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Contents

EDITORIAL

We are proud to present to you the XIth edition of the NALSAR Student Law Review. The NALSAR Student Law Review is the flagship journal of NALSAR University of Law, Hyderabad. The XIth edition of the NSLR presents a diverse collection of articles ranging from health law, consumer protection and criminal law regime to issues of taxation, regulatory jurisdictions and investor-state arbitration.

This edition begins with Arpita Sengupta's article titled, "*Clinical Trials in India: A Way towards Impoverishment*" exploring the ethical concerns surrounding clinical trials in India and the manner in which it has contributed to impoverishment. With the author locating the issue in human rights jurisprudence, the paper constructs an argument for immediate government intervention and evening the bargaining scales.

Moving along such rights-centric discourse, Saumya Maheshwari in her paper titled, "*Reproductive Autonomy in India*" examines the systematic powerlessness over reproductive decision-making experienced by women in our society. The article specifically looks at the limitations of the Medical Termination of Pregnancy Act, 197 and argues in favour of a change in status quo vis-à-vis maternal healthcare in India.

In the field of Intellectual Property, the role of Standard Setting Organizations ("SSOs") has assumed unprecedented relevance in the contemporary context and Shreya Prakash in her paper titled, "*Injunctive Relief for Standard Essential Patent Holders: A Comparative Analysis*" adopts a critical approach towards the same. The article evaluates the interaction between Standard Essential Patent ("SEP") Holders and SSOs while commenting upon the use of injunction as a judicial remedy in cases of patent infringement.

Engaging in a trace-back approach, Deekshitha Ganesan in her article titled, "*Thayer and Morgan v Stephen: How Presumptions operate under the Indian Evidence Act 1872*" delves into a field of law which has been relatively untouched. The paper highlights the consequences of academic discussions around operation of presumptions on the current understanding of the central term, "burden of proof" in criminal and civil proceedings.

Contributing to the interesting scholarship featuring in this edition, Karuna Maharaj in her paper titled, "*Evaluating Issues Regarding Post-Penetrative Rape from a Women's Perspective"* evaluates the centrality of consent in social transactions. Utilizing the concept of post-penetration rape, the paper engages

in a cross-jurisdictional jurisprudential analysis to construct a case for recognizing this often ignored dimension of women's sexual autonomy in criminal jurisprudence.

With the Competition Commission of India ("CCI") constantly involved in jurisdictional disputes, Sahithya M. and Abhik Chakraborty in their article titled, "*Sectoral Regulator and Competition Commission: Envisaging a Movement from Turf War to Reconciliation"* capture the matter in a comprehensive manner. The paper while critiquing the current treatment of the operational ambit of CCI aptly brings out a multi-jurisdictional narrative to suggest reforms in the domain of disputes related to competition law.

The Recent Maggi Controversy has certainly unlocked the Pandora's box surrounding questions of endorser liability in India and Raghavi Vishwanath and Twinkle Chawla in their paper titled, "*Two Minute Experiment Gone Bad: Stars to Bear Liability?"* discuss the issue in greater detail. While endorsing joint and several liability for the manufacturer/advertiser, the authors reflect upon the gaps in the existing legal regime and attempt to strike a balance between publicity rights and social responsibility of celebrities.

The current edition brings out extensive academic coverage of several issues popularized in mainstream media and Rudresh Mandal in his article titled, "*The Aadhar Scheme- Ambitious Plan for India's Future or Violation of the Right to Privacy?*" attempts to do the same. The paper questions the often stated merits of the scheme and problematizes the various provisions of the Aadhar Act, 2016 sourcing arguments in the data protection and privacy jurisprudence.

Intellectual Property Taxation has been a major concern for corporates around the world and Balaji Subramanian and Amritha Kumar in their paper titled, "*Bottling Fame, Brewing Glory and Taxing the Transfer of Intangibles"* succinctly articulate the unstable judicial position on this subject in India. Keeping in mind the inevitable ushering in of the GST Bill, the paper comments upon the uncertainty faced by transactions involving transfer of intangible property and the manner in which the GST Model Act serves as a step in the right direction.

Shifting the focus to International Law, Sourav Roy through his case comment on the Arbitral Award in *Phillip Morris Asia Ltd. v. the Commonwealth of Australia* essentializes the conflict faced by modern states while pursuing certain public welfare goals impeded by the investor-state dispute settlement regime.

Finally, the current edition concludes with Ipshita Bhuwania's nuanced analysis of the *Draft Assisted Reproductive Technology (Regulation) Bill, 2014* wherein she demystifies the controversy surrounding the bill placing special focus on vulnerability of surrogates and insufficiency of child welfare measures.

We would like to thank all the contributors, faculty, students, alumni, reviewers and other well- wishers of NSLR without whose inputs, this law review would not have been possible.

Editorial Board

CLINICAL TRIALS IN INDIA: A WAY TOWARDS IMPOVERISHMENT?

Arpita Sengupta[1]

ABSTRACT

Drug trials in India have been a matter of contemporary concern, especially in light of the Public Interest Litigation ("PIL") filed by Swasthya Adhikar Manch in the Supreme Court of India. The PIL was filed keeping in mind the numerous deaths that were reported from the trial site due to unethical research that was being carried out by the sponsors without the necessary licenses from the Drugs Controller of India. Developing countries like India have become preferred sites for trials mainly because of the ease of finding participants. People from economically weaker sections of society participate in these trials in the hope of monetary compensation and free drugs. On the contrary, participants are provided with sub-standard care, inadequate remedies and compensation in case of any unfavourable events, inadequate protection from laws, minimal government interventions in case of emergencies and inadequate consent mechanisms, thereby resulting in inevitable impoverishment of the participants. This paper seeks to make a detailed analysis of clinical trials in India as a source of impoverishment, mostly among the economically and socially weaker sections of the society.

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I. INTRODUCTION

Clinical trials in India have been in news for the last decade. There have been various instances of death of participants in clinical trials, especially in states like Madhya Pradesh, Andhra Pradesh and Gujarat. Swasthya Adhikar Manch, an Indore based NGO filed a PIL[2] in the Supreme Court to bring to light the deaths caused by unethical research that was being carried out on children, mentally challenged people, tribals and dalits who were incapable of giving free informed consent[3]. The PIL mentioned the various irregularities like violation of ethical guidelines, violation of laws governing clinical trials and medical ethics, inactive role by ethical committees, thereby alleging a violation of Articles 21 and 32 of the Constitution of India.

Another PIL[4] was filed by Gramya Resource Centre for Women when seven deaths were reported in Andhra Pradesh and Gujarat during the Human Papilloma Virus ("HPV") vaccination trials on tribal girls. The sponsors[5] had

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2 Swasthya Adhikar Manch, Indore & Anr. v. Union of India & Ors., Writ Petition (Civil) No. 33 of 2012.

3 Divya Rajagopal, *PIL filed against illegal drug trials*, THE ECONOMIC TIMES, (Feb. 6, 2012), *available at* http://articles.economictimes.indiatimes.com/2012-02-06/news/31030826_1_drug-trials-pil-drug-controller; *See also,* Alishan Naqvee & Abhijeet Das, *Clinical Research in 2015: The Ghost of Christmas past, present and yet to come*, THE FINANCIAL EXPRESS, (Dec. 24, 2014), *available at* http://www.financialexpress.com/article/pharma/latest-updates/clinical-research-in-2015-the-ghost-of-christmas-past-present-and-yet-to-come/22744/. There have also been other similar instances of unethical trials. Quest Life Sciences, a clinical research organisation has been issued a warning by the WHO for major lapses in the trial of a vaccine for HIV. For further information, *see, Quest Life Sciences Under WHO Fire Over Lapses in Clinical Trials*, NDTV PROFIT, (Jul. 7, 2015), *available at* http://profit.ndtv.com/news/corporates/article-quest-life-sciences-under-who-fire-over-lapses-in-clinical-trials-778998.

4 Kalpana Mehta & Ors. v. Union of India & Ors., Writ Petition (Civil) No. 558 of 2012.

5 The research was being conducted by an NGO, the Programme for Appropriate Technology in Health and was funded by Bill and Melinda Gates Foundation.

violated norms by not only allegedly using "unproven and hazardous" drugs but also initiating the project without appropriate license from the Drugs Controller of India[6].

In both these cases, the court applauded the efforts of the NGOs to bring into notice the problems that clinical trial participants were facing. They had asked for suggestions from the National Human Rights Commission and other stakeholder organizations. They had also asked the Department of Health and the Central Drugs Standard Control Organisation to provide their statement on the matter. However, the government and the drug control authority failed to provide any satisfactory solution thereby keeping the entire situation in a legal limbo.[7]

Third world countries like India and Africa have become favoured locations for trials mostly due to the liberal or inadequate laws and largely uneducated people who lack the freedom of choice due to absence of economic sufficiency.[8] Clinical trials in have therefore been largely criticised due to some major controversies[9] surrounding them: While issues of

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6 *Supreme Court admits PIL on cancer cervical vaccine trial*, THE TIMES OF INDIA, (Jan. 8, 2013), *available at* http://timesofindia.indiatimes.com/city/indore/Supreme-Court-admits-PIL-on-cancer-cervical-vaccine-trial/articleshow/17933564.cms.

7 *Supreme Court asks NGOs to suggest methods to strengthen Clinical Trials*, HUMAN RIGHTS LAW NETWORK, (2013), *available at* http://www.hrln.org/hrln/newsroom/media-reports/1326-supreme-court-asks-ngos-to-suggest-methods-to-strengthen-clinical-trial-laws.html.

8 Mohammed Imran, Abul K. Najmi, Mohammad F. Rashid, Shams Tabrez & Mushtaq A. Shah, *Clinical Research Regulation in Indian History, Development, Initiatives, Challenges and Controversies: Still long way to go*, 5(1) J. PHARM. BIOALLIED SCI. 2 (2013).

9 Ezekiel J. Emanuel, David Wendler, Jack Killen & Christine Grady, *What Makes Clinical Research in Developing Countries Ethical? The Benchmarks of Ethical Research*, 189(5) J. INFECT. DIS. 930 (2004). *See also*, Cecilia Nardini, *The Ethics of Clinical Trials*, 8 E CANCER MEDICAL SCI. 387 (2014), *available at*, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3894239/.

inadequacy of laws and need for ethical regulations have been widely researched on, not much has been written about the link between clinical trials and the resulting impoverishment.

This paper makes a detailed analysis of clinical trials as a means of impoverishment, by way of analysing the trials using the Capabilities Approach as propounded by eminent scholars like Amartya Sen and Martha Nussbaum. Part II links the lack of economic freedom to enrolment in clinical trials while seeking to find whether such involvement can result in further impoverishment[10]. This part further talks about the impoverishment caused due to exclusion from participation of certain groups in clinical trials, mainly on grounds of age and gender[11]. Part III looks into the loopholes in the existing legislations and policy measures which act as a means of impoverishment. Part IV examines the changes that need to be brought about in the existing laws in order to address impoverishment due to clinical trials. The paper concludes with an enquiry as to whether legislative efforts can help in addressing such impoverishment.

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10 Emanuel et al., *id*, 933.

11 It has been found that elderly people with multiple diseases are mostly excluded from clinical trials. *See*, A. Cherubini, S. Del Signore, J. Ouslander, T. Selma & J.P. Michael, *Fighting against age discrimination in clinical trials*, 58(9) J. AM. GERIATR. SOC. 1791 (2010). Also, in USA, in most of the clinical trials involving sophisticated drugs for cancer, it has been found that mostly white males participate as subjects. Such racial and gender based discrimination lead to impoverishment of women and the black population due to lack of adequate represention thereby leading to lack of information on the effectiveness of the drugs on them. For further reading, *see*, G. Marie Swanson & Amy J. Ward, *Recruiting Minorities into Clinical Trials towards a Participant-Friendly System*, 87(23) J. NAT. CANCER. INST. 1747 (1995). *See also*, Amy Westervelt, *Excluding women from Clinical Trials is Hurting our Health,* (May 1, 2015), *available at*, http://food.ndtv.com/health/excluding-women-from-clinical-trials-is-hurting-our-health-759762.

II. IMPOVERISHMENT AND CLINICAL TRIALS IN INDIA

A. Impoverishment due to Participation in Clinical Trials

Clinical trials have been very popular in developing countries like India. As was stated by the Drugs Controller General of India ("DCGI"), India is preferred as a trial site by most pharmaceutical companies due to its "*trained English speaking human resource pool and a large, diverse and treatment-naive [untreated] population with six out of the seven genetic varieties of the human race*."[12] However, the trials have largely exploited participants more than they have helped them. The adverse effects can be felt especially among the economically weaker sections of India who lack income autonomy, which has the instrumental value to allow "substantive freedom of choice to lead the kind of life that a person has reason to value"[13].

They participate in such trials in lieu of a meagre economic incentive and free drugs that would otherwise have been beyond their reach[14]. A further issue is the information asymmetry that exists between the researchers and participants, thereby resulting in absence of free informed consent. Since most

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12 Sandhya Srinivasan, *Ethical concerns in Clinical Trials in India: An Investigation,* CENTRE FOR STUDIES IN ETHICS AND RIGHTS, (Feb., 2009), *available at* http://www.wemos.nl/files/Documenten%20Informatief/Bestanden%20voor%20'Medicijnen'/Ethical_concerns_in_clinical_trials_in_India_An_investigation.pdf

13 AMARTYA SEN, THE IDEA OF JUSTICE 231-232 (Allen Lane, 2009). (Sen defines capability as "the substantive freedoms a person enjoys to lead the kind of life he or she has reason to value". While Sen argues that poverty due to capability inadequacy cannot be used synonymously with poverty due to lowliness of income, he concedes that the two concepts are related given that income is an important means to capabilities.). *See also*, AMARTYA SEN, DEVELOPMENT AS FREEDOM 90-91 (OUP, 1999).

14 Imran et al., *supra* note 6, at 2.

people in India are illiterate[15], the participants are not aware of the subject matter of the trial and their rights in such instances. In most cases, they do not know about the recourse that is to be taken if they suffer from some injury or death due to the trial. Their consent also cannot be called free since the economic incentive obscures their thought process.

The Belmont Report, that was brought out by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, raised the concern that certain populations, such as prisoners, children, incapacitated or socioeconomically disadvantaged are enrolled in trials because of their impressionability and not because the research is significant to their disease[16]. The report focuses on the need to maintain individual and social justice while selecting subjects for clinical trials. The participants who are considered "undesirable" should not be selected solely for research that involves greater risk unless that study is relevant to such class of people[17].

As Sen asserts, freedom of choice and individual agency is intrinsically important to well-being[18]. This lack of free informed consent leads to a major deprivation of human capability. The participants are therefore deprived of

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15 *India's illiterate population largest in the world, says UNESCO report*, THE HINDU, (Jan. 30, 2014), *available at* http://www.thehindu.com/news/national/indias-illiterate-population-largest-in-the-world-says-unesco-report/article5631797.ece. (Education For All Global Monitoring Report (GMR), released worldwide by UNESCO in 2014 stated that while India's literacy rate rose from 48 % in 1991 to 63 % in 2006, the population growth cancelled the gains).

16 Part C of the Report speaks about the selection of subjects. *See*, *Ethical Principles and Guidelines for the Protection of Human Subjects of Research*, THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, (Apr. 18, 1979), *available at* http://www.hhs.gov/ohrp/humansubjects/guidance/belmont.html#xselect.

17 *Id.*

18 SEN, *supra* note 10, at 236.

their right to make an informed choice, which is an integral aspect of their right to life and personal liberty[19]. Lack of free consent also goes against the basic ethics of clinical trials as has been stated in the Nuremberg Code[20] that was developed by judges adjudicating in the Nuremburg Trials. The Code enumerates the importance of human rights and individual autonomy.

Drawing from the findings of the Belmont Report and the Nuremburg Code, one can infer that such minimal ethical standards are necessary for not just clinical trial participants in developed countries but also the people in developing countries. This mind set can largely be seen in the CIOMS guidelines that were jointly prepared by the World Health Organisation and the Council for International Organisations of Medical Sciences[21]. Of the CIOMS guidelines, guidelines 4, 5, 14, 15, 16 and 17 are the most relevant for the discussion on consent and protection of vulnerable groups. While guideline 4 talks about the essential requirement of informed consent for both competent adults and incapacitated individuals, guideline 14 speaks of the importance of protection of clinical trial participants from any form of exploitation.

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19 Many judicial decisions have stated that the right to be informed is a part of Art 19 and 21 of the constitution. Some of the cases which have said so include State of U.P. v. Raj Narain, AIR 1975 SC 865, Benett Coleman v. Union of India, AIR 1973 SC 106 and S.P. Gupta v. Union of India, AIR 1982 SC 149.

20 The Nuremberg Code, 1947, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, (Nov. 7, 2005), *available at* http://www.hhs.gov/ohrp/archive/nurcode.html. (Principle 1 states, "The voluntary consent of the human subject is absolutely essential").

21 CIOMS & WHO, *Council for International Organisation of Medical Sciences, available at* www.cioms.ch (last visited Sept. 30, 2015).

