person would have arrived at it;
b. Contrary to the interest of India, i.e. it affects India's relations with other countries
c. Contrary to justice and/or morality, i.e. it "shocks the conscience of the court", or it relates to an immoral contract
d. patently illegal

[35] AIR 1994 SC 860.
[36] AIR 2003 SC 2629.
[37] (2003) 5 SCC 705.
[38] 2014 (4) ARBLR 307.

Finally, in the 246th report of the Law Commission, a recommendation was made, that an award modifies the ambit of violation of public policy to only include those awards that are: (i) affected by fraud or corruption, (ii) in contravention with the fundamental policy of Indian Law or (iii) conflict with the notions of morality or justice.

Third Party funding is in reality a furtherance of the public policy that it is pertinent that no litigant should suffer from financial crippleness for his quest for access to justice. It is a furtherance of morality and justice. It will enable furtherance of legitimate claims in arbitration.

ii) Maintenance and Champerty: -

Champerty is the process whereby one person bargains with a party to a lawsuit to obtain a share in the proceeds of the suit. Maintenance is the support or promotion of another person's suit initiated by intermeddling for personal gain. Both are common law doctrines especially made to protect the judicial system from influence by the rich and the exploitation of the poor by the rich. The doctrine took birth as a part of common law provided by Lord Denning, who in 1963 stated:

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses".[39]

Champertous agreements opposed to public policy are strictly prohibited under English Law. Some jurisdictions still recognize champerty and

[39] Re Trepca Mines (No 2) [1963] Ch 199 (Court of Appeal, England and Wales).

maintenance as offenses but in most states they have been replaced with the civil actions of Abuse of Process and Malicious Prosecution, both of which deal with the wrongful initiation of litigation and perversion of legal process. In India such agreements become per se illegal only if Advocates are involved, as decided by the Court in Dr.V.A.BabuLegal vs State Of Kerala (2007)[40]. An agreement for supplying funds by way of 'maintenance for 'Champerty' is valid in India unless:

(a) It is unreasonable so as to be unjust to the other party,

(b) It is made by a malicious motive like that of gambling in litigation or oppressing other party by encouraging unrighteous suits, and not with the bona fide object of assisting a claim believed to be just.

An agreement is not champertous unless it is immoral or opposed to public policy and that the terms of the agreement are unjust or shocking to the conscience of law. Also, Champerty gets initiated only when there is specific Intent to initiate an action for the funder's own benefit. It has been reiterated in many arbitration decisions that Maintenance and Champerty are different from Third Party Funding agreements.

Also, it is pertinent to look to the objectives of these doctrines. Keeping in mind the financial status of people in India and the diversity of the nation, bringing financial accessibility to justice, so that no individual is crippled financially in his quest for justice is also a part of India's public policy.

Third Party Funding Agreement, a Wager or a Contingent Contract?

[40]CRP. No. 933 of 2002 (E).

A wager is a promise to pay money or money's worth on the happening or non-happening of an uncertain event. It is basically a gamble. The parties do not have any personal interest other than the amount to be won. In a wagering agreement the amount to be paid is pre-decided by the parties to the agreement there is no question of indemnity as no risk is covered.

The essentials of a wagering agreement have not been enlisted in a specific statute or case laws by the Hon'ble courts of the country, but the following points constitute the essence of a wagering agreement: -

1. There should be uncertainty related to the event. There must be an element of gamble, a play of luck.
2. The parties should not have any other interest in the transaction other than winning or losing. Parties are interested in knowing about the event only for the purpose of winning or losing.
3. In a wagering agreement the amount to be paid is pre-decided by the parties to the agreement.
4. There is no question of disclosure of material facts by either of the parties. The parties are only interested in the win or loss

Wagering Contracts are void as per the Indian law and illegal in some states including Gujarat and Maharashtra. The rationale behind Sec.30 of the Indian Contract Act, 1872 which treats an agreement by way of wager as void is that the law discourages people to enter into games of chance and make earning by trying their luck instead of spending their time, energy and labour for more fruitful and useful work for themselves, their family and

society.[41] The law is made such with a view to inculcate a positive outlook towards earning a living by way of sincere and dedicated efforts towards securing a job.

A contingent contract has been defined as a contract to do or not to do something, if some event collateral to such contract does or does not happen. It is wider in scope and includes wager. The parties have an independent interest apart from the money involved. For example, A gets his house insured. It is a contingent contract as A has independent interest in this case. A contingent contract is valid.

The main difference between a contingent contract and a wager is that the parties do not have any other personal interest in the happening of the event. The parties in a wager do not have an interest in the subject matter of the agreement. Unless the contingent contract is based on an impossible event, it is valid.

A Third Party Funding agreement is not a wager. It is not a gamble on the part of the parties, but a calculated risk taken by the funder to fund a dispute after considering the merits of the claimant's case. Both the parties make disclosure of the material facts of the suit. Assessment of risks is based on actual calculations. The Third Party funding agreement is a contingent contract, and hence valid.

Enforcement of the Contract between the Funder and the Funded Party

Third party funding is an alternative method of funding where a commercial funder with no connection to the proceedings will pay some or all of the

[41]Subhash Kumar Manwani v. State Of M.P., A.I.R. 2000 MP 109.

costs of a case in return for a share of any sum of money awarded in damages if the case is won. However, if a funder refuses to pay the amount promised in the middle of the proceedings, due to the apprehension of the case going in favour of the non- funded party, as recourse funding is not available in third party funding agreements,can a non- party be made a party in the arbitration proceedings?

This point of law has been settled by the Hon'ble Supreme Court in the case Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. &Ors. . The Hon'ble Supreme Court interpreted Section 45[42] of the Arbitration and Conciliation Act, 1996. The case involved a set of facts where the parties had entered into multiple agreements and disputes had arisen between the Indian promoter and the foreign collaborator in relation to a joint venture which had been undertaken by the two, interlinked agreements, the performance of which were also linked with one another. The court interpreted Section 45 'person claiming through or under' interpreting that the section does not refer to parties to the agreement but persons in general. Transaction should be of composite nature where performance of principal agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute, to serve the ends of justice.

Third Party Funders can be brought under the purview of arbitration through the means of the reasoning of this judgment. The funder can also be held liable to pay the costs of the suit, under recovery of costs by this judgment as the general rule is that the losing party pays the cost of arbitration.

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[42] S. 45, The Arbitration and Conciliation Act, 1996 .

IV. Conclusion

India has showed a Pro- Arbitration approach in recent years. The recent amendment to the Arbitration and Conciliation Act, 1996as recommended by the Law Commission includes very prominent steps to make India a favourable destination for International Arbitrations by making the Act in consonance with UNCITRAL Law and the New York Convention. The judgments given by the Indian Courts are an addition to that. The 246th Law Commission Report recommended Institutional Arbitration in India.

In India there are some institutions which are already doing good work in the area of arbitration. Delhi International Arbitration Centre was set up by the High Court of Delhi. Indian Council for Arbitration was established jointly by the Indian Government and the FIICI. It has signed cooperation agreements with 46 major arbitration centres around the world and provides services in the area of international commercial and maritime arbitration. International Centre for Alternate Dispute Resolution is an autonomous body working under the aegis of the Ministry of Law and Justice, Government of India. It is head quartered in New Delhi and has regional centres in Hyderabad and Bengaluru. The Nani Palkhiwala Arbitration Centre situated at Chennai, is modelled on the lines of the International Council of Arbitration set up by the International Chamber of Commerce, Paris. The establishment of the Mumbai International Arbitration Centre is a step forward in making the country arbitration friendly.

The establishment of the aforesaid arbitral institutions clearly shows that a tone is already been set in India to make arbitration a big success. In India there is a tardy process of arbitration, usually avoided due to high costs. That's where Third Party Funding comes into picture. In a country, where

most of the small scale industries do not have lines of finance available, Third Party Funding will bring a boost to the Arbitration network in India and bring India in line with other Arbitration seats, as Singapore and Hong Kong have done.

India can allow Third Party Funding to walk on a tight rope with stringent regulations as done by Singapore, and put qualifications on funders. It can restrict funding to Institutional funders only and put restrictions on lawyers to enter into agreements (success fee arrangements which can irk India) and the mandatory requirement of being paid a 'share' in the arbitration fruits: be it costs or award, depending on the outcome of the proceedings, mandatory disclosure requirements.

India needs a robust arbitration machinery to resolve the issues inundating the current system. The creation of a strong arbitration institution, replete with its own rules, guidelines and facilities, would allow for consistency in procedure. A strong Arbitration Institution is the need of the hour.

Critical assessment of Real Estate Law Reforms in Urban Areas: Issues of Policies, Planning and Governance for Land Use

-Robin Prasad[*]

Abstract

Recently the Union government has passed the Real Estate Regulation Act, 2016 that aims at regulating the entire Real Estate sector. The Act has been brought into force to protect the buyers of houses from corrupt developers. The governance of land is complex, as land is an asset on which law and finance has different perspectives and people are the first casualty to ignorance of the rigor of both disciplines. The article aims to do a comparative analysis of the hitherto existing legal framework that the Act is trying to replace. Through such analysis the bracketed construction of the Act has been problematized. The article shows how real estate is in practice moving to neo-liberal governance wherein sovereign in effect abdicates its central power to market actors and only acts as a neutral watchdog with sole responsibility to check compliances on paper.

[*]Author is a practicing advocate in the Chambers of M.C.Bhatt, S.H.Iyer and Vikram J. Thakor, Ahmedabad, Gujarat. He holds a B.A. LL.B(Hons.) degree from Nirma University. He can be reached at: robin.prasad93@gmail.com

I. Introduction

Since the beginning of the India's existence as independent, governance of land remained one of the central concerns of the bureaucratic structures inclusive of union and provincial governments. One of the interesting features of this particular concern was its acceptance of the fact that certain steps taken by the colonial administration pertaining to *upkeep of land records* so that nation-state has a fair idea of the land it has and under whose control, in the form of ownership it has, is known by the government. This tendency of nation-state is an inherently political act with its own set of implications, and it is this enumeration and recording that post-modernist thinkers like Foucault and Agamben has described as *governmentality*.

May that the situation be, the governance of land being a concurrent subject witnessed heavy corruption wherein bureaucratic structures more often than not furthered the provincial or union governments aim solely and apathetic to the concerns of original ancestral holders of the land. However, the era of globalization saw the structures of governance of land back-firing and slipping out of the control of respective governments and started off to be governed by market through the new players, who were builders, constructors and profit pursuing original owners, be it farmers, small land tillers or holders of land as tenants.

Market forces now dictated the methodology in which governments, be it union or provincial,determine the end-use of the land as an underlying asset and its present and future valuations. The drivers of these market forces which were real estate developers, builders and large scale infrastructure companies reconfigured the bureaucratic mandate in such a way that it became the pious duty of the governments to make them remain

unencumbered by the dense legal procedure of the earlier times; where there was presence of cress-crossing central and state government laws and regulations, so that *ease of doing business* gets a boost.

The contemporary reforms in real estate laws undertaken in this socio-political backdrop are having a significant impact on the two broadest categories of land present in India, that is, land of rural areas that are agriculture intensive and the land of urban areas that are service intensive: having residential and commercial uses located within it. The treatment of land by the market players who heavily use the concepts of project finance and risk management is not control- based; for their own ends, like the government, but instead *instrumental* and for profit. It is this treatment that augments the possibility of original land owners and residential house dwellers interests being consumed and increases the chances of them getting *erased* from the land governance landscape. This marks a significant departure from the earlier times when these categories were at least present but only not heard.

It is to be noted that from this point onwards, the problems pertaining to the aspiring house owners will be discussed, keeping in mind the backdrop of the projects in which their investment is sought by real estate market players. These projects are from this point onwards being traversed as a complex maze of contested entitlements.

Prior to the enactment of Real Estate Act, 2016

As far as the poor services of the real estate developers went, the aggrieved prior to the enactment of the Act had two distinct forums available with him. It is no doubt the case that the forums were general in nature and not

specifically covering the issues of real estate. Firstly, the aggrieved person who has been denied the promises made in the offer document of the developers be it time in which the allotment of flat will take place, the method of payment or any other issue can, depending upon the value of the claim go to the Consumer Forum which derives its statutory powers from the Consumer Protection Act, 1986.

There is availability of three levels through which Consumer Forum works, they are, district, state and national. In the real estate sector, most of the times the claim is above twenty lakh rupees therefore, it is the State Consumer Forum or the National Consumer Forum that takes up these cases. The liability is fastened on the erring developers by these forums mainly considering the aggrieved party as a *consumer*. For this purpose Section 2(r) is used which exhaustively defines 'unfair trade practice' and fixes liability on the project developers. Along with it Section 2(f) defining 'defect' and 2(g) defining 'deficiency' is also used to provide relief.

Secondly, and concurrently to the jurisdiction of the Consumer Forum, in certain cases even the Competition Commission can be approached which derives its jurisdiction from the Competition Act, 2002. This enactment is an anti-trust Act that ensures level playing field in the market. The Commission however, only provides relief if it is able to establish that the erring party, the developers in the present context, has *abused its dominance* as per Section 4 of this Act. Now, let us analyze one case decided by the Competition Commission that exposed the numerous problems in the real estate sector.

In the landmark case of *Belaire Association vs. DLF*[1], the informant association had booked flats in one of the projects of the respondent developer by the name of 'The Belaire' coming up in Zone 8, Phase V in DLF City, Gurgaon, Haryana. The informant association had alleged that the respondent developers were engaging in *abuse of dominance* by imposing arbitrary condition in the *Apartment Buyer's Agreement*. The arbitrariness was shown by the informants from the conduct of the developers through instances like delay in handing of possession, unilateral authority to change terms and conditions of the *Buyer's Agreement* etc.

In its landmark order, the Competition Commission established that *abuse of dominance* is indeed taking place by citing the conduct of the developer and the *Apartment Buyer's Agreement* which was found to be loop-sided. It was shown to be such by citing the below mentioned points[2]:-

- Sanction and commencement of project without approval from competent provincial authority but assuring such compliances to be done in the *Buyer's Agreement*. Increasing floors mid-way as also Floor Area Ratio & Density per Acre.
- Inordinate delay in completion and possession and forfeiture of amount
- Drafting of heavily biased clauses in the *Buyer's Agreement* in favour of the developer

[1]Belaire Association v. DLF,Case No. 19 of 2010, (Competition Commission of India,12/08/2011).
[2]Ibid, at 220.

The commission further went on to appreciate the problems of the aggrieved informant association by stating that[3]:-

"…it is only understandable that applicants who had paid substantial sums of advance deposits for the booking would get concerned due to inordinate project delays as was the case here. But their genuine anxiety was met with utter disregard and insensitivity by DLF Ltd. When out of sheer desperation some allottees stopped payment to create pressure on DLF Ltd. Their allotments were cancelled and huge deposits were forfeited. For those who succumbed to these unilateral and retaliatory conduct, DLF Ltd. charged heavy interests on delayed payments."

After analyzing the above factual matrix and enumerating as many as 16 unfair conditions[4] in the *Buyer's Agreement* the commission held the respondent developer to be *abusing dominant position*.[5] The case was significant since it was first in providing relief to the plot allottee owners and started to pose a major threat to the exploitative conduct of the developers and led to major re-drafting of the *Plot Buyers Agreements* in the realty sector.

Despite of the relief and availability of the forum that this particular case provided, the factual matrix of it rested on the crucial condition of whether DLF is *dominant* in the *relevant market*. However, the Competition Commission restrained from interfering in those cases where the defaulting

[3]Ibid, at 222.
[4]Ibid, at208-218.
[5]See Section 19 (4), (6) & (7) of Competition Act,2002 which were also used along with Sec.4.

developer was not *dominant* and yet abusing his position by imposing unfair conditions.[6]

Real Estate (Regulation & Development) Act, 2016

In the preceding part, one witnessed the method in which relief was provided to aggrieved allottees with the help of general statutes of Consumer Protection Act and the Competition Act. Since both of them were made to fulfil a different set of objectives, these statutes were only able to provide limited help. Hence, it could have been easily said that there was a legal vacuum as far as central statutes went, in considering the exploitative behavior of realty developers.

These socio-legal circumstances led to the passage of the Real Estate (Regulation & Development) Act in the year 2016 by the union government as a central legislation whose main objective can be inferred from the preamble of the Act, that is, to ensure regulation and promotion of the real estate sector and to protect the interest of the consumer. This Act in its definition clause comprehensively defines 'allottee' under Section 2(d) to mean any person to whom land has been allotted by the promoter. Further, under Section 2(zk) 'promoter' has been defined through 6 sub-clauses and an explanation appended to the last sub-clause. This particular definition is indeed extremely comprehensive and includes practically every party that is involved in the development of an estate project under its fold. The act also systematizes who may be called 'real estate agent' by defining the same

[6]See Jagmohan Chabra v. Unitech, Case No.27 of 2011(Competition Commission of India, 8/11/2011).

under Section 2(zm) and mandating its registration to be done under Chapter II of this Act.

Chapter III containing the rights and duties of the promoter, which can be stated to be the heart of the entire Act, comprising of 7 sections from Section 11 to Section 18. These sections fix liability on practically any promoter, if he errs and contravenes any of the promises made in the *prospectus*. This chapter has both advantages and disadvantages for the real estate sector in India. In this part we will limit our focus to the advantages. A bare reading of the sections contained in Chapter III will show that the earlier problems that were encountered by the Competition Commission and the Consumer Forums have now been eliminated by fixing liability straightaway in case of default.

