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Is India next ? Harnessing the Power of Positive Peer Pressure through the Global Youth Justice Movement

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Abstract

The predicament of juvenile delinquency for most nations, including that of India, has been something of an enigma ever since juvenile justice legislation was first introduced. In recent years, juvenile delinquency in India has not only been increasing but its gravity has also trended upward and added to the burden of a strained juvenile justice system. This article presents an alternative option to the formal juvenile justice system which is designed to empower youth, builds community capacity, and is re-integrative and restorative in nature. An overview of the peer court model is presented and described within a possible Indian context. Various evidence is discussed as to its relative success in other regions of the world. The paper concludes with several observations as to why the peer court model could/should be adopted in India along with several pragmatic and practical considerations around the implementation and administration of the model.

Key words: Juvenile delinquency, Peer Courts, Alternative measures, Diversion, Restorative Justice

Juvenile delinquency has represented something of an enigma to criminal justice systems around the world[2]. Despite the plethora of initiatives and resources directed towards combating the plight of juvenile delinquency and the voluminous body of related research, the plight of juvenile crime/delinquency continues to be the bane of most jurisdictions[3]. India is in no exception.

According to the National Crime Records Bureau's data, the rate of juvenile offences has steadily increased in recent years. In 2004, the rate for juvenile crime

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[2] GREEN, R., *Understanding The Youth Criminal Justice Act*, (J. Winterdyk & R. Smandych eds., 2nd ed., 2016) YOUTH AT RISK AND YOUTH JUSTICE: A CANADIAN OVERVIEW,Don Mills, ON: OUP.

[3] JUVENILE JUSTICE: INTERNATIONAL PERSPECTIVES, MODELS, AND TRENDS, (Winterdyk, J. ed. 2015) , Boca Raton, FL.: CRC Press.

was 1.77 incidents per lakh of population. By 2013 it had risen to 2.58 incidents per Lakh. Of social and cultural concern is the fact that, unlike the trends found in many western countries, between 2004 and 2014, the incidents of rape by juvenile offenders, in India, rose 70%, and in 2014 rape accounted for some 20% of all juvenile crimes. Furthermore, sex related offences account for 80% of all officially recorded juvenile crimes in India (Juvenile justice in India, 2016). In addition, available data also shows that cognizable crimes have steadily increased between 2004 and 2013[4]. Therefore, the increase in violent youthful offenders entering the justice system is taxing the time and limited service resources of the India juvenile justice system. The increased attention that must be afforded these more complicated cases has generally resulted in a redistribution of court resources and a concomitant decrease in the attention that the justice system can give to lesser offenders. For some of these youth, this form of "systemic neglect" becomes an open invitation to continue, if not accelerate, the progression to bolder and more violent crimes. And, as a recent article by Rukmini[5] pointed out: by 2040 not only will the population of India surpass that of China (which currently has the largest population in the world), but it will also mean that there will be more young people who will likely be at risk of engaging in delinquent activity.

And although some of the increase in juvenile crime in India can be attributed to the change in the definition of juvenile crime as introduced in 2001, various open sources point to the fact that poverty and illiteracy are the primary factors that contribute to juvenile crime in India. For example, in 2014, almost 56% of the known juvenile offenders came from families whose annual income did not exceed 25,000 rupees a year. In addition, almost 22% of the juvenile offenders were illiterate and some 31% only had a primary school education[6]. And as a report by Oxfam observed, although India's economy is rapidly changing, the country has the largest number of illiterate women and children in the world which adds further challenges to using education as a tool for intervention and prevention[7].

In the wake of available data showing that juvenile crime in India is not only growing but that there has been a simultaneous increase in the level of violent

[4] *Id.*
[5] Rukmini, S. (2017, June 24). Five Surprising Trends In India's Population Growth In The Coming Decades. Retrieved from http://www.huffingtonpost.in/2017/06/24/five-surprising-trends-in-indias-population-growth-in-the-comin_a_22676736/
[6]Juvenile justice in India. (2016, October 18). Retrieved from http://indpaedia.com/ind/index.php/Juvenile_delinquency_in_India#2004-2013:_Juvenile_crime
[7]10 Facts on illiteracy in India that you must know. (2015, Sept. 8). Oxfam India. Retrieved from https://www.oxfamindia.org/education/10-facts-on-illiteracy-in-India-that-you-must-know

crime committed by young persons, there would appear to be a clear need to examine the issue and trend. As an outsider, one can only assume that this is causing concern among criminal justice professionals, policy-makers, and community leaders alike. Coupled with the current growth in the nation's juvenile age population, there is a very real risk (without trying to sound like an alarmist) that the trend will continue unless there is a concerted shift in how juvenile crime is addressed in India.

Admittedly, as the esteemed American sociologist Edwin Sutherland observed back in 1934, (juvenile) crime statistics can often be skewed and/or because much of this criminal activity is committed by groups and often goes undetected (i.e., 'dark figure' of crime) (see Winterdyk and Smandych, 2016). Nevertheless, there is a clear and growing propensity for criminal activity by juveniles which demands the attention and direct response of policy leaders from all levels of government in India, and dedicated research by academics and researchers. Fortunately, by looking outside of the country (i.e., comparative criminology and/or criminal justice) at what is being done in some other jurisdictions may prove helpful in informing and guiding the formulation of bold policy decisions that will strategically direct resources to support innovative programming where it can be most effective.

Another issue that confronts India and many other jurisdictions is the fact that legislatures are responding to the increased societal demand for a wider variety of juvenile offenders to experience more punitively-oriented judicial sanctioning (as opposed to the primarily rehabilitative approaches practiced in recent years) by enacting laws that provide for such and which curtail police discretion at arrest. This can, in part be observed in the new Juvenile Justice Act of 2015 in India (see below for further discussion). However, in the absence of increased resources for police, the courts, and formal response mechanisms, these tactics further increase the caseloads of the courts, burden the juvenile justice system in general (see, e.g., Thakurl, 2017). Thus, the "systemic neglect" is perpetuated by legislation which is largely ineffectual and inefficient. Such factors are further compounded by the continual eroding of public faith and support in the system (Ibid.). For example, in 2014, the Minister of Women and Child Development, Maneka Gandhi commented that they were preparing a new law which would allow 16-year-olds to be tried as adult. During the same briefing, she noted that 50% of juvenile crimes were committed by teens who know that they get away with it (IBNLive, 2014).

With this brief overview on the state of juvenile justice and the juvenile justice system in India, there is a need among all (at least most) juvenile justice systems to provide alternative sentencing options which sanction the juvenile offender while allowing for that young person to be held accountable in a positive manner to them self and the community for their delinquent and criminal behavior.

This article explores a promising new option to formal sanctions that have proven to be cost efficient and cost effective. And although it is based on the established principles of diversion and restorative justice, it is a model that is quickly gathering support around the world and may prove to be of value to India. Therefore, in addition to providing an overview of the per court model, this article attempts to place the model within the context of India's juvenile justice system.

A viable option to conventional juvenile justice practices

What began as a 'Global Goal' by the American Social Entrepreneur Scott Peterson in 1993, peer court volunteer-driven youth justice diversion programs, also referred to as youth/teen/student court and peer jury, have mushroomed from 78 programs in 1994 to over 1,700 communities around the world on four continents (i.e., North America, Europe, Africa, and Asia) as of 2017, with no signs of this local volunteer-driven approach to Youth Justice and Juvenile Justice slowing down anytime soon. In the USA, volunteer-driven peer court diversion programs can now be found in forty-nine states, the District of Columbia, and dozens of Native American and Alaskan Native Tribes. Continuous research and ongoing evaluations are not only adding to the growing momentum, but the evidence is also demonstrating reduced recidivism rates, high social returns on investment, fostering of prosocial attitudes, and active civic involvement among both youth volunteers, and youthful offenders (Peterson, 2017). Yet, there is no such formalized program in India.

This article will provide an overview of peer court diversion programs, describe how they could readily become a diversion program in India, as an option under the new, and controversial, Juvenile Justice (Care and Protection of Children) Act (JJA), 2015, which came into force in January 2016. This Act replaced the existing Act of 2000 and among its various amendments and revisions and specifically now allows those young persons between the ages of 16–18 and who have committed a Heinous Offence (e.g., rape, murder, arson, kidnapping, etc.) to be tried as adults.[8] This provision is similar that found in Canada's latest (i.e. 2004) iteration of the Youth Criminal Justice Act (YCJA). However, as with India's previous Act of 2000, the current Act is intended to promote a positive approach towards the handling of juvenile offenders rather than using a strict punitive approach (Rana, 2016). The Indian model of juvenile justice has been described as a welfare-justice models (see Winterdyk, 2015).

[8] The JJA and Indian Penal Code define 'heinous offences' as those "for which the minimum punishment…for the time being in force is imprisonment for seven years or more." Interestingly, the various provisions under the new Act violate the UN Convention of the Rights of the Child (see Nair, 2015).

In general terms, the model advocates a degree of informality when dealing with young offenders, or "child in conflict with law" as used in the JJA 2015, and creating individualized treatment based on the needs and personal situation of the young person. In addition, as with the previous Act, the current Act of 2015; in general, advocates for a very positive predisposition towards the handling and processing of juveniles in conflict with law and follows a policy which is non-punitive and reformative in nature. However, the model also reflects the fact that the JJA also relies on due process, accountability, and where possible the least restrictive sanctions - including educational options. Therefore, as in my country (Canada), the new Indian JJA would appear to be well situated (see, for example, section 15 of the JJA) to consider exploring the pre-charge diversion option which has become well established in the United States and Canada, and is spreading quickly to many foreign jurisdictions.

Furthermore, borrowing from the Canadian system, the pre-charge diversion option being proposed falls under what is referred to as an 'extrajudicial measure' (EJM) (i.e., "outside the court"). Under this provision (i.e., section 4 of the CYJA) the police are expected to consider using this option when dealing with youth who have committed minor offences – again, some parallels can be drawn with the Indian JJA 2015 (see, e.g., Green, 2016). Again, the current JJA would appear to have sufficient latitude to consider and accommodate the use of such pre-diversions options.

Brief history and Rational for youth/peer courts

Although the legacy of the youth justice movement dates back to 1950's in the State of Maine where a judge wrote about such a concept in a local newspaper, there is no formal record of what transpired then (Peterson, 2009). Furthermore, it has never been determined if such a program was implemented. Nevertheless, in the 1970s and coinciding with major juvenile justice reforms and support for diversion programs for young offenders, a couple of mostly northern States implemented what are now known as youth/teen/student/peer court and peer jury diversion programs (hereafter referred to as peer court). It is important to note that peer courts are not a formal court or a specialize court, they are diversion programs. During the 1970's and 80's most of these 20 or so peer court diversion programs did not expand to neighboring communities, as a result social and political changes, and reforms throughout the country, as concerns over high rates of juvenile crime, a growing concern over the rise of youth gangs, along with a gradual shift towards the use of more punitive measures such as incarceration (see, generally, McCord et al., 2000).

Nevertheless, by the early 1990's, the peer court concept began to take hold in local communities and evolve thanks in large part to the efforts of those who believed that young offenders, especially those first-time offenders and/or youth having committed minor offenses, should be diverted from the formal process of youth justice and juvenile justice systems, but still be held accountable for their actions. It was not until 1997, when the United States Department of Justice launched the first federal effort within its Office of Juvenile Justice and Delinquency and Prevention (OJJDP) to actively undertake a wide range of federally funded projects, utilizing millions of dollars in tax payer funding for the specific purpose to proliferate these peer court diversion programs throughout the United States of America. This federal funding continued for a decade, until OJJDP suffered major reductions in federal funding, combined with the elimination of its research and training division. However, by 2008, the number of peer court diversion programs in the USA had passed an impressive 1,200+ communities now operating one of these peer court diversion programs. It is interesting and important to note, the Federal Government in the United States of American has never funded any local peer court diversion program – their rapid local expansion has been a textbook example of a grass-roots social justice movement in America, which has now spread to Germany, Japan, England, South Korea, Trinidad, Tobago, Egypt in addition to other countries with operational peer courts, and still more countries in various stages of establishing a demonstration peer court.

In part, driven by the continued interest in these peer court diversion programs, both in the United States and abroad, a new private philanthropic-based company called Global Youth Justice, LLC (i.e., limited liability company) was created in 2009, with the specific purpose to continue the expansion of peer court diversion programs in America and around the globe. Between 2009 and 2016, Global Youth Justice had trained more than 2,000+ adults at sixteen (16) training institutes, dozens of technical assistance projects, and a wide range of other programs and services in support of implanting and enhancing peer court diversion programs. The success of Global Youth Justice, LLC led to it being transitioned to an International Nonprofit Corporation called Global Youth Justice, Inc. with a board of directors and a newly expanded plan for more programs and services aimed at the continued expansion of peer courts around the globe.

Overview 'Peer Courts'

Over the past two decades, hundreds of communities have determined that they needed a youth court because youth courts offer a positive alternative to traditional juvenile justice and school disciplinary procedures. Additionally, youth courts:

- Serve as a prevention and early intervention program;
- Hold juvenile offenders accountable for their actions;
- Provide another option on the continuum of services available to youth;
- Promote restorative justice principles;
- Educate youth about the legal system;
- Offer an opportunity for young people to connect positively with adults and youth from their community; and,
- Encourage youth to take ownership in their own health and well-being and that of their communities.

Peer court diversion programs address the problem of anti-social, delinquent, and criminal behavior engaged in by youth typically between the ages of 10-18, with the goal of reducing the incidence and preventing the escalation of such behavior. To the extent that peer judgments are influential, a sentence impose by a jury of peers will shape positive behavior. Sentencing, in peer courts, is designed to hold youth accountable according the idea that peer pressure exerts a powerful influence over adolescent behavior. If peer pressure leads juveniles into law breaking, it can be redirected to become some force leading juveniles into law-abiding behavior. Service on another jury will enable youth who have committed a crime, offense and/or violation to participate in the juvenile justice system, rather than being the object of that system, thereby causing and reinforcing positive behavior. The diversion of cases to peer court will reduce the caseload of the courts and the probation office, resulting in saving in time and resources, and thereby allow valuable resources to be directed to the more serious crimes and juvenile offenders.

The Youth Court Diversion Program envisions the deterrence of negative juvenile behavior by redirecting youth to behave in a pro-social manner and therefore becoming an asset to our community. Through the Youth Court model, it strives to promote feelings of self-esteem and desire for self-improvement, and foster a healthy attitude toward rules and authority. Operationalized properly, the youth court model provides guidance, rehabilitative placements, mentoring and close supervision of juvenile offenders and, in turn, is designed to promote youth to become positive contributing citizens of their community.

Peer court diversion programs also benefit youth volunteers, to include former youthful offenders who appeared in peer court, who participate in Youth Court as members and volunteer jurors, by increasing their knowledge of the criminal and juvenile justice system and facilitating development of important skills relating to the analysis of information, determination of its relevance and importance, and articulating and advocating positions. Youth volunteers typically serve in the roles

of judge, prosecutor, defender, clerk/bailiff, and jury foreperson, and will be required to complete successfully a multi-week law-related educational program. Volunteer youth jurors often consist of any youth who wishes to participate. Typically, Youth Court members consist of young people of high school age (i.e. 15-18 years of age) who have completed a multi-week course of law-related instruction.[9]

If introduced (perhaps pilot tested) in India, this system would help promote awareness of the rule of law and the functioning of the legal system among all young people. It would potentially reach the entire spectrum of young people, from youth who have committed an offense, to youth who wish to invest only a small amount of their time as jurors, to youth who will to invest substantial time, effort, study, and energy in the program.

In addition to peer court being called different names, the peer courts have been established and administered in a variety of ways. Yet, most of the programs are used as an alternative sentencing option for (mostly) first time offenders who have committed non-serious/non-violent crimes. The volunteer youth and youthful offenders are both usually between the ages of 10 to 18, and in many of the programs the parent or guardian of the defendant must agree to the youth offenders' participation in the peer court. In addition, and like the more established diversion type programs in Canada and several other western countries, generally the youth has admitted to her or her wrongdoing (i.e., guilt) and then when provided with the option, voluntarily participates in a peer court rather than following the traditional and formal trajectory of the youth justice process.

Furthermore, in addition to representing an alternative to conventional youth justice measures and promoting civic engagement, the youth court model differs in that they rely on other young persons to pass on judicially the offender's sanction. Typically, the sanctions range from a combination of community service, conflict resolution training, restitution, jury duty, and/or educational workshops. Furthermore, depending on the model used, the youth serving as court officials may serve as jurors, prosecuting attorneys, defense council, clerks, and even as judges. Overall, the peer court dispositions place an emphasis on rehabilitative and restorative goals - - typically including: the performance of community service; victim restitution; and service on a future youth court jury. In addition, the specific areas in which

[9] Areas of instruction include an overview of the criminal justice system from arrest through appeal, the organization of youth court, including jurisdiction operation procedure and rules, the penal law, the consequences of crime to victims, the courts, the police, the probation office, and the community at large, the role of sentencing in rehabilitation of offenders, the range and effectiveness of rehabilitative actions and programs that are available, and sentencing issues, including aggravating and mitigating circumstances, and the nature and type of evidence that is admissible and probative in sentencing.

benefits are anticipated for juvenile offenders in India include the areas of knowledge, attitude, skill, satisfaction, and economy. They are described in greater detail below.

A. KNOWLEDGE. Knowledge is generally defined as: the aggregate of facts, information, and principles that an individual has acquired through learning and experience. The Youth Court programs are constructed to focus directly on identifiable areas in need of increased law-related education, including areas of substantive criminal law, criminal procedure, and rehabilitation.

B. ATTITUDE. An attitude is generally defined as: a state of readiness, a tendency to act or react in a certain manner when confronted with certain stimuli. Youth Courts are designed to promote positive attitudes toward and respect for the law and the criminal justice system.

C. SKILL. Skill is generally defined as: the ability required performing a specific task. Youth Courts are intended to promote the development of skills in the analysis of information, determination of its relevance and importance, articulation of facts, inference and conclusions, advocacy and decision making.

D. SATISFACTION. In a general context, satisfaction refers to an individual's positive evaluations or assessments of a give situation. With this in mind, Youth Courts are created to achieve among participants a sense of satisfaction with the criminal justice system process through their direct participation in cases and influence over outcomes.

E. ECONOMY. Economy can be characterized as the prudent and efficient use of resources and material. Accordingly, the goal of Youth Courts' is to utilize volunteer and community resources to address problems of inappropriate youth behavior before that behavior escalates to the point of imposing costs on the traditional criminal justice system.

What is further unique about the model, and which could work well in an Indian context, is that peer courts are established within and by local communities. Hence, they are adaptable to the social, cultural, ethnic, and other possible key factors that can accommodate different community needs. Although there are currently over 1,700+ of these peer courts, it is unique that it is largely left up to the community to determine what type of entity will serve as the administering agency to operate the peer court diversion programs. Police, probation, juvenile court, youth bureaus, district attorney's offices, public defender offices, schools, youth serving agencies, community service organizations, and a wide range of nonprofit organizations operate peer courts. In almost all cases, it is necessary for the elected and appointed officials to approve these peer court programs to be established, and operate within approved guidelines by the stakeholders.

An integral component for the success of a peer court is contingent upon local support and involvement of community members from diverse sectors. It is essential to recognize, for example, that the peer court model cannot operate without the coordinated collaboration of local agencies and community efforts. In so doing this also ensures the sustainability of the program regardless of economic and/or political agendas. Because the programmatic and operational design of peer court diversion programs require considerable volunteer involvement from both youth and adults, these peer courts are among the least expensive diversion programs to operate within a system of graduated sanctions, which also has allowed these peer court programs to further expand and remain operational, even when communities have deficits and/or budgetary problems.[10]

Peer Court Models

As noted above, peer courts are characterized not only by different names but also by different operational models that can be helpful to describe them. More importantly, the flexibility of the model allows for adaptation and/or accommodation to different regions in India where some of the models might not be as practical to implement as others.

For discussion purposes, there are four main program models, which have dozens of programmatic, operational, and administrative practices, which again, give local communities considerable options to operate a peer court that works best for them. Almost all models require a youth to admit guilt, so therefore, the peer court is not a trial, but rather a sentencing hear, where the youth present evidence relevant to sentencing. The four primary models include:

1. *Adult Judge Model* which relies on an adult judge (usually voluntary) to preside over the courtroom procedure and ensure legal protocols are properly followed. However, youth volunteers are typically between the ages of 14-18 and serve as defender, prosecutor, clerk/bailiff and jurors.

2. *Youth Judge Model* is like the Adult Judge Model except that a youth volunteer serves as a judge. In some program models, the youth judge has first served as a volunteer in peer court in the other roles for a period.

3. *Peer Jury Model* draws on the peer model, in that the model uses a panel of youth jurors who question the offender directly. Under this model there is no one defender, prosecutor, or judge. With this model, the judge is often an adult volunteer who has essential knowledge of the legal system and due process.

[10] Literature, videos, lectures, guest speakers and actual participation in mock and actual cases are the primary tools used to provide knowledge to the prospective Youth Court members. Youth Court members in turn will provide instruction and guidance to volunteer jurors and offenders.

4. *Tribunal Model* parallels the adult system in that there is no peer jury. Instead, the youth typically who serve as the judge, prosecutor and defender, and present cases to an adult judge who then determines the appropriate sanction.

Regardless of which model a community selects, most peer courts are situated either in a youth justice system (i.e., police, probation, and delinquency court), school or within a community non-profit setting. Coincidentally, these three settings are almost equal in terms of peer courts being operated within these three settings. Typically, most peer court models hold hearings 2-3 times per month and the most common agencies operating or administering youth court programs are juvenile courts and private nonprofit organizations (29% each). The next most common agencies are law enforcement agencies and juvenile probation departments (17 % each). Schools are the operating agencies for about 10 percent of youth courts while a variety of other agencies (e.g., city government, the administrative office of the court) are less commonly the operating agency. However, some communities hold peer court hearings weekly, once a month, and even twice a week. The remaining modes of delivery have covered the spectrum from local governments, the administrative office of the courts, and/or some other formal organization such as a bar association or district attorney office. Various American based studies have shown the successful completion rate of dispositions runs as high as 88% compared to only around 15% not reoffending after being referred to probation or some other conventional sanction for a subsequent offense (Peterson, 2009).

Irrespective of the peer court model, all models strive to attain a "constructive disposition" (i.e., accountability) for the defendant that is seen to have a restorative and/or rehabilitative component to it. Hence, the main sentencing outcomes involve some form of community service or participation in an educational type program. However, other options can and have been used. In more than 50% of all peer court diversion programs in the USA, peer court hearings are held in the evening in adult criminal justice courtrooms when they are not in use. About 30% of peer court hearing take place in school, with the remaining 20% being held in various locations such as a government building, youth bureau or law enforcement settings.

The Youth Court program/model is designed to operate year-round. Offenders who are involved in the youth court program are referred by the police department, county probation department, and the justice courts. Types of offenses committed are generally first time, misdemeanor and/or violations. In North American, typical cases referred to Youth Court are shoplifting, larcenies, criminal mischief, vandalism, harassment, unlawful possession of marijuana, etc. However, different jurisdictions may choose to explore different case scenarios based on case profiles and social-cultural-political will and capacity. Again, the choice of which cases in India might best qualify for such a program, is something that local policy-makers and experts could discussion and then decide upon.

All peer court models create a positive and educational alternative to an already overburdened Indian youth justice system. Yet, a typical and comparable response can be found in the comments by Margaret Waddell who in 2012 wrote that the four best ways to address an overburdened judicial system (in Ontario, Canada) was to: 1) hire more clerks for the judges, 2) create an online reservation system for motion scheduling, 3) Abolish automatic dismissals; and, 4) stablish a province-wide online database of current court cases. And while she acknowledges that such changes would come with an additional price tag, she suggests that the result would not only help to streamline the system but also make it more efficient. Yet, a fundamental detail overlooked in her argument is that the accused would still be subjected to the stigma of the court formal process and essentially conflates the underlying objective of the YCJA. Therefore, consideration of introducing the peer court model in India could and pragmatically should help to streamline its juvenile justice system. Hence, provided there is social and political will, the proposed (and proven) peer court model would appear to offer a unique, cost-effective, and positive alternative to the handling of most minor offences committed by young offenders. In particular, the model would appear most practical in the rural and outlying areas of India where formal juvenile mechanisms are limited and/or not working efficiently or effectively.

A final argument that could be made for the introduction of you/peer courts in India is that an overarching characteristic of the model is that it also embraces elements of crime prevention. Using crime prevention measures, as have been well documented over the years (see generally Winterdyk, 2017), is a far more effective and efficient means of addresses crime than relying on reactive response mechanism. By involving young persons in various elements and stages of the peer court model, it provides a direct and indirect means by which to educate young persons about the risks and harm of engaging in delinquent behavior. Also, by involving community capacity, there is a greater likelihood that other young persons (especially youth who might be deemed 'at-risk' of offending) will become informed about the process and make informed decisions that do not involve at-risk behavior.

To consider such change in a system that is already bureaucratically burdened, one might want to reflect on the sage reminder of Robinson-Easley (2012)[11] who concluded her book on saving the youth with the phrase: "never give up on a child" (p. 206). Because, after all, children (as we all know) constitute the most vulnerable sector of the society and are considered supremely important assets to the future of any nation, including that of India.

[11] Robinson - Easley, C.A., Our Children, Our Responsibility, (2012), NY: at 206; Peter Lang.

Conclusion and Potential for peer court models within the Indian Juvenile Justice System

This article began with the observation that juvenile delinquency is an enigma from which no country appears to be immune from. And while crime trends have gone up and gone down at different times in most regions of the world, the fact remains that juvenile crime remains omnipresent – regardless of whether one lives in Canada, India, or any other country in the world.

It was also observed that with increasing populations, especially in India, that available resources (especially within the formal structure of the juvenile justice system) are being stretched to, if not beyond their limits. Therefore, a system which has existed for centuries is proving not as capable to address the types of activities efficiently nor effectively that erode the stability, safety, and security of a country. Again, as discussed briefly (but is well known to policy-makers and academics who study such matters in India), from a human rights and social justice perspective, it is important to explore other viable alternatives to conventional juvenile justice practices if not for the well-being of India but arguably and more importantly for the well-being of its youth who will one day become those who lead and shape the country.

Although the peer court model is not considered to represent a panacea for the plight of juvenile crime in India – let alone anywhere else in the world – but based on the evidence available in other jurisdictions, its rapid expansion, and its adaptability, the model offers a viable alternative to conventional response mechanisms that are currently used and relied upon in India. Also, fortunately, the new JJA of 2015 includes provisions which would allow for the program to be introduced and/or experimented with in the Indian context.

Should the idea be introduced/experimented with in India, the program would help to reduce to burden to the formal elements of the system and thereby optimize the use of alternative measures or alternative sanctions as readily as it could, or arguably should. Again, based on available evidence of the India context, the use of the peer court model would create considerable opportunity to establish additional community-based/alternative options that and in accordance with the JJA would help to alleviate some of the burden on the formal juvenile justice system and build some community capacity which as Dandurand (2017)[12] points out is essential to building/restoring social well-being within communities.

Therefore, aside from offering a viable alternative to existing extrajudicial

[12] Yvon Dandurand, The Impact of Sentencing and other Judicial Decisions on the children of Parents in conflict with the Law; Implications of Sentencing Reform, ICCLR (2017).

programs within the Indian juvenile justice system, the highly successful, and affordable peer court model would appear to offer the Indian juvenile youth justice system several instrumental and functional benefits. They include, among others:

- Civic engagement of both young offenders and youth in general.
- Foster youth and adult partnerships that are continual service and not just episodic.
- Various studies have shown them not only to be effective in reducing reoffending rates but the programs are among the least expensive youth justice programs. For example, Peterson (2009)[13] sites a study conducted by the prestigious George Washington University where they calculated the average annual cost of operating a youth court was around $55,000 per year. This clearly pales by comparison to the salary of one judge, let along factoring in the costs of lawyers, bailiffs, clerks, etc.
- Since most of the youth involved in such programs are between the ages of 10-18, they are often still in need of guidance and a 'second chance'.
- The peer court model would align with a key objective of the JJA of 2015, that is, promoting rehabilitation and reintegration of the young offender back into society.

Evidence that the proposed program would attract the participants can be summed up in two words – "Peer Justice." Offenders participate because they can be judged by their peers rather than adults and be diverted from the traditional criminal justice system. They are also able to have their case handled in a swift, effective, and efficient manner.

Although this article did not address some of the pragmatic issues such as how to recruit and train both youth and adult volunteers, types of referral sources and the referral process, the implications of deferring young offenders into such programs, or how best to standardize the establishment of peer court models, the focus of this article was to simply introduce the concept, stimulate interest in the concept, and ideally generate an initiative to explore and pilot test the model within the Indian context on a local level.

Finally, what has been proposed in this article is not revolutionary but it does/ may call for a degree of 'risk-taking'. However, with informed and evidence-based innovation, there is considerable potential for India, or communities and/or regions within India, to create a potentially more effective juvenile justice system that is largely founded on rehabilitation and restorative concepts and which also helps to build community capacity.

[13] Peterson, S.B., "Made in America : The Global Youth Justice Movement", RECLAIMING CHILDREN AND YOUTH - INT. JOURNAL, 18(2) (2009) al-48-52.

A Negotiation Case Study of Shanghai Market Sellers – Lessons Negotiators and Dispute Resolvers may not want to ignore.

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Abstract

It is natural to perceive that in solving major issues, we need equally substantial solution. However such perception may not be always true as many at times, answers to complicated problems could be far simpler that we could imagine. Resolutions to issues may also become harder to achieve due to complicated approach without fully understanding the motivations of the parties involved or the rationale behind the issues. Whether in the negotiation of disputes or business deals, even the seasoned negotiators may ended up over-negotiating issues resulting in unfruitful outcomes, thus the saying 'to extinguish a candle, just blow it out'. Yet, it is also admitted that not all negotiations are inherently simple to resolve given that each of the parties involved seek to fulfil their self-interests and achieve their pre-determined objectives. Therefore to achieve successful outcome in a negotiation, a good negotiator relies on his/her experience, skills and knowledge (perhaps also with some instinct) not just in the subject matter of the negotiation but also good understanding of the cultures of the party or parties whom he/she is negotiating with. This article pertains to a case study on negotiating with market sellers in Shanghai. So as another saying that 'a child can teach an adult many things' despite the humble scale of such market sellers who are unlikely to hold academic qualifications or possessing experience in negotiating multi-million dollar deals, there are some noteworthy observations and lessons where business executives and lawyers may want to take a leaf out of their book. Among others, the cultural dimensions as devised by Geert Hofstede as to how cultures can affect negotiation process will be dealt with in this article including the widely known negotiation concept of BATNA (Best Alternative to Negotiated Agreement).

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I. Introduction

In any major cities in the world, there are its quintessential marketplaces to go to for tourists because of vast range of local souvenirs and all other products of interests. Tourists visiting major cities in China such as Beijing, Shanghai and Shenzhen will be certain to receive recommendations by travel guides or natives to patronise the local markets to complete their visits. Yet, these markets in China have developed reputation as the place to go for imitation goods, but strict enforcement efforts by the local authorities in recent times have no doubt resulted in counterfeit products no longer seen in plain sight.[1] Still, tourists and visitors can be expected to be approached by the many touts in these markets offering among fake designer products. Interested buyers are usually 'invited' and brought to discrete locations to be shown the goods, out of plain sight of the public so as to avoid detection by the authorities, but conventional wisdom has it such invitation should be declined. Nevertheless these markets are not all about shoddy affairs but also gold mines for buyers looking to purchase goods of practical use and everyday needs such as clothing, electronic gadgets, souvenirs or mobile phone accessories. Considering China being the 'factory of the world', one can expect to find useful generic products at a fraction of the price if they were to be sold in department stores.

Those who have been to these tourist markets in China invariably go home to tell the tale of intense bargaining and negotiation in haggling for low prices. The sellers are skilful negotiators and arguably good businesspeople. Bearing in mind, these sellers are unlikely to have higher education, very likely street smart individuals coming from impoverished part of China who are natural-born traders and negotiators and they will negotiate hard for their livelihood and profitability. These sellers are fearless, 'hungry', versatile in that they can sell anything and are prepared to take on anyone in a negotiation process.

Negotiation applies to getting business deal done or resolving business disputes.[2] It is also the first step in diffusing conflicts or resolving disputes and undertaken by parties themselves or by their lawyers. Although negotiation process may not be structured or conducted according to formal procedures, it is very much dependent on the parties how to coordinate or structure the negotiation. For instance, a party

[1] See 'Fate of Shanghai's Most Notorious 'Fake Market' Shows Changing Approach to Counterfeits', Jing Daily, 2 September 2016 <https://jingdaily.com/fate-of-shanghais-most-notorious-fake-market-shows-changing-approach-to-counterfeits/>

[2] See generally, Pereira de Oliveira Carvalho, Fernando Manuel and Azevedo Sobral, Filipe, 'The Importance of Communication Skills in Negotiation: An Empirical Study' (16th Annual IACM Conference Melbourne, Australia).

seeking to negotiate with another party may inform the latter that they would like to dedicate some time to discuss their issues with a view of seeking closure. Not all negotiations are hostile although in the case of dispute resolution, the process could be more formal with each parties acting cautious. The author had been involved in numerous non-hostile negotiation processes, in one such example, the parties were rather composed that they can have lunch together talking friendlily each day for several days, only to resume serious negotiation after their lunch trying to resolve the dispute at hand. Nevertheless, any negotiation process whether structure or not can be crafted by the parties in accordance with the nature and circumstances of the negotiation, depending on the preferences of the parties.[3]

II. Xinyang market shopping case study: a negotiation experience

a. First visit

AP Xinyang Fashion & Gifts Market or sometimes known as AP Plaza is a large subterranean shopping place located at the Science & Technology Museum Metro Station in Shanghai's Pudong district. It is said to be Shanghai's largest collection of shops offering a wide range of goods and products but fake designer goods are also peddled here.[4] However strict enforcements by the government in recent times have resulted in practically no such goods on display anywhere but touts are still everywhere, offering visitors fake designer goods and if there are interests, the potential buyers will be brought to secluded locations, away from public sight. Located subterranean connected to the metro station, its set-up is far from anything unsettling or 'underground' but a bright, vibrant and clean infrastructure with climate control. At the entrance of the market is a metro station which is heavily guarded by police personnel and x-ray machines requiring random commuters entering and exiting the station to get screened.

On one unusually cold afternoon in early March, the writer and his companion paid a visit to AP Plaza. There are some ground rules to be aware of when shopping in these markets, that is, the prices offered by the seller are not what one should remotely consider paying. The sellers will basically quote a high price nonchalantly and will never expect anyone to accept the initially quoted price. Some travel guide books advocate commencing the bargaining by counter-offering at a quarter of the price offered; however there are risks attached to this because not all products are of valueless and there are certainly manufacturing cost and profit elements from

[3] See also, Maurits Barendrecht, 'In Search of Microjustice: Five Basic Elements of a Dispute System (2009) Tilburg University Legal Studies Working Paper No. 002/2009, 12-13.
[4] See <http://www.globaltimes.cn/content/812092.shtml>

the manufacturer to the seller. Thus this could attract retaliation by the seller in the form of unkind remarks. The 'novice' buyers visiting such markets can often find themselves 'unwelcomed'; visits to such markets are bound to be treated with the amusing experience of seeing other people do their bargaining. In one such incident, a visitor offered to pay US$1 (equivalent in Chinese currency) for a neck tie of seemingly good materials, much to the consternation of the seller who then suggested to the tourist to go and make a tie and she will pay US$5 for it. Goods sold here are not used but mass production goods of generally satisfactory quality for the final transacted price. Inspect the products briefly then make an offer to the seller. It is not advisable to make an offer if there is no serious intention of buying it eventually; some visitors bargained out of curiosity with no genuine intention of eventually buying. If so, be prepared for some serious rebuked.

On the writer's first visit with his companion, they first approached a stall selling neckties. Both picked up items to their liking and of quality to their satisfaction. The neck tie's selling price was RMB 90 and the bowtie RMB 50.[5] Both buyers counter offered RMB 40 for the neck tie (about 45% reduction) whereas RMB20 for the bow-tie (60% reduction). The seller was firm, saying that the offered price was too low and she 'will not be making any profit', thus offered RMB 60 and RMB 30 respectively for the necktie and bowtie. Because the writer and his companion were satisfied with the price against the quality of the product and also in a hurry, they agreed with the price and did not attempt the 'walk away' tactic. However, several stalls further down, a similar bow-tie was price tagged 'RMB 15 only' and without even the need to bargain, the seller offered to sell at RMB 10. The writer earlier paid RMB30 for a similar product.

Next, the writer was keen to purchase a high specification flashlight which retails for at least US$ 70 in the writer's own home country. Approaching a stall selling electronic and electrical equipment, a seller shown several products. The writer took interest in one flashlight, the stall owner explained that the 'usual price' is RMB 200 but for the writer, he can sell it at a 'special price' of RMB 100. The writer left to think about it.

b. Second visit

On the second day, the writer and his companion decided to go back to AP Plaza. It proves to be an interesting visit due to noteworthy experience and encounter the day before. The market opens at 10.00 am and due to free time, the writer and

[5] Exchange rate of Chinese Renminbi (RMB) is about RMB 10 to USD 1.45 at the time of writing this article.

his companion decided to pay the place another visit. The rule of thumb is there are usually no customers at opening time and these sellers, it was thought to be part culturally superstitious and part keen to start the day on a positive note could be more conceding in terms of bargaining. Indeed arriving at 10am, the place was devoid of customers, with some stalls not yet opened. The first stop was the electrical shop from the previous day, selling flashlights. Manning the stall was a lady who turns out to be the wife the seller from the previous day. The writer picked up the similar flashlight and asked for the price. To his surprise, the seller said that her husband already offered to sell at RMB100 and her final price is RMB80. It was rather surprisingly to the writer that the seller's wife recognised him. Nevertheless, the writer counter offered RMB40. She was agitated and told the writer that should he go to another stall manned by an elderly lady, she will sell a lower specification flashlight for RMB40. Indeed she was right because the day before, the writer did momentarily stop by a stall manned by an elderly lady fitting the description and a different product was indeed offered at the said price. The writer did the walk away strategy but she was not about to give in without a good fight. From behind, she was saying out loud that RMB 80 is a good price then finally calling the writer back to sell it at RMB 50. The writer walked back to the stall collect the item only to face the unhappy seller who promptly handed him the goods and took the money in silence. Perhaps she was expecting me to thank her.

Next, the writer and his companion stopped at a shop selling silk clothing. His companion saw a woman's silk dress selling for a whopping RMB 1699. The seller's standard narrative was this is the retail price in Shanghai's leading department store but she can for only RMB600. Both said no and did the 'walk away' stunt. The price came down to RMB500 but finally settled at RMB250 which was accepted. At the same time, the seller offered some allegedly silk scarfs which the seller offered to sell at RMB 60. The writer offered to buy at RMB 40 but the seller refused and made no further offer. In a few stalls away, a similar scarf was on sale for RMB60 and when the writer offered RMB35, the seller readily agreed.

c. Some observations

Basing on general enquiries about all the intense bargaining sometimes emotionally charged, none of the sellers will ever make a loss, just less money. If the sellers were to make a loss, they would not have made the sale. This is contrary to the myriads of common remarks such as 'I am making a loss but today is your lucky day' or 'I give you a good price because you look like a good person' are ubiquitous. Typical in the case of buying and selling like in this market, sometimes a trader makes more profit from one customer to cover up for making less from another, some sort of 'cross- subsidising' trade. Such practice actually exists in

other industries too. For example in the building industry, some projects were undertaken at break-even point only so that machineries and workers can be deployed instead of sitting idle, or because a particular project is high-profile thus can lead to good publicity. Sometimes losses will be incurred hence the builders can only hope to make profit or recoup losses from other projects. Also, there are many instances of parties bidding for contracts at razor thin profit margin, hoping to make higher profits from variation orders in the course of the work, but they also risk getting into disputes when expectations fell short.

There were no doubts several interesting observations from the shopping exercises. First is the flashlight seller which must be credited for their consistent approach and good team work (in this instance the husband and wife team). Consistency is a strong attribute in negotiation because no one likes flip-flops stand which can be frustrating and reflects poorly on the other party. Also, negotiation to some extent can be a psychological exercise therefore a strong party can overcome or overwhelm the other. Generally too, negotiation is a psychological game to a greater extent where it is a question of who gives up first; it is a game of survival of the fittest and this concept applies in both business negotiation and dispute resolution. The party who stood firm may also do so with trepidation because should the customer walk away, then the bluff is called.

In the case of the silk dress seller, she had obviously made less than she would wanted from this sale. As such, she was determined to sell the scarfs for more money or not to close the deal, thus leaving her goods to be sold to other buyers since she might have the holding power to do so. However the other seller who was willing to part of with her goods at lower price may have her own strategy. Perhaps to her, small profits are still profits to her and at times it might be idea to get the stocks moving than to keep them. Keeping of stocks can lead to high overheads whereas clearing them out provides opportunity to restock with new products. This situation certainly applies in the case of fast-moving consumer goods where volume of sales is important.

III Negotiation considerations and cultural factors

There are numerous books published and training courses on negotiations whereas this article does not intend to replicate them. Instead, this article will analyse the case study to distil from it useful points and values that can serve as takeaway lessons in business negotiation and dispute resolution processes. In this case of market sellers, sceptics might be quick to judge that petty traders are not at all in the same league as major business corporations, hence there is nothing to learn from. Whilst this may be true to some extent, an aircraft executive is required to sell multi-million dollar airplanes to keep his job, a car salesman need to sell a

certain number of cars to earn his sales commission whereas a tourist market seller need to sell as many trinkets as possible in a day as possible to earn his living. They are all working towards achieving the same aim, all are 'hungry' to fulfil their 'economic' roles which can be different for one person compared to the other. For example, the market seller only need to earn enough money to survive by way of paying his house rent, putting food on the table and pay for his children's education. If he is able to fulfil this, he would be a very happy man. But on the other spectrum, the aircraft sales executive need to make enough sales because he rely on his sales commission to pay for his recently purchased luxury car and bungalow. It is a matter of survival in accordance with each of the people's social hierarchy. According to Maslow, human have physiological needs but 'if all the needs are unsatisfied, and the organism is then dominated by the physiological needs, all other needs may become simply non-existent or be pushed into the background'.[6] It cannot be said that the aircraft executive has a much more important job and greater motivation than the market seller; they are both be expected to negotiate as hard as they need to in accordance to their motivation and needs in life.

Dutch social psychologist, Geert Hofstede is the renowned for his seminal work on cross-culture studies where he developed a cultural dimensions theory comprising six dimensions of national culture that can have a bearing on a negotiation process[7] and they are: 'Power Distance', 'Individualism', 'Masculinity', 'Uncertainty Avoidance', 'Long Term Orientation' and 'Indulgence'.[8] Briefly, according to Hofstede, China scores high in terms of 'Power Distance' which means that individuals accept that there is inequality in the society therefore this is consistent with hierarchical structure in Chinese (as well as other Asian) organisations where there are subordinates and superiors where this can impact upon decision-making process, therefore influencing negotiation. 'Individualism' or 'collectivism' deals with interdependence among members in the society where China scores low, thus can imply that in a negotiation process, any decisions are likely to be made in the interest of the organisation, taking into account common good. Next, China is a 'Masculine' society, indicating competitive nature of the society, driven to achieve results and success.

This is followed by 'Uncertainty Avoidance' referring to the society's tolerance for ambiguity and uncertainty, where China scores low. This can imply that in the

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[6] Abraham H. Maslow, 'A theory of human motivation' (1943) Vol 50 (4) Psychological Review, 373.
[7] Geert Hofstede, Gert Jan Hofstede & Michael Minkov, *Cultures and Organizations: Software of the Mind* (McGraw-Hill Education 3rd edn 2010) 399-401.
[8] Ibid, 31.

process of negotiation, the Chinese can stomach ambiguity and hardship, making them likely to be tough negotiators. Next is 'Long Term Orientation' which deals with perseverance and pragmatism, also denoting whether or not in this culture the people are willing to adapt to changing conditions. China scores high and this would suggest that in negotiation, they may make concessions and are willing to consider future relationship. Finally, is the 'Indulgence' dimension where the Chinese scores low. This suggest a 'restrained' society, unlikely to indulge themselves. The Chinese negotiators are likely to be focussed in getting their work done than taking things easy. The above model is useful in attempting to comprehend or anticipate negotiation styles, approach and outcomes but there are always exceptions.[9]

Another universal method is BATNA (Best Alternative To a Negotiated Agreement), which was developed by Roger Fisher and William Ury, academics instrumental with the Harvard Negotiation Project. Whilst there are certainly many other negotiation techniques that can be used, the propositions of Fisher and Ury are a result of well synthesised ideas and theories that develop negotiation methods:[10]

The reason you negotiate is to produce something better than the results you can obtain without negotiating…What is your BATNA – your Best Alternative To a Negotiated Agreement? That is the standard against which any proposed agreement should be measured. That is the only standard that can protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept.