The International Guidelines that have been discussed above and are the basic principles that are followed by pharmaceutical countries in the developed world is mostly missing in India. One form of exploitation that can be noticed is that the participants of trials that are conducted in India are used for research while the benefits of the tested drugs are mostly reaped by developed countries[22]. An analogy can be drawn with Marion Young's concept of exploitation where oppression occurs through a steady process of transfer of results of the trials on the impoverished for the benefit of people in developed countries[23].

This majorly leads to deprivation of their capabilities. Lack of basic healthcare facilities in case a participant is adversely affected in the process of clinical trials is another domain where there is further deprivation of capabilities. Studies have shown that most research sponsors do not keep facilities for treatment in cases of emergency on the pretext that such economically weaker people would not have been able to access these costly medicines anyway[24]. This not only leads to a violation of the formal principle of justice[25] but also leads to a violation of their fundamental right to health[26] and right against discrimination[27].

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22 Emanuel et al., *supra* note 7, at 933.

23 IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 48 (Princeton University Press, 1990).

24 Marcia Angell, *The Ethics of Clinical Research in the Third World*, 337(12) NEW ENG. J. MED. 849 (1997).

25 The formal principle of justice states that unequal treatment of individuals who are equal in all respects is morally wrong. This principle was propounded by Aristotle and authors like Rawls, Nagel and Dworkin have discussed this in their writings. *See*, David B. Resnik, *Unequal Treatment of Human Research Subjects*, 18(1) MED. HEALTH CARE PHILOS. 23 (Feb., 2015).

26 The right to health has been declared as part of Right to Life by the Supreme Court in numerous instances like Consumer Education and Resource Centre v. Union of India, AIR 1995 SC 636, Paschim Banga Khet Mazdoor Samity & Ors. v. State of West Bengal, AIR 1996 SC 2426 and Paramanand Katara v. Union of India & Ors., (1989) 4 SCC 286.

27 Article 14 of the Constitution.

The 59th Report of the Central Drugs Standard Control Organisation had observed that the "regulatory framework in India was not as stringent as that of the US, UK and Australia"[28]. Despite such cognizance of an inadequate regulatory framework, the Indian Government has mostly been negligent. They have failed to give effect to the fact that rights are indivisible in nature; a violation of right to life under Article 21 would inevitably lead to a violation of the right to health, right to livelihood, right to equality and so on[29]. The judiciary on the other hand has particularly noted the various instances of illegal clinical trials in the country.

In *Rahul Dutta v. Union of India*[30] and *Swasthya Adhikar Manch v. Union of India*[31], the judges have highly criticised the government for its failure to curb illegal trials. The courts further stated that the untimely death in such trials was grossly violative of the fundamental principles guiding Article 21 of the Constitution. While the Swasthya Adhikar Manch Case is still ongoing, one can only hope that the Supreme Court, by way of a continuing mandamus would take up the matter and direct the government to amend the laws to make them in line with internationally acceptable standards. Unless the judiciary and the legislature do away with their passivity regarding this particular issue, keeping in mind their role as the creator and protector of rights, the situation would never improve.

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28 The Department Related Parliamentary Standing Committee on Health and Family Welfare, *Fifty Ninth Report on the Functioning of the Central Drugs Standard Control Organisation (CDSCO), available at*, http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%200no2OHealtho2Oand%2OFamilyo20VWelfare/59.pdf (last visited Sept. 4, 2015).

29 The Supreme Court in Maneka Gandhi v. Union of India, AIR 1978 SC 597 stated that Art 14, 19 and 21 are indivisible.

30 Misc. Bench No. 12280 of 2010, Allahabad High Court.

31 Writ Petition (Civil) No. 33 of 2012.

B. Impoverishment due to Lack of Representation in Clinical Trials

While participation in clinical trials can be a form of impoverishment when done so without free informed consent and proper safety mechanisms, impoverishment can also be caused in India by the way of exclusion of certain groups from the trials. Drawing from Harsh Mander's [32] analysis on the subject, exclusion results in "*inequitable social attainments, capabilities, development, justice and dignity outcomes*". Exclusion has specially affected children, women and the elderly people who have often been barred from participation in drug trials. A 2014 report by the Mary Horrigan Connors Center for Women's Health & Gender Biology at Brigham and Women's Hospital[33] asserts that females are mostly excluded from human studies and even in cases where they are included, their representation is either very poor or the data collected is not analysed separately on the basis of gender.

There is a failure to recognise the fact that medicines have different effects on males and females[34] and therefore such trials conclusively infer as to whether a particular drug will be beneficial to all. This leads to a violation of the right to health of women. The 2014 report can be said to apply to the

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32 Harsh Mander and Gitanjali Prasad have used this definition of exclusion in the introduction to their India Exclusion Report 2013-14, *available at* http://www.indianet.nl/pdf/IndiaExclusionReport2013-2014.pdf, at 4.

33 Paula Johnson, Therese Fitzgerald, Alina Salganicoff, Susan Wood & Jill Goldstein, *Why women's health can't wait*, MARY HORRIGAN CONNORS CENTER FOR WOMEN'S HEALTH & GENDER BIOLOGY AT BRIGHAM AND WOMEN'S HOSPITAL, (2014), *available at* http://www.brighamandwomens.org/Departments_and_Services/womenshealth/ConnorsCenter/Policy/ConnorsReportFINAL.pdf.

34 Amy Westervelt, *The medical research gender gap: How excluding women from clinical trials is hurting our health,* THE GUARDIAN, (Apr. 30, 2015), *available at* http://www.theguardian.com/lifeandstyle/2015/apr/30/fda-clinical-trials-gender-gap-epa-nih-institute-of-medicine-cardiovascular-disease.

context of India as well. While there are very few reports directly connecting exclusion of women and participation in clinical trials in India but as can be concluded from the findings of the World Economic Forum, India ranks extremely low in terms of gender equality[35]. Given the vast prevalence of gender inequality, it is evident that women remain largely excluded from most social and economic activities.

Children also suffer from certain deprivations of human capabilities like the capability to live the normal length of the life due to their lack of representation in clinical trials. There are a number of factors that result in the lack of representation of children in such trials - lack of funding, dearth of investigators trained to deal with children, lack of participants and the complexity with the issue of consent for children[36]. Parents are at times reluctant to enroll their child for trials in the fear that he or she will be treated as a guinea pig and will be exposed to the potential risks of research.

There is a lack of understanding regarding the importance of free informed consent and the complex consent forms lead to creation of doubt among parents regarding the entire trial process[37]. The result of such exclusion implies that doctors usually extrapolate data based on the effect of the drug on adults[38]. The failure to recognize children as a separate group, and the

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35 Anita Raj, *Gender equity and universal health coverage in India,* LANCET, (JAN. 11, 2011), *available at* http://dx.doi.org/10.1016/S0140-6736(10)62112-5.

36 Patrina H.Y. Caldwell, Sharon B. Murphy, Phyllis N. Butow & Jonathan C. Craig, *Clinical trials in Children*, 364 LANCET 803, 806 (2004).

37 *Id.*, 807.

38 Pathma D. Joseph, Jonathan C. Craig & Patrina H.Y. Caldwell, *Clinical trials in Children*, 73(9) BRIT. J. CLINICAL PHARM. 357 (2013).

ignorance of their unique physiological needs, leads to the deprivation of their basic capabilities. It also violates their basic right to health.

Furthermore, elderly people form a large chunk of the population in India. However, their importance in the social and medical setup occupies a very insignificant proportion due to the multiple incidences of diseases that families mostly consider as a burden to their economic budget[39]. There have however been very few efforts to adapt to the changing socio-economic needs and come up with models of healthcare that would be conducive to the elderly people. Given such general indifference towards the health of elderly people, older participants have a higher possibility of exclusion due to a variety of factors.

Greater chances of trial related injury or death, higher risk of adverse effects from drugs due to existing multiple comorbidities, inability to understand the requirements of free informed consent and dependence on family members to travel till the trial site[40] many a times force the older participants to sit out of the trials. Sponsors have also been accused for fixing arbitrary upper age limits for trials[41].

Such arbitrary guidelines set by sponsors violate the right to non-arbitrariness under Article 14 of the constitution. Elderly people and children also suffer from deprivation due to the coupling of disadvantages. Apart from

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39 Ramesh Verma & Pradeep Khanna, *National Program of Health-Care for the Elderly in India: A Hope for Healthy Ageing*, 4(10) Int'l J. Prev. Med. 1103-1107 (Oct., 2013).

40 Cherubini et al., *supra* note 9, at 1792.

41 R. Briggs, S. Robinson & D. O' Neill, *Aegism and Clinical Research*, 105(9) IR. MED. J. 311(2012).

the other factors that lead to their exclusion, deprivation is also caused due to unnecessary paternalism and marginalization caused by extreme, asymmetrical dependency on their family or state[42].

As Young states, "*being a dependent in our society implies being legitimately subject to the often arbitrary and invasive authority of social service providers*."[43] Every person is dependent at some point of time in their lives and dependency should not be a cause of deprivation due to lack of freedom of choice. Thus, clinical trials not only exploit the impoverished but also direct some people into impoverishment by denying them their basic capabilities and violating certain basic rights like the right to health, right to equality and the right to life.

C. *Violation of Rights and Deprivation of Capabilities of the Impoverished due to Clinical Trials*

Martha Nussbaum, in an effort to study how impoverishment leads to depravation of human capabilities and basic human rights argued that there were certain minimal human capabilities that no legislation should degrade in any manner[44]. She draws a link between rights and human capabilities thereby maintaining that the violation of a right inescapably leads to the violation of basic human capabilities[45]. A correlation can be drawn between the list of

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42 Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice* in *Capabilities, Freedom and Equality: Amartya Sen's Work from a Gender Perspective* 59 (Agarwal, et al. ed., Oxford, 2007).

43 YOUNG, *supra* note 20, at 54.

44 Nussbaum, *supra* note 33, at 42-46. (Nussbaum states that Capabilities Approach provides a foundation through which rights can function while rights become an instrument for ensuring certain capabilities. The enjoyment of a right is realized only when one has the relevant capability to function. Capability Approach therefore looks at rights in a substantive manner).

45 Nussbaum, *supra* note 33, at 47-49.

essential human capabilities that Nussbaum has mentioned and the manner in which the rules regulating clinical trials in India violate them.

Lack of access of participants to adequate healthcare in trial related injury or deaths due to trials affect the freedom to live to the end of human life of normal length. Exclusion from participation also denies participants the right to get medicines that have been proven to be effective on them, thereby violating their right to health. Further, failure to get the best possible care in instances of adverse effects in clinical trial denies participants the freedom to have a good health. This is therefore an outright violation of Article 21 of the Constitution.

The next capability the trials affect is the right to be able to imagine, think and reason in an informed manner. The senses, imagination and thought, which as per Nussbaum are intrinsic to the life of an individual is affected since there is an absence of free informed consent. Trials further affect the ability of the impoverished people to form a conception of the good and to engage in critical reflection about the planning of one's life due to the economic incentive and free medical treatment that is promised by the sponsors to the participants.

Furthering Nussbaum's claims, clinical trials in India also affect the right of individuals to be treated as a dignified being whose worth is equal to that of others. Sponsors do not keep facilities for treatment in cases of emergency on the pretext that such impoverished people would not have been able to access these costly medicines anyway. The capability of affiliation which

also entails non-discrimination on the basis of sex or age is affected when women, children and the aged are not adequately represented in trials.

One can thus find a broad connection between the theoretical foundations that Nussbaum had laid down and the practical way in which clinical trials are conducted in India. It is therefore imperative to look at the regulations dealing with clinical trials and the changes that the law must undergo so as to make the trials more conducive to protection of rights of the participants.

III. LEGISLATIONS AND ADMINISTRATIVE MEASURES AS A MEANS OF IMPOVERISHMENT

Impoverishment is furthered by existing regulations governing clinical trials in India. The legislations which mostly regulate trials - the Drugs and Cosmetics Act 1940[46] and Schedule Y[47] of the Drugs and Cosmetics Rules, 1945, including the 2013 amendment to the rules[48], suffer from major loopholes. While the amendment has brought in some positive provisions, certain lacunae fail to be addressed.

Rule 122DAC of Schedule Y necessitates permission from Drugs

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46 Drugs and Cosmetics Act, 1940, *available at* http://www.cdsco.nic.in/writereaddata/Drugs&CosmeticAct.pdf.

47 Schedule Y of the Drugs and Cosmetics Rules, 1945, *available at* http://cdsco.nic.in/html /D&C_Rules_Schedule_Y.pdf.

48 Mrinali Mudol, *Latest amendments in 2013 to the Drugs and Cosmetics Rules, 1945*, MONDAQ, (Jun. 11, 2013), *available at* http://www.mondaq.com/india/x/244304/Healthcare /Latest+Amendments+ In+2013+To+The+Drugs+And+Cosmetics+Rule+1945. See also, Manoj Karwa, Saurabh Arora & Shilpa Garg Agarwal, *Recent regulatory amendment in Schedule Y: Impact on Bioequivalence studies conducted in India*, 5(4) J. BIOEQUIV. & BIOAVAIL. 174 (2013).

Controller General, India, Ethics Committee and mandatory registration with the Indian Council for Medical Research ("ICMR") for conducting a trial. The Central Drugs Standard Control Organisation ("CDSCO") is authorized to inspect trial sites. In instances of non-compliance of rules, the DCGI can recommend the discontinuation or suspension of the trial while cancelling the permission of the investigator, sponsor and his representatives from conducting future trials. Such a move came as late as 2013 before which there was no mechanism for registering a clinical trial, thereby leaving no scope for accountability and grievance redressal. However, certain concerns still remain. There is major lack of training among personnel conducting such inspections[49] and thus the effectiveness of the amendment remains a matter of concern.

Rule 122DAB provides for free medical treatment, in cases of injury as long as necessary and financial compensation, in case of trial-related injury or death, to be decided by the DCGI. Payment for medical treatment and compensation has to be made by the sponsor and failure to provide the same would lead to the suspension or cancellation of the trial. Such a provision is progressive given that it promotes the right to life and health of participants. However, the provision fails to distinguish between "injury" and "trial related injury" thereby leaving it open to interpretation and abuse by sponsors who enjoy a higher bargaining power[50]. The DCGI has fixed the basic

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49 Sandhya Srinivasan, *Ethical concerns in Clinical Trials in India: An Investigation,* CENTRE FOR STUDIES IN ETHICS AND RIGHTS, (Feb., 2009), *available at* http://www.wemos.nl/files/Documenten%20Informatief/Bestanden%20voor%20'Medicijnen'/Ethical_concerns_in_clinical_trials_in_India_An_investigation.pdf, at 5.

50 Vidya Krishnan, *Government tightens guidelines for Clinical Trials*, LIVEMINT, (Oct. 22, 2015), *available at* http://www.livemint.com/Industry/Z7SPMRvBh9Ap1sxo8iOcGI/Government-tightens-guidelines-for-clinical-trials.html.

compensation at a floor minimum of Rupees Eight Lakhs[51]. Many critics have raised the concern that such a high amount may act as a factor to induce more and more economically weak people into clinical trials thereby vitiating the concept of free informed consent.

Amendments[52] have been made in the "informed consent form" to include an undertaking by the sponsor to pay for the medical treatment and compensation in case of injury or death. However, the major flaw remains with the informed consent forms which require consent to be in writing. Given that most of the impoverished people who are enrolled in such trials are illiterate, written consent fails to provide effective safeguard[53]. While an order by the government[54] has brought in provisions for recording of consent, its implementation has been lacking due to poor infrastructure.

Rule 122DD mandates the registration of Ethics Committee, which is responsible for approving clinical trials and conducting periodic reviews. The rules however fail to put up any responsibility on the ethics committee in case

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51 Compensation Formula, CENTRAL DRUGS STANDARD CONTROL ORGANISATION, (2013), *available at* http://www.cdsco.nic.in/writereaddata/formula2013SAE.pdf. Formula to determine the quantum of compensation in case of clinical trial related injury (other than death), CENTRAL DRUGS STANDARD CONTROL ORGANISATION, (Nov., 2014), *available at* http://www.cdsco.nic.in/writereaddata/ORDER%20and%20Formula%20to%20Determine%20the%20quantum%20of%20compensation%20in%20the%20cases%20of%20Clinical%20Trial%20related%20serious%20Adverse%20Events(SAEs)%20of%20Injury%20other%20than%20Death.pdf

52 Rule 122 DA of Schedule Y.

53 If policy mandates that only literate people be included in clinical trials so as to do away with the shortcoming of written informed consent, the illiterate people, who form a major chunk of the population would be excluded with is another reason for impoverishment.

54 Order of the Office of Drugs Controller General, MINISTRY OF HEALTH AND FAMILY WELFARE, (Nov. 19, 2013), *available at* http://www.cdsco.nic.in/writereaddata/Office%20Order%20dated%2019.11.2013.pdf.

of trial related deaths or injury. The 2013 Amendment Bill[55] to the Drugs and Compensation Act envisaged placing the entire responsibility on the ethics committee. The standing committee on health was however of the opinion that the responsibility must be divided equally among the sponsors, investigators and ethics committee[56]. Lack of any clarity in this regard makes it difficult for families of victims to claim compensation.