From now onwards the *buyer's agreement* needs to comply with Sections 11 and Section 14 of this Act. If the case of *Belaire Association* had occurred now, liability could have been fixed straightaway as per Section 18 which states that any delay in the handing over of possession he has to return the investment made by the allottee or pay interest for the delay caused in handling of the possession. From now onwards there is no need to establish that the developer is *dominant* or that there is *unfair trade practice* which was general terms till this point used to fixate the liability on the developers of realty projects.

Hence, the above sections contained in Chapter III though appear simple will bring a gestalt change in the manner in which realty sector is being arbitrarily administered by different authorities and developers in India. No doubt it comes after years of dolling out injustices to the flat bookers who had invested their hard earned money to have a house and it was lost and

stolen by the realty developers. One can easily conclude from reading this part and the previous part that law on governance of land whose central aim is to ensure just real estate sector has indeed evolved and is trying to articulate and remedy the unethical practices in contemporary land laws taking place blatantly.

Implications on Project Finance and Urban Planning

May the evolution of real estate laws for the good be; it leaves much to be desired when it comes to articulation of concepts in Project Finance through which a real estate project is developed. It has universally pushed all the developers in unethical vacuum and simplistically fixated liability on each error.

The real estate legal reforms can at best be analyzed by comparing it with the Corporate Listing Agreements and Corporate Declarations that only remain on paper and strengthen the Olympian character of the law and in actuality a different picture emerges through academic researches and\/\/or controversies in Corporate Boards. At most it will open a new era of *drafting Buyer's Agreement* keeping in mind the rights and duties of promoters as a compliance, similar to the method in which Annual General Reports of corporate entities are *drafted*.

One of the central features of the Project Finance is management of risk. Risk is defined as nothing more than the variable or circumstances associated with the implementation of a specific project that have the potential to adversely affect the development of a project or the interest of a participant,

as the case may be.[7] Further, legal risks are presented by the legal framework governing the project and include the possibility of alteration of the concerned legal framework to the prejudice of the implementation of the project on commercial lines.[8] It can be very well said that for the real estate players the passage of the Real Estate (Regulation& Development) Act is merely augmentation of the legal risk.

If this style of reasoning is used of terming the statutory obligation as risks, then it pushes the realty developers to take insurance against such risks. The taking of insurance is also mandated under Section 16 of the Real Estate (Regulation & Development) Act. However, if such insurance contracts are not framed carefully then it can lead to a situation wherein the realty players will deliberately default and the purpose of this Act will get defeated. This is the first instance that exposes the bracketed understanding of this Act wherein no acknowledgement of risk is done and the extent it needs to be distributed[9].

It is a well-known fact that most of the real estate project occurs through the instruments of debt-financing since *Return of Investment* in such projects is long term and distributed. For this *syndicate financing* structure[10] is employed. Herein, a large number of creditors lend to a single borrower.

Syndicate financing is essentially a number of separate loans made by individual banks to the same borrower, that is, the project developer, which are essentially subject to the same terms and conditions. The arrangement

[7]P. Mishra, *Law relating to Infrastructure Projects*,43 (2nd ed.,, 2011).
[8]Ibid, at 60.
[9]Ibid, at 192.
[10]Ibid, at 184.

made between the borrower and the financing firm is done through a term sheet. This term sheet strengthen to address liabilities in different cases is dependent upon its wordings.[11]

The central question that will arise after the passage of this enactment is whether the lending banks will also be made liable if contravention to Chapter III of the Real Estate (Regulation & Development) Act is proved before the competent authority. For this one will have to look in the definition clause, specifically Section 2(zk) which does define promoter but does not take cognizance of such major industrial practice. Even if the joint liability is cast on the basis of Explanation appended to Section 2(zk), it will be mere stretching of the words beyond its intent and knowledge. This is the second instance that exposes the bracketed understanding of the Real Estate (Regulation & Development) Act.

From the above one can easily infer the methodology in which governance of land in the contemporary neo-liberal era is being determined not by the sovereignty but by the market forces and its requirements. Renowned political philosopher Wendy Brown goes further and argues that in contemporary times, states in essence have shifted from being '*Homo Politicus'* to being *'Homo Oeconomicus'* [12]wherein it is economic forces alone, in the form of asset appreciation or asset depreciation determines governance parameters of society and interestingly of individual also.[13] This

[11]Ibid, at 185.
[12] W. Brown, *Undoing the Demos,* 84 (1st ed.,, 2015).
[13]Michel Feher, *Self Appreciation; or, the Aspirations of the Human Capital*,21:1 Public Culture, 21-41(2009).

can be explicitly witnessed as far as Real Estate law reforms undertaken by government are concerned.

II. Conclusion:WayForward

In the first part of the research article one is introduced on a theoretical plane to the manner in which governance of land is taking place in India. From second part of the research article the focus get limited to the issues in the real estate sector specifically and the problem of forums it faced prior to the coming of the enactment. In third part of the present research article analysis of the enactment and its major strength is done and from these two parts a comparative analysis of the legal issues of real estate sector is achieved. In the fourth part of one gets exposed to the bracketed articulation of the enactment and the problems it will pose to the different regulatory authorities if and when *lis* will arise.

In this last and concluding part, it is categorically asserted that the Real Estate (Regulation & Development) Act needs to do away with the ignorance that has crept into it by way of not taking into cognizance the concepts of Project Finance and Infrastructure Laws. In the first part of this research article it was stated that the critical maze of infringement of rights of both the original land givers and aspiring house purchasers is being critically assessed. It is these distinct concepts in real estate laws and project finance embedded in solipsism that denude the rights of both the categories and make governance of land a cruel joke.

At this crucial juncture, the compliance based drafting the Real Estate Regulation Act prescribes if critically assessed can at best be articulated as

what noted political philosopher Foucault describes as *governmentality*.[14] Herein, government is defined a right manner of disposing things so as to lead not to the form of the common good, but to an end which is 'convenient' for each of the things that are to be governed. This convenience remains enmeshed in the neo-liberal paradigm which must clearly not be the case for dispensation of justice to be a realizable goal.

In the end we can only hope that these shortcomings will be accepted from both the distinct sides, that is, of the union and provincial government as well as the project developers so as to reach a comprehensively workable new real estate legal regime.

[14]G.Burchell, C.Gordon & P. Miller, *Michel Foucault, The Foucault Effect*, 95 (1st ed.,1991).

The Pleasure- Pain Principle: BDSM's Interaction with Law

-Parvathi Menon*

The popularity of E. L James's Fifty Shades brings forth a topic worth discussing viz. BDSM's interaction with law in today's time. Though Indian courts have so far not had to play the role of a referee between the pro-BDSM and anti - BDSM supporters, it may not be long when it may have to do so due to growing affinity for BDSM amongst the Indian population. This article is an attempt to understand the role of consent in attaching culpability on the practitioners of BDSM and to bring forth various issues as regards the consent that the courts might have to grapple with keeping in mind the liberal and protectionist arguments.

I. Introduction

Oscar Wilde's famous quote "everything in the world is about sex except sex and sex is about power" has gained greater relevance in today's time when the Fifty Shades book and movie franchise has brought BDSM[1] from outside the confines of the bedroom of few, to the mainstream. From its inception since the time of Kamasutra, to being shackled by the Victorian ideals and being touted as a perversion[2] and to finally come out of the confines of the term 'abnormality'[3] with the success of Fifty shades series and short movie 'Khujli'[4], the journey of BDSM has been has not been a smooth one. The legal literature on BDSM has been starkly divided into liberal and protectionist approaches wherein the former criticizes the intervention of the

*Advocate, Delhi High Court. Author holds a B.A LL.B(Hons.) and LL.M(University of Toronto). She can be reached at: parvathi.menon@mail.utoronto.ca

[1]BDSM is an acronym for Bondage, Dominance/Discipline, Sado- Masochism.

[2] S. Freud, J. Strachey & A. Richards, *On Sexuality: Three Essays on the theory of Sexuality and other works,* 157 (1977).

[3] M. Pa, *Beyond the Pleasure Principle: The criminalization of consensual Sadomasochistic Sex*, 11 Texas Journal of Women & Law 51, 63, (2001) (American Psychiatric Association removed BDSM as a mental disorder in its Diagnostic and Statistical Manual of Mental Disorders in 1980) .

[4]*Khujli*, S.Nair available athttps://www.youtube.com/watch?v=KmRzflPuCjE last seen on 18/12/2017.

State in expression of consensual sexual autonomy and the latter advocating BDSM as violence as opposed to sex and urging the State to protect its citizen and thereby appealing to the supporters of J.S Mill's harm principle.[5] Though few courts in the world have had to peek inside the bedroom and grapple with issues arising out of BDSM, Indian courts have so far not had to confront the same. This article is an attempt to understand BDSM in light of Indian laws and suggests an approach that should be taken by the courts when encountered with this issue.

Firstly, the article will delve into the meaning and the characteristics of BDSM. Thereafter, the article will analyze the various arguments advanced by the liberal approach scholars who believe that BDSM is a manifestation of sexual autonomy of a person and consent of the parties should act as a shield from state intervention. The next part of the article will be dedicated to various arguments against BDSM. The article will then discuss the various cases in which the Courts had to deal with this challenging concept of 'consent' within the context BDSM. The article will move on to analyze various legal provisions in Indian law to discern its applicability in the context of BDSM and suggest the approach that should be adopted by the courts.

What is BDSM?

BDSM is an acronym for various sexual activities such as bondage and dominance (BD), discipline and submission (DS) and sadism and masochism

[5] See J. S. Mill, *On Liberty*, 93 (8th ed. ,1978), (for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection).

(SM)[6]. According to National Coalition for Sexual Freedom, BDSM "includes, but is not limited to, the use of physical and/or psychological stimulation to produce sexual arousal and satisfaction"[7]. Some of its key features are dominance and submission, consent of both the parties to indulge in the activities, a mutual understanding of the activities involved, sexual content, use of safe word[8] and role playing.[9] BDSM has been in practice since 400 BC and this becomes evident from the book Kamasutra, which expounds various activities with the overarching BDSM theme such as slapping[10], biting[11], scratching with nails[12] and acting like animals[13]. With the globalization and influx of the western pop culture, India could not stay aloof to the practice of BDSM and had to succumb to its charms by giving birth to ardent followers amongst the Indians. Although, no statistics exist to determine what part of the Indian population practices BDSM, but the presence of internet based communities such as the Kinky Collective[14], various websites[15] offering the BDSM props for sale in India and various

[6] A. Onomal, *Legal Censure of Unconventional Expressions of Love and Sexuality; Finding a Place in the Law for BDSM*, 28 Hastings Women's Law Journal 25, 26 (2017).
[7] *Is BDSM Sexual Orientation or Behavior*, NCSF available at https://www.ncsfreedom.org/please-login-to-kap/item/381-what-is-sm?-sm-is-sexual-orientation-or-behavior last seen on 18/ 12/ 2017.
[8] Certain words decided among the BDSM Practitioners to be used by the submissive to indicate the dominant to stop the BDM activity
[9] Ibid.
[10] Vatsyayna *Kamasutra*,130 (Lars Martin Fosse tr., 1st ed., YogaVidya 2012).
[11] Ibid, at 92.
[12] Ibid, at 85.
[13] Ibid, at 100.
[14] *Kinky Collective*, available at http://kinkycollective.com/ last seen on 18/12/2017.
[15] *That's Personal,* available at https://www.thatspersonal.com/ last seen on 18/12/2017.

newspaper[16] articles enlighten us to the fact that BDSM culture has gained momentum in India.

BDSM as Sex and not violence:

The leading proponent of this view is Monica Pa who believes that BDSM practitioners are involved in "consensual sex with potentially violent aspects"[17]. It is her belief that consent, safe word[18] and negotiation constitute primary parts of BDSM activities and to categorize BDSM as violence would be wrong as victims of violence are not given such wide range of decision making powers as seen in the case of submissive in BDSM activities.[19] Categorization of BDSM as sex as opposed to violence is essential as in such a situation the BDSM practitioner can take the defense of consent in case of state intervention.[20]

According to McLachlan, if the victim has intended the consequence, one cannot say that any crime has been committed "beyond a moral disapproval of the consent itself, and this is insufficient for law"[21]. He believes that it is important that the BDSM practitioner understands the nature and consequences of consent and that "it is proper to determine that consent is

[16]B.Vilson, *Did you know that Bengaluru has BDSM community*, Bangalore Mirror (21/02/2017) available at http://bangaloremirror.indiatimes.com/bangalore/cover-story/did-you-know-that-bengaluru-has-bdsm-community/articleshow/57226458.cms last seen on 18/12/2017.
[17]Supra 3, at 77.
[18] Certain words decided among the BDSM Practitioners to be used by the submissive to indicate the dominant to stop the BDSM activity.
[19]Ibid.
[20]Ibid, at 79.
[21]G. McLachlan, *The Legal Consequences of BDSM Acts*, 43 Bracton Law Journal 78, 83, (2011).

genuine but to assume that it cannot be genuine from the act rather than the actor is the wrong test." [22]

Pro- sex feminists are ardent supporters of BDSM due to their belief that such activities are a mode of empowerment for women who express their choice in matters of sex.[23]BDSM involves consent and negotiation of the nature and consequences of activities undertaken during sex and this gives a lot of bargaining power to women, which was more or less denied to them in other relationships. Pro- sex feminists view the criminalization of BDSM activities as obstacles to women empowerment and consider State interference as reinforcing the heteronormative ideas about sex where a woman is supposed be a mere spectator with no choice of her own. They view criminalization of BDSM to protect women as a farce due to its tendency of infantilizing women not capable of consenting and thereby reinforcing the patriarchal stereotypes.[24] Further, according to Katherine Franck, law has always tried to subvert the female sexual desire rather than trying to promote it[25] and therefore, criminalizing BDSM on the pretext of protecting women falls within this thought.

There is an increasing worry that if BDSM were criminalized, it would not deter the BDSM practitioners from indulging in it but would rather force them to go underground. Pa believes that this would be problematic as there

[22]Ibid, at 85.
[23] M. Deckha ,*Pain, Pleasure and Consenting Women: Exploring Feminst Responses to BDSM and Its Legal Regulation in Canada Jelinek's The Piano Teacher*, 30 Harvard Journal of Law & Gender 425, 430 (2007).
[24] L. Naria, *Ongoing Consent: A proposed Model for Consent to Assault in the S&M Context*, 1 Carceral Notebooks 133, 145 (2005).
[25] K. Francke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 Columbia Law Review 181, 200 (2001).

are various organizations that teach how to practice safe and consensual BDSM sex and people will not learn from these organizations, as it would reveal their involvement in BDSM practice.[26] Moreover such organizations might also close down due to the fear of aiding and abetting these offences.[27] This would make BDSM practitioners more prone to dangers due to their naivety. Further, Pa believes that BDSM criminalization would deter the victims from seeking the aid of police and hospitals in case of abuse or accidents.[28] Pa recognizes another danger associated with criminalizing BDSM *viz.* the prejudice against the accused BDSM practitioner will not ensure fair trial to them, which in turn will result in them pleading guilty rather than going for trial mostly.[29] It would be even more worrisome for gay BDSM practitioners as they would be doubly prejudiced if BDSM were to be criminalized.[30]

BDSM as violence as opposed to Sex:

Cheryl Hanna who believes that BDSM is consensual violence with aspects of sex is the leading proponent of protectionist approach.[31] According to her if consent is allowed to be claimed as a defense in BDSM activities then that would "suggest that anyone should have the right to control, beat or brutalize another and escape culpability under the theory of sexual consent and that

[26]Supra 3, at 83.
[27]Ibid.
[28]Ibid 84.
[29]Ibid,at 83.
[30] C. White, *The Spanner Trials and the Changing Law on Sadomasochism in the UK*, 50 Journal of Homosexuality 167, 182- 183 (2006).
[31]Supra 3, at 77.

violates our deepest notions of freedom, human rights and civility"[32]. She believes that law should set limits on sexual autonomy in the name of "civilized humanity"[33]. Hanna's views are based on certain factors namely- firstly, if consent were allowed to be a defense in the BDSM cases, then women masochists will never come out and report the abusive treatment of their sadist partners.[34] Secondly, the judge and the jury will view the women masochists through the lens of prejudice and stereotypes that exist in the legal system and will consider that they deserved what they got, even though they may not have consented to the particular activity.[35] Thirdly, marginalized groups such as prostitutes involved in BDSM activities will face even more prejudice due to their status and no one will be willing to believe them in case of sexual assault.[36] Similarly, even in the case of homosexuals there is a fear that the jury will believe that the victim is sexually deviant and not worthy of protection.[37]Fourthly, she believes that if consent was allowed to be defense then the defendant in every case of domestic sexual abuse could claim that they had contract with their partner for physical punishment and the abused wife may not even deny it due to fear.[38] Fifthly, she believes that consent to injury in dangerous sporting events is not analogous to consent in BDSM sexual activities because unlike the former there is no regulating authority to control the BDSM activities to

[32] C. Hanna, *Sex is not a Sport: Consent and Violence in Criminal Law*, 42(2(1)), Boston College Law Review 239, 290 (2001).
[33]Ibid.
[34]Ibid, at 285.
[35]Ibid.
[36]Ibid, at 272.
[37]Ibid, at 262.
[38]Ibid, at 261.

go out of hand in the latter[39]. Lastly Hanna believes that usage of safe word is merely a guideline and everyone does not use it.[40]

Anti- BDSM feminists oppose the BDSM activities by claiming that BDSM does not empower women and rather reinforces the hetero-normative stereotypes attached to women. They believe that women's desire to have pain inflicted on them to attain pleasure is itself a patriarchal idea and it is due to the existing ideas in the society with that they have developed such desires.[41] Andrea Dworkin believes that BDSM is merely a manifestation of the patriarchal view that women need to be possessed and abused.[42]

Maneesha Deckha advocates Hanna's argument by claiming that the police, jury and the judge will not believe the masochist victim in case of abuse given their affinity for pain deduced from their consent for BDSM activities.[43] Another problem seen in many BDSM cases has been with respect to the use of evidence of women masochist's prior sexual history despite having the rape shield laws. This view has been illustrated by Karen Busby, who studied many BDSM consent cases in Canada and noted that post the *Welch case* (discussed in the next part), prior sexual history has been considered to decide the issue of consent in all BDSM cases except for two.[44] Therefore, if consent defense is allowed in BDSM cases, then the

[39]Ibid, at 290.
[40]Ibid, at 288.
[41] S. Pagner, *Pornography and the Sexual Revolution: the Backlash of Sadomasochism*, 35 in *Against Sadomasochism: A Radical Feminist Agenda,* (Linden Robin *et al,* 1st ed., 1983).
[42] J. Stoltenberg, *Sadomasochism: Eroticized Violence, Eroticized Powerlessness*, 126 in *Against Sadomasochism: A Radical Feminist Agenda,* (Linden Robin *et al,* 1st ed., 1983).
[43]Supra 23, at 456.
[44] K. Busby, *Every Breath you take: Erotic Asphyxiation, Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions*, 24(2) Canadian Journal of Women and Law 328, 353 (2012).