In the ideal world, we want to have it all and obtain a deal entirely to our interest yet we have to come to our senses that the real world does not pan out this way. No negotiation between two parties except under duress or coercion would result in one party have it all. Fisher and Ury further suggest that:[11]

Your BATNA not only is a better measure but also has the advantage of being flexible enough to permit the exploration of imaginative solutions. Instead of ruling out any solution that does not meet your bottom line, you can compare a proposal with your BATNA to see whether it better satisfies your interests.

In this case under study, both the sellers and buyers take into account BATNA in their negotiation process. Clearly, the seller would want to make better profit whereas the buyer would like to pay as less as possible in acquiring the goods. This

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[9] See also Steve Ngo, *The Chinese approach to international commercial arbitration* (Russell Square Publishing, 2016).
[10] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes – Negotiating agreement without giving in*, (Penguin Books, 2011) 102.
[11] Ibid, 102

is typical in any business transaction, whether large or small acquisitions; or in the resolution of disputes regardless of the amount in dispute. Negotiation is about strategy and at times not about a party's 'strength' (such as resources or wealth) but rather how better your BATNA is[12] for instance in the case of the neck tie and bow ties, the buyers did not know how much the items would cost elsewhere even though they have the financial resources to acquire them. This was compounded by them already setting the pricing range and threshold for themselves basing on their home country price tag for similar products. For example, they would have told themselves that, 'I've seen this retailing for $20 but if I can buy it for even $10, it is a good bargain' hence the buyers' ability to negotiate for even lower price is weaken by their own self-imposed limitation. In the above case, some of the sellers demonstrated good understanding of their own market, and turf. Coupled with experience, the sellers can assess the situation and try to sell at a better profit than they can, to other buyers hence have developed their good BATNA.

There are also myriads of scenarios that will affect a negotiation process. Lower profit per item but cumulatively higher revenue due to more sales or items. For instance selling an item at a profit of $10 compared to a profit of $5 per item but selling 100 items in one transaction. In this respect, one need to consider the other party's BATNA[13] in that by knowing their alternatives, one can be realistic about what can be expected from the negotiation. In the case of the sellers, it need to be gauged whether the buyers have a real need for the goods because it may simply be something which is not a necessity. In dispute resolution negotiation, a potential claimant need to evaluate whether there is a strong case at winning after taking into consideration cost of legal representation and whether the other party might have a cross-claim much larger. Meanwhile a person who requires a replacement car engine for his exotic Italian sports car would very likely face a 'take it or leave it' treatment by the manufacturer but reversibly, the buyer may just decide not to repair but to sell this car as scrap.

Whatever method used in negotiation, whether or not it is called BATNA or otherwise, this method can be said to be a fundamental idea of negotiation that one can reasonably apply to any negotiation process.[14]

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[12] Ibid 104
[13] Ibid 107
[14] Ury, Fisher and Patton's method is not without criticism whereby it is said that 'It suggests a variety of negotiating techniques that are both clever and likely to facilitate effective negotiation. On the other hand, the authors seem to deny the existence of a significant part of the negotiation process, and to oversimplify or explain away many of the most troublesome problems-inherent in the art and practice of negotiation. The book is frequently naive,

IV Some useful lessons for negotiation

Sceptics may be of the view that petty traders in conducting their trades only take into consideration far lesser risk factors compared to large, 'serious' businesses. Also, it might be argued that unlike market sellers, large corporations may make or break from one deal therefore their negotiation processes put them in a totally different risk category, demand, stress intensity and hostility than mere petty traders selling only, say, t-shirts. There are its merits to these arguments however in negotiations, we can only assume that each parties have their determined objectives and goals, thus driven by these in conducting their negotiations. It is difficult to conclude that monetary values are all that dictate one's level of motivation and determination in negotiating for sometimes disputes happen as a matter of principle and not because of financial considerations. It is also a question of the parties' interests. Correspondingly, if one walks into a good café and orders a cup of coffee, he should be served by the waiter with the same vigour as the next customer who orders a cup of coffee but with a piece of cake. Likewise a prosecutor need to put in the same amount of work and effort in prosecuting a thief who rob someone of $200 similar to if $2,000 was taken.

Nevertheless in this case study, it is observed that the market sellers adopt the approach of gaining by losing some.[15] In dispute resolution negotiation, failure to resolve or refusal to compromise will only lead to legal proceedings and the costs incurred to hire lawyers as well as time involved to fight may well turn out to be a pyrrhic victory. In the case of business negotiation, it can be a question of merely earning less only. It would appears that sometimes people are unable to accept less but wanting more. The harsher word for this is greed. But Hong Kong billionaire Li Ka Shing has this advice which can be food for thought in negotiation process, where he advocated the perspective of not taking it all but to leave some profit for one's partners so that they will come back to do more business with him happily:

It is the man who goes to the table to ask and squeeze for the last nickel who is never happy… It is because that person leaves the table, typically getting the nickel, but then hates himself for not asking for two nickels.[16]

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occasionally self-righteous, but often helpful.' James J. White, 'The Pros and Cons of Getting to YES." Review of Getting to YES, by R. Fisher and W. Ury' (1984) J. Legal Educ. 34: 115-24 (at 115).

[15] There is an Indonesian saying about 'losing in order to win'.

[16] Anthony Scaramucci, *Goodbye Gordon Gekko: How to Find Your Fortune Without Losing Your Soul* (John Wiley & Sons (NJ), 2010) 87-88.

When in negotiations, be mindful not to squeeze the other party too hard because there might be hidden defects in the deal. In large business deals, the same may well happen. There was a story about a major real estate development negotiation of which the investor was said to be very demanding towards the landowner. Although the deal was in the favour of the investor, the landowner eventually negotiated with other investors for land parcels with better amenities and public infrastructure at lower price. So it is sometimes said, revenge is sweet.

Secondly, it does not mean that just because one is in a weaker position, he/she cannot turn adversity into opportunity. Negotiation requires strategy and some evidence to bolster one's case and in order to do this, one ideally need to be able to 'argue both sides of an argument', which is a quality often said to be attributed to lawyers as well as they are expected to do although most have not formally studied the process.[17] In addition, the writer had been involved in dispute resolution negotiations whereby a stronger party with a better case decided to throw in the towel much to the relief of the other party. Whilst this is perplexing but the reasons can often be unexpected though not unreasonable, for instance another business deal requires their full attention and resources hence it is better to end an unproductive dispute to focus on an upcoming lucrative business deal. If this appears fortuitous, as earlier mentioned above a stronger party may also lack local knowledge and awareness, hence giving in to the so-called 'weaker party'. The more astute negotiator will have the advantage of knowing his own turf. According to *Sun Tzu*:

Know thy enemy, know thyself, and every victory is never in doubt, not in a hundred battles. He who knows self but not the enemy will suffer one defeat for every victory. He who knows neither self nor enemy will fail in every battle.[18]

Thirdly, when all arguments fail, psychological warfare tactic may need to be deployed. One may attempt the 'walk away' tactic and succeed because the order might re-evaluate and thought that 'a bird in hand is worth two in the bush'. The question is who will budge and give in, either paying more or selling at lesser price. Depending on the nature of businesses, some are eager to have their goods move or resources as well as assets deployed but others could well be the opposite. In the case of dispute resolution, the prospect of going to arbitration is often dreaded by business people these days, due to rising cost of arbitration therefore an amicable resolution is often seen the desired outcome however this can be elusive.

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[17]Charles B. Craver, 'The Negotiation Process', (2003) GWU Law School Public Law Research Paper No. 277 1.
[18] Sun Tzu (trans John Minford), *The Art of War* (Penguin Books, 2002) 17.

Finally it is worth noting that when negotiating across cultures, understanding the local cultural 'terrain' is an important element to consider.[19] However any negotiators need to be careful not to overplay the cultural card because at times, it is the 'culture of profits and money' that reign supreme in the world we are living in. Avoid stereotyping cultures in negotiation but it is never to be underestimated either. For instance, elements of 'face value' when negotiating with East Asian parties (such as Chinese, Korean and Japanese) do come to play. In this culture, it advocates giving 'face' to the other party as a show of magnanimity and also partly to lessen the embarrassment of one party having to make certain concession for the other. However cultural element remains a complex subject and often difficult to predict, a nightmare for negotiators. For example at times, giving even a small discount in a deal of which the price cannot go any lower is a sign of 'giving face' to the other party yet at times, it can be misconstrued as an insult. Reversibly, paying a little bit more can be a demonstration of 'giving face', no matter how meagre or pointless it could be perceived. A negotiator once said 'I can handle factual aspects but I can't manage people's emotions'. Westerners, among others, do uphold the sanctity of contracts and to some extent this forms part of their culture which can also affect negotiation process. In this instance, to breach a contract even though the quantum may be low could result in expensive arbitration or litigation because it is a 'matter of principle' not to let it off so as not to set a bad precedent.

V. Conclusion

In business or dispute resolution negotiation, among others, goals, objectives and interests need to be identified, for it is said that no one goes into a battlefield without a blueprint. At times, parties go into negotiation without the slightest willingness to compromise; some think that negotiation is where they tell off the other party that they are wrong but he/she is right. Unfortunately this not what a negotiation is intrinsically about, which is essentially a discussion aiming at reaching an agreement between the parties. Big or small businesses all need to negotiate whether to strike a commercial deal or resolve disputes. Even business schools in educating and retraining business people on negotiation techniques have turned to examining small business to draw some lessons and inspirations. For example, the success of the humble Dabbawala lunch delivery service has been made its way into the case study of leading business schools in the world, even for mega rich

[19] See, Wu Liu and Leigh Anne Liu, 'Cultural Intelligence in International Business Negotiation' (2006) IACM 2006 Meetings Paper.

logistic companies to emulate; this is despite the fact that it cost a paltry sum of up to ¹ 1000 per customer monthly to use this service.[20] Clearly, there are its benefits for business negotiators and dispute resolvers to recalibrate their understanding and mindset in terms of negotiation techniques. No lessons are too small for all it takes is a small hole to sink a big ship.

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[20] http://www.thehindubusinessline.com/news/mumbais-dabbawalas-up-delivery-charges-by-100/article6170725.ece

Qualitative Legal Research: A Methodological Discourse

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1. Introduction

Experiences on human and worldly phenomenon reveal in the form of words, numbers or both. Words narrate the complexities of life in its natural setting and enable us to derive meaning about the experience in a manner intimate to the community from which evidences are collected. Numbers give objective measurement of the phenomenon, hint at the cause and effect relationship and provide insights on thrusts of central tendencies. Although law's world is full of words and narrations, human mind has the habit of inferring on the basis of numbers also, especially on matters related to coverage of population, economic positions and facilities. High quality empirical research has to appropriately deal with the word-based data, which reflects quality of human experience, and with the number-based data, which focuses on the quantity related estimations. Qualitative and quantitative legal researches are two indispensable wheels of the same chariot of empirical legal research.

This chapter intends to discuss the features and types of qualitative legal research and give an outline of steps suitable for the same. Since it can be better understood by contrasting and comparing with quantitative legal research, it will incidentally deal with these aspects as well. It will also address the issues relating to secondary use of qualitative research data and the extent to which software can be used for qualitative research. It argues against compartmentalization between qualitative and quantitative research and favours the path of systematic approach.

2. Meaning

According to Denzin and Lincoln, "qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that makes the world visible. These practices turn the world into a series of representations including fieldwork, interviews, conversations, photographs, recordings and memos to self"[1]. Other scholars agree on the point that qualitative legal researchers study things in their natural settings, understand and interpret their social reality and provide insight into various aspects of social life.[2] Kirk and Miller consider that qualitative research "fundamentally depends on watching people

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[1] N. K. Denzin and Y. S. Lincoln, *Handbook of Qualitative Research* Sage 2000 p. 3

[2] A. Bryman, *Quantity and Quality in Social Research* Routledge 1988 p. 8; J. Ritchie and J. Lewis, *Qualitative Research Practice* Sage 2011 pp. 2-3

in their own territory and interacting with them in their own language, on their own terms. As identified with sociology, cultural anthropology and political science, among other disciplines, qualitative research has been to be 'naturalistic', 'ethnographic' and 'participatory'."[3]

Kristina Simion writes, "in qualitative research, emphasis is placed on people's feelings, perceptions and experiences in order to explore and understand the meaning individuals or groups ascribe to a social or human problem."[4] Its essential feature is that it allows the researcher to identify issues and interpret the behaviour, events or objects from the perspective of participants.[5] It focuses on how their experiences are shaped by the context of their lives such as the social, cultural, economic or physical context in which they live.[6] It is an approach where the researcher examines the people's experiences in detail by using tools of data collection such as interview, focus group discussion, observation, content analysis and biographies.[7] Its prominent feature is that the researcher can identify the issues from the perspective of the study participants, and understand their interpretation of the events or objects.

When statistical figures and books do not provide enough inputs for understanding the phenomenon, and an in-depth study of contextual influences is likely to unfold the meaning, qualitative legal research becomes a comfortable tool. It looks to social life as a process rather than a static affair, makes a naturalistic inquiry with flexible research strategy, generates data by class contact with participants and produces detailed description with an interpretation from the perspective of participants.[8] Its aim is to 're-present' the social world of participants and map the social meaning. Certain amount of subjectivity is implied in qualitative legal research.

Quantitative research method, on the other hand, deals with numbers, statistics or hard data and helps in verifying existing theories. According to Marin

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[3] J. Kirk and ML Miller, *Reliability and Validity in Qualitative Research* Sage 1986 p. 9 as cited in Lisa Webley, 'Qualitative Approaches to Empirical Legal Research; in Peter Crane and Herbert Kritzer (Eds.) *The Oxford Handbook of Empirical Legal Research* Oxford University Press, 2010 p. 927.

[4] K. Simion, *Qualitative and Quantitative Approach to Rule of Law Research* International Network to Promote Rule of Law, 2016 p. 7 <http://www.kpsrl.org/browse/download/t/qualitative-and-quantitative-approaches-to-rule-of-law-research> Accessed 21 January 2017

[5] M. Hennink, I. Hutter and A. Bailey, *Qualitative Research Methods* Sage 2011 p. 9

[6] ibid

[7] Monique Hennink, Inge Huttee and Ajay Bailey, Qualitative Research Methods SAGE, 2011 pp. 8-9

[8] Ritchie and Lewis (n 2) p. 4

Hammersley, "the term 'quantitative method' refers in large part to the adoption of the natural science experiment as the model of scientific research, its key factors being quantitative measurement of the phenomena studied and systematic control of the theoretical principles influencing those phenomena".[9] Quantitative method generates numbers for analysis, gives an overview, and makes comparative evaluation. Kristina Simion states, "in quantitative research, statistical means are used to objectively measure things that can be illustrated with graphs or charts. Results from quantitative research are often being 'generalizable' across group of people (e.g. inmates, offenders or judges) or phenomenon (e.g. assault, corruption or drug use) or across time. The results can be used to generalize concepts widely, predict results and investigate casual relationships."[10] It quantifies the relationship between variables. For the reason that quantitative research lays emphasis on examination of cause and effect relationship and works with objectivity and precision it is regarded as 'positivist' research and the most scientific way of doing research.[11] Observation and measurement or counting of objective facts and their behaviour constitute basic approach of Quantitative Research. It engages in exploratory, descriptive and explanatory study by use of quantifiable data.

An illustration of qualitative and quantitative methods of research on the matter of legal profession will clarify the methods and their differences. Let us take a moderately populated district head quarter in a state which is served by legal practitioners numbering 1000. Suppose the researcher collects data through interview and observations about the treatment of clients by lawyers, or about practice of touting for getting clients, or about colleague relationship in light of ruthless competition, or on lawyer's relation with Para-professionals, or about structure and hierarchy (economic and caste) in the bar, or on the social role of the bar in matters of public causes and analyses from insider's perspective. The researcher involves in interpretivism and engages in narration of the bar in words in its natural setting. The method is qualitative. Suppose the researcher gathers numerical data by counting how many lawyer-client relations are formed through touting, or how the brief capturing is reflecting uneven or inequitable situations as demonstrated in numbers, or analyses statistical data through tabular presentation and calculation of percentage,; or compares the position vis-a-vis different groups or across the time and examines the cause-effect relationship, the method is quantitative. For

[9] M. Hammersley, 'What is Social Research?' in M. Hammersley (ed.), *Principles of Social and Educational Research* Open University Press 1993 p. 39 as cited in M. McConville and W. H. Chui (ed.),*Research Methods for Law* Edinburg University Press 2010 p. 48
[10] Simion (n 4) p. 7
[11] McConville and Chui (n 9) p. 49

example, he may find in X district that the first 20 top lawyers get 30% of briefs, next 80 lawyers getting 20% of briefs, next 300 lawyers getting 40% of briefs, next 200 lawyers getting 10% of briefs and the remaining 400 not having any briefs. He may compare the position with the position in other districts (Y and Z) or make time series analysis. Simultaneously he may examine the statistical details about the time taken by various categories of lawyers in disposing the cases and overall pendency of cases. Correlation between the skewed positions of the bar with duration of disposal of cases may reveal cause and effect relationship. Compared to the qualitative legal research one may find quantitative legal research as more objective, accurate and scientific.

Another example of quantitative legal research can be research on cases pending before Family Courts on matrimonial issues as on December, 2016. Kerala has 52,246 cases pending before 28 courts (cases disposed in 2015 being 51,288); Bihar 50,847 cases before 39 courts (cases disposed in 2015 being 13,756); MP 46,866 cases before 50 courts; Maharashtra 45,690 cases; Tamil Nadu 37,618 cases (whose top position in 2013 was reduced to the fifth position); Uttar Pradesh (whose population is five times bigger than that of Kerala) has 5,466 cases before 76 courts (2 lakh cases were disposed between 2013 and 2015 and 1.19 lakh cases disposed in 2015 alone). Kerala whose population is less than 3 per cent of country's population has more pendency than Uttar Pradesh, West Bengal, Tamil Nadu, Rajasthan, Karnataka, Gujarat, Andhra Pradesh, Telengana and Odisha put together whose population is more than half the country's total population. The contrast between Kerala and Uttar Pradesh is glaring.[12] The number depicts unequal situation convincingly.

Research on what percentage of people get access to justice will take the shape of quantitative legal research whereas research on why some people do not get access to justice will take the form of qualitative legal research. The level of society's attainment in access to education or health is a matter of quantitative legal research whereas inquiry into the reasons which block access to education or health for some section of the society belongs to the domain of qualitative legal research.

3. Distinctions and relations between Qualitative and Quantitative Legal Research Methods

The key differences between the two are as follows:

i. The objective of qualitative legal research is to understand and explain the

[12] Indian Express 8 January 2017

reasons, beliefs and motivation underlying people's experiences whereas quantitative legal research has the objective of quantifying the research problem, measuring and counting issues and then generalizing the findings to a broader population.[13] Qualitative legal research has the capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome.[14] Baldwin and Davis view, "Qualitative research calls for fine judgment in deciding what significance to attach to elements of practice and to fleeting interactions within the individual dramas of the law, and this is a potential weakness and strength."[15] In contrast, Quantitative legal research looks to macro experience on the basis of large scale data collection with standardized interrogation that arrives at objective generalizations. Qualitative research considers the meanings which the people attribute to legal events, and has subjective element. Quantitative research is closer to pure scientific method by solely acting on the basis of statistical data. QLR asks: Why? How? and What? Quantitative legal research asks: How much? How often? What Proportion?

ii. The theoretical underpinning and assumptions beneath the two are different. (a) Epistemology (understanding the nature of knowledge) is the approach of qualitative legal research whereas ontology (understanding the nature of being or reality – is there one or several) is the approach of quantitative legal research.[16] (b) qualitative legal research relies heavily on inductive reasoning by exposing to progressive experience and theorising on the basis of larger inferences as the research progresses. Quantitative legal research employs deductive reasoning by formulating hypothesis before the collection of statistical data and analyses the data resulting in proving or disproving the hypothesis.[17] (c) Interpretivism (understanding through another's viewpoint and not interjecting one's own view) is the main plank of qualitative legal research approach. In order to understand and reveal the layers of social meaning and know the contextual social behaviour or to understand people's meaning, the processes of data collection and data analysis should give attention to social reality rather than to objective reality.[18] In contrast, quantitative legal research believes that researcher as an objective observer can assess the data drawn

[13] Hennink, Hutter and Bailey (n 5) p. 16
[14] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (Eds) The Oxford Handbook of Legal Studies Oxford University Press 2003 p. 891
[15] Ibid
[16] Lisa Webley (n 3) p. 909
[17] Ibid
[18] Ibid 910-11

from people who are products of their environment. Statistical data require human interpretation. Data producer (people) may not have role in interpretation due to bias, but data gatherer has the competence and responsibility in the task. This theoretical stand is positivism.

iii. Qualitative legal research data is in words, soft and flexible. Quantitative legal research data are numbers or statistical and hence hard or fixed. Qualitative legal research studies small number of participants and is familiar with micro study. Quantitative legal research takes large samples. Quantitative legal research extrapolates the results by resorting to sampling study.

iv. Observation, interview case study and ethnography are the tools of data collection for qualitative legal research. These tools provide input for researcher's own understanding of the legal phenomenon, which can be subsequently transmitted to others. Tools like survey will not help qualitative legal researcher that much. On the other hand, quantitative legal research employs surveys, opinion polls and census for data collection.[19]

v. Historically, qualitative research and quantitative research traditions got developed in different backgrounds. The quantitative method started with the concept and practice of census in ancient civilizations of Rome, Egypt and China and has traces in Kautilya's Arthasastra (321-276 BC) and Ain-i-Akbari (1590 AD). Doomsday Book of England (1085 AD) provided statistical basis for taxation for centuries.[20] The Post Darwin interest in statistical research gave a fillip to quantitative analysis in 19th Century. Karl Pearson, RA Fisher in England, P C Mahalanobis and others in India made scholarly contributions to quantitative analysis and its application to social sciences.[21]

The qualitative research, in contrast, has been the product of modern scientific outlook which initiated empiricism in social sciences. Rene Descartes (1637) emphasised on unbiased analytical capacity. Francis Bacon regarded direct observation (induction) as the basis of knowledge.[22] David Hume (1711-76) argued that knowledge about the world originates in experience and derived through senses.[23] Auguste Comte favoured a study of social world through systematic

[19] Hennink, Hutter and Bailey (n 5) 16; McConville and Chui (n 8) 49
[20] DN Elhance, *Fundamentals of Statistics* Kitab Mahal 1981 p. 8
[21] A M Goon, MK Gupta and B Dasgupta, *Fundamentals of Statistics - I* World Press, 1998 p. 13
[22] Done Snape and Liz Pencer, 'The Foundations of Qualitative Research' in Jane Ritchie and Jane Lewis (Eds.) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* SAGE, 2005 p. 6
[23] Ibid

means. Kant (1781) viewed that human interpretations of what our sense tells builds body of knowledge and that knowing and knowledge transcend basic empirical enquiry.[24] Max Weber (1864-1920) pointed out that meaning of social action shall be understood within the context of material conditions in which people live. The aim shall be to comprehend subjectively meaningful experiences.[25] In 20th century, inter-disciplinary study expanded the scope and efficacy of qualitative legal research.

These differences do not in any way suggest mutual exclusion or compartmentalisation.[26] Qualitative legal research and quantitative legal research work in continuum and are mutually reinforcing each other. Answers to the questions what is the extent of access to justice, education, health etc become incomplete without having answers to these questions why there is denial of access. Synergy occurs by combining the inquiries. The lacuna in one can be made good by the advantage of the other. The process and application of triangulation facilitates cross checking the data, rectification of errors and identification of accurate facts. For example, quantitative study of the composition of bar may correct the subjective estimation of the lawyer-client relation, unprofessional acts and situations of inequality. Both the qualitative and quantitative methods may use same tools: questionnaire, interview and sample study. Hence, the same source of data will be feeding certain parts of the qualitative and other parts of quantitative analysis. The question of superiority of one over the other does not arise as they shed light on different dimensions or facets of the same factual situation. Baldwin and Davis give the example of research on bail decisions through statistical method along with other methods like face-to-face interviews.[27] Such combination not only gave hints about the factors that influenced bail decisions but also gave insight into the various ways that remands in custody may affect plea bargaining decisions.

Scholars view that combinations of qualitative and quantitative methods make considerable contribution towards social policy research.[28] For example, qualitative and quantitative data on farmer's suicide in two different districts may fulfil different research objectives. Qualitative research will contextualise family experience; will explain the events and reasons leading to the compelling circumstances of

[24] Immanuel Kant, *Critique of Pure Reason* cited in Snape and Pencer et al (n 22) pp. 6-7
[25] Snape and Pencer(n 22) p. 7
[26] M. Balnaves and P. Caputi *Introduction to Quantitative Research Methods* Sage 2001 p. 1
[27] Baldwin and Davis (n. 14) p. 892
[28] See P Ishwara Bhat, 'Multi Method Legal Research: Need, Procedure and Potentiality' 3 *Karnataka State Law Journal* 2015 pp. 37-70.

helplessness of suicide seeker. Quantitative research will engage in explanation of factors statistically associated with farmer's suicide. Qualitative research may evaluate the factors that culminated into suicide or factors that prevented the occurrence of suicide by resort to alternate strategy like micro-finance system, organic farming, cooperative marketing etc. Quantitative research will bring out statistical analysis and evaluation of the extent of rural indebtedness, adequacy or inadequacy of public support, economic situation of different categories of farmers and economic impact of suicide upon families of suicide seekers. Qualitative research will generate suggestions for helping the farmers to avoid suicide. Quantitative research will predict the future level of suicides and levels of effort or interventions required for saving farmers from suicide. It can be seen that the aim and output of Qualitative and Quantitative researches are of different nature or on different dimensions. Together, they contribute to comprehensive understanding, analysis and estimations.

The sequence of application of Qualitative research and Quantitative research may be of three kinds: Qualitative research preceding Quantitative research, simultaneous application of Qualitative research and Quantitative research, and Qualitative research following Quantitative research. The first situation arises suitably when the investigation is new and underdeveloped, and Qualitative research can hint at hypothesis and generate the 'real life' language which depicts attitude and behaviours.[29] The second situation occurs when the need to examine both the number and nature of the same phenomenon is felt. Both Qualitative research and Quantitative research may have common grounds in identifying the areas of data collection and have same or similar tools for data collection. For example, Qualitative research on child sexual abuse may focus on circumstances of abuse while Quantitative research may report about characteristics of victims by reference to age and frequencies of occurrence. The third situation arises when Quantitative research reveals unusual experiences that need to be tackled by Qualitative research. For example, a survey of persons with disability in the context of access to employment may reveal unexpectedly high proportion of severely disabled persons working as forced labourers. This will trigger a new Qualitative research. Triangulation helps in checking the integrity of data and qualifies the inferences that can be drawn from them. Subjectivity of Qualitative research will be cured by reflexivity and objectivity of Quantitative research.[30] The problem of generality in Qualitative research can be solved by adding Quantitative research findings whereas

[29] Ritchie and Lewis (n 2) 40
[30] Hennink, Hutter and Bailey (n 5) 19-21

relationships between variables in Quantitative research can be better interpreted by using Qualitative research findings.[31] The combination of Qualitative and Quantitative research can also clarify the relationship between micro and macro levels in substantial area.[32]. In spite of mixing, Qualitative research and Qualitative research have their own distinctive set of components for planning, preparing, collecting and analysing data.[33]

In spite of different backgrounds of historical developments of Qualitative research and Quantitative research, the concurrence between the two about the requirement of acting scientifically has enabled their joint operation and interaction. In the field of legal research both are in application. Depending upon the objective, topic and design of research, the researcher may choose one or the other or both. In practice, it can be found that when behavioural study is to be undertaken, or when ethnographic narration of court procedure, investigation or family relation is to be done, the researcher opts for Qualitative research. Study of rape trials by Prateeksha Baxi, study of structure of bar by Sharma, JS Gandhi or Marc Galenter, study of judicial appointments by George Gadbois and Abhinav Chandrachud primarily rely on Qualitative research and incidentally use Quantitative research.[34] Assessment of trends of development in Supreme Court's functioning by resort to study of statistical details can be found in the works of Nick Robinson, Chintan Chandrachud and others.[35] The analysis of numbers clarifies theoretical assumptions. On the whole, complimentary character of Qualitative and Quantitative research and their integrated approach has helped empirical legal research to grow. Any kind of compartmentalization of Qualitative and Quantitative research is 'divisive, misleading and destructive'[36]. Every method of data collection and analysis is an approximation to knowledge. Each is valid glimpse of reality and has serious limitation

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[31] A. Bryman, 'Quantitative and Qualitative Research: Further Reflections on their Integration' in J. Brannen (ed.), *Mixing Methods: Qualitative and Quantitative Research* 1992 pp. 57–80 as cited in U. Flick, *An Introduction to Qualitative Research* Sage 2009 p. 31

[32] ibid

[33] Simion (n 4)

[34] George H Gadbois, *Judges of the Supreme Court of India 1950-1989*(New Delhi: Oxford University Press, 2011, 2012); Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999); Abhinav Chandrachud, *The Informal Constitution* (New Delhi: Oxford University Press, 2014)

[35] Nick Robinson, 'The Indian Supreme Court by the Numbers' LGDI Working Paper Number 2012-2 Azim Premji University; Chintan Chandrachud, 'The Salency in Constitutional Law; Journal of Indian Law and Society 2015

[36] E. Bruser, 'The Scientists vs. Humanists' *Anthropology Newsletter* 31 1990 p. 28

when looked alone.[37] Further, basic alignment of Qualitative research for interpretivism and Quantitative research for positivism is not exclusionary. Qualitative research also emphasis value neutrality and looks to human element underlying the numbers.[38]

4. Qualitative Legal Research Method: Categories of Analysis

The 'goodness' of Qualitative research consists in intimately and naturally comprehending the community's feelings, beliefs, experiences and estimates about specific social problem. Alan Peshkin traces such goodness in the following four categories of analysis.[39]

First category relates to description of processes, relationships, setting and situations, system and people. Examples of Qualitative research could be description of police investigatory process[40], or of traumatic experiences related to rape trial brought out with a heart rending treatment by Prateeksha Baxi[41], or of relationships between lawyers and clients, judge and society, lawyer and society[42], or of setting of a community's situation as that of Scheduled Castes, minorities[43], or of systems of marriage, separation and succession amidst tribal communities[44], or of people living in slums in Bombay, prostitutes in Kolkata.

The second category consists in interpretation, whose outcomes are: explaining and creating generalizations (for example, behavioural study of Parliamentarians during session over a decade may bring some broad inferences), developing new

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[37] D. Warwick, 'Survey Search and Participant Observation: A Benefit Cost Analysis' as cited in A. Peshkin, 'The Goodness of Qualitative Research' 22 *Educational Researcher* 1993 p. 23, 29

[38] Webley (n 3) 929-931; A.M. Goon, M.K. Gupta and B. Dasgupta, *Fundamentals of Statistics I* World Press 1998 pp. 8-13; D.N. Enhance, *Fundamentals of Statistics* Kitab Mahal 1981 pp. 9-13; Ritchie and Lewis (n 2) 5-7

[39] Peshkin (n 20) 22

[40] Satnam Choongh, 'Doing Ethnographic Research: Lessons from a Case Study' in M. McConville and W. H. Chui (ed.),*Research Methods for Law* Edinburg University Press 2010 pp. 69-86

[41] Prateeksha Baxi, *Public Secrets of Law: Rape Trials in India* Oxford University Press 2014

[42] J.S. Gandhi, *Lawyers and Touts: A Study in the Sociology of the Legal Profession* 1982; Marc Galenter, 'The Study of Indian Legal Profession' 3 *Law and Society Review* 1968-69 p. 201; P.B. Gajendragadkar, *Law Lawyers and Social Changes* National Forum of Lawyers & Legal Aid 1976

[43] S.C. Dube, *Indian Village* Harper & Raw 1967

[44] K.S. Singh, *Tribal Ethnography, Customary Law and Change* Concept Publishing Co., 1991; Kusum and Bakshi, *Customary Law and Justice in Tribal Areas of Meghalaya* Indian Law Institute 1982

concepts or elaborating existing concepts (Sanskritization)[45], providing insights into the changing patterns of behaviour or refine knowledge on social practice such as witch hunting[46] or or khap panchayat,[47] find solutions to problems by clarifying and understanding complexity (the issue of inner reservation within the Scheduled Castes)[48].

The third category of analysis can be found in verification of assumptions, theories and generalizations. The assumption that trafficking in women takes place because of economic compulsion may be tested with an empirical study of sex workers who sometimes persuade their daughters also to indulge in the profession[49] or who diligently desist from such practice. A theory that economic backwardness is the root cause of social backwardness[50] can be tested through Qualitative research on caste based reservations, which excludes the creamy layer and that which does not do so. A generalization that sexual harassment of women in workplace[51] occurs because of lack of investigative, supervisory and remedial mechanism like Internal Complaints Committee can be better tested through empirical study through interviews, questionnaire and case study.

The fourth category of analysis under Qualitative research is evaluation of policies, practices and innovations. The policy of protecting the street vendors from variety of exploitation can be evaluated by multiple techniques of Qualitative research by resort to observation study, case study and interview. Whether the new law has brought any qualitative change in the lives of street vendors can be closely examined. Evaluation of good practice of philanthropy- who does it, for whose benefit, how it is done and with what impact – can give critical estimate of its social dimension. Evaluation of bad practice of kangaroo panchayat decision

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[45] M.N. Srinivas, *Social Change in Modern India* Orient Longman 1995; Yogendra Singh, *Culture Change in India* Rawat Publications 2000

[46] Research report on witch hunting conducted by Partners in Law and Development 2011 about the practice in Bihar, Jharkhand and Orissa (copy with the author); Andrea Fishman, *Amish Literacy: What and How it Means* Heinemann 15 March 1988; Case study of temple administration triggering a catena of social problems like caste hierarchy, exploitation by the priestly class, political interventions, etc.

[47] *Arumugam Servai* v. *State of Tamil Nadu*, (2011) 6 SCC 405 : (AIR 2011 SC 1859)

[48] An empirical study of various subcategories of scheduled castes which have different levels of educational, economic and social development competing for some reservation benefit resulting in denial of advantages to weakest of the weak. Justice Ramachandra Raju Commission Report. See *E V Chinnaiah* v. *State of Andhra Pradesh* (2005) 1 SCC 394

[49] An incident reported in Kolkata in 2016

[50] *Kumari jayashree and Another* v. *State of Kerala*, AIR 1976 SC 2381; *Nishi Maghu* v. *State of J& K*, AIR 1980 SC 1975

[51] *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011

ordering for gang rape of a named protesting girl [52] or khap panchayat practice of honour killing[53] may unfold the social realities and interrogate the efficacy of the law in dealing with such organised wrongs. Innovation involved in demonetization as a method of combating black money may be empirically evaluated by going for behavioural study of specific sections of society. In all the above four categories of analysis there is a drive of carrying search for truth. Tentative answers add to understanding of the social reality. Flexibility in inquiry is the strength of Qualitative research as no paradigm has monopoly on quality nor one can say with finality 'that is it'.[54]

5. Steps involved in Qualitative Legal Research

Framing of research design gives a scientific planning for research, and is most essential for its success. In the sphere of Qualitative legal research since flexibility depending upon the nature of topic is an essential factor, the researcher has wide choices about tools of data collection and modes of analysis. Following requirements in qualitative legal research design can be identified: (1) Framing of specific research questions, (2) choice of data collection tools/s and their combination, (3) selection of research subject by appropriate sampling method (4) data collection by employing suitable tools; (5) analysing the data; and (6) generalisation based on data.[55]

5. 1 Framing of Specific Questions:

Since research questions shall be on central theme of research topic, its formulation should be done carefully. In a Qualitative legal research on 'honour killing' the following research questions can be apt: What is the phenomenon called honour killing? Why does it occur or reoccur? Where does it occur, and what is the role of Khap Panchayat in it? How do the society and the Khap Panchayat respond to general criminal law and the special statutes, if any? A Qualitative legal research on POSCO (Protection of Children against Sexual Offences) may pose questions such as: What are its types; which age group of children and which class of children are victims; who commit such crimes; what is the response of law and society to the occurrence of such crimes or for their prevention and remedial justice. Research

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[52] Birbhum incident *In Re : India Woman says Gang-raped on Orders of Village Court published in Business and Financial News dated 23-1-2014* AIR 2014 SC 2816
[53] *Arumugam Servai* v. *State of Tamil Nadu*, (2011) 6 SCC 405 : (AIR 2011 SC 1859)
[54] Peshkin (n 2) 29
[55] A. Fink, *Conducting Research Literature Review: From the Internet to Paper* Sage, 2005 p. 3 as cited in I. Dobinson and F. Johns, 'Qualitative Legal Research' in M. McConville and W. H. Chui (ed.),*Research Methods for Law* Edinburg University Press 2010 p. 33

question shall be so framed that they zero down the discourse to specific issues and render the research viable. Depending on the size of the project-whether short term, long term, macro or micro, funded or academic – the research question are to be formulated.

Formulation of research questions is a vital step in Qualitative legal research as it determines the success of research. The researcher should consider whether social experience or researcher's practical interest is the basis for the research question, whether the people or groups to whom the questions are to be asked are likely to respond, and whether the questions are formulated concretely with the aim of clarifying what the field contacts are supposed to reveal.[56] A well framed question delimits the field of inquiry. For example, the lawyer – client relation may have many dimensions. But a question about lawyer's fee or availing of adjournments will circumscribe the inquiry.

5.2 Choice of tools for data collection:

Researcher has to decide which data collection tool – case study, ethnography, observation, interview, audio visual recordings, documentary analysis – or combination of which of them will effectively answer his research questions by generating pertinent data. Case study means 'collection and preservation of detailed information about a particular participant, a small group or organisation' observed in a 'real life' setting.[57] For example, in a research on social and economic conditions of housemaids, a focussed and detailed study on one or few housemaids by collecting data through interviews and observation constitutes case study approach.

Ethnographic study focuses on specific group or culture and its characteristics and examines the shared patterns of behaviour, language and action of a distinct cultural group in a natural setting over a prolonged period of time. According to Hammerseley and Atkinson, it involves ethnographer participating overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions – in fact collecting whatever data are available to throw light on the issues that are the focus of the research.[58] Ethnography is a revised version of participant observation.[59] Tendency to deal with specific group, focus on unstructured data, confining the study to small number and

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[56] Uwe Flick, *An Introduction to Qualitative Research* SAGE 2006 pp. 98-100
[57] Simion (n 4) 17
[58] Hammerseley, M and Atkinson, P, *Ethnography Principle and Practice* Routlege 1995 p. 1
[59] According to Denzin, participant observation is a field strategy that simultaneously combines document analysis, interviewing of participants and informants, direct participation and observation, and introspection. See NK Denzin, The Research Act Engelwood Cliff 1989 pp. 157-8

interpretation of explicit data are its characteristics. For example, Prateeksha Baxi's ethnographic study of rape trial records the disgust and indignity involved in several factors such as: cross examinations; arguments on consent or its falsity; treatment of 'habitue' (women habituated) as identified through two figure test; treatment of child witness; the factors of power and violence involved in compromise; criminalization of love as rape; and rape as a means of caste based atrocity. Her depiction of the behaviour and belief of participants in rape trial coming from observation over a substantive period gives a realistic picture of humiliation. The largely prevalent gender bias against women reflected the culture of the group. Ethnography becomes the most effective tool for this research.[60] In non participant observation, the observer maintains distance from the observed events in order to avoid influencing them, and many a times observed persons are not informed that they are being observed.[61] Behavioural research conducted on legislators, administrators, judges, lawyers, clients and the public at large which S. K. Agrawala refers, relied on observations.[62]

Interview is another important tool of data collection. Like a careful miner, interviewer can unearth valuable information through appropriate questions. It involves interactive process, use of range of probes, gets story in the language of the interviewee and generates knowledge.[63] It should be systematic, well prepared and conducted preferably with the help of schedule (a list of questions). Focussed interview, standardized interview, expert interview and ethnographic interview are the different types of interview for data collection. There can be group interview instead of or in addition to individual interview. How interview can serve as a powerful tool to unearth data on death condemned criminals awaiting for death sentence is explicit in NLU Delhi's research.

Case study on specific event, person, situation, institution with the purpose of finding answer to research question is another tool in the kit of empirical researcher. Fieldwork and questionnaire are the effective tools for collection of empirical data. This requires adequate planning and preparation. In research on JJBs under NUJS research project, the researchers visited all the district head quarters, collected responses to questionnaires already sent, interviewed and collected additional information from officers NGOs and stakeholders. Consultation with focus groups and discussions are also the means employed for data collection.

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[60] Baxi (n 24)
[61] Uwe Flick (n 56) p. 223
[62] S.K. Agrawala, 'Law and Behavioural Studies in India' in S.K. Verma & M. Afzal Wani (ed.), *Legal research and Methodology* Indian Law Institute 2001 pp. 90-109
[63] Robin Legard et al., 'In-depth Interviews' in Jane Ritchie and Jane Lewis (n 2) pp. 141-2

Audio visual recorded interviews, photos, films and videos are also objects of Qualitative research if the factor of informed consent had been satisfied.[64] These scientific evidences are authentic unless manipulation had influenced in obtaining them.

Documents in the form of letters, private communications, diaries, file notes and archives are also objects of Qualitative legal research. In biographical research or research on legal institutions such valuable evidences are vital. Research on the functioning of the President or other constitutional functionaries relies on these documents. Glanville Austin used these types of documents for his two famous works on political and constitutional history of India.[65]

The importance and value of data collection tools vary from circumstance to circumstance. King and Epstein advise that the data going to be collected shall be relevant, exhaustive, unbiased and properly recorded.[66]

5.3 Sampling:

Sampling involves delimiting the universe for the purpose of observation in such a way that the sampled unit significantly represents the universe in quality and features.[67] This method saves time, money and energy of observation, has comfortable levels of accuracy and adoptability and ensures feasibility.[68] Unlike Quantitative legal research which actually covers large portions of the population, Qualitative legal research, because of the need for focussed study, is compelled to be selective in choosing the research participants. But it is a requirement that the researcher shall capture a spectrum of viewpoints and experiences and for this purpose should interview sufficient number of people. When the research uses the views of legal professionals, it is appropriate to include within the sample certain number of advocates, certain number of judges, certain number of legal academicians etc.[69] Instead of one time selection, the researcher in Qualitative research may find it convenient to opt for gradual selection keeping always in mind the representativeness of the sample and relevance from the angle of research

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[64] Uwe Flick (n 56) pp. 240-252
[65] Granville Austin, Indian Constitution: The Cornerstone of a Nation; Granville Austin, Working of a Democratic Constitution
[66] Lee *Epstein* and Gary*King*, 'The *Rules of Inference*' 69 *University of Chicago Law Review* 2002 p. 1
[67] William J Goode and Paul K Hatt, *Methods in Social Research* McGraw Hill Book Co, 1952 pp 209-210
[68] R B Jain, 'Sampling Method in Legal Research' in S.K. Verma & M. Afzal Wani (ed.), *Legal Research and Methodology* Indian Law Institute 2001 318 at 319
[69] Webley (n 3) p. 934

questions.[70] S/he may opt for random sampling, intentionally stratified sampling, purposeful sampling or snowball sampling depending upon the need of circumstance.[71] Lisa Webley writes, "a well designed study will usually also provide findings that capture a broad range of experiences rather that those from only a few people or situations. The findings will be representative in the sense of capturing the range or variation in a phenomenon."[72]

5.4 Data collection

Having chosen the tools of collection of data, the researcher should generate data by using those tools. Some of the ethical principles that should be complied in the course of data collection include the following: In the choice of participants the researcher shall not be biased. Only on the basis of informed consent a participant may be subjected to observation. Research shall not physically or mentally harm the participants. Confidentiality shall be maintained scrupulously.

In the course of ethnographic study or participant observation the researcher should attempt at obtaining complete sociological data by observing the social event, the events which precede and follow it, and explanations of its meaning by participants and spectators at various stages of the event.[73] Participant observation gives insider's view and a native outlook, which is reflexive and positive. On the other hand, it is subject to criticism that it may lack critical scrutiny. Scholars preferring non participant observation argue that such method represents more independent standpoint and is objective. The researcher in both the types should keep notes seeking to capture in detail the scene observed and the perceptions about the scene. Field notes should support the task of depicting the scene through written words objectively. The researcher may go for audio or visual recording with the permission of the participants.

Interviews of individuals and groups should be with adequate planning about the questions that may be put during interview. The structured or semi-structured interview with interview schedule helps in unearthing necessary data. Webley observes, "Interviews are extremely effective at garnering data on individuals' perceptions or views and on the reasoning underlying the responses. They also provide an insight into individuals' experiences."[74] Group interviews enable accumulation of individual views and give synergetic insights and solutions that might not come in individual interview.

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[70] Uwe Flick (n 50) pp. 120-122.
[71] R B Jain 323-28
[72] Webley (n 3) 934
[73] Becker and Geer cited by Webley (n 3) 937
[74] Webley (n 3) 936

Case study satisfies the exploratory, explanatory and descriptive objectives of research. It examines the contemporary phenomenon with real-life context by asking the 'how' and 'why' questions. Study of a case, event, organisation or situation should be comprehensive and be cross checked through use of multiplicity of sources. Research on more than one case study will help objective generalization. The researcher shall keep in mind how the data collected through case study will be helping the examination of hypothesis.