The other major lacuna in the law includes absence of demarcation between trials involving simple medicinal drugs, medicinal drugs for gene therapy and special medicinal drugs. There should be separate requirements for permission and separate methods of calculating compensation for different kinds of drug trials, depending on the potential severity of their effects[57]. The only law governing clinical trials is Schedule Y of the Drugs and Cosmetics Rules. However, the law suffers from numerous errors. While the government should assume the role of the protector and provide with adequate rights and safety mechanisms their people, the unhelpful amendments clearly show the lackadaisical attitude of the government towards an important issue like clinical trials.

The PIL filed by Swasthya Adhikar Manch has brought to the fore the

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55 The Drugs and Cosmetics (Amendment) Bill, 2013, *available at* http://www.prsindia.org/uploads/media/Drugs%20and%20Cosmetics/drugs%20and%20cosmetics%20bill.pdf.

56 79th Report on The Drugs and Cosmetics (Amendment) Bill, 2013, MINISTRY OF HEALTH AND FAMILY WELFARE, (2013), *available at* http://www.prsindia.org/uploads/media/Drugs%20and%20Cosmetics/SCR-Drugs%20and%20cosmetics.pdf.

57 Ashna Ashesh & Zubin Dash, *Inadequacies of Clinical Trial Regulations in India*, 5 NUJS L. REV. 379, 395 (2012).

important role that free informed consent can play in clinical trials. Keeping that in mind, one can say that the Indian laws still lack very important features that are present in the jurisprudence of other developed countries. Laws in the UK, for instance, classify incapacitated people into three groups – people who had consented to participation before incapacitation, people who had neither consented nor negated their consent and people who had repudiated their consent before incapacitation. The third group of people cannot be used as participants of trial while the second group of people can participate only if the legal representatives consent to it[58].

India creates no such distinction thereby treating all incapacitated people as a homogenous group whose inclusion in trials can be done by the consent of their legal representatives. Such a provision fails to respect the autonomy of the third set of incapacitated people thereby depriving them of their basic human capabilities. This provision also has the potential to be misused given that economically weaker people would consent to the involvement of their incapacitated relatives, in return for financial benefits and free medical care.

Schedule Y does not provide for separate guidelines regarding participation of women and children in trials. Such an absence leads to discrimination against them by excluding them from participation or participation under reduced autonomy. There is a lack of punitive measures and criminal penalties in the act and rules. Severe penalties can act as a

[58] *Id.*, 398.

deterrent for future sponsors and encourage them to conduct trials in a manner that does not further impoverish participants. Additionally, the current system suffers from an absence of a settled grievance redressal mechanism for participants[59]. A mere compensation may not be sufficient to address issues of physical and psychological transformations that an impoverished person undergoes in a clinical trial. It is critical to look at clinical trials as affecting participants in multiple ways.

Unfortunately, a number of progressive legislations and policies have not yet been implemented. The Ethical Guidelines for Biomedical Research on Human Subjects[60] which was released by the ICMR in 2000 is one such example. These guidelines are progressive and in consonance with the CIOMS International Ethical Guidelines[61] as they provide separate guidelines for women and children trial participants and recognize the possibility of undue influence and coercion in certain relationships[62]. The guidelines have however failed in its realization due to lack of statutory backing. The CIOMS guidelines, before being brought out proclaimed, underwent a detailed study of special groups like children and women as participants of trials.

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59 There should be proper awareness about who to approach in case of trial related injury or deaths. Participants and their families should also be made aware of their rights, the methodology and procedure of the experiment, the cost benefit analysis, the compensation policy, alternative methods available and the benefits arising from commercialization.

60 Ethical Guidelines for Biomedical Research on Human Subjects, INDIAN COUNCIL FOR MEDICAL RESEARCH, (2000), *available at* http://icmr.nic.in/ethical_guidelines.pdf.

61 The Council for International Organisations of Medical Sciences brought out the International Ethical Guidelines for Biomedical Research involving Human Subject in 1993 and amended it in 2002. The guidelines can be viewed at http://www.cioms.ch/publications/layout_guide2002.pdf.

62 Such people who may take a decision under undue influence can include a person who is not well versed with medical terminology, an illiterate person, a prisoner, an employee and so on.

The reason for a special study was to "*emancipate them from the constructs of patriarchal society that is largely prevalent in developing countries*"[63]. However, it is to be noted that Schedule Y was enacted with no such prior studies being conducted. This move is especially surprising since in a country like India, where the society is largely patriarchal, such a study would have played a major role in curbing the undesirable practices of gender discrimination. Additionally, in absence of any specific provisions protecting women and the elderly in particular, there is a great possibility of men from the economically weaker sections dominating their partners or elderly parents from participating in the trials for monetary gain.

The Drugs and Cosmetics (Amendment) Bill, 2013[64] which has prescribed penal consequences for the use of sub-standard drugs and medical devices has also not seen the light of the day. Lack of proper regulations, absence of uniform standards, arbitrary guidelines and ineffective implementation of legislative provisions has led to denial of fundamental principles defining the scope of Right to life and Right to Health under Article 21[65]. Article 21 of the Constitution does not allow for the deprivation of life and personal liberty, except according to fair, just and reasonable procedure established by law. In the absence of a fair, just and reasonable procedure established by law, such deprivation of right to life and health can be argued to be unconstitutional.

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63 Ashesh & Dash, *supra* note 56, at 400.

64 *Supra* note 46.

65 Article 21 of the Constitution does not allow for the deprivation of life and personal liberty, except according to fair, just and reasonable procedure established by law, as has been held in Maneka Gandhi v. Union of India, AIR 1978 SC 597.

IV. HOW CAN IMPOVERISHMENT BE ADDRESSED?

Given that existing legislations act as a means of impoverishment, certain changes should be brought about in the legal provisions so that the impoverished can enjoy their freedom in the substantive sense. Clinical trials largely involve people who are not economically well off because of the economic incentive and free medical treatment that they offer. This can be majorly addressed if basic public health facilities and essential medicines are made cheaper and more accessible. The exorbitant amount of basic minimum compensation needs to be given only after proper scrutiny of the conditions of the participant and whether the participant has given free informed consent.

The compensation should not influence the thought process of the economically weaker sections of the society in any manner. The laws regarding voluntary informed consent needs to be amended. A more consultative and participatory approach will also help address the problems of disadvantaged groups like women, children and the aged. The people lacking sufficient means should be effectively made aware of the possible benefits and risks of the trial. There needs to be clarity in Schedule Y as to signing of consent for incapacitated people and requirement of consent in writing. Audio visual mode of consent taken by objective observers may help overcome the lacunae.

It is essential to have separate requirements for permission for different kinds of drug trials depending on the severity of their effects. There is also a need for an international standard of training for personnel conducting investigations at trial sites. The Supreme Court had ordered the government

to file its response regarding its failure to supervise the HPV vaccination trials[66]. However, the government in April 2015 responded saying that it could not hold the sponsors liable due to inadequacy of penalty clauses in the existing laws[67]. While the laws must provide for penal provisions for sponsors, investigators and ethics committee for any trial related injury or death, there is a need to clarify definitions of 'injury' and 'trial related injury'.

In June 2016, the Cabinet withdrew the Drugs and Cosmetics (Amendment) Bill, 2013 stating that there were many new areas of law, namely areas involving stem cells, medical devices and clinical trials that were to be included in the bill[68]. While this may seem as a welcome move, the scrapping of the bill to include other new provisions can also be seen as a delaying tactic by the government.

The delay essentially fails to acknowledge the importance that participation in clinical trials hold. However, it is also necessary to understand that amendments and policy changes with regard to clinical trials alone cannot themselves do away with impoverishment and violation of rights. The biggest problem in India is effective enforcement of laws and when laws are flouted, there is a lack of redressal mechanisms thereby rarely leading to penalty of violators. While implementation of laws need to be done strictly, other

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66 *Supra* note 3.

67 *Can't penalize US NGO for violating drug trial norms*, THE INDIAN EXPRESS, (Apr. 18, 2015), *available at* http://indianexpress.com/article/india/india-others/cant-penalise-us-ngo-for-violating-drug-trial-norms/.

68 Jyotsna Singh, *Cabinet withdraws drugs and cosmetics amendment bill*, LIVEMINT, June 22, 2016, *available at* http://www.livemint.com/Industry/EY23lZyuBPOHbpvNqFmN4K/Govt-to-revise-drugs-law-draft-new-rules-for-medical-device.html.

government schemes promoting literacy, access to health care, micro insurance, employment and access to food will have to be simultaneously dealt with in order to do away with impoverishment. Any person will be able to make an informed choice only if he has the "freedom to choose the kind of life that he has reason to value"[69]. One needs to enjoy a combination of economic, social and political freedom in order to live a life free of any coercion.

V. CONCLUSION

Clinical trials operate within a regime where the advancement of science and technology is considered to be the most important and immediate need for the greater good of the society. This leads to a *hierarchisation* of rights in which the right to life and health of an individual is considered to be subservient to the right of the society to avail an advanced drug. Such *hierarchisation* raises concerns over whether the utilitarian notion of greatest good for the greatest number is a valid justification for violation of inalienable human rights. Economically weaker people need to be looked at as citizens and not merely as 'subjects' of the state. There is a duty on the state to not only avoid and protect from deprivation but also to aid the deprived[70]. Proper regulations need to be introduced and numerous government schemes need to be improved concurrently so as to grant every individual their right to a dignified existence. The job of the legislature has to be supplemented by the

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69 SEN, *supra* note 10.

70 HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY 60 (Princeton University Press, 1980).

role of the judiciary. The judiciary needs to take cognizance of the fact that it has been conferred with the role of the protector of rights by the Constitution of India.

REPRODUCTIVE AUTONOMY IN INDIA

Saumya Maheshwari[*]

ABSTRACT

18% of all maternal deaths in India are attributable to unsafe abortions. This disproportionately high number is a result of powerlessness over reproductive decision making, that either delays the final decision, or prompts women to seek maternal healthcare services from unqualified persons, thus increasing the likelihood of unsafe abortions. It is argued that this systematic deprivation of power is a result of a flaw in the letter of the law, and can be remedied, albeit only to a limited extent, by amending the Medical Termination of Pregnancy Act, 1971.

I. INTRODUCTION

Until 1971, termination of pregnancy in India was governed by Section 312 of the Indian Penal Code, 1860 which criminalized inducing a miscarriage other than to save the woman's life. As a consequence of the restrictive nature of this provision, the number of illegal and therefore, unsafe abortions was remarkably high. Recognizing the need for a dedicated legislation, the Parliament enacted the Medical Termination of Pregnancy Act, 1971 ("MTP Act") to check the tide of pregnancy-related deaths in the country.

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This enactment also coincided with the Union Government's earliest campaigns promoting family planning measures aimed at controlling India's burgeoning population. Although population control was not a purported objective of the Act, it was liberal enough to allow those willing to use it for that purpose, to do so.[1] In the coming years, it was also advocated as a legitimate family planning tool.[2]

MTP Act, on the one hand, was expected to reduce maternal mortality resulting from unsafe abortions, and on the other hand, reduce the high birth rate in India.[3] While the birth rate in India has reduced as a result of greater awareness,[4] the MTP Act has not succeeded in substantially lowering the number of women who seek illegal abortions.[5] Complications from unsafe abortions account for almost 18% of maternal deaths, higher than the global average of 13%. It is estimated that about sixty-seven lakh women seek abortion services from unqualified persons in India every year. It should also be noted that this problem affects young women in the age group of 15-19

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1 Jyotsna Agnihotri Gupta, NEW REPRODUCTIVE TECHNOLOGIES, WOMEN'S HEALTH AND AUTONOMY: FREEDOM OR DEPENDENCY? 213 (2000).

2 *Id.*
Saroj Pachauri, Priority Strategies for India's Family Planning Programme, INDIAN JOURNAL OF MEDICAL RESEARCH pp. 137 – 146 (November 2014), *available at* http://icmr.nic.in/ijmr/2014/nov_supplement/1121.pdf (Last visited on February 20, 2016).

3 The birth rate in India in 1971 was 5.40, and has since consistently reduced to 2.3in 2014. *See* http://www.unicef.org/infobycountry/india_statistics.html.

4 P. Arokiasamy, *Fertility Decline: Contributions of Uneducated Women Using Contraception,* Vol. 44 (30) Economic and Political Weekly (2009).

5 Illegal abortions here means abortions sought from persons not qualified to do so under the Act. Centre for Reproductive Rights, *Maternal Mortality in India: Using International and Constitutional Law to Promote Accountability and Change* (2008).

years disproportionately, with almost 50% of the maternal deaths in this age group resulting from unsafe abortions.[6]

It may be argued that liberalization of the legal regime does not always translate into greater access to safe and legal abortion services. Where legal medical assistance is available, the services may not be provided in sanitary surroundings. Even in areas where safe and legal medical assistance is available and affordable, access to these services is determined by a host of other factors, including the socio-economic status of a woman, and the extent of control she exercises over her reproductive choices.

The lesser the control, greater is the likelihood of her delaying her decision to seek medical help, or of seeking medical help from unqualified persons.[7] The basic premise of this paper is that a woman's bodily autonomy should supersede concerns for the competing claims of spouses or those of the foetus.[8] It is argued in this paper that family members and medical practitioners exercise greater control over reproductive decision making than women themselves, thus violating her autonomy, and furthermore resulting in a greater number of illegal and unsafe abortions.[9] It is further argued that this loss of control, while a function of several socio-legal factors, can be remedied

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6 *Id.*

7 Saseendran Pallikadavath and R. William Stones, *Maternal and Social Factors Associated with Abortion in India: A Population-Based Study*, Vol. 32 (3) INTERNATIONAL FAMILY PLANNING PERSPECTIVES (2006), p. 120-125, *available at* http://www.jstor.org/stable/4147621 (Last visited on November 15, 2015).

8 Hilarie Barnette, Introduction to Feminist Jurisprudence (1998).

9 Nirmala Sudhakaran, *Teaching Clinical Obstetrics*, Vol. 40 (18) ECONOMIC AND POLITICAL WEEKLY, p. 1867 (2005).

to a limited extent through amendments to the MTP Act and sensitisation of medical practitioners.

This paper is divided into three parts. The first part seeks to explain the concept of reproductive autonomy. The second part studies the limitations that have been imposed on the reproductive autonomy of women, both minor and adult. The final part discusses various remedial measures that can be adopted to provide greater control to women.

II. UNDERSTANDING REPRODUCTIVE AUTONOMY

Feminist theory has for long challenged biological essentialism, the belief that the unequal position of women and men in marriage, with respect to employment opportunities, discriminatory pay, is rooted in biological differences between sexes. Biological essentialism in effect attempts to scientifically justify the public-private divide, and states that women's place is in the private sphere on account of their ability to give birth.

Since pregnancy and child-birth facilitate such oppression, the women's liberation movement that arose simultaneously with the sexual liberation movement sought to transfer the control over women's bodies from men, fathers or husbands, to women, thus giving rise to the concept of reproductive rights, *viz.* rights that would enable women to control their fertility. Contraception and abortion have the possibility of allowing women

to conceptualise themselves as women, and not merely as mothers, and thus leave the private sphere.[10]

Reproductive autonomy is thus understood as the right of women to choose whether to have children or not, and if so, the right to determine the number of children they want, when and with whom; and the freedom to choose the means and methods to exercise their choices regarding fertility management.[11]Some of the most fundamental determinants of whether a legal system guarantees reproductive autonomy to women within that legal system are access to information on sexuality, access to contraceptives, access to reproductive and maternal health care, access to pregnancy termination services, and access to economic resources.[12]

The right to reproductive health is explicitly recognised in the Yogyakarta Principles, as well as in the Convention on the Rights of Persons with Disabilities ("CRPD").[13] Furthermore, the monitoring committees of various human rights treaties including the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW"), The United Nations Convention on the Rights of the Child ("UNCRC"), the International Covenant on Civil and Political Rights ("ICCPR") and the International

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10 Lucy Irigaray, *The Power of Discourse and Subordination of the Feminine* in The Irigaray Reader (1991).

11 Agnihotri, *supra* note 3, at 26. The meaning of the word 'autonomy' here is similar to that in biomedical ethics, and is different from its usage in legal philosophy. In biomedical ethics, autonomy refers to the patient's right to choose what happens to her body, and is the cornerstone of the concept of informed consent, as reiterated in the landmark case of Montgomey v. Lanarkshire Health Board ¶. 108 [2015] UKSC 11.

12 REBECCA COOK *ET AL*, REPRODUCTIVE HEALTH AND HUMAN RIGHTS (2003).

13 Article 25, Convention on the Rights of Persons with Disabilities.

Covenant on Economic, Social and Cultural Rights ("ICESCR") have recognised the importance of the same in fully realizing all other human rights.[14] For instance, the CEDAW Committee recognises that the protection of women's right to self-determination requires states to take a holistic approach toward women's health and ensure access to safe abortion services; medically accurate information about sexual and reproductive health; and safeguards against violations of confidentiality, and quality of care.[15]

The right to reproductive autonomy has also been recognised by the Indian courts as a constitutionally guaranteed fundamental right. The judicial attitude towards the right to abort has evolved to a great extent since the 1990s, when in the case of *Jacob George v. State of Kerala*, the Apex Court refused to comment on the right of women to abort an unwanted pregnancy,[16] to the decision of the Delhi High Court in the case of *Laxmi Mandal* v. *Deen Dayal Harinagar Hospital*[17].