Courts will deduce the consent of the abused victim from prior sexual history rather than from the actual act in question.[45]

Judicial Approach to BDSM cases:

- People v Samuels[46], is the first case of BDSM decided by the courts in United States of America.[47] In this case the defendant was ophthalmologist with sadomasochistic tendencies. He had sent a roll of film to a studio for developing them in which he had taken photographs of BDSM activities performed by him along with other consenting adults and the studio had sent these photographs to the police. The police arrested him and charged with aggravated assault. The court refused to recognize consent as a defense to battery or assault except in case of contact sports and observed that when a person consents to be a recipient of pain, he/ she must be suffering from mental aberration which akin to insanity and therefore, ineffective.
- In Commonwealth v. Appleby[48]the Supreme Court of Massachusetts observed that the fact that violence may be related to sexual activity (or may even *be* sexual activity to the person inflicting pain on another, as [the defendant] testified) does not prevent the State from protecting its citizens against physical harm.
- In People v Davidson[49], the court observed that consent is not a recognized defense to assault even when based on consensual

[45]Ibid, at 254.
[46] 250 Cal. App. 2d 501 (1967) (California Court of Appeal).
[47]Supra 6, at 30.
[48] 250 Cal. App. 2d 501 (1967) (California Court of Appeal) .
[49] 2d. Crim No. B244607 (2013).

sadomasochistic activity and lack of consent is not an element of assault and therefore, presence of consent does not eliminate the crime.

- R v Welch*:* In this case the Canadian courts refused to accept the consent defense of the accused involved in bondage and spanking of the victim.[50] The Court, following the reasoning in R v Jobidon, observed that consent cannot be a defense for inflicting bodily injury except for generally approved social purpose. The Court decided this case through the lens of social acceptability and some have criticized this as it demeans BDSM practitioners and reinforces the hegemonic social, cultural and religious ideas about sex.[51]
- R v JA*:* The Supreme Court refrained from answering whether consent would be a valid defense in BDSM cases[52] but in turn observed that a complainant must have a conscious operating mind capable of revoking the consent anytime and the defendant cannot claim unconscious person's advance consent to engage in sexual activity.[53] In this case, the complainant and the defendant were engaged in BDSM practice of erotic asphyxiation after which the victim became unconscious. While she was unconscious, he inserted a dildo for which the defendant claimed the defense of consent. It is important to note that in this case nobody objected to looking into complainant's prior sexual history to deduce her consent.[54]

[50]*R* v *Welch*, [1995] 25 OR (3d) 665; 101 CCC (3d) 216 (Ontario Court of Appeal).
[51] E. Craig, *Capacity to Consent to Sexual Risk*, 17(1) New Cri L Rev 103, 118, (2013).
[52]*R* v *JA*, [2011] 2 SCR 440 at para 21 (Supreme Court of Canada).
[53]Ibid, at para 44.
[54]Supra 44, at 352.

- R v Davidson*:* The accused raised the consent defense for BDSM activity and the Court observed that the accused must fully inform the complainant about what he was going to do and the complainant should expressly consent to the activity for consent to act as defense.[55]
- R v Brown*:* This case arose in United Kingdom wherein sixteen gay men engaged in consensual BDSM were arrested. The dominants were charged with assault whereas the masochists were charged with aiding and abetting assaults upon themselves. The House of Lords convicted them as these practices were not acceptable in civilized society and it promoted a cult of violence.[56]
- In R v Wilson[57], the Court of Appeal in England observed "consensual branding between husband and wife in the privacy of matrimonial home, is not a proper matter for criminal investigation, let alone criminal prosecution." However, the court did not treat the branding as inflicting of pain for sexual activity. Rather, it dealt with it as akin to tattooing or cosmetic enhancement.

In USA, more or less, the trend has been that the court has criminalized sadomasochistic activities on the ground that consent is not a valid defense for the charges of assault and battery and therefore, consent cannot be a valid defense for sadomasochistic activities. Except for the infamous Welch case, the Canadian courts have not as such placed any limitation on sexual autonomy by criminalizing BDSM. The cases that have so far come before

[55]R v Davidson, 2010 BCPC 228at para 167.
[56] R v Brown, [1992] UKHL 7, [1994] 1 AC 212 (CA) (House of Lords).
[57] (1996) 2 Crim LR 573 (Court of Appeal, England and Wales).

the courts in Canada have not been related to whether consent can be given to S/ M activities but rather was there consent or not.[58] The trend so far indicates that practitioners of safe and consensual BDSM would be less likely to face prosecutions in Canada.[59] In England, the courts are rather inconsistent in dealing with BDSM. However, the precedent of the Brown case still prevails.

Indian Position

The Indian courts have so far not been confronted with issues involved in the BDSM activity. However, with the growing numbers of BDSM practitioners in India, it may not be long when the Courts may have to wrestle with BDSM. Therefore, it is essential to scrutinize the Indian laws and come up with a balanced approach wherein the sexual autonomy and the privacy right of individual is given credence and at the same time the duty of the State to protect its citizens is not negated. As many academicians have observed, treating BDSM activities purely from the moral perspective as observed in Welch, Brown and Jobidon case should be strictly avoided as that would merely reinforce the hegemonic ideas of what is considered to be'normal' sex. Furthermore, the courts by avoiding the moral argument would enforce the fundamental right of privacy of sexual preferences[60] by not yielding to the hetero- normative idea of sexual preference.

[58] Supra 44, at 251.
[59] Ibid.
[60] See Justice K S Puttaswamy (Retd.) and Anr. v Union of India and Anr. W.P (Civil) No 494 of 2012, 263 part T 3(F) (Supreme Court, 24/08/2017) (Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone.).

Firstly, BDSM practitioners may find respite from prosecution under Section 87 Indian Penal Code, 1860 (hereinafter IPC) which categorically states- "nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm". Unlike in USA, this section is not merely limited to the contact sports and this is evident from various cases decided by the courts.[61] There is nothing in IPC or the ruling of the courts that prevent the acceptance of the defense of Section 87 IPC in BDSM cases. Secondly, if the BDSM activity results in death, consent will not provide an absolute defense. As observed by the Honorable Supreme Court in the case of Gian Kaur v State of Punjab[62]the right to life does not include right to die and therefore, one cannot consent to his/ her death even in case of BDSM. However, consent may act as a mitigating factor and reduce the charge of murder to culpable homicide.[63] One can say that IPC is adept at dealing with BDSM cases so far as it results in death or hurt. However, the grey area arises in case of BDSM activities that result in grievous hurt and invite the discretion of the court in dealing with such cases. Considering the gravity of injuries as listed in the definition of grievous hurt under 320 IPC, it would be most appropriate to follow the

[61] See Bishambhar v Roomal AIR 1951 All 500; NgaShwe Kin v Empreor (1916) Cr. LJ 581; Tunda v Rex AIR 1950 All 95 (In all these cases 87 IPC was accepted as a defense and none of these cases relate to contact sports).
[62] AIR 1996 SC 946.
[63] S. 300, Explanation 5, The Indian Penal Code, 1860.

reasoning of the US Court in *People* v *Samuel*[64]viz. that since absence of consent is not an element for proving the charge of grievous hurt, similarly, the presence of consent will not absolve the offender. By adopting this approach, the courts would cater to the sexual autonomy arguments of liberal approach scholar and at the same time address the grievances of the protectionist approach scholars.

In order to determine whether consent would be a valid defense from prosecution of BDSM activities, it is essential to delineate the meaning of consent. The Indian Contract Act, 1872 gives us a good definition of consent. It states two or more persons are said to consent when they agree upon the same thing in the same sense.[65] Furthermore, as per the IPC which unambiguously states a consent is not a consent, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.[66] Since BDSM has sexual aspects inherent in it, Explanation 2 of Section 375 also gains importance which states- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the

[64]Supra 46.
[65] S. 13, The Indian Contract Act, 1872.
[66] S. 90, The Indian Penal Code, 1860.

specific sexual act. Therefore, in light of the above provisions one may surmise that-

- Both the parties to BDSM should be on the same page regarding the activities to be undertaken by them while practicing BDSM;
- Consent to such activities should not have been induced by coercion, intoxication or mistake.
- The dominant has to make sure that the submissive consents to each and every act at the time while that specific act is being performed.

In order to determine whether there was consent in BDSM activities and to address the concerns of the protectionist supporters, the following factors ought to be kept in mind by the judges while dealing with the same-

- Position of the parties- Since the parties involved in BDSM agree to sustain pain inflicted by the dominant and the whole relationship is an epitome of trust, it is essential for the courts to examine whether any of the parties was in such a position to dominate the will of another and whether they used this position to obtain the consent unfairly. In such a situation the court should assume the role of a protector and negate such consent. This should be particularly so in case of vulnerable parties such as victims of domestic abuse, prostitutes etc.
- Just as in rape cases, the court should not presume consent from prior history of the parties of engaging in BDSM activities.
- When a masochist/ submissive claims to have used the safe word, there should be a rebuttable presumption that consent was withdrawn

and it should be upon the sadist/ dominant to prove that the safe word was not used or that consent was again given for the specific act.

II. Conclusion

In today's time when the Fifty Shades book and movie series has raked in millions of dollars and have become bestsellers, many people have found themselves singing to the tune of BDSM and abandoning the vanilla sex. Since BDSM is a mixture of sex and violence, many a times the practitioners may find themselves knocking on the doors of law. Therefore, it becomes imperative to analyze whether, and if so, where should the line be drawn for sexual autonomy. This article advocates that consent should be a valid defense in those cases where BDSM activity results in injuries that are short of grievous hurt. Section 87 IPC should be an acceptable defense in case of BDSM injuries too. By doing so the Courts would try to be inclusive of all kinds of people and help in promoting the coveted fundamental right of privacy. However, if BDSM activity causes injury that are within the arena of grievous hurt as defined under Section 320 IPC, consent should not be a defense as absence of consent is not an essential element for establishing the charge of grievous hurt and therefore presence of it should not negate the charge of grievous hurt. Further, the article also advocates that the laws of consent applicable in case of rape should also be applicable in case of consent in BDSM to prevent the exploitation of the right to sexual choice.

58 Years of Militarization and Victimization of Vulnerable Groups in Northeast India

-Bhabani Sonowal[*] &Dr. Dipa Dube[**]

ABSTRACT

Over the last 58 years, the innocent civilians of North East India have become the deliberate targets of violence in the region. To eliminate the armed opposition groups, the Government imposed the Armed Forces Special Powers Act, 1958 to tackle the situation. Unfortunately, the armed forces deployed in the region have been alleged of flagrant human rights violations. Over the years, these allegations have only tended to increase its impact on the life and living of the people of the region. Those specifically affected are the vulnerable groups including women and children. Rapes, sexual abuses, disappearances, and many such violations have devastated the mental psyche and physical well-being and dehumanized the lives of the people of the region. The present paper focuses on the contours of AFSPA, 1958, its operation in the region, and the consequent victimization of the vulnerable groups as documented through various studies and reports.

Keywords: Militarization, Victimization, Victims, Vulnerable group, armed conflict.

I. Introduction

[*]Doctoral Research Fellow, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology Kharagpur, email: bhabanisonowal0@gmail.com
[**]Professor, Rajiv Gandhi School of Intellectual Property Law, Indian Institute of Technology, Kharagpur, email: dipadube@rgsoipl.iitkgp.ernet.in

Continuous militarization and armed conflict have become permanent features of North East India. More than fifty years of de facto military rule through Armed Forces Special Powers Act (AFSPA), 1958 has engendered neither stability nor peace, but a pervasive sense of impunity and license, not only in relation to violence but also in terms of official corruption and the collapse of the rule of law[1].Though a worldwide effort is underway to combat armed conflict, the internal armed conflict in India's North East has become a major cause of concern. The situation of insurgency and low-intensity war has led to the implementation of militarization rule for almost fifty-eight years, wherein, the regions are fully or partially governed by the (AFSPA), 1958. The said act has conferred immense powers upon the armed forces operating in the region and provided a sort of blanket ban on legal proceedings against the erring armed personnel. AFSPA has provided a launch pad for military offensives to counter armed separatist movements in the region, which many claims to have done more harm than good[2].The military and paramilitary forces operating in the region have, over the years, engaged in indiscriminate violence against the innocent civilians, leading to their incessant victimization.

"Victimization" refers to an event where persons, communities, and institutions are damaged or injured in a significant way. Those persons who are impacted by persons or events suffer a violation of rights or significant

[1]T. Ngaihte, *Armed Forces in India's North-east: A Necessity Review*, 35(3) South Asia Research 368- 385 (2015).
[2]. K.CVadlamannati, *Why Indian Men rebel? Explaining armed rebellion in the northeast states of India 1970-2007*, 48(5) Journal of Peace Research 605-619 (2011).

disruption of their well-being[3]. Victimization always affects different persons in different ways and causes various degrees of damages and injuries. In a conflict situation, though the harm is inflicted on the population as a whole, it specifically affects the vulnerable groups including women and children. There is a growing body of evidence[4] that the longterm impact of armed conflict on women and girls may be exacerbated by their social vulnerability. The harm done to women and girls during and after the armed conflict is significant and often exposes them to further harm and violence[5]. Research has established that conflict and militarism are more likely to create environments that repress and harm women disproportionately, compared to men[6].

The paper aims to analyze the application of AFSPA in the region as well as its impact on the vulnerable sections of society. The next part discusses the international instruments about the protection of vulnerable groups in conflict situations and projects the failure of the Indian Government to adopt a holistic approach to the conflict in Northeast.

Northeast at a Glimpse

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[3]. P.J. John Dussich, S.Cornell (ed.), *Victimology- Past, Present, and Future*. 131st Int' Senior Seminar Visiting Experts Paper (From Resource Material Series No. 70) 116-129 (2006) available at https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=241427 last seen on 19/09/2018.

[4]. ICRC 2001, UNIFEM 2002.

[5]. D.Mazurana, *Women in the World Today*, State Department's Bureau of International Information Programs (2012) available at https://static.america.gov/uploads/sites/8/2016/05/Global-Womens-Issues_Women-in-the-World-Today_English_508.pdf, last seen 15/09/2018.

[6]. J.Gardam& H.Charlesworth, *Protection of Women in Armed Conflict* 22(1) Human Rights Quarterly 148- 66 (2000).

The North-Eastern part of India has always been kept separate from the mainstream due to its diverse culture and region. In fact, the region is so diverse and culturally heterogeneous, that it led to conflict in the region[7].Defense analysts from India like Kanti Bajpai argue that this region is not only complex which has always had very complicated relations with New Delhi and the Indian mainstream, the conflict here exists at many different levels[8].