Preparation of questionnaire should give attention to the requirements of simplicity, communicability and inspiring of interest in participants for responding. Distribution of questionnaire and collection of responses should be done with meticulous attention, persuasion and prompt action. Collection of documents such as letters, diaries and archival records should be governed by the factors of relevancy to the research questions. If the research is a collaborative work, proper distribution of work amidst various researchers should be done. Co-ordination among the researchers adds to success. Lack of planning results in wastage of resource, duplicity and delay.

5.5 *Analysing the data:*

Identifying the appropriate method for analyzing the data is a crucial step in Qualitative legal research. There are several ways of doing it: such as (i) classical content analysis; (ii) discourse analysis; and (iii) grounded theory method. There are no definite guidelines about the choice. Depending on the suitability to the instant work at hand, the researcher has to select the process of analysis. In examining the text, case report, newspaper article, image or interview transcript, the researcher should employ content analysis. It can be descriptive and delimited with codes. According to Maying, the following steps are pertinent: (a) select or identify the material (interviews, questionnaire response etc) for answering the research question; (b) analyse how the data was generated; (c) formally classify the material; (d) define the direction of analysis; (e) bring the theoretical differentiation of research questions; (f) paraphrase, abstract and generalize various levels of data units such as coding unit, contextual unit and analytic unit; (g) and summarize the paraphrases by employing theoretical assumptions.[75]

Discourse analysis focuses on the text, describes the content, and evaluates. It socially constructs the way in which the speaker or writer can establish a particular version of the world.[76] Conversation analysis is the starting point of discourse

[75] P. Maying, *Qualitative Inhaltanalyse: Grundlagen and Techiken* 1997 Deuttscher Studien Verlang cited by Uwe Flick (n 56) pp. 323-25
[76] Webley (n 3) p. 943

analysis. It consists in getting the recordings, transcribing it into written text, analyzing the selected parts of the text, and reporting the research.[77] Discourse analysis lays greater focus on content of talk, its social implication and psychological factors.[78] Foucaldian Discourse Analysis has the following seven critical components: (i) get the text to be analysed in written form; (ii) understand its meaning in the context of cultural network and note down it; (iii) systematically itemize the objects marked by nouns in the text; (iv) maintain distance from the text; (v) systematically itemize the subjects specified in the text; (vi) reconstruct the rights and responsibilities of the subjects; and (vii) map the network of relations into patterns.[79]

Grounded theory explores to develop a theory along with the progress of research instead of proving or rejecting a hypothesis formulated in advance. It reflects natural patterns of human inquiry and provides a framework for research process by guiding data collection, analysing the data and germinating a theory.[80] Its stages include: analysing documents, producing the theoretical category and developing a concept or theory.[81] Reading the document, interview transcript, field note or case study report line by line, giving attention to the central points in the paragraphs and noting anything that strikes to the mind of researcher are the tasks involved in the document analysis. The concepts and subcategories which hold solid in the context of data should be retained and those which are unsustainable should be abandoned. In the second phase, the relations between concepts and subcategories should be further clarified, refined and elaborated. Called as axial coding, the process involves application of inductive and deductive reasoning at several steps by comparisons and interrogations.[82] More focused discussion, testing and cause and effect analysis are required for crystallising the concepts and relations. The third phase involves higher level of abstraction with further examples and reasoning, interrogation and comparison. The analysis goes beyond the descriptive level, engages in interpretation and takes to the point of theoretical saturation.[83] Grounded theory model generates more positivist findings with wider use of inductive method of reasoning.[84]

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[77] Uwe Flick (n 56) p. 336
[78] Ibid 339
[79] I Parker, 'Discourse Analysis' in U Flick et al (Eds.) *A Companion to Qualitative Research* SAGE 2004 p. 310 cited in Uwe Flick (n 56) p. 340
[80] Webley (n 3) p. 944
[81] ibid
[82] Uwe Flick (n 50) p 310-11 citing from Strauss AL and Corbin J, *Basis of Qualitative Research* SAGE 1990, 1998, 2008 p. 114
[83] Uwe Flick (n 50) p. 312.
[84] Webley (n 3) p. 945

5.6 Generalisation:

In this final stage the researcher should evolve justifiable generalisations based on data. S/he shall make narrative constructs by organising the thoughts, depict the relevant relations through chain of causation and develop the knowledge claims after establishing the story and character with definite focalization to the audience.[85] Generalisations are of two kinds: empirical generalisation and theoretical generalisation.[86] Empirical generalisations apply the findings from Qualitative research studies to populations or settings beyond the particular sample of the study. As can be gathered from Prateeksha Baxi's Qualitative research on rape trial, the process of interpretation of rape trial system involved bringing out shocking levels of gender bias in the attitude and beliefs of participants in rape trials; unsympathetic use of archaic evidentiary rules on penetration, consent, habitué and loose character; and unjust assumptions about love elopements, two finger test and compromise. How the overall system– from investigator to final disposal– acts against the interests of women is brought out through generalisations.[87] When the researcher builds up a theory of gender bias in administration of justice in criminal law, the researcher makes a theoretical generalisation. Theoretical generalisations are context-free assertions, whose validity and reliability depend upon convincing ability of arguments in their support. They must be universal, unrestricted as to time and space, and applicable everywhere and always, once the appropriate conditions for its application are satisfied.[88]

The above path of Qualitative research is a continuous path of search for truth in which tentative answers refine the questions for further probing, and the repeated probe yields further tentative solutions and the whole exercise becomes journey in indefinite path.[89]

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[85] K. Holley and J. Colyar, 'Rethinking Texts: Narrative and the Construction of Qualitative Research' 38 *Educational Researcher* 2009] pp. 680-686

[86] Jane Lewis and Jane Ritchie, 'Generalising from Qualitative Research' in Jane Lewis and Jane Ritchie (Eds) (n 2) p. 264

[87] Baxi (n 24)

[88] Jane Lewis and Jane Ritchie, 'Generalizing from Qualitative Research' in Jane Lewis and Jane Ritchie (Eds) (n 2) p. 267

[89] C. Selltiz, L. S. Wrightsman, S. W. Cook, *Research Methods in Social Relations* , (New York, Holt, Rinehart and Winston, 1965) 23; Vidich and Bersman, *Small Town in Mass Society: Class Power and Religion in a Rural Community* (Princeton University Press, 1968) 396 as cited in A. Peshkin, 'The Goodness of Qualitative Research' [1993] 22 Educational Researcher 23, 29

6. Secondary Analysis of Qualitative Data

Re-using of pre-existing research data in doctrinal research or Quantitative research with sincere acknowledgement has been in vogue in scholarly circles, and has not faced many theoretical, moral and practical difficulties. But in the context of Qualitative research it has been experienced that secondary use of qualitative data has certain problems, and requires specific steps for their resolution. An earlier approach was to allow use of qualitative data as one time measure by the original researcher. According to Janet Heaton, the justifications for this approach are several.[90] One set of justifications is traceable to the fundamental principles of Qualitative research: (a) Data collected for one primary purpose with reference to specific objective and in relation to specific research question is not fit for use for another research whose purpose and questions are different. (b) When data is collected by one researcher through interview or observation s/he becomes the appropriate person to interpret and analyse it. When the original researcher is not there, the intimate way of knowing in the natural setting vanishes. This is the problem of 'not having been there'. (c) The problem of verification of qualitative data by using triangulation can be better handled by original researcher by resort to quantitative data. The trustworthiness or authenticity will be severely affected if the subsequent researcher goes on verification according to his whims and fancies.[91]

The second set of justifications can be attributed to ethical and legal issues.[92] (i) The informed consent for recording or retaining data originally given by the research participant might have been with reference to specific purpose and context. Sharing of that data by re-use for different purpose or context will go against the consent, and research would become unethical. If consent for multiple uses is to be obtained whose dimensions are not known, it would not become informed consent. (ii) There is problem relating to maintaining the confidentiality and anonymity of data by the original researcher in case s/he shares the data with another person. Even if the same researcher happens to conduct the second research, this problem is not resolved as the confidential information is going to be used in different context. (iii) Legal problem relating to violation of copyright law or data protection law will haunt the second researcher. The law and policy guidelines governing public archives will operate. Unless the qualitative data is not uploaded to public archives with adequate compliance with ethical principles re-use of data loses legitimacy.

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[90] Janet Heaton, 'Secondary Analysis of Qualitative Data' 33 *Historical Social Research* 2008 pp 33-45.
[91] Ibid 40
[92] Ibid 40-41

Along with the growth of the practice of creating public archives of qualitative data collected through hard work in Europe and US, a process began in 1990s, the practice of re-using the qualitative data began. But as per Heaton, the percentage of original researcher/s who involved in secondary analysis of qualitative research data has been 86%.[93] The high expenses involved in data generation, the vital interest of the society to use the factual resource, tendency towards transparency and the inclination of original researchers to share their resources with commercial arrangement have led to greater social realization of the advantage of data sharing.

Janet Heaton notices emergence of five prominent types of secondary analysis of qualitative data.[94] (1) The first type is supplementary analysis, which brings more in-depth analysis of an emergent issue or aspect of the data by addressing some of the issues not properly dealt in earlier research. (2) The second type is supra analysis where the focus of secondary study transcends that of original research. (3) Re-analysis is the third type of secondary analysis which confirms or validates or rectifies the primary research finding. (4) Amplified analysis is the fourth category whereby two or more datasets in earlier researches may be compared or combined for purposes of secondary analysis. (5) Assorted analysis is the fifth category where re-use of existing qualitative data is carried on along with collection and analysis of new data as a part of primary research.

The policy for augmenting secondary analysis of qualitative research data has several dimensions: (A) building up and strengthening public archives and depositing the qualitative data into it; (B) mandating all the researchers under the sponsored projects to deposit the qualitative data in the public archive; (C) identifying the priority areas (for example health and social care researches) for setting up depository of qualitative research data; (D) allowing continuation of typical flexibility needed for qualitative research analysis.[95]

7. Using Software in Qualitative Research[96]

Qualitative research unlike Quantitative research entails comprehension, dissection and presentation of perspectives, opinions and prejudices of a target group. Since it involves collection and analysis of data which are as aforementioned relates to the thought, the behaviour, the perceptions etc. of people the task is

[93] Ibid 38-9
[94] Ibid 39
[95] Ibid 40-41
[96] I acknowledge the help of Dr. Shuvro Prosun Sarker, Research Associate in CRSGPP, NUJS in writing this part.

arduous. It is so because the entire process of research is divided into several steps, the primary one being collection of data. This process takes a lot of time and requires constant monitoring by the researcher who manually organizes the data so collected, carries out primary analysis and scoops out the relevant and important portion. Thus, an attempt at organising, coding, arranging the data etc. electronically came as a relief to researchers.[97] In fact, now-a-days qualitative researchers are more tending in using software for analysing research related data. Some examples of such software are ATLAS.TI[98], MAXQDA[99], NVivo[100] etc. Mainly the process of qualitative data analysis is exploration, organization, interpretation and integration. To continue on this process the researcher needs to retrieve, rethink and compare and identify relationship of the data.

Now, a question might arise as to how computers can analyse data because they are not yet capable of thinking for themselves. Therefore, computer aided qualitative research is restricted to organization, ordering etc. often termed as coding[101] and retrieving[102] in context of qualitative data analysis software. The data that is collected is analysed solely by the researcher. The role of the software is only to code and retrieve the input or the data given to it. Now, what exactly does the software do? The first thing any of the software will do in general is storing and managing the data. This will entail the researcher to put the raw data and then saving it securely. The raw data can be of different types and forms such as plain text in word format, formatted text, photo, video, audio, diagrams etc. After putting the data into the software, it will allow the researcher to edit the data or annotate the data as required for several technical purposes. The second stage of using the software is searching and retrieving the data to count frequently used words or referred words for analyzing the content. This process will enable the researcher to retrieve the data with relevant context and the source of the data. The third stage will enable the researcher to make coding. The codes can be created by the researcher manually or automatically generated by the software. The researcher

[97] Uwe Flick (n 3) pp. 359-361
[98]See http://atlasti.com/qualitative-data-analysis-software/
[99]See http://www.maxqda.com/
[100]See http://www.qsrinternational.com/what-is-nvivo
[101] Udo Kelle, 'Computer-Assisted Analysis of Qualitative Data '[*Paper prepared for the Discussion paper series of the LSE Methodology Institute]* 1997. Alan Bryman, *Social Research Methods* OUP 2001 p. 392: "Coding is one of the most central processes in grounded theory. It entails reviewing transcripts and/or field notes and giving labels (names) to component parts that seem to be of potential theoretical significance and/or that appear to be particularly salient within the social worlds of those being studied".
[102] Ibid.

then assigns the relevant portion of the data under the created codes manually or automatically by the software. The next stage is developing and testing the theory by analyzing the coded data. It may happen in a way where major concepts are divided into several themes and then analysis are done towards theory making or may foster an inductive approach. Therefore, the software mainly discovers the differences, similarities and relation between text segments, helps develop typologies and theories and examining hypothesis.[103]

In qualitative research, a researcher examines the data. While doing so the researcher adopts the process of constant comparison between each unit of data and the rest of the body of data in order to establish analytical categories of data.[104] This may be compared to the process of solving a jigsaw puzzle where a person starts collecting pieces based on their relevance and similarity, and keeps in mind the differences, so that all of these pieces can be linked and the puzzle could be solved.[105] The same procedure is carried out by a qualitative data analysis software where the process is named as 'coding and retrieving'.[106]

In several research projects the comparison of text segments leads to the creation of descriptive typologies and it also paves way to development theories.[107] In order to record the process by which a researcher comes up with such typologies or develops any theory he uses diagrams[108], figures[109] or uses labels etc. These diagrams or labels etc. are easily created and recorded by the software used for such qualitative research.[110]

Further, such software also aids a researcher to re-examine and formulate a hypothesis.[111] In order to examine one's hypothesis the researcher undertakes a process where he refines the data on the basis of common ideas and thoughts

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[103] Ibid. Also, see Al Yahmadi H. Hilal and Saleh Said Alabri, 'Using NVIVO for Data Analysis in Qualitative Research' 2.2 *International Interdisciplinary Journal of Education* 2013
[104] Catherine Pope, Sue Ziebland, Nicholas Mays, 'Qualitative Research in Health Care: Analysing Qualitative Data' 320 *British Medical Journal* 2000
[105] Kelle (n 101) p. 1
[106]Ibid. Also, *see* Valentina Petrova, 'Intro to Atlas.ti: Qualitative Data Analysis Software' *available at* http://julius.csscr.washington.edu/pdf/atlasti.pdf
[107] Ibid.
[108] Ibid.
[109]Ibid.
[110]Ibid. Also, see Al Yahmadi H. Hilal and Saleh Said Alabri (n 97); L. L. Rademaker, Elizabenth Grace and S. K. Curda, 'Using Computer-assisted Qualitative Data Analysis Software (CAQDAS) to Re-examine Traditionally Analyzed Data: Expanding our Understanding of the Data and of Ourselves as Scholars' 17.22 *The Qualitative Report* 2012
[111]Ibid.

which are reflected from the collected data. Such refinement helps in finding out the relevant interlinked opinions or thoughts or behavioural pattern etc. This process of refining is done by the software which is termed as hypothesis complex retrieval facilities which is available in any software designed to be qualitative data analysis software.[112]

However, no technique is fool proof and it keeps on evolving. Qualitative data analysis software too has its own limitations: (1) the in-built limitation of the software may sideline the researcher from the methodological and theoretical orientation of the research; (2) main storage of data (as in Atlas.ti) might lose track of original files; (3) it may lack community users; (4) the researcher is pressurized to focus more on length and volume than on meaning and depth of the content; (5) a lot of time might be spent in learning the package and in entering the collected data in the system for the software to function.[113]

On the other hand, the utility of the software is manifold: (a) it saves time and is useful in storing and managing large number of data; (b) it renders the research process more systematic, transparent and rigorous; (c) it helps to find the inter-relationship between data thoroughly; and (d) it increases validity and reliability of qualitative research.

8. Conclusions

As a type of empirical legal research, Qualitative legal research has all inclinations to capture and analyse the social experience in its natural setting as exhibited by the community's response in its inherent complexity and understanding. In spite of historical, theoretical and practical differences between the two, the synergy of using Qualitative and Quantitative legal research can hardly be undermined. The inter-disciplinary and multi-disciplinary researches conducted by using Qualitative legal research method have great vitality. Meticulous attention on the natural setting of the researched subject, choice and use of appropriate tool of data collection, critical analysis by looking to the content, discourse and changing theoretical dimensions, and mature generalisations on the basis of overall estimation are the essential features of the qualitative research procedure. In the course of secondary analysis of qualitative data and in the use of software for qualitative analysis, these basic features should be regarded as having paramount effect.

Scholars in India have produced some seminal works, although handful in numbers, through Qualitative legal research. Institutional research and sponsored

[112] Ibid
[113] Kelle (n 101) p. 1

projects have increasingly applied this method. Its application is on the increase, showing hopes about bright future. Compared to the enormity of challenging works in this sphere, the extent of work done is not encouraging. Inadequacy of trained researcher having the skill of using Qualitative legal research and the problem in funding have obstructed big entry of this method into legal research. Capacity building is the need of the hour.

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Conceptual Understanding of 'Conduct' in Indian Evidence Act, 1872

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Introduction

Crime consists of *actus reus* and *mens rea*. Mens rea is nomenon where as *actus reus* is the phenomenon and manifestation of the former. This phenomenon is event and circumstance. Actus reus is the physical manifestation of the psychological happenings of the mind of the actor. In Indian Penal Code, an attempt is made to understand the phenomena by incorporation of word "act" under section 32[3]. Though it has not defined this word, a broader canvas is set by incorporation of "omission" as commission or *act*. Emphasising to understand the motion of events and its inherent traits the very next section mentions *act* means *acts*[4]. So an act is physical manifestations of events and phenomena. And to understand an "act", the *conduct* of an accused person is important. And to better understand the offence the conduct of the victim as well as the witnesses and other associated parties are also important. It is with such broad gamut the conduct is understood in law of evidence.

Meaning of Conduct: The conduct is the expression in outward behaviour of the quality or condition operating to produce those effects. The results are the traces by which we may infer the moving cause. It is "personal behaviour, whether by action or inaction; It is the "manner in which the person behaves"[5]. Conduct may, in certain circumstances, include statements.

Relevancy of Conduct in Indian Law

To analyze the law on conduct it is pertinent to look Section 8 of the EA,

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[3]Indian Penal Code, 1861, Section 32 Words referring to acts include illegal omissions.—In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to ille- gal omissions.
[4]Indian Penal Code, 1861, Section 32 , "Act", "Omission".—The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.
[5] Aiyar, P. Ramanatha, Concise Law Dictionary, 3 Edition, Reprint, 2009, P.232

1872[6]. It makes motive, preparation, previous and subsequent conduct as relevant. Here it is to note that, while the motive and preparation of an accused of the crime are relevant; understandable and self-explanatory; the conduct is made relevant in an inclusive way. This means conducts not only of the accused but also the victims of the offence as well as the persons who are witnessing the offence are also relevant. If the event is so enthused that, it is reflected though body and mind of the persons witnessing, then such shall be relevant. The relevancy of such events is taken care of by section 6[7] of the Act, if the happening is *shortly before or after* the event. These are some essentially the principles of ***res gestate*** incorporated in the law of evidence in India under various sections.

The section does not rest there as to the inclusive incorporations of facets of conduct. It also states that conducts *before and after* the fact in issue are relevant. One of the obvious examples of it, when under section 84[8] of IPC the plea as to unsoundness of mind is taken and as per the section, the unsoundness at the *very* time of the offence committed becomes fact in issue, the prior or subsequent conducts reflecting the unsoundness of the accused become relevant u/s 8 of the Act to reach the unsoundness of mind at the very time of the offence committed.

Let us take a hypothetical case to understand the meaning and gamut of conduct. Suppose, A wants to kill B. The facts are:

He conceived a plot to kill B. He arranged a pistol. On a certain day he left for B with a pistol on his hand. He went towards the market where B happened to

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[6] Indian Evidence Act, 1872 Sec 8, Motive, preparation and previous or subsequent conduct is relevant, as any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto".
Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
Explanation 2 — When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

[7] Indian Evidence Act, 1872 Section 6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

[8] The Indian Penal Code, 1861, Section 84. Act of a person of unsound mind.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

purchase his daily needs. He searched him at the market and went one shop after another. Near a Grocers shop he saw him. He drew his pistol. B get petrified, seeing the A drawing his pistol. He is stricken with fear. The vendor too get petrified and scrambled for safe place. The customers witnessing the events also ran hunter and banter. B cried for help. Then, A pulled the trigger. The crowd and the vendor raised hullaballoo. And the bullet lunched into the chest of B. B fell down instantaneously. B writhed in pain. After that A ran away from the scene of the offence. B is shifted to hospital in the agony of pain by some persons who were part of the crowd that gathered due to the incident. B wreathed in pain. His body is blood soaked. He tried to utter the name of assistant, A. While wreathing in pain he uttered the facts of the event happened on him.

To break the facts for the convenience of understanding,

1. A conceived plot to kill B.
2. A arranged a pistol.
3. On a certain day A left for B with a pistol on his hand. He went towards the market where B happened to purchase his daily needs. He searched him at the market and went one shop after another. Near a Grocers shop he saw him.
4. He drew his pistol.
5. B get petrified, seeing the A drawing his pistol. He is stricken with fear.
6. The vendor too got petrified and scrambled for the safe place.
7. The customers witnessing the events also ran hunter and banter.
8. B cried for help.
9. Then, A pulled the trigger. The crowd and the vendor raised hullaballoo. And the bullet lunched into the chest of B.
10. B fell down instantaneously. B writhed in pain.
11. After that A ran away from the scene of the offence.
12. B is shifted to hospital in the agony of pain by some persons who were part of the crowd that gathered due to the incident. B wreathed in pain. His body is blood soaked. He tried to utter the name of assistant, A. While wreathing in pain he uttered the facts of the event happened on him.

Here, the motive and preparation of the accused shall be relevantly as neither the victim nor the witness can entertain or demonstrate it, understandably. Para.1 and 2, reflect it. The offence part of the facts which are in issue are in Para.4, 9

and 10. Those acts cumulatively show the *act* of the accused from the muscular contraction to its relative logical end, *effect*. So the *act* and its *effect* are compendium of facts constitute one normative event, *act*.

Just prior to the facts in issue, there are certain facts of conduct; Para.3 can be considered as conduct of the accused. It is previous conduct of the accused. Then, Para.11 reflects another conduct of the accused which is demonstrated after the offence. It is the subsequent conduct of the accused. Conduct u/s 8 is inclusive of conduct of the accused, victim and witnesses. So Para.5, 6 and 8 are also relevant u/s8.

There is a major difference between section 8 where the *conduct*, even if it is a *statement*, which is integral part of the former, is relevant and sec 6 where *statement* when it is integral part of the physical event and, in short, is considered in normative jargon *transaction*. At times these become so overlapping that these are difficult to differentiate from one another. The difference between statement u/s 8 and statement u/s 6 is that, the statement u/s 8 needs a canvas of *conduct* to understand it and becomes un-meaningful without such context of conduct. Whereas statement u/s 6 is independent meaningful statement and, it spontaneously oozes out of the psychological plain of the person due to the pulls and pressure of unfolding of the events. It is in essence the event speaking through the media of person undergoing it. Para.8 can be such statement. Also statements, in Para.9 raising of hullabaloos, if independently meaningful, and in Para.12 when the victim tries to utter the name of the assailant and facts of the case come u/s 6. If any such meaningful statement would have been uttered in Para.5, 6 and 7, then such would also have been relevant u/s 6 as the *act* for the *act* of *transaction* already has begun after Para.4 drawing of the pistol. And if the victim happens to die, those *statements* of transaction if shows the cause of death will be relevant as Dying Declaration and would be relevant u/s 32[9] of the Act.

If the motion of events stretched more farther than the scene of the offence, certain other actions of the accused till the beginning of the *trial* of the case, and sometimes before the *judgment* of the case, becomes the relevant conduct. To quote an illustrations[10], A is accused of a crime, the facts that…..... at the time of,

[9]*Id*., Section 32, IPC

[10]Section 8, Illustrations, A is accused of a crime, the facts that, ... at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

Also, not only the conduct but those words and statements, oral or written are relevant if those *influence or influenced* by the conduct. This last parameter makes the relevancy of the facts as to the conduct most inclusive and broad. The Explanation 2 of the section 8[11] states it. The illustrations appended states, the question is, whether A owes B rupees 10,000. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 Rupees", and that A went away without making any answer, are relevant facts.

Conduct and the Dying Declaration

The relevancy of the conduct of the complainant, ***res gastae*** u/s 6 of the Act and Dying Declaration statement become intertwined in the complex sets of fact. It becomes difficult at times to segregate those facts one from one another.

To reiterate, if the complainant or the victim dies, then the facts as to the statements become relevant u/s 32 of the Act than sec 6 of the Act. However the facts of conduct are relevant u/s 8 of the Act. If the complainant or the victim is alive then the facts of statements are relevant u/s 6 where as the facts conducts are relevant u/s 8 of the Act. In both these, it is important to differentiate the facts of statements, facts of conduct and those statements which apparently are words spoken but essentially a dimension of the conduct. These are, in short known as statement of "complaint", means the conducts are as if those are seeking for attention, asking for the redressal of the happening or complaining of the event of happening on the body and mind of the accused. The Explanation 1.of the Section states, " the word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act".

The effect of the evidence is different in large scope of its relevancy under those sections. While a fact which is relevant u/s 32 as dying declaration is substantive in nature, means does not need to stand the test of corroboration and

[11] *Id*., Explanation 2 of Section 8 EA,1872

contradiction u/s 145 and 157[12] of the Act others are relevant within the preview of corroboration and contradiction, or simply relevant for the contradiction depending upon the nature where the facts are reflected, to be evidence within the meaning of section 3[13] of the EA. If the facts are reflected on the FIR u/s 154[14] of Cr. P. C., those relevant facts can be used both for the corroboration and contradiction. However, if is reflected in the 161[15] Crpc statements, the relevant fact can only be used in order to contradict the statement of the maker making on the dock before the Court on oath.

A Leading Case on the point is relevancy u/s 8 and 32 is Queen v. Abdullah[16].

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[12] Indian Evidence Act, 1872, Section 145 Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."
Indian Evidence Act, 1872, Section 157. Former statements of witness may be proved to corroborate later testimony as to same fact.—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[13] Section 3, Indian Evidence Act, 1872, defines evidence which impliedly mean a fact which is deposed on oath and subject to cross-examination. Hence to qualify a fact to be an evidence strictly, requirement of the section is necessary. However the section 4 for the proof of a fact uses the word "after considering the *matter* before it" the court comes to a conclusion if a fact is proved or disproved. It does not use the word evidence. So apart from evidence other thing which are before the court is, the court considers it for the proof of the matter.

[14] The Code Of Criminal Procedure, 1973, Section 154. Information in cognizable cases: (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

[15]The Code Of Criminal Procedure, 1973, Section 161. Examination of witnesses by police: (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case... (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

[16]https://indiankanoon.org/doc/401427/;(1885) ILR 7 All 385 (last visited on Mar. 21. 2017 at 13:21 hrs.)

Queen V. Abdullah

Fact of the Case, in short:

Abdullah was prosecuted for the murder of a young girl, Dulari, aged about 15 to 20 years, allegedly a prostitute while she was asleep in her home. It was already morning and there was sufficient light to enable her to identify the assailant, who cut her throat with a razor. She was taken to a police-station and thence to the hospital where her mother, the Kotwal, a Deputy Magistrate and the Assistant Surgeon repeatedly attempted to know from her the name of the person who had injured her. But she was unable to speak, her throat being cut. She was, however, fully conscious and lifted her eyes to look upon every man who wanted to talk to her. She endeavoured to answer the question by nodding her head, but surgeon forbade her from doing so, as it was prejudicial to her health. Her mother assisted her elbow and enabled her to answer by affirmative and negative sign of her hand. Magistrate uttered some name like, Ismail, Akbar Khan, Khuda Baskh, Hussain and the like and asked regarding them one by one if they had wounded her. Every time she nodded negative sign except on the name of Abdullah. And then with subsequent various questions she revealed various particulars of Abduallh and other details of the crime.

Issues before the Full Bench of Allahabad HC

1. Can the signs, here waiving of the hand, be regarded as "conduct" within the meaning of Section 8?
2. Shall the signs, waiving of the hand, affirmative and negative, with questions posed be considered as "statement" and hence outside the preview of section 8 and relevant u/s 32, as the victim subsequently died in the facts of this case?

The Learned CJ speaking for the majority stated his view as under

He opined that, the conduct must be relevant first and then any statement influencing that conduct becomes relevant. In this case, the signs of the hand were a conduct which indicated nothing and were therefore irrelevant and any statement influencing an irrelevant conduct would also be irrelevant. To reproduce the language of the verdict, "*The only conduct which is alleged on the part of the deceased is, that she moved her hand in answer to questions put to her by some of the persons at the hospital. If we went no further than this, there would be nothing to show that her conduct in lifting her hand either influenced or was influenced by the fact in issue,—i.e., the cutting of her throat. Then Explanation 2 is brought in; but it is obvious that before you can let in the words of a third person, you must show that the conduct which they are alleged to affect is*

relevant. ***And in the present case it is clear that until you let in the words, the conduct is not relevant****, and therefore the words cannot be let in because the condition precedent to their admissibility has not been satisfied, and that not having been done, their whole basis fails.*

Explanation 1 of Section 8 points to a case in which a person whose conduct is in dispute mixes up together actions and statements; and in such a case those ***actions and statements*** *may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant, and the circumstances under which the injuries were inflicted. Here what the injured person says and what he does may be taken together and proved as a whole. But the case would be very different if some passer-by stopped him and suggested some name, or asked some question regarding the transaction.* ***If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct****. But where the statement is made merely in response to some question or suggestion, it shows a state of things introduced, not by the fact in issue, but by the interposition of something else. For these reasons I think that the signs made by the deceased cannot be admitted by way of "conduct" u/s 8 of the Act.*

The reasoning is succinctly put by the judge as to why he did not consider the waiving of the hands by the victim at this stage as a conduct. Then the Court proceeded to analyze the law from the vintage of section 32 of the Act. The judge tried to make out a case for the admission of that waiving of the hand as a language of statement u/s 32. He stated " *it is clear that section 32 was intended by the framers of the Act to provide for cases of "dying declarations;" that is to say, where a person mortally injured makes certain* ***statements regarding the cause and other circumstances of the injury****, and then dies. The question then arises—Is the statement a "verbal" one? "Verbal" means by words. It is not necessary that the words should be spoken. If the term used in the section were "oral," it might be that the statement must be confined to words spoken by the mouth.* ***But the meaning of "verbal" is something wider.*** *From the earliest times it has been held that the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself. The same objection which is now made to the admission in evidence of these signs might equally be made to the assent given by a witness in an action to leading questions put by counsel. If, for example, counsel were to ask—"Is this place a thousand miles from Calcutta?" and the witness replied "Yes," it might be said that the witness made no statement as to the distance referred to. The objection to*

leading questions is not that they are absolutely illegal, but only that they are unfair. The only question here is, whether the deceased, by the signs of assent which she made, adopted the verbal statements employed by the questions? I think it must be held that she did so. ..... since the deceased might undoubtedly have adopted the words of the Deputy Magistrate by express words, such as "Yes," though even in that case the words in which the statement was actually made would not have been her own, I think she might equally adopt them by signs also. On these grounds, I would answer the reference in the amended form, which I indicated at the outset, in the affirmative.

That waiving of the hand shall be evidence u/s 32 of Act, as it provides any *statement* verbal or documentary made by person as to the cause of the death is relevant. The signs of the hand looked at through the medium of questions posed did explain the cause of death. By affirmative answer she adopted the words of the questions and it becomes her "verbal statement".

By this reasoning, strange or otherwise, the conduct was reduced to verbal statement.

Dissenting opinion of J. Mahamood

He said he would willing differ to the questions of those whose mother tongue was English, as a judge, to him verbal statement could not mean more than by means of word or words. Nodding of head or waiving of hand is not a word. The reproduction of his language is worth reading "*I have arrived at the same conclusion as my learned brethren; but I am obliged to say that my reasons for doing so are not precisely the same. I should accept the view expressed by the learned Chief Justice, if we had not to interpret the language of the statute, and if I did not feel unable to extend the meaning of the term "verbal" in Section 32 of the Evidence Act beyond that of "a word." I take it to be a fundamental principle of the interpretation of statutes that their language must be understood in its most ordinary and popular acceptation. .....and to me "verbal" cannot mean more than "by means of a word or words." Nodding the head or waving the hand is not a word. I therefore put aside Clause (1) of Section 32, which can only apply to "statements written or verbal."*

Effect in Evidence on the Ratio of the Judgment

On plain reading of both the sections the effects does not noticed. Reiterating the principles it is to state that, both the sections make relevancy of the facts. However, the crucial effect of admission of those words u/s 32 instead of section 8 is that, while u/s 8 the facts when become relevant need to go through the process of corroboration and contradiction, while u/s 32, it becomes itself evidence moreover

substantive. That means relevancy of facts need not go through the strict rules of evidence u/s 3 and it becomes substantive, means conviction of an accused can be laid basing solely upon this facts, without corroboration of material particulars from any other source.

Conclusion

To conclude, given all this, the appreciation of relevancy of the conduct is much more important than its relevancy.

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Tax treatment of Derivatives Transactions under Income Tax Act

Ms. Kumud Malviya[1]

Introduction

With the opening of the boundary of India for foreign investment after the economic reforms which started in India during 90's decade created a very suitable environment for the investment in various segments of the financial market. Business also brings with it some sort of risk. Investors are always exposed towards these risk, like credit risk[2], market risk[3] etc. As there is always change in the price of the stocks and spot market, it creates fear of risk in the corporate world. To accommodate with the new trends, here one instrument is innovated called Derivatives.

Derivatives are used to mitigate the risk involved in the financial market. Derivative transaction involves two parties. Generally one of the parties wants to mitigate the risk, called hedger and another party is willing to take that risk called speculator. Although the concept of derivatives is as old as the market itself, but it got legalized only after 1952, when the Forward Market Regulation[4] came into existence. The Regulation was dealing with commodity derivatives transaction. Financial derivatives were legalized only after 1995 when section 20 of the Securities Contract Regulation was repealed which prohibited the dealing in options securities.[5]

The importance of the derivatives can be understood from the statement of Warren Buffett, a great investor known for his investment philosophy as well as owner of the Berkshire Hathaway Inc. as **"Derivatives is a weapon of mass destruction"** in the annual report of the said company in 2002. It is evident from

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[2] The word credit risk has two aspects. First one is before the risk actually arises there is a calculation of financial position of the debtor and his past behaviour with regard to meeting his liabilities. The second situation is related to the collection difficulties when the debtor made a default in timely payment of loan.

[3] Market risk reflects the fluctuation in the prices of goods and services which may further result in unwanted changes in the value of investments.

[4] The Forward Market Commission is now merged with SEBI on 28th September, 2015 and thereby the Regulation is repealed.

[5] Now the repercussion of the amendment would be to legalise the derivative transaction if it is traded on recognised stock exchanges settled by the clearing corporation of the recognised stock exchanges.

the economic crisis of 2008 which started from the USA after the collapse of the largest investment Bank Lehman Brothers that excessive use of derivatives can affect even the world economy crossing transnational barriers.

The paper will analyze the fundamental principle of taxation followed on derivative transaction in the two developed economy i.e. US and UK. The paper will also throw some light on the provisions of taxation of derivative transaction in India and changes required.

The concept of derivatives

A derivative[6] is a contract between two parties holding different views with regard to price of an underlying representing an asset. Derivative is an independent contract but linked with some assets called underlying and its pricing depends on the value of underlying assets. This underlying may be shares, bonds, interest rate, indices etc. Derivative contract confers a right to buy or sell a specific thing in a specific quantity, on a specified date at a pre-determine price. This right of the party creates an obligation on the other party to sell or purchase the particular property at the fixed time, rate and quantity. The basic purpose behind the making of the derivative contract is to ensure a fixed future price of the underlying at a fixed future date irrespective of the market price of the product. The basic function of the derivative contract indicates the nature of the derivative as a hedging instrument. Primarily derivative is used as a risk management tool by the parties. It ensures the parties of the contracts from the unwanted movement of price of the underlying assets.

Basically derivative contract transfer these risk from one party to the other party of the contract. One party in this contract is hedger whose purpose is to protect him from the unwanted movement in the prices of underlying by purchasing hedge protection. In most of the cases one of the parties is speculator and speculates on the price of the underlying and gains from the favourable movements in the price of the underlying. One of the importances of derivative contract is to anticipate the future price of underlying and as such it indicates the direction of the market of particular underlying property.

Derivative contract has two dimensions, one is cash settlement and another is physical settlement. When the contract is settled by the party by making payments

[6] Section 2 [(ac)] of the Securities Contract Regulation Act says "derivative" includes— (A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security; (B) a contract which derives its value from the prices, or index of prices, of underlying securities;]

instead of actual delivery of the property that is called spot market. Another mode of the settlement of derivative contract is physical delivery of the property. These are decided by the party of the contract what they prefer i.e. actual delivery or payment equivalent to the price of the property. Derivative contract is used for two purposes, one is as a risk management tool and the other is as a profit making instrument by speculating upon the future price of the underlying. In both the way derivative plays a very important role. For example, whatever the price paid by the party to purchase derivative contract[7] is always less than the prices he will actually pay. Derivative has its own independent value from the underlying property from which it derive its value, it can be easily transferable and thus can be traded as the shares of the company is traded on the stock exchanges. As derivative derive its value from the underlying property, an exact prediction based on the speculation technique is required. This is very important task under the derivative contract as one of the parties would be speculator.

There are varieties of derivative products such as forward[8], future[9], option[10] or swaps entered by the parties as per their requirements. Derivatives helps in many way to an economy from various risk necessarily arises as part of the market forces. But at the same time a precaution to be taken while using derivatives product because if it is used inefficiently the consequences may be dangerous.[11]

Taxation of Derivative transactions

Derivative instrument is very complex in nature. As a result it is a difficult task to tax the derivative transactions. Under the income tax Act, 1961 tax can be levied on income which is divided into five categories i.e. salary, house property, business income, capital gains and other sources of income.[12]

Now the question arises how to characterize the income from derivative

[7] Derivative contract gives a right to one party to buy that underlying at a price which is lower in view of the party who is purchasing the derivative contract.

[8] Section 2 (c) of the Forward Contract Regulation Act, 1952 says "forward contract" means a contract for the delivery of goods and which is not a ready delivery contract:

[9] Future contract is a forward contract, only difference is that it is a standard form of Contract and traded on a registered stock exchange.

[10] Section 2 (g) "option in goods" means an agreement, by whatever name called, for the purchase or sale of a right to buy or sell, or a right to buy and sell, goods in future and includes a teji, a mandi, a teji-mandi, a galli, a put, a call or a put, and call in goods

[11] As per the recommendation made by the two committees that are committee headed by Dr. L. C. Gupta in November 1996 and J.R.Varma committee in June 1998

[12] Section 14 of the Income tax, 1961.

transaction. Whether it should be treated under the head of a business income[13] or as a capital gains[14] or other source of income[15]? Value of the derivative contract is based on the underlying assets. Although derivative contract has its own independent value but it is connected and linked with the underlying to whom it relates. While determining the taxation of derivative transaction, the purpose for which it is used also need a proper consideration. It's mean whether it is an investment for the company or it has been entered into to make a profit on the basis of speculation based on the asymmetry of information.

On the question of taxation of derivative transactions, there are some issues which need to be resolved and requires proper consideration. These questions are, how to separate the action of levy of taxes on the underlying which is the basis for the formation of derivative contract and on the derivative transactions itself which relate to same underlying. It creates problem of double taxation on the same underlying.[16] To explain further, suppose a tax is already imposed on a particular income by putting that income into pre-classified category and then the income is further characterized as a subject of tax in the another category then problem of double taxation on the same security arises which requires proper accounting method to resolve the problem of double taxation. Another issue which required proper consideration is the purpose for which the derivative contract is used. For example

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[13] Section 28 of the Income tax Act says that following are the income chargeable as profit and gains from businesses-

1. Normal Profit from general activities as per profit and loss account of business entity.
2. Profit from speculation business should be kept separate from business income and shown separately.
3. Any profit other than regular activities of a business should be shown as casual income and will be shown under "income from other sources" head.
4. Profit earned on sale of REP License/Exim scrip, cash assistance against export or duty drawback of custom or excise.
5. The value of any benefits whether convertible into money or no from business/ profession activities.
6. Any interest, salary, commission etc. received by the partner of a firm will be treated as business/professional income in hand of partner. However, the share of profit from partnership firm is exempt in hand of partner.
7. Amount recovered on account of bad debts which were already adjusted in profit in earlier years etc.

[14] Income tax Act does not define what capital gain tax is directly but it defines what Capital gain is and in what situation a capital gain will be exempted from taxation under section 2(14), 54, 54EC, 54F.

[15] There is a big list in the category of Income from other sources under section 56 of the Income tax Act.

[16] These underlying may be securities, or commodity etc.

if it is made to hedge the risk associated with the particular underlying then the principle which is followed to impose insurance transaction can be adopted.[17] If the main purpose of derivative transaction is profit making then it should be taxed on the philosophy which is followed to impose taxation of business income and capital gain.[18] Questions also arise as to the time when the liability to pay tax arise. There is no uniform rule to tax the derivative transaction. Generally derivatives are subject to general principle of taxation irrespective of their use. On the question whether a derivative contract is made for the purpose of hedging or not, there is no such taxation rule developed in India. Before making the derivative transaction subject to taxation, an analysis is required to know what the particular risk is associated with the business and the nature of the underlying property to which derivative is associated. If derivative instrument is used to manage the risk then tax avoidance rule can be applied and it must be showed in the balance sheet as such i.e. identification of the character and function thereof and there accounting method. In other words there must be an account created specifically for the purpose of showing the particular risk associated with particular property and the profit or loss occurred. All these kind of hedging instruments must be put in the book of accounts and an accurate record should be maintain.[19]

Taxation of Derivative transaction in UK

In UK there are frequent changes brought out by Finance Act every year to accommodate the current changes. UK tax law is moving from the traditional accounting method[20] to mark to market accounting method.[21]

Historically there was stamp duty imposed on the share transaction in UK. Gradually stamp duty was reduced on share transaction. Stamp duty is one of the

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[17] Insurance of the assets of the company is considered under the expenses in the account book of the company.

[18] Dealing in shares are taxed as per the nature of the transaction and choice of the tax payer. It will come under the category of capital gain tax if tax payer treat it as an investment. It will be treated as a business income if trading is so frequent that it does not involve delivery.

[19]Zee, Howell H, "*Taxing the Financial Sector : Concepts, Issues, and Practices"*. Washington DC, US: International Monetary Fund (IMF), 2004. ProQuest ebrary. Web. 9 August 2016 Page no..45 to 87 available on. http://site.ebrary.com/lib/kiituniv/detail.action?docID=10300232 last visited on 09/08/16

[20] Accounting method refers the method of calculating income and expenses of a company for tax purposes. Tradition method of accounting is based on the accrual basis i.e when the income accrues and expenses incurred in the form of invoices.

[21]. Mark to market method of accounting is based on the current market value of the assets which may be different from the book value based on the price paid for the same assets by deducting the depreciation cost.

forms of financial transaction tax which makes the taxpayer unable to avoid taxes on share transaction as it requires registration of title of the owner and when it is transferred there must be change in title of the ownership of the shares. To ensure the transfer of the title, even a non-resident of the UK has to pay stamp duty on the transfer of shares. One interesting point to be noted here is that financial transaction tax i.e. FTT comes under indirect taxation. General perception is that taxation of derivative comes under direct taxation in the form of capital gain or business income or other source of income. Now if one see carefully one come to know that general practice on the taxation of share transfer is that there is no tax on the primary market. If derivative contract is made and registered in other country then stamp duty cannot be imposed. The global practice is that the primary issue of shares is exempted from the financial transaction tax. Financial transaction tax makes the transaction cost[22] to increase and further the impact which it will have on the valuation of the shares are huge.

After the new Finance Act, 2002 and subsequent changes brought out by the government it can be concluded that derivative are taxed under the new regime as per the following criteria-

- Relevancy of the contract[23]
- Nature of the underlying property[24]
- Methods of accounting treatment[25]

If a derivative transaction passes the above test then it will be taxed under the new Finance Act as per the norms prescribed specifically for the derivative transaction.

The first test whether the contract, considered under the new regime is taxable or not, must be met. The relevant contract which is taxable under the head of derivatives, are options[26], futures[27], and contract for differences[28].