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14 Centre for Reproductive Rights, *Whose Right to Life? Women's Rights and Prenatal Protections under Human Rights and Comparative Law* (2014). *See also* Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the combined fourth and fifth periodic reports of India*, CEDAW/C/IND/CO/4-5 (July 24, 2014).

15 *Id.*

16 Jacob George v. State of Kerala 1994 (2) SCALE 563 (Supreme Court of India).

17 Laxmi Mandal v. Deen Dayal Harinagar Hospital 172 (2010) DLT 9 (High Court of Delhi). This case was brought on behalf of Shanti Devi, who was refused admission into a government hospital even though she qualified for free services under a state-sponsored scheme. She died immediately after delivering a premature daughter at home. The Court held that the Constitution protects the right to access public health facilities, to receive a minimum standard of treatment and the enforcement of reproductive rights of women.

In the above case, the right to health as defined in the case of *Paschim Banga Khet Majdoor Samiti* v. *State of West Bengal*[18] was sought to be broadened to include reproductive rights. However, the decision in *Laxmi Mandal* was in the context of denial of maternal healthcare services, and did not explicitly recognise abortion as a part of 'reproductive rights.' Mere legal recognition is not sufficient to ensure the enforcement of reproductive rights. A legal framework that enables women to exercise them needs to be built, in order to fulfil India's obligations under the abovementioned international instruments.[19]

III. GUARANTEES UNDER THE MTP ACT

As the MTP Act governs women's access to pregnancy termination services, it has a key impact on the reproductive autonomy of women within the Indian legal system. Under this Act, women have the right to undergo an abortion within twenty weeks, on the grounds that there is grave risk of physical or mental injury to the mother, or that the child is likely to be born seriously handicapped.[20] The right to abort a pregnancy is available to the pregnant woman throughout the duration of the pregnancy for the purpose

[18] Paschim Banga Khet Mazdoor Samiti v. State of West Bengal 1996 (4) SCC 37 (Supreme Court of India). In this case, it was held that failure of the Government to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.

[19] India acceded to ICCPR and ICESCR in 1979, signed CEDAW in 1980 and ratified it in 1993, and signed and ratified UNCRC in 1992.

[20] Sec. 3, MTP Act.

of saving her life.[21] The MTP Act legalizes medical and surgical forms of terminating pregnancy.

It allows abortions on socio-economic grounds, and permits consideration of a woman's economic resources, her age, her marital status, and the number of her children for the purpose of determining whether non-termination of the pregnancy will result in injury to her mental health.[22] Despite there being an enabling law for safe abortions, statistics suggest that a large number of Indian women who die due to pregnancy related causes, die as a result of unsafe abortions.[23]

This is because even though there is a legal framework for legal abortions, the same has not translated into greater access to safe abortion facilities. Even where such facilities are available, women rarely have the ability to determine whether the pregnancy should be terminated or not. Socio-economic factors such as lack of agency generate the harrowing statistics stated above. This lack of agency, and its causes, has been studied in the next section.

A. Who Decides?

Section 3(4) of the MTP Act states that,

21 Sec. 5. MTP Act.
22 Centre for Reproductive Rights, *World's Abortion Laws* (2008).
23 CRR, *supra* note 6.

> "*(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.*
>
> *(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.*"

The pregnancy of a sound adult woman cannot be terminated unless she consents to the same. Moreover, her consent is sufficient to terminate the pregnancy. For the termination of the pregnancy of a minor or a mentally ill person, the registered medical practitioner is required to obtain the consent of her guardian. Clause (b) of sub-section (4) of section 3 can also states that the consent of a woman who is either a minor or mentally unsound need not be obtained before her pregnancy is terminated.

B. Losing Control over Bodily Autonomy

Section 3(4) gives rise to a number of questions on the issue of consent, and the different ways in which it deprives women of control over their own bodies. For the purpose of understanding the same, women can be classified into the following broad categories – minor women, minor married women, adult married women, and adult unmarried women.[24]

[24] This classification has been made on the basis of the treatment of women of different age groups by the law, and is solely for the purpose of analysis in this paper. It does not take into account differences of class, caste, region, religion, etc.

1. Adult Married Women and the Need for Spousal Consent

The MTP Act was hailed as a revolutionary legislation for its time, not only because of the wide range of grounds that it prescribed for termination of pregnancy, but also because in the 1970s itself, when the western world was grappling with the idea of abortion and the right of fathers to be equal parties in the decision-making,[25] the Indian legislature recognised the need to give married women complete control over their bodies by eliminating the need for spousal consent for termination of pregnancy.

Section 3(4) has been read to mean that a married woman's consent is *enough* for terminating her pregnancy, and the registered medical practitioner *need not* obtain the consent of her husband for the same. To that extent, the Act recognises that a woman has complete control over her body, and legally, her husband has no stake in the foetus' survival or termination, until the baby is delivered. This view has been endorsed by the Federation of Obstetric and Gynaecological Societies of India ("FOGSI"), which in its Guidelines for good clinical practice states that,

> "*An adult woman who is not mentally ill can undergo MTP with only her own consent as provided under the MTP Act. This section seeks to emphasize certain important but not always appreciated aspects of the MTP act of India. ... It is emphasized that spousal consent or consent of*

[25] HILARIE BARNETTE, INTRODUCTION TO FEMINIST JURISPRUDENCE (1998).

> *partner is not required in case a major woman who has no mental illness desires to terminate an unwanted pregnancy.*"[26]

Given that the brunt of pregnancy, physical, economic and social, is largely borne by the woman carrying the foetus,[27] women alone should have control over the decision whether the pregnancy should be carried to term or not. Moreover, in a societal set-up where women have little say in family planning and carry almost complete responsibility of birth control,[28] a spousal consent requirement could pose a significant obstacle to undergoing an abortion for most women.[29] In a societal set-up like ours, where a male child is preferred over a female child,[30] married women are often compelled to reproduce until a male heir is born,[31] and the society puts a phenomenal amount of pressure on women to bear their first child soon after marriage, any form of spousal consent is likely to be detrimental to the interests of women.

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26 Guideline 3.3, FOGSI Good Clinical Practice Recommendation on Medical Termination of Pregnancy, 2004.

27 Women physically bear the burden of bearing a pregnancy. Moreover, women who carry an unplanned pregnancy to term may be unable to finish their school education, or seek higher education. Women are also usually the primary caregivers in a family, and their careers are often adversely affected as they spend a disproportionate amount of time on care-giving.

28 ARNA SEAL, NEGOTIATING INTIMACIES: SEXUALITIES, BIRTH CONTROL AND POOR HOUSEHOLDS 13 (2000).

29 The spousal consent requirement, which has been incorporated into several state statutes in the USA in various forms such as the spousal notification requirement, has been consistently struck down as being unconstitutional, and has been considered as being akin to a total ban on abortions. *Planned Parenthood of Central Missouri* v. *Danforth* 428 U.S. 52 (1976) (Supreme Court of United States of America).

30 WORLD HEALTH ORGANISATION, PREVENTING GENDER BIASED SEX-SELECTION (2011).

31 *Id.*

Despite the recognition of the right of a woman to unilaterally determine whether her pregnancy should be terminated, in practice, married women have little or no control over this decision. The prime facilitator of this loss of control over bodily autonomy, it can be argued, is the medical fraternity itself. Literature suggests that medical practitioners are often unwilling to terminate pregnancies of married women without the consent of their husbands.[32] While some doctors refuse to terminate pregnancies without spousal consent altogether, some others consider it a condition precedent for second-trimester abortions. While on the one hand medical practitioners are fearful of terminating pregnancies without the spouse's consent because of the social backlash that may follow, others state that the same is necessary for abortions that require hospitalization.[33]

The right guaranteed by the MTP Act is further limited by judicial precedents that recognise the termination of a pregnancy without spousal consent as mental cruelty, and hence, a ground for divorce,[34] thus effectively

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32 Manish Gupte *et al*, "*Women's perspectives on the quality of general and reproductive health care: evidence from rural Maharashtra*" in IMPROVING QUALITY OF CARE IN INDIA'S FAMILY WELFARE PROGRAMME (Koenig MA, Khan ME eds.,1999) p. 117-39.

33 *Id.*

34 Suman Kapur v. Sudhir Kapur. AIR 2009 SC 589 (Supreme Court of India).
In this case the husband sought divorce on the grounds of mental cruelty as she had undergone two abortions without his consent. She was unwilling to bear a child, for fear that it would hinder the growth of her career. It was held that termination of pregnancy by the wife without the consent of the husband is mental cruelty, and a ground for divorce. If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty. The Court failed to take into account the fact that she had no objection to adopting a child.
Note that while impotency is a ground for divorce, infertility is not a ground for divorce under any personal laws in India. As such, it is sexual intercourse that statutes consider central to a conjugal relationship, and not reproduction.

curtailing the reproductive rights of married women by making reproduction an essential and non-negotiable component of married life. While there have been dissenting voices, such as in *Mangla Dogra* v. *Anil Malhotra*,[35] wherein it was stated that,

> "*if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband.*"

However, the current judicial attitude towards spousal consent, and the prevalent medical practice of mandating the same forms a grave threat to the reproductive rights of married women.

2. Infantilization of Adult Unmarried Women

Even though pre-marital sex is stigmatised and discouraged, studies suggests that a significant number of young persons engage in sex before marriage in India.[36] It is therefore necessary that reproductive healthcare

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[35] Mangla Dogra v. Anil Malhotra (2012) ILR 2 Punjab and Haryana 446 (High Court of Punjab and Haryana). After the marriage broke down and the spouses separated, the husband discovered that his estranged wife was pregnant. He filed for an injunction to prevent her from terminating the pregnancy. While the trial court granted his request, the High Court reversed the decision of the lower court on the grounds that the Appellant alone had the right to decide whether the pregnancy should be terminated or not.

[36] Shveta Kalyanwala *et al*, *Abortion Experiences of Unmarried Young Women in India: Evidence from a*

services are made easily available to this demographic as well. However, in several parts of the country, unmarried women, irrespective of age, are expected to obtain the consent of at least one parent for the termination of pregnancy.[37] Where this practice is not strictly followed, women are required to produce an attendant, a relative or friend, who is informed about the abortion. Reasons cited for this practice are similar to those cited for the spousal consent, most notably that consent is necessary to avoid any liability in the event of medical complications.

The parental consent requirement, apart from wholly infantilising adult women, also acts as an obstacle to the right to safe and legal abortions. Given the stigma attached to pre-marital sex and pregnancy in most parts of India, and the grave implications that pre-marital pregnancy can have on social standing of a woman and her family,[38] the parental consent requirement also acts as an obstacle to obtaining abortion services.

The reasons cited for this practice are untenable, as a person is not refused treatment for any other medical treatment for lack of parental consent. The general practice is to ask for the name of an emergency contact person in case complications. Not only do the above-stated practices infringe upon statutorily guaranteed rights, they are also reflective of a culture that

Facility-Based Study In Bihar and Jharkhand, Vol. 36, No. 2 INTERNATIONAL PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH, (2010), pp. 62-71, *available at* http://www.jstor.org/stable/27821031 (Last visited on November 8, 2015).

37 *Id.*

38 Purandare VN *et al*, *A study of psycho-social factors of out-of wedlock pregnancies*, JOURNAL OF OBSTETRICS AND GYNAECOLOGY OF INDIA 303–307 (1979).

refuses to recognise women as individuals in their own right. They also show the different ways in which statutorily guaranteed rights are nullified in practice.

IV. MINOR GIRLS – DO CHILDREN LACK BODILY AUTONOMY?

While the poor implementation of the MTP Act deprives a large number of women from exercising their reproductive rights, the MTP Act fails to recognise the rights of certain categories of women, including minor girls and mentally-ill women. The MTP Act states that a minor girl cannot get her pregnancy terminated without the written consent of her guardian. This requirement stems from the incapacity of minors to consent to a legally binding contract.[39] Since every intrusive medical procedure requires consent, it cannot be performed on a minor without the consent of her guardian, as stated in Clause 7.16 of the Code of Medical Ethics, 2002.[40] One exception to this rule is that in case of an emergency, a minor may be subjected to invasive treatment without the consent of her parents. The emergency exception recognises that the authority of the guardian is not absolute, and must yield to more immediate interests.[41]

This requirement of parental consent gives rise to several absurdities, some of which are listed below:

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39 Section 10, Indian Contract Act, 1872.

40 7.16. Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of a minor, or the patient himself as the case may be, Code of Medical Ethics, 2002.

41 T.T. Thomas v. Elisa AIR 1987 Ker 52 (High Court of Kerala). *See* J. Shoshanna Ehrlich, WHO DECIDES? THE ABORTION RIGHTS OF TEENS (2006).

- A minor girl, who is willing to terminate her pregnancy, may not be permitted to do so, and may be forced to carry the pregnancy to term by a guardian who withholds consent to termination of pregnancy. Such denial of consent has indelible consequences for the minor. The consequences suffered by women due to denial of pregnancy termination services are not mitigated by minority, but are rather made more severe by it. Apart from the mental cruelty suffered by her for being made to carry an unwanted pregnancy to term, she suffers grave socio-economic consequences, considering the loss of probable education and employment opportunities.[42]

- A minor girl, whose consent to termination of pregnancy is irrelevant, may be forced to undergo an abortion by her guardian. Generally, if a medical person administers treatment to or performs an operation upon a patient without the latter's consent, her actions amount to an actionable assault.[43] However, the language of Section 3(4)(b) seems to suggest that this rule does not apply to minor girls, or to mentally-ill women.

The overwhelming power given by the statute to the guardian in such cases is problematic not only because it is based on the premise that minors are incapable of making responsible decisions when it comes to their own bodies, but also because it assumes that the guardian's decision will always be

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42 *Id.*

43 Samira Kohli v. Prabha Manchanda (2008) CPJ 56 (Supreme Court of India).

unbiased, and in the best interests of the minor girl. These assumptions are challenged below.

A. The Unbiased Guardian

In a society where the sexuality of women is closely monitored, and where pre-marital pregnancy of a daughter in the family leads to social exclusion, it is unlikely that any decision taken by parents for a minor girl will ever be unbiased, with only her best interests influencing it. Moreover, studies suggest that an overwhelming number of Indian women face sexual abuse at the hands of family members, including fathers and brothers.[44] In case of a pregnancy resulting from such sexual assault within the family,[45] it is unlikely that the decision to terminate it will be influenced by concern for the minor, who in such cases loses complete control over her body.

The Child Bride

"*I did not want a child so soon after marriage. My mother-in-law told me to have the child. For six months she did not take me to a doctor. Actually my mother-in-law was scared that I might go to the doctor for termination of pregnancy. That is why she does not even allow me to go to a doctor...*"[46]

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44 Harsh Mander, *The Dangers that Lurk Close to Home,* THE HINDU (September 5, 2015), *available at* http://www.thehindu.com/opinion/columns/Harsh_Mander/harsh-mander-on-sexual-abuse-at-home/article7615539.ece.

45 In a study conducted delay in getting a pregnancy aborted, it was found that those who had a second-trimester abortion were more likely than those who had a first-trimester abortion to report that the pregnancy had resulted from forced sex (35% vs. 12%). Pallikadavath and Stones, *supra* note 7.

46 Alka Barua and Kathleen Kurz, R*eproductive Health-Seeking by Married Adolescent Girls in Maharashtra*, Vol. 9 (17) REPRODUCTIVE HEALTH MATTERS (2001), p. 53-62, *available at* http://www.jstor.org/stable/3776398 .Accessed: 08/02/2015 (Last visited on November 15, 2015).

Another situation in which the guardian has vested interest in the pregnancy is in the case of child marriage. The husband of a minor girl is considered her guardian.[47] Where a minor married girl seeks abortion, the requirement for guardians consent amounts to spousal consent, and is as such, a major obstacle in the way of obtaining an abortion, especially as child brides face social and familial pressure to begin childbearing soon after marriage.[48] The husband and the mother-in-law, in the case of young brides, are the decision makers when it comes to seeking healthcare in India.[49] Treatment for adolescent girls is often delayed as they negotiate this familial decision-making process, making the incidence of second trimester abortions more common among married adolescents.[50]

B. Abortion – A Decision like none Other

While the general defence for the practice of obtaining the guardian's consent for a medical procedure, as stated above, is that a minor does not have the capacity to consent to a contract, it is argued here that the decision to abort a pregnancy is fundamentally different from other medical decisions, and therefore, should be accorded special treatment. The abortion decision is fundamentally different from other kinds of medical decisions because the minor's parents have a vested interest in the pregnancy in allowing or disallowing an abortion.

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47 Section 21, Guardians and Wards Act, 1890; Section 6(c) Hindu Guardians and Wards Act, 1956.

48 Sandhya Rani *et al* , *Maternal Healthcare Seeking among Tribal Adolescent Girls in Jharkhand*, Vol. 42 (48) ECONOMIC & POLITICAL WEEKLY p. 56 (2007).