Since the inception of the Indian Republic, the North-Eastern region has been gripped by armed insurrections and political violence, directed in equal measures against settlers, against different ethnic groups and the authorities[9]. The demand for complete sovereignty and independence by the armed groups of the north-eastern states mainly the Nagas who inhabited the Naga hills of Assam and Manipur became a threat to the Government of India in 1951[10].TheNagas, in fact, opposed the merger of their state with the rest of India. Insurgency and internal armed conflict became a permanent feature of the North-Eastern region, fueled by the increased proliferation of small arms and the frequent support received from external militant outfits[11].By 1970, the region experienced a variety of conflict movements, ranging from

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[7]. K.Mukherjee, *The Conflict in the Indian Northeast,*14(2) Defence Studies 111-133 (2014).
[8]. K.P.Bajpai, *Roots of Terrorism*, 20 (1st ed., 2002).
[9]. S.Barbora, *Rethinking India's Counter Insurgency Campaign in North-East 41*(35) Economic& Political Weekly3805-3812 (2006) available at https://www.epw.in/journal/2006/35/special-articles/rethinking-indias-counter-insurgency-campaign-north-east.html last seen 15/09/2018.
[10] U C Jha, Armed Forces Special Powers Act, a Draconian Law? 47 (1st ed., 2015).
[11] A.Dasgupta, *Small Arms Proliferation in India's North-East: A Case Study of Assam*, 36(1) Economic& Political Weekly 59-65 (2001) available at https://www.epw.in/journal/2001/01/special-articles/small-arms-proliferation-indias-north-east.html last seen on 12/09/2018.

insurgency for secession to insurgency for autonomy[12].Since the Government of India had always a policy difference for the North Eastern States[13], it introduced the Armed Forces Special Powers Act in 1958 which was modeled after the Armed Forces Special Powers Ordinance of 1942, promulgated by the British on August 15, 1942, to suppress the 'Quit India Movement'.

The Armed Forces Special Powers Act, 1958

The Union government introduced the Armed Forces Special Powers Act, 1958 to function within the disturbed areas of Assam and largely egalitarian tribal society of Manipur in 1958, conferring wide-reaching powers on the military and paramilitary forces operating in the region. As the title itself indicates, 'special powers' were bestowed on 'certain officers' of the armed forces to deal with an 'emergency'[14]. Though the act was initially implemented only in Assam and Manipur, it was amended in 1972 to extend over all the seven states in the Northeastern region, Assam, Arunachal Pradesh, Meghalaya, Mizoram, and Tripura.

AFSPA is basically a skeletal legislation with only six sections. Sections 1 to 3 cover the scope and definition of 'disturbed areas'. The term 'disturbed area' means an area which is for the time being declared by notification to be a 'disturbed area'. Since 1972, the power to declare a disturbed area has resided with both the State Governors and Central government. As of the

[12]. Supra 2.
[13]. S.Saikia., *9/11 of India: A Critical Review on Armed Forces Special Powers Act (AFSPA), and Human Rights Violation in North East India* 2(1) Journal of Social Welfare and Human Rights 265- 279 (2014).
[14]P.Das, *The History of Armed Forces Special Powers Act*, 10-21 in *Armed Forces Special Powers Act: The Debate*, IDSA Monograph Series Nov (7) (ChadhaVivek, 2012).

connotation, 'disturbed area,' there is no such clear definition within the Act. The Delhi High Court has interpreted that, "The term 'disturbed area' defies any definition- it has to be adjudged according to the location, situation, and circumstances of a particular case"[15].The Act further provides that all the words and expressions used in AFSPA, but not defined in it shall have meanings assigned to them in the Air Force Act 1950, or the Army Act 1950[16]. Section 4 confers powers upon armed forces to arrest 'without warrant'", any person who has committed any cognizable offense or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offense and can use any such force to carry out the arrest and empowers them to conduct any search or seizure of property in any premises. The most debatable provision under the Act is section 6, which provides immunity to the armed forces from any prosecution under the general law. This immunity extends to the mandate of the National Human Rights Commission (NHRC), which, according to Section 19 of the Protection of Human Rights Act, 1993 (PHRA), is not empowered to investigate alleged violations by the armed forces in areas governed by AFSPA[17].

Every country dealing with the insurgency or internal conflict has its own laws to tackle the menace. Likewise, India has enacted AFSPA, 1958 to fight the insurgency and given necessary powers to the armed forces operating in

[15]. Indrajit Baruah v. State of Assam, A.I.R. 1983 Del 54.
[16]. S. 2 (c), The Armed Forces (Special Powers) Act, 1958.
[17]. It can only seek a report from or make recommendations to the central government, and require that it be informed of action taken on a case within three months.

'disturbed' areas[18].In consequence thereof, an extensive network of military and paramilitary forces have been deployed to aid civil power; the Indian Army, Border Security Forces(BSF), National Security Guards (NSG), Assam Rifles and Rashtriya Rifles[19].These forces have, over the years, acted with impunity and jeopardized the lives of innocent civilians to such an extent that it has resulted in unaccounted and unending bloodshed in the Northeastern region of India[20]. As commented by an army officer, "Imphal, the capital for Manipur – today -- is like Saigon during the Vietnam War and nobody can explain why so many paramilitary forces are stationed in such a small area. Thus, began the era of little wars and insurrection, a bane which continues to ail Manipur to this very day[21]".

Implication of the Act in Northeast India

Violations under AFSPA, 1958 in North-East India were rarely documented till the seventies. It was in the post-emergency period that stories about violation started finding space nation-wide[22]. The Act became debilitating for the people of the region where it is applicable till date. The 'Malom Massacre' in Manipur on 2nd November 2000 bears evidence as to how

[18]. A.Kamboj, *Manipur and Armed Forces Special Powers Act 1958*, 28(4) Strategic Analysis 616-620 (2004).

[19]. J.Baker, *Sisters in Crisis: Violence against women under India's Armed Forces Special Powers Act, A Legal Study*, London: School of Oriental and African Studies (2010-2011) available at https://www.jobakeronline.com/articles/sisters-in-crisis-violence-against-women-under-indias-armed-forces-special-powers-act/, last seen on 20/08/2018.

[20].B.Oinam, *Violence, Impunity, and the Fallout: A tale from Manipur*, 128-150 in *Landscapes of Fear: Understanding Impunity in India* (Hoenig & Singh, 1st ed., 2014).

[21] B.Nepram, *Roots of Manipur Insurgency*, DNA India, available at https://www.dnaindia.com/analysis/column-roots-of-manipur-insurgency-2094038, last seen on 12/08/2018.

[22] U.Mishra, *Review: Human Rights Violations in North East*, 19(51) Economic & Political Weekly 2157+2159-2160 (1984) available at https://www.epw.in/journal/1984/51-52/reviews-uncategorised/human-rights-violations-north-east.html, last seen on 20/08/2018.

civilians have become victims in the hands of the security forces in Manipur[23].The Act which also reinforces other repressive legislation such as Unlawful Activities Prevention Act 1967, National Security Act 1980, Prevention of Terrorism Activities Act 2002, Prevention of Seditious Meetings Act 1911, etc., has converted Manipur into a permanent state of siege[24], i.e., "State of Exception" according to Giorgio Agamben for a similar situation[25]. In other words, if there is severe violence as a result of "war on people", violence under the regime of AFSPA is self-illustrative[26]. Actions taken under the Act has led to a number of killings. The armed forces have widely used its powers to detain persons and several amongst them have been reported as missing or disappeared after arrest or detention[27]. Some of them may have been victims of violence, while others may have been witnesses to the brutality committed towards their near and dear ones. Society itself has become the helpless witness to its own victimhood. Over the years, numerous cases of rapes, murders, enforced disappearances; extrajudicial killings by security forces have sparked public outrage against AFSPA, especially in Manipur[28]and Nagaland. The Act being applied for

[23]. For further details see *Malom Massacre of Nov 2, 2000: Ten killed, one crusader born*, The Sanghai Express (04/11/2014), available at http://www.thesangaiexpress.com/malom-massacre-of-nov-2-2000-ten-killed-one-crusader-born / last seen on 25/08/2018.

[24]M.Ningthouja, *Violence as AFSPA 1958 and People's Movement against It*, 6(IV) Eastern quarterly 145 (2010).

[25]. G.Agamben, *State of Exception*, 34 (1st ed., 2005).

[26].(1) Refers to the Operation Green Hunt against the Naxalite rebels. (2) Resolution of the All India Convention against War on People, December 4, 2009, New Delhi.

[27]. E.Kaufman & P.W.Fagen, *Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation*, 3(4) Human Rights Quarterly 81-100 (1981).

[28]. A.Kolas, *Naga Militancy and violent politics in the shadow of ceasefire*, 48(6) Journal of Peace Research 781-797 (2011).

half a century with expanding scope has only confirmed the rife between what is and what is not India[29].

While no statistics are available to measure the extent of violence perpetrated in the region, we may present some glaring incidents documented by various sources as also brought up before the judiciary to support the above argument on the impact of the internal armed conflict upon the vulnerable groups. Unfortunately, in most of the cases, the perpetrators have walked scot free as they could not be prosecuted under any domestic law due to the immunity clause under the Act. In few cases, paltry amounts as compensation have been paid to those affected.

Children as Victims

In the wee hours of 28th February 1996**,** two units of the Rapid Action Police Force (RAPF)[30] entered the village of Kakwa Nameirakpam Keikai, Singjamai district, chasing two suspected members of an armed opposition group. During the encounter, an innocent child, Netaji, was killed along with two members. At the time of the incident, the boy was on his way to school, standing at the bus stop. There was an inquiry to probe into the killing. The commission pointed the need for further investigation by a competent police officer for the death of Netaji but it only remained in the

[29].A.Vajpeyi, *Resenting the Indian state: For a new political practice in the Northeast* 25-48 in *Beyond Counter- Insurgency: Breaking the Impasse in Northeast* (Sanjib Baruah, 2009).

[30] Under the Manipur police there is a special unit called the Rapid Action Police Force (RAPF). Established in mid-1995 to deal with insurgency.

paper[31]. A similar incident was reported on 14th March 1997 when Renu along with her niece Binita was on their way home from the market[32]. They were immediately rushed to the hospital where Binita succumbed to her injuries as the bullet had passed through her kidney and Renu survived with a permanent injury to her leg. Later, the local police filed first information report (FIR) at the police station stating that it was an encounter between the state armed forces and the ULFA, a banned organization in Assam. In response to the incident, the government of Assam awarded a minimal compensation of Rs.10, 000 for the injury and exgratia compensation to the deceased family.

In retaliation to an encounter with the armed opposition groups, the 14th Assam Rifles[33] personnel on 13th July 2003 reportedly carried out a sudden attack on four Kuki villages, in Manipur (ACHR 2005). The villagers were dragged out of their houses, tortured and eventually, their houses were set on fire. Fifty young men were dragged to an open field at Gelbungvillage and among them, three children were picked and shot by the personnel while rests of them were set free. An investigation into the killing of the three children was instructed by the Chief Minister of the state. But, the report to that investigation was never revealed to the public. Several other instances of such brutal killings have been documented [34] and the consequent

[31] India Official Sanctions for Killing in Manipur, Amnesty International Index, ASA/20/14/97. For detailed information refer to https://www.amnesty.org/en/documents/asa20/014/1997/en/. Last seen on 20/09/2018.

[32] *Landscapes of Fear: Understanding Impunity in India*, 68 (Hoenig & Singh, 1st ed., 2014).

[33] Assam Rifles is the Oldest Paramilitary Force in India.

[34] Report of the Justice Hegde Committee.The Supreme Court appointed a special 3-member Commission headed by Justice N. Santosh Hegde, a retired judge of the Supreme Court of India, the former Chief Election Commissioner, J.M. Lyngdoh, and the former DGP,

responsibility of the armed forces established. However, it has led to no respite.

Women as Victims

There are also innumerable instances of sexual violence against women since early 70s in the conflict-ridden areas of Northeast. As it is observed, conflict increases the opportunity for hidden actions and, therefore, the likelihood of sexual violence by state agents. Way back in 1971, three girls aged eleven, twelve and seventeen were raped by the commanding officer and his subordinate on the pulpit of the Yankeli (Nagaland) Baptist Mission Church; again, eighteen girls were raped at Chiswezumi (Nagaland) in December 1970[35].The first instance of involvement of Manipuri Women in human rights violation was in the year 1974 when two incidents of rape against women took place in two remote villages ofUkhrul District of Manipur[36]. More incidents of barbarity and torture poured in over the years. Acts of sexual violence against women, including rape of two girls aged seventeen and nineteen as well as the disappearance of a girl student of Class VIII by the Assam Rifles between July and October 1987, as a part of the Operation Bluebird (insurgency operation) were reported in Manipur[37] were recorded. Another case of sexual assault and forced labor of nearly 300 women was filed by the Women's Union of Manipur Baptist Church in 1987. At the initial stage of the proceeding, the army involved sent a telegram to the then chief justice of Gauhati High Court saying that vested interests were

Karnataka, Ajay Kumar Singh, in response to a writ petition seeking an investigation into alleged extrajudicial executions committed in the state of Manipur from 1978 and 2010.

[35]Supra 22.

[36].L.Luithi & N. Haksar, *Nagaland Files: A Question of Human Rights* 45 (1st ed., 1984).

[37].N.Haksar & S.M Hongray, *The Judgment that never came: Army Rule in Northeast India* 67 (1st ed., 2011).

tarnishing their image and also achieving their aim of diverting the attention of the security forces from the task of combating insurgency[38]. The case still awaits judgment. Another heart-rending incident of the region was the rape of Thangjam Manorama Devi, a 32 year-old-women of Manipur, who was raped and brutally killed by the Assam Rifles. Manorama's death bore the testimony of the most visceral kind, to the unwavering brutality of the security forces. Her corpse bore the marks of violence of the state. In fact, her genitals were mangled to such an extent that it was absolutely impossible to even ascertain whether she had been raped or not[39].

On 10th February 2006, a protest march was taken out in Kakopathar, a remote village in Upper Assam, after the custodial death of a person. An estimate of 20,000 people participated in the march and it was a huge crowd to be handled by the state police. Therefore, Central Reserve Police Force (CRPF) was deployed to control the protesters from marching on, but when the time came to stop them, the CRPF opened fire with live bullets, which resulted in the death of nine protestors, including children, elderly persons, and six women and a dozen more were injured. Maleika, a woman in her late sixties, went missing for three days after the incident. Later on, her dead body was handed over to the family by the local police station. The case was not even reported; only after two years of the incident, it was documented under the impunity project where the team interviewed the deceased family[40]The family of the deceased received an amount of Rs. 3.5 lakhs as compensation.

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[38] Supra 38, at 113.
[39] N.Gaikwad, *Revolting bodies, hysterical state: women protesting the Armed Forces Special Powers Act(1958)*17(3) Contemporary South Asia 299-311(2009).
[40] Supra 33.

Instances of sexual violence, rape, and attempted rape have also been reported from the other states of Northeast (AFSPA dominated states) which time and again reminds us of the culture of impunity in AFSPA dominated region and denial of justice towards them[41]. Thus, in accepting death, rape, torture, assault,and disappearance as inevitable, the loss of human freedom in terms of right to truth and right to reparation (not to mention the right to life) has reduced human life to "bare life"[42] in these regions of the country.

International Instruments for Protection of Women and Children During Conflict

The protection of civilians' population is the cornerstone of International Humanitarian Law (IHL) with strict rules defining the obligations and duties of the parties to a conflict towards civilians[43]. The most widely prevalent armed conflict in modern day is the non-international armed conflict (internal armed conflict).It involves hostilities between government armed forces and organized non-State armed groups or is carried on among members of such groups themselves.

International Humanitarian Law identifies and protects vulnerable civilian groups such as women, children, the aged and displaced persons who are not engaged in any hostilities. It recognized the ways in which women and children are affected by violence during armed conflict and adopted a normative international framework for their protection. Prominent amongst

[41]U.Chakravarti, *They Have the Power, They Have the Guns: We'd Better Remain Silent": The Meaning of Impunity on the Ground*, 51-72 in *Landscapes of Fear: Understanding Impunity in India* (Hoenig & Singh, 1st ed., 2014).
[42]G.Agamben, *Homo Sacer: Sovereign Power and Bare Life* 66 (1st ed., 1998).
[43]C.Cirlig, *Protecting civilians in armed conflict International framework and challenges,* (European Parliament Research Service Briefing 2016).

such provisions are the Geneva Conventions 1949 and the Additional Protocol II (1977) which extends Common Article 3 of the 1949 Conventions to all internal armed conflicts which are not "internationalized" as a result of Article 1 of Protocol I, and which at the same time is greater in magnitude than mere riot or banditry[44].Common Article 3 of the Convention is applicable in the case of armed conflict, not of an international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves. It provides that "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

Another key provision is the General Recommendation No. 19 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Recommendation provides for the right to equal

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[44]. Article 1- Material field of application, states:

(a) The present Protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol.

(b) The present Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Article 1, Protocol II

protection for women without any discrimination not only in peacetime but also during the time of international or internal armed conflict. Article 1 defines discrimination as "gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence."[45]And General Comment No.19 (7) states that "Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention." These rights and freedoms include right to life;right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; right to equal protection according to humanitarian norms in time of international or internal armed conflict; right to liberty and security of person.

The Beijing Declaration and Platform for Action1995[46]for the protection of women in armed conflicts flagged twelve key areas to ensure equal opportunities among genders. Imperative among them is the "Women and Armed Conflict", which emphasized on the following:

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[45] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 19: Violence against women, 1992 available at http://www.refworld.org/docid/52d920c54.html, last seen on 22/09/2018.

[46] For detailed information see the UN document on Beijing Declaration and Platform for Action http://www.unwomen.org/~/media/headquarters/attachments/sections/csw/pfa_e_final_web.pd, last seen on 21/09/2018.

(a) Increase the participation of women in conflict resolution at decision-making levels and protect women living in situations of armed and other conflicts or under foreign occupation.
(b) Reduce excessive military expenditures and control the availability of armaments.
(c) Promote non-violent forms of conflict resolution and reduce the incidence of human rights abuse in conflict situations.
(d) Promote women's contribution to fostering a culture of peace.
(e) Provide protection, assistance and training to refugee women, other displaced women in need of international protection and internally displaced women.
(f) Provide assistance to the women of the colonies and non-self-governing territories.