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[22]. Transaction cost of derivative refers expenses of making derivative contract which relates to the brokerage charges, fee or any duty and differences in the price of the underlying.
[23] Relevant contract has been defined as" a future, an option, and a contract for differences"
[24] Property which is the subject matter of derivative contract has been pre-determined as taxable or not.
[25] It showed, how the derivative transaction is shown in the books of account i.e. as s source of income or as an expenditure.
[26] An option is a right (without any compulsion to buy or sell) sold by one party to the other party to buy or sell the shares at a certain price in a certain future date.
[27] A future is a contract for the sale of property under which delivery is to be made at a future date, which is agreed when the contract is made, and at a price which is also agreed when the contract is made.

The second criterion to impose tax on derivative is the nature of the underlying property. The new regime taxed the derivative transaction on the basis of tax treatment of the underlying property to which derivative relates. Taxation of the derivative contract under the new regime depends on how the underlying property from which derivative contract derives its value, is taxed. The objective behind the classification of the property[29] is to avoid the double imposition of taxes. In short no derivative transaction be taxed if underlying is already taxed under any other category of income.

The third criteria to tax the particular transaction as derivative is the accounting treatment of particular transaction. If a particular derivative contract passes the test of relevancy and the underlying is within the list of the property taxable, then the third criteria i.e. accounting method of the transaction to be complied with. If it is treated as a financial derivative instrument under the new Finance Act then underlying assets will not be taxed under any other category. The underlying, which is the subject matter of derivative transactions and taxed as such are exchange rates, stock market indices.[30]

Taxation of Derivative under the U.S

Taxation of derivative transaction in US is clear and transparent. In US taxation of derivative is administered by US tax code[31]. It provides various rules with regard to how to tax derivative transactions. These tax rules are made by the US authority without considering the accounting method and their impact on taxing ability. In US there is no general practice with regard to taxation of derivative transaction. There are many factors which is taken into consideration by the US authorities while imposing tax on derivative. These key points are following-

- Types of derivative products[32]

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[28] A contract for differences is defined as a contract the purpose of which is to make a profit or avoid a loss by reference to fluctuations in the value or price of property referred to in the contract or an index or other factor designated in the contract.

[29] The property which is excluded from the taxation under the derivative transaction has been classified into two category -Financial property (shares, right of unit holder under the concerned scheme loan relationship)

1. Non- financial property (land, tangible movable property excluding commodities

[30] Muller, Charles, and Ruttiens, Alain, "*Practical Guide to UCITS Funds and Their Risk Management*" Liège, BE: Edipro, 2013. ProQuest ebrary. Web. 9 August 2016 Page no.. 38 to 145.available on http://site.ebrary.com/lib/kiituniv/reader.action?docID=10805185&ppg=39 last visited on 09/08/16

[31] Chapter 26 of the U.S code deals with the internal revenue system.

[32] There various types of derivative products available in the market. For examples, future, forward, options.

- Timing when the income accrues[33]
- Purpose behind the derivative transaction[34]
- Parties of the Derivative transaction[35]
- Jurisdiction[36]
- Residential status of the parties[37]

The US Internal Revenue Code, 1986 treat derivative transaction under the two categories i.e. as a capital gain and the ordinary income. If the intention of the parties shows that they are using derivative to earn profit on the basis of speculation then it will be taxed on the principle of capital gain. If underlying property is already taxed under any other category of income then it will not be taxed as derivative transaction.

Taxation of hedging transactions

Derivatives are treated in a different way from the taxation perspective in case it is used as a hedging instrument. U.S. Tax Code exempt the taxation of derivative transaction entered into by the parties to save from the unexpected exposure towards risk. One of the points to be noted here is that in most of the cases one of the parties to the derivatives transactions is using it as a risk management tool. Qualification to get exemption under the hedge rules is that the assessee requires to make the identification of nature[38] and timing[39] of income. U.S. tax hedge rules contain certain principle to eliminate tax evasion by the tax payer involved in the derivative transaction. The main objective of the hedge rule is to prevent tax payer from manipulation while identifying the nature of income to take advantage of tax hedge rules. Sometimes it is possible that some derivative transactions are qualified to be exempted but it is not claimed by the tax payer under the hedge rule. In this situation tax authority may exempt the transaction from taxing. There are several factors which need consideration in the application of hedge rules.

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[33] When gains or loss arise in case of derivative transaction.
[34] Why the parties are entering into derivative contract? Whether to make profit or as an instrument of risk management
[35] Whether the tax payers are individual or corporation, trader etc.
[36] Whether derivative transaction is done in within US or outside the country.
[37] Whether the parties are US resident or non-resident of US.
[38] Nature of the income indicates source and form of income.
[39] The word timing denotes when the income accrues or loss is incurred.

- The intention of the parties of the derivative transaction
- The underlying items intended to be hedged
- Balance sheet of the company
- Risk management policy of the company
- The link between aims and items hedged
- Financial report

A hedging transaction must relate with the ordinary assets associated with some risk[40] which may arise due to changes in the prices of the hedged item.[41] These risks are inherent and cannot be avoided completely but by using derivative transaction, the result can be extended.[42]

Derivatives under Indian Income Tax Act

In India, derivative business Income which is earned by speculative activities[43] has been classified into two categories under the Income Tax Act[44]. These are speculative business[45] and speculative transactions[46]. If one reads the provisions

[40] There are many risk (i.e. Market risk, credit risk) which parties are bound to expose in the course of business which can be calculated and managed by using feasible derivative product.

[41] If property is not an ordinary property then its shows that the derivative is made to speculate on the price movement of the property and not to hedge the risk.

[42]Hufbauer, Gary Clyde, and Assa, Ariel. "*US Taxation of Foreign Income. Washington, US: Peterson Institute for International Economics"*, 2007. ProQuest ebrary. Web. 9 August 2016.page no..175-319. Available on http://site.ebrary.com/lib/kiituniv/reader.action?docID=10199737&ppg=194 last visited on 09/08/16

[43] Speculative activities are those which are based on a risk of loss in expectation of a gain.

[44] Income Tax Act, 1961

[45] A speculation business means any business in which a contract for the purchase and sale of any commodity including stock and shares are periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity but does not include a business in which a contract in respect of raw materials or merchandise is entered into by a person in the course of a manufacturing or mercantile business to guard against loss through future price fluctuations for the purposes of fulfilling the person's other contracts for the actual delivery of the goods to be manufactured or merchandise to be sold.

[46] Section 43 (5) of the Income tax Act says speculative transaction" means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips:

Provided that for the purposes of this clause— (a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting

of Income Tax Act related to levying of taxes on speculative income, there are some confusion in the treatment of speculative income for the purpose of levying taxes and set off those income against the speculative income or losses. Section 43(5)[47] of the Act defines speculative business and says that any transaction which does not involve actual delivery will be considered as speculative transaction. One more point is that explanation 2 of section 28[48] uses the word speculative transaction(s) which says "to constitute speculative business there must not be a single transaction". Further, there is a clear demarcation under the Act between speculative transactions and speculative business. To impose a tax on the income from speculative activities, it must constitute a business. Now the question arises what is business and how it is different from the transaction.

Transaction means "an act of agreement or several acts of agreement having some connection with each other in which more than one person is concerned and by which legal relation of such persons among themselves are altered"[49].

Business means "employment, occupation, profession or commercial activity engaged in for gain or livelihood. Enterprise in which person engaged shows willingness to invest time and capital on future outcome[50].

If one reads both the definitions carefully he reaches the conclusion that business is a broader term which includes transaction and one major difference is the intention of doing business is the livelihood. Income Tax Act having regard to these points,

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business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or (b) a contract in respect of stocks and shares entered into by a dealer or investor therein to guard against loss in his holdings of stocks and shares through price fluctuations; or (c) a contract entered into by a member of a forward market or a stock exchange in the course of any transaction in the nature of jobbing or arbitrage to guard against loss which may arise in the ordinary course of his business as such member; [or] [(d) an eligible transaction in respect of trading in derivatives a referred to in clause 27[(ac)] of section 228 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) carried out in a recognised stock exchange; [or]] [(e) an eligible transaction in respect of trading in commodity derivatives a carried out in a recognised association [, which is chargeable to commodities transaction tax under Chapter VII of the Finance Act, 2013 (17 of 2013),]] shall not be deemed to be a speculative transaction

[47] *Id.*

[48] Section 28 Explanation 2.—Where speculative transactions carried on by an assessee are of such a nature as to constitute a business, the business (hereinafter referred to as "speculation business") shall be deemed to be distinct and separate from any other business.

[49] Black Law Dictionary 6th Edition

[50] *Id.*

uses this term separately. Tax is imposed on business which may include transaction. This question was raised in a Delhi High Court case[51]. In this case, the question was related to treatment of Derivative. Derivative, as discussed above, is a risk mitigating instrument which derived their value from the underlying assets. Derivatives are considered as a speculative transaction as it is based on the contract of differences. The essence of the derivative contract is speculation about the price of the underlying assets. In this case the assessee claims that the income from derivative, does not come under the category of "Speculative Income" and as such any loss incurred due to the fluctuations in the prices of the underlying, cannot be treated as speculative loss. His claim was rejected by the assessing officer by saying that income from derivatives transaction is speculative income and any loss will also be treated as such. It was argued that it is not a business income as there is express provision under explanation 2 of section 73[52] of the Act that purchase and sale of shares do not come under the category of business. Section 43[53] of the Income Tax Act although does not define the term derivatives but it expressly excludes derivatives from the purview of speculative income.[54]

Section 43 of the Income tax Act, 1961, defines certain terms for the purpose of section 28 to 41. On the other hand section 73 provides general principle regarding treatment of speculative income and as such has wider application. But the issue which requires proper analysis is that in case of conflict between these two provisions which provisions should prevail. Court said in this case[55] that there is no conflict between these two provisions and if any such conflict arises then section 43 shall prevail. If one analyzes these provisions he will reach the conclusion that there is ambiguity in the Act regarding the treatment of speculative transactions including Derivatives.

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[51] The commissioner of Income tax v. DLF Commercial Developer's Ltd. (2013)

[52] Explanation to sec. 73 states: "Where any part of the business of a company other than a company whose gross total income consists mainly of income which is chargeable under the heads "Interest on securities", "Income from house property", "Capital gains" and "Income from other sources", or a company the principal business of which is the business of banking or the granting of loans and advances consists in the purchase and sale of shares of other companies, such company shall, for the purpose of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares."

[53] Section 43 defines of certain terms relevant to income from profits and gains of business or profession for the purpose of sections 28 to 41 and in this section

[54]Income Tax Act, 1961 section 43(5) (d).

[55]*Id.*

One another ruling on this point is a case[56] where Income-tax Appellate Tribunal made a relevant observation regarding foreign currency swap transaction which comes under OTC settlement. Income tax tribunal said that hedging transaction related to fluctuation in the foreign currency made with the bank to hedge the risk inherent in the foreign exchange transaction should be considered as a business income as the nature of the transaction shows that it is a business income as it is integral to foreign exchange dealing. In another world foreign currency swap one of the form of derivative contract made by banks to hedge the risk involved in the foreign exchange transaction need to be taken as a business activity not speculative which is obvious from its objective itself.

Implication of the ruling

- Under the explanation to section 73 of the Income tax Act, any company if want to take exemption it has to prove that the companies main business is not buying and selling of shares. If company has earn profit from the main business which is not trading in shares and loss in the other business that is buying and selling in shares then company cannot set off losses by not paying income tax on business but can carry forward it for next four years. This is applicable under this provision only. Its mean for the application of section 73 Explanation there must be two business and main business should not be trading in shares.
- For the application of section 43(5) company's main business should be trading in shares and contract must be settled physically i.e. actual delivery of shares. Here problem arise with the dematerialization of share and introduction of depository where actually no delivery take place. One issue is related to intraday transaction where shares are sold on the same day of receiving.
- According to Section 43(5) of the Income Tax Act, 1961, intra-day[57] trading shall be deemed to be speculative business transactions and the income accrues shall be either speculative gains or speculation losses. Income from speculation gains is taxed at the normal rates.
- Losses from the Speculative activities are allowed to be set off only against the income from speculative transactions and not against any other source of income or non-speculative business income.

[56] London Star Diamond Company (I) P. Ltd v. DCIT [2013] 38 taxmann.com 338 (Mumbai-Trib.)

[57]Intra-day trading is the trading of shares within the same day. Generally, delivery is not taken in case of intra-day trading, and thus, these are said to be speculative transactions.

- The short-term capital loss is allowed to be set off only against income from short/long-term capital gains.
- The non-speculative business loss is allowed to be set off against the Long Term or Short Term Capital Gains made during the said year.

Under the Act, speculative income is considered as normal income and taxed accordingly as per the prevailing rate. So there is no different treatment of the income irrespective of the source of it. Thus, liability to pay tax depends on the taxable income. The point to be noted here is that in case of speculative loss it can be set off against the speculative gain.

It means if one has incurred a non-speculation business loss, the same can be set off against the long Term or short Term Capital Gains made during the year.

Issue

Explanation 2 to Section 28 says if speculative transactions are coming under the term business then it should be treated differently from the other business. Section 43(5) defines what does speculative transaction mean and says any transaction which does not involve actual delivery shall be deemed to be speculative transactions. However, Section 43(5) defines only what speculative transaction is but it does not define what speculative business is. Section 73 prohibits the set off of losses of speculative business against any income including business income. Explanation to Section 73 provides that any loss relating to transactions of dealing in shares by a company would be subject to taxation and income loss accruing out of such purchase will be deemed to be a speculative business loss. Thus, unless speculative transactions constitute business activity, it cannot be treated as a speculative business and so Section 73 cannot apply.

Shares can be taxed either under the head of capital gain or business income. Investors who purchase shares for the purpose of investment to get a return are bound to pay capital gain tax as per the holding period which may be long term or short term.[58]

Conclusion

The general principle of taxation with regard to derivative transaction depends on the accounting treatment of the derivatives in the balance sheet of the company. It should follow the accounting standards which are more universal in nature i.e generally acceptable.

[58] Intra trading are considered speculative income where there is no actual delivery takes place where as investment for a period less than 12 months will be subjected to short term capital gain.

The taxation of derivative contract should be based on the underlying to with derivative relates. Thus if underlying are not the subject of taxation then derivative contract should be excluded from the purview of taxation. To make it clearer its mean either the derivative contract should be taxed or the underlying subject should be taxed. There should not be double taxation. For the application of these objectives following properties are excluded from the taxation under derivative contract. These properties may be categorized as financial assets and non-financial assets. Financial assets include shares and other securities. The second category includes properties like land and other tangible and fixed assets. Nature of the taxation of derivative contract also depends on the types of derivative entered into by the parties. In case of an option, the underlying subject matter is the property that is anticipated to be delivered when the option is exercised. If the property is another derivative contract then the underlying of the original contract is the underlying subject matter of the subsequent contract. In case the contract is based on differences the underlying is determined on the basis of following criteria-

- If under the derivative contract, payments is determined on the basis of price of the property which is the subject matter, then underlying is that property
- If the contract is based on the index or other factors then the collateral is that property which provides the subject-matter of that index
- Contract of differences may be based on any other factors like interest rates etc.

To conclude it can be said that derivative is based on speculation but now it has become a powerful instrument to mitigate the risk. It is evident from the fact that now it has been legalized by an amendment made in the Securities Contract Regulation Act, 1956 which repeals section 20 and adds section 18A. With the increasing use of this instrument the problem also arises about the taxation on the income accrues from derivative. There are many cases on this issue whether it should be treated as speculative business or transactions. There is a need of amendment in the Income Tax Act which should provide for firstly the definition of derivative, secondly whether income accrues there from is taxable or not, thirdly to provide for the following criteria that in what circumstances section 73 will apply.

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Women as living donors of organs/tissues in India

Ms. Kirandeep Kaur[1]

Studies reveal that more women than men are organ donors in case of live organ donations in India; whether it be an organ donation for money, or organ donation in the family. Very rarely the recipient of an organ, in case of a live organ transplant, is a woman. Is it the Indian mind-set to be blamed or acknowledged as the pivotal factor responsible for the phenomenon. This paper aims to analyse whether the exploitation of women as organ donors in India is linked to their socio-economic status. It aims to look into the factors which lead to maximum organ/tissue donors in case of both altruistic (legal) and commercial (illegal) live organ/tissue donations in India, to be women.

The paper does not attempt to venture into the debate of addressing the paucity of availability of human organs; the scope of cadaveric donations; and the debate whether penalizing commercial dealings in human organs is viable. The entire issue is looked at through the lens, which focuses on women as organ/tissue donors, both in case of legal-altruistic organ donations and illegal-commercial transplants, in India. It is the predicament of women, their decision-making and vulnerability, in the background of their social and economic status in the family and society at large which forms the looming area of concern for this paper.

A. Introduction

The notion of considering women as givers, the ones who sacrifice, has been engrained in the mind-set of humanity from ages, right from the time of Sita in Ramayana; and sadly is still the dormant and at times the active thread which runs through the societal framework. The *"woman questions"*[2] are questions that are rarely asked. Whether acknowledged or not, it is always the women who bear the

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[2] *"Women Questions"* could be defined as questions *"designed to identify the gender implications of rules and practices which might otherwise appear to be neutral and objective,"* and would include questions like, *"have the women been left out of consideration? If so, in what way; how might that ommission be corrected? What difference would it make to do so?"* -Katherine T. Barlett, *Feminist Legal Methods*, 103 (4) Harvard Law Review 829 (1990).

brunt of every tragedy that hits humanity, whether it be the family, the society, the nation or the world at large. In the closed doors of the family, the one who generally goes on to make sacrifices is the woman. Having a general view about an Indian household is a difficult task at hand, because of the multiple cultures and lifestyles which run through the nation. In 2003, when Bina Agarwal, renowned scholar of land rights and gender, interviewed a group of rural women, she asked them whether they might want the land they farmed or looked after, to be registered in their names.[3] The question was followed by silence, and then one woman volunteered to explain, she said, *"We are taking so long in answering because no one had ever asked us this before! It seems like a dream that we might have land of our own."*[4]

When it comes to access to medical care, gender inequality is prevalent in the country. The role of the mother, the daughter, the wife, the daughter-in-law crouch the autonomy of women, in the realms of duty towards the family; and the men go on to take the decisions on behalf of the women of their household even in matters of health care.

There is much vulnerability which women face, which are oft ignored by the male-dominated thought process in India. Studies reveal that organ donors in case of live organ donations are almost always women; whether it be an organ donation for money, or organ donation in the family. Very rarely the recipient of an organ, in case of a live organ transplant, is a woman.

"In complicated diseases like renal failure, men are much more likely to arrive at hospitals to receive medical attention than women. Even if diagnosed, women fail to show up for treatment because kidney haemodialysis is an expensive process. That also makes women less likely to receive dialysis treatments, and gives them even slimmer chances of receiving renal transplants."[5]

Is it the Indian mind-set to be blamed or acknowledged as the pivotal factor in this discussion, is what intrigues one's mind. A leading Indian national newspaper

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[3] Nilanjana S. Roy, *Freedom from Gender: Imagining Equality for Men and Women in India*, FORBES INDIA, August 16, 2013, available at http://forbesindia.com/article/recliner/freedom-from-gender-imagining-equality-for-men-and-women-in-india/35879/1 Last visited on March 5, 2017.

[4] *Id.*

[5] Saritha Rai, *The Fifth Metro: Given by women, received by men*, THE INDIAN EXPRESS, OPINION, March 16, 2016, available at http://indianexpress.com/article/opinion/columns/the-fifth-metro-given-by-women-received-by-men/ Last visited on March 5, 2017.

daily, on the occasion of International Women's Day, 8th March, 2015, published an article titled *"Women's giving nature puts them at the forefront of organ donation"*[6] in which Dr Bharat Shah, Director of the Renal Science Department in Global Hospital in Mumbai, who also runs the Narmada Kidney Foundation, reportedly said,

"It is true that in organ transplantation around 75-80% donors are women. This may be attributed to the caring and giving nature of women... hence, when the need comes, we see them at the forefront, be it for donating kidney or liver to their brother, husband or son."[7]

This paper aims to analyze whether the phenomenon of more women as organ donors in India is linked to their socio-economic status. It aims to look into the factors which lead to maximum organ/tissue donors in case of both altruistic (legal) and commercial (illegal) live organ/tissue donations in India, to be women.

B. The role played by *Body Politics*

Belinda Bennett states that health care is no longer just populated by patients and doctors but is infested with health consumers and health care providers.[8] These new role players have brought to fore the economic dimensions of health and health care, thereby *"transforming health care into an agreement over the provision of goods and services."*[9] Needless to say, the influence of power is with the economically privileged in the health care arena, including that relating to kidney transplants. Nancy Schepher-Hughes[10] very succinctly sums up this power and hierarchy in the following words:

"In general, the circulation of kidneys follows established routes of capital from South to North, from East to West, from poorer to more affluent bodies, from black and brown bodies to white ones, and from female to male or from poor, low status men to more affluent men. Women are rarely the recipients of purchased organs anywhere in the world."

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[6] *Women's giving nature puts them at the forefront of organ donation: Doctors,* DNA, March 8, 2015, available at http://www.dnaindia.com/mumbai/report-women-s-giving-nature-puts-them-at-the-forefront-of-organ-donation-doctors-2066881 Last visited on March 5, 2017.

[7] *Id.*

[8] BELINDA BENNETT, HEALTH LAW'S KALEIDOSCOPE -HEALTH LAW RIGHTS IN A GLOBAL AGE 64-65 (2008).

[9] *Id.*

[10] Nancy Schepher-Hughes, *Parts Unknown -undercover ethnography of the organs-trafficking underworld,* Ethnography 29-73 Vol. 5(1), Sage Publications, available at http://eth.sagepub.com/content/5/1/29.abstract Last visited on March 1, 2017.

The term *"body politics"* implies *"the practices and policies through which powers of society regulate the human body, as well as the struggle over the degree of individual and social control of the body."*[11] The term finds relevance in the instant discussion, wherein the woman-donor, though, on the face of it, appears to take the decision to donate her organ; the decision is mostly that of the influential members of the family, who are generally the male members of the household and the in-laws. The situation in this perspective, reiterates what the radical feminists have been saying over the years.

Sometimes there is no coercion or undue influence, but rather the woman herself thinks that she is duty-bound. It is the patriarchal notions and attributed gendered roles in an Indian household which act on the background of such a decision-making on her part. This politics has further ingrains in situations where the woman is unemployed and does not have financial security. A senior transplant surgeon at a Hyderabad Hospital specializing in kidney and liver transplants,[12] said that sometimes even if the recipient-husband has been a drunkard, and is in the habit of beating up his wife, the wife has come forward to donate part of her liver, to save his life. She is ready to incur this life-risk for her husband, since she is socially and financially dependent upon him. Leaving her husband to die and walking out of the relationship is not always the option to such a woman, when her own parents might not be willing to have her back in her family, her in-laws are not supportive and have an eye on her husband's property and she is financially dependent upon her husband.

When it comes to illegal selling of organs by women, as have been reported in big-pockets of India,[13] the debate surrounding commodification of human organs is often juxtaposed to surrogacy, where, in crude terms, a woman rents her womb for money in return. It is to be noted that in both these situations, the women come from poor households, and the promised sum of money in return of the organ transplant or surrogacy,[14] is sometimes meant for a daughter's marriage, paying

[11] C. Pateman, *Body Politics- Feminism and Racial*, WOMAN, BODIES, ABORTION AND POWER, JRANK, (August, 2014).

[12] Interviewed on February 20th, 2015 at Hyderabad, India. The name of the Hospital and the Doctor is not disclosed in the paper on the request for anonymity made by the Doctor. Complete transcript of the meeting is available with the author.

[13] Situations relating to Tamil Nadu and West Bengal having been discussed earlier in this paper.

[14] There is no law regulating surrogacy in India; there have been multiple Draft Assisted Reproductive Technology Bills; the latest Draft Assisted Reproductive Technology Bill, 2014 is with the Cabinet and has not been made available for public access till date.

off of husband's debts, children's education and sometimes just to make both ends meet. A surrogate undergoes the artificial process to become a mother for two strangers who are the commissioning parents. Here too the health risks involved are not less; but, there is no removal of an organ from her body. However, the same cannot be justified; for it is nothing but body politics, where a woman's body is made to be used by her circumstances and her family to fend money. In a documentary titled *"Can we see the Baby Bump, Please?"* directed by Surabhi Sharma,[15] one surrogate mother says that with the money she got from surrogacy, her family has been able to purchase their own place to live; and she is again here to be a surrogate, so that she can make money for her children's education. Another surrogate said, this way she was able to help her husband financially.

The hue of body politics thereby can be said to be subduing the autonomy of a woman in both the instances, that of commercial surrogacy, and illegal-commercial sale of organs by women.

C. Commercial transactions pertaining to live Organ/Tissue Transplants: *a glimpse of some Indian States*

"Issues of consent and exploitation related to organ removal are complicated by the fact that often victims consent to the removal of their organs, and may even receive the agreed payment for them. However, as is common in situations of trafficking for any exploitative purpose, the provision of the 'service' is driven by extreme poverty."[16]

Over the last few years, organ transplants have become common and with the increase in frequency of the number of organ transplants, the demand for organs has also increased. The demand is huge and the moneyed fulfil this need at the cost of the poor.[17] With the rapid advancement in medical science the chances of saving the ill and even the old has increased. Resultantly, the list of prospective recipients of organ transplants has also increased in a humongous proportion. The ratio of expectant recipients and available donors is thus, becoming substantially disproportionate. The poor are lured and sometimes deceived into donating their

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[15] *See* https://surabhisharma.wordpress.com/2012/10/16/may-we-see-the-baby-bump-please/ Last visited on March 7, 2017.

[16] The Vienna Forum to fight Human Trafficking ,13-15 February 2008, Austria Centre Vienna, Background Paper, 011 Workshop: Human Trafficking for the Removal of Organs and Body Parts, available at https://www.unodc.org/documents/human-trafficking/2008/BP011HumanTraffickingfortheRemovalofOrgans.pdf Last visited on April 10, 2016.

[17] Thomas Schmitt, *A Pound of Flesh – Organ trade thrives in Indian slums* (2007), available at http://www.spiegel.de/international/world/0,1518,488281,00.html Last visited on February 10, 2017.

organs for consideration. Despite the law penalizing commercial dealing in organs the black dealings take place in the open daylight.

"India's slums are a gold mine for organ traders, full of poor people desperate enough to sell their organs. But with a healthy kidney fetching just €500, most donors only make enough to pay off their debts — and end up even poorer in the long term."[18]

The Transplantation of Human Organs and Tissues Act, 1994 aims to facilitate human organ transplants and regulate them to avert commercial transactions. Only altruistic organ/tissue donations are permitted within the purview of law, and any commercial dealing in the organs is a crime. However, the law has not been successful in the last 21 years to curb commercial dealings in human organ transplants which still take place in a hush-hush scenario wherein middlemen/touts work hand-in-glove with some of the medical personnel and authorities in the country to facilitate selling and buying of human organs.

In 2007 a note attached to a tree trunk in the buzzing city of Chennai, across the road in front of the Central Hospital, carried the words scribbled away saying, *"top notch kidney."* The offer price was 30000 Rupees and the author said that he was in urgent need of money to pay off his debts.[19] The situation is equally bad in the neighbouring refugee camp of the tsunami victims, popularly known as *'Tsunaminagar.'* A former middleman reveals that a healthy human kidney can easily be arranged here for a price of around 20000 Rupees to 40000 Rupees.[20]

"The kidney donors are often poor young women," says George Kurian from the Christian Medical College Hospital, Vellore. *"The buyers, on the other hand, are usually older and well-off men."*[21] A lady who has donated a kidney said:

"My husband needs his strength for work, and could not work if he had the operation." "Yes, I work too."[22]

One of the tsunami-hit villages, Villivakkam, a slum in the northern end of Chennai, was colloquially known as *'Kidneyvakkam'* or *'Kidney town.'* Almost every woman in this small town has at least one member who has donated a kidney for money.

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Lawrence Cohen, *Where it hurts: Indian Material for an Ethics of Organ Transplantation*, Daedalus, Vol. 128, No. 4, Bioethics and Beyond 135-165 (Fall, 1999).

Samantha Grant in her article titled *"Human Kidneys for Sale"*,[23] writes about her visit to Villivakkam. She goes on to say that, at a local lady's house, she was able to find women willing to talk about kidney sales. Selling a kidney was well known there as the women's way of earning money. (Samantha was told by the women present there that only four men had donated their kidney in the entire village.) Geetha was one such woman who had recently sold her kidney to her former employer *"out of compassion"*. She was promised $1000 but given only $750 in hand. Though her operation was okay, Geetha refused to recommend to anyone to donate one's kidney like she had done.[24] Samantha even visited the home of a broker who had herself donated a kidney in the past. According to the information received from the broker, the recipient generally pays $1300 for a kidney, of which $1000 only is promised to the donor who many a time receives only half the amount as the rest is usurped and divided among the brokers and the Doctors. The broker claimed to have successfully executed around 60 to 70 such deals. It is noteworthy that most of the women-donors Samantha interviewed were deeply enmeshed in debts, or needed the money for the dowry of the daughter of the family.[25]

It is alleged by the health activists and even the medical practitioners that, there exists a strong nexus amongst the hospitals, touts and doctors which has eventually lead to West Bengal becoming a hub of black marketing of kidney.[26] A kidney racket was reported in The Hindu in January, 2013 in Bangalore. A Police team arrested seven persons for running a kidney transplantation racket, allegedly involving government officials and major hospitals in the city.[27] When there are no other known links between the donor and the recipient, it is but obvious that the common factor to bring them together is *'money'* and the presence of a well-oiled interstate racket of sale of human organs;[28] and more often than not, the donor is a woman.

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[23] Samantha Grant, *Human Kidneys for Sale*, MARKETPLACE WORLD July 20, 2006, available at http://www.marketplace.org/topics/world/human-kidneys-sale Last visited on Last visited on February 10, 2017.

[24] *Id*.

[25] *Id*.

[26] *The Great Kidney Bazaar*, THE TELEGRAPH (Kolkata) November 13, 2011, available at http://www.telegraphindia.com/1111113/jsp/7days/story_14743553.jsp Last visited on March 9, 2016.

[27] Articles in THE HINDU pertaining to the issue are available at http://charaka.hpage.co.in/blore-kidney-racket_21126786.html Last visited on February 10, 2017.

[28] Anuja Jaiswal, *Chattisgarh's Renal Transplant Patients go Kidney Shopping to West Bengal*, THE TIMES OF INDIA (Raipur) February 8, 2013, available at http://articles.timesofindia.indiatimes.com/2013-02-08/raipur/36992706_1_donor-authorization-committee-authorisation-committee Last visited on February 10, 2017.

The state of Tamil Nadu, however, took cognizance of the issue by addressing the paucity in human organs and issued a number of Government Orders, wherein declaration of brain death was made mandatory in Government Medical College Hospitals in Chennai.[29] In 2008, Tamil Nadu appointed an administrator to chart out its deceased donor programme; post which a diktat to hospitals to identify brain death compulsorily was issued.[30] The State floated a novel organ-sharing formula between public and private hospitals. By 2012, the State had managed to get 78 cadaver donations.[31]

D. WHO Guiding Principles[32]

The WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation[33] were passed in 2010[34], as endorsed by the sixty-third World Health Assembly in May 2010, in Resolution WHA63.22. The 2010 Guiding Principles *"intended to provide an orderly, ethical and acceptable framework for the acquisition and transplantation of human cells, tissues and organs for therapeutic purposes."* These Principles retained the essential points of the 1991[35] Principles, and further incorporated new provisions in response to the current trends in transplantation, *"particularly organ transplants from living donors and the increasing use of human cells and tissues."*

Guiding Principle 3 states *inter alia* that adult living persons may donate organs as permitted by domestic regulations. However, in general *"living donors should be genetically, legally or emotionally related to their recipients."*

Live donations, it is stated, are acceptable when the following conditions are fulfilled, namely:

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[29] G.O. (Ms.) No. 75, Dated: March 3, 2008, available at http://cms.tn.gov.in/sites/default/files/gos/hfw/hfw_e_75_2008.pdf Last visited on February 10, 2017; and G.O. (Ms.) No. 6, Dated: January 8, 2008, available at http://cms.tn.gov.in/sites/default/files/gos/hfw/hfw_e_6_2008.pdf Last visited on February 10, 2017.

[30] Malathy Iyer, *Life Can Begin After Death; Rays of Hope,* THE TIMES OF INDIA (Bangalore) July 29, 2013.

[31] *Id.*

[32] *See* also A Report of the Amsterdam Forum On the Care of the Live Kidney Donor: Data and Medical Guidelines (2005), available at http://www.kidneyregistry.org/docs/amsterdam_guidelines.pdf Last visited on March 10, 2017.

[33] Available at http://www.who.int/transplantation/Guiding_PrinciplesTransplantation_WHA63.22en.pdf Last visited on March 10, 2017.

[34] Hereinafter referred to as the *"2010 Guiding Principles"*.

[35] Available at http://www.transplant-observatory.org/SiteCollectionDocuments/wha44resen.pdf Last visited on March 10, 2017.

- donor's informed voluntary consent is obtained;
- professional care of donors is ensured and follow-up is well organized,
- selection criteria for donors are scrupulously applied and monitored.

The Guiding Principles require live donors to be well-informed of the probable risks, benefits and consequences of donation in a complete and understandable fashion; and that they should be acting willingly, free of any undue influence or coercion.[36] In case of live donation, a lot of precautions should be taken; one of them being psychological evaluation to avert any form of coercion being exercised on the donor or the existence of any form of commercialization; which should most importantly be looked into, in the case of live donation by unrelated donors.

E. The Indian Legal Scenario pertaining to live organ/tissue transplants

In India, the Transplantation of Human Organs and Tissues Act, 1994 and the Transplantation of Human Organs and Tissues Rules, 2014 aim to regulate removal, storage and transplantation of human organs and tissues for therapeutic purposes (both in case of live organ donations, and when the donor is brain-stem dead), and prevent commercial dealings in human organs and tissues, the same being made punishable by the Act.[37] The **live organ/tissue** transplants dealt with, addressed and regulated by the Act, can be categorized into three broad heads:

- Organ donation by a near-relative
- Organ donation by reason of affection and attachment for the recipient by the donor
- Swap organ donations

A **near relative**, for the purposes of the Act, means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter.[38] Where the proposed transplant of organs is between near relatives[39], the Competent Authority[40] or the Authorisation Committee (in case donor or recipient is a foreigner) is to give permission for the transplant.

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[36] WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, 2010, Guiding Principle 3.
[37] Transplantation of Human Organs and Tissues Act, 1994, Chapter VI (Sections 18-22).
[38] Transplantation of Human Organs and Tissues Act, 1994, Section 2(i).
[39] Transplantation of Human Organs and Tissues Rules, 2014, Rule 18.
[40] "Competent Authority" means the Head of the institution or hospital carrying out transplantation or committee constituted by the head of the institution or hospital for the purpose - Transplantation of Human Organs and Tissues Rules, 2014, Rule 2(c).

The Authority is to evaluate[41] documentary evidence of relationship[42]; and documentary evidence of identity and residence of the proposed donor, ration card or voters identity card or passport or driving license or PAN card or bank account and family photograph depicting the proposed donor and the proposed recipient along with another near relative, or similar other identity certificates like AADHAAR Card.[43]Any document with regard to the proof of residence or domicile and particulars of parentage should be relatable to the photo identity of the applicant.[44]

If in the opinion of the Competent Authority, the relationship between the proposed donor and recipient is not conclusively established, it may in its discretion direct for DNA Profiling.[45]

Where the proposed transplant is between a married couple the competent authority or Authorisation Committee (in case donor or recipient is a foreigner) must evaluate the *factum* and *duration* of marriage and ensure that documents such as marriage certificate, marriage photograph etc. are kept for records along with the information on the number and age of children and a family photograph depicting the entire family, birth certificate of children containing the particulars of parents and issue a certificate in Form 6 (for spousal donor).[46]

When the proposed donor and the recipient are **not near relatives, that is, when the organ donation is proposed to be made by reason of affection and attachment for the recipient by the donor**, the transplantation shall not be conducted without the prior approval of the Authorisation Committee.[47] The Authorization Committee is to *inter alia*[48]:

- *evaluate that there is no commercial transaction between the recipient and the donor;*
- *prepare an explanation of the link between them and the circumstances which led to the offer being made;*

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[41] Transplantation of Human Organs and Tissues Rules, 2014, Rule 18(1).

[42] Example relevant birth certificates, marriage certificate, other relationship certificate from Tehsildar or Sub-divisional magistrate or Metropolitan Magistrate or Sarpanch of the Panchayat, or similar other identity certificates like Electors Photo Identity Card or AADHAAR card.

[43] Transplantation of Human Organs and Tissues Rules, 2014, Rule 18(1).

[44] *Id.*, Rule 18(5).

[45] *Id.*, Rule 18(2).

[46] *Id.*, Rule 18(5).

[47] The Transplantation of Human Organs and Tissues Act, 1994, Section 9(3).

[48] Transplantation of Human Organs and Tissues Rules, 2014, Rule 7(3).

- *examine the reasons why the donor wishes to donate;*
- *examine the documentary evidence of the link;*
- *examine old photographs showing the donor and the recipient together;*
- *evaluate that there is no middleman or tout involved;*
- *evaluate that financial status of the donor and the recipient;*
- *ensure that the donor is not a drug addict; etc.*[49]

Cases of **swap donation**[50] are to be approved by Authorisation Committee of hospital or district or State in which transplantation is proposed to be done.[51] Swap donation[52] of organs shall be permissible only from near relatives of the swap recipients.[53]

The Indian legal framework[54] regulating live organ/tissue donations well-equips the Competent Authority and the Authorization Committee, as the case may be, to

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[49] *See* also Kuldeep Singh and another v. State of Tamil Nadu and others, AIR 2005 SC 2106.

[50] Swap donation is when:

"(a) any donor has agreed to make a donation of his human organ or tissue or both before his death to a recipient, who is his near relative, but such donor is not compatible biologically as a donor for the recipient; and

(b) the second donor has agreed to make a 'donation of his human organ or tissue or both before his death to such recipient, who is his near relative, but such donor is not compatible biologically as a donor for such recipient; then

(c) the first donor who is compatible biologically as a donor for the second recipient and the second donor is compatible biologically as a donor of a human organ or tissue or both for the first recipient and both donors and both recipients in the aforesaid group of donor and recipient have entered into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility in the group" - Transplantation of Human Organs and Tissues Act, 1994, Section 9(3A).

[51] The Transplantation of Human Organs and Tissues Act, 1994, Section 9(3A); and Transplantation of Human Organs and Tissues Rules, 2014, Rule 7(4).

[52] *See* Reeta Dhar, *Swap and Domino Organ Transplantation Transgressing Socio-Cultural and Political Boundaries*, 3 Intl. Journal of Interdisciplinary Research and Innovations 84-89 (2015).

[53] Transplantation of Human Organs and Tissues Rules, 2014, Rule 7(4).

[54] The Orissa High Court in Arup Kumar Das and others v. State of Orissa and others, 2010 (2) OLR 837 observed that even though the Transplantation of Human Organs Act, 1994 had existed for so many years, many an aim and objective of the Act had remained largely unfulfilled. Stating the same, the Court issued the following directions to the State Government, so that the true purpose of the Transplantation of Human Organs Act, 1994 could be fulfilled:

- The State Government was required to issue necessary directives to the Authorisation Committees to the effect that, while dealing with applications for kidney transplantation,

see that frivolous claims of relationship and/or love and affection are not made by the donor and the recipient. The clause, in particular, with respect to married couples, if strictly adhered to can substantially address the exercise of undue influence or emotional pressure upon the wife to donate her organ to her husband. However, in stark contrast to the aims and objectives of the law, the societal situation is not quite how the law envisaged it to be.

F. Proceedings of a meeting of the Competent Authority, at a leading private Hospital in Bangalore in April, 2015.

The author had the opportunity to attend and observe the proceedings of a meeting of the Competent Authority,[55] at a leading private Hospital in Bangalore on 25th April, 2015. This hospital is a 500-bed health care centre that provides multi-speciality care through global standard medical technology.[56]

The Competent Authority means the Head of the institution or hospital carrying out transplantation or committee constituted by the head of the institution or hospital

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in the case of a single unrelated donor and recipient, absence of HLA matching should not be considered a reason for denying permission for renal transplantation;

- That the State Government may consider reconstitution of the Authorisation Committee with competent members who possess up to date knowledge and are well-versed with the time to time scientific developments;
- The State Government was directed to set up facilities for removal, storage and transplantation, at all the three Government Medical Colleges in the State and for the same, necessary financial support to such Government hospitals was directed to be provided at the earliest. The Court also directed the recruitment of competent medical personnel for the aforesaid purpose;
- The State Government was directed to issue necessary Notifications fixing time limits within which the applications for transplantation of human organs may be processed by the Authorisation Committee and also the time limit for disposal of the statutory appeals; and
- The State Government was also directed to issue necessary direction fixing time limits for dealing with the applications under Chapters- III and IV of the Transplantation of Human Organs Act, 1994.

The Secretary in the Department of Health, Union of India was also directed to convene quarterly/half yearly meetings of all the Members of the Authorisation Committee of all the States, in order to apprise them of all the latest scientific developments relevant to the exercise of their authority under the Transplantation of Human Organs Act, 1994.

[55] Where the proposed transplant of organs is between near relatives, the Competent Authority or the Authorisation Committee (in case donor or recipient is a foreigner) is to give permission for the transplant -Transplantation of Human Organs and Tissues Rules, 2014, Rule 18.

[56] The name of the Hospital is not disclosed in the paper on the request for anonymity made by the concerned authorities at the Hospital. Complete transcript of the meeting is available with the author.

for the purpose.[57] The Competent Authority of this Hospital comprised a body of three members, namely: the Head of the institution, the head of the Nursing Department of the Hospital and the Legal Advisor of the Hospital.[58] The instant meeting was convened to consider 5 Cases of proposals of kidney donations by near relatives, respectively.

Case I: The recipient was a 46 years old male. He was a primary school teacher at Hassan district of Karnataka. He had been undergoing dialysis, thrice a week, lately. The donor in this case was the elder brother of the recipient. The donor (a farmer) and the recipient lived in a joint family comprising 19 members, the donor and the recipient were five brothers. The recipient's wife's blood group didn't match with that of the recipient. The Competent Authority was also told that the mother of the donor and recipient, had come forward to donate her kidney, but the two brothers had refused, keeping in mind the age of the mother and the fact that she was diabetic. The recipient had two daughters and the donor had a son and a daughter. On being asked, the reason for agreeing to donate his kidney to the recipient, the donor said that his younger brother (recipient) had no son, and therefore, no one to look after him in the future. The Competent Authority was also informed that they were one big family where the health of both the convalescent brothers, post-operation would be properly taken care of. The bond and love in this joint family, is what came out as the chord of this entire decision making by the donor and the recipient to undergo the kidney transplant.

Case II: The recipient was a 59 years old male. He was the Chief Account Officer at a District in Karnataka. The donor, in this case, was the wife of the recipient. She was a house wife. The couple had two children: a daughter, married to a software engineer in the United States; and a son, who too was married, whose wife had just had a baby. Their son was working as an engineer in Doha, and post the illness of his father, had recently moved back to India. The donor-wife said, she being the wife, she felt it was okay for her to donate her kidney. *"One kidney is enough! And if not me, then who?"* she said. On being asked, why their son, who was comparatively fitter and young was not donating, she said, that their son has a future ahead and living with one kidney would be difficult. When

[57] The Transplantation of Human Organs Rules, 2014, Rule 2(c).

[58] The proceedings of the meeting were video-recorded. Other persons present at the venue of the meeting were the transplant co-ordinator of the Hospital, the camera man, one representative of the administrative staff of the Hospital and the author. The instant meeting was convened to consider 5 cases of proposals of kidney donations by near relatives, respectively.

the son was asked about his duty towards his convalescent parents (the donor and recipient) post-operation, the son said that he could not extend anything beyond *"moral support."* The donor-wife told the Competent Authority that she had no one to look after their post-operative care, and therefore, she would be hiring help for doing the cooking and other household chores, till she recovered after the operation. What came out clear in this case was an inherent tension between the ailing father and the willing donor-wife-mother on one side, and the son on the other, the son being ready to do only the bare minimum required. In stark contrast to the bond of the joint family in Case I, in this case, even the immediate nuclear family members seemed apathetic to the situation of the donor and the recipient.

Case III: The recipient was a 39 years old male. The donor was his mother, who was approximately 50 years old. The donor-mother was married to her maternal uncle at the age of about 9 and was pregnant with the recipient-son at the age of about 11. The age difference of just about 11 years between the recipient-son and the donor-mother was something which stunned the Competent Authority. The only birth proof of the donor-mother was the ration card. Neither the donor or the recipient had birth certificates nor school certificates, as both of them had never gone to a school. The age of the donor-mother was written as 49, 50 and even 53 in three different documents in the file of this Case. The recipient's brother was completely fit but he was never approached by the recipient asking him for a kidney. The recipient's father (donor's husband) was tested for probable kidney donation; however, his kidney was asymmetrical for the said transplant. The donor-mother, seemed too docile to say no to a transplant. She seemed to have no issue with donating her kidney to her son. She was confident that her daughter-in-law (the recipient's wife) would take care of her post the operation. The Competent Authority was told that the recipient-son was married to his mother's (donor's) brother's daughter; that is, his first cousin.