49 *Id.*

50 *Id.*

Apart from that, the abortion decision is of a special nature because of its temporal nature and enduring impact. It is not a decision that can simply be postponed to a later time. Unlike the decision to marry, or to enter into an employment contract, the decision to terminate one's pregnancy is extremely time-sensitive, and becomes more and more so with the lapse of every week. The decision to terminate one's pregnancy thus requires to be treated differently from other medical decisions. This has been recognised by the Supreme Court of USA in *Planned Parenthood of Central Missouri* v. *Danforth*,[51] where J. Blackburn stated that,

> "*It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the non-consenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.*"

It was with this decision that the judicial bypass rule was formulated, that allowed minors to seek *parens patriae* jurisdiction of the courts to obtain consent for the termination of pregnancy. While the implementation of such a judicial bypass rule is likely to be lax in India, given the slow pace of the justice system, it could be a step towards fulfilling India's obligations under

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[51] *Planned Parenthood of Central Missouri* v. *Danforth* 428 U.S. 52 (1976) (Supreme Court of United States of America).

the UNCRC, which urges signatory nations to ensure universal access to sexual and reproductive healthcare facilities.[52]

V. RECOMMENDATIONS

The state is under an obligation to not only implement the MTP Act, but also to build a legal framework that safeguards the fundamental rights of women. The failure of the state to do the same is in violation of such basic rights. For the state to fulfil its obligation, it must ensure that *all* women have access to safe and legal abortion. This chapter seeks to make certain recommendations for achieving this objective.

A. Narrowing the Space for Negotiation

By differentiating between the normal and the abnormal, medical science creates an order in society.[53] In this sense, the network of medical practitioners forms the central part of a system of moral regulation of society.[54] It is therefore important to recognise that medical practitioners are a part of the society that we live in, and are influenced by the same patriarchal values that are entrenched in us. As seen in the last chapter, the morality of the society is enforced through the medical practitioners who, by misinterpreting the law, nullify the rights guaranteed to women under the MTP Act, by either demanding parental or spousal consent from adult

52 Centre for Reproductive Rights, *Reproductive Rights under the Convention on Rights of the Child* (2014).
53 B Subha Sri, *Women's Bodies and the Medical Profession*, Vol. 45 (17) ECONOMIC AND POLITICAL WEEKLY (2010).
54 Agnihotri, *supra* note 3, at 49.

women, or by making compulsory birth control a pre-condition for conducting an abortion.[55]

The poor implementation of the MTP Act, as far as the rights of adult mentally sound women are concerned, is a result of a flaw in the design of the law itself. The Act provides a space for negotiation between the doctor and patient, wherein the doctor has the authority to make judgements on the immediacy or need of an abortion based on extra-medical factors that include making various socio-economic determinations. The abortion decision is one of the few treatments that can be refused by a doctor to a patient solely because of non-medical reasons.

Furthermore, it can also be argued that the MTP Act, by merely setting a minimum threshold of the consent requirement, gives doctors the freedom to demand parental or spousal consent. It does not specifically bar them from refusing abortion services to women who fall within the framework of Sec. 3, nor does it prohibit doctors from actively seeking the consent of persons other than the patient herself, in breach of their duty to maintain confidentiality.[56] It is therefore submitted that the MTP Act should be

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55 In a study conducted on the attitudes of medical practitioners to women seeking maternal health services, it was found that in Bihar, Gujarat, Maharashtra, Tamil Nadu and Uttar Pradesh, the interactions of doctors with women were not respectful, and many insisted on sterilisation as a precondition for conducting abortions. Alka Barua and Hemant Apte, *Quality of Abortion Care: Perspectives of Clients and Providers in Jharkhand*, Vol. 42 (48) ECONOMIC AND POLITICAL WEEKLY p. 71 (2007).

56 Preservation of a patient's confidentiality is a central aspect of medical professionalism, with Hippocratic roots. Confidentiality is of greater significance in matters of sexual or reproductive health, as patients are likely to forego help altogether, instead of seeking it from someone who is unlikely to maintain confidentiality. Rebecca Cook *et al*, REPRODUCTIVE HEALTH AND HUMAN RIGHTS (2003).

amended to prohibit registered medical practitioners from seeking parental or spousal consent from adult women of sound mind, to enable them to exercise their right to reproductive autonomy.

Additionally, to address the issue of legislation sponsored requirement for spousal consent in the case of minor married women, and that of parental consent in the case of minor unmarried women, it is submitted that a provision for judicial bypass should be made, to enable minor women to overcome additional obstacles.[57] Given the high rate of pendency of cases, a special court or committee, similar to the Child Welfare Committee under the Juvenile Justice Act, 2000 can be established. In addition to the same, the consent of the minor should be made a pre-condition to abortion, to ensure that no minor is forced to terminate a pregnancy that she wishes to carry to term.

B. Sensitisation

As noted above, it is the primary implementers of MTP Act who control access to abortion. While on one hand it is necessary to create a legal obligation on their part to safeguard and cede to the reproductive rights of women, on the other hand, it is also important to educate them about the position of women in the decision making process, and their role in elevating the same. Sensitisation of healthcare service providers to the gendered power-

[57] In the past, there have been instances where the Court assumed *parens patriae* jurisdiction for determining whether an abortion would be in the best interests of a pregnant woman who is incapable of consenting to medical treatment. *See* Suchita Srivatsava v. Chandigarh Administration 2009 (11) SCALE 813 (Supreme Court of India).

dynamics of the abortion decision is therefore, imperative. To that end, the content and process of medical education, which has an important role to play in shaping the attitudes of doctors, should be revised.[58]

The books generally used by students of obstetrics and gynaecology, refer to the MTP Act and the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, and educate the students about the legal and regulatory aspects of the same. However, none of these books makes any references to how the provisions of the Acts relating to confidentiality and consent should be interpreted, the struggles women face in the decision making process, and the relationship between gender inequity and lack of access to abortion.[59]

Medical practitioners also need to be made aware of the needs of special groups of patients, such as adolescents, and their lack of information on aspects related to sexuality and contraception, the difficulty they face in talking to adults on such matters and their financial constraints, which results in delay in care seeking.[60] The education that students of medicine receive can prevent the medicalisation of women's bodies, and enable doctors to locate women in the socio-economic background that they come from.

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58 Keerti Iyengar, *How Gender-Sensitive Are Obstetrics and Gynaecology Textbooks?*, Vol. 40 (18), ECONOMIC AND POLITICAL WEEKLY, p. 1839. (2005). In her review of *Shaw's Textbook of Gynaecology*, Howkins and Bourne, 12th edn. 2002, D.C. Dutta's *Textbook of Obstetrics including Perinatology and Contraception*, 5th edn., 2001, and *Holland and Brews Manual of Obstetrics*, 16th edn., 1998, Keerti Iyengar concludes that the authors and editors have failed to include directions on counselling women, and tend to take a paternalistic view of solutions to maternal health problems. Moreover, the textbooks do not discuss the problems faced by vulnerable groups of women, adolescents, etc., that can enable doctors to provide services in a non-judgemental manner.

59 Renu Khanna, *Obstetrics and Gynaecology: A Women's Health Approach to Textbook*s, Vol. 40 (18) ECONOMIC AND POLITICAL WEEKLY, p. 1876 (2005).

60 *Id.*

C. Awareness and State Action

Statistics show that women who have finished high school are more likely to be aware of their right to abort in the event of an unwanted pregnancy, and such women are less likely to delay their decision of abortion to the second trimester, thus minimising the chance of complications. This is especially true in the case of unmarried women, a large number of whom are unaware that they can legally abort an unwanted foetus.[61]It is therefore submitted that for the complete realisation of women's right to bodily autonomy and consequent reduction in maternal mortality, it is crucial that the state make sincere efforts to spread awareness about women's right to make autonomous and unhindered reproductive choices.

VI. CONCLUSION

Abortion is, and continues to be, a healthcare service that is layered with meaning. While incremental changes in the law are unlikely to revolutionise the understanding of abortion, they will definitely provide an enabling legal framework within which women can demand the enforcement of their rights.

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[61] In a study conducted on young unmarried women seeking maternal healthcare services, it was found that only 22% of respondents were aware that unmarried women can legally abort their pregnancy. Moreover, women were more likely to be aware of this if they had a high school education rather than less education. Those who had the procedure in the first trimester were more likely than those who had it in the second trimester to report that they had participated in the decision making process. Suchitra S. Dalvie, *Second Trimester Abortions in India*, Vol. 16 (31) REPRODUCTIVE HEALTH MATTERS, (2008), pp. 37-45, *available at* http://www.jstor.org/stable/25475399 (Last visited on November 8, 2015).

It was observed in this paper that women play a rather insignificant part in the process of deciding whether a pregnancy should be terminated or not. Remnants of the feudal society that considers women as chattel, which either belongs to the father or the husband remains, and are reflected in the different ways in which the control that they should exercise over their own bodies is transferred into the hands of parents or spouse, either with or without the sanction of the law. Maternal healthcare providers often act as intermediaries through whom such social norms are enforced.

It is submitted that the government must take responsibility for the various societal practices that deprive women of agency in deciding whether they should terminate their pregnancy or not, in order to fulfil its international and constitutional obligations. A three-pronged approach has been suggested for the same. Firstly, the MTP Act should be amended to disallow doctors from seeking the consent of a second party when they are approached by women for termination of pregnancy. Secondly, it is necessary to sensitise doctors to societal realities and the lack of agency of women, to enable them to understand the challenges faced by their patients. For this purpose, contextualised understanding of the provisions of the MTP Act must be incorporated into textbooks on gynaecology and obstetrics. Finally, women must be made aware of their rights under the MTP Act, to enable them to seek the maternal healthcare services.

INJUNCTIVE RELIEF FOR STANDARD ESSENTIAL PATENT HOLDERS: A COMPARATIVE ANALYSIS

Shreya Prakash[*]

ABSTRACT

Intellectual property rights grant market power to holders, which is enhanced manifold when industry standards incorporate patented technology. In fact, such standards are susceptible to creating monopolies, which mandates a higher level of regulation. While Standard Setting Organisations ("SSOs") have built-in regulatory mechanisms obligating owners of Standard Essential Patents ("SEPs") to license their patents on Fair, Reasonable and Non Discriminatory ("FRAND") terms, greater regulation is required to ensure that implementers have access to standard patented technology. In particular, regulation may prove hard when even enforcement of an SEP holder's rights may result in the abuse of SEP's dominant position. This is illustrated by the current dilemma courts find themselves in, with regard to granting injunctions to SEPs.

Through this paper I seek to first, explore what obligations SEP holders have and whether they are enforceable by potential licensees, secondly review how courts across the world have balanced the SEP holders right to relief versus the implementer's right to access the patent. Thirdly, I examine how

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Indian courts have reacted to granting injunctions for patent infringement claims by SEPs and make recommendations on how Indian policy should evolve in this regard. Ultimately, this paper argues that India should adopt a more pro-competition approach and grant injunctions sparingly, only in situations when the potential licensee is 'unwilling' or does not have the means to pay FRAND royalties.

I. SEP HOLDERS, SSOS AND FRAND

Standard Setting Organisations are voluntarily formed organisations that allow the standardization of technology by establishing an industry consensus. This will allow consumers of technology to be sure that the technology they have bought will be interoperable, and participate in a common technology platform.[1]

SSOs usually require that technology be submitted to them to be incorporated into a standard. If a patent holder's technology is incorporated into a standard, it will provide them a monopolistic position since all those who adopt the particular standard will have to license these Standard Essential Patents. Interestingly, various SSOs do not take steps to verify either the essentiality or the validity of the SEPs, and the designation is usually based on self-declaration.[2]

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1 Joseph Barber, *SSOs, SEPs and RAND licensing: patent law evolves to accommodate technology,* CHICAGO DAILY LAW BULETIN, available at http://howardandhoward.com/user_area/uploads/Barber%20CDLB%201-26-15.pdf .

2 Joseph Mueller *et al*, *The Unwarranted Attempts To Extend The "Unwilling Licensee" Concept,* MLEX MARKET INSIGHT, available at < http://mlexmarketinsight.com/wp-content/uploads/2016/03/Unwilling_Licensee.pdf>; *See*: Bye-law 6.2, IEEE-SA STANDARDS

However, they set a basic threshold whereby SEP holders agree to license their patents to all those who seek to be standard compliant. This allows the standard to gain more subscription, since potential licensees designing standard compliant products will be aware that they will receive licenses at reasonable terms. This will also ensure that those whose patents are made standard essential do not abuse their position, and preclude access to this technology.

SSOs across the world are imposing obligations on SEP holders to license their patents on FRAND terms. These are voluntarily adopted terms, and FRAND terms are enforceable as against SEP holders since they have undertaken to license their patents on these terms. This voluntary adoption is usually characterized as a contractual obligation, and potential licensees as third-party beneficiaries can seek to enforce this contractual obligation. However, some commentators argue that contracts of SEP holders with SSOs are very vague in respect of FRAND terms. Instead the details of these FRAND terms are often to be found in the bye-laws and policies of the SSOs.[3] Therefore, it is sometimes argued that the contractual theory is not the most appropriate theory for enforcement. Instead alternate theories such as promissory estoppel, based on the SEP holders' promise to license on a FRAND basis have also been put forward to justify the enforcement of

BOARD BYE-LAWS, *available at* <http://standards.ieee.org/develop/policies/bylaws/sect6-7.html> (Last seen on August 11, 2016); Section 3.1.2, ETSI GUIDE ON INTELLECTUAL PROPERTY RIGHTS (IPRS), *available at* <http://www.etsi.org/images/files/IPR/etsi-guide-on-ipr.pdf> (Last seen on August 11, 2016).

3 Professor Jorge L. Contreras, *Why FRAND Commitments are Not (usually) Contracts*, (September 14, 2014), PATENTLY-O *available at* <http://patentlyo.com/patent/2014/09/commitments-usually-contracts.html>.

FRAND terms. Others still, argue that FRAND terms should be enforced in the framework of anti-trust laws.[4] Regardless, of the theory of enforcement suggested, it is clear that these voluntarily adopted obligations *are* legally enforceable.

Once SEP holders voluntarily undertake to license their technology on FRAND terms, it has been noticed that often, they do not comply with this obligation. Given that there is no single FRAND rate, it is alleged that SEP holders try to prolong negotiations on the pretext of determining this rate, and hold-up licensing so that the potential licensee agrees to higher rates. This works because potential licensees are forced to use these patents to makes their products standards compliant.[5] Due to this, potential licensees across the world are trying to enforce FRAND terms.

Sometimes this is done by using the non-compliant conduct of SEP holders to prevent actions for infringement, by requiring courts to arrive at a FRAND rate of royalty or by using competition law to show that SEP holders are abusing market dominance. While some courts have been reluctant to enforce FRAND obligations,[6] we find that most courts have agreed to their enforcement. The most commonly employed reasoning for enforcing FRAND is that FRAND terms are contractual obligations and potential

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4 Jorge L. Contreras, *A Market Reliance Theory for FRAND Commitments and other Patent Pledges*, 2 UTAH LAW REVIEW 479, (2015)

5 Mark Lemley & Carl Shapiro, *Patent Hold-up and Royalty stacking,* 85 TEXAS LAW REVIEW 1991 (2007).

6 *Certain Audio-visual Components and Products Containing the Same*, Initial Determination of 18 July 2013, Investigation No 337-TA-837.

licensees are third-party beneficiaries who can enforce such terms.[7] Other theories that justify such enforcement include promissory estoppel, equitable estoppel and implied license.[8] Even India seems to have implicitly accepted that FRAND terms can be enforced.[9]

Sometimes SEP holders, some of whose patents are often neither valid, nor essential,[10] seek to circumvent their FRAND obligations by seeking injunctions against potential licensees, which forms the substance of their right. This is likely to hold-up negotiations and the threat of an injunction that could potentially wipe out its business, would force potential licensees to agree to coercive terms. There are also likely to possess massive anti-competitive effects of granting such injunctions since SEP holders will pursue such relief against competing parties in the market. Courts, globally, have recognised this and trying to balancing the right to access the courts with the right to access the standard while granting such injunctions.[11]

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7 *See: Microsoft Corp. v. Motorola, Inc.,* 854 F. Supp. 2d 993, 999 (W.D. Wash. 2012).

8 Jeffrey I. D. Lewis, *What is "FRAND" all about? The Licensing of Patents Essential to an Accepted Standard*, (November 6, 2015), CARDOZO LAW *available at* <http://www.cardozo.yu.edu/what-"frand"-all-about-licensing-patents-essential-accepted-standard> (Last seen on August 11, 2016).

9 *Ericsson v. Intex*, I.A. No. 6735/2014 in CS (OS) No. 1045/2014.

10 Studies have indicated that a large number of designated Standard Essential Patents actually fail the test of essentiality. *See:* Fairfield Resources International, *Review of Patents Declared as Essential to WCDMA* (January 6, 2009) available at <http://www.frlicense.com/wcdma1.pdf>; Fairfield Resources International, *Review of Patents Declared as Essential to LTE and SAE (4G Wireless Standards)* (January 6, 2010) available at < http://www.frlicense.com/LTE%20Final%20Report.pdf>. Even the European Commission, in Case AT.39985 - *Motorola- Enforcement of GPRS Standard Essential Patents,* Commission Decision of 29.04.2014, 86 notes that FRAND rate setting may be made difficult since various SEPs are not valid or not essential.

11 Even SSOs like IEEE have recognised this and require that SEP holders agree not to seek injunctive relief against potential licensees except under special circumstances.

II. INTERNATIONAL POSITION

This section seeks to outline how courts, globally, are increasingly aware of the negative effects of granting injunctions to SEP holders. Accordingly, they have restricted the circumstances in which SEP holders should be granted injunctions and have also penalized them if they have used this remedy as a means to abuse their market dominance.