As a follow-up action to the commitments made by India during the Fourth World Conference on Women in Beijing, a National Policy for the Empowerment of Women was drafted after nation-wide consultations to enhance the status of women[47].

Equally imperative is the recent Security Council Resolution, particularly 1820 (2008), which establishes that sexual violence in conflict zones is a major security concern. Sexual violence during conflict especially 'rape' has become a tactic of war and a war crime; the resolution thereby designates

[47]For detailed information refer to https:/sustainabledevelopment.un.org/content/documents/13091India_review_Beijing20, last seen on 20/09/2018.

rape as a crime against humanity. Therefore, there is a growing body of subject-specific treaties and protocols as well as regional instruments for the protection of civilians during armed conflict.

In case of children, there has been the rise of the concept of child rights globally, which has been encoded in the United Nations Convention on the Rights of Child (1989) and its Optional Protocol on the involvement of children in armed conflict (2000). Article 38 (4)of the Convention provides that the "States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."**;** Article 39 of the Convention provides that the "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect, and dignity of the child".

Another significant initiative has been taken by the Security Council Resolution 1612 of 2005. It offers to the countries affected by armed conflict useful instrument to monitor and put an end to the violations against children. Pursuant to this Resolution, relevant UN agencies and other actors have established various mechanisms for collecting information on violations against children in armed conflict[48].

[48] UN Security Council Resolution 1612 on children and armed conflict (2005) established a UN led monitoring and reporting mechanism (MRM) to document and report on six grave violations against children in armed conflict and created the UN Security Council Working Group on Children and Armed Conflict.

Armed Forces Special Powers Act, 1958 & International Law: Analyses

The manifold ways in which AFSPA, 1958 facilitate acts of violence against women and children have been indicated above[49].The gross forms of violations take place in the leeway given to the armed personnel under Sections 4 and 5 of the Act. As there is no such safeguard and protection under these provisions, the armed forces perpetrate indiscriminate acts of violence while making arrest, searches, raids, and encounters. Women have been tactically targeted during raids and forced to work as laborers, arbitrarily detained, or raped which constitute gross violations of the General Recommendation 19 of the CEDAW Committee. When a woman is sexually abused or raped, it is not only a crime against her body but also against dignity and womanhood, which has been denied by virtue of the operation of the law. Though India has acquiesced the international obligations, the very implementation of the AFSPA, 1958 with excessive powers to the armed forces and without any safeguards for the protection and reparation to civilians affected by the conflict indicates its failure to comply with those international obligations.

Arguably the greatest outrage against the AFSPA stems from the blanket immunity given to the armed forces under Section 6. The blanket immunity under this provision has in many ways stimulated the increase in violence against the vulnerable sections. The CEDAW Committee in its 2007 periodic report to India recommended a review of the Act,“ so that special powers given to the security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and

[49] D.McDuie-Ra, *Fifty-year disturbance: the Armed Forces Special Powers Act and exceptionalism in a South Asian periphery*, 17(3)Contemporary South Asia 255-270 (2009).

arrest[50]." The immunity clause has blocked the way for women in the region to access justice. Due to their inherent vulnerabilities coupled with economic independence, many times women do not show up in the courts and police stations due to fear and societal stigma (Baker 2010). There are inestimable cases which will never come to light. And even if they come up, they will fall through due to lack of evidence (Mishra 1984) and lack of prior sanction from the government. The case of Thangjam Manorama Devi is one of the glaring examples, where the victim's family is still waiting for justice and the perpetrators to be punished by law. Both, the framework of AFSPA and the persistent failure of the state to act with due diligence has made it liable under international law for perpetuating discrimination against women(and children) and jeopardizing their positions as easy targets for violence[51].

II. Conclusion

Armed conflict, militarization, insurgency, impunity, violation, disturbed areas, AFSPA- these terms have become inherent features of Northeast India. AFSPA has completely transformed the landscape into a conflict zone. It has also touched the lives of the people in a way as to shatter their inherent life and dignity. Violations have become a part of their daily lives. In the process of combating insurgency in Northeast India, the government of India has ignored its commitment towards protection of its own civilians. It is arguably

[50] For detailed information refer to http://e-pao.net/GP.asp?src=21..240714.jul14,last seen on 20/09/2018.

[51]. As directed by HRC Resolution 14/12, 2010; GA Res 48/104, Art 4c; and the Report of the Special Rapporteur on Violence against Women, UN Do. E/CN.4/2006/61.

established that conflicts are inherently complex and difficult to solve. The conflict governed by AFSPA is a complex battle between the state and non-state actors which have a great impact on the innocent civilians and those especially\affected are the vulnerable groups. It is not due to lack of binding law that India has failed to protect the rights of those sections of the population, but a persistent failure to comply with both the domestic and international legal norms. The mitigation and policy framework for the protection of civilians during armed conflict is the only key to protect the rights of those sections of the people. This, in turn, can be achieved when India fully complies with the international treaties and conventions for the protection of civilians during the internal armed conflict. No violations can ever be inevitable or insurmountable; this can be mitigated even by domestic laws when it is framed in compliance with the international legal regime.

Scope of Government Authority Exception under Article 1 (3) (B) of GATS

-PoojaTiwari*

Abstract

In 1995, the conclusion to Uruguay Round of trade negotiations led to the inclusion of GATS to provide multilateral trading system to 'services'. Under GATS, Article 1:3(b) deals with services stating "Services' includes any service in any sector except services supplied in the exercise of governmental authority". The Government Authority is an exception to the supply of services under the GATS rules and is negatively defined to mean that any service is supplied on "non-commercial basis" or "supplied in no competition with one or more suppliers"[1].

Due to the existence of great deal of ambiguities regarding the scope of the authority in this article the researcher is trying to draw out the scope of government authority under GATS in the light of Article 1:3(c) and by interpreting the conclusions drawn by the existing comments by the WTO secretariat or by the WTO members.

*LL.M Candidate at The WB National University of Juridical Sciences, Kolkata. The author can be reached at poojatiwari2308@gmail.com

[1]Article 1(3)(c), GATS Agreement, (WTO).

I. Introduction

From telecommunication to transport, health to space, for both developed and developing countries, 'services' have become the most dynamic component of International trade. In 1995, the Uruguay Round of trade negotiations led to the inclusion of General Agreement on Trade in Services (GATS) to provide multilateral trading system to 'services'. Since its inception, a lot of attention was attained by GATS as it was the first set of legally-enforceable rules aimed at the liberalisation of trade in services "All the members of the WTO are signatories to the GATS and have to assume to assume the resulting obligations"[2]. Article 1 of the GATS deals with the scope and definition clause and encircles the modes[3] by which services may be supplied. An understanding regarding the type of services supplied can be achieved by an analysis of what is supplied, the circumstances of the supply, to whom it is supplied and who the supplier is.

Article 1:3(b) of the GATS defines "services" as "any service in any sector except services supplied in the exercise of governmental authority". As the scope of governmental authority is not defined it can be properly understood in the light of phrases "*supplied on a commercial basis*" and "*supplied in competition with one or more services suppliers*" under Article 1:3(c).The "*services supplied on a commercial basis"* can be determined as any service which is not supplied free of charge. In order to fall under Article 1:3(c) of GATS the intention of making profit must be absent and the services supplied should be on *sans but lucrative i.e.* not-for-profit basis. When the supply of any service is made in return for a price it becomes a commercial

[2]*A Handbook on the GATS Agreement*, WTO Secretariat Publication, 1 (2005).
[3]Article 1(2), GATS Agreement, (WTO).

supply. Article 1:3(c) also talks about the "*services provided in competition with one or more other service supplier*s". Here, the central term used is '*competition*' which refers to a "situation when one or more service suppliers targets the same customers or market segments or tries to realize the same advantage"[4]. The approach must be such that they establish that the services supplied have a competitive basis. In order to establish when a service is supplied on a competitive basis, the following two step approach is suggested: first, it should be a situation where two or more service suppliers supply the same or comparable service. Second, the service supplied should substitute or complement each other.[5]Therefore, to fall within the scope of government authority it must be made sure that the supply of services made is neither commercial nor on profit basis.

The paper is divided into five parts and deals with the interpretation of the scope of the Government authority. As the limits of the scope are not very well defined, the paper deals with the synthesis of arguments made during WTO member's discussions and of the documents to determine the coverage of services. The interpretation of the non-commercial and non-competitive nature of services is essential in that regard.

The Textual Ambiguities Regarding the Scope of Government Authority

"Services" includes any service in any sector except services supplied in the exercise of governmental authority[6]. As the GATS Agreement has a wide definitional coverage of "service", the extent to which it affects the scope of

[4] M.Krajewski, *Public Services and the Scope of the General Agreement on Trade in Service* (GATS), Center for International Environmental Law (CIEL), 12 (2001).
[5]R.Cassim & I.Steuart, *Public Service and the GATS,* ICTSD Policy Paper on Trade in Services and Sustainable, 12 (2005).
[6] Article 1(3)(b), GATS Agreement, (WTO).

government action is unclear. It is an exception to the supply of services under the GATS rules and is negatively defined to mean any service supplied on "non-commercial basis" or "supplied in no competition with one or more suppliers"[7]. In other words, both the criteria must necessarily apply in order for a service to be excluded from the GATS.

Due to the existence of great deal of ambiguities regarding the scope of the authority amongst the WTO members and the documents available, the literal interpretation of the scope of government authority is not possible. The scope can only be understood when it is read in the light of Article 1:3(c) and also by interpreting the conclusions drawn from the existing comments of the WTO secretariat or the WTO members. Therefore, the scope of government authority under Article 1:3(b) of GATS is in dire need of reform.

'Objective Criteria' as a Basis to Determine the Scope of Government Authority

Article XXVII (b) of the GATS broadly defines the 'the supply of a service' as including production, distribution, marketing, sale and delivery of service and the term '*Commercial basis'* means the supply of service when the services provided are in exchange of some monetary value. Thus, the objective of the supply concentrates not only on the supply of service and supplier but also on the manner of the supply and the price in exchange. For the supply to fall under the scope of Article 1:3(b) it should necessarily be non-commercial and non-competitive in nature. Thus, when the supply is

[7] Article 1(3)(c), GATS Agreement, (WTO).

made, the circumstances and objectives must be determined on a case to case basis.

Parameters to Determine the Competitive Relationship of Public and Private Body

'*Supply in competition with one or more service suppliers'* is a situation where competition arises from the same customers or market being targeted to realise advantage by one or more suppliers of services. And when the government supply a service the competitive nature in the supply must be absent. Thus, the competition should be determined on case to case basis considering the facts underlying, economic interest of the suppliers and the legal tests reached. For example, when it comes to education, both private and public bodies serve in the same sector. But the goal of the government body is education for all and hence targets the common market whereas private body focuses on the certain segments who can afford to attain education. So even when both public and private bodies function in the same sector, the competitive nature remains absent.

When a Private Body carries out a Public Function, can it be included in the Scope of a Public Body?

Article 1(3) explicitly refers to the conditions which govern the supply of services under the authority of the government. Broadly speaking any services provided, free of cost, to the consumers, with no competition, will be a service under government authority as the public body functions in public interest, with governmental sanctions whereas a private body functions to attain monopoly on the market structure and aims to liberalise

the trade of services in a manner more feasible to their interests. It is the common interests which shall be the main focus for a public body and not their own interests. So, when a private body performs public functions, the size of the market, the objectives of the supply of services and the consequences thereafter should be taken into consideration.

Equation of 'Public Services' With the Concept of 'Services Provided in the Exercise of Governmental Authority'

The exception in the GATS is 'services provided in the exercise of governmental authority' and is not explicitly ‘public services’. Therefore, can the interpretation drawn that it includes all services advanced under the government authority be justified. The services provided by the government are universal services, with affordability, quality and bears not for profit motives. The object and purpose behind such services is public good and the general and economic interest of the public. As theGovernment practice covers all acts of governments or public bodies and the criteria for trade of service is mandated by non-competitive and non-commercial basis for the affordability and general interest of the public thus, the services advanced by the government authority could be interpreted as public service.

II. Substantial Scope of GATS

General Agreement on Trade in Services is comparatively a recent agreement. In January 1995, as a result of Uruguay round of negotiations, General Agreement on Trade in Services (GATS) was brought into force as the first multilateral trade agreement that covers trade in services. The Preamble of GATS recognises and desires to contribute to the expansion of

trade by stating "Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries[8]".

There is no specific definition given under the agreement for the term 'service' but services can be related to something which cannot be served directly at your juncture. The Treaty on the functioning of European Union opened for signature on 7th of February 1992 defined services as "services shall be considered to be 'services' within the meaning of treaties where they are normally provided for remuneration in so far as they are not governed by provisions relating to freedom of movement for goods, capital and persons". Article 1(1) stipulates "the measures taken by Members affecting trade in services". "The measures as all the laws, regulations and practices taken by central, regional or local government or non-governmental bodies in exercise of the powers delegated to them by government that may affect trade"[9]. GATS lack any definition for services, but under Article 1(2) it defines the 4 different modes for the supply of services. They are:

a) "From the territory of one Member into the territory of any other Member;
b) In the territory of one Member to the service consumer of any other Member;
c) By a service supplier of one Member, through commercial presence in the territory of any other Member;

[8]Preamble ¶ 2, General Agreement on Trade in Services (GATS), (WTO).
[9] Article 1(3)(a), GATS Agreement, (WTO).

d) By a service of one Member, through presence of natural persons of a Members in the territory of any other Member"[10];

Article 1:3(b) of the GATS

Now, the question stands as to what extent does the GATS rules may affect the supply of these services. Article 1:3(b) defines the scope of the services provided under the agreement as: "Services include any service in any sector except services supplied in the exercise of governmental authority";

Due to the existence of different meanings in different contexts and varying roles of government bodies in different countries in accordance with their market and state responsibilities, it is not immediately clear as to what constructs a government authority. A differentiating line has been drawn by the article 1:3(b) between the supply of services under GATS and the supply of services under the government authority.

Article 1:3(c) of the GATS

There is no definite standard to understand the authority of government. It can only be understood when it is brought in light of Article 1:3(c) of the GATS which states:

"A service supplied in the exercise of government authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

So, in order to articulate the authority of government authority it is necessary to establish the non-commercial and non-competitive basis of the supply of

[10] Article 1(2), GATS Agreement, (WTO).

services and once it is established the services as such provided under this head shall be excluded from all the disciplines of GATS inclusive of the participation duties for the liberalisation of trade in services. Thus, the reason of findings for the actual substantial scope of the GATS lies in the understanding of the supply of services provided under the government authority[11] that is supply of government services in non-commercial and non-competitive basis.

III. The Commercial and Competitive Nature Under Article 1:3 (c)

The scope of the GATS can be only determined when a clear and rational interpretation of Article 1:3(b) and 1:3(c) is made. The scope of government authority in the supply of the services lies in the understanding of the non-commercial and non-competitive basis of the supply. To determine the services that may fall under the ambit of government authority two approaches should be kept in mind:

A) *Institutional approach*: This approach basically focuses on the condition that governs the supply of the services. Example: who has the ownership or what is its status or how is the organisation of the market.

B) *Functional approach*: This approach deals with the policy objectives that may be underlying. Example: what are the concepts involving universal access or other relative objectives.

[11] Article 1:3(c) of the GATS which states: "A service supplied in the exercise of government authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

To undermine the scope government authority, it would be appropriate to have the functional step forward and a rational and clear determination of non-commercial and non-competitive basis of supply is made.

The Commercial Basis

The WTO services division director in his recent address to European Services forum reinstated that, "we in secretariat, often have to explain the exclusion of government services and we have come up against the difficulty that these terms are not defined. Therefore, to understand the scope of government authority we need to be clear on what is meant by 'not on commercial basis'.[12]" Thus, what can be drawn, is that the central term that lies is the term 'commerce' and it needs a clear understanding to determine the scope.

The word 'commerce' according to Webster's dictionary means an activity of buying and selling and the black's law dictionary defines commerce as a general term that can be termed for most all aspects of buying and selling[13]. So, it can be derived that any service not supplied free of charge can be considered falling in under purview of supply of commercial basis[14]. As the intention of making profit is typically present when one engages into any commercial activity. 'Not on commercial basis' would then be construed as provided on non-profit motive or service is supplied in return of no amount

[12]*Conference on GATS 2000 Negotiations*, European Services Forum, Brussels, 27th November. 2000, https://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm, last seen on 03/01/2018.
[13] M.Krajewski, *Public Services and the Scope of the General Agreement on Trade in Service* (GATS), Center for International Environmental Law (CIEL), 11 (2001).
[14]N.Munin, *Legal Guide to GATS*, (Global Trade Series, 2010).

of monetary value. And when a supply has any monetary value involved or profit motive it could be considered as a commercial supply. However, this does not always stand as a sole basis of determination. It may vary by varied circumstances, so to determine the commercial supply of services, circumstances on case to case should be brought into consideration.

Therefore, a conclusion can be drawn that a broad understanding given to the terms 'commercial basis' could to an extent determine the scope of government authority. The supply of services made on non-commercial basis with no monetary value involved or on a not for profit basis would fall within the scope of government authority. But it necessarily needs to be non-competitive as well, as if a service is supplied on a non-commercial basis but involves competitiveness it would not fall within the scope of government authority[15].