Case IV: The recipient was a 55 year old man. He had the business of poultry-farming and was also an active member of the Panchayat and hailed from a district of Karnataka, neighbouring the outskirts of the city of Bangalore. The donor was his wife. The recipient-husband and the donor-wife had an unmarried son, an unmarried daughter, both of whom were studying; and a married son. The recipient had six elder brothers. The eldest brother had offered to donate his kidney. However, herein, the donor-wife, felt it was okay and natural for her, being the wife, to go ahead and donate her kidney to her husband who was undergoing so much of trouble because of the kidney failure and regular dialysis.

Case V: The recipient was a 40 years old practising Advocate from one of the Districts of Karnataka. He had been suffering from severe diabetes from the last

eight years and also had high blood pressure. He had been undergoing dialysis since the last one year. The donor was his 34 years old wife. The couple had an 11 year old daughter and a 5 years old son. They proposed to undergo the transplant in the month of June, keeping in mind the vacation-time of their daughter's school. The couple's parents had volunteered to take care of the health of the couple and the wellbeing of the couple's children, during the post-operation days.

In all the five Cases, the recipient of the kidney was a man. Except for Case I, what came out as a stark observation was the inherent responsibility rendered upon the woman in each of these families to come forward and donate her kidney. Was her consent free? The donor in Case II, felt duty-bound to save her husband's life, in the absence of anything but only *"moral support"* from her son. The donor in Case III was at the most vulnerable of situations, and seemed too intimidated by her family to show any signs of dissent. The very fact that she had been a child-bride and had given birth to her son (the recipient) at a very early age, was proof enough that lack of education and autonomy, gave her very little say in any decision making process in her household. The donor in Case IV hailed from a well-to-do happy family, but she again felt duty-bound to donate her kidney to her husband, and was unwilling that her children come forward to do the same, as she felt they were young and had a bright future ahead of them. The donor in Case V was a young lady of the age as less as 35, she had two little children to look after. The couple seemed to have no other option, they said, other than the wife coming forward and saving her husband's health.

The present scenario of nuclear families in contrast to the traditional joint families (as in Case I), seemed to have narrowed the option available to a patient in need of organ transplants. The couples generally don't wish to jeopardize the future of their children, and sometimes, well-settled children, do not seem so keen to come forward and donate an organ and incur health risk of any kind.

In each of these five Cases, the donor was interviewed in the presence of the recipient and in a couple of cases, other family members were also present at the time of the donor's interview. It is proposed that the practice of the Competent Authority to interview the donor in the presence of other family members, should be avoided. Apart from being questioned in the group, the donor should also be questioned individually, wherein the donor can feel free to speak her/his heart out and revert out of a coerced decision.

G. Excerpts from an interview of a clinical psychologist working as a part of the transplant team

The author had the opportunity to interview a clinical psychologist (on May

11th, 2015) who works as a part of the transplant team at a leading Bangalore Hospital.[59]

The author was told that before the file of a donor and recipient is placed before the Competent Authority/Authorization Committee, the same has to go through multiple rounds of screening by the transplant team, which includes along with the general physician, the transplant specialist, other senior Doctors in the hospital, also a team to overlook the mental set up of the donor and the recipient. The latter team in the case of this hospital in Bangalore, comprised a psychiatrist and a clinical psychologist (the interviewee).

The clinical psychologist apprised the author about the multiple rounds of interviews and discussions that take place to screen the mental set-up of the donor, in particular. More often than not, she said that the donor is a woman; and when it comes to married couples, except for once when the donor was a husband, in all the other cases the donor was the wife and the husband the recipient. The clinical psychologist apprised the author that the ultimate aim of their team is to protect the interest of the donor. Through multiple sittings the donor is interviewed, so is the recipient. The donor is interviewed in person and also in the presence of others. The donor is interviewed in person, individually on multiple occasions in order to gauge the change in behaviour, if any, for the clinical psychologist and the psychiatrist in the team to draw a better understanding of the genuineness of the free consent of the donor. The donor is given sufficient time to open up. The clinical psychologist said that there have been occasions where the woman-donor is unwilling to donate but is afraid of consequences if she refuses to donate. Generally wives of abusive husbands, or husbands who are drunkards or drug-addicts, feel it to be a sheer waste of their life to donate an organ for a husband who might tread back to the same path which lead to his illness in the first place. More often than not, it is the financial security issues and the societal pressure, the pressure to play the role of a sacrificing wife, which stand in the way of these women taking a stand of their own. However, the team doesn't give the green signal from its side, unless it is absolutely sure about the absence of duress or undue influence in the decision and consent of the donor. Coming to the aid of the unwilling donor, who is afraid of social stigma and/or ostracising by the family, for refusing to donate her organ, the team at this hospital often gives medical reasons for their inability to accept the particular person as a donor.

[59] The name of the clinical psychologist is not disclosed in the paper on the request for anonymity made by her. Complete transcript of the interview is available with the author.

This conversation with the clinical psychologist drew a picture which makes one realise that things are not as bleak as they seemed to be. By the time the matters arrives before the Competent Authority/Authorization Committee for screening, the transplant team at this hospital does multiple reviews of the medical and psycho-social set-up of the donor and the recipient, leaving the final decision-making at the end of the Competent Authority/Authorization Committee, a firmer and easier process.

H. Looking at some other Countries

According to the data provided by the United States Department of Health and Human Services, published in 2013, 61% of living donors were women and 39% were men.[60] An article published as early as in 1996[61] talked about *"gender discrepancies"* among living related kidney transplants in the United States, which among other things, highlighted the role of social reasons which may contribute to the difference in donation rates. Economic factors also tend to contribute to the overall gender disparity as was reported in an article in the American Journal of Kidney Diseases in 2000.[62] It was reported that among spouses, the gender disparity in donation rate is greater, it was also put forth that the same could be largely attributed to an overwhelming predominance of wives among spousal donors.[63]

"In theory, the decision whether someone is a suitable living organ donor seems a straightforward matter. Laws and professional guidelines list criteria such as legal majority, free and informed consent, lack of equivalent therapeutic alternatives, and absence of financial recompense. Although some cases are indeed fairly unproblematic, practice shows that it is not always quite so easy, especially when emotionally related donors are concerned."

-Nikola Biller-Andorno, Henning Schauenburg,

It's only love? Some pitfalls in emotionally related organ donation,

27 J Med Ethics 162-164 (2001)

The reports from Norway narrate a similar situation of gender disparity when it comes to live human organ donations.[64] Data from Germany on kidney transplants

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[60] Available at www.organdonor.gov/about/data.html Last visited on March 10, 2016.

[61] Wendy E. Bloemergen and Ors., *Gender Discrepancies in Living Related Renal Transplant Donors and Recipients,* 7 J. Am. Soc. Nephrol. 1139-1144 (1996).

[62] D Zimmerman, *Gender disparity in living renal transplant donation,* 36 (3) Am J Kidney Dis. 534-540 (2000).

[63] *Id.*

[64] Cecilia M. Oien and others, *Gender imbalance among donors in living kidney transplantation: the Norwegian experience,* 20(4) Nephrol. Dial. Transplant. 783-789 (2005).

also reiterates that women are about twice as likely to donate to their husbands as the men are to their wives.[65] A report by Dr Nikola Biller Andorno of the Department of Medical Ethics, University of Gottingen, Germany states *inter alia* that:

"The expansion of living organ donation has been accompanied by an increasing gender imbalance among donors. In 1988 the female to male-donor ratio in the USA was 1.2 (55% female vs 45% male donors), and has since then risen steadily to a 1.4 in 1998 (58% female vs. 42% male donors)."

A large Canadian transplant centre reported that 36% of wives who were acceptable for donation did in fact donate in comparison to 6.5% of husbands who donated.[66] It is noteworthy that in each of these countries, though more number of women are donors of organs, very few women are organ recipients. Studies in these reports acknowledge that *"economic, attitudinal, or psycho social factors"* are the most likely explanations for the sex differences in organ transplantation.[67]

Reports warrant the presence of women organ donors outnumbering men organ donors almost everywhere across the globe[68]; however, no law in the world is expressly vigilant towards this issue.

A 2013 report suggests that women aged 35-54 years are significantly more committed to donating their organs than any other demographic in England.[69] In the United Kingdom[70] all donors and organ recipients are supposed to see an Independent Assessor (IA) who is trained and accredited by the Human Tissue Act, 2004[71]. The IA is required to interview the donor and recipient both separately and together, the purpose of the interview being *"to ensure that donors are not forced to do*

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[65] *Id.*

[66] *See* Roger Dobson, *More women than men become living organ donors,* 325 BMJ 851 (2002).

[67] *Id.*

[68] The only reported exception being the country of Iran. *See* S Taheri and Ors., *Gender bias in Iranian living kidney transplantation program: a national report,* 24 (4) Clin. Transplant. 528-534 (2010).

[69] Optimisia Research, *NHSBT Organ Donation: 2013 Research* (2013), available at http://www.nhsbt.nhs.uk/to2020/the-strategy/supporting-documents/nhsbt-organ-donor-report-140813.pdf Last visited on February 1, 2017.

[70] In the United Kingdom, the law regarding removal of organs from people after their death is set out in the Human Tissue Act 2004, covering England, Wales and Northern Ireland; and the Human Tissue (Scotland) Act, 2006 applying to Scotland.

[71] *See* Human Tissue Act, 2004, Sections 3, 16-25 and 13-15; *See* also the United Kingdom Guidelines for Living Donor Kidney Transplantation (2011), available at https://www.bts.org.uk/Documents/Guidelines/Active/UK%20Guidelines%20for%20Living%20Donor%20Kidney%20July%202011.pdf Last visited on February 1, 2017.

something against their wishes, to ensure that no reward has been sought or offered and to ensure that the donor has the capacity to make an informed decision."[72] The Human Tissue Authority (HTA) interviews take place after the donor has been deemed medically and clinically suitable to donate by their medical practitioner; the Living Donor Coordinator (LDC) organizes the interview at a time convenient to the donor, recipient and the IA.[73] After the interview, the IA is required to submit a report of the interview to the HTA.[74] The HTA is required to arrive at a decision on all cases that are referred to it by the transplant unit and once the decision is made, the concerned LDC and the medical practitioner with responsibility for the donor will be informed; and the LDC further communicates the decision to the donor and recipient on the HTA's behalf.[75]

Data warrants the prevalence of women as donors; however, the same has not been able to draw the attention of the legal fraternity anywhere in the world by far.

I. Thinking aloud and arriving at recommendations, aiming for plausible solutions:

"One kidney is enough! And if not me, then who?"[76]

Operation of patriarchy, family and societal dynamics coupled with the financial status of women came out as some of the multifarious factors driving the existent scenario in India. One can find the hue of a familial tacit expectation towards the female being the natural donor within the family. Even if she is a working woman, financial impact of organ donation from her lost wages is considered less significant by her family members, than would have been looked upon, in the case of loss of income if the donor had been a male member of the household.[77]

In case of commercial-illegal sales, women felt necessitated to put their healthy bodies into use, keeping in mind that their husbands toil at work, despite the fact that many of them were working women themselves.[78] The notion of being *the*

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[72] Human Tissue Authority, *The Role of Human Tissue Authority in living organ donation* (2014), available at https://www.hta.gov.uk/sites/default/files/Living_Donor_Leaflet_July_2014_for_Web.pdf Last visited on February 1, 2017.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *See* Section F, Case II of this article.
[77] Fangmin Ge and others, *Gender Issues in Solid Organ Transplantation and Donation*, 18 ANN TRANSPLANT 508 (2003).
[78] *"My husband needs his strength for work, and could not work if he had the operation."*

man of the house, the father figure, sometimes makes the family consider the health of its male members as that of prime importance, subduing the health needs of the women.

"The pressure stems from women feeling more responsible for the welfare of the family. Mothers and sisters counted for the most frequent donors after the wives."[79]

Narayana Health, a large Bangalore-headquartered hospital chain run by well-known cardiac surgeon Devi Shetty acknowledged that 65 per cent of kidney donors in its hospitals are women and 70 per cent of kidney recipients are male. The family's pressure on the woman, to donate, sometimes is so immense that, the Doctors have to protect the woman who is unwilling to donate her organ, by stating to her family that the woman is not *"medically fit"*, says Dr. Vincent Lloyd, head of department and senior consultant, Nephrology, of Narayana Hospitals.[80] Making the woman to gather confidence and confide in the Doctor or a social worker is a tough task at hand; and if a woman is able to put in her opinion in front of either of them, the doctors address the same by claiming her unsuitability as a donor by stating that she is not being medically fit.

Usha Bapat, a psychiatric social worker who has worked for decades in the field of renal transplants at St John's Hospital, Bangalore, presently a consultant at Jain Hospital, Bangalore acknowledges that, *"It is culturally ingrained in Indian women that they have to sacrifice."*[81] Bapat also said that she has come across cases where women who are divorcees or have been widowed, or are in any way financially dependent, considering it an obligation to repay their parental families by donating their kidneys.

Men have been reported to have a higher in- cidence of end-stage diseases in need of a trans- plant and are more inclined to ischemic heart disease or hypertension thereby resulting in their unsuita- bility as donors most of the time.[82] Even if the

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"Yes, I work too." -Lawrence Cohen, *Where it hurts: Indian Material for an Ethics of Organ Transplantation*, Daedalus, Vol. 128, No. 4, Bioethics and Beyond 135-165 (Fall, 1999).

[79] Saritha Rai, *The Fifth Metro: Given by women, received by men*, THE INDIAN EXPRESS, OPINION, March 20, 2016, available at http://indianexpress.com/article/opinion/columns/the-fifth-metro-given-by-women-received-by-men/ Last visited on March 20, 2016.

[80] *Id.*

[81] *Id.*

[82] Fangmin Ge and others, *Gender Issues in Solid Organ Transplantation and Donation*, 18 ANN TRANSPLANT 508 (2003).

same is not the case, some women who happen to be in need of an organ transplant, feel it wrong to, or are unable to ask for an organ donation from the healthy male members of the family. The author was told by the clinical psychologist that whenever the recipient of the organ was a woman, the donor generally was either her mother or sister; and there was only one case, among the many cases she had dealt with by far, where the husband had come forward to donate his kidney to his wife.

It is felt that the checks in place to ensure that the consent of the donor is free should be more vigilant when the donor is a woman. The Transplantation of Human Organs and Tissues Act, 1994 and the Transplantation of Human Organs and Tissues Rules, 2014, have put safeguards in place and penalize[83] proposals/acts of organ transplants where the commercial aspect is involved. However, newspaper reports and other assembled literature, in this paper, go on to suggest that the law has not actually been able to fulfil its aim, to rule out commercial dealings in human organ transplants in India, in totality. Commercial transactions do take place and the donors are almost always women from poor households, for sadly *"flesh in India moves up the social hierarchy, and not down."*[84] What can be said with respect to commercial dealings in organ transplants is that proper enforcement of the law is the ultimate solution to check that the poor and vulnerable women are not made victims by pimps and middlemen to give away an organ to fetch money for their impoverished family which is struggling to make both ends meet. The same has been succinctly put by Dr. Sunil Shroff, Managing Trustee of MOHAN Foundation[85] in the following words:

"There are two issues to be addressed. The first relates to the effectiveness in implementing the current law and the second the financial compulsions that lead to commercial donors to donate their organs."[86]

An express mention of the Commentary on Guiding Principle 3 of the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, 2010 becomes relevant in this discussion. It highlights, *inter alia,* the necessity of *"genuine and well-informed choice,"* thereby requiring full, objective, and locally relevant information and the direction to exclude vulnerable persons who are incapable of

[83] The Transplantation of Human Organs and Tissues Act, 1994, Chapter VI.
[84] SCOTT CARNEY, THE RED MARKET - ON THE TRIAL OF THE WORLD'S ORGAN BROKERS, BONE THIEVES, BLOOD FARMERS, AND CHILD TRAFFICKERS 61-89 (2011).
[85]http://www.mohanfoundation.org
[86] Sunil Shroff, *Organ Donation and Transplantation In India – Legal Aspects & Solutions to Help with Shortage of Organs,* 2(1) JNRT 23-34 (2009).

fulfilling the requirements for voluntary and knowledgeable consent.[87]

When it comes to live organ donations out of sheer altruism, between near relatives- a form of transplantation permitted and regulated by law, again the donor is mostly a woman. Though this woman-donor may be better placed financially than the woman who is selling her kidney for a lump-sum amount; her predicament and situation is no less vulnerable, her consent may not be always free. It is here where the law and the medical fraternity should come to her aid, to make sure that her decision is not backed by multifarious factors, and that it is her own independent stand; all attempts should be made to help her escape from the decision safely if the situation is otherwise.

One cannot belittle the importance of the decision that is made by an Authority to accept someone as a living organ donor. The Authorization Committee/Competent Authority[88], constituted under the Transplantation of Human Organs and Tissues Act, 1994, have a huge task at hand.

The clinical psychologist whom the author had the opportunity to interview, was a member of the transplant team at a very renowned transplant hospital in the country, thereby the check mechanisms in place in that particular hospital were up to one's expectations, the concerns of the donor's predicament were thoroughly studied before granting of approval for transplantation. The Competent Authority in the leading private hospital in Bangalore seemed very meticulous in the process of its decision making. The author admits that the file for approval of a live organ donation is supposed to be placed before these Authorities after having undergone severe screening and scrutiny by the transplant team, but is it always the case in every hospital?

One can reasonably conclude that the law can be of little help unless the safeguards it provides are put to efficient use. Not every transplant team has an active psychiatric team on board. Psychiatrists and social workers (generally) do

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[87] The Commentary on Guiding Principle 3 of the WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation, 2010.

[88] Where the proposed transplant of organs is between near relatives, the Competent Authority or the Authorisation Committee (in case donor or recipient is a foreigner) is to give permission for the transplant -Transplantation of Human Organs and Tissues Rules, 2014, Rule 18; When the proposed donor and the recipient are not near relatives, that is, when the organ donation is proposed to be made by reason of affection and attachment for the recipient by the donor, the transplantation shall not be conducted without the prior approval of an Authorisation Committee- The Transplantation of Human Organs and Tissues Act, 1994, Section 9(3).

form part of the transplant teams at hospitals but the nature of their role played, if at all, is one which may draw serious concern, for the available data and information have different stories, altogether, to relate: the stories of commercial dealings in the garb of altruistic organ donations; and the stories of women and the vulnerable being organ donors more often than not.

Another question which arises is what is the level of inroads that these authorities, doctors and psychiatric teams can make into the donor-recipient relationship to ascertain the genuineness and freeness of consent of the donor. It is felt that with a balance of right words and proper safeguards, the nature of the consent of the donor-woman can be approximately ascertained without making inroads into the privacy of her family life. Bearing in mind evidence of maximum organ donors almost always being woman, it is suggested that severest of precautions should be taken to assure that she is acting independently and that her decision-making is free from any form of duress, guilt trip and/or undue influence.

Proper briefing by the transplant team, especially the psychiatric team, to the Authorization Committee/Competent Authority, can be a vital step towards safeguarding the interest of the donor. Minutes of the multiple sittings with the proposed donor and the recipient should be made available by the transplant team to these Authorities. The practice of giving of a reasoned decision by the Authorization Committee/Competent Authority should be strictly adhered to, so that the presence of any inadvertent duress or undue influence upon the donor can be checked upon with greater fervour. Moreover, the donor should be interviewed by the Authorities individually and not in the presence of the recipient and other family members, so that the donor can feel free to express opinion regarding her/ his consent to donate the organ to the recipient.

There is a limit up to which the Authorities can make inroads; however if these limits are exhausted to the fullest, the presence of any form of pressure on the woman donor can be easily discerned and she can be helped to walk out of this decision of donating her organ. Arriving at straight-jacketed solutions is not possible. However, it is reiterated that proper implementation of the law and extra vigilance when the proposed donor is a woman, seem to be the best plausible ways to check the situation.

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Regulation of Surrogacy : A Necessary Evil

By Ms. Saema Jamil[1]

Surrogacy is the practice by which a woman (called a surrogate mother) becomes pregnant and gives birth to a baby in order to give it to someone who cannot have children.[2] It is a sensitive topic as it involves several issues including the right to health, human rights and conflict of laws between nations. This paper attempts to critically examine the law on surrogacy in India. It has been divided into three parts. The first part would discuss the desirability of legalising surrogacy by scrutinising the different arguments for and against surrogacy. The second part would critically examine the Bills on surrogacy in India with special reference to the Surrogacy (Regulation) Bill, 2016 and the third part would suggest changes to the proposed legislations.

I. Surrogacy and Human Rights

It is believed that women naturally possess motherly qualities and that they are more adept at taking care of their young ones because of biological reasons. It is hard to deny that mothers get emotionally attached to their babies as they carry the child in their womb for nine months. It is in accordance with the laws of nature. The desire to have a biological child is also perhaps natural for most people, males and females alike. The questions however that needs to be answered while dealing with surrogacy laws are these: how far and at what cost should the law permit persons to fulfill this natural want? Should the natural desire to have a biological child be given precedence over the natural bond that is formed between the woman who carries the baby and the baby being carried? Is it humane and fair to use a woman as a tool to give birth to somebody else's baby even if the woman has given consent (especially when surrogate mothers are generally women who live in abject poverty)?

An attempt to answer these questions can only be made if the effect of surrogacy is studied from the point of view of the commissioning parties (the party/ parties who give sperms/oocytes to have a biological baby) as well as the surrogate mother (who carries the baby for the gestational period) and the baby.

Commissioning parties are persons who are unable to have a child of their own for medical reasons. If they are keen to have a baby, they would have two

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[2] See Merriam-webster dictionary, Available at http://www.merriam-webster.com/dictionary/surrogacy

avenues open: either to have a child through surrogacy or to adopt a child. The benefit of the first option is that the child would have their genes. But it is necessary to pause here and ask why that is a benefit. Would the person/s be in a better position to take care of the child if the child is biologically theirs? Why is there a fixation on the biological aspect? There could be several answers to this question. This author can think of two: the desire to have a child who can continue the legacy of the family and the natural instinct to have a child who has one's genes. The former reason is regressive as it promotes patriarchy and the notion of blood relation being a necessity to continue the name of the family. The latter reason might be natural but its justification must depend on the consequences it leads to.

Adoption on the other hand would fulfill one's desire to have a baby as well as help provide a family to the millions of babies who are in dire need of shelter and love.[3]

The second party that is deeply affected by surrogacy laws is the woman who becomes the surrogate. The primary reason for agreeing to be a surrogate mother is the substantial amount of money she gets in a short span of time. Most of these women would not earn the same amount by years of physical labour. Thus, for financial reasons, surrogacy seems like a lucrative option for these hapless poor women. For women who have not seen money, 1.5 lacs seems a substantial amount of money and carrying a child for nine months seems worth the pain. They consent to be surrogate mothers giving in to the temptation of having the means of securing a decent living. But being a surrogate once does not ensure solvency for long. Expenses like marriage of children and expenditures on health are substantial and the money received for surrogacy does not prove to be enough in the long run in most cases.[4]

The poverty and illiteracy of surrogates results in their failure to understand and evaluate the physical and psychological costs they might have to pay for being surrogates. Any artificial procedure involves side effects. In the case of surrogacy, the surrogate is given drugs and medications to prepare her body for the pregnancy. The common side effects of these drugs are headaches, bloating, mood swings, spotting, light headedness, uterine cramping, hot flashes, fullness of breasts and vaginal irritation. Apart from these consequences, most children born to surrogate

[3] The Hindu personal law gives the adopted child the same status as a natural born child. Also, the Juvenile Justice Act, 2000 allows for the adoption of abandoned and surrendered babies.

[4] See GLOBALIZATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE 15 (Sayantani Das Gupta & Shamita Das Dasgupta Eds. 2014)

mothers are caesarians as opposed to vaginal births, even when there are no complications. It is no secret that caesarian births are dangerous and unsafe for the mother but then the surrogate mothers (mostly illiterate and extremely poor) are in no position to bargain. The focus is on the safe delivery of the baby. Once the baby is born, the recovery of the surrogate mother is not a priority for the medical centres or the commissioning parties.

The psychological consequences are also several. It is usually traumatic for the surrogate mother to carry the baby for nine months and then to give it away to the commissioning parties.[5]

Despite such serious negative consequences of surrogacy, the proponents argue that surrogacy should be legal. The primary argument is that women should have the freedom of choice and that surrogacy is a win-win situation for all: the commissioning parents get the baby they desire and the surrogate mother gets the money she needs[6]. It has been argued that surrogacy contracts are like any other legal contracts (albeit more complex) and therefore must be enforced.[7] Illegal activities like prostitution, organ sales, and slavery have been differentiated from surrogacy in the following way: in the former cases the body is used **by someone else** for someone else's benefit and in the latter case the body is used **by the person** for someone else's benefit.[8] Thus, it is argued that surrogacy does not amount to treating the surrogate's body as an object of commerce.[9] However, according to this author, the argument is a specious one as even in prostitution and organ sale cases, it is the person who is allowing his/her body to be used (thus using the body himself/herself constructively) and gets a monetary return for the same.

Despite the ill effects of surrogacy, before deciding questions of policy on the issue, it is necessary to ponder over the alternatives that are available with a woman

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[5] The ethical and psychological problems that surrogacy gives rise to have been discussed by Scott B. Rae. These problems include treating children as objects for sale, exploitation of the surrogate mothers, encouragement of detachment of the child in utero and violation of the right of the mother to associate with her child. See Scott B. Rae, *Brave New Families?: The Ethics Of The New Reproductive Technologies*, CRI, Statement DD135, *Available at* http://www.equip.org/PDF/DD135.pdf

[6] See generally Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 JOURNAL OF CONTEMPORARY HEALTH LAW AND POLICY 21 (1989).

[7] See Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VIRGINIA LAW REVIEW 2305 (1995).

[8] See Angie Godwin McEwan, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 292 1999.

[9] *Ibid.*

who is willing to be a surrogate in order to have enough money to survive. If the State cannot provide an alternative, it might be more cruel to make surrogacy illegal and in fact force the business of commercial surrogacy to go underground thereby increasing the exploitation of vulnerable women. Hence, this article argues for regulation of commercial surrogacy with the attempt to make it as less exploitative as possible even though it is not justified ethically, is violative of human rights and is accelerating our march towards a "Brave New World"[10].

The next part of the paper would analyse the draft Assisted Reproductive Technology Bill, 2014 which intended to regulate surrogacy.

II. Proposed legislations on surrogacy: An overview

India does not have any law that regulates surrogacy. The Indian Council of Medical Research (ICMR) came out with national guidelines for accreditation, supervision and regulation of Assisted Reproductive Technology clinics in India in 2005.[11] These guidelines, being non-statutory, do not have any binding force and there is no compulsion to adhere to them. Thus, law in India neither prohibits nor permits surrogacy. The Supreme Court in 2008 held commercial surrogacy[12] to be legal in India.[13] It did not explain why or how commercial surrogacy was legal in India but just presumed that it was. The apparent principle applied was: what is not prohibited is permitted.[14] Post this decision, Assisted Reproductive Technology

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[10] "Brave New World" is a book by Aldous Huxley which is a satirical piece of fiction written in 1932. It describes a dystopian State where a totalitarian government is in control of society by the use of science and technology.

[11] Indian Council of Medical Research, National Academy of Medical Sciences (India). National guidelines for accreditation, supervision and regulation of ART clinics in India. New Delhi: Ministry of health and family welfare, government of India; 2005.

[12]Commercial surrogacy is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. *Baby Manji Yamada v. Union of India* JT 2008 (11) SC 150, para 9.

[13]*Ibid* ("*This medical procedure (commercial surrogacy) is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions*.")

[14]The Court could have decided the issue after addressing issues like whether surrogacy contracts are against public policy. See generally *In re Baby M*, 537 A.2d 1227 (1988) where the the Supreme Court of New Jersey held the surrogacy contract to be invalid on the ground of public policy. In the case, the surrogate mother refused to part with the child after she was born. The surrogate mother and the biological father were held to be legal parents of the baby and the matter was referred to the Family Court to decide who should have the custody of the child using the "best interests of the child" analysis. Eventually the father was given the custody and the surrogate mother was given visitation rights.

(Regulation) Bill, 2008, Assisted Reproductive Technologies (Regulation) Bill, 2010 and Assisted Reproductive Technology (Regulation) Bill, 2014 were drafted but could not be passed. The latest Bill on the subject is the Surrogacy Regulation Bill, 2016. This was post instructions issued by the Department of Health Research on the 4th of November, 2015 stating that the Ministry of Commerce has through a notification banned the import of human embryos except for research purposes and that the Ministry of Home Affairs has issued directions to not grant visa/ permission to foreign nationals (including OCI Cardholders) to visit India for commissioning Surrogacy.[15]

Until legislation is passed, uncertainty regarding surrogacy laws would continue to linger on. The ICMR guidelines require the parties involved to sign consent forms[16] but the guidelines do not specify as to what would happen if one of the parties wishes to breach the contract. For example, there is no clarity as to what would happen if the surrogate mother refuses to hand over the child to the commissioning parents. This would amount to a breach under Indian Contract Act, 1872 and the court would either have to award compensation or order specific performance. Keeping in mind the financial conditions of most surrogate mothers and the nature of the contract, compensation would not be practical. At the same time, specific performance would be a cruel way of enforcing the contract and would be a blatant violation of the human rights of the surrogate mother. Such a case has not arisen before the Indian courts so far but the Parliament must consider such situations.

The ICMR guidelines state, *"Infertility, though not life threatening, can cause intense agony and trauma..... In some cases, the infertile couple are being cheated by providing relatively simple procedures and charged with complicated and expensive procedures..... (Guidelines) would be very useful in regulating and supervising the functioning of ART Clinics and would be helping the ART Clinics in providing safe and ethical services to the needy infertile couples."*[17] This foreword demonstrates the concerns of ICMR. The guidelines have been drafted clearly for the benefit of the commissioning parties

[15] Ministry of Health and Family Welfare (Department of Health Research), Government of India, letter No. V. 25011/119/2015-HR

[16]Indian Council of Medical Research, National Academy of Medical Sciences (India), National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India, Chapter 4; *Available at* http://icmr.nic.in/art/Chapter_4.pdf (last visited on January 29, 2016).

[17] *Ibid*, Foreword, pp. ix

and not for protecting the interests of the surrogate mother when the most vulnerable parties in a surrogacy agreement are the surrogate mothers.

Analysis of Surrogacy Regulation Bill, 2016

The Surrogacy Regulation Bill, 2016 has introduced a lot of provisions which were not present in the earlier Bills. This article would analyse some of the provisions of this Bill.

First and foremost, it has disallowed surrogacy for homosexual couples, single parents, couples in live in relationships, foreigners and couples with children.[18] Many of these categories are based on regressive ideologies and are plain illogical. But the most shocking part of the Bill is that it bans commercial surrogacy and only permits altruistic surrogacy.[19] It requires a couple to employ only a close relative as a surrogate mother. This means that only a married blood relative who has a child herself and is not an NRI or a foreigner can be a surrogate mother. Further, she can be a surrogate only once in her lifetime. It is also to be noted that the term "close relative" has not been defined in the Bill and thus the meaning of the term remains obscure.

This provision is going to raise multiple problems. Firstly, it would lead to confusion and emotional issues at home as there would be a biological/surrogate mother and a commissioning party who would be the legal mother in the same family. It would be difficult for the surrogate mother to distance herself from her child when the child continues to stay within the same family (even if not in the same house). Moreover, if the child comes to know about his/her biological mother, the emotional turmoil would be difficult to surmount.

Secondly, the provision would foster an underground abusive trade in surrogacy. Relatives would be generated and surrogates would be impregnated in India and shifted to permissible jurisdictions. It would also adversely affect the lives of poor women who earned their livelihood by becoming surrogates. The State cannot take away their source of livelihood without providing them with an alternative.

The 2016 Bill also prohibits Indian couples who already have biological or adopted children from having children through surrogacy.[20] The prohibition with

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[18] See Section 2 (g) and 2(r) of the Surrogacy (Regulation) Bill, 2016.

[19]In the Statement of Objects and Reasons, the legislature has conceded that unethical practices in commercial surrogacy are due to "*lack of legislation to regulate surrogacy*". Yet, it has chosen to completely ban commercial surrogacy rather than regulate it.

[20] See Section 4 (iii) (c) (III) of the Surrogacy (Regulation) Bill, 2016.

respect to couples who have biological children is justified; however, prohibiting those with adopted children can prove to be counterproductive. It would deter couples from adopting since they would not be able to have a baby with their genes later. The rationale behind surrogacy is the lack of ability to have children biologically and we have not yet reached a stage where adopted children can be equated with surrogate children.

The Bill with its limitations on the kind of surrogacy allowed, the persons who can become surrogates and persons who can employ surrogacy to have a child is in blatant violation of constitutional provisions. It violates the fundamental rights to equality and protection of life and liberty which are guaranteed by Articles 14 and 21 of the Constitution of India. The disqualification on the basis of nationality, marital status, sexual orientation or age does not satisfy the test of equality and has no connection with the object of the proposed legislation. Further, the right to life under Article 21 includes the right to reproductive autonomy[21] and the right to procreation and parenthood are rights which fall within the ambit of this right to reproductive autonomy. Undoubtedly, reasonable restrictions can be put on this right. For instance, a restriction not to allow fertile persons to have children through surrogacy can be claimed to be reasonable as the main aim of surrogacy is to come to the rescue of persons who cannot procreate on their own. However, a blanket ban on all homosexuals, single persons, NRI's, foreigners, etc. does not pass the reasonable differentia test and is thus unconstitutional.

The laws are expected to adapt to changing times. But the drafts on surrogacy over the years prove that the reality is very different. The draft bills in 2008, 2010 and 2013 proposed that surrogacy would be available in India to all, including single persons and foreign couples. Then the draft surrogacy Bill of 2014 had a contradiction in the definition clauses which made it difficult to interpret it. "Commissioning couple" had been defined as "*infertile married couples*"[22] while "couple" was defined as "*a relationship between a male person and female person who live together in a shared household through a relationship in the nature of marriage*

[21]See *R. Rajagopal v. State of Tamil Nadu* 1994 SCC (6) 632. The Supreme Court held that the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21 and that a citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. Also see *B.K. Parthasarthi v. Government of Andhra Pradesh* 1999 (5) ALT 715. The Supreme Court in *Javed v. State of Haryana* 2003 (8) SCC 369 though upheld 'the two living children' norm to debar a person from contesting a Panchayati Raj election did not state that the right to procreation is not a basic human right.

[22] Section 2 (h), Assisted Reproductive Technology (Regulation) Bill, 2014.

which is legal in India"[23]. Thus, the definition of couple included live in relationships[24] while commissioning parties were to be necessarily married. And finally, the 2016 draft Bill has unequivocally permitted surrogacy only in cases of married couples. Thus with each passing draft Bill, the provisions are becoming more and more regressive.

Another drawback of the 2016 Bill is that like its predecessors, it has failed to explicitly state what would happen if a surrogate mother refuses to part with the surrogate child. Section 7 of the Act does prohibit the intending couple from abandoning a child born from a surrogacy procedure due to any reason including any physical or mental defects in the child. But there is no provision that deals with a situation where the surrogate mother does not wish to give her child to the intending couple. Section 38 is a residuary Section for penalties in case of contravention of any provision of the Act and where no specific penalty has been prescribed[25]. It may be argued that this provision can be used to enforce the surrogacy agreement in case such a situation arises but imprisoning or fining the surrogate mother would not serve any purpose and would be inhumane.

The 2016 Bill, unfortunately, has instead of offering solutions raised more problems.

III. Suggestions

The regulation of surrogacy is a necessary evil according to this author as explained in the first part of the paper. It is necessary to regulate it keeping in mind the interests of all parties involved. The following suggestions to accommodate the rights of all stake holders are made by this author:

1. First and foremost, a separate Bill enumerating the rights and liabilities of the parties must be made. Human parties must not be reduced to objects on which technology can be applied to produce desired results. Technological aspects

[23] Section 2 (i), Assisted Reproductive Technology (Regulation) Bill, 2014.

[24] The scope of the phrase "in the nature of marriage" was narrowly interpreted by the Supreme Court in *D. Velusamy v. D. Patchaiammal* (2010) 10 SCC 469. It was held to mean a common law marriage which fulfilled the following conditions: (a) the couple must hold themselves out to society as being akin to spouses; (b) they must be of legal age to marry; (c) they must be otherwise qualified to enter into a legal marriage, including being unmarried; (d) They must have voluntarily cohabited for a significant period of time. Despite this narrow reading, the scope of the phrase is broader than the phrase "married couple".

[25] It prescribes an imprisonment for a term which shall not be less than three years and with fine which may extend to five lakh rupees.

and human aspects deserve to be dealt with separately and sensitively.[26] The rights and liabilities of the parties involved and the technological aspects of surrogacy should be dealt with in two distinct statutes.

2. The scope of the definition of "surrogate mother" must be broadened to include cases where the woman uses her own egg. This form of traditional surrogacy is safer for the mother. The argument that it would adversely affect the surrogate mother because she would be more attached to a baby with her genes is not credible.

3. According to the 2016 Bill, only a married woman who is a relative with a live baby can become a surrogate mother. This is apparently to ensure that the mother has a baby of her own and suffers lesser mental agony while parting with the baby of the commissioning parties. However such an embargo might prove to be problematic for women who wish to be surrogate mothers but do not wish to get married or have children. It is not fair to universalise the proposition that a mother with her own child would find it easier to part with a child that she has carried for nine months in her womb for somebody else.

4. Gays, lesbians, single persons, NRI's and foreigners should also be permitted to be commissioning parties. The laws must adapt to changing times. When society is attempting to accept homosexuals and live-in-relationships, the laws must also be more accepting towards them. The Supreme Court in ***National Legal Services Authority v. Union of India (UOI) and Ors***[27] case held that transgenders have the right to lead a life of dignity and upheld their right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport, a ration card, a driver's license, the right to education, employment, health and has also guaranteed all other constitutional protections and fundamental rights, such as the right to privacy and freedom of expression, right to empowerment, right against violence, right against exploitation and the right against discrimination. It has also presumed marriage in a lot of cases where the parties have been living together for a long period time. It is high time that the legislature joins in to protect the rights of marginalized communities.

5. The legislature defining the rights and liabilities of the commissioning parties and the surrogate mother must be foolproof and must provide the course of

[26] See Chaitanya Shah, *Regulate Technology, Not Lives: A Critique of the Draft ART (Regulation) Bill*, INDIAN JOURNAL OF MEDICAL ETHICS Vol VI No. 1 34 Jan-Mar, 2009.
[27] AIR 2014 SC 1863.

action if any of the parties rescinds its promise to perform his/her part.

6. Commercial surrogacy must be permitted but regulated by the State to ensure that hapless women are not abused and cheated.

Surrogacy is undoubtedly a sensitive issue and any law regulating it should also be sensitive towards all the parties involved in a surrogacy agreement. It cannot be biased towards any one stakeholder and it is necessary for all the potential problems to be addressed by the legislature.

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Investment Disputes and ADR in Private International Law

A.R. Poornaja*

Abstract

Dispute resolution in Investment disputes at the international arena offers a platform to connect both public and private international law. Deviating from the adversarial system of conflict resolution, several countries decided to set up a distinctive Tribunal to facilitate amicable settlement of such investment related disputes involving foreign element, thereby leading to the formation of ICSID-International Center for Settlement of Investment Disputes. Established in 1965 by ICSID convention, it had successfully handled nearly 400 cases until the last decade by employing the techniques of both the conciliation and arbitration. Most of the countries have their membership in ICSID except for few like India, Brazil etc. ICSID not only resolves the disputes by itself but also provides necessary support to the other systems at International level like UNCITRAL framework, ICC, LCIA, Permanent Court of Arbitration etc, and vice versa. Unlike the International commercial arbitration, ICSID rely primarily on Bilateral Investment Treaties (BIT) and other multilateral agreements to settle the disputes between various countries along with the parallel arbitration agreement. The existence of such treaties is however verified with the help of World Bank and Ministry of Foreign affairs in party-country. It had offered itself to conciliate investor-state disputes and had proven its ability to provide an international protection for investors.

However, there are number of private international law issues to be dealt in relation to ICSID starting from Jurisdiction issues till the execution of the Awards. ICSID has to carefully look through the provisions of BIT so as to identify the nationality of the corporation to settle on the jurisdiction. It is additionally burdened to apply the principles of both public and private international law in deciding the dispute. One of the significant issues in it would include the ICSID's power to apply rules of private international law to resolve conflict of laws which is constantly debated by the scholars. This paper would briefly analyze the above-mentioned issues along with the concerns of forum-shopping and India's stance on BIT and investment arbitration. This paper would also suggest practicable solutions in the context of improvising the working of ICSID and India's role in ICSID.

Keywords: ICSID, investment arbitration, BIT, conflict of laws, forum shopping, model BIT, Foreign Awards.

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Introduction

Investment laws and arbitration are one of the chased out fields in international legal disciplines in terms of flourishing globalization and increasing FDI. Deviating from the adversarial system of conflict resolution, several countries decided to set up a distinctive Tribunal to facilitate amicable settlement of such investment related disputes involving foreign element, thereby leading to the formation of ICSID-International Center for Settlement of Investment Disputes. Established in 1965 by ICSID convention, it had successfully handled nearly 400 cases until the last decade by employing the techniques of both the conciliation and arbitration. Most of the countries have their membership in ICSID except for few like India, Brazil etc. However, there are number of private international law issues to be dealt in relation to ICSID starting from Jurisdiction issues till the execution of the Awards. This paper would briefly analyze the above-mentioned issues along with the concerns of forum-shopping and India's stance on BIT and investment arbitration. This paper would also suggest practicable solutions in the context of improvising the working of ICSID and India's role in ICSID.

Investment Treaties- an Overview

Investment Treaties, in simple terms would mean nothing but the agreements that are entered into, by the parties for the purpose of affording protection to their investments by including several defensive and strategic clauses. Any disputes arising out of such investments will be dealt in accordance with the Treaties or agreements entered. These are essential with the growing need of FDIs and emerging globalization of markets so as to afford fair treatment to the investors. At the international domain, such treaties or agreements are concluded between different Nations so as to provide a working and practicable framework for investor protection against state, thus facilitating the proceeding against the host state (Investor State disputes settlement-ISDS).[1] Among them, ***Bilateral Investment Treaties (BIT) and Bilateral Investment Promotion and Protection Agreements (BIPPA/ BIPA***) are more common.[2] Treaties BITs have been defined as agreements that "*protect investments by investors of one state in the territory of another state by*

[1] *See* Dr.Yaraslav Kryvoi, *International Center for Settlement of Investment Disputes (ICSID)*, Kluwer International Arbitration, 23 (2010), http://cisarbitration.com/wp-content/uploads/2013/07/International-Centre-for-Settlement-of-Investment-Disputes-ICSID.-Ya.-Kryvoi.-Kluwer-Law-Int-2010.pdf., (last visited, Mar.22,2017, (N.T.M.)).

[2] Law Senate, *International Investment Arbitration,* 2012, http://www.lawsenate.com/publications/articles/international-investment-arbitration.pdf, (last visited, Mar.22,2017, (N.T.M.)).

articulating substantive rules governing the host state's treatment of the investment and by establishing dispute resolution mechanisms applicable to alleged violations of those rules."[3]

BITs have a number of clauses incorporated in it, commencing from the definition of 'investments' and other general clauses like the 'Fair and Equitable Treatment', 'National Treatment', 'Most Favoured Nation', 'Free Transfer of Funds', 'Protection against Expropriation' in addition to the dispute resolution clauses[4], in order to have a substantiated and strong claim against the defaulting party. Until 2015, there are about 3,304 IIAs (International Investment Agreements) entered across the world to facilitate investment in different sovereign states, out of which, 2,946 are BITs and 358 are other treaties with investment provisions, according to the World Investment Report and there are about 57 agreements already under negotiation that are expected to be completed within May, 2016.[5] As far as India is concerned, till Jan 2016, it had concluded almost 83 BITs with several countries.[6]

These agreements had proved to be a better barricade against the political and economic changes in the host state that could have negative impacts on the investors such as expropriation, taxing liabilities etc. BITs usually provide for a dispute resolution clause, that specifies arbitration as a common method of redressal. The arbitration is mostly taken to and held under the governance of **ICSID-** International Center for Settlement of Investment Disputes with the help of ICSID convention and others would be dealt by or under UNCITRAL rules in any other agreed ad-hoc or institutional arbitration centers.[7] Such a kind of arbitration is more legally termed as *'Arbitration without privity'* and is chosen not only by a variety of bilateral investment treaties but also by multilateral arrangements.[8] FTA Agreements

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[3] *Refer* Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 Harv. Int. L. J. 469,470 (2000).

[4] Supra 4.