A. United States

The United States has been quick to recognise that providing injunctive relief to SEP holders may be incompatible with FRAND terms. US case law recognizes that injunctive relief against infringement is inconsistent with FRAND licensing commitments.[12] However, courts have not out-rightly rejected the remedy, but have chosen to apply it in a pro-competitive manner, thereby relying on traditional patent law instead of applying anti-trust principles.

In patent infringement claims, the United States employs the four-fold *eBay* test[13] for granting injunctions in cases of patent infringement claims. The same test is applied to evaluate requests by SEP holders. However, in *Apple v.*

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12 *See:* Amadeo Arena *et al, Two bodies of law separated by a Common Mission: Unilateral Conduct by Dominant Firms at the IP/Anti-trust intersection in the EU and the US*, 9(3) EUROPEAN COMPETITION JOURNAL 623, 665 (2013).

13 In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006) the court held that "*(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction*."

Motorola,[14] the court acknowledges that in such cases the patentee may find it difficult to establish irreparable harm,[15] since it has agreed to license on FRAND terms to all those that are willing to purchase the technology. Moreover, public interest would be best served by "*encouraging participation in standard-setting organizations*" and "*ensuring that SEPs are not overvalued.*"[16] This is in line with US SC's dicta which emphasised that injunctions would not be in public interest "*when the threat of an injunction is employed simply for undue leverage in negotiations.*"[17]

The majority further opined that injunctive relief may be provided in the case where the licensor is an unwilling licensor "*who unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect.*"[18] However, that does not preclude the potential licensee from challenging the validity or essentiality of the patent itself. Prost J. in his partly dissenting opinion proposes that only when there is a doubt that monetary compensation cannot be recovered from the infringer, should injunctions be imposed.[19] This would mean that irrespective of the willingness of the potential licensee to pay royalties, injunctive relief would not be granted. This approach is even bolder than that adopted by Posner J., who opined that given FRAND, it would not

14 *Apple Inc. v. Motorola Inc.*, No. 12-1548 (Fed. Cir. 2014) ("Apple")
15 Apple at 72.
16 Apple at 71.
17 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396-97 (2006)
18 Apple at 72.
19 Apple at 95

be justified to impose injunctions unless the infringer "*refuse[s] to pay a royalty that meets the FRAND requirement.*"[20]

In *Microsoft v. Motorola* too,[21] Justice Robarts recognised that in these cases involving irreparable harm of the sort that cannot be adequately monetarily quantified would not accrue since the harm is only in terms of lost royalties that can be quantified on doing a FRAND determination. However, the court also took care to clarify that merely seeking an injunctive relief is not indicative of bad faith on behalf of the SEP holder.[22] A similar stance has been taken by the court in *Realtek v. LSI*[23] in respect of preliminary injunctions, wherein it was opined that "*the promise to license on Reasonable and Non-Discriminatory ("RAND") terms implies a promise not to seek injunctive relief… until the standard essential patent holder first satisfies its RAND obligation.*"[24]

Moreover, the court clarified that an injunction will not be granted unless the infringer "*outright refuses to accept a RAND license.*"[25] The court also held that even if the potential licensee chooses to challenge the validity of the patent, as long as it is willing to negotiate RAND terms.[26] The practicality of

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20 *Apple v. Motorola*,869 F Supp 2d 901, 919 (2012). Interestingly, the majority disagrees with this view and likens it to making injunctions unavailable for SEPs.

21 *Microsoft Corp v Motorola Inc*, Order Granting Microsoft's Motion Dismissing Motorola's Claim for Injunctive Relief, C10-1823JLR.

22 *Microsoft Corp v Motorola Inc*, Order on Parties' Summary Judgment Motions, C10-1823JLR.

23 *Realtek Semiconductor Corporation v. LSI Corporation*, Order Granting Plaintiff Realtek Semiconductor Corporation's motion for Partial Summary Judgment and denying Defendants LSI Corporation and Agere Systems LLC's Motion to Stay, C-12-03451-RMW ('Realtek').

24 *Realtek* at 14.

25 *Realtek* at 10.

26 *Realtek* at 14.

this standard is in question since it is unlikely that any potential licensee will out-rightly refuse a RAND offer.

Despite the increasingly progressive view taken by US courts, the International Trade Commission ("ITC") in the United States has taken a different view on the matter.[27] In the cases of *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*,[28] and *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers*,[29] the ITC held that an exclusionary order would not be contrary to public interest. While this may be because they have more limited discretion in granting injunctions,[30] the standard they applied resulted in a Presidential order which stopped the enforcement of the latter order. It has been argued that it is important for the ITC to adopt a more pro-competition stance with regard to SEP holders to protect consumer interest and ensure that the agreements with SSOs are not frustrated.

Apart from this, the US Federal Trade Commission ("FTC") has also brought actions for anti-competitive behavior against SEP holders and has compelled SEP holders to comply. For instance, Bosch, in its agreement with the FTC has agreed to not claim injunctive relief against potential licensees who seek to comply with Society of Automotive Engineers ("SAE") standards

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27 Stefano Barazza , *Licensing standard essential patents, part two: the availability of injunctive relief ,* 9(7) JOURNAL OF INTELLECTUAL PROPERTY LAW & PRACTICE 552, 555 (2014).

28 Investigation No. 337-TA-752.

29 Investigation No 337-TA-794.

30 AIPPI Special Committee on Patents and Standards, *Availability of injunctive relief for FRAND-committed standard essential patents, including FRAND-defence in patent infringement proceedings,* March 2014.

as long as it is willing to license the patents in accordance with FRAND terms.[31] Similarly, Motorola and Google in their settlement agreement with FTC, have agreed to desist from seeking injunctive relief for alleged infringement unless the potential licensee refuses to deal on FRAND terms.[32] They have specifically clarified that "*challenging the validity, value, infringement or essentiality*" of the patents would not constitute a refusal to deal on FRAND terms.[33]

B. European Union

The European Union too has recognised that granting injunctive relief would be inconsistent with FRAND terms.[34] They have specifically employed the competition law framework to penalise SEP holders for the abuse of their dominant position, by requesting for an injunction against the use of their SEPs from potential licensees.

In this respect, the European court has recognised that even though injunctions are usually the vehicle for enforcing intellectual property rights, SEP holders who have made a "*voluntary commitment to license on FRAND terms*"[35] will have to be treated differently. The court believes that the rights of the patent holder to enforce his intellectual property right, access the tribunals and

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31 *In the Matter of Robert Bosch GmbH*, Docket No. C-4377, 14.

32 *In the Matter of Motorola Mobility Inc. and Google Inc.*, Docket No. C-4410, 8.

33 *Id.* at 9 and 11.

34 Nicolas Petit, *Injunctions for Frand-Pledged Standard Essential Patents: The Quest for an Appropriate Test of Abuse Under Article 102 TFEU* (December 23, 2013) *available at* <http://awards.concurrences.com/IMG/pdf/ssrn-id2371192.pdf> (Last seen on August 11, 2016)

35 Case AT.39985 - *Motorola- Enforcement of GPRS Standard Essential Patents,* Commission Decision of 29.04.2014, 86.

freedom of trade need to be balanced against the harms that will accrue due to the abuse of the dominant position of the SEP holder, which would be contrary to Article 102 TFEU.[36] A proportionality analysis needs to be made to determine what kind of limitations can be enforced. Public interest would lie in protecting competition that is necessary for the functioning of the internal markets.

In this respect, the Advocate General Wathelet has laid down clear standards in *Huawei v. ZTE*.[37] He opines that if a holder of an SEP who has agreed to license on FRAND terms seeks to ask for an injunction against a potential licensee, it might constitute an abuse of its dominant position. This would occur if the infringer had shown himself objectively ready, willing and able to conclude a FRAND license but the SEP holder has not honoured its FRAND commitment. While defining an "unwilling licensee," the court opined that only if the infringer's conduct must be "*purely tactical and/or dilatory and/or not serious*"[38] or bringing an injunction would not be considered abuse of the SEP holder's dominant position.

Before the SEP holder can bring a claim in courts, he would have to demonstrate that prior to seeking the injunction, he had alerted the potential licensee of the infringement and had presented him with FRAND terms. If the infringer didn't respond promptly, with a counter-offer, it could be

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36 See also: European Commission, *Antitrust decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently asked questions,* MEMO/14/322.

37 Case C170/13, *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH,* Opinion of Advocate General Wathelet of November 2014. ("Huawei")

38 Huawei at ¶103

considered dilatory. However, it would be legitimate for the potential licensee to request that courts fix a FRAND rate if the negotiations prove unsuccessful, and to reserve the right to challenge the validity as well as the essentiality of the patent itself.[39]

This clarification came in after a request from a German Court to clarify the position of the EU on who could be classified as "unwilling licensees". The test laid down in the Orange Book standard[40] applied by German Courts requires that the potential licensee should have made an unconditional offer to conclude a license on FRAND terms and should agree to pay royalties on FRAND terms from the date of infringement.[41] The European standard is much wider than the standard propounded in Orange and very similar to the standard that the US is moving towards.

In explaining why the potential licensee's challenge to the validity of the patent does not constitute unwillingness, Justice Birrs of the United Kingdom clarifies that allowing a potential licensee to challenge the validity of the patent while agreeing to FRAND terms may seem inconsistent, but it would not be fair to describe a "*contingent position*"[42] as unwillingness. Moreover, even allowing for such a challenge is not likely to adversely affect the SEP holder in all cases. If SEPs are found valid, the potential licensee would not be

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39 Huawei at ¶103; See: European Commission, *Antitrust decisions on standard essential patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently asked questions,* MEMO/14/322.

40 *Orange Book Standard*, Doc. no. KZR 39/06 (German Federal Supreme Court). This case has been decided in context of defenses on patent infringement.

41 *Supra* note 34 at 14-15.

42 *Vringo Infrastructure v. ZTE*, [2013] EWHC 1591 (Pat) at ¶44.

in a position to argue "*Oh! But these are weak patents likely to be invalid or not infringed and the royalty should correspondingly be less.*"[43] While the issue was not in contention in this case, the same reasoning will apply to allow potential licensees to reserve the right to challenge the essentiality of the patent.

While the EU's framework looks at the characterization of such injunctions as anti-competitive, different member states can also allow potential licensees to use the anti-competitive effects of such injunctions as defenses. Analysis of these different practices in different member states is outside the scope of this paper.

III. INDIAN POSITION

Globally, courts are moving towards considering the competition aspects of granting injunctions to SEP holders. However, the Indian IP regime is "*guilty of overprotecting of IP on this count.*"[44] Delhi HC has granted injunctive relief in various cases such as in *Micromax v. Ericsson*[45] and *Vringo v. Xu Dejun*.[46] and *Ericsson v. Xiaomi*.[47] Interestingly, while granting such relief, the Delhi HC has not discussed the potential anti-competitive effects of complainants being

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43 *Vringo Infrastructure v. ZTE*, [2013] EWHC 1591 (Pat) at ¶44.

44 Shamnad Basheer, *FRAND-ly Injunctions from India: Has Ex Parte Becom the "Standard"?,*(December 9, 2014), SPICYIP *available at* <http://spicyip.com/2014/12/frand-ly-injunctions-from-india-has-ex-parte-become-the-standard.html> (Last seen on August 11, 2016).

45 FAO(OS) 143/2013 *available at* <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=53213&yr=2013> (Last seen on August 11, 2016).

46 CS(OS) 2168/2013 *available at* <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=221627&yr=2013> (Last seen on August 11, 2016). This was later vacated.

47 CS (OS) 3775/2014 *available at* <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=250092&yr=2014> (Last seen on August 11, 2016).

SEP holders who have agreed to license their patents on FRAND terms. Indeed, ex parte injunctions have also been granted liberally by the courts.[48]

However, the court's opinion in *Vringo v. Indiamart*,[49] provides a framework that can be applied in the future. Here the High court vacates a temporary injunction since Vringo is unable to prove a prima facie case and show balance of convenience in their favour. With respect to a *prima facie* case, the court emphasised that patent validity is not to be presumed. With respect to the balance of convenience, the court held that the plaintiff's conduct would be the key. If a plaintiff were to come to court with unclean hands or were to unduly delay filing the suit for infringement, the balance of convenience would not be in his favour. Further, no irreparable loss will be suffered by the SEP holder as long as an estimate of infringing products is made available and the infringer provides security for payment of royalties, should the infringement be found valid. Interestingly, the court never discussed that Vringo was an SEP holder who had agreed to license its patents on FRAND terms.

In *Ericsson v. Intex*,[50] the court determined if Ericsson was entitled to injunctive relief. While granting the relief, the court relied on the conduct of the potential licensees to indicate that the equitable remedy should be granted especially since the defendant avoided negotiation and approached the IPAB

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48 Prashant Reddy, *Interim Justice: A troubling trend,* (March 30, 2013), BUSINESS STANDARD *available at* <http://www.business-standard.com/article/opinion/interim-justice-troubling-trend-113033000223_1.html> (Last seen on August 11, 2016).

49 I.A. No.2112/2014 in C.S. (OS) No.314 of 2014 *available at* <http://lobis.nic.in/ddir/dhc/VKS/judgement/07-08-2014/VKS05082014S3142014.pdf> (Last seen on August 11, 2016).

50 I.A. No. 6735/2014 in CS (OS) No. 1045/2014 *available at* < http://lobis.nic.in/ddir/dhc/MAN/judgement/16-03-2015/MAN13032015S10452014.pdf> (Last seen on August 11, 2016) ("Intex")

and CCI to extend litigation. In addition, they denied the validity and essentiality of the patents in the instant proceedings, while impliedly accepting their validity and essentiality in their complaint to the CCI. While Intex's conduct could be considered to be that of an "unwilling licensee", and Ericsson could have potentially obtained injunctive relief across the globe, it is noteworthy that the Delhi HC believes that once the patent's validity is established, the court should grant injunctions against infringement if the SEP holder has come to court without undue delay.[51]

This indicates that the court would not apply a different matrix of analysis for SEP holders. Moreover, the court held that the balance of convenience and irreparable loss would accrue because "*it would have an impact on other 100 licensors who are well known companies in the world who are paying the royalty.*"[52] This analysis is presumably based on the assumption that not paying FRAND royalties enables Intex to be more competitive in the Indian market, which will adversely affect the other licensors. However, this seems to be extremely remote. The court, moreover, opined that challenging the validity of a patent would be inconsistent with the actions of a willing FRAND licensee.[53] This indicates that the court has not examined the issues specific to SEP holders in this ruling. Additionally, if Intex wants to avoid the injunction, it would have to pay interim royalties[54] and interim damages.[55] This judicial

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51 Intex at ¶ 150.
52 Intex at ¶ 159.
53 Intex at ¶ 149.
54 This was also done in *Ericsson v. Gionee, available at* <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=211053&yr=2013> (Last seen on August 11, 2016).
55 Intex at ¶ 161.

position has come under criticism[56] since the court seems to have devised completely novel remedies, out of traditional reliefs that were never meant to be equitable reliefs.

Given the pro-property stance taken by Indian courts, potential licensees have also approached the CCI to adjudicate upon the potential of 'abuse of market dominance'. In Case No. 76/2013, the CCI held that Ericsson's conduct *prima facie* constitutes abuse of market dominance primarily because it imposes discriminatory rates of royalty.[57] However, the Delhi HC admonished the CCI for making detailed observations at the stage of Section 26(1) of the Competition Act, 2002 which is supposed to be a merely administrative order. While the court allowed investigation to go on, no final report was made in this regard.

In Case No. 50/ 2013, the CCI held that the conduct of the defendant deserved investigation. Interestingly, it was argued that the litigative behaviour of the filing applications for permanent injunctions would constitute abuse of dominant position.[58] Ericsson has filed a writ petition claiming that the CCI does not have jurisdiction to investigate into failed negotiations under Section 26 of the Act,[59] however no adjudication has been made by the Delhi HC in this regard.

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56 Prashant Reddy, *'Interim damages' in FRAND patent litigation: When did that become a thing?,* (April 3, 2015), SPICYIP *available at* <http://spicyip.com/2015/04/guest-post-interim-damages-in-frand-patent-litigation-when-did-that-become-a-thing.html> (Last seen on August 11, 2016).

57 *In Re Intex Technologies and Telefonaktiebolaget LM Ericsson*, Case No. 76/2013.

58 *In Re Micromax Informatics and Telefonaktiebolaget LM Ericsson*, Case No. 50/2013, 4.

59 Anubha Sinha, *FRANDly Wars at Delhi HC: Ericsson cries foul play against Intex; CCI barred from adjudicating the dispute*, (February 27, 2014), SPICYIP *available at* <http://spicyip.com/2014/02/frandly-

IV. RECOMMENDATIONS

As a developing country, which is increasingly pushing for 'Make in India' it is important for us to ensure that manufacturers and consumers in India have equitable access to standard technology, patents to which are usually owned by multi-national corporations. As discussed earlier, SEP licensing negotiations are inherently titled towards licensors since the licensee cannot choose to implement another technology. Indeed, allowing SEP holders to restrict such access, will force potential licensees who wish to manufacture standard compliant products to accept discriminatory terms. If equitable access to SEP technology is not ensured, India will be prevented from truly becoming a part of and reaping the benefits of the technological revolution.