Observations Made by WTO Secretariat

Observations made by WTO Secretariat in various sectors about the scope of the authority are:

- The secretariat stated that "In a background note on 'postal and courier services' prepared for the council for Trade in Services (CTS) there might be a relation between postal services provided by wholly government entities and the GATS Article I provision excluding government functions. Postal services of a Member, whatever the status of the postal supplier, would be services covered by the GATS

[15]*A Handbook on the GATS Agreement*, WTO Secretariat Publication, (2005).

as long as, and *which is usually the case*, they are supplied on the commercial basis"[16].

- In its background note on Environment Services, secretariat asserted that "the question does arise of when public service functions fall within the scope of GATS disciplines and when they do not.

  Nevertheless, if services were deemed to be supplied on a commercial basis, then, regardless of whether ownership was in public or private hands, the sector would be subject to the main GATS disciplines and to the negotiation of commitments under Article XVI and XVII.[17]"

An example of a *'public library'* would clearly highlight the difference between the commercial and the non-commercial aspect of the supply of services. The public libraries when has a fee based criteria for the supply of the service or is providing some services in lieu of the competition with other private libraries (which functions solely with their own profit making motive), then the services provided by the public services would not be considered to be supplied in the authority of the government. Only when it has services which has no-profit motive involved it would have benefits of exceptions. Therefore, the entire matter revolves around the interpretation of article 1:3(c) of the GATS agreement[18].

[16] Postal and courier services, Background note by the Secretariat, 12 June 1998, S/C/W/39, 2, available at https://www.wto.org/english/tratop_e/serv_e/w39.doc (last seen on 03/01/2018).

[17] *Environment services*, Background note by the Secretariat, Council for Trade in services, 6 July 1998, S/C/S/46,14 available at https://www.wto.org/english/tratop_e/serv_e/w46.doc (last seen on 01/01/2018).

[18] F.Hunt, The GATS Article I, paragraph 3, available at http://libr.org/gats/GATS-Article-1-3.pdf, last seen on 03/01/2018.

Now the question stands when private libraries having no fee criteria or low fee criteria within the affordability of people or has universal accessibility, will they be considered as falling under the authority of the government?

In order to fall under the authority of the government the criteria standing are non-commercial and non-competitive and there also stands another criterion of it being under the authority of government i.e. there must be some amount of government participation over the service supply. This third criteria rule was coined by *Vanduzer*[19]. According to his theory, if some non-profit function is taken by private entity then the control of the government and also the objective behind it should be looked into. So, if a private library does have no fee criteria then it would not be falling under the exception of the government authority due to the lack of government authority or any competitive objective lying behind.

In Competition with One or More Service Suppliers

For a better understanding of this phrase we need to first understand the term "Competition". The oxford law dictionary defines 'competition' as "rivalry in the market, striving for customers between those who have commodities to dispose of" or "competition" refers to "rivalry between two or more businesses for the same customers or market[20]". Competition is therefore a situation where to realise same benefits and advantages as the other service supplier one supplier targets the same customers or market[21].

In M*exico-Measure affecting telecommunication services: -*

[19]R.Adlung, WTO "public services & GATS, (2005)available at https://www.wto.org/english/res_e/reser_e/ersd200503_e.htm , last seen on 01/01/2018.
[20]Webster's Dictionary.
[21]N.Munin, *Legal Guide to GATS* (Global Trade Series, 2010).

"The term 'anti-competitive practices' was defined broad in scope, suggesting actions that lessens the rivalry or competition in the market, striving for customers between those who have the same commodities to dispose. Thus, the existence of competition would depend on the behaviour of the supplier concerned, rivalling or not regardless of the actions of others within or beyond a country's jurisdiction.[22]"

Therefore, it can be drawn that in order to establish whether a service has competitive nature or not two approaches can be looked into:

- Whether a situation exists where supply of same or comparable service is made by two or more service suppliers.
- Whether the services supplied by the service suppliers can be substituted or complemented by each other.

To establish competition, it is necessary to establish that the services supplied can substitute the services of another i.e. the ordinary meaning of competition under Article 1:3(c) is inclusive of both identical services and services which can be directly substituted. But it is not necessary that services provided by either public body or private body in one market or sector would stand in competition with one another. Mere presence of both the public and private entities in same market would not mean that the services provided by them are competing. The size of the market to which the services are provided also plays a major role for the same.

[22] WT/DS204/R, 2 April 2004 (04-1211), last seen on 03/01/2018.

An illustrative example to complement the argument: 'a *government hospital*[23]' in some country does not has ability to actually accommodate or provide medical facility to all the members of the country and if there is a private hospital also there then they won't be considered to be in competition with one another. As the private hospital would majorly try to target a particular segment of the society whereas public hospital would aim at serving the population with the universal access target.

A contrary view that stands here is when a service which is better in a private hospital that does not exist in public hospital or when the supply of services is at a reasonable price as that of the public hospital, then would it fall under the exception of government authority. In situations like these the determining factor would be to see the authority of the government lying behind or the participation under the head of the authority of the government or if any commercial benefit is involved with the service supply or not.

In case of public hospitals, it is not necessary that they would always be considered to be under the government authority. If any service is supplied by a public hospital that has commercial basis i.e. if it has some monetary value involved or if it is providing not-for profit services but is in the same market as a private hospital by virtue of competition, it would not fall under the purview of government authority.

Again, applying the two-test approach we would look into the education system. Both private and public schools provide the same primary

[23] M.Krajewski, *Public Services and the Scope of the General Agreement on Trade in Service* (GATS), Center for International Environmental Law (CIEL),(2001).

education, function in the same market and also target the same range of people. But public schools have universal access criteria and would fall within the affordability of the people whereas private schools target the particular segment who can afford the fees of the schools or may be willing to pay the fees. A contrary view to this situation would again be looked into and it needs to be established that there exists some amount of government agency control for private school to fall under the exception of the government authority.

Therefore, these considerations make it clear that in order for a service to fall under the exception of the GATS, it must necessarily be non-commercial and non-competitive in nature i.e. the criteria of Article 1:3(c) should be clearly established in order to make a service fall under the authority of government.

Interpretation

A report commissioned by the Canadian government notes that "the conclusion as to the scope to be possibly drawn from existing comments regarding the scope and including from individual, WTO members and WTO secretariat, is the existence of a range of interpretations.

There are two interpretative principles[24] that are also brought into consideration in the international arena to shed some light on the scope of the government authority:

- Restrictive Interpretation (*in dubiomitius):dubiomitius*

[24] M.Krajewski, *Public Services and the Scope of the General Agreement on Trade in Service* (GATS), Center for International Environmental Law (CIEL), (2001).

The principle is used to interpret non-commercial and non-competitive nature of services by which the scope of government authority can be curtailed and also reduce the broad scope of GATS. Like the term 'commercial' should be brought into consideration when some monetary value has been advanced for the service supplied and same 'competition' can only be proved when different service suppliers are supplying same service in the same market. The restrictive interpretation is used in order to narrow down or restrict the scope of government authority within the bounds of non-commercial and non-competitive nature of services supplied as this principle identifies the true intent of the government authorities while providing services whether they have profit motive involved or not.

Measures in China affecting trading rights and Distribution Services for certain publications and Audio-visual Entertainment Products:

The panel defined *in dubiomitius dubiomitius* "according to this principle, if the meaning of a term is ambiguous, the meaning preferred is the one that is less burdensome to the party assuming an obligation or the one that interferes the least with party's territorial supremacy or involves fewer general restrictions upon the parties[25]".

- Effective interpretation (*effect utile*):

This principle focuses on the goals and objectives that lie behind during the formulation of a treaty. The interpretation of the treaties is to be brought in such a manner that goals and objectives like universal access and public affordability of the government body are effectively achieved. As the

[25] WT/DS363/R 12 August 2009 (09-3798),last seen on 03/01/2018.

preamble of GATS[26] states that the main focus of the agreement is to liberalise trade in services and also to regulate the process and also as Article 1:3(c) states the services by government authority to have non-commercial and non-competitive nature. Thus, a broad interpretation of the terms should be made to curtail the scope of GATS. The overall objective of GATS is that this liberalisation of the services to be in a manner that sovereignty right of a member state to regulate their trade could also be attained.

Interpretations Advanced by the WTO Members and Secretariat

Few interpretations advanced by the WTO members and Secretariat while interpreting the scope is:

- Director of WTO trade in service division stated that:

"Article 1 of the GATS makes it clear that there is a complete exemption from GATS of all the services supplied in the exercise of government authority which means services supplied on non-commercial and non-competitive basis such services are not subject to any GATS discipline-they are simply outside the scope[27]".

- WTO service division on another occasion:

[26] Preamble of the GATS: "Wishing to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries",last seen on 09 September 2017.

[27] In letter circulated publicly in June 2000 (also cited in GATS and Public services systems-Ministry of Employment and Investment (British Colombia), available at https://www.iatp.org/files/GATS_and_Public_Service_Systems.htm, last seen on 01/01/2018.

"When asked what protection is there for a government which allows both a private services provision and a public provision but wants to ring-fence the public component?

Answer: if the public component consists of services supplied in exercise of the government authority, it is outside the scope of the GATS, by virtue of Article 1[28]"

- Secretariat claimed that:

"Because no question has been raised by any member about the services supplied in exercise of government authority there has been no interpretation of this phrase.[29]"

Annexes

In order to determine the 'services supplied under the government authority' and its interpretations, references are made to few annexes:

Annex on financial services[30] Article 1(b) states that: "For the purpose of Article 1:3(b) 'services supplied in the exercise of government authority' of GATS services mean the following:

[28] *Conference on GATS 2000 Negotiations*, European Services Forum, Brussels, 27th November. 2000, available at https://www.wto.org/english/news_e/news00_e/gats2000neg_hartridge_e.htm, last seen on 03/01/2018.
[29] WTO secretariat, GATS facts and Fiction, March 2001, available at https://www.wto.org/english/tratop_e/serv_e/gats_factfictionfalse_e.htm, last seen on 03/01/2018.
[30] Annex on financial services (WTO), available at https://www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm,last seen on 03/01/2018.

i. Activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies;
ii. Activities forming part of a social security or public retirement plans &;
iii. Other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government."

Annex on Air Transport Services Section 2 (a) (b)

Traffic rights and related services are excluded from the scope of the GATS. As argued by Markus Krajewski in his article "Public Services and Scope of GATS[31]" that even though the inclusion in government authority is not specified, it would not be justified to conclude that it may fall under the scope of government authority because a separate annex would not have been brought forth to exclude it from GATS scope.

IV. Conclusions and Suggestions

From the interpretations and analysis put forward in the research it can be argued that Article 1:3(c) of the GATS stands as an exception to extensive and widespread scope of GATS. When a proper observation of the WTO documents are made and discussions are analysed and made, conclusion can be drawn that there exists a great deal of uncertainties and ambiguities about the Government Authority and there stands no definitional benchmark as to

[31] M.Krajewski, *Public Services and the Scope of the General Agreement on Trade in Service* (GATS), Center for International Environmental Law (CIEL), (2001).

what services fall under its ambit. The Vienna Convention on the Law of Treaties (VCLT) under Article 31 gives the interpretative methods by which an interpretation of Article I:3 (b)(c) GATS can be made but even that does not render a proper result. Besides, the words in the provision are such that hardly any clear or additional information can be drawn in order to bring a proper clarity to the Article and its scope.

Thus, to make a service fall under the scope of government authority the non-commercial and non-competitive nature of the service necessarily needs to be established. As the broad scope of GATS has become a threat to the national, economic or other policies of the member state and these many services falling under the scope of GATS has also narrowed down the scope of government authority. Neither the WTO members nor the Secretariat has given any clear cut view or proper understanding of the scope which is also undermining the scope of GATS. In WTO world development movement held in 2001 it was argued that the "actual text of Article 1:3(c) i.e. "A service supplied in the exercise of government authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" also has made the exception of government authority very narrow in its scope".

Some steps that can be advanced by the WTO members in order to determine the scope of the government authority could be that if a proper and explicit understanding of the provisions Article 1:3(b) (c) are made by the authorities. What they fail to point out is the exact scope of the Article 1:3(b) &(&(&c) and the objectives and goals lying behind, due to ambiguity of the text which has led to different interpretations and possibly making lot of services fall in the scope of GATS. Thus, if the interpretation of the words of

the Article or of the services that would fall under the scope of the government authority or which services are exempted because of participation of government agencies in their supply are made by the Secretariat of WTO members a clear and coherent understanding of the scope can be achieved.

If some negotiations are made by the Secretariat or the WTO members during their discussions and WTO meetings over the issue of scope of the government authority a proper understanding can be given to the services falling under its ambit. And also, an elaborative interpretation of the provisions can be put forward by bringing in a few changes to clarify the exact scope. This possibly can be done by amending the provision either by changing it in entirety or by adding few words to bring clarity to the scope.

While making changes Article 1:3(b) "Services include any service in any sector except services supplied in the exercise of governmental authority" specification of the laws or regulations made by the member nations can be given a specific mention. This would circumscribe all the services which are determined by government authority to be governed by the laws of the member country. Changes to Article 1:3 (c) "A service supplied in the exercise of government authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers" can be brought in with the specificity of supply made in exchange for some market price (which may or may not be monetary) and for the commercial basis of supply of services and for the competitive basis in order to determine the competition mention like, when supply made it should have some supply obligations in such a manner which are universally accessible and are provided under the same conditions by the supplier.

Delhi High Court's judgment of Mahmood Farooqui v. State (Govt. of NCT of Delhi) and Debate of Consent in the Rape Cases: An Analysis

-Anant Prakash Narayan*

Abstract

After a long debate on rape, it has always been seen as a crime where the consent of the complainant was debated during the trial. The definition and interpretation of consent in the rape law is one of the most significant and debatable issues. Several interpretations have also surfaced in different judgements of various courts. Previously it was believed that passive submission is consent, some interpreted that if the woman has not resisted until the end of the sexual intercourse, it amounts to consent but after a long journey of rape law reform, the consent is now defined in some different ways. Delhi High Court's judgement of Mahmood Farooqui v. State started the debate on consent and its interpretations in rape cases once again. The Court tried to set the different standard of consent if compared to previous judgments on consent. However the judgments have also been criticised by several legal scholars. In this article author has attempted to describe the historical development of the concept of consent regarding rape and in light of the recent Delhi High court judgement of the Farooqui case, it has also been evaluated in detail.

I. Introduction

On 25 September 2017, Delhi High Court delivered the judgement in the case of *Mahmood Farooqui* v.*State (Govt. of NCT of Delhi)*[1] and acquitted Mahmood Farooqui (hereinafter MF) who was earlier convicted for the offence of rape under Section 376 of IPC of a research scholar from Columbia University at his house on 28 March 2015, by the Additional

*PhD. Research Scholar at Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi. The author can be reached at - anitshe@gmail.com

1 Mahmood Farooqui v. State (Govt of NCT of Delhi), Criminal Appeal no 944/2016 (Delhi High Court, 25/09/17), available at http://lobis.nic.in/ddir/dhc/ASK/judgement/25-09-2017/ASK25092017CRLA9442016.pdf., last seen on 11/10/2017.

sessions judge-special fast-track court, Saket, New Delhi.[2]The Delhi High Court acquitted MF on the ground of the benefit of doubt and set aside the verdict of the trial court, which was rigorous imprisonment of seven years and fifty thousand rupees fine. The main argument for the acquittal of MF was that he suffered from 'bipolar disorder' and was not able to understand what the woman wanted to communicate.[3]

Rape is legally defined crime in Common Law "as non-consensual sexual penetration of an adolescent or adult obtained by physical force, by a threat of bodily harm, or at such time when the victim is incapable of giving consent by virtue of mental illness, mental retardation, or intoxication".[4] The law always defines rape in terms of intercourse with force and coercion, and without will or consent. The law assumes that the reason behind force is the absence of consent of the woman involved. It is a crime where the victim's lack of consent needs to be established using physical resistance, and any signs of consent are treated as a defence. This understanding of the law has been time and again challenged by feminist legal scholars.[5]

Reform in rape laws has been the always major demand of women movement. When the rape law reforms emerged in the 1970s, the

2 State (Govt. of NCT of Delhi) v.Mahmood Farooqui, SC No.: 118/15 and New SC No. 1590/2016 (Additional Sessions Judge-Special. Fast Track Court, Saket Courts: New Delhi, 30/07/2016).
3 Supra 2, at 79-81.
4 W. D. Loh, *The Impact Of Common Law And Reform Rape Statutes On Prosecution: An Empirical Study*, 55 Washington Law Review 543, 549 (1980), available at http://heinonline.org/HOL/Page?andle=hein.journals/washlr55&collection=journals&id=555&startid=&endid=666#, last seen on 25/12/2017.
5 See, S.Estrich, *Real Rape* (1st ed., 1987).

movement's main aim was to claim sexual autonomy of women.[6]Feminist(s) scholars always question the law's behaviour which only focuses on the character and behaviour of the victim.[7] The demand of the movement was to do away with the patriarchal interpretation of consent and establish rape as a crime of violence.[8] The aim of the rape law reform movement is also to remove the ingredients of force and demands that the trial should only concentrate on the woman's consent at the time of sexual intercourse. It should be the point of debate, and somehow the feminist movement has been successful in establishing this debate in rape law reform.[9]

II. A Brief History of the Consent Debate in India

In 1837, Thomas Macaulay proposed the Indian Penal Code through the First Law Commission. In this proposed Penal Code the term rape was defined —as "sexual intercourse by a man with a woman under one of five circumstances: against her will; without her consent while she is insensible; with her consent when it has been obtained by putting her in fear of death or hurt; with her consent when the man has tricked her into thinking he is her husband; or when the girl is under nine years of age."[10] The very first proposed draft of the definition regarding the offence of rape has given the

6 C. C. Spohn, *The rape reform movement: The traditional common law and rape law reforms*,39 Jurimetrics 119, 121 (1999), available at http://www.jstor.org/stable/pdf/29762593.pdf, last seen on 25/12/2017.
7 Ibid, at 119.
8 Ibid, at 122.
9 There are many progressive rape reform took place in the several countries after these reforms-movements throughout the world.
10 E.Kolsky, *The Body Evidencing the Crime': Rape on Trial in Colonial India, 1860–1947*, 22 Gender & History109, 109 (2010), available at http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0424.2009.01581.x/epdf, last seen on 25/12/2017.

provision that the consent should be free and not obtained by putting in the fear. When the Indian Penal Code was enacted in 1860, the rape section remained almost as originally drafted.