[5] *Refer* UNCTAD.org, *World Investment Report 2016: Investor Nationality and Policy Challenges*, 20,21, (2016), http://unctad.org/en/PublicationsLibrary/wir2016_Overview_en.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[6] *See* generally, Tojo Jose, *What are Bilateral Investment Promotion and Protection Agreements (BIPAs)?*, Indian Economy.net, (Jan 10, 2016), http://www.indianeconomy.net/splclassroom/116/what-are-bilateral-investment-promotion-and-protection-agreements-bipas/, (last visited, Mar.22,2017, (N.T.M.)).

[7] *Ibid.*

[8] *Refer* J. Paulsson: "Arbitration without Privity", ICSID Review, Foreign Investment Law Journal, Vol. 10, 1995, 232.

like NAFTA- North American Free Trade Agreements, Energy Charter Treaty, ASEAN Comprehensive Investment Agreement (ACIA), Economic Partnership Agreements, Mercosur Protocols also form a part of International Investment Agreements that actively encourage amicable dispute settlement between investors offering protection framework for investors.[9]

The claims in ICSID are increasingly recognized as a 'two-way street' where even developing countries have successfully initiated claims breaking the myth of dominance by OECD countries.[10] In India, after a number of issues, we have a model BIT finally notified at the edge of December, 2015 that would guide us in the future BITs and help us to re-negotiate the existing and upcoming bilateral and multilateral investment agreements and treaties.[11]

ICSID- Structure and Functions

International Center for Settlement of Investment Disputes was established in 1966 at Washington, by the ICSID convention, that was actually put forward by the Executive directors of the World Bank (also called as International Bank for Reconstruction and Development (IBRD)) and later it turned out as an autonomous institution[12] with 153 contracting states till date[13]. With the increase in the number of International Investment Agreements and Double Taxation Avoidance Agreements (DTAA), it was considered necessary to set up a neutral impartial body for the settlement of investment disputes, and thus the ICSID was established to serve the purpose.

ICSID facilitates for both arbitration and conciliation of investment disputes based on the consent given by the parties through agreements, both bilateral and multilateral or through contracts.[14] It does not in itself conduct arbitration or

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[9]Claudia Salomon & et al., *Investment Treaty Arbitration- a primer*, 1563, Client Alert Commentary, Latham & Watkins, 2 (July 29, 2013), https://m.lw.com/thoughtLeadership/LW-investment-treaty-arbitration-primer, (last visited, Mar.22,2017, (N.T.M.)).

[10]Maffezini v. Spain, ICSID Award of November 13, 2000, *cited at*, Francisco Vicuna, *Arbitrating Investment Disputes, p.2*, http://www.arbitration-icca.org/media/4/39975189729667/media012224280177670arbitrating_investment_disputes.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[11]*See* King & Wood Mallisons, *Investment Treaty Arbitration India, (*May, 2016), http://www.kwm.com/en/knowledge/insights/investment-treaty-arbitration-india-20160419, (last visited, Mar.22,2017, (N.T.M.)).

[12] *Supra* 1 at p.21.

[13]*Visit* the web page of ICSID- ICSID, ICSID Convention, https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx, (last visited, Mar.22,2017, (N.T.M.)).

[14] *Refer* Meg Kinnear, *An overview of ICSID*, ICSID, (Nov.15,2012), http://uba.ua/documents/doc/meg_kinnear_2.pdf, (last visited, Mar.22,2017, (N.T.M.)).

conciliation but only provides for the rules and other services, facilitating an ad-hoc Tribunal or other International Institutions in proceeding with the investment dispute resolution.[15] It had concluded agreements with the Permanent Court of Arbitration (PCA), Singapore International Commercial Arbitration Center (SIAC), Australian Commercial Disputes Center, Sydney etc., so as to facilitate them in entertaining the investment disputes and availing technical services.[16] There are certain jurisdiction essentials to be fulfilled in order to come within the scope of ICSID convention namely[17],

i. The dispute must be between an ICSID Contracting State and an individual or company that qualifies as a national of another ICSID Contracting State. (ICSID Contracting States may designate constituent subdivisions and agencies to become parties to ICSID proceedings),

ii. The dispute must qualify as a legal dispute arising directly out of an investment,

iii. The disputing parties must have consented in writing to the submission of their dispute to ICSID arbitration or conciliation.

ICSID facilitates the disputes of non-member disputes also, by offering Additional Facility Rules promoting other related activities.[18] ICSID has two working bodies within its organizational structure,[19]

a) Administrative Council- It is the governing body with members of the contracting state and the World bank President being the ex-officio chairman in the body. It provides for adoption of arbitration and conciliation rules, annual reports and budget and conditions of services in relation to the Secretariat. Each contracting states has single voting power while President of the World Bank is left with no voting power.

b) Secretariat- It is the legal representative and operating body with Secretary General, Deputy Secretary General and 45 other members. It looks after the day to day working of ICSID including the proceedings, Constitution of the Tribunals and technical assistance to the Tribunals, publications and finances. It also maintains a panel of arbitrators and mediators nominated by the chairman and the contracting states.

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[15] *Supra* 13.
[16]Smriti Chand, *International Center for Settlement of Investment Disputes (ICSID)*, YourArticlelibrary, http://www.yourarticlelibrary.com/organization/international-centre-for-settlement-of-investment-disputes-icsid/23535/, (last visited, Mar.22,2017, (N.T.M.)).
[17] *Ibid.*
[18] *Supra 16.*
[19] *Supra* 14.

The Award rendered by the Tribunal is final and cannot be set aside by the countries but however, can avail post Award remedies. The number of cases proceeded by ICSID was below the benchmark until the last decade, which witnessed a substantial rise in the claim raising the total number of cases that had been entertained, to nearly 400.[20] The procedures start from registering a case, constitution of the Tribunal and proceed to holding several sessions until the final Award is delivered and post Award remedies are considered. The existence of BITs is confirmed by reference to the World Bank.[21] India had not signed the convention yet there are atleast 17 claims against the State till 2015 after surging claims on Vodafone dispute and 2G scam.[22] India had shown considerable amount of disinterest towards the Awards rendered by interface with ICSID which is evident from *White Industries case* (dealt later). Further, there are certain practical difficulties in becoming signatory to ICSID convention and ratify it, thereby subjecting the state to the concerned proceedings. The main reason amongst them would be the cost of submitting to the Award, wherein some of the companies that make claims in ICSID are enriched giants and big MNCs, whose income is more than the host state's GDP itself.[23] Also, the compensation awarded in such claims is huge which would be detrimental to the whole economy of the host state. In such cases, the developing and the low income countries shall be hesitant in signing the convention, as it would obstruct the progress of the country, holding against the national interest.

Public v. Private International Law in Investment Disputes

The process of resolving the disputes starts from identifying the conflict and then to apply the relevant law for more appropriate solution. Not only in that regard but also in the lens of disciplinary distinction, there arises the most important question, ***'Whether the international investment law and its dispute resolution fall under***

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[20]See Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/date ien/waibelwinter11-12, *cited at*, Inba Vijayan & Kirthi Jeyakumar, *Investment and arbitration- Initial focus,* 2(1), Indian Journal of arbitration Law, 40, http://www.ijal.in/sites/default/files/IJAL%20Volume%202_Issue%201_V.%20Inbavijayan%20%26%20Kirthi%20Jayakumar.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[21] *Ibid.*

[22] *See* Anirudh Krishnan, *A bit for the State, a bit for the investor,* The Hindu, Sep.2015, http://www.thehindu.com/opinion/op-ed/a-bit-for-the-state-a-bit-for-the-investor/article7625893.ece, (last visited, Mar.22,2017, (N.T.M.)).

[23] *See* Bretton Woods project, *International Center for Settlement of Investment Disputes (ICSID), (*July,2009, last updated 2013), http://old.brettonwoodsproject.org/art.shtml?x=564868, (last visited, Mar.22,2017, (N.T.M.)).

public or private international law?' Certain schools of law, more specifically the Realists and New Deal Theorists are against the first hand distinction between public and private international law itself, which is considered to be unworkable in the practical scenario.[24] Criticisms and debates suggest a mixed and confused opinion in this regard leading to paradigm conundrum at large, probably owing to our blind adherence to traditionalist views and '*misunderstanding of the discourse analysis'*.

The implications of whether a dispute is concerned with private international law depends on the parties involved, actions claimed and rights infringed/violated and they are actually private in investment arbitration. However, the distinction in simple sense, also devolves on whether the impact is produced on civil society/ public or the private parties? which could sometimes bear the burden of classification between *rights in rem* and *rights in personam*. However, as suggested by scholar *Maupin* in his article, the international investment law has the characteristics of both public and private international law, when observed from the context of historical, structural, jurisprudential and sociological perspectives.[25] The investment disputes entertained by ICSID are classified into three types depending on the source of rights accrued in the claim namely, **treaty-based, contract-based and statute based**.[26] While dealing with such disputes, it is pertinent to distinguish between the issues and rights on the considerations of public and private claims at the initial stage itself so as to proceed in a right direction. As enumerated in ***Empire of Iran case***[27], it is inevitable to make a distinction on the concerned acts enumerated or disputed, as *jure imperii (*sovereign acts*)* and *jure gestionis* (commercial acts). This evaluation of the acts based on the capacity or motive of the state to enter into an investment related arrangement with the investor would be far more helpful in distinguishing and treating the issues. The relevant excerpt of the Award is quoted herein:

"*As a means for determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the State transaction*

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[24] *See* Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454 (1909), *cited in, infra* 25.

[25]*See generally,* Julie A. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach,* 54(2) VIRGINIA J. INT'L L, 1-66, (2014), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5843&context=faculty_scholarship, (last visited, Mar.22,2017, (N.T.M.)).

[26] *Ibid*.

[27] I Congreso del Partido [1983] 1 AC 244, 267 (HL), citing Claim against the Empire of Iran (1963), 45 ILR 57, 80 (Ger Fed Const Ct).

or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends upon whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."[28]

Further, the implications of public law considerations started gaining significance in the recent years after 1990 and are reflected in very many notable decisions like *Philip Morris v. Australia*[29]. The investment disputes however, arise between a state and private party/individual through identifiable private arrangements but might as well necessitates the need to examine the public policy and laws of the state. And this is where the private international law once again comes into play. In the reign of 'clash of paradigms', some of the scholars had rightly called the international investment laws as the 'hybrid' of both private and public law[30] and it serves as a perfect example in that regard. As such, an integrated system of approach[31] would fulfill the end goal of settling investment disputes in an international platform, since applying any one of the two, would prejudicially favour either the state or the investor and would not give way to a decision on the judicial and justiciable considerations in the long run.

Hence, it is important to distinguish the issues and concerned activities at first hand (whether it is private or public, sovereign or commercial?), and to apply both the principles of public and private international law in consonance with the customary law, treaties etc, keeping apart the distinction, which is far more important so as to achieve the end results. ICSID is also dealing with the human rights treaties in the recent years[32], and hence its capacity to proceed with the public issues cannot be put to question and it is also a transparent and neutral forum at the international regime. In terms of relevant public policy defence raised by the states, it could as well look into the domestic laws of the state and get opinions from the domestic courts too. Compensation in cases concerned with valid public policy defence,

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[28]van Harten, *The public-private distinction in the international arbitration of individual claims against the state, 56(2),* International and comparative corporate law quarterly, 374 (2007), http://eprints.lse.ac.uk/15223/1/The%20public-private%20distinction%20in%20the%2 0international%20arbitration%20of%20individual% 20claims%20against%20the%20state(lsero).pdf, (last visited, Mar.22,2017, (N.T.M.)).

[29] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case no.2012-12.

[30]José E. Alvarez, *Is Investor-State Arbitration 'Public'?,* 6 IILJ 1-43 (2016), p.2 http://www.iilj.org/wp-content/uploads/2016/09/Alvarez-Is-Invest-State-Arbitration-Public-IILJ-WP-2016_6-GAL.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[31] *Supra* 25.

[32] *Supra* 9.

could be altered to the benefit of the state sometimes in view of *in dubio mitius*[33] rule.

Applicable Law and Conflict of Laws in International Investment Arbitration

As mentioned earlier, the process of dispute resolution under ICSID proceeds from request for arbitration or conciliation, registration of the dispute to several sessions being conducted ending with the passage of Award with an option of revising, finalizing or annulment of Awards. The private international law has its own role to play, after the identification of the conflict in order to decide which law would be applicable for a particular dispute. Being an arbitral process, investment treaty arbitration in no way differs from international commercial arbitration in that the principle of party autonomy is the primary rule governing the arbitration, including as regards the law applicable to the substance of the dispute.[34] With regard to the substantive law, **Art.42 of the ICSID convention**[35] guides the Tribunal in choosing the applicable law for the process, yet it serves as the most complex and debated provision in ICSID convention. The procedural law that may be applied is not a big matter of concern as the rules of ICSID convention would govern those aspects.

Going by the first sentence of Art 42(1), the applicable law could be enumerated from the contracts, agreements or treaties forming the substance of the dispute. It is interesting to note that the provision allows parties to agree on the ***"rules of law"*** applicable to the substance of their dispute and with this rather broad term, the Convention intends to make clear that the choice of the parties is not limited to one or more national laws or legal systems, but may, for example, "incorporate" a national law in existence at a certain moment in time or exclude certain provisions

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[33] *Supra 30* at p.19.

[34] Yas Banifatemi, *The Law Applicable in Investment Treaty Arbitration*, 192 (2010), http://www.shearman.com/~/media/Files/NewsInsights/Publications/2010/06/The-Law-Applicable-in-Investment-Treaty-Arbitrat__/Files/View-full-article-The-Law-Applicable-in-Investme__/FileAttachment/IA061010TheLawApplicableinInvestmentTreatyArbitr__.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[35] ICSID Convention- "**Article 42**

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."

of such a law.[36] It gives utmost respect to the '***Party Autonomy'*** principle, giving freedom to the concerned parties to choose the governing law through the agreement and for purposes of this particular rule, the parties' agreement on applicable law must be expressed or may be implied from the facts and circumstances of the relationship[37]. It need not be in writing explicitly but could be gathered from the agreed terms of the contract. However, for the implied derivation of applicable law or the other, parties' submissions must reflect their admission to the choice made and the same had to be looked over by the Tribunal.[38] The problem arises when the parties fail to make a choice of law or come to a consensus. In such cases, as provided under Art 42(2) -second sentence, the Tribunal should apply the law of the host/contracting state including its rules on conflict of laws and the international laws. This part of the article has created a difference of opinion among the Tribunals, as to whether the municipal law of the host state or the international laws should be given first priority in adjudicating the disputes in the absence of agreed applicable law.

In some of the decisions like the 1986 decision of the ad hoc committee in ***Amco Asia Corp.* v. *Indonesia***[39], it was held that the provision of the second sentence of Article 42(1) *"authorizes an ICSID tribunal to apply rules of international law only to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms."* This decision and similar other decisions prefer municipal law reference over the international law at first instance, giving due respect to the sovereignty of the states, though upholding the international law norms in terms of conflict.

On contrary, certain other decisions have embraced the importance of international law application at first instance itself, thereby upkeeping its supremacy over other domestic laws in international regime. Such an opinion also becomes relevant in the context that the states might show their own domestic laws so as to justify the breach of the contractual terms or treaty provisions. In ***Siemens AG* v.**

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[36] Transational notes**,** *Applicable Law Under Article 42 of the ICSID Convention, (*Oct. 19, 2011), http://blogs.law.nyu.edu/transnational/2011/10/applicable-law-under-article-42-of-the-icsid-convention/, (last visited, Mar.22,2017, (N.T.M.)).

[37] UNCTAD, *Dispute Settlement- Applicable law,* 1-39 *(2003),* http://unctad.org/en/docs/edmmisc232add5_en.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[38] AAPL V. Srilanka, Award, 27 June 1990, 4 ICSID Reports 250 at p. 256.

[39] *Amco Asia Corp*. v. *Republic of Indonesia*, ad hoc committee decision of May 16, 1986, 1 ICSID Rep. 509, 515 (1993). *See also Amco Asia Corp*. v. *Republic of Indonesia*, Award of May 31, 1990, 1 ICSID Rep. 569, 580 (1993).

Argentine Republic[40], the tribunal in its Award discussed the role of international law under the BIT provision, on choosing applicable law and it rejected the notion that international law was referred to in the provision merely *"as a corrective to municipal law or as a filler of lacunae in that law."* It went on to point out that, as the case concerned alleged breaches on the part of Argentina of its treaty commitments, *"the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by applicable international law. Argentina's domestic law constitutes evidence of the measures taken by Argentina and of Argentina's conduct in relation to its commitments under the BIT."*[41] The second sentence had explicitly mentioned about the applicability of **conflict of laws-** rules and hence with the chosen law enumerated in the agreement as mentioned in the first sentence of Art.42(1), ***Doctrine of Renvoi*** [42](state's obligation to refer to some other country's legal system) need not be applied in the latter. The conflict of law rules in Indian Private International law with regard to the contracts would include the application of proper law and jurisdiction in the agreement, Lex domicile and lex fori to decide on the capacity of the parties and other public policy considerations, lex loci contractus (where the contract has been made) for substantive law, lex loci solutionis (place where the remedy would be enforced) etc.[43]

However, the rule put forth in Art 42 is still a debated one and might have serious consequences if the proper law is not chosen accordingly. In ***MINE v. Guinea***[44], the Ad Hoc Committee confirmed the view that failure to decide the dispute in accordance with the applicable rules of law would constitute an excess of power leading to the annulment of the Award under **Art 52 of ICSID convention**. It is pertinent to have a subjective approach and to go by the merits of the dispute on a case to case basis in terms of choosing applicable law. Further, the identifiable law could be understood from Art 38(1) of ICJ Statute[45], and the relevant applicable law either domestic or international would include statutes, customary laws, precedent judgments etc.

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[40] *Refer Siemens AG* v. *Argentine Republic,* Award of Feb. 6, 2007, *supra* note 15, at para. 77 and 78.

[41] *See* Antonio R. Parra, Applicable Law in Investor-State Arbitration.

[42] *Supra* 37 at p.8.

[43] *See generally,* Atul M. Setalvad. *Setalvad's Conflict of Laws,* 562-564 *(*3rd Edition, 2014), Lexis Nexis, Haryana.

[44] *Maritime International Nominees Establishment v Government of Guinea,* 5 ICSID Review (1990) at 95.

[45] *Supra* 36.

Referring to Art. 42(2), a Tribunal may not refuse to render a decision on the ground that the law is not clear (***non liquet***) and an Award should deal with each and every necessary questions in the dispute as under Art.48(3).[46] Further, filing the gap in law is different from deciding the dispute on equity and good conscience under Art. 42(3) ***(ex aequo et bono)*** and the latter requires explicit agreement of the parties for such a decision.[47]

Forum Shopping in Investment Arbitration

The process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her is referred to as "***forum shopping"***.[48] The significance of private international law in the investment arbitration is also touched upon via 'forum shopping' where the parties have the option of moving to another forum which might as well have jurisdiction in the dispute, simultaneously or after a decision is rendered by one of the fora. Forum shopping in the international investment arbitration takes place both *horizontally*- between various international Tribunals and *vertically*- from international to regional set up or domestic courts. Apart from such fundamental classification, investment arbitration in recent years has provided a much wider platform for forum shifting paradigms in the form of arbitration to litigation shift, arbitration to arbitration shift, shift from treaty based claims to contract based or statute based and vice versa, and also transition between applicable laws under Art.42(1).[49]

When a dispute is posted under ICSID, there are a number of 'forum shopping' possibilities, since it might be taken to an ad-hoc/institutional Tribunal constituted under UNCITRAL rules or it might be subjected to local court's jurisdiction of host state or investor, or might shift within the walls of ICSID but from treaty to contract based claims etc. At times, treaty shopping from BIT to FTAs is also a possibility and intellectual property related investment disputes might as well go to WIPO arbitration and mediation center or WTO dispute settlement body. This creates an

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[46] ICSID Convention- "**Article 48** *(3) The Award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."*

[47] *Supra 37* at p.27,29.

[48] *See* Yuval Shany "The Competing Jurisdictions of International Courts and Tribunals", Oxford University Press, International Court and Tribunal Series, 2003.

[49] *See generally* Richard H. Kreindler, *Arbitral Forum shopping*, in Parallel State and Arbitral Procedures in International Arbitration, 153-210 (July, 2005) ICC Publishing, http://www.shearman.com/~/media/Files/NewsInsights/Publications/2005/07/Arbitral-Forum-Shopping/Files/Publikation/FileAttachment/Arbitral-Forum-Shopping—263.pdf, (last visited, Mar.22,2017, (N.T.M.)).

opportunity for forum shopping very different from the traditional private international law one: a forum shopping facility offered intentionally in favour of the investor.[50]

In the case of ***CME/Lauder v. the Czech Republic***[51], the Czech Republic was subject to two different UNCITRAL proceedings concerning certain governmental measures with regard to a local company that owned a TV license, under US-Czech BIT in London and Netherlands- Czech BIT in Stockholms. The parallel proceedings took place irrespective of the other as there is no legal stance to apply *forum non-conveniens* rule and restrict themselves from entertaining the dispute. However, the other Tribunal took account of the compensation rendered by former Tribunal. Some of these problems could be tackled when the clauses in the treaty or agreement confine its jurisdiction to a specified forum or state and the umbrella and stabilization clauses are carefully handled by the Tribunal, even then not all the issues of forum shifting could be resolved.

Particularly, treaty and contract based forum shopping create a lot of dilemma and give rise to unstable Awards that might be put to challenge any time. In the case of ***Vivendi v. Argentina***[52], the ad-hoc committee faced with a situation so as to distinguish between the treaty-based and contract based claims and breach by the parties in relation to the exclusive jurisdiction clause. It was held that the exclusive jurisdiction clause would be applicable when it is contractual breach and for the breach of treaty provisions, BIT could be invoked. However, this view was put to criticisms and later overruled in other cases. In the ***Sempra Energy Case***[53], the Tribunal however accepted the view but also held that for such contractual claims distinctive and separable from Treaty, domestic proceedings in local courts could also be resorted. The Tribunal has no choice but to go on a case to case basis in relation to forum shopping. Further, inclusion of a well-defined umbrella clause in the source Treaties and Agreements that restricts the forum shopping might serve the purpose.

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[50] *See* Cathrine Yannaca-Small, *Improving the System of Investor-state Dispute Settlement: An Overview*, International Investment Perspectives, 201 (2006), https://www.oecd.org/investment/internationalinvestmentagreements/40079647.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[51] CME (Netherlands) v. Czech Republic (Partial Award) and Lauder (US) v. Czech Republic (Final Award) see op. cit., No. 28-29.

[52] Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 ILM 1135, p. 1156, paragraphs 102, 103.

[53] *Refer,* Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, May 11, 2005.

Indian stance on International Investment Arbitration

India's responsibility to respect treaty obligations and international law is adhered as an inevitable part of the constitution under Art. 51 (c). However, the principle of sovereignty has given independence to the state to enter into Treaty obligations or international agreements of its choice and abide by those that have been ratified in the Legislature. India is not a signatory to ICSID Convention yet is facing nearly 21 claims in the Tribunal till 2016, and four claims particularly during 2016, according to Investment Dispute Settlement Navigator (IDSN) and this could as well have an impact on the reputation of India in global markets.[54] The same had also been put forward though not as a recommendation by the Law Commission report No.260[55], that the model BIT, 2015's non-reference to ICSID convention and dispute settlement would be disadvantageous to the Indian investors abroad. There might be a number of reasons for such policy decisions including the cost of the claims raised as mentioned earlier. Irrespective of these concerns, India had shown sufficient disinterest in enforcing the Foreign Investment Awards that will be ever remembered in the history.

Enforcement of foreign investment Awards in India- Case Analysis

The first and most notable decisions of the Tribunal against India, was in ***White Industries v. India***,[56] where the Australian company- White industries invoked arbitral proceedings based on its contract with Indian public sector undertaking- Coal India Ltd. The proceedings were held in International Chamber of Commerce (ICC) seated in London and a damage of 4.08 million AUD was levied against India in the First Award in the year 2002.[57] Several applications to set aside the Award on one hand and to enforce the Award on the other were preferred in the domestic courts. But it took almost ten years for its enforcement in India and the delay in enforcement by Indian Courts was held to be denial of 'effective means'

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[54]*See* Sreeja Sen, *Have treaty arbitration cases hurt India's investment-friendly image?*, Live Mint, Feb.13,2017, http://www.livemint.com/Politics/1L1GGswm0w2c7qfmiVfrZN/Have-treaty-arbitration-cases-hurt-Indias-investmentfriend.html, (last visited, Mar.22,2017, (N.T.M.)).

[55]*See* Law Commission Report no.260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, August 2015, http://lawcommissionofindia.nic.in/reports/Report260.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[56] White industries Australia v. Republic of India, . UNCITRAL, Award of Nov. 30, 2011, Final Award, available at http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[57] Raj Panchmatia and Meghna Rajadhyaksha, *Investment Arbitration in India: An introduction to Concepts and Challenges in the White Industries Dispute*, http://barandbench.com/wp-content/uploads/2016/11/Investment-Arbitration-in-India.pdf, (last visited, Mar.22,2017, (N.T.M.)).

standard and 'fair and equitable treatment' under the invoked Indian- Australian BIT.[58] It was the final international Award that was enforced at the end of the day, with the expenses of the previous Award and the claims mentioned.

Another important case was the ***Dabhol c***ase, in which Enron Company had successfully invoked arbitration under India- Dutch BIT and made a claim against Maharashtra Electricity board for the termination of the contract.[59] Indian government had to pay the sum to settle the dispute as the Final Award was received against India. This had essentially put forth the fact that even though India is not a party to ICSID convention, it will be somehow subjected to the Foreign investment arbitration claims and that it could not escape from fulfilling its obligations under BIT or any other contract to afford full security to the investments with fair and equitable treatment rather than just defending the claims of legitimate expectation. It is also argued by many scholars that India is entering into BITs and FTAs without understanding its full significance and consequence and we need to revisit on the same.[60]

The decision in ***Antrix v. Devas Ltd***.[61], rendered by the Tribunals of ICC and PCA is noteworthy, that made India, financially liable to pay a compensation of Rs.4,400 crores. Antrix Corporattion Ltd. being the commercial arm of ISRO, entered into a contract with Devas multimedia to lease out satellite spectrum but later the contract was annulled, owing to the alleged corruption practices by the government officials. This claim against India seems to have a huge impact on the economy and FDI that reflects the instability of the Indian laws, policy decisions in correlation with the corrupt practices in the authority. India has a strong notion to appeal against these decisions of the Tribunal.[62] Further, there are pending claims against India, and notices have been issued by Vodafone PLC and some other companies with regard to the investments made by them in telecommunication and

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[58] Shalaka Patil and Pratibha Jain, *Bilateral Investment Treaties and their impact on the Global Economy*, International Taxation- A compendium, 354, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Bilateral%20 Investment%20 Treaties.pdf, (last visited, Mar.22,2017, (N.T.M.)).

[59] Ibid.

[60] *Refer* Vivek Vashi and Kanika Sharma*Increasing litigation under Bilateral Investment Treaties – should the Government be worried?*, http://www.indialawjournal.org/archives/volume5/issue_2/article_1.html, (last visited, Mar.22,2017, (N.T.M.)).

[61] Anuj Srivas, *India Loses Big in Arbitration Case Over Antrix-Devas Controversy*, The Wire, July,26,2016, https://thewire.in/53993/india-loses-big-in-abritration-case-over-antrix-devas-controversy/, (last visited, Mar.22,2017, (N.T.M.)).

[62] Ians, *India to appeal against all verdicts in Antrix-Devas legal battle***,** Hindustan Times, Aug 31, 2016, 01:23 IST, http://www.hindustantimes.com/india-news/india-to-appeal-against-all-verdicts-in-antrix-devas-legal-battle/story-EeeuVD10QtBFtZSTF5pB6O.html, (last visited, Mar.22,2017, (N.T.M.)).

other industries within India.[63] Certain tax related decisions also play a vital role in vitiating investment based claims through BITs.

Model 2015 BIT has successfully defined the 'investment' and 'investor' giving them a broad colour with a restrictive interpretation (excluding Intellectual property, good will etc.) and it had also explored several nuances. In fact, it had looked into the rule of *forum non-conveniens,* making provision for the investors to be sued in the home state too. Yet, it failed to address the issue of forum shopping though not by ICSID Tribunals but by UNCITRAL proceedings. Apart from, model BIT, Arbitration amendment Act, 2015 had relaxed the concept of invalidating an Award on public policy considerations along with minimal judicial intervention in domestic arbitral proceedings too. The intention of Indian Government to attract FDI is very obvious but it needs to take more conscious decisions to proliferate investments and income out of them.

Conclusion

Investment arbitration under ICSID has large implications over global and domestic markets and would certainly have a major role to play in the international relations. The structure and working of ICSID with its facilitation services to the International Tribunals, ensure impartial and efficient Awards that could be enforced in the countries without much objections. Yet, it stands in a position to weigh and consider the host state's economical conditions while delivering the award employing both public and private rules of international law. On the other hand, it should take steps to remove the vagueness in its rules like Art.42 and should also focus on prohibiting the forum shopping options available to the parties. The proverb,

'Strike the iron, while it is hot',

would be more suited to India's current situation where there are a number of investment claims against India. India though is a non-signatory, is subjected to the ICSID dispute settlement process through Additional facility rules. It does not make any difference being a party to ICSID convention or not, except for restricting some of the benefits to Indian investors abroad. Hence, it is advisable for India to become a party to ICSID convention at the earliest, and show specific concerns in enforcing investment foreign awards in India without any delays. Policy decisions have to be taken in this regard, and the provisions for international investment arbitration and its awards should be included as part of the Indian Arbitration and Conciliation Act, 1996, giving them due recognition. This would not only ensure the expected FDI prosperity in India but also would save our reputation globally.

[63] Supra 60.

An Interplay of Inheritance of Financial Instruments Between Nominees and Successors: An Analysis of the Rulings of Bombay High Court

Mansi Rajput*
Hussain Ali**

ABSTRACT

Nomination is a prevalent mechanism followed around the globe. It is exercised to prevent the property from becoming ownerless when the original proprietor dies, until the legal heirs come on the record. Nomination is practiced in different sphere namely insurance, banking, cooperative society etc. However, a major adverse outcome of nomination which is highly litigated is that nominee, though temporary estate holders, contests to become the permanent legal heir.

For the first time, this conflict came up in the field of financial instruments. This struggle between nominees and successors was resolved in the Kokate where the single bench of the Bombay High Court gave an unprecedented judgment in the favour of the nominees. However, subsequently an another single bench of the Bombay High Court in the case of Salgaonkar overruled Kokate and held that in the case of succession the position of a nominee is not similar to that of a legal successor. Afterwards the ruling of Salgaonkar was upheld by the division bench of Bombay High Court in Yezdani.

In this article, an attempt has been made to analyze these abovementioned cases, their facts, the contentions of parties, the judgment and the provisions of various statutes relied upon.

1. INTRODUCTION

The contest for inheritance between nominees and successors is an old and a recurring issue. The Indian judiciary has delivered multiple cases on this contentious issue. Nomination of shares under company law as well as the law relating to titles of shares after the death of the holder has been deliberated and litigated in various courts and tribunals. Unlike succession, there are no general or special laws to

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govern nomination. This is the root cause of dispute in this subject matter.

The provisions relating to 'nomination' are specifically prescribed under § 72 of the Companies Act, 2013[1] and § 109A and § 109B of the Companies Act, 1956[2] These provisions in the old and new the Acts are similar with only two difference – *firstly*, § 109A and § 109B uses the term 'shares and debentures', whereas § 72 refers to the phrase 'securities'; *secondly*, there are different forms (Form – 2B under 1956 Act and Form – SH-13 under 2013 Act) for nomination under both the statutes.

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[1] **§ 72. Companies Act, 2013. Power to nominate –**

(1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

(2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(4) Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

[2] **§ 109A. of the Companies Act, 1956 Nomination of shares –**

(1) Every holder of shares in, or holder of debentures of a company may, at any time, nominate, in the prescribed manner, a person to whom his shares in or debentures of, the company shall vest in the event of his death.

(2) Where the shares in, or debentures of, a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, a person to whom all the rights in the shares or debentures of the company shall vest in the event of death of all the joint holders.

(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such shares in, or debentures of, the company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the shares in, or debentures of, the company, the nominee shall, on the death of the shareholder or holder of debentures of the company or, as the case may be, on the death of the joint holders become entitled to all the rights in the shares or debentures of the company or, as the case may be, all the joint holders, in relation to such shares in, or debentures of the company to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

§ 109B. Companies Act, 1956. Transmission of shares —

(1) Any person who becomes a nominee by virtue of the provisions of section 109A, upon

The Securities and Exchange Board of India ("**SEBI**") has made the recording of nomination for all demat account held by individuals mandatory. If nomination is not given then the account holder(s) should give a written and signed declaration to the effect. Pursuant to this, National Securities Depository Ltd.[3] has made nomination declaration compulsory for all existing and new depository accounts.[4]

Recently, the Bombay High Court clarified the misapprehension regarding the nominees under the Companies Act. This article will delve into a series of rulings of the High Court on this subject. However, firstly, it is significant to appreciate the basic concept behind succession and nomination.

NOMINATION: A RIGHT TO RECEIVE

The word *nomination* is not defined under any statute. **Wharton's Law Lexicon** defines 'nomination' as "*the act of mentioning by name; especially the power of appointing, by virtue of some manor or otherwise, a clerk to a*

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the production of such evidence as may be required by the Board and subject as hereinafter provided, elect, either—

(a) to be registered himself as holder of the share, or debenture, as the case may be; or

(b) to make such transfer of the share or debenture, as the case may be, as the deceased shareholder or debenture-holder, as the case may be, could have made.

(2) If the person being a nominee, so becoming entitled, elects to be registered as holder of the share or debenture, himself, as the case may be, he shall deliver or send to the company a notice in writing signed by him stating that he so elects and such notice shall be accompanied with the death certificate of the deceased shareholder or debenture-holder, as the case may be.

(3) All the limitations, restrictions and provisions of this Act relating to the right to transfer and the registration of transfers of shares or debentures shall be applicable to any such notice or transfer as aforesaid as if the death of the member had not occurred and the notice or transfer were a transfer signed by that shareholder or debenture-holder, as the case may be.

(4) A person, being a nominee, becoming entitled to a share or debenture by reason of the death of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share or debenture except that he shall not, before being registered a member in respect of his share or debenture, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company:

Provided that the Board may, at any time, give notice requiring any such person to elect either to be registered himself or to transfer the share or debenture, and if the notice is not complied with within ninety days, the Board may thereafter withhold payment of all dividends, bonuses or other moneys payable in respect of the share or debenture, until the requirements of the notice have been complied with.

[3] Henceforth referred to as *'NDSL'*.

[4] Policy circular No. NSDL/Policy/2009/0004.

patron of a benefice, by him to be presented to the ordinary.[5]*"* **Black's Law Dictionary** defines a "Nominee" as "*a person designated to act in place of another, usu. in a very limited way"* or *"a party who holds the bare legal title for the benefit of others or who receives and distributes funds for the benefit of others".*[6]

From a layman's perspective, nomination is a *right to receive the property in the event of death*. However, it does not absolutely transfer the ownership in favour of the nominee. It is a temporary arrangement made by the holder/owner of the property and comes into force after his death.

Nomination is a prevalent practice, carried out with the primary objective to appoint a trustworthy person who would handle and manage the property as per the nominator's last wishes. Nomination also avoids property to be left ownerless until the succession-related issues are resolved or the succession comes into effect.

SUCCESSION: A RIGHT TO OWN

Like nomination, there is no legislative definition of *succession* available. **Black's Law Dictionary** defines 'succession' as "*the act or right of legally or officially taking over a predecessor's office, rank, or duties*" or *"the acquisition of rights or property by inheritance under the laws of descent and distribution".*[7]

Similarly, the general meaning of 'successor' is one that succeeds or follows; one who takes the place that another has left, and sustains the like part or character; one who takes the place of another by succession.[8] In other words, a successor is the one who "survive". It must be regarded as settled by the House of Lords that the prima facie and ordinary meaning of "surviving" is "living at and after the event" and requires that the person who is to survive shall be living both at and after a particular point of time.[9]

In simple language, succession is a *right to own the property in the event of death*. There is a transfer the ownership in favour of the successor. It comes into force after the death of the holder/owner of the asset by broadly two modes *i.e.*

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[5] Nomination. (1997). In: *Wharton's Law Lexicon*, 14th ed. Delhi: Universal Law Publishing Co. Pvt. Ltd.
[6] Nominee. (2004). In: *Black's Law Dictionary*, 8th ed. West Group.
[7] Succession. (2004). In: *Black's Law Dictionary*, 8th ed. West Group.
[8] *Thompson v North Texas National Bank*, Tex., 37 S.W.2d 735, 740.
[9] *Elliot v. Lord Joicey,* (1935) AC 209.

testamentary succession (through a will) and *intestate succession* (in absence of will, administered as per the intestate succession law). In India, succession is majorly governed by Indian Succession Act, 1925, Hindu Succession Act, 1956 and Sharia Law.

HARSHA NITIN KOKATE *v.* THE SARASWAT COOPERATIVE BANK[10]

On 20th April 2010, the single bench of the Bombay High Court presided by Roshan Dalvi, J. delivered one of the most debatable and contentious judgment. In the case of *Harsha Nitin Kokate v. The Saraswat Cooperative Bank*[11] reversed an established practice in the matter of transmission of shares. In this case, the deceased had, in his lifetime, made a nomination in respect of certain shares (held in dematerialised form), in favour of his defendant-nephew. After the death, the plaintiff widow claimed an interest in those shares as the heir and legal representative of the deceased. This was, however, conflicted by defendant-nephew pursuant to the nomination executed in his favour.

The problem placed before the Court was; whether upon the death of an owner, the rights, title, and interest in the shares would be transferred to a nominee (defendant-nephew) or to the successor (plaintiff-wife) to the property?

The legal question of similar nature has been put forth before various courts. The majority of them adopted a successor friendly approach *i.e.* the successors were given precedence over the nominees. Nonetheless, the Bombay High Court ruled in favour of the nominee (defendant-nephew), hence adopting a contrary viewpoint. The decision of the court was based upon the following factors –

A. § 109A of the Companies Act, 1956 and Bye-Law 9.11 of the NSDL Bye Laws –

As per the aforesaid provisions, a valid and enforceable nomination can be made on completion of two requirements. *Firstly,* it shall be made by the shareholder during his lifetime and *secondly,* it shall be made in the prescribed manner. In the present case, the deceased shareholder had fulfilled both the requirements. Henceforth, when the shareholder died, such nomination will have two effects, *firstly* the shares would *vest* in the nominee, and *secondly* the nominee would become the beneficial owner or become *entitled* to all of the rights in the shares.

[10] 2010 (112) Bom. LR 2014.
[11] Henceforth referred to as '*Kokate*'.

Further, Bye-Law 9.11.7 of the NDSL Bye-Law[12], is a *non-obstante clause*. As per the provision, the nomination would have an overriding effect upon succession by will. It places nomination equal to testamentary disposition. The court stated that: "*…any other disposition or nomination under any other law stands subject to the nomination made under the Depositories Act. Section 9.11.7 further shows that the last of the nominations would prevail.*"

B. Interpretation of 'vest' –

As mentioned above, the shares would *vest* in the nominee. The court went on to interpret the word *vest* and held that it broadly means 'to confer ownership'.

The court cited **Black's Law Dictionary.** *Vest* is defined as – *"1. To confer ownership of (property) upon a person. 2. To invest (a person) with the full title to property."* The court relied on the case[13], where it was held that the term vest in common English acceptation would mean and imply conferment of ownership of properties upon a person and in a similar vein, it gives immediate and fixed right of present and future enjoinment. The court added that the term vest is a word of variable import.[14]

The counsel of the plaintiff-wife contended that the nominee is merely a trustee, who holds the shares in trust for the estate of the deceased. He supported his arguments by § 39 of the Insurance Act, 1938[15] and § 30 of Maharashtra Co-operative Societies Act, 1960[16]. Here, the nominees are treated as trustees of the

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[12] **Bye-Law 9.11.7. of the NSDL Bye Laws –**

Notwithstanding anything contained in any other disposition and/or nominations made by the Nominating Person(s) under any other law for the time being in force, for the purposes of dealing with the securities lying to the credit of deceased Nominating Person(s) in any manner, the Depository shall rely upon the last nomination validly made prior to the demise of the Nominating Person(s). The Depository shall not be liable for any action taken in reliance upon and on the basis of nomination validly made by the Nominating Person(s).

[13] *Bharat Coking Coal Ltd. v. Karam Chand Thapar & Bro,* 2002 (8) SCALE 388.

[14] *Dr. M. Ismail Faruqui v. Union of India,* A.I.R. 1995 S.C. 605; *Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust,* A.I.R. 1957 SC 344.

[15] **§ 39. Insurance Act, 1938. Nomination by policy-holder** –

(1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death."

[16] **§ 30. Maharashtra Co-operative Societies Act, 1960. Transfer of interest on death of member –**

(1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or,

property of the deceased. The court specified that: *"...these provisions are made merely to give a valid discharge to the Insurance Company or the Co-operative Society without vesting the ownership rights in the Insurance Policy or the membership rights in the Society upon such nominee."*

JAYANAND JAYANT SALGAONKAR AND ORS. *v.* JAYASHREE JAYANT SALGAONKAR AND ORS[17]

The single bench of the Bombay High Court gave one of the most welcomed decisions. In the case of *Jayanand Jayant Salgaonkar and Ors. v. Jayashree Jayant Salgaonkar and Ors.*[18], retuned the disturbance created by *Kokate* by declaring the latter to be *per incuriam.* A decision should be treated as given *per incuriam* when it is given in ignorance in terms of a statute, or of a rule having the force of a statute.[19]

An action was initiated by the plaintiffs for the administration of the estate of the deceased investor. The latter had made several investments in mutual funds where the defendants were made nominees. The plaintiffs urged that these investments formed part of the deceased's estate, therefore shall be subject to the succession. The defendants negated this claim on the ground that they would be the exclusive successor of such investments *qua* such nominees.

G.S. Patel, J. through his judgment had reinstated the equilibrium which was disturbed by *Kokate*. The court declared that nomination cannot eclipse succession. Therefore, the nominee-defendant cannot supersede the rights of the legal heirs of deceased.

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if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a Society.

(4) All transfers and payments duly made by a society in accordance with the provisions of this section, shall be valid and effectual against any demand made upon the society by any other person.

[17] [2015] 190 Comp Cas 44 (Bom).

[18] Henceforth referred to as *'Salgaonkar'*.

[19] *Municipal Corporation of Delhi v. Gurnam Kaur,* AIR 1989 SC 38.

ARGUMENTS OF THE PLAINTIFF

The following arguments were put forth by the Plaintiff –

A. *Nominee is trustee*

A nominee is merely a trustee. He is a person who holds the financial instrument for the benefit of another. Here, the Defendants held the investments in mutual funds in trust for the estate of the deceased.

B. *Nomination doesn't create third line of succession*

There are only two types of succession[20]. Nomination is not another type of succession. If held otherwise, it would have the following consequences – *Firstly*, the above mentioned corporate statutes would be in *direct and irreconcilable* conflict with the Indian Succession Act, 1925; *secondly*, nomination would single-handedly defeat succession by intestacy and testamentary disposition (irrespective that the will is made after the nomination); *thirdly*, nomination would gain superiority over other forms of testamentary disposition. In order to support this argument, the counsel drew the attention towards the following –

1. **The preamble to the Depositories Act, 1996[21]** – Nothing has been said about succession or disposition in the preamble.
2. **§ 2(1) (a) of the Depositories Act, 1996[22]** – Nothing related to fiduciary relationship or nomination has been mentioned, either in this provision or any other provision *per se*.
3. **Bye-Law 9.11.7. of the NSDL Bye Laws** – Although, there is a *non-obstatnte* clause in this provision, the purpose is clear from this phrase used in the provision – "*for the purposes of dealing with the securities lying to the credit of the deceased Nominating Person(s) in any manner.*"
4. **§ 109A of Companies Act, 1956 –** This provision was inserted in the statute in 1999 for conformity with the Depositories Act. The introduction of such provision cannot be recognised as an amendment *sub-silentio* of the testamentary and other dispositive laws. Also, the Companies Act is not enacted to amend the law related to succession or create a new mode of succession. Hence, the provisions shall be construed in the same light.

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[20] *See* discussion *supra* Part 1.2.

[21] **Preamble to the Depositories Act, 1996** – *An Act to provide for regulation of depositories in securities and for matters connected therewith or incidental thereto.*

[22] **§ 2(1) (a). Depositories Act, 1996. Beneficial owner –** A person whose name is recorded as such with a depository.