One way to ensure this would be to increase Indian participation in standard setting programs. Another would be to incentivize better negotiations with SEP holders. Allowing for liberal injunctions, skews the process towards the SEP holder further and also undermines the obligations that the SEP holder undertakes. Other manufacturing dependent economies like China, have acknowledged that once SEP holders have contracted to grant licenses on FRAND terms, injunctions can be granted only when potential licensees refuse to agree to FRAND terms. The Institute of Electrical and Electronics Engineers ("IEEE") too has acknowledged that SEP holders should not be

wars-at-delhi-hc-ericsson-cries-foul-play-against-intex-cci-barred-from-adjudicating-the-dispute.html> (Last seen on August 11, 2016).

granted injunctions against potential licensees, except in limited circumstances[60].

Completely removing the ability of SEP holders to ask for injunctions is not a protean solution either. Without the threat of injunctions, there is no incentive for the potential licensee to negotiate reasonably and they may hold out on the SEP holder. SEP holders claim that litigation is a last resort remedy, and only resorted to enable proper negotiations.[61]The jurisprudence of the US and the EU has adopted a more balanced stance, and allows granting of injunctions in those cases where the pre-litigation conduct indicates that the licensee is an 'unwilling licensee', or would be unable to pay FRAND royalties. This helps in balancing the concerns of both the SEP holder, and the potential licensee.

Indian courts, however, have liberally granted injunctions, often *ex-parte* undermining the ability of parties to negotiate. Many of these injunctions have been granted without due consideration of legal and practical issues, grant of many others has involved an inadequate analysis of the law. It is desirable for courts to move towards a more balanced standard of granting injunctions only in those cases where it is clear that the potential licensee was unwilling.

This standard can easily be incorporated in the Indian framework for granting injunctions for patents. At present, a grant of injunction in respect of

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60 Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions,* Journal of Competition Law & Economics, 11(1), 201, 222 (2015).

61 The Centre for Internet & Society, *The two-faced FRAND: Licensing and injunctive relief in ICTs,* available at <http://cis-india.org/a2k/blogs/two-faced-frand-licensing-and-injunctive-relief-in-icts>

a patent can take place if there is a prima facie case (for temporary injunctions), possibility of irreparable injury in the event that injunction is not granted, and if the balance of convenience is in the plaintiff's position. Additionally, Indian courts may also consider 'public interest' as a factor for granting injunctions.[62] Moreover, injunctions are equitable remedies, and doctrines of equity would also apply.

Since grant of injunctions is an equitable remedy, the conduct of parties is necessarily relevant. Thus, the conduct of both the SEP holders and the potential licensees must be considered before granting an injunction. Courts have considered this in their judgments, however, they have not paid due attention to the difference in the bargaining power of the two parties. This is problematic, since even minor oppressive tactics of the SEP holders can have hugely detrimental effects on the negotiations, for the use of the SEP. Similarly, greater leeway must be granted to potential licensees, since they have a lower bargaining power. Some courts have started trying to incorporate the standard of unwilling licensee in the determination of equitable conduct of parties.

This is indeed a welcome move, but care must be taken to only target that conduct which is *mala fide,* with an attempt to circumvent paying royalties. Thus, actions such as challenging the validity or essentiality of the patent unless motivated by *mala fide* should not be considered as inequitable conduct of an

[62] Ananth Padmanabhan, INTELLECTUAL PROPERTY RIGHTS: INFRINGEMENT AND REMEDIES, 575 (2012).

unwilling licensee, especially because neither validity nor essentiality is conclusively verified by SSOs.

In addition, while determining whether it is in the 'public interest' to grant an injunction, courts may also consider the anti-competitive effects of granting injunctions to SEP holders. Given India's unique position, as a technology importing country, with a promising manufacturing sector, public interest would not be served if an SEP holder seeks to gain leverage in negotiations by enforcing injunctions indiscriminately. Thus, the standard that should be adopted by courts ought to be more licensee friendly.

If SEP holders routinely seek injunctions, it could lead to an abuse of their dominance. The CCI seems to have been proactive in trying to curb the anti-competitive effects of such practices. However, there is great debate over whether the CCI should be allowed to extend its jurisdictions over such cases, especially given the Delhi High Court's unwillingness to allow their intervention. However, these issues are not merely contractual in nature, and the CCI should be allowed to examine the effects of SEP holders' actions, particularly because it has unique expertise to determine these anti-competitive effects.[63] Given that SEP holders have undertaken to provide access to their patents on FRAND terms, and their actions could potentially have hugely

[63] The Centre for Internet & Society, *The two-faced FRAND: Licensing and injunctive relief in ICTs,* available at http://cis-india.org/a2k/blogs/two-faced-frand-licensing-and-injunctive-relief-in-icts; The Centre for Internet & Society, *Transcript of the Conference on Standards Settings Organizations (SSO) and FRAND, NLSIU* available at http://cis-india.org/a2k/blogs/conference-on-standards-settings-organizations-sso-and-frand-nlsiu.

adverse economic effects, they should be penalised for indulging in anti-competitive behavior, if pursued as a strategy to leverage their SEPs.

V. CONCLUSION

To conclude, there is global awareness that SEP holders may abuse their dominant position by holding up negotiations with potential licensees. They may choose to do so by ostensibly exercising their IP rights by seeking injunctions on patent infringement. This is in violation of their commitment to license on a FRAND basis and may also have an anti-competitive effect on the market. Given the public interest in preventing abuse of dominance by SEP holders, courts across the world have chosen to enforce FRAND obligations of SEP holders and grant injunctions very sparingly. Usually, only when the potential licensee has been an unwilling licensee who has tried to hold-up FRAND negotiations do courts grant injunctions. SEP holders may also be penalised under Competition Laws if they seek injunctions to gain unfair trade advantage.

Indian courts however, have not shown such caution in granting injunctions to SEP holders. This is surprising, particularly because India is a technology importing country. Indeed, Indian courts should not grant such injunctions unless a clear determination of the unwillingness of the licensee has been established. This is likely to help Indian manufacturers produce standard compliant products, which is a necessity for a developing country like India that seeks to be a global manufacturing and technology hub. Moreover, the bars to the exercise of the Competition Commission's jurisdiction are

unnecessary and impede the process of creating a competitive environment for the licensing of patents.

THAYER AND MORGAN V STEPHEN
HOW PRESUMPTIONS OPERATE UNDER THE INDIAN EVIDENCE ACT, 1872

Deekshitha Ganesan[*]

ABSTRACT

The operation of presumptions is a largely unexplored area under the Indian Evidence Act, 1872. However, its application has huge consequences for the manner in which we understand the 'burden of proof' of the prosecution and defence. Recent penal legislations have seen a dramatic rise in the inclusion of 'reverse onus' clauses, which have placed a persuasive burden of proof on the accused. At the heart of such clauses lies raising a presumption of guilt. However, the questions of when and how such a burden shifts and when such clauses are valid remain unresolved.

The Thayer-Morgan debate on presumptions provides some insight into the working of presumptions in civil proceedings. However, there is no detailed study on how they would apply in criminal proceedings, quite possibly because they were not contemplated then. Nevertheless, criminal presumptions are a reality today and the dearth of authoritative case law in the Indian context necessitates a detailed study of the Indian Evidence

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Act, 1872. This paper attempts to revisit this complex issue, to look for answers on the operation of presumptions in criminal cases in light of this background.

I. INTRODUCTION

The law on 'presumptions' has been considered to be a conundrum despite volumes of academic debate on it. Most advanced pieces of legal writing on the topic begin with a caveat, highlighting the complexity of the issue. As the operation of presumptions also affects the burden of proof on the parties, both evidentiary[1] and persuasive[2], it assumes greater significance in the appreciation of evidence in criminal trials in jurisdictions that follow the adversarial system. Moreover, the interpretation of presumptions could also have an effect on substantive rules of law such as the 'presumption of innocence' in a criminal trial. Despite this, some scholars have gone as far as to state that 'presumptions' is an empty concept and their conditional nature makes them no different from 'burden of proof'.[3]

1 When a burden is evidential in nature, the opponent may rebut the presumption by introducing evidence against the presumed fact sufficient to amount to a *prima facie* case, upon which the presumed fact will be decided according to the applicable rule as to the burden and standard of proof as any other fact in the case.

2 When a burden is persuasive in nature, the opponent may rebut the presumption only by disproving the presumed fact to the appropriate standard of proof.

3 C.A. Harwood, *Burden of Proof and the Morgan Approach to Presumptions*, Vol.19, WILLIAMETTE L. REV. 361, 390 (1983). However, this would not apply to conclusive presumptions and is limited to rebuttable presumptions.

Two of the most detailed yet divergent expositions on this complex area are by Professor James B. Thayer[4] and Professor Edmund M. Morgan[5]. Their debate resulted in what are popularly referred to as Thayer presumptions and Morgan presumptions, which went on to form the basis of the Federal Rules of Evidence in the United States. However, the drafting of the Indian Evidence Act, 1872 ["IEA"] by James Stephen pre-dated the debates regarding presumptions and a perusal of the statute would indicate as much. No subsequent legislation has further discussed or clarified the nature and operation of presumptions in India. Consequently, there is minimal nuanced discussion in India on the operation of presumptions.

The debate between Thayer and Morgan arose out of a difference of opinion regarding instructions on presumptions to the jury. However, this aspect of the debate has little bearing on this issue as the jury system which has since been abolished in India. Nevertheless, a study of the IEA suggests that the text and interpretation of this statute favours Morgan's approach. Therefore, a persuasive burden is placed on the party against whom the presumption operates to rebut the presumption. It will also be argued that the limited exhaustive case law discussing this issue indicates that courts in India have gravitated towards the standard of proof of 'preponderance of probabilities' once the persuasive burden shifts, irrespective of the nature of the proceedings.

4 James B. Thayer, *Presumptions and the Law of Evidence*, Vol. 3(4), H LAW. REV., 141 (1889).
5 Edmund M. Morgan, *Presumptions*, Vol. 10(3) RUTGERS LAW REV., 512 (1955-56).

II. WHAT IS A PRESUMPTION?

A 'presumption' as defined by Thayer is "*a rule of law that courts and judges shall draw a particular inference from a particular fact or from a particular piece of evidence unless and until the truth of such inference is disproved*." [6] Some statutes or provisions, like the Indian Evidence Act, 1872, could also provide that the court may draw an inference from a particular fact or piece of evidence. Often, presumptions have an evidential effect which is in excess of the true probative worth of the basic fact as they cause an inference to be drawn from a basic fact and thus gives it a 'preternatural weight'.[7] These presumptions which can be used to draw an inference must be differentiated from a different kind of presumption which operates to allocate the burden of proof in a criminal trial such as the presumption of innocence or a presumption of sanity.[8] In the latter, the distinction between the inference (presumed fact) and the particular fact or particular piece of evidence based on which the inference is drawn (basic fact) does not exist.

Common law has recognised different categories of presumptions such as presumptions of law and fact, as well as rebuttable[9] and conclusive presumptions.[10] The uncertainty surrounding presumptions arose from differences in decisions on whether the judge or the jury should draw the

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6 *Supra* note 4, at 154.

7 CROSS AND TAPPER ON EVIDENCE, 123 (Colin Tapper ed., 9th edn, 1999).

8 Ian Dennis, THE LAW ON EVIDENCE, 511-512 (5th edn, 2013).

9 They could be of two kinds, that is, 'may presume' and 'shall presume'.

10 James Fitzjames Stephen, THE INDIAN EVIDENCE ACT: WITH AN INTRODUCTION ON THE PRINCIPLES OF JUDICIAL EVIDENCE, 131, 132 (1902). Stephen followed this categorisation as early as 1872, however, he does not name them specifically.

presumption.[11] The ambiguity between the judge's and the jury's role gave rise to the debate on when and how a presumption operates and how the burden to displace it should shift. A rebuttable presumption always arises only on the proof of certain basic facts, subsequently requiring the opposite party to displace it by adducing contrary evidence.

In order to displace such a presumption, the opposite party might have to meet a persuasive or an evidentiary burden. The result of a shifting of a persuasive burden is that the presumption can be rebutted only by meeting the appropriate standard of proof. On the other hand, a shift in the evidentiary burden (or where a tactical burden is created[12]) could require contrary evidence sufficient to *prima facie* create a reasonable doubt to be adduced by the party against whom the presumption operates.[13] However, no clear formula has been established on the appropriate standard of proof required to discharge an evidential burden.[14]

English scholars opined that the standard of proof would be different depending on the kind of presumption,[15] while American scholars argued that

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11 S.L. Phipson, LAW ON EVIDENCE, 662 (Rolan Burrows KC ed., 8th edn., 1942).

12 *Supra* note 7, at 125-126.

13 Peter Murphy, A PRACTICAL APPROACH TO EVIDENCE, 80 (3rd edn., 1988).

14 *Supra* note 7, at 152. Cases in the UK have held that as a general rule "*such evidence as, if believed, and if left uncontradicted and unexplained could be accepted by the jury as proof*" is required to discharge an evidential burden. Here, 'proof' could mean beyond reasonable doubt, a preponderance of probabilities or even a prima facie standard. It is only admitted that the standard of proof in criminal proceedings must be higher than what is required to be discharged to displace an evidential burden in civil proceedings.

15 However, Stephen's view seems to have been different as the Indian Evidence Act, 1872 does not indicate a difference in standard of proof depending on the type of presumption. This will be discussed in greater detail in the section on the Indian Evidence Act.

there is a universal principle that applies to all presumptions.[16] Professor Thayer and Professor Morgan, both American scholars, disagreed on these core issues of which burden would shift and which standard of proof would be sufficient to displace a presumption.

III. THE THAYER-MORGAN DEBATE

Thayer argued that when a basic fact is proved leading to the operation of a presumption, it leads to an evidential burden being placed on the party who is silenced by it, to adduce sufficient evidence to create reasonable doubt regarding the presumed fact.[17] If the opposite party succeeds in doing so, the presumption disappears and the 'bubble bursts'.[18] Subsequently, the burden of proof shifts back to the party making the claim, as if the presumption never existed. Thayer also argued that this entire exercise should take place before the judge and the issue of the presumption did not have to go to the jury at all.

Morgan disagreed with Thayer on two levels. *First*, he believed that the question of presumptions should go to the jury and they should decide whether upon proof of the basic fact(s), the presumption begins to operate or not.[19] Once the jury was convinced that the basic facts exist, they were instructed that they must find the existence of the presumed fact.[20]

16 *Supra* note 13, at 80.
17 *Supra* note 4, at 166.
18 *Supra* note 13.
19 *Supra* note 5, at 518-521.
20 *Supra* note 3, at 386.

Secondly, in order to displace the presumption, his theory required the satisfaction of a persuasive burden, that is, the applicable standard of proof, which he set as one of 'preponderance of probabilities'.[21] Additionally, he argued that merely adducing contrary evidence is insufficient, as the point of the presumption would be lost if the balance could be tilted so easily against it.[22]

The difference in their theories can be explained using the example of the presumption of death of a person if he/she is unheard of for a period of seven years or more by those who would normally be aware of the person's existence.[23] According to Thayer, once absence or lack of knowledge of the person's existence by kith and kin is established, the presumption operates. Thereafter, the evidential burden on the opposite party is only a *prima facie* one whereby they need to introduce evidence which casts a doubt on the story of the party claiming death. This could be in the form of a testimony of a person who would normally have seen him/her alive.

However, Morgan's theory would require the opposite party to adduce sufficient evidence to make the fact of him/her being alive more probable than the fact of death, at the very least. There are two main aspects that distinguish Morgan's theory. The *first* concern is that a Thayer presumption that is created because of the strength of the inference can be destroyed just as easily, often

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21 Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burden of Proof*, Vol. 68(4), UNIVERSITY OF PENNSYLVANIA LAW REV., 307, 319 (1920).

22 *Supra* note 5, at 521,522.

23 *Supra* note 4, at 151.

even on false testimony.[24] Therefore, the Thayer test is based on sufficiency and not credibility.[25]

The *second* is that Thayer's theory and its modified versions cause great difficulty in instructing the jury on the presumption.[26] It had often led to situations where the jury confused the presumption itself to be evidence. Even if it did make the distinction, it faced difficulty in weighing it against other direct evidence.[27] However, Morgan's theory has also been criticised as it requires the shifting of the persuasive burden which traditionally never shifted once fixed.[28]

The debate between Thayer and Morgan was primarily in relation to civil cases and certain aspects of criminal trials only, as the persuasive burden is rarely ever shifted in the latter. However, due to the manner in which the IEA has been drafted, the possibility of different standards for the two does not exist. Courts have construed statutes in a manner resulting in a shift of the persuasive burden in many criminal cases as well, which will be dealt with in the next section.

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24 WIGMORE ON EVIDENCE, 2493c (Arthur Best ed., 4th edn., 1985).

25 Neil S. Heicht, *Rebutting Presumptions: Order Out of Chaos*, Vol. 58, B.U.L. REV. 527, 536 (1978).

26 This is in a situation where no contrary evidence is adduced and hence the presumption continues to operate. Here, the jury is informed only of the inference.

27 *Supra* note 3, at 386.

28 *Supra* note 25, at 539, 553.