Sir Matthew Hale's understanding of rape law always concentrated on character of the survivor in which rape was considered to have been taken place on different grounds like sexual experience of the survivor, the presence of clear physical proof of her violation and promptness of complaint of the alleged rape and it also had a significant effect on the rape trials in India. According to his prescription, in the absence of these proofs allegations may be considered as false. After Hale's warning, the prejudice had become rule against the woman that she is a non-credible witness in her case.[11] Susan Estrich says that ―this effectively establishes a judicial situation in which there were two defendants on trial: one charged with rape and the other charged with the presumption of consent.[12]According to Kolsky,Indian women faced a twofold challenge in colonial courtrooms. Not only were they subjected to British legal presumptions about false charges, they also had to contend with specifically colonial ideas about the unreliability of native witnesses and other prejudicial ideas about Indian culture. Indian rape victims were doubly suspect.[13]

In India, medical jurisprudence was not developing only for the scientific and objective proof against the crime, but it also developed for the

11M.Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*, 1736–39 (1680), available https://ia800301.us.archive.org/30/items/historiaplacitor01hale/historiaplacitor01hale.pdf last seen 25/11/2017.
12 S. Estrich, *Rape*, 95 The Yale Law Journal 1087 (1986), available at http://www.jstor.org/stable/pdf/796522.pdf, last seen 25/11/2017.
13 Supra 11, at 111.

—unreliable people and culture.[14] In 1854, Chevers issued first formal guidelines for medical personnel to conduct physical examinations on charges of rape and stating that there is always a chance of false charge by the accuser. It means the medico-legal approach of rape in colonial India was more to save the defendant from the 'false charge' rather than to dispense justice to the survivor.[15] It will not be an exaggeration to say that rape laws in colonial India were predominantly obsessed with the false charges. It means when the trial of the rape victim is going on, the age of the victim, social background, prior sexual history and moral conduct of the survivor become as important as the sexual assault itself.[16] The distrust placed on Indian rape complainants and the insistence on medical corroboration of rape charges was not the exclusive preserve of British colonial personnel until the 1980s even after India's independence. This understanding has started the tradition of believing that the woman consented earlier for sexual intercourse but denying later. Jaising Modi (1920), one of the most credible authorities in medical jurisprudence in India, was of the opinion that most of the rape cases are false, levied for blackmailing or to deny illicit consensual sex. According to Modi, under ordinary circumstances, it is not possible that a single man can hold sexual intercourse with a healthy woman without her consent unless she is completely helpless.[17]

14 N. Chevers, *A manual of medical jurisprudence for Bengal and the North-Western provinces*, 5 (1856),
available at https://archive.org/stream/manualofmedicalj00chev#page/n9/mode/2up, last seen 25/12/2017.
15 Supra 11, at 113.
16 Supra 11, at 113.
17 See J.Modi, *Modi's Textbook of Medical Jurisprudence and Taxology* [1920], (2001).

In case of *King* v. *Patha Kala* (1904)[18]We learn that a young and ―modest girl working in the field was raped by a lower class man. Some witnesses heard the girl screaming. Overcome by the sense of shame the victim threw herself into the well. The court held that rape was established since the victim did not have 'prior relation with the boy', she was ‘modest’ and her attempt to suicide ‘showed that she was not willing to make intercourse with the man'. The court opined that since the victim belonged to a higher caste and the accused hailed from a lower caste, the offence could not be mitigated and a severe sentence was mandated.

In *Emperor* v. *Prabhatsang*(1907)[19] The same Kathiawad Chief Court heard the testimony of a low caste beggar woman who was gang-raped at a temple platform by two men. Her screams attracted nearby villagers. The witnesses at the crime scene saw signs of the victim's struggle. Sufficient medical evidence of injury was also gathered. However, the court observed that sexual intercourse between the parties had occurred, but it is impossible that it happened without victim's consent because there was no ―satisfactory resistance. Acquitting the accused, the Court found resistance to be unsatisfactory, which was expected by a lower caste woman. This judicial view point echoed Modi's axiomatic statement that able-bodied working-class women would be able to offer greater resistance as compared to rich (or fair) women.[20]

18 1 CrLJ 900.
19 5 CrLJ 465.
20 Supra 18.

Colonial law constituted lower caste women as pathological liars. In *Musummat Chapa Pasin* v. *Emperor*(1928),[21] where the marks of struggle were visible, the court held that it was quite natural for a 'street woman' to be violent during consensual sexual intercourse and hence, the marks on her body did not necessarily proof the case of the rape. The court further inferred that the attempt of outrage of modesty could not be perpetrated on a woman who had none. In contrast to this, the case of *Labh Singh* v. *Emperor*[22](1923) where the Lahore High Court upheld the testimony of an upper-class woman because the victim's class status left them with no basis to doubt her. Further, the court held that it was very difficult for any ―self- respecting woman to come to a court of law to make such testimonial against her ―honour until or unless it was not very true. On the basis of prior sexual activities, the court also had not believed that a rape victim could be a credible witness.

Until 2002, the past sexual history of woman was admissible in the courts. In 2002, Section 155(4) of Indian Evidence Act was repealed which permitted evidence of the victim's character and sexual history to discredit her testimony and Proviso of Section 146 of the Indian Evidence Act inserted. According to Proviso during the trial of rape, the question related to the general immoral character of prosecutrix shall not be allowed.[23] The assumption in colonial law that a woman with past sexual experiences is likely to consent to sexual intercourse and then file a false charge continued

21 25 CrLJ 325.
22 24 CrLJ 877.
23 After long debate, The amendment in Indian Evidence Act 1872 came into existence in 2002.

to frame rape trials in the post-independence period.[24] In *Amir-ud-Din* v. *Emperor* (1924),[25] the Lahore High Court, on the basis of the medical report, declined to believe that the victim could be raped because she was not virgin when she is raped. In *Sultan* v. *Emperor*(1926),[26] the same High Court declared that because the victim girl was a virgin, the court could not believe that the victim consented to sex. Judicial distrust was not limited to an unmarried non-virgin girl but it extended to lower caste and working-class married women. In the case of *Emperor* v. *Panna Lal*(1924),[27] the Allahabad High Court acquitted the accused because the woman was from ―a lower caste and was habituated to sex in her married life. Despite the fact that the cries of girl attracted many eyewitnesses, and the court had direct evidence, the colonial courts accorded punishment only when the victim was young and virginal.

Proof of violent resistance and a physical injury was one of the major requirements of the colonial courts to a determination of the consent of the complaints and colonial judges routinely warned juries not to convict in rape cases unless the complainant's testimony was corroborated by physical facts.[28] The most important case on the issue of physical resistance was *Empress* v. *Shankar* (1881).[29] In this judgment the court cited *Reg.* v. *Lloyd*, which held that, ―in order to find the prisoner guilty of an assault with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the complainant, not only desired to gratify his passions upon her,

24 Supra 11, at 116.
25 25 CrLJ 1200.
26 27 CrLJ 1488.
27 25 CrLJ 981.
28 Supra 11, at 120.
29 ILR 5 Bombay 403.

but that he intended to do so at all events, and notwithstanding any resistance on her part.

In *Shankar*,[30] the court declared that the proof of the non-consent should always be derived from evidence of physical resistance of the complainant. As Susan Estrich observes, consent is used as a defence in other crimes also, but rape is only crime where consent must be corroborated by the physical injuries[31]. There were many cases after *Shanker* in which signs of physical injuries to the complainant were presented to colonial courts however this too was not sufficient proof of resistance and lack of consent. The colonial practice was remained unchanged until 1983.[32]I now turn to the Mathura case, which led to the first amendment in the rape law on the question of consent in the year 1983.After the Mathura rape[33] a case, where a minor girl was raped by two constables in the police station, the debate of consent in rape cases came into public discourse in India. The Supreme Court's view was, as there was no sign of the resistance, it is unbelievable that the girl was raped. The court presumed that she was a consenting party. After the Mathura Case verdict, widespread protests happened across the country. These protests resulted in the amendment of the criminal law.[34] In the aftermath of this outrageous verdict, four law professors wrote an open letter to the Chief Justice of India highlighting various lapses in the treatment of

30 Supra 13.
31 Supra 13, at 1090.
32 See, Pratap Misra And Ors. v. the State Of Orissa, AIR 1977 SC 1307; Jayanti Rani Panda v. State of West Bengal And Anr,1984 CriLJ 1535.
33 Tukaram and other v. State of Maharastra, 1979 AIR 185.
34 The Criminal Law (Amendment) Act 2013.

the case.[35] They pointed out that 'submission', obtained under various circumstances, is not necessarily the same as 'consent'. They wrote, ―one suspects that the Court gathered an impression from Mathura's liaison with her lover that she was a person of easy virtue. Is the taboo against pre-marital sex so strong as to provide a license to Indian police to rape young girls? Or to make them submit to their desires in police stations?[36] They asked why the Supreme Court did not find the available evidence enough to convict the policemen when the High Court had convicted them on the basis of the same evidence.

The Criminal Law (Amendment) Act 1983 then came into the existence. In the Amendment Act 1983, along with other things, it became clear, if consent for sexual intercourse was taken from the complainant by putting her into a fear of death and hurt, it will be considered as rape. Section 114A of Indian Evidence Act 1872 was introduced according to which there is a presumption of the non-consent in the rape cases when woman says she did not consent to the sexual intercourse. The category of aggravated rape[37] and

35 U. Baxi, V. Dhagamwar, R.Kelkar & L. Sarkar,*An Open Letter To The Chief Justice of India*, Partners for Law in Development, available at http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf, last seen on 23/12/2017.

36 Ibid.

37 Before Criminal Law (Amendment) Act 2013, Section 376 (2) (a)-(e) and (g) of Indian Penal Code came into the category of the aggravated rape. According to Section 114A if the prosecution proves that sexual intercourse had taken place then it now burdens on the defence that he will prove that it happened with the consent of the woman. After Criminal Law (Amendment) Act 2013, it is now from Section 376 (2) (a) to (o). After keeping the vulnerability of the woman in mind, the presumption of non-consent of the woman in aggravated rape was introduced in Criminal Law (Amendment) Act 1983. In Section 114A of Indian evidence Act 1972, there is provision that if a woman states in the court that she did not consent to the sexual intercourse, the court is bound to presume that she did not consent. In the Case of State of Rajasthan v.Roshan Khan,Crl.A. No.-000079-000080 / 2005, the court asserted that if a woman is saying that she has not consented for the sexual

custodial rape[38] was also introduced in the IPC. These two concepts of the consent spread the horizon of the consent under IPC. According to Criminal Laws' understanding in India "Consent is an act of reason accompanied by deliberation, a mere helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in, cannot be deemed to be consent."[39] Ever since the amendment in the criminal law, from time to time, the courts have interpreted consent for the purpose of rape, saying that consent should be a voluntary participation and it should be an exercise in the choices of resistance and assent.[40]

India witnessed the gruesome Nirbhaya gang rape case in Delhi on 16 December 2012; there were countrywide massive protests. This resulted in Criminal Law (Amendment) Act 2013 to come into existence. After this amendment, the definition of the consent for the rape was introduced first time in Indian Penal Code under Section 376 of IPC.[41]

In the MF Judgement[42], the debate about consent again resurfaced. This eighty-two page judgment challenged all the advancements and evolution of the rape laws in the country in various ways. The judgement challenged the proposition of affirmative model of consent which is 'no mean no', and also established once again that the past sexual history/physical contact of the

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intercourse, then the court shall presume that "she did not give consent to the sexual intercourse committed on her by the accused persons." The Court further has gone to expect that it is an obligation on the defence lawyer to rebut it.

38 The demand for the power rape as a separated category was set aside in 1983 but the Sections 376 B, 376C and 37D recognised the power rape. After Criminal Law (Amendment) Act 2013 Section 376C includes power rape.

39 K.Vibhute, *PSA Pillai's Criminal Law*. 967 (10th ed., 2008).

40 Vijayan Pillai v. State of Kerala (1989)2 Ker LJ 234;State of Himachal Pradesh v. Mango Ram AIR, 2000 SC 2798.

41Detailed Discussion in Affirmative Consent Debate.

42Supra 2.

complaint relevant matter for the rape trial. These events are necessary to discuss because the women's rape law movement has a long history of challenging the regressive understanding about rape and the principles established to secure the sexual autonomy of women. There are Scholars who argue that this judgement again pushed back all the developments that took place about the consent regarding rape trials and led to the regressive interpretation of the consent while once again interpreting it in a misogynist manner.[43] The judgement is trying to lay down the absurd precedent for the consent in the rape cases. The judgement once again asserted the old notion of rape, resistance and consent which always contested through rape law reforms.

III. Affirmative Consent Debate

"The consent does not merely mean hesitation or reluctance or a 'No' to any sexual advances but has to be an *affirmative* one in clear term."[44](Emphasis Added). This statement is one of the major critiques of the whole judgement of the MF case. The judgement is not ready to accept the hesitation, reluctance or 'simple' 'no' of the women as a 'no' to the offered sexual advances but it demands that the women 'no' should be 'affirmative'. Before analysing the above statement of the court, we will discuss here that what is affirmative consent? The affirmative model of the consent asserted that

43S.Nigam, *From Mathura to Farooqui Rape Case: The regressive Patriarchy Found its Way Back*, Counter Current, available at http://www.countercurrents.org/2017/10/09/from-mathura-to-farooqui-rape-case-the-regressive-patriarchy-found-its-way-back/, last seen on 25/12/2017.
44 Supra 2, at 56.

woman's 'yes' means yes and woman's 'no' means no for any sexual offer[45] and the word of a woman should be taken in the real form with real spirit. Under the affirmative consent standard, there exists a presumption that woman did not give consent unless until she is asked and a woman says clearly yes for the sexual intercourse.[46] The proponents of the affirmative consent believe that the man and woman may have a different interpretation of the same behaviour, therefore, the concept of the affirmative model of consent end the confusing situation.[47]It is not necessary that affirmative consent always expressed verbally and may be implied, but it should be unambiguous.[48]

The definition of consent under the Illustration of Section 375 is "consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity." This definition of consent also advocated an affirmative model of the consent, thereby establishing the fact that consent for the involving sexual act should be clear by words or unambiguous behaviour. It can take place in

45P.Baxi, *When 'No' is Not 'No' in Law*, Wire, available at https://thewire.in/182578/law-no-may-not-actually-mean-no/, last seen on 25/12/2017.
46 N. J. Little, *From No Means No To Only Yes Means Yes: The Rational Results of An Affirmative Consent Standard In Rape Law*, 58 Vanderbilt Law Review 1321, 1356 (2005).
47 Deborah Tuerkheimer, *Affirmative Consent*, 13 Ohio State Journal of Criminal Law 441, 449 (2016).
also See, C.L.Muehlenhard, T.P. Humphreys, K.N. Jozkowski& Z. D. Peterson, *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*, 53 The Journal of Sex Research 141(2008).
48 Ibid, at 448.

several forms, other than verbal form also and it should communicate the willingness of the participation of the woman in the sexual act. This definition also clears that the absence of physical resistance should not be treated as consent. The definition imposes the burden of understanding or getting the consent of woman on the man. If we analyse the judgement, the court is saying that the woman's hesitation or reluctance and 'no' are not sufficient to constitute her unwillingness to man. It is against the model of the affirmative consent. Further, the court expecting that consent "...has to be an *affirmative* one in clear terms", but in the same statement, the court is not considering the woman's 'no' as 'no'. It is a very contradictory statement in itself. The court further also stated that "the appellate has not been communicated or at least it is not known whether he has been consent of the prosecutrix".[49] And "There is no communication regarding this fear in the mind of the prosecutrix to the appellant."[50]The affirmative model of consent imposes the burden on the man to ask a woman for the sexual intercourse. In this MF case, the judgement interpreted the affirmative consent in the wrong way and imposed the burden of saying 'no' on the woman instead of asking 'yes' by the man to the women and the definition of consent under Section 375 IPC was not followed by the court when at the same time it is asserting for affirmative consent itself.