5. ***Smt. Sarbati Devi v. Smt. Usha Devi***[23] **–** A similar question arose in this case. The nominee claimed the beneficial interest in the amount received under the life insurance policy as a legal heir. The court was of the opinion that: *"…It is difficult to hold that Section 39 of the Act was intended to act as a third mode of succession provided by the statute."*

C. *Interpretation of 'nominee'*

The court should give more emphasis to the interpretation of the term 'nominee' rather than 'vest' (as previously done in *Kokate*). Out of various definitions in Blacks' Law Dictionary, the most relevant for this case is – *'A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.'*[24] From this definition, it is clear that the nominee holds title only in a fiduciary capacity.

The counsel further argued that nomination is done merely for the convenience of the company as well as depositary. The purpose is to eliminates the possibility of *legal vacuum,* not to transfer the ownership title to the nominee.

Arguments of the Defendant

The following arguments were submitted by the defendant –

A. Shri Vishin N.Khanchandani & Anr. v. Vidya Lachmandas Khanchandani & Anr.[25]

The counsel of the Plaintiff relied upon this judgment of the Supreme Court. The issue before the court was whether, on the death of the National Savings Certificate holder, the nominee specified therein becomes entitled to the sum due under the certificate to the exclusion of all other persons? The court answered in negative and held that as per § 6(1) and § 8 of the Government Savings Certificates Act, 1959[26], the nominee can only retain the amount of the certificate for the benefit of the deceased's legal heirs.

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[23] 1984 AIR 346; 1984 SCR (1) 992.

[24] *Supra* note 4.

[25] (2000) 6 SCC724.

[26] **§ 6(1). Government Savings Certificates Act, 1959. Nomination by holders of savings certificates –**
Notwithstanding anything contained in any law for the time being in force, or in any disposition, testamentary or otherwise in respect of any savings certificate, where a nomination made in the prescribed manner purports to confer on any person the right to receive payment of the sum for the time being due on the savings certificate on the death of the holder thereof and before the maturity of the certificate, or before the certificate having reached maturity has been discharged, the nominee shall, on the death of the

The counsel for the defendant argued that this case has no applicability in the present scenario because – *firstly,* § 8(2) expressly safeguards the interest of heirs; *secondly,* the schemes and the law under the Companies Act or the Depositary Act and the Government Savings Certificates Act are different. However, this argument was rejected by the court on the basis that § 8(2) is merely clarificatory or *ex majore cautela* and an absence of a saving provision will not change a settled position of law.

B. Cases in support

The counsel presented before the court a ruling[27] of the Calcutta High Court where a nominee of a provident fund account was held as an exclusive owner of the money in that account. In another case[28], the Delhi High Court on the basis of the non-obstante clause of § 109A rejected the submission that nominee is merely a trustee. Further, this provision represents the intention of the legislature to override the general law of succession and create an exception to the same.

C. Peculiarity of the case

Although, it is a settled position that nominee is merely a trustee the application of such law shall be subject to the peculiarity of each particular case. This approach cannot be universally used in all the cases having some similarity. Also, no previous cases dealt especially with Companies Act, 1956 or the Depositories Act, 1996, and thus these two statutes *stand alone and apart.*

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holder of the savings certificate, become entitled to the savings certificate and to be paid the sum due thereon to the exclusion of all other persons, unless nomination is varied or cancelled in the prescribed manner.

§ 8. Government Savings Certificates Act, 1959. Payment to be a full discharge –

(1) Any payment made in accordance with the foregoing provisions of this Act to a minor or to his parent or guardian or to a nominee or to any other person shall be a full discharge from all further liability in respect of the sum so paid.

(2) Nothing in Sub-section (1) shall be deemed to preclude any executor or administrator or other representative of a deceased holder of a savings certificate from recovering from the person receiving the same under § 7 the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

(3) Any creditor or claimant against the estate of a holder of a savings certificate may recover his debt or claim out of the sum paid under this Act to any person and remaining in his hands unadministered in the same manner and to the same extent as if the latter had obtained letters of administration to the estate of the deceased

[27] *Smt. Usha Majumdar v Smt. Smriti Basu;* AIR 1988 Cal 115.

[28] *Dayagen Pvt. Ltd. v. Rajendra Dorian Punj and Anr;* [2009] 151 Comp Cas9 2 (Delhi); 151 (2008) DLT 375.

D. Similarity between nomination and will

Defendants claim that on the basis of following factors, nomination shall be treated equivalently to will and a nominee shall also be entitled to the same privileges of a natural successor –

a. nomination is a statutory testament and therefore a part and parcel of the Indian Succession Act, 1925.

b. nomination serves the same purpose as that of will *i.e.* it disrupts a natural line of succession.

c. on the interpretation of § 58(2) of the Indian Succession Act[29], it is found that the Act specifically excludes other modes of succession. In other words, it accepts the possibility and recognition of other modes of testamentary succession.

JUDGMENT

The court accepted the arguments presented by the counsel for the Plaintiff and thereby overruled the *Kokate* decision. *Salgaonkar* held that: *"The interpretation of Section 109A and Bye-Law 9.11 placed by the Kokate Court does not seem to me to be reconcilable with the explicit decisions of the Supreme Court and of this Court."* Further, the court came up with the following points –

A. Purpose of nomination

Succession litigations are a common practice in the event of death of the estate holder. Therefore, in order to terminate the liability of the company or the depository and to shift any further accountability to the nominee, the mechanism of nomination was created. To quote the court: *"The sole intention is, quite clearly, to afford the company or depository in question a legally valid quittance so that it does not remain forever answerable to a raft of succession litigations and an endless slew of claimants under succession law.*

If nomination is testamentary instrument

Relying on the argument put forth by the Defendant, if the court believes that nomination is a 'statutory testament or will', then –

a. to this effect, nomination shall be eclipsed by the later formulated will. Yet, the Defendants plead that it will have an overriding effect on will. This is self-

[29] **§ 58(2). Indian Succession Act, 1925 –** Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India applicable to all cases of testamentary succession.

contradictory.

b. the succession through a will is subject to several restrictions imposed by personal laws. If nomination is elevated to the level of will, it will oust the application of personal laws entirely.

c. this will promote an unnatural practice to give preference to an outsider or one heir to the exclusion of others. It is irrational that the assets or property of a deceased shall necessarily devolve upon an outsider or one heir to the exclusion of others.

B. Nomination is a not a super will

If the Defendant's view (nomination is equivalent to will) is accepted, nomination shall be regarded as *'super will'* (which is unreasonable). This is because the nomination lacks the following essential features of a will and various discipline mandated under § 63 the Indian Succession Act, 1925[30]

a. Codicil.

b. Probate or other proof 'in solemn form' to proove the authenticity of will.

c. Witnesses need not be in the presence of the nominator.

d. Witnesses need not act at the instance of the nominator.

e. Witnesses need not see the nominator execute the nomination.

f. Nomination cannot be discarded on the ground of importunity, fraud, coercion or undue influence.[31]

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[30] **§ 63. Indian Succession Act, 1925. Execution of unprivileged wills –**
Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-
(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

[31] As per § 61 of the Indian Succession Act, 1925, a will or any part of a will, vitiated by fraud or coercion is void.

CASES REFERRED BY THE COURT

The court while pronouncing its decision made reliance upon the *ratios* of several cases. The following are the excerpts of relevant and significant judgments –

Shipra Sengupta v. Mridul Sengupta & Ors[32]

"In view of the clear legal position, it is made abundantly clear that the amount in any head can be received by the nominee, but the amount can be claimed by the heirs of the deceased in accordance with law of succession governing them. In other words, nomination does not confer any beneficial interest on the nominee."

Vishin N. Khanchandani and Anr. v. Vidya Lachmandas Khanchandani and Anr.[33]

"...the nomination only indicated the hand which was authorised to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy."

Smt. Sarbati Devi and Anr. v. Smt. Usha Devi[34]

"…the nominee under Section 39 of the Act is nothing more than an agent to receive the money due under a life insurance policy in the circumstances similar to those in the present case and that the money remains the property of the assured during his lifetime and on his death forms part of his estate subject to the law of succession applicable to him...."

Antonio Joao Fernandes v. The Assistant Provident Fund Commissioner & Ors[35]

"…further held that the use of the word "vest" in Section 10(2) of the Employees' Provident Funds and Miscellaneous Provisions Act of 1952 does not clothe a nominee with an absolute title or beneficial title in respect of provident fund amount lying to the credit of the deceased. This Court further held that the nominee is merely authorised to receive the amount for the benefit of heirs of the deceased."

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[32] (2009) 10 SCC 680; 2009 (6) Bom CR 117.
[33] AIR 2000 SC 2747; (2000) 6 SCC 724.
[34] (1984) 1 SCC 424.
[35] 2010 (4) Bom CR 208.

Ram Chander Talwar & Anr. v Devender Kumar Talwar & Ors[36]

"Section 45ZA (2) of the Banking Regulation Act gives nominee all the rights of the depositor, so for as the depositor's account is concerned, however does not make him owner of the money lying in said account."

Salgaonkar held that this above-mentioned provision[37] is in *pari materia* with § 109A of the Companies Act, 1956.

SHAKTI YEZDANI AND ANR *V.* JAYANAND JAYANT SALGONKAR[38]

The issue identical to that in *Salgaonkar* came up in *Shakti Yezdani and Anr v. Jayanand Jayant Salgonkar*[39] - Does the combined interpretation of §109A of the Companies Act, 1956 and Bye-laws under the Depositories Act, 1996 provides the nominee with the beneficial ownership of the subject matter of nomination (shares or securities) to the exclusion of the legal successors of the deceased?

On 1st December 2016, the division bench of the Bombay High Court consisting of A.S. Oka andA. A. Sayed, JJ. in the *Yezdani* case upheld *Salgaonkar.* It reiterated that only the legal heirs or the successors shall inherit the shares of the deceased.

ARGUMENTS OF THE APPELLANT

The Appellant made detailed submissions. However, arguments of only Appellant are noteworthy. The arguments of the Respondent are similar to that of the Plaintiff in *Salgaonkar. Inter alia* the Appellant through the following submissions contended that *Salgaonkar* shall be *set aside* and the validity of *Kokate* shall be *upheld* –

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[36] (2010) 10 SCC 671.

[37] **§ 45-ZA (2). Banking Regulation Act, 1949.**
Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

[38] 2017 (1) Bom CR 319; [2017] 136 CLA 119 (Bom); [2017] 139 SCL 432 (Bom); 2017 (1) Bom CR 319.

[39] Henceforth referred to as *'Yezdani'*.

A. No reference in Companies Act

The shares shall *vest* in the nominee absolutely because –

a. there is nothing in Companies Act to show otherwise;

b. nothing in Companies Act creates any fiduciary duty of nominee.

c. the concept of nomination is undefined in the Companies Act, therefore it shall be construed in reference to §109A and § 109B.

B. Precedents and stautes not par materia

§ 109A and §109B of the Companies Act, 1956 and the provisions regarding nomination under the following statutes (as discussed in *Salgaonkar*) are not *in pari materia* – (a.) Insurance Act, 1939; (b.) Banking Regulations Act, 1949; (c.) National Saving Certificates Act, 1959; (d.) Employees' Provident Fund and the Miscellaneous Provisions Act, 1952.

Also, most of the precedents which were relied upon in *Salgaonkar* did not directly or expressly deal with the provisions of the Companies Act.

C. Different intention of legislature

The intention of the legislature is utterly clear from § 109A and §109B of the Companies Act, 1956 that they wanted to outweigh the intestate and testamentary law of succession because – *firstly*, it was inserted especially through the Companies (Amendment) Act, 1999; *secondly*, § 109A (3) incorporates a non-obstante clause.

Also, the Indian Succession Act, 1925 will not be applicable here[40]. Nevertheless, the court rejected this argument and said: *"Sections 109A was not on the Statute Book when the Indian Succession Act, 1925 came into force. We do not see how the said provision will help the Appellants."*

D. Stare Decisis not applicable

The counsel for the Appellant cited a case[41] where the court stated that the principle of *stare decisis* is not applicable where the multiple constructions of the statutes are possible.

In the present case, even though there are multiple precedents where the courts have supported successors to inherit the property of the deceased, these

[40] See discussion *supra* Part 3.2, Point D.

[41] *State of Himachal Pradesh and Others v. Ashwani Kumar and Others*; 2015(12) Scale 619.

shares will vest in the nominee because the statute is unambiguous and clear on this part. Therefore, the principle of *stare decisis* will not apply.

JUDGMENT

Purpose of nomination

The objective of nomination is not to create a third mode of succession but, to safeguard the estate of the deceased shareholder for the following purposes –

a. the market value of shares fluctuates due to many forces, so it is necessary that on the demise of the shareholder his/her shares are represented by someone.

b. the advantages attached to the shares shall be accrued to the shareholder's family/relatives even after the death.

c. somebody shall represent the shareholders in the annual general meetings.

In short, the business of the company shall not suffer on account of the legal heirs of the deceased shareholders establishing their rights of succession in the left shares.

No material difference

§109A(3) of the Companies Act 1956 and the following provisions of the statutes are *pari materia* – § 6(1) of the Government Saving and Certificate Act, 1959 and § 45-ZA(2) of the Banking Regulation act, 1949. The only crucial similarity among these provisions is that they begin with a *non-obstante clause* which has a dual effect – *firstly,* nomination will override both testamentary and intestate disposition; *secondly* it exclude all other persons except the nominee from inheriting the property whatsoever.

The laws creating nomination are enacted to safeguard subject matter of the nomination until the legal representative's steps into the shoes of the deceased.

Indrani Wahi v. Registrar of Co-op. Societies and Others[42]

In this case, the Apex Court held that under the West Bengal Co-operative Societies Act, 1983, the nominee is entitled to the share of the deceased shareholder and the respective co-operative societies are obliged to transfer the shares of the deceased shareholder in favour of the nominee. After the interpretation of provisions of the said Act (§ 79, § 80) and the rules formed thereunder (Rule 127 and Rule

[42] [2016] 6 SCC 440.

128), the court came to the following conclusion – *firstly,* a *n*ominee is favoured only when he/she is a family member. In this case, the nominee is already declared as the family member. However, this is subject to a major condition that there shall be a valid nomination. *Secondly, l*egal heir is favoured only in the absence of the nominee.

CONCLUSION

Kokate had two negative effects, *firstly,* it contradicted the notion adopted by the Supreme Court of India with respect to nomination and; *secondly,* it annulled the effect of several provisions of succession law. The court in *Kokate* declared that nomination is similar to a testamentary instrument, however, it failed to discuss the questions arising from this proposition *e.g.* whether nomination would be subjected to probate? What will be the effect of codicil on nomination? Who all are capable of becoming witness to nomination? Thankfully, *Salgoankar* nullified such effects and once again upheld the approach of the Supreme Court embraced in the subject matter of nomination.

Salgoankar bought Indian laws on nomination at par with English laws. According to the English Law the payee or the nominee is nothing more than an agent to receive the money, which money remains the property of the assured and at his disposal during his lifetime and on his death forms part of the estate.[43]

Nomination is a common machinery found in different laws such as Insurance, Banking, Co-operative Societies, etc. Although the language used in these statutes are different yet, the intention of the legislature is constant *i.e.* nomination would not amount to a Will or a gift or trust in favour of the nominee and the nominee would only get the right to receive the amount and he holds the amount for the benefit of the heirs.[44]

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[43] *Hardial Devi Ditta v Janki Das & Anr.;* 6 (1970) DLT 342.

[44] *D. Mohanavelu Mudaliar v. Indian Insurance & Banking Corporation, Salem & Anr;* AIR 1957 Mad 115.

Freedom of Press in democratic State

Mr. Kush Kalra*

Abstract

The freedom of Press as has been noted is the paramount in public governance in democratic State. Voicing for the deprived, exploited marginalized people, who may be identifiable collectively as a caste, linguistic or belonging to a particular community or religion is not anathema to the constitutional values. Essence of expression must be with an objective to accommodate their need or right within the Scheme of Constitution. Having plural voices in democracy is conducive to democratic and polity itself. Therefore, any attempt of the Press portraying the voice of the people for their upliftment or emancipation cannot be decried as a foul against the State to deny the constitutional protection of free speech and expression. The Press has full freedom to criticize Governmental policy and decision without any fear or restraint.

Democracy cannot exist without public reasoning based on freedom of expression. The role of Press is therefore generally perceived to allow citizen to allow formation of public reasoning to realise their goal in public governance.

Therefore, the right to have a free flow of information and formulate idea of individual in their public conduct, co-exists with Freedom of Press in disseminating information in public domain.

Key words: Press, Democracy, people, constitution, speech etc.

Introduction

The democracy survives only when there is a serious inter play between public opinion and law making. Informed choice is central, in governance in democratic republic. In "Democracy" every citizen is born with an appetite for information that transforms him as a true citizen. Thus, like a child hungry for food, like diseased need medicine, like underfed needs nourishment, like insecure needs security, the citizen depend upon information for his own strength and need. If a citizen's surge for free flow of information is denied, it would be the death bell of democracy itself. Realisation of a well ordered constitutional State is possible only when freedom is nourished; and that freedom is the life blood of democracy. It is based on the formation of public reasoning, the democracy acts as a catalyst in public governance based on an elected representation.

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The freedom of Press is not specifically referable to the Constitution. However, under Article 19(1)[1] of the Constitution, such freedom is referred.

In *Bennett Coleman and Co. v. Union of India*[2] at page 777, it was held by the Hon'ble Supreme Court as follows:

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[1] **Article 19 in The Constitution Of India 1949**

19. Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business

(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

(3) Nothing in sub clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub clause

(4) Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause

(5) Nothing in sub clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe

(6) Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

[2] [1973 2 SCR 756]

"Although Article 19(1)(a) does not mention the freedom of press, it was settled view of Court that freedom of speech and expression includes the freedom of the press and circulation".

In *Indian Express Newspapers (Bombay) Pvt.* Ltd. *and others v. Union of India and Others*[3], it was observed by the Hon'ble Supreme Court that the purpose of the press is to advance public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.

In *Romesh Thappar v. State of Madras*[4] the Hon'ble Supreme Court held as follows:

"... (The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse ... (But) it is better to leave a few of its noxious[5] branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

In *Indian Express Newspapers (Bombay) Private* Ltd. *And Others etc. v. Union of India and others*[6] in para. 68, the Hon'ble Supreme Court observed as follows:-

"...The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves."[7] Freedom of expression has four broad social purposes to serve: (i) It helps an individual to attain self-fulfillment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's

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[3] (1985) 1 SCC 641

[4] 1950 SCR 594

[5] **Meaning of noxious:**
1. Harmful to living things; injurious to health
2. Harmful to the mind or morals; corrupting

[6] (1985) 1 SCC 641

[7] (Per Lord Simon of Glaisdale in *Attorney-General v. Times Newspapers Ltd.* (1973) 3 All ER 54).

right to know. Freedom of speech and expression should, therefore, receive a generous support from all those who believe in the participation of people in the administration ...."

Thus, **democracy cannot exist without public reasoning based on freedom of expression**. The role of Press is therefore generally perceived to allow citizen to allow formation of public reasoning to realise their goal in public governance.

Therefore, the right to have a free flow of information and formulate idea of individual in their public conduct, co-exists with Freedom of Press in disseminating information in public domain.

Nature and function of Press in India under the Constitution and ordinary law

The PRB Act 1867 defines newspaper as follows:

"Newspaper means any printed periodical work containing public news or comments on public news". The definition accorded to newspaper clearly indicates that operational freedom conferred on press is in public domain.

In *Binny* Ltd. *v. V. Sadasivan*[8], the Hon'ble Supreme Court held in para. 11 as follows:

"..... A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest..."

The registration under the PRB Act 1867 is fettered with a responsibility to act in public domain. The PRB Act 1867, enacted during the British Government, was with the intention to catalogue all the works in India within public domain. Thereafter, it underwent several amendments by different legislations after independence. The publisher has also to make a declaration as contemplated under the PRB Act 1867 showing the name of the reader and the publisher. This declaration, in fact, is to create accountability and responsibility on the printer and the publisher for the news published.

[8] (2005) 6 SCC 657

The Press Council of India Act, 1978 (for short, the "PCI Act 1978") was enacted to preserve the freedom of the Press and for maintaining and improving the standards of newspapers and news agencies in India. It establishes a Press Council. The objects and functions of the Council have been set out in Section 13 of the above Act. It is relevant to go through such objects in the context of public function as provided under Sections 13(2)(d) and (2)(e), which read as follows:

"13.(2)(d) to encourage the growth of a sense of responsibility and public service among all those engaged in the profession of journalism.

(13)(2)(e) to keep under review any development likely to restrict the supply and dissemination of news of public interest and importance."

The Press has pervasive control of individual and society at large in moulding public reasoning. The accountability of the Press is regulated in terms of its responsibility. This responsibility is essentially emanating from the constitutional value for public governance. The underlined principles behind registration and the control being exercised by the Council are to ensure such responsibility of the Press. It is not a mere regulation of private activities of an entity which established the Press. Thus, the registration of the Press under the PRB Act 1867 and the control exercised by the Press Council under the PCI Act 1978 is clearly indicative of the public function discharged by the Press.

Liberty of the Press

Under Art. 41[9] of Part IV[10] of the Constitution, it is the duty of the State to endeavour within the limits of its economic capacity, for securing the right to work,

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[9] **Article 41 in The Constitution Of India 1949**

41. Right to work, to education and to public assistance in certain cases The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want

[10] The **Directive Principles of State Policy** are guidelines/principles given to the central and state governments of India, to be kept in mind while framing laws and policies. These provisions, contained in Part IV of the Constitution of India, are not enforceable by any court, but the principles laid down therein are considered fundamental in the governance of the country, making it the duty of the State to apply these principles in making laws to establish a just society in the country. The principles have been inspired by the Directive Principles given in the Constitution of Ireland and also by the principles of Gandhism; and relate to social justice, economic welfare, foreign policy, and legal and administrative matters.

Directive Principles are classified under the following categories: Gandhian, economic and socialistic, political and administrative, justice and legal, environmental, protection of monuments and peace and securit

education etc. The directive principles though are not enforceable, nevertheless in terms of liberty of an individual, on the right to have education, the principles have a relevance while amplifying his right under Article 21 of the Constitution. This education is not to be limited for any learning programme for employment or otherwise. Its reach is beyond learning or knowledge and is to equip him as a reasonable citizen, think ideally for him in the democratic State. The education of individual through dissemination of information and knowledge is the bedrock of democracy. The universal declaration of Human Rights in its Preamble speaks about such right available to the individual. Thus, to exercise political power in democracy, citizen must be educated to actuate his public reasoning. Thus, the media's role has to be understood on the anvil[11] of public function to educate the citizen in terms of his political, social and economic aspiration and development. The liberty of the Press having operational freedom in terms of Art. 19(1) of Constitution must be understood with liberty with responsibility. This responsibility has to be considered from the constitutional scheme of polity and the society as envisaged under the Constitution.

In *Re: Harijai Singh and another*[12], the Hon'ble Supreme Court held as follows:

"In an organised society, the rights of the Press have to be recognised with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded."

In *Sanjoy Narayan Editor in Chief Hindustan & Ors. v. Hon. High Court of Allahabad Thr.R.G.*[13] it was held in para. 6 as follows:

"6. The impact of media is far-reaching as it reaches not only the people physically but also influences them mentally. It creates opinions, broadcasts different points of view, brings to the fore wrongs and lapses of the Government and all other governing bodies and is an important tool in restraining corruption and other ill-effects of society. The media ensures that the individual actively participates in the decision-making process. The right to information is fundamental in encouraging the individual to be a part of the governing process. The enactment of the Right to Information Act is the most empowering step in this direction. The role of people in

[11] **Meaning of Anvil:**
a. A heavy block of iron or steel with a smooth, flat top on which metals are shaped by hammering.
b. Something resembling an anvil, as in shape or function.
[12] AIR 1997 SC 73
[13] JT 2011(9) SC 74

a democracy and that of active debate is essential for the functioning of a vibrant democracy."

The Delhi High Court in *Abc v. Commissioner of Police & Others*[14] held that the media performs a public function and held as follows:

"Press and the media perform a public function and discharge a public duty of: disseminating news, views & information; initiating and responding to debates; dealing with matters of current interest in the society in all fields such as politics, morality, law, crime, arts, sports, entertainment, science, philosophy, religion, etc. There is not an aspect related to human rights and human existence which is not dealt with by the press and the media.

Freedom of Press in comparison with the freedom of individual and limitation of freedom of Press under the Constitution

The Constitution is the result of collective 'will' of the people to create a legal system with the principles of definite character to regulate themselves. The fundamental values of the Constitution must embrace their conduct in general and collectively, though individual still may have discord. This collective regulation must bind them to retain the collectivity. The public function in the State is therefore, essential to sustain this collectivity for common good. A legal system is understood as a coercive order to regulate the conduct of subjects. The public functionary is a protector and keeper of such order.

There are two primordial[15] freedom with the individual. These are freedom of idea or thought and freedom of expression. These freedom is inherent and inalienable right with the individual. The Constitution of India also categorizes fundamental freedom of its citizen under Art. 19(1). The Press is also having same freedom as available to the individual. Though seemingly individual freedom and freedom of Press appears to be one and the same, it has a significant difference while such freedom is practiced. Art. 19(2) sets out area where individual liberty could be restricted. This restriction is in the interest of the State based on State's security, public order, social order; to maintain friendly relationship with foreign States etc. This restriction are ideals and reasons on which freedom of citizen is regulated. Although it reflects enabling power to restrict freedom of individual, it nevertheless

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[14] *W.P.(C). No. 12730/2005*

[15] **Meaning of primordial:**
1. Being or happening first in sequence time; original.
2. Primary or fundamental

forms the very ideal in the legal order in public governance. An individual has freedom to think in terms of his aspiration unless his aspiration confronts with any positive law of the State as framed or enacted under Article 19(2) of the Constitution. His ideas and thoughts even if it is in not conformity with the constitutional values, remain unfettered unless it is encroached upon any area restricted in terms of Art. 19(2) of the Constitution (see S. 153A[16] of IPC, Unlawful Activities (Prevention) Act, 1967). However, Press has no such freedom. The liberty of the Press is to disseminate information or idea in circulation. Since it is public function, it has bounden duty and responsibility to discharge its functions in conformity with the constitutional values and ideals, and without any repugnancy to principles under Art. 19(2) of the Constitution. Therefore, Freedom of Press must take into account, values of constitutional polity as envisaged under the constitution while discharging its function as like any other public functionary under the Constitution. The keeper of such values cannot denounce those values as the same would be repugnant to the responsibility attached to the very nature of the public function being discharged by them. Thus, the Press has inherent limitation on their freedom based on the criteria of restriction under Article 19(2) of the Constitution.

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[16] **Section 153A in The Indian Penal Code**

153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.—(1) Whoever—

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different reli- gious, racial, language or regional groups or castes or communi- ties, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, [or] organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the partici- pants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,] shall be punished with imprisonment which may extend to three years, or with fine, or with both. Offence committed in place of worship, etc.—(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious wor- ship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.]

In a recent judgment of the Hon'ble Supreme Court in *Devidas Ramachandra Tuljapurkar v. State of Maharashtra and others*[17] court held as follows*:*

"The words, freedom of speech and expression find place in the association words "liberty of thought, expression, belief, faith and worship", which form a part of the Preamble of the Constitution. Preamble has its own sanctity and the said concepts have been enshrined in the Preamble. There can be no two opinions that one can express his views freely about a historically respected personality showing his disagreement, dissent, criticism, non-acceptance or critical evaluation. Freedom of speech and expression has to be given a broad canvas, but it has to have inherent limitations which are permissible within the constitutional parameters. We have already opined that freedom of speech and expression as enshrined under Article 19(1)(a) of the Constitution is not absolute in view of Article 19(2) of the Constitution. We reiterate the said right is a right of great value and transcends and with the passage of time and growth of culture, it has to pave the path of ascendancy, but it cannot be put in the compartment of absoluteness. There is constitutional limitation attached to it."

The Indian Press has to maintain secular credential while discharging public function. Their actions must be in conformity with secular values of the State as envisaged in the Constitution. Any negative approach by Press denouncing fundamental constitutional values such as secularism will have a cascading effect on public reasoning to impair the collectivity, integrity and unity of the nation. The registration under the PRB Act 1867 must be exercised by the Press for the good governance envisaged under the Constitution. Press has to strive for participation of average or ordinary citizen in democratic process with the aim to create a responsibility on them to maintain democratic and constitutional values of State polity. Media or Press must be able to promote such values unregulated with the above objectives. However, their freedom must be stopped when it indulges in polarisation of freedom of thought of citizen on religious line or communal line which is anti-thesis to social or political ethoses of the society intended to be created under the Constitution. Any attempt on the part of the Press to divide the people and country on the line of religious or communal hostility will have to be curbed by any responsible Government.

The Press Council of India have no teeth to tackle issues affecting security of the State or unity or integrity of the State. The regulatory mechanism under the PCI Act is only with the intent to regulate standards of newspapers in India. The

[17] ILR 2015 (2) Ker. 659

very challenge of the Press against the security, unity & integrity of India is to be dealt with based on the registration of the Press of the PRB Act 1867. The power to register includes power to de-register. Therefore, in appropriate circumstances if Press function poses threat to State security, unity and integrity, necessarily sufficient power is vested with the registering authority to de-register the Press.

Test for classifying freedom of Press for the purpose of control and action

The freedom of Press as has been noted is the paramount in public governance in democratic State. Voicing for the deprived, exploited marginalized people, who may be identifiable collectively as a caste, linguistic or belonging to a particular community or religion is not anathema to the constitutional values. Essence of expression must be with an objective to accommodate their need or right within the Scheme of Constitution. Having plural voices in democracy is conducive to democratic and polity itself. Therefore, any attempt of the Press portraying the voice of the people for their upliftment or emancipation cannot be decried as a foul against the State to deny the constitutional protection of free speech and expression. The Press has full freedom to criticize Governmental policy and decision without any fear or restraint.

The American Courts particularly the Supreme Court of the United States have developed three concepts veering around freedom of speech and expression. These are advocacy, discussion and incitement[18].

In *Whitney v. California*[19], the Supreme Court opined, while upholding individual liberty to advocate, as follows:

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches[20] and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to

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[18] **Meaning of Incite:**
To provoke and urge on
[19] [274 US 357 (1927)]
[20] **Meaning of Witches:**
A person, especially a woman, claiming or popularly believed to possess magical powers and practice sorcery.

increase the probability that there will be violation of it. Condonation[21] of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated."

The touchstone to control, restrict and prevent freedom as provided under Art. 19(1) referred in Art. 19(2) of the Constitution are: threat of security to the State, public order, integrity and unity of India decency or morality of friendly relation with Foreign States etc. The concept of advocacy, discussion and incitement has to be adjudged in the light of ground for restriction under Art. 19(2) of the Constitution.

Conclusion

In the context of Press freedom, what could be the prohibited line for the Press? A Press can advocate presidential form of system in India, instead of Parliamentary system. Though this may appear, is against the very basic structure of the Indian Constitution, it will not amount to threat to the State security or results in public order. However, a Press cannot advocate or incite public for control of the State by a particular religion or by use of theocracy in the governance. This would necessarily pose threat to the unity and integrity of the country which composed of plural religious society or communities. An advocacy or incitement has to be differentiated from discussion. A discussion, in normal course is a deliberation of issues among public. A discussion normally cannot have any impact upon the security of the State or Unity and integrity of the State or also of public order. However, advocacy or incitement, necessarily fall within the prohibited line. The objective line of test is based on the purpose of reporting by the Press. Any distorted version with the intention to polarise people on communal line, certainly

[21] **Meaning of Condonation:**
The act of condoning, especially the implied forgiveness of an offense by ignoring

would fall within the prohibited line. The proximate relationship between advocacy or incitement and threat caused to the unity and integrity of the Nation or security of the State or public order or decency or morality and other areas referred in Article 19 (2), is the gauge[22] to restrict freedom of speech and of the Press. If security of India and sovereignty and integrity of India or friendly relationship with foreign state is imminent, necessarily, it warrants urgent action to deny the very right to function as a Press based on the registration. It all depends upon the assessment of the dissemination of information and ideas reported for such action. In the matter relating to the public order or decency or morality, it is also open for the State to regulate activity to remove the evil. As has been noted it is all for the State to adjudge after analysing the function of the Press.

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[22] **Meaning of Gauge:**
1. to measure or determine the amount, quantity, size, condition, etc, of
2. to estimate or appraisejudge

Right to Bail and Anticipatory Bail: Special Reference to Railway Property (Unlawful Possession) Act

By Rajesh Kumar Singh[1]

Introduction

Railway Property (Unlawful Possession) Act, 1966 [RP (UP) Act] is a special statute with only sixteen sections and has penal provisions of maximum five years imprisonment. Under this statute the Officers of Railway Protection Force (RPF) are empowered to arrest without warrant. When a person is accused of an offence under RP (UP) Act has to be released on bail. As the term "Bail" has not been defined in RP (UP) Act or anywhere in Code of Criminal Procedure, 1973 (Code) the dictionary meaning of the word "Bail" is referred, "security for appearance of the prisoner." It means one who procures the release of an accused by becoming guarantor or security for his appearance in a court. This bail is a bond for the release of the accused from custody with conditions that he will appear before the court or an officer in authority on a date fixed in that bond and as such it is a guarantee for appearance on executing a bond. This paper attempts to study bail and anticipatory bail under RP (UP) Act.

Bail under Railway Property (Unlawful Possession) Act, 1966

In RP (UP) Act there is no specific provision to hold whether the offences under this Act are bailable or non-bailable. As per provision of section 2[2] of the Code, 'bailable' and 'non- bailable' offences are those offences which are shown as bailable or non-bailable in the 2nd schedule of the Code or are made bailable or non-bailable by any other law for the time being in force. Hence, Code is referred in this regard according to which offence punishable with imprisonment for three years and upwards is non-bailable. In all bailable offences, bail can be claimed as a matter of right by an accused person because of mandatory provision of law as enumerated under section 436[3] of Code dealing with bailable offences. The court

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[1] Ph. D Scholar, WBNUJS.

[2] Code of Criminal Procedure, (hereinafter referred as CrPC), No. 2, 1973, § 2(a), *"bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence.*

[3] Code of Criminal Procedure, No. 2, 1973, § 436, *In what cases bail to be taken.*(1) *When any person other than a person accused of a non- bailable offence is arrested or detained*

is not competent enough to refuse bail in case the accused is willing to furnish bond but in non-bailable cases the position of law is quite different. Section 437[4] Code, gives a huge discretion to Magistrate either to grant bail or send the accused under

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without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A.
(2) *Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.*

[4] Code of Criminal Procedure, No. 2, 1973, § 437, *when bail may be taken in case of non-bailable offence.*(1) *When any person accused of, or suspected of, the commission of any non- bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-* (i) *such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;*
(ii) *such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non- bailable and cognizable offence: Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail it such person is under the age of sixteen years or is a woman or is sick or infirm: Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason: Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]*
(2) *If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his [1] guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.*
(3) *When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1), the Court may impose any condition which the Court considers necessary-*
(a) *in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or*

custody. As per Section 8 of the RP (UP) Act[5] if upon an investigation made by an officer of the force, it appears to him that prima facie no case is sufficiently made out against the accused he shall be released on executing a bond with or without sureties and may be directed to appear before the Magistrate if and when required. The officer of the force shall also make a full report of all the particulars of such cases to his superior Officer who is supervising the investigation. The provision of section 8(2)(b) of the Act is therefore analogous to section 169 of the Code[6], an officer-in-charge of a police station having found evidence insufficient, shall release the accused on bail.

In view of the above provisions of law a great controversy arose whether the offences in RP (UP) Act are bailable or non bailable as RPF Officer's are vest with the power and discretion to grant bail even in non- bailable offences under RP (UP) Act. The decision of Hon'ble Guwahati High Court in *Union of India v State of Assam,*[7] gave a fuel to the controversy. In the impugned judgment Hon'ble

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(b) *in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or*
(c) *otherwise in the interests of justice.*
(4) *An officer or a Court releasing any person on bail under sub- section (1) or sub-section (2), shall record in writing his or its reasons or special seasons] for so doing.*

[5] Code of Criminal Procedure, No. 2, 1973, § 8, Inquiry how to be made (1) When an officer of the Force receives information about the commission of an offence punishable under this Act, or when any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person.(2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case: Provided that-(a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;
(b) if it appears to the officer of the Force that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person, on his executing a bond, with or without sureties as the officer of the Force may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

[6] Code of Criminal Procedure, No. 2, 1973, § 169, *Release of accused when evidence deficient- If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial.*

[7] 1997 Cr.LJ 1033(Gau).

High Court held that the discretion to decide whether an offence under this Act is bailable or not is with the officer concerned which is statutorily prescribed. Such discretion is controlled by the prescription regarding forming of opinion as regards the sufficiency of material or otherwise. Under the proviso to Section 8 (2) of the Act three situations are envisaged. Two of three situations are relatable to clause (a) of the proviso. If the officer of the force is of opinion that there is sufficient evidence or reasonable ground for suspicion against the accused person he shall (a) either admit him to bail to appear before a Magistrate having jurisdiction in the case or (b) forward him in custody to such Magistrate. There are two options given to the officer to form an opinion as whether there is sufficient evidence or reasonable ground for suspicion against the accused person. It no where deals with the right of the accused to get bail. The third category deals with a case when there is absence of sufficient evidence or reasonable ground of suspicion. In such a case the officer concerned has the power to release the accused on his executing the bonds. So the Hon'ble High Court viewed the offence under this Act are bailable.[8] However Hon'ble Supreme Court turn down such view of Guwahati High Court in *Union of India v State of Assam*,[9] and held the above view of Guwahati High Court as erroneous. Apex Court held that that the controversy can be looked into from another angle. In schedule I of the Code offences are classified. Part I deals with offences under the Indian Penal Code in which it has been specified which offences are bailable and non-cognizable. Part II deals with classification of offences "against other laws". Undisputedly the offence under Railway Property (Unlawful Possession) Act 1966 is covered by Part II. While classifying offences on the basis of the punishment with imprisonment for three years and above, but not more than seven years, it is provided that the offences shall be cognizable and non-bailable. However, an exception has been provided in section 5 of the RP (UP) Act of 1966 which makes all the offences under the Act to be non-cognizable. Except that exception provided under section 5 of the Act, Schedule I to the Code of Criminal Procedure shall apply to the offences under the Act of 1966. Under section 3 of the Act of 1966 for the first offence the imprisonment may extend to five years and for subsequent offences the imprisonment may extend to similar term. Only for special and adequate reason to be recorded the minimum sentence can be one year and two years respectively. On interpreting the provision of Section 8(2) of the RP (UP) Act, the Supreme Court observed that Ld. Single Judge appears to have taken the view that the direction that can be given by the officer having jurisdiction of the case is as a corollary of accused right to get bail. The interpretation

[8] A.N SAHA, CRIMINAL REFERENCE 1925 (6th ed. 2009).
[9] (2004) 7 SCC 474.

is clearly erroneous. It has been observed that the discretion to decide whether it is bailable or not cannot be left to the discretion of the officer. The view overlooks the clear language of the proviso and the jurisdiction to exercise the discretion is statutorily provided. The exercise of such discretion is also controlled by the prescription regarding forming of opinion as regards sufficiency of material or otherwise. There are two options given to the officer to form opinion i.e. whether there is sufficient evidence or reasonable ground of suspicion against the accused persons. It nowhere deals with the right of the accused to get the bail. The third category is contemplated by clause (b) of the proviso. It inter alia, provides that when it appears to the officer that there is no sufficient evidence or reasonable suspicion, he shall release the accused person on his executing a bond with or without surety as the officer of the Force may direct to appear if and when so required before the Magistrate having jurisdiction and shall make a full report of all the particulars of the case to his superior officer. This category deals with a case where there is absence of sufficient evidence or reasonable ground of suspicion. In such case concerned officer has the power to release the accused person on his executing bonds. Therefore the High Court was not justified in holding that all the offences under the Act are bailable. Such a view is contrary to the provision contained in section 8 of the RP (UP) Act.

Anticipatory Bail Under R.P (U.P) Act

Anticipatory Bail means bail in anticipation. When any person is apprehending arrest may approach to High Court or Court of Sessions for direction that in event of his arrest he shall be released on bail. The provision in respect of anticipatory bail has been laid down under section 438 of Code As there is no provision in RP (UP) Act regarding anticipatory bail, and the offences under RP (UP) Act being non-bailable, the Provision of Section 438[10] of Code will be applicable there. Where

[10] Code of Criminal Procedure, No. 2, 1973, § 438, *Direction for grant of bail to person apprehending arrest.- (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:- (i) the nature and gravity of the accusation; (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; (iii) the possibility of the applicant to flee from justice; and 6 (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:*
Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant

any person has reason to believe that he may be arrested on accusation of having committed an offence under RP (UP) Act, may apply to the High Court or the Court of Session having jurisdiction for a direction under this section that in the event of his arrest he shall be release on bail.

It is notable that in the beginning there was no provision of 'Anticipatory Bail' in the Code. But subsequently it was found that some influential persons sometimes falsely implicate their rivals in criminal cases and thus, they had to land in jail for a few days. This laid to lower down their prestige and reputation in society. Due to above mentioned facts the provision of anticipatory bail was introduced in the new Code of Criminal Procedure 1973 with a view to protect the prestige of those persons who used to become the victim of false implication in a criminal case.

In *Gurubaksh Singh v state of Punjab,*[11] Hon'ble Apex Court observed that section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of expression "reason to believe" shows that the belief that the applicant may be so arrested

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of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.
(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.
(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.
(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including - (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
(ii)a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; (iii) a condition that the person shall not leave India without the previous permission of the Court; (iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section. (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail.
[11] AIR 1980 SC 1632.

must be founded on reasonable grounds. Mere "fact" is not belief, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1) of Code, therefore cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest, otherwise the number of applicants for anticipatory bail will be as large as at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

An order of anticipatory bail is it interim or final is a direction that in the event of arrest of the petitioner, "he shall be released on bail". The condition precedent for the operation of this direction is arrest of the petitioner. "This being so, the irresistible inference is that while dealing with an application under section 438 the court cannot restrain arrest". [12] The Apex court has further observed in this case, the legality of the proposed arrest cannot be gone into an application under section 438 of the code. The role of the investigator is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under section 438 of the code will amount to interference in the investigation which cannot, at any rate, be done under section 438 of the code. In *Sidharam Satlingappa Mhetre v State of Maharashtra,*[13] Hon'ble Supreme Court observed, no inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. Court was of clear view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Gurubaksh Singh v State of Punjab*[14] that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Code by a wise and careful use of their discretion

[12] Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303.
[13] (2011) 1 SCC 694.
[14] (1980) 2 SCC 565.

which by their long training and experience they are ideally suited to do. In any event, this is 63the legislative mandate which we are bound to respect and honour. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail[15]:

i. *The nature and gravity of the accusation and the exact role of the accused must be roperly comprehended before arrest is made;*

ii. *The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*

iii. *The possibility of the applicant to flee from justice;*

iv. *The possibility of the accused likelihood to repeat similar or the other offences.*

v. *Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.*

vi. *Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.*

vii. *The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;*

viii. *While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be 64 caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*

ix. *The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*

x. *Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.*

[15] Sidharam Satlingappa Mhetre v. State of Maharashtra, (2011)1 SCC 694.

The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for 65anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

Irrational and indiscriminate arrests are gross violation of human rights. In *Joginder Kumar v State of U.P*[16], a three Judge Bench of the Supreme Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

In *Sidharam Satlingappa case,* [17] Hon'ble Supreme Court observed that the personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions of Hon'ble Court are only illustrative and not exhaustive.

1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

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[16] (1994) 4 SCC 260.
[17] (2011) 1 SCC 694.

3) Direct the accused to execute bonds.

4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

6) Bank accounts can be frozen for small duration during investigation.

In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

Exercise of jurisdiction under section 438 of Code is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

In *Gurubaksh Singh Case*,[18] Hon'ble Supreme Court while explaining the expression "reason to believe" pointed out that the use of the said expression shows that the belief that the applicant may be arrested, must be founded on reasonable grounds. Mere 'fear' is not 'belief ' for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence must be capable of being examined by the court objectively, because is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested.

The offences under R. P (U.P) Act is non bailable, since the highest punishment provided for the offences is five years imprisonment. Therefore in case there is apprehension of arrest, the provision of Section 438 of Code can invoked. An anticipatory bail is a pre arrest legal process which directs that if the person in

[18] (1980) 2 SCC 565.

whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued; he shall be released on bail. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore, effective at the very moment of arrest. A direction under section 438 is therefore intended to confer conditional immunity from the 'touch' or confinement contemplated by section 46 of the Code.