In this MF case, the Court has imposed the burden on the woman that she should prove that she communicated her 'no' to the accused despite the accused will prove that he has taken the consent of the complainant and

49 Supra 2, at 65.
50 Supra 2, at 62.

stated that "the appellate has not been communicated or at least it is not known whether he has been consent of the prosecutrix,"[51] "if it was without the consent of the prosecutrix, whether the appellant could discern/understand the same"[52]These statements of the Court are entirely against the concept of an affirmative model of the consent and also ignored the vulnerability of the woman in that particular incident.

The courts, especially Supreme Court time to time has given some judgements to clarify the debate of the consent particularly regarding the relationship of the submission of the woman and its relationship with the consent.[53] In the case of *Idan Singh* v. *State of Rajasthan*[54] Supreme Court stated that if consent is obtained under the influence of terror and fear then it will not amount to consent. The Court further explained that there is a very thin line between the consent and submission. Every consent involves a submission, but every submission does not amount to consent. The consent should always be voluntary and conscious acceptance what is proposed by opposite party.

In case of *State of U.P* v. *Chhoteylal*[55]the Supreme Court has given a more comprehensive interpretation of the consent in the context of the sexual offences. In this judgment the Court stated that "consent supposes three

51 Supra 2, at 65.
52 Supra 2, at 81.
53In State of H.P. v. Mango Ram, Crl.A. No.-000790-000790 of 1996, the Supreme Court held that submission of a woman under fear of terror could not see as consent of the woman and it should always be seen as a voluntary participation. Further court clarifies that consent is fully exercised choice between resistance and assent.
54 1977 CriLJ 556, 1976 (9) WLN 665.
55 Crl.A. No.-000769-000769 / 2006 (Supreme Court, 14/1/2011).

things--a physical power, a mental power, and a free and serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."[56]The Court has given the example of American courts' judgments to understand the concept of the consent in the rape cases and written that "In order to constitute 'rape', there need not be resistance to the utmost, and a woman who is assaulted need not resist to the point of risking being beaten into insensibility, and, if she resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not 'consent' ".[57]

These judgements have given clear precedent that if woman submitted herself to the man; it does not mean that she has consented to the sexual intercourses for each case. If the mere submission is not a part of consent then the judgement of MF, which has given the benefit of the doubt by submission of the girl, is entirely against the previous judicial interpretations of consent by the Supreme Court. In this case the complainant has submitted herself due to fear of death not with the willingness of the intercourse.[58]

56Ibid.

57In Words and Phrases, Permanent Edition, (Volume 8A) at pages 205-206, few American decisions wherein the word `consent' has been considered and explained about the law of rape have been referred.

58 The court writes in this MF judgement that "in the deposition of the prosecutrix as compared to the averments made in the FIR is that she claims to have remembered the case of Nirbhaya, whose offender had declared that if she (Nirbhaya) had not protested, she would have lived her life. The prosecutrix claims that she kept quiet and faked an orgasm to avoid any physical harm to her." Supra 2, at 12.

The judgement of the MF reminds the observation of the Justice Thakkar in *Bharwada Bhoginbhai Hirijibhai* v. *State of Gujarat*[59]case. In this case, the Supreme Court was not very happy to on going practice which disbelief or suspicion on the complainants of the rape or sexual molestation. Justice Thakkar saw this practice as a product of the 'male chauvinism in a male-dominated society'. Susan Estrich summarises the criminal law's unique treatment of rape: That the law puts a special burden on the rape victim to prove more through actions her non-consent (or at least to account for why her actions did not demonstrate 'non-consent'), while imposing no similar burden on the victim of trespass, battery, or robbery, cannot be explained by the oft-observed fact that consensual sex is part of everyday life.[60] This judgement is one of the examples that how the burden of the proof regarding consent always tries to shift on the woman, it makes perpetrator centric rather than complainant centric.[61]

The Doctrine of Feeble 'No'

The Judgement goes far ahead to reject the notion of affirmative consent and justified that sometimes a word 'No' means 'Yes'. The Court's claim is "instances of woman behaviour are not unknown that feeble 'no' may mean a 'yes' ".".[62] According to this statement, a wrong precedent might set that the initial 'No' of the woman has no meaning because there may be a situation that when a man initiated the 'act' the woman might show polite resistance initially. The feminist legal scholars always asserted that the term

59 1983 Crl.L.J. 1096.
60 Supra 13, at 1126.
61 Supra 5.
62 Supra 2, at 59.

'no' means only no, nothing else.[63] Legal scholars argue that defendant's argument that he perceives the woman's no as yes should not consider seriously.[64] There are many countries which they have started to recognise this meaning of the consent.[65] For example there was an amendment to the Canadian law that the man will take all the reasonable steps to assure that his partner is consenting party for the sexual intercourse.[66] The rationale of the opposing this concept of 'no' means 'yes' by the feminists scholar, who are committed for rape law reform, that this practice does not recognise the women agency and denied woman as a person.[67]

The discourse of rape has reached a point where "sexual intercourse as a result of threats of non-violent harms such as job loss, is sufficient for a charge of rape to be brought" .[68] The definition of consent claims to the extent that "a person to choose between her sexual autonomy and any of her other legally protected entitlements-right to property, privacy and to reputation- is by definition improper and deserves to be treated as a serious criminal offence."[69]

63 Supra 13, at 1104.
64 L. Guinier, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does"Yes"Mean?,* 117 Harvard Law. Review 2341, 2341 (2004).
65 There are several countries like Canada, England, Germany and many states of the United States of America recognises the no mean 'no' principle.
66 L. Henderson, *Rape and responsibility,* 11 Law and Philosophy 127, 159 (1992).
67 Ibid.
68. S. Leahy, *'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence,* 78 The Journal of Criminal Law 309, 310 (2014).
69 S. J Schulhofer, *Unwanted sex: The Culture of Intimidation And The Failure Of Law*, 132 (1st ed.,1998).

The logic of the claiming that no does not means 'no' always, because it believes that the man is initiator of the sexual intercourse and due to her gendered behaviours, the woman always deny for the same.[70] The judgement is also claiming the same and asserted that "There are differences between how men and women initiate and reciprocate sexual consent. He performs the active part whereas a woman is, by and large, non-verbal."[71] The feminist has challenged this typical and traditional understanding that the role of man is seducer and female will be seduced. Estrich asserted that the rape law should come out from traditional understanding to 'no' means yes concept.[72]The judgement also stated that "...it may not necessarily always mean yes in case of yes or no in case of no."[73]Susan Estrich, one of the feminists proponents of 'no mean no' argument, opposed the law practice that the gendered behaviour of the male in which he conditioned to be aggressive on the no of the women, therefore, the law used to give the space for no until unless meeting physical resistance.[74] Justice Verma Committee also advocated this understanding and asserted "Consent must be real. Often, it is vitiated by circumstances which take away the freedom of choice."[75] Therefore the committee proposed the definition of the affirmative consent in the explanation of the rape for the amendment. The committee has also given

70 C. L. Muehlenhard & L.C. Hollabaugh, *Do women sometimes say no when they mean yes? The prevalence and correlates of women's token resistance to sex,* 54 Journal of Personality and Social Psychology 872 (1988).
71 Supra 2, at 64.
72 David P. Bryden, *Redefining Rape*, 3 Buffalo Law Review 317, 388 (2000).
73 Supra 2, at 64.
74 Supra 6, at 102.
75 Justice Verma Committee Report, *Report of the Committee on Amendment to Criminal Law*,99 (2013) . available at http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf, last seen on 25/12/2017.

the illustration of some countries for giving the road map to interpreting the consent of the woman.[76]

The judgement also carried the traditional notion of the understanding that man performs the active role and woman performs the passive role in the sexual intercourse.[77] This understanding created the concept of mistaken believe because women are not expressive then the man should get a chance to the mistaken belief. According to Estrich, the stereotypical idea that women do not know what they want sexually explains the suspicion with which the modem judicial system regards the rape victims.[78] The Court says that the appellate mistakenly believed that the woman consented.[79] The concept of the mistaken believe comes in the scene in the rape trial when the requirement of the resistance challenged by the rape law reforms.[80] The defence of the mistaken belief always uses in such a cases where the complaint surrenders herself without verbal and physical resistance. The concept of mistaken believes totally shift the focus from victim to a defendant.[81]

76 Justice Verma Committee has given the example of the Canada and England as an illustration for interpretation of the consent.
77 Supra 2, at 64.
78 Supra 13,at 1129.
79 Supra 2, at 62.
80 V. J. Dettmar, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 Dickinson. Law Review 473, 481 (1985).
81 S. Murthy, *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 California Law Review 541, 545 (1991), available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1821&context=californialawreview, last seen on 25/12/2017.

The all above discussion shows that the feminist legal scholars assert time and again and it is now a part of the law that the word 'no' is sufficient for the showing the unwillingness of the women for entering in any sexual advances and the court should stop to interpreting the 'other' meaning and explanation. Once a woman says no any subsequent sexual intercourse should be regarded as rape. It comes from the "either obvious from the circumstances or else manifested by physical or verbal resistance."[82] in case of *Bijoy Kumar Mohapatra and Ors* v.*State*[83] the Court clearly stated that "A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance or passive giving in, when volitional faculty is either crowded by fear or vitiated by duress, cannot be deemed to be 'consent'. Consent on the part of a woman, as a defence to an allegation of rape, requires voluntary participation after having fully exercised the choice between resistance and assent." In this MF case, the complainant stated that "appellant tried to pull down her underwear and she kept on pulling it up"[84] it means the complainant manifested to the appellant that she was not willing to any sexual intercourse.

If we consider feeble no doctrine, then it is against the spirit of the anti-rape reforms and feminist struggle who fought long decade to establish the principle of woman dignity which asserted that the women words also have the meaning and it is subject of respect and consideration. The judgment once again reminds us of feminist claims that non-consent is not enough for the conviction in the eye of law but rape remains a crime of violence, and it

82 Supra 73, at 396.
831982 CriLJ 2162.
84 Supra 2, at 4.

needs proof of the 'actual' force.[85] It has also proved the allegation that "both historically and currently, acquaintance rape law has been chiefly reflective of male standards and perspective, and greatly favoured rapist."[86]

Past Physical Contact and Consent

The judgement also considered the relevance of the past physical contact with the accused and complainant and stated that "The communication further reads that the appellant, on that night went too far. This obviously means that there were some earlier encounters which may not have been of such intensity or passion but physical contact in some measure was accepted", and further "History of intimacy and the unabashed liking/attraction of the prosecutrix towards the appellant may have given an impression to the appellant of consent."[87] The Court has not only taken the previous relationship into consideration, but it played a major role in the acquittal of accused while there is established law that the prior relationship will not have any effect on the consent of the woman.[88] Under Common Law, evidence of the victim's sexual history was admissible to prove she had consented to intercourse and to impeach her credibility.[89] The notion that the victim's prior sexual conduct was pertinent to whether she consented was based on the assumptions that chastity was a character trait and that, therefore, an unchaste woman would be more likely to agree to intercourse

85 S.J. Schulhofer, *Taking sexual autonomy seriously: Rape law and beyond* 11 Law and Philosophy 35, 44 (1992).
86 D. Vetterhoffer, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 Saint Louis University Law Journal 1229, 1230 (2005).
87 Supra 2, at 39.
88 Section. 53A, The Indian Evidence Act, 1872.
89 C. Spohn&J.Horney. *Rape law reform: A Grassroots Revolution and its Impact*, 137 (1st ed., 1992).

than a woman without premarital or extramarital experiences .[90] There was a series of cases where the courts acquitted many of the accused on the basis of the 'questionable character' of the woman. There was a long-standing demand of feminist legal scholars that the question of character of woman should be irrelevant in the trial[91]. One of the significant demands of anti-rape movement was that the sexual autonomy of the woman should be respected and the past sexual history of the woman should not be on trial. Feminist scholars have taken a clear stance and have always called fore respecting the agencies of women and even once she has given the consent it does not mean that the man got the licence for her and always asserted that consent should be define in such a manner which respects autonomy of the woman.[92]

The 84thLaw Commission's Report also asserted that the character of the victim should be irrelevant and stated that even the prostitute and the hornet can be raped.[93] Therefore after long demand, The Indian Evidence (Amendment) Act 2002 introduced the Proviso of Section 146 of the Indian Evidence Act and repealed Section 155(4). In this proviso, the provision is that during the trial of rape the question related to the general immoral character of prosecutrix shall not be allowed. Later the provision of Section 53A, which inserted through Criminal Law Amendment Act 2013, more clearly stated regarding the issue related to the consent. According to Section 53A- "...where the question of the consent is in issue, evidence of the

90 Ibid.
91 Supra 8.
92 Supra13, at 1095.
93 84th Law Commission of India Report, *Rape and allied offences some questions of Substantive Law, Procedure and Evidence*(1980), available at http://lawcommissionofindia.nic.in/51-100/report84.pdf, last seen on 25/12/2017.

character of the victim or such person's sexual experience with any person shall not be relevant on the issue of such consent of the quality of the consent." But the court ignored the provisions of the Section 53A of Indian Evidence Act in MF judgement. After these two provisions, it is evident enough that when the question of consent comes then, the court should only concentrate on the issue that did the woman consented for the particular sexual intercourse with the man or not? Nothing else will be the determining factor for the consent. Before the insertion of Section 53A the Apex court time to time instructed that how consent of woman should interpret. In *State of U.P.*v. *Pappu@Yunus&Anr*.[94] The Supreme Court emphasised the autonomy of the woman and held that where there is a girl of easy virtue or habituated to the sexual intercourse even, it will be not ground of the acquittal from the rape charge.

The Court itself in the judgement asserted that past physical intimacy should not matter for the consent.[95] But at the same time, the court stated: "…this obviously means that there were some earlier encounters which may not have been of such intensity or passion but physical contact in some measure was accepted."[96] Since the accused and the victim have already been in physical contact the opinion of the court is "under such circumstances, this Court is required to see as to what was communicated to the appellant."[97]It means the Court was following the defence argument that "History of intimacy and the unabashed liking/attraction of the prosecutrix towards the

94 AIR 2005 SC 1248.
95 Supra 2, at 56.
96 Supra 2, at 59.
97 Supra 2, at 59.

appellant may have given an impression to the appellant of consent."[98] The Court has not only taken the complainant and appellant's previous relationship in to consideration, but it played a major role in the acquittal of appellate.

The Court also tried to highlight the past physical contact for determining the consent of the woman, especially for the citing that "the woman was not a naive but educated" and stated that "intellectually/ academically proficient and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and feeble 'no' was actually a denial of consent."[99] I argue, there is an indication by the court that in such cases the ingredients of the resistance should come back to prove the non-consent of the woman. The court also asserted, when parties are in the 'prohibited' relationship then the only 'no' is not relevant to manifest the intention of the parties. It is against the philosophy of the rape laws reform that Court gives the advantage to man to assume that woman consented to physical intercourse because she was earlier in the physical contact with the person. Baxi analyses this judgement and thinks that "the court suspended carceral energy at male bodies, but simultaneously unleashes disciplinary energy towards a specific class of women."[100]

IV. Conclusion

98 Supra 2, at 39.
99 Supra 2, at 59-60.
100 Supra 46.

The Supreme Court statement in the case of *State of Rajasthan* v.*N. K*[101] that "accused should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists." Hence from the above-mentioned statement it can be deciphered that assumption of 'doubts' should be based on concrete terms rather than explained as mere 'excuse'. This has also been argued by Supreme Court in the same judgement that, "Doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal."[102]

Mackinnon says, "It is a matter of sexual politics that the law about consent, for whom it will work till now it is in favour of the male. And it is the result of sexual politics that takes the favour of the male for the mistaken beliefs."[103] Unfortunately, the Court once again used the old traditional defence for the appellant which used to preserve 'victim as suspect'.[104] In the whole judgement, the subjectivity of the appellate (accused) was the centre of the debate while it should be consent of the woman which should have been the central point. While we are discussing the case, then we cannot forget the main reason for the acquittal in the judgement that MF was suffering from bipolar disorder. Therefore, he was not able to understand the nature of the consent of the woman. Interestingly there is no evidence on the record that he was bipolar except his wife's mail to the complainant that he is bipolar.

101 Crl.A. No.-001698-001698 of 1996 (Supreme Court, 30/03/2000).
102 Ibid.
103 C.MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*,*Signs:* 8 Journal of Women in Culture and Society635, 654 (1983).
104 Supra 82.

The courts do not treat women's consent as a free exercise of sexual autonomy. Even in this particular case, despite multiple reforms in the rape law with modern developments, the court chose to go with the traditional approach of the consent. The court rejected the affirmative consent, and the burden of communication of consent shifted on the complainant. It also recognised the past physical contact. This judgement carries the regressive and misogynist approach and denied sexual autonomy to a woman. However, this has been challenged regularly by the anti-rape movements. The courts are not ready to change their attitude and somehow hesitate to recognise the sexual autonomy rather regulates and controls women's access to their sexuality. Carol Smart (1989) says that the law is always governed by the existing power structure and ignores all other possible reality.[105] If the existing power structure is in favour of the male, then the female sexuality is also governed by the cultural values of the patriarchy. Courts always try to protect the male and always try to prove that the woman has given the consent. If any woman gives the consent to partial intimacy, it is assumed that the man has a right to intercourse. The legal process has been witnessed to narrow down the complainant's case and provided many ways for the acquittal of the accused. The creation of complexity for the victim by questioning the past sexual history or the judging the character of a woman has been a case in point in this judgement.

105 See C. Smart, *Feminism and the Power of Law*, (1st ed., 1989).