Since denial of bail amounts to deprivation of personal liberty, the Court lean against the imposition of unnecessary restriction on the scope of section 438 of Code, especially when not imposed by the legislature. An over generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in section 438 of Code must be served, not jettisoned.[19]

When an anticipatory bail is refused by the Court of Session, the petitioner can file another application before the High Court. But, upon dismissal of a petition for anticipatory bail, no second application lies in the same Court. This is because entertaining a second application for anticipatory bail would amount to review or reconsideration of the earlier order passed by a Bench having co-ordinate jurisdiction, as the 'accusation' remains unchanged. Further, the 'accusation' being the sine qua non and which remains the same, there cannot be any revival of "reasons to believe" or apprehension of arrest which was considered by the court in the earlier application for an anticipatory bail.[20]

The bar of *res judicata*, strictly speaking, is not applicable in criminal proceedings. In spite of that no one can file petition for anticipatory bail one after another. But, a person will be entitled to move High Court or Court of Session, as the case may be, for the second time. He can do so only on the ground of substantial change in the facts and circumstances of the case due to subsequent events, provided he has not been taken into custody meanwhile. It is to be remembered that he will not be entitled to move the second application on the ground that the court on earlier occasion failed to consider any particular aspect or material on record or that any point then available to him was, for some reason or other, not agitated before the court who heard his earlier application.[21]

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[19] AIR 1980 SC 1632.
[20] 2003 Cr.LJ 1(CAl) (FB).
[21] Sudip sen v. State of West Bengal, 2010 Cr.LJ 4628 (FB).

Section 438 of the Code in State of Uttar Pradesh has been omitted by state amendment.[22] Thus the Power of the Courts has been curtailed by State Legislature by making law. However the High Court has power to consider such application by invoking writ jurisdiction. A Division Bench of Calcutta High Court has held that in a very exceptional situation, the High Court can invoke its power to grant anticipatory bail in exercise of its writ jurisdiction under Article 226 of the Constitution.[23]

The State of West Bengal by State Amendment laid provision for issuance of Notice to Public Prosecutor before hearing of application for anticipatory bail. The provision laid down that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the state not less than seven days notice to present its case.[24]

Hon'ble Karnataka High Court has elaborately discussed the scope of anticipatory bail under RP (UP) Act, in *Ashraf Alias Lal Basha v Inspector of Police, Railway*[25]. In this case the petitioners have sought anticipatory bail, apprehending arrest for alleged offences relating to theft and unlawful possession of Railway Property. It is alleged that they apprehend arrest by the RPF. The

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[22] U.P Act, 1976, No. 16, § 9, w.e.f 28.11.1975.
[23] Sumer Jain v. State of West Bengal, 2003 C Cr LR (Cal) 398.
[24] In its application to the State of W. B. for sub-section (1) of Section 438, the following sub-sections be substituted, namely :- "(1)(a) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest, he shall be released on bail; Provided that the mere fact that a person has applied to the High Court or the Court of Session for a direction under this section shall not, in the absence of any order by that Court, be a bar to the apprehension of such person, or the detention of such person in custody, by an officer in charge of a police station.(b) The High Court or the Court of Session, as the case may be, shall dispose of an application for a direction under this sub-section within thirty days of the date of such application : Provided that where the apprehended accusation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than seven years, no final order shall be made on such application without giving the State not less than seven days' notice to present its case.
(c) If any person is arrested and detained in custody by an officer in charge of a police station before the disposal of the application of such person for a direction under this sub-section , the release of such person on bail by a Court having jurisdiction, pending such disposal, shall be subject to the provisions of section 437.
(1A) The provisions of sub-section (1) shall have effect notwithstanding anything to the contrary contained elsewhere in this Act or in any judgment, decree or order of any Court, tribunal or other authority.". - W. B. Act of 1990, S. 2 25.
[25] 1995 Cr.LJ 182.

petition is opposed by the Ld. Government Pleader on the ground that under Section 438 of Code, no anticipatory bail can be granted when the accused apprehend arrest by the RPF and also on merits. The Ld. Government Pleader vehemently contended that the powers under Section 438 Code cannot be invoked in the case of alleged offences under the RP (UP) Act and Railway Protection Force Act, 1957. Elaborating his contention Ld. Pleader referred to Section 4[26] of Code. Sub Section (1) of section 4 lays down that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained. Sub Section (2) of section 4 says all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner of place of investigating, inquiring into, trying or otherwise dealing with such offences. The contention of the Ld. Govt. Pleader was that only offences under the Indian Penal Code can be investigated, inquired into, tried, and otherwise dealt with according to the provisions of Code. In his submission all offences under any other law shall be dealt with according to the provisions contained therein and not under the Criminal Procedure Code.

Hon'ble Court did not agree with the submission of the Ld. Government Pleader and observed that under Sub Section (1) of Section 4, it is laid down that all the offences under the Indian Penal Code shall be dealt with in accordance with the provisions of Code. Under Sub Section (2), the investigation, inquiry and trial of all other offences arising out of other laws shall be dealt with in accordance with the provisions of those enactments. Where there is no provision in the enactments, the application of the provisions of Code are not ruled out. Hon'ble Court referred the provisions under Section 11 of the RP (UP) Act which deals with searches and arrest as how to be made under this Act. According to this Section, all searches and arrest made under this Act shall be carried out in accordance with the provisions of the Code, relating respectively to searches and arrests made under the Code. It is therefore clear that under Section 11 of RP (UP) Act, all searches and arrests shall be carried out in accordance with the provisions of Code relating to searches and arrest under the Code. So far as the arrest which includes release on bail is

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[26] Code of Criminal Procedure, No. 2, 1973, § 4, *Trial of offences under the Indian Penal Code and other laws.(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.*

concerned, the provisions of the Code relating to arrest are made applicable to the proceedings taken under RP (UP) Act.

The Ld. Government Pleader next contended that Section 7[27] of Railway Property (Unlawful Possession) Act, provides for disposal of person arrested. This provision comes into operation only after the arrest of the accused person and it has no application to situation which arises prior to the arrest, for which Section 438 Code makes a provision. Hon'ble Court held that submission of Govt. Pleader is without substance. The next submission made by the Ld. Govt. Pleader was that Section 3 of the Railway Protection Act, 1957, the members of the Force are not Police Officer and that no direction can be issued to such Officers, directing them to release the accused person on bail. Hon'ble Court again held that this contention is also without substance, in view of the fact that direction under Sub Section (1) of Section 438 Code, can be issued to any person, which includes an officer of the RPF.

The next submission of Ld. Pleader was that as per Section 6 of the RP (UP) Act relating to power to arrest without warrant and it was contended that any superior officer or member of the RPF may, without an order from the Magistrate and without a warrant, arrest any person who has been concerned in an offence punishable under the Act, or against whom a reasonable suspicion exists, and therefore no order of anticipatory bail can be granted. It was also submitted that if the accused is released on anticipatory bail, the power under Section 6 would become nugatory. Hon'ble Court held there is nothing in this provision which would restrict the exercise of the power conferred on the Sessions Court or High Court under Section 438 of Criminal Procedure Code. The Court finally conclude that the person apprehending arrest for alleged offences under RP (UP) Act and under Railway Protection Force Act, 1957 are not precluded from seeking anticipatory bail under Section 438 Criminal Procedure Code and hence, the petition filed is maintainable.

Conclusion

Bail and anticipatory bail are most debatable area of criminal justice administration. Numerous Supreme Court Cases and various committee reports on these topics underscore its importance of these unusual devices. There is no shortage of attempt to reform both the law and the rules governing it but no attempt has

[27] The Railway Property (Unlawful Possession) Ordinance, 1979, § 7, *Disposal of persons arrested- Every person arrested for an offence punishable under this Act shall, if the arrest was made by a person other than an officer of the Force, be forwarded without delay to the nearest officer of the Force.*

been made to study bail procedure under RP (UP) Act this raises the importance of this study of bail under special statute like the RP (UP) Act and what should be approach of the Court in granting bail and anticipatory bail under RP (UP) Act. To finally conclude offences under RP (UP) Act are non-bailable offence as settled in *Union of India v State of Assam,*[28] therefore bail can be availed from Court. Accused of an offences anticipating arrest can seek anticipatory bail also.

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[28] (2004) 7 SCC 474.

Right to Health with Reference to Access to Medicines under the Trips Regime

By Dr. Surekha Somabalan[1]

Over 12,000,000 people in Africa alone have already died of AIDS, and 20,000,000 more in Africa are now living with HIV, according to generally accepted estimates[2]. Worldwide, about 90% of people with HIV live in developing countries and have no access to modern pharmaceuticals, which often cost more than $10,000 per year, the situation is similar for many other serious illnesses including cancer and drug resistant tuberculosis[3]. Eight thousand people die from AIDS in the developing world everyday due to the lack of access to essential medicines[4]. Infectitious diseases kill over 10 million people each year, more than 90% of whom are in the developing world[5]. The leading causes of illness and death in Africa, Asia and South America– regions that account for four-fifths of the world's population-are HIV/AIDS, respiratory infections, malaria and tuberculosis[6]. Each day, close to eight thousand people die of AIDS in the developing world[7]. One-third of the world population lacks access to the most basic essential drugs and, in the poorest parts of Africa and Asia, this figure climbs to one half[8]. Only 13 of the more than 12,000 new drugs introduced globally, between 1975 and 1997, were specifically directed to tropical diseases ie., diseases afflicting developing countries[9].

All this is true even though the right to health is one of the economic, social and cultural human right (HR) that requires affirmative government action to create better conditions for people rather than just governmental restraint vis-à-vis citizens. Historically speaking the right to health has roots in the 19th century public health

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[1] Assistant Professor, South Calcutta Law College, Kolkata
[2] John & James, Pharmaceutical Patents and Developing Countries, Nov. 5, 1999, P.1
[3] *Id.*
[4] Ellen F.M.'t Hoen, European Parliament committee on international Trade Hearing on TRIPS and Access to Medicines, Medicines Sans Frontier (MSF) Access to Essential Medicines Campaign, Jan. 18, 2005, p.11.
[5] World Health Organization: The World Health Report 2001, WHO, 2000, p.144
[6] Ellen F.M.'t Hoen, TRIPS, pharmaceutical patents and access to Essential Medicines; Seattle, Doha and Beyond, May 18, 2008, p.1
[7] UNAIDS : Report on the Global HIV/AIDS Epidemic, 2000, Apx.19, 2009, p.122
[8] Avanish Kumar, Human Right to Health, Satyam Law International, 1st ed., p.1
[9] David P. Fiddler, International Law and Infectitious Diseases, Oxford : Clarendon Press 1999, p.179

movement in the Europe and in the US, which produced sanitation reforms designed to reduce the burden of infectitious diseases. These reform efforts helped to solidify the belief that governments had a fundamental duty to provide for and protect the public health[10]. In the HR revolution, the government's duty in the health field was translated into the right to health. The first expression of this right in an international legal instrument came in the Constitution of the WHO in1946[11]. This first declaration of right to health was followed by many declarations and treaties that proclaimed the existence of the right to health, such as Article 25 of the UDHR; Article 12 of the ICESCR; Declaration of Alma-Ata (1978); and the World Health Declaration (1998) adopted by the World Health Assembly. The World Health Organization has defined health, not negatively or narrowly as the absence of disease or infirmity, but positively and broadly as "a state of complete physical, mental and social well being", the enjoyment of which should be part of the rightful heritage of "every human being without distinction of race, religion, political belief, economic or social condition."[12] In the same spirit as the UN Charter, the Preamble of the WHO asserted that the principles it states were basic to the happiness, harmonious relations and security of all peoples, thus expressing a modern set of universal applications. Health, it says, was an essential condition for their attainment, and the highest possible attainment of health was a fundamental right of every human being without distinction of any kind[13]. The concept of public health is contemporary, but in its phrasing the Preamble echoes the rhetorical cadences of the Age of Reason in the last part of the 18th century[14]. In this view, certain rights- such as to health or to life, liberty and the pursuit of happiness –cannot be granted or denied by any government because they were fundamental, inalienable HR which all the human beings had possessed. The Preamble went on to analyze the obligations of nations to contribute to the health of their people. This obligation was not imposed from the outside, but followed from the fundamental right of every human being, and therefore of humanity as a whole[15]. From the fundamental right to health of every human being, the Preamble moves to the health of all peoples, observing that this is fundamental to their attainment of peace and security, and depends on the fullest cooperation of individuals and states. The connection between health, peace and

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[10] *Id.*
[11] WHO: Basic Documents, 43rd edition (Geneva : World Health Organization, 2001)
[12] WHO OR No.2 Summary Report on Proceedings Minutes and Final Acts of the international Health Conference (New York: UN-WHO Interim Commission, 1948), p.16
[13] Frank P. Grad, "The Preamble of the constitution of the world Health Organization" (2002) 80:12 Bulletin of the WHO, p.981
[14] *Id.*
[15] *Id*, p.982

security is self-evident when diseases coupled with poverty destabilize societies. The Preamble notes that the achievement of any state in the promotion and protection of health is of value to all. For the fullest attainment of health, the benefits of medical knowledge must be extended to all peoples. This principle serves as a reminder that the availability of essential medicines must not be stopped at any national border, and that such interference should not be tolerated for any political or economic reasons. The UDHR can well be understood as the cornerstone of the modern HR movement. Article 25 of the UDHR laid down the foundations for the international legal framework for the right to health; it contained in fact the seeds of right to health as a HR, which is a precondition for the enjoyment of all other HR. Economic, Social and Cultural Rights as embodied in the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR) have formed an integral part of the internationally recognized catalogue of HR as developed since 1945. Economic, social and cultural rights could be said to be an expression of Roosevelts's idea of 'Freedom from Want'[16] and are frequently termed as 'second generation rights' deriving from the growth of socialist ideals in the late 19th and 20th centuries. The vital need for greater social justice in order to improve health was first brought sharply into focus at the 30th World Health Assembly held at Geneva in May 1977, when it was decided that the main social goal of governments and the WHO in the coming decades should be the attainment by all the people of the world by the year 2000 of a level of health that would permit them to lead a socially and economically productive life[17]. The following year, WHO and the UNICEF jointly convened an International Conference on Primary Health Care at Alma-Ata, in Soviet Kazakhstan, attended by delegations from 134 member states and by 67 representatives of UN Organizations, specialized agencies and NGO. The Declaration affirmed health as HR in its first principle. The WHO's lead in focusing on health rights at the series of UN world conference of the 1990's has stimulated an enhanced awareness and activity among the WHO programmes and policy documents, especially 'Health For All in the 21st Century',1998[18]. The WHO, for the first time, in the "Informal Consultation on Health and Human Rights" in 1997, brought together experts in HR, international law and public health, representatives of the OHCHR and other UN bodies, and WHO staff from HQ and regional offices. The report of the "Informal Consultation

[16] Matthew Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development, Oxford : Clarendon Press 1998, p.7
[17] Supra Note 7, p.10
[18] Just Health Rights: WHO's Health and Human Rights News letter (1998), p.2

on Health and Human Rights" provided the base for the adoption of 'World Health Declaration' by 51st World Health Assembly. The Declaration contained five principles. The first principle declares health as a fundamental right of every human being.

Access to medication constitutes an integral part of the HR right to health. It is a critical component of the right to health both as treatment for diseases and part of medical attention in the event of any kind of sickness. The General Comment No. 14 on the 'Right to the Highest Attainable Standard of Health', the ICESCR explained that all healthcare facilities including medicines should be

(i) Available in sufficient quantity;

(ii) Accessible to everyone without discrimination;

(iii) Acceptable in the sense of respectful medical ethics and customs; and

(iv) Of good quality and scientifically appropriate.

Accessibility includes:

(a) Physical accessibility

(b) Economic accessibility

(c) Information accessibility.

Access to essential medicines as HR implies that it is not only the moral or humanitarian responsibility of the government to ensure access to essential drugs, but it is also the government's legal obligation[19]. From a public health perspective, access to essential drugs depends on:

(i) Rational selection and use of medicines;

(ii) Sustainable adequate financing;

(iii) Affordable prices;

(iv) Reliable health and supply systems[20].

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[19] Supra Note 7, p.61

[20]Kamayari Bali Mahabal, "Access to Essential Drugs A Human Right", http:/ www.expresshealthcare
mgmt.com/ 20041031/ health human rights 01.shtml, accessed on Jan.12, 2005, p.33.

The various international documents which have recognized the right to health are as follows:-

1. Universal Declaration on Human Rights, Article 25(1)(2)
2. International Covenant on Economic, Social and Cultural rights, Articles 7, 11(1), 12(1)(2)
3. Convention on the Elimination of All Forms of Discrimination Against Women, Articles 10, 12(1)(2), 14(2)
4. Agenda 21, paragraphs 1 and 12
5. Cairo Program of Action, Principle 8
6. Copenhagen Declaration, Commitment 6
7. Beijing Declaration, paragraphs 17 and 30
8. Beijing Platform for Action, paragraphs 89 and 106(b)
9. Habitat Agenda, paragraphs 36 and 128
10. Convention on the Rights of Child, Article 24(1)

The World Trade Organisation (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their Parliaments. The goal is to help producers of goods and services, exporters, and importers conduct their business. As part of this agenda, on January 1, 1995, the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS)] became effective as part of the Uruguay Round[21] of the General Agreement on Tariffs and Trade (GATT) and was brought within the ambit of WTO[22]. While the organization continues to be mainly devoted to trade issues, controversies have arisen on issues like "trade and health"[23]. Since solutions to such issues were never clearly contemplated in the texts, the institution has found it difficult to resolve them to the full satisfaction of all the parties involved.

[21] Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annexe 1C, Legal Instruments-Results of the Uruguay Round, Vol. 31, 33 ILM 81 (1994)
[22] Daniel Gervais, The TRIPS Agreement : Drafting History and Analysis, Sweet & Maxwell, London, 2nd ed. 2003, p.26
[23] For example, "Australia-Measures Affecting Importation of Salmon", WT/DS18/ AB/R., DSR 1998: VII

One such issue has been accessibility to affordable life-saving drugs and the nature of the patent regime for the pharmaceutical industry as required by the TRIPS Agreement. As a result TRIPS has become a battleground between the proponents and the opponents of a globally "one-shoe-fits-all" intellectual property regime.

As TRIPS became a part of the WTO regime the member countries became bound to provide intellectual property protection as per TRIPS provision and were forced to amend their laws in tune with TRIPS. The binding nature of the TRIPS Agreement has had immense impact once all the member countries became bound to implement an across-the-board product patent regime. Before TRIPS came into force many developing countries, including India, allowed patents only for pharmaceutical processes and not for pharmaceutical products. Some countries like Brazil, Thailand and Korea simply did not include medicines within the patent laws[24]. Due to a weak patent regime generic versions of patented medicines could be produced locally and therefore, the local prices of a formulation were much lower compared to that in the developed world. For example, AZT (a drug for treatment of HIV) treatment was produced at a supply cost of $48 a month in India as compared with $239 in the United States; and Lariam, a treatment for malaria, at a cost of $4 as compared with $37 in US, according to a UN document published in 2000[25]. However, a product patent results in a complete monopoly in favour of a patentee and he becomes free to manipulate the market price of the product[26]. Arguably, patent rights for pharmaceutical products have resulted in higher prices making the drugs inaccessible for the poor[27]. There, thus, seems to be an apparent conflict between the TRIPS regime and human rights values.

The reasons for the lack of access to essential medicines are manifold, but in many cases the high prices of drugs are a barrier to needed treatments[28]. While TRIPS does offer safeguards to remedy negative effects of patent protection or

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[24] The Pharmaceutical Industry : A Survey of the Patent Laws of Various Countries, 30 Int'l L 835 (1996), p.106

[25]Audrey R. Chapman, Approaching Intellectual Property as a Human, Right: Obligations Related to Article 15 (1) (c), discussion paper submitted Rights, 24th Sess., UN Doc E/C. 12/ 2000/12, Oct. 3, 2000, p.22

[26]Robert House and Michael J. Trebilcock, The Regulation of International Trade, 2nd Edn, (1999) p.309

[27]F.M. Scherer and Jayashree Watal, "Post TRIPS Options for Access to Patented Medicines in Developing countries", Commission on Macroeconomics and Health, CMH Working Paper Series, Paper No. WG 4:1, p.5

[28]Supra Note 5, p.6

patent abuse, in practice it is unclear whether and how countries can make use of these safeguards when patents increasingly present barriers to medicine access. The Fourth WTO Ministerial Conference, held in 2001 in Doha, Qatar , adopted a Declaration on TRIPS and Public Health ("Doha Declaration" or "Declaration") which affirmed the sovereign right of governments to take measures to protect public health[29]. Public health advocates welcomed the Doha Declaration as an important achievement because it gave primacy to public health over private intellectual property, and clarified WTO Members' rights to use TRIPS safeguards. Although the Doha Declaration broke new ground in guaranteeing Members' access to medical products, it did not solve all of the problems associated with intellectual property protection and public health indicating that the optimism felt at Doha was premature. Developing countries are under pressure from industrialized countries and the pharmaceutical industry to implement patent legislation that goes beyond the obligations of TRIPS. This is often referred to as "TRIPS plus"[30]. TRIPS plus is a non-technical term which refers to efforts to extend patent life beyond the twenty-year TRIPS minimum, to tighten patent protection, to limit compulsory licensing in ways not required by TRIPS, or to limit exceptions which facilitate prompt introduction of generics[31]. History shows, however, that many of the countries with the most innovative pharmaceutical industries did not have patents until their industries had already grown to a significant size.

For example France, Germany, Italy, Sweden and Switzerland resisted providing pharmaceutical product patents for a long time. During the time when the US industry was still young and developing, the US also refused to respect international IPRs, on the grounds that copying was entitled in furtherance of its social and economic development.

For the developing countries the TRIPS Agreement is nothing but an embodiment of Western legal philosophy, norms, values and mindset that are contrary to many indigenous peoples' cosmologies and values. The concern of such countries is that TRIPS imposes unnecessarily rigid intellectual property protection. The fact remains that corporate pharmaceutical monopolies are being created under the auspices of free trade. The financial power of these pharmaceutical companies relative to

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[29] *Id*
[30] Medicines Sans Frontiers : Access to Essential Medicines Campaign and the Drug's for Neglected Diseases, Sep. 1, 2001, p.18
[31]Amit Gupta & Aditi Patel, A Human Rights Approach to TRIPS, July 18, 2004, p.4

developing countries is reflected by their market capitalization. This financial power has been converted into tremendous political influence both nationally and internationally. The effect of the TRIPS Agreement on developing countries has been likened to that of colonialism. It contributes to the depletion of southern economies because these countries will have to honour foreign patents and buy medicines at exorbitant prices from MNCs. It is not surprising that the TRIPS Agreement is fast becoming the epicenter of a battle which pitches some of the world's most powerful pharmaceutical companies, backed by rich governments, against some of the world's most vulnerable people. The winners are the large MNCs while the losers are the millions of people in poor countries.

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Re-Vision of Outrage of Modesty in Indian Penal Code: Percepting in the Light of Iran and Taiwan

Somabha Bandopadhay & Shivam Pandey[1]

The idea to write this article occurred to us when in the IPC classes we were being taught about the concept of outraging the modesty of a woman laid down under §509 and §354 of the Indian Penal Code. The idea dawned upon us just through few simple unanswered questions, which may have not occurred to us had we not been the youth of this era.

The women have stepped out from the four corners of the walls and have achieved immense success, but when she comes back to the four corners of the house is she treated with equal dignity as her counterpart? The first set of questions thus arose: whether IPC recognizes what happens if a woman outrages the modesty of another woman? Has there been recent developments in the society with the introduction of the Protection of Women Against Domestic Violence Act 2005? Has the judiciary been able to live out the expectations of the women and intention of the drafters?

The second set of questions that we have tried to answer in this paper concern the changing dimensions of modesty and are the notions of modesty universal? How far is the developed conceptualization of modesty as comparable to the men of the patriarchal society?

Finally, we have tried to grasp an understanding of modesty from varied angles trying to address another crucial issue are there everyday incidents of outrages? Have we addressed those outrages? How grave are their impacts in the psyche of the women?

Thus, our paper will be encompassing these varied juxtapositions of modesty in light of a comparative analysis of two different legal systems developed out of two differing traditional culture in contrast to the situation in India realizing the concern to bring about changes in the existing legal propositions in India.

Introducing the changing discourse of modesty

The Indian Penal Code provides for the protection of the modesty of the women primarily as follows-

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"Assault or criminal force to woman with intent to outrage her modesty.- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."[2]

§509[3] establishes the acts which would constitute outraging the modesty of a woman which has a wide application and ensures a strict interpretation to allow limited scope of acquittal.

These benevolent provisions have been applied in several landmark cases starting from the *Rupan Deol Bajaj v KPS Gill*[4] and taking a huge turn at the most controversial *S. Khushboo v Kanniammal*[5] case. These cases have shown several landmark interpretations of these sections.

Paul Ernest Hervieu in the year 1915 in "*Modesty: a comedy in one act play*" has revealed a very different and modern form of modesty of women which to that era was definitely striking. In this one act play there are two characters who are cousins and the brother is unmarried while the sister is a widow. The former proposes to marry the later to which she refused and she says in the first phase of the act- "A great change is taking place in the hearts of women. We have resolved henceforward not to be treated as dolls, but as creatures of reason."[6] This brings out the aspect of the changing notions of modesty and the outward attitude of the women which was unthinkable in the earlier times, but isn't concrete now. Modesty of a woman lied earlier in not speaking of it openly and especially in front of men. But, the play in the last few dialogues show us a diversion to this where the cousin sister says- "Will you swear to tell me, without reserve every time you find me at fault." [7] This shows a kind of compromise in the modesty or

[2] §354, Indian Penal Code, 1807.
[3] Word, gesture or act intended to insult the modesty of a woman.—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.
[4] 1996 AIR SC 309.
[5] Criminal Appeal No. 913 of 2010 [Arising out of SLP (Crl.) No. 4010 of 2008.
[6] Modesty: a comedy in one act play Paul Ernest Hervieu, at 1 (1st ed. 1915).
[7] *Id.* at 12.

rather a new idea of modesty has evolved now, which shows that modesty also lies in correcting oneself and it is the mutual duty as members of society to respect it.

The inner self in a self-realization discourse

Modesty, as we have realized is an inner self of belief.[8] Mahnaz Kousha a female activist in Iran in her book[9] interviewed several characters who were generally middle aged women trying to analyze their perceptions of women and their modesty in Iran and in other parts of the world. Mina who was interviewed feels that the "women's ability to give birth endowed them with a sacred quality and innate source of power. The power to give birth overshadowed all the oppression women experience on a daily basis."[10] Thus, anyone fidgeting with this inner self or if any woman feels that it affects this inner self it is outraging the modesty of the woman as understood in a sociological perspective.

However; legally, modesty is not the reaction of the victim; it is the intention of the wrong-doer[11] which if it is to oppress the women that is also an ill desire and hence must be penalizing. Iranian women have never been exposed to the innate powers of women, the independence of women, the other branches of a woman's talent other than the cultural rearing of children, being faithful wives, etc. Yet, Mahnaz Kousha believed in the power of women. This is modesty of a woman, which have been subdued for many years.[12] But, it is interesting to see that the in a country like Iran, the ideas of modesty have changed where a divorced women now no longer hesitates to narrate stories of women empowerment to their kids.[13] So this changing discourse of modesty of women is comparable to women across the world. But, how far is the developed conceptualization of modesty as comparable to the men of the patriarchal society?

Many women might feel that the situations would have been different had they been born men, but, for women like Sima and Zhaleh in Iran their modesty lies in their potentials and hence they believe that changing their gender is not a solution to their deprived status. In fact, their modesty is hampered when they are obstructed from being what they like.[14] Relating this to the Indian penal laws and the conditions

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[8] Cecil O. Samuelson, An Outward Expression of the Inner Self, Brigham Young University Speeches, (Jan. 13, 2004, 7:53 AM). https://speeches.byu.edu/talks/cecil-o-samuelson_outward-expressions-inner-self/.
[9] Mahnaz Kousha, Voices of Iran (1st ed. 2002).
[10] *Id.* at 183-184.
[11] Jospeh Rax, On Respect, Authority and Neutrality: A Response at 11, 19.
[12] Mahnaz Kousha, Voices of Iran at 179 (1st ed. 2002).
[13] *Id.* at 18.
[14] *Id*. at 183.

women face in India we can establish that "any gesture or word" which hampers this beingness aspect of modesty should also be penalizing. So, modesty is not only the *actus* of conducting the listed acts, but could be in any form which obstructs the inner self. At, this juncture thus, we can endorse the amalgamation of criminal conduct of the perpetrator and the inner feeling which is hampered as a result of it.

Kousha interviewed another character Minoo who pointed out a very interesting and critical phenomenon relevant even to the Indian context. She says- "even women tend to oppress women. They do it because they have been subject to the same oppression."[15] This is also outraging of a woman's modesty pursuant to the interpretation we have mentioned above.

This brings to light two very poignant facts; *firstly*; concepts of modesty is universal in nature based on universal morality ans *secondly*; the modesty of a woman can not only be outraged by a man but also by another woman. The second truth remains unaddressed in most of the jurisdictions including the Indian Penal Laws. The Protection of Women Against Domestic Violence Act 2005 is comparatively a recent development, which recognizes this in a limited manner, but the judicial developments have progressed through its interpretations in cases like *Kusum Lata Sharma v State & Anr*[16], *Jagdev Singh v Paramjit Kaur And Others*[17] among many others. But, the Act being a welfare, regulatory legislation seeks to merely regulate and prevent incidents of domestic violence, and not enshrine concepts of modesty explicitly which though can be interpreted in the course deciding a case.

Thus, even if an act is done in closed doors it would still amount to outraging the modesty of the woman[18] for when the woman feels low within herself in the "inner self" and it becomes difficult for her to face the world, which judges the women since their birth which concertize at unfortunate events. She is thus shunned from the society. Many hide these incidents in shame calling in for greater effects later[19]. This is a common phenomenon through the world throughout history. This we term as an indirect effect of the acts. The Indian judiciary has moved steps ahead through its pronouncements by interpreting the provisions in light of extending maximum protection to the victims. In plethora of cases it has been held that whether

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[15] *Id.* at 185.
[16] Crl. M.C. No. 725/2011.
[17] CRR No. 2937 of 2010 (O&M)-1-.
[18] State of Punjab v Major Singh, AIR 1967 SC 63.
[19] Chandrakant Jantilal Suther v State of Gujarat, 2015 SCC OnLine SC 668.

the girl is aware[20], whether she is conscious[21], whether she is sane are factors which does not matter at all[22], what matters is her dignity within herself and outside in front of the world which was in contravention to the intent of the perpetrator.

As a matter of fact in Iran the buses are also divided according to the sex i.e. men and women. The former get the better seats which are more airy and the latter get the not- so-good seats, the houses cannot be registered in the name of the daughters or wives.[23] Aren't these also a kind of injuring the modesty of the women? This once again establishes that modesty is not confined to the understandings in the landmark judgments only, but much more. But, these everyday notions of modesty may not be gravely penalizing as compared to the notions of modesty we are dealing with but, the accumulation of such trivial incidents lead women like Azad and many other women in rest part of the world to feel that "I believe it is not worth it to be born again."[24] Ziba says that she wants to be a man when asked about her preference in her next birth as a human being. She tells that the man's world is a "safer place".[25] The emphasis on the word "safer" is *res ipsa loquitor* of the modesty in the world today. Many women like Ziba and Sousan say that men are valued more which is commonplace notion not only in Iran but in many other countries including India from the very grass-root levels of the families despite being offsprings of the tech-savy "modern" and developed generation. Thus, we believe that the trivial everyday acts no should be regulated if not penalized pursuant to the psychological impacts these incidents have on the psyche of the women which may provoke suicidal instincts. Can it be termed to be an abetment to suicide? Trivial acts *de minimis non curat lex* no more remains so whose consequences traverses much beyond the trivial contemplation.

Independence is thus equivalent to modesty[26] since that is the essence of respecting the integrity of women and having faith in their capabilities.

Protecting modesty: the integral inner self

In contrast to this much negative view of modesty, let us bring in the context of the east where a very different situation exists. In Taiwan the travel account of Ch'ing during the colonial era brings forth the matrilineal society where "the savages

[20] Girdhar Gopal v State, 1953 CriLJ 964.
[21] State of Punjab v Major Singh, Air 1967 SC 63.
[22] Rama Goswami v Lakshmi Kanta Roy, (2005) 2 CALLT 451 HC.
[23] *Id.* at 196.
[24] *Id.* at 197.
[25] *Id.* at 190.
[26] *Id.* at 188.

value women and undervalue men"[27] which became the commonplace idea and is portrayed in his writings. This could be traced from the writings of Emma Teng who also observed the kind of a belief Ch'ing expressed was a direct inversion of Confucian patriarchal maxim "value men and undervalue women". This island was hence called the "Kingdom of women".[28] This illustrates the importance of modesty and dignity of women as accorded to the women in Taiwan.

Emma Teng in the writing mentions that the trope of gender inversion was particularly popular in accounts of South East Asia. As a matter of fact these writings figured a demarcation between the "civilized" and the "barbarians". The Confucian ideology was strict about the rigidity of sex and any variation from that shows signs of barbarianism.[29] In this part of the globe in our discussion, we thus get unique and contemporary ideas on modesty which surprisingly is not the product of evolution, but a matter of tradition. In several accounts of the traditional society in China the women were found to be engaged in the agricultural work which led to the evolving of the term female as "industriousness" and male as "idleness". Ch'en Ti accounts that the notions of modesty in this society is remarkably different from the commonplace know-how.[30]

However, interestingly it is believed that after the publication of Edwad Said's "Orientalism" in 1968 the concept of "other" and the presence of structural equivalence between male and female was colored with the notion of men being strong and rational whereas women being weak and irrational.[31] This irony has later been depicted in the writings of the Chinese anthropologists like Dru C. Glaney[32] and Stevan Harrell.[33] Accordingly, the women centrist modesty of this island started changing. Recent studies marked an intersectional approach where modesty is termed as per Chineseness and Americanness to the 'masculine' and 'feminine' characters. Wong had studies this.

But, as the years rolled by there arose a major problem in Taiwan which is very poignant but often ignored and spreads across nations like India and USA-

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[27] Emma Junua Teng, An Island of Women: The Discourse of Gender in Qing Travel Writing about Taiwan, The International History Review, June 1998, at 362.
[28] Catherine Farris, et. al., Women in the New Taiwan: gender roles and consciousness in a changing society, at 41 (1st ed. 2004).
[29] *Id. a*t 41.
[30] Ch'en Ti, Record of the eastern savages.
[31] *Id.*
[32] Dru C. Glaney, Dislocating China:Reflections on Muslims, Minorities and other subaltern subjects, 82 (1st ed. 1988).
[33] Steven Harrell, Cultural Encounters on China's Ethnic Frontiers, at 147 (1st ed. 1995).

the problem of Equal pay for equal work for the same job in the same workplace which infringes upon the rights and modesty of the women. They feel affronted and the modesty of these women is hence hampered giving a portrayal of a separate emerging notion of modesty of women.

Robert M. Marsh writes in '*Should Women Get Equal Pay for Equal Work?*' on the attitudes of the male members of Taiwan on this subject.[34] He administered a survey across 28 years and culminated it in the tabular form which expressed the attitudes of the men in this regard which was shockingly unchanged over this period. It was interesting to note a considerable number of people favoring the modern idea of equality in payment in 1963 (667.6%) but the attitude remained unchanged even in 1991 when people favoring it was only 73.1%. Robert Marsh finds it to be amusing as the reasons given were the same over the period of 28 years which pertained to the idea that women are not meant for physical activities, men are the breadwinners and that women work to earn extra money, women cannot devote as many hours as a man can do and the like. We can witness the transforming nature of the society because of societal reasons. If we look at India's history, we can witness a similar pattern of of change where women in the primitive stage were given equal if not more attention as delineated from Indian heritage. We in India worship the feminine power; we engrave the temple walls with feminine sculptures; we respect their work and we never let them feel low. But, the situations have changed. The reasons are attributable to many; the effects of the colonial period or industrialization or globalization among many other.

A similar account could be grasped from Hsin-yi Lu's *Imagining "New Women," Imagining Modernity Gender Rhetoric in Colonial Taiwan* where it is established that while searching for the colonial past of Taiwan, the "women" becomes a very important aspect because "women" is an encompassing sign that signifies the emergence of modernity, as well as the ambivalent colonial mentality, in colonial Taiwan."[35] This thought can be mingled with Emma Teng's writings where we realize that modesty to the women were gifted by the society. The 1994 *Nanchin* policy announced by the then President of Taiwan brought about the changes through mechanization of work, expansion of industries to influence the Southeast Asian markets, emergence of cheap labor, etc..

[34] Robert M. Marsh, Should Women Get Equal Pay for Equal Work?,Women in the New Taiwan, (1st ed. 1991), at 152.
[35] Hsin-yi Lu, New Women, 'Imagining Modernity Gender Rhetoric in Colonial Taiwan Women in the New Taiwan, at 76 (1st ed. 2004).

During the several enlightenment movements like *Tai-oan chheng-lian*, *Tai-wan* and *Tai-wan min-pao* the subject matter of women got high importance. In fact, it was so said that "women" had high significance in the history of Taiwan.[36] But, conflicts arose when the call for nationalism was gendered and was called to be mainly masculine. Tani Barlow suggests that Chinese modernity had the potential to emancipate women but in the practicality masculinity was getting interconnected with nationalism. This is ironical because "women are typically construed as the symbolic bearer of the nation" which means we generally link our countries as the 'motherland' instead of 'fatherland' hence the image is to consider the nation-as-woman. It is paradoxical to understand on one hand the womaness and on the other the discriminatory nature by exclusion from nationalism. This outraged the modesty of the women who started voicing their opinions though and women liberation became a symbol of nation building. This helped in the emergence of policies specific to women, nation's power got strengthened through projecting women, and women were respected and were expected to contribute to the family and the industries. This led to the reemergence of a "new women". "New women" however has been interpreted differently; it was once to indicate the identity crisis during the nationalist movements and sometimes seen as the part of cultural movements (Ching-kiu Stephen Chan) and sometimes was understood as those who were opposing modernity and tradition (Lydia Liu).[37]

Concluding changing nature of modesty

In this account, we see modesty had been vacillating in Taiwan but raising voices against the vanishing of it brought back their modesty which has unfortunately not been the case for the women in Iran. Thus, modesty is not relative for women it is the same but the context and situations differ colored by socio-cultural constructs.

We began our paper from analyzing contours of modesty in regard to the Indian scenario and its limited applicability but evolved judicial pronouncements we delved deeper in trying to understand the varied notions of modesty across the world noting the similarities and differences in the attitude of the women facing similar experiences with modesty.

Before we conclude; here is a very interesting data- very recently in Dubai, the Female Motorists' Club conducted a race of the female motorists to show to the world the changing nature of modesty of women as they perceive and they expect the world to perceive. Women participants were from countries like Yemen,

[36] *Id.* at 80.
[37] *Id.* at 80-81.

Saudi Arabia among others which are strictly Islamic countries and some of them allow women to only drive but not ride publicly.[38]

This reinforces that women are changing, the society is changing and the aspects of modesty and its outrage are also changing and hence there is an urgent need to address these through effective regulation towards preservation even noting the most trivial everyday instances of outrage of modesty.

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[38] Times Of India (Ranchi), Times Trends Section, May 29 2015, at 4.

Book Review

By Dr. Arpita Mitra*

Farhad Malekian: *Judgments of Love in Criminal Justice*. Cham: Springer International Publishing AG, 2017, xvii+340pp. [ISBN 978-3-319-46899-0]

The author, in ***Judgments of Love in Criminal Justice*** creates a noteworthy contribution by introducing the norm of love as the most significant norm of law, criminal law and criminal justice. In an attempt to find an answer to national, regional and international conflict that sweeps away hundreds of lives, the author assigns the responsibility to misapprehension and misinterpretation of the law and absence in the rule of law of love for human beings, for justice and for democracy.

The book is divided into two sections: the first section concentrates on the Corpus of Love in the Chambers of Criminal Justice and explores the norm of love as a powerful norm in the system of criminal law and public international law. It supports not only positivist views but also moralist view with the reservation that there is also an implicit third view on the enforcement of legal positivism and moral legalism. To the author the word love implies the powerful tool to achieve justice or the most powerful energy that exists in human nature. This section is divided into five chapters.

In the first chapter the author discusses the surveillance of the norm of love in criminal law. A healthy norm of law intends to create not only the norm but also justice based on morality, non-volatile behaviour, and equal division of the balance of power and also the inner satisfaction of the substance or intention of the law.

In the second chapter the author unveils the oxytocin of love in the context of medical sciences. Oxytocin is what makes us human beings able to love. However the function of this hormone is obstructed by stress, social inequality and the use of force. Thus, power of law, the law of force, the law of war, the law of retaliation and the law of murder harms the significant function of the norm of love. Hence a clear understanding of one another in the constant awareness of love for justice and obedience to the moral requirements of law is required. The norm of love has to be cultivated in our national and international criminal justice system to reduce crime.

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The following chapter identifies the rule of love for the interrogation of Criminal Justice. The philosophy of love in legal theory is not to say that love has to be the first touchstone of human justice but rather that love is a norm beyond all norms of law when the other norms are wholly incapable of performing their function. The disappearance of love in a human society which has entered into armed conflict calls upon the intense need of that society for endowing norm of love in law. International laws wish to ensure that consensus or a unanimous decision for the expression of love for humanity has been achieved through the principle of concern of all states.

The fourth chapter explores the modus operandi of the norm of love in criminal justice. There is a common human interest in preventing injustice and in transmitting the principle of love for justice with full protection. 'Jus cogens' norms are not a matter of utility or private interests but about a high value of morality that has to be protected in the international, legal and political community of states.

The fifth chapter unveils the right to demand love in criminal justice. The norm of love searches for the soul of judgment and not the role or rule of judgment. It also searches for the application of friendship, respect and service for justice with the dedication of love. The basic institution of most law is love or has to be love, if it is going to be effective. Hence it is not so primary to know if the relevant authorities are correctly practicing the law but if the reason or the essence of the law is correct. If human beings who are the subjects of the law are not the subject of the love, the position of the law or the nature of the law will be modified such as not to be a law but undemocratic regulations.

The second section discusses the Rule of Love in the Aquarium of International Criminal Procedures through seven chapters.

The sixth and seventh chapter discusses the underpinnings and dimensions of love in criminal justice system. Human beings are not created to hate or to fulfill a singular judgment of one nation over another. The opinions which create violations are not laws but an individualistic understanding of our social existence which changes the level of our judgment, the result of which ignores love for justice, love for peace and love for equality. Any law which imposes its rules by force is invalid and null. Further, the torture of offenders is not only useless but also hazardous to the social structure of human beings and against moral and legal codes. The strength of moral and legal codes forces them to confine themselves to the elaboration of the fact that severe punishment is not recommended by the force of love for human nature. We are aware of the fact that violations, judgments, or conducts which are based on the obvious reason of human beings need cannot be good choices for the structure of law and are therefore legally or philosophically invalid.

In the eighth chapter the author discerns the maestro of the norm of love on the morality of criminal law. The concept of morality is closely connected to the concept of humanity. It plays a significant role in regulating social relations and ensuring and maintaining social order. Law and morality are interrelated relations and hence when a law is regulated it is affected by a sense of morality. A persuading court of love is a court which has several functions for the designation of conflicts between different groups against one another. It is a court of love for justice to prevent the commission of crimes against the soul of justice.

In the following chapter the author notes that there is not any criterion in law for how the idea of proper justice can be measured. With the norm that is punctuality of justice and reliability for objectivity in law the source for which exists concretely for the positive application of justice and the prevention of diversity is targeted. If the aim of justice is affirmative with purity then love is an integral part of that purity and anything other to that is not justice at all.

Further, in the tenth chapter the author interestingly analyses the principle of impartiality and its possible infringement in the practice of the International Criminal Court. Different ways of presentation of legal theories demand equal application of justice within the spirit of love, but may not be sufficient for the cultivation of justice and the creation of an international legal philosophy. In addition to this, the eleventh chapter highlights the gavel of love in International Criminal Courts. Human beings have to orient themselves to the truth and not just present on outside of the case. Legal thought should have strong contact with its objectives. It is like the heart of justice, it is human constitutional legal mechanism which has to work and interact with different principles, great or small and cannot rest at all.

In the concluding chapter the author aims to cultivate confidence in the future carriers of love for justice. To him, interpretation, implementation and proceedings under the law may be very wise, comprehensive, and realistic. It still has to operate with the norm for justice which is free of any personal interference. Love is interpreted as a norm of reality, as a norm against humiliation, as a norm of equality with substance and also as a norm in which we trust and which is going to be performed by any judge, prosecutor, or court even it if the court is manipulated to condemn the accused. The ability to love justice can only come from a good character.

The present work under review is one of its kinds and unveils a unique dimension in delivery of justice, which is the norm of love. It is an immense initiative in fulfilling a dearth and will bestow students of criminal justice and international law a fresh lease of air. In this regard, while exploring this unique love theory in different aspects of justice delivery system it would have been more enriching if the author

would have highlighted the importance of this theory in dealing with special cases in relevance to the juveniles in conflict with the law, first time offenders, and custodial torture. Further, the sensitization of the norm of love among the law enforcement agencies will have significant effect on the society. However, the author has rightfully felt the need to teach law with love in order to help the present generation of lawyers and judges realize that peace with justice can never be attained unless the concept of law is not performed and interpreted with love. Love may not be equal to law but it orients the role of objective justice for the protection of humanity. Thus, appreciating this novel venture, the present work will remain a path breaker in a less traversed path of legal literature- the norm of love.

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