IV. POSITION UNDER THE INDIAN EVIDENCE ACT

In India, the various presumptions that can be permissibly drawn are listed in the IEA. The Act does away with the traditional distinction that existed in English Law between presumptions of law and fact and only divides presumptions into 'may presume', 'shall presume' and 'conclusive proof' under Section 4.

On a bare perusal of Section 4[29], it would appear that the difference between 'may presume' and 'shall presume' is the extent of discretion given to the courts to draw the particular presumption. In fact, in the former, the court can call for further proof before it raises the presumption. It is fundamental under both categories that the basic facts (which will give rise to the presumed fact) have to be proved by the party claiming the existence of such facts and the presumption can be raised only following this.

However, subsequent to drawing the presumption, the provision does not seem to indicate that there is any difference in its effect in terms of the burden to be satisfied by the opposite party.[30] The definition of both 'may

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[29] May Presume- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
Shall presume- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
Conclusive proof- Where one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[30] Syad Akbar v. State of Karnataka, 1980 (1) SCC 30 seems to suggest that a presumption of fact shifts only the evidential burden and a presumption of law shifts the persuasive burden. However, this distinction between presumption of law and fact is not followed under the IEA. Therefore, there suggested effect cannot result and the distinction between 'may' and 'shall' is the only relevant difference under the IEA.

presume' and 'shall presume' refers to two words in Section 3, which are 'proved'[31] and 'disproved'[32]. For the purpose of displacing the burden, it is the latter that is of concern to a judge or jury, as the case may be. The definition of 'disproved' uses two phrases that are of interest, that is, "…*Court either believes that it does not exist*…" and "…*considers its non-existence so probable that a prudent man ought…to act upon the supposition that it does not exist*…". Any evidence adduced by the party attempting to displace the operation of presumption has to meet this standard.

A perusal of the definition of 'disproved' in the IEA would indicate that the standard imposed by it for rebutting a presumption is one of 'preponderance of probabilities'.[33] Admittedly, the IEA was drafted prior to the debate between Thayer and Morgan however, a comparison of their theories is instructive in understanding the standard that Stephen sought to introduce. Morgan states clearly that simply establishing that the 'non-existence of the presumed fact is as probable as its existence'[34] is insufficient and that a standard of preponderance of probabilities would be preferable.

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31 Proved- A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

32 Disproved- A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

33 The analysis of reverse onus clauses by Glanville Williams is instructive in this regard as presumptions often have the effect of placing such a persuasive burden on the opposite party or accused, as the case may be. *See* Glanville Williams, *The Logic of "Exceptions"*, Vol. 47 CAMBRIDGE L.J., 263 (1988).

34 *Supra* note 4, at 165.

On the other hand, Thayer also uses the word 'probable' without qualifying it by a degree of proof. He states that a presumption "…*goes no further than to call for proof of that which it negatives i.e., for something which renders it probable. It does not specify how much; whether proof beyond a reasonable doubt or by a preponderance of all the evidence*…"[35]

The definition in the IEA goes beyond Thayer's standard of 'calling for proof' and requires the proof adduced to be so probable so as to convince a prudent man as to its non-existence. An interesting feature of this provision is the incorporation of the belief of the 'prudent man'. The provision suggests that a prudent man would at least require evidence to be adduced to make one (set of) facts more probable than another. That is, here too it would be a test of credibility and not merely sufficiency.

Further, it would seem that this abstraction of a prudent man would further complicate matters by laying down an uncertain standard. However, a reason for its inclusion could be that Stephen was attempting to make instructions to the jury easier.[36] One of the greatest difficulties with the operation of presumptions was the issue of communication of its operation and effect to the jury, which Stephen seems to have recognised and endeavoured to simplify, through this definition.

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35 *Supra* note 5, at 514.

36 There is no authority which indicates the same. However, given that India did have the jury system until the middle of the 19th century, the difficulty in instructing the jury on presumptions could have played in the mind of Stephen when he drafted the Indian Evidence Act.

An additional issue that directly arises from the standard of proof that satisfies the 'prudent man' is whether the same standard of proof would be applicable in civil proceedings and in criminal trials in the operation of presumptions.[37] The wording of the definition of 'disproved' in the IEA could be interpreted as intending to divide the standard of proof into one of 'beyond reasonable doubt'[38] and 'preponderance of probabilities'[39] for criminal and civil proceedings respectively. While the difference in burdens of proof has existed for many years now, it was authoritatively laid down only a few years after Stephen framed the IEA.[40]

Admittedly, the Thayer-Morgan debate focused on civil proceedings. Further, all the provisions that raised a presumption in the IEA as it existed in 1872, pertained only to documents. It is only in recent times that onerous provisions such as Section 111A[41] have shifted the persuasive burden on to the accused. However, as the definitions in IEA do not suggest that there is a difference between the two in the operation of presumptions, it may be argued that there is little strength to the claim that such a shifting of persuasive burden in criminal cases is excessive or unconstitutional. Further, Indian law has also

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37 The popular view is that in criminal trials, the burden of persuasion can never be placed on the accused, except in some situations such as the defence of insanity.

38 "…the Court either believes that it does not exist…" in Section 4, INDIAN EVIDENCE ACT, 1872.

39 "…or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

40 Woolmington v. DPP, [1935] A.C. 462; R v. Davies, 8 C.A.R. 211.

41 This provision provides that where any person is accused of an offence specified in the section in a disturbed area, it shall be presumed that he committed the offence, upon the satisfaction of certain conditions specified in the section. The provision contains a 'shall presume' and the conditions to be proved by the prosecution are limited and simple. However, the punishment for the offences described in the provision is high and an onerous burden is placed on the accused to rebut the presumption.

recognised the possibility of shifting of the burden of proof in cases of statutory exceptions,[42] as reflected in Sections 111A-114A. Therefore, Section 3 supports the conclusion that the persuasive burden of proof, one of a preponderance of probabilities, is transferred to the accused once a presumption is raised.

This conclusion is to be examined in light of two main factors. *First*, some scholars have taken the view that that the reason for differing standards of proof of a fact in a civil and criminal proceeding is unclear, and in order to prove or disprove something, the standard must be the same irrespective of the nature of the proceeding.[43] *Secondly*, Stephen himself has stated that the standard should be flexible because a strict distinction might be arbitrary in certain situations, such as in serious civil disputes or trivial criminal actions.[44] Thus, he chose the standard of prudent man and what such a person thinks is most probable.

In *Krishna* v. *State*,[45] one of the counsels made a similar argument on Stephen's intention regarding the standard under Section 3 when he framed the Act. The court was unwilling to accept that point of view and held instead that Section 3 encapsulates the different standards for civil and criminal proceedings. However, it is important to refer to the text of the IEA to

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42 Willie Slaney v. State of Madhya Pradesh, AIR 1956 SC 116. *See also* Rahul Singh, *Reverse Onus Clauses: A Comparative Law Perspective*, Vol. 13, STUDENT ADVOCATE, 148, 170 (2001).

43 *Supra* note 7, at 141.

44 185th Law Commission Report, REVIEW OF THE INDIAN EVIDENCE ACT, 1872 (2003).

45 2012 (2) KLT 769.

understand what Section 3 seeks to do as the court's decision may be incorrect in light of the following reason.

A plain reading for Section 3 suggests that there is no clear difference. This is supported by a comparison with other statutes of evidence that Stephen has framed such as the Singapore's Evidence Act (Cap 97, 1997 Rev Ed).[46] The flexibility that he incorporated into the definition takes into account the inherent difficulties in having such rigid and fixed standards of proof.[47] Therefore, if a standard has to be identified in the definition of 'disproved' under Section 3, it would be one of a preponderance of probabilities from the perspective of a prudent man. Thus, through the statute, Stephen does take Morgan's side on the operation and effect of presumptions.

Indian courts have shed little light on this issue, often blurring the distinction between an evidentiary burden and a persuasive burden. On the one hand, these cases use the words 'preponderance of probabilities' to describe the standard that is required to be met to displace a presumption. At the same time, at numerous places, these judgements seem to suggest that it is only an evidential burden that has to be shifted.[48] However, irrespective of the nature of the proceedings, courts have uniformly upheld the standard of

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46 J. Pinsler, *Approaches to the Evidence Act: The Judicial Development of a Code*, Vol. 14, SACLJ 365 (2002).

47 *Id*, at 368.

48 Regi Isac v. Philomina Pious, AS.No. 370 of 1996 (Kerala High Court); Jnanaprakash v. T.S. Susheela, 2012 (6) KarLJ 588. Subbarayulu v. Lakshmanan, (2011) 4 TNLJ 128. These decisions are some examples of how these decisions are essentially a medley of all the phrases discussed in this paper and how the courts have not distinguished between them. Therefore, there is no way of knowing how the burden shifts and what the standard of proof is in Indian courts.

preponderance for disproof such as in cases of corruption[49], cheque bouncing[50] and negligence[51]. Therefore, courts too appear to have ultimately adopted the Morgan standard while addressing the question of presumptions.

In the cases relating to Sections 113A[52], 113B[53] and 114A[54], the focus of the analysis has only been on proof of the facts that gave rise to the presumption and whether that was sufficient or not. A discussion on the evidence adduced to disprove such a presumption is noticeably absent in these cases.[55] However, these decisions are not instructive in themselves in coming to any conclusions regarding the standard, as an 'evidentiary burden' and 'preponderance' are often confused and used interchangeably.

Two decisions of the Supreme Court highlight the confused nature of the decisions on this area of criminal law. Recently, the Court discussed the operation of presumptions under Section 113B of the IEA in *Sher Singh* v. *State of Haryana*.[56] The court held, contrary to an established line of precedent on

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49 State of Madras v. A. Vaidyanatha Iyer, AIR 1958 SC 61.

50 Regi Isac v. Philomina Pious, AS.No. 370 of 1996 (Kerala High Court); Subbarayulu v. Lakshmanan, (2011) 4 TNLJ 128.

51 The National Small Industries v. Bishambar Nath, AIR 1979 All 35.

52 Mangat Ram v. State of Haryana, AIR 2014 SC 1782; Hans Raj v. State of Haryana, AIR 2004 SC 2790.

53 In Kansraj v. State of Punjab, CRAN No. 443 of 2013, the court opined that in order to disprove a presumption under this provision, the court would be satisfied if the presumption was dislodged either by cross-examining the witness or by adducing proof to the contrary. While this does appear similar to a prima facie evidential burden that is cast upon the accused, the court has at no point discussed such a possibility in detail. Such exceptional decisions do exist but the trend does appear to be that courts will be satisfied only if a standard of preponderance is met. That is, it would be insufficient if evidence alone is adduced but the party must go ahead and prove the evidence as well.

54 Puran Chand v. State of Himachal Pradesh, (2014) 5 SCC 689; Munna v. State of Madhya Pradesh, (2014) 10 SCC 254.

55 *Supra* note 48.

56 AIR 2015 SC 980.

burdens in a criminal trial, that the prosecution would only have to prove the basic facts to a preponderance of probabilities, on which the burden would shift to the accused. The accused would then have to prove that the death was not caused due to cruelty and was not a case of dowry death beyond reasonable doubt. While the court held that a persuasive burden has been cast on the accused to displace the burden, the nature of such burden is excessive. This understanding of how presumptions operate is untenable, particularly in light of the purpose they have historically served.

On the other hand, in *Abdul Rashid Ibrahim* v. *State of Gujarat*[57], the Court held that an accused can discharge his burden under Section 35 of the Narcotics and Psychotropic Substances Act, 1985 ["NDPS Act"] by cross-examining prosecution witnesses or by relying on other evidence and on materials in the prosecution evidence. This, however, appears to reflect the standard that Thayer prescribed for displacing a presumption.[58] Therefore, this inconsistency in the decision of Indian courts takes the discussion back to the statute and a strict reading of the definition under Section 3 must be adopted, as argued earlier.

Despite the interpretation that is suggested by the provision itself, a potential constitutional challenge to such a shifting of the persuasive or legal burden in cases of presumptions in criminal cases is not unforeseeable.[59] The

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57 (2000) 2 SCC 513.

58 *Infra*, page 5, 6.

59 Prof. Glanville Williams was also of the opinion that no developed and civilised society that believes in a rule of law could possibly be in favour of and support reverse onus clauses. *See* Glanville Williams, *The Logic of "Exceptions"*, Vol. 47 CAMBRIDGE L.J. 263-66 (1988).

court dealt with a similar situation in *Noor Aga* v. *State of Punjab*,[60] and such a challenge can be raised in relation to presumptions as well. The issue before the Supreme Court was whether the NDPS Act was constitutional, given that Sections 35 and 54 of the NDPS Act placed the burden of proof on the accused i.e. they were reverse onus clauses and therefore were in violation of the rule of presumption of innocence.[61]

The court held the NDPS Act to be constitutional and upheld such reverse onus clauses as valid on two grounds: *first*, that the needs of protecting societal values and people has to be balanced against the rights of the accused and *second* that in any case, the prosecution still needs to prove the basic elements of the offence to a 'standard of beyond reasonable doubt'.[62] It is only after this that the evidentiary or persuasive burden shifts to the accused, depending on what has been prescribed by the statute, following which the accused has to meet the appropriate burden of proof. Therefore, the provisions are not placing the persuasive or legal burden on the accused at the outset, and the prosecution still needs to meet a standard of beyond reasonable doubt for the presumption to be raised, thus protecting the sanctity of the rule of presumption of innocence.

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60 2008 (9) SCALE 681.

61 The 'presumption of innocence' is not to be confused with 'presumptions' as has been discussed in the rest of the paper and the former is a substantive rule of law. *See supra* note 7.

62 The rationale of the court here is that while individual facts have to be proved to a standard of preponderance first, by the prosecution and the entire narrative or set of facts have to meet a standard of beyond reasonable doubt. Thereafter, the burden shifts to the accused.

This conclusion was supported in the recent Bombay High Court decision in *Shaikh Zaid Mukhtar*.[63] The constitutional challenge was against Section 9B which placed the burden of proof on the accused to show that the slaughter, transport, export etc. of bovine flesh was not against the statute. The decision contains an elaborate discussion on the place of the presumption of innocence under the Constitution. In addition, the court discussed the interaction of presumptions and burdens in a criminal trial.

It held that statutes sometimes place the burden of proof, whether evidential or persuasive, on the accused for reasons such as situations where knowledge of a special fact is with the accused, the relative ease of the accused in discharging the burden or to ensure that the prosecution need not discharge a negative burden. Nevertheless, even in such situations, the prosecution is expected to prove foundational facts which establish a probative connection between these basic facts and the facts that are presumed. Therefore, it laid down four tests to determine whether a provision placing a burden of proof on the accused is constitutionally sound:

> *"1. Is the State required to prove enough basic or essential facts constituting a crime so as to raise a presumption of balance facts (considering the probative connection between these basic facts and the presumed facts) to bring home the guilt of the accused, and to disprove which the burden is cast on the accused?*

[63] Writ Petition No. 5731 of 2015 dated May 6, 2016.

2. *Does the proof of these balance facts involve a burden to prove a negative fact?*
3. *Are these balance facts within the special knowledge of the accused?*
4. *Does this burden, considering the aspect of relative ease for the accused to discharge it or the State to prove otherwise, subject the accused to any hardship or oppression?"*

A culpable mental state is almost always within the special knowledge of the accused[64] and such a test could result in allowing provisions that always require the accused to bear the persuasive burden of proof. However, by incorporating the fourth condition, the court avoids this consequence.[65] Further, a line of decisions were cited by the Judge which held that the accused only has to meet the standard of preponderance of probabilities once the burden shifts to him. In light of the tests laid down and the catena of decisions cited Justice Gupte held Section 9B to be unconstitutional, as it did not require the prosecution to prove any foundational facts and directly allowed for raising a presumption.

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64 Section 30 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO") provides that where any provision requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such a state and it shall be a defence for the accused to prove that he had no such mental state with respect to the offence. This is a classic example of the problem that the fourth condition laid down by Justice Gupte seeks to address. Section 30 of the statute, if challenged, is likely to be held to be unconstitutional for very similar reasons as in the beef ban decision of the Bombay High Court i.e. violation of the presumption of innocence and lack of proof of foundational facts.

65 Abhinav Sekhri, *The Bombay High Court's Beef Ban decision-II: On the Unconstitutionality of Reverse Onus Clauses*, (May 8, 2016), INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, *available at* https://indconlawphil.wordpress.com/2016/05/08/the-bombay-high-courts-beef-ban-decision-ii-on-the-unconstitutionality-of-the-reverse-onus-clause/ (Last visited on May 31, 2016).

The conclusion of the court applies to the IEA as well where similarly the persuasive burden shifts to the opposite party once a presumption is raised who is then required to satisfy the burden of preponderance of probabilities by introducing evidence to rebut and displace the presumption. The court, that is the judge, will consider the basic facts which have been proved and the presumed fact(s), together with the evidence adduced by the opposite party to determine whether the presumption will continue to operate or not.

V. CONCLUSION

The extended debate between these two stalwarts of the law of evidence would appear to have a limited impact on the Indian position today. While the debate was instrumental in the drafting of many evidence statutes in the United States of America, from the text of Section 3, it seems that Stephen made a choice much before the discussion on presumptions took on the significance that it did in the 20th Century. In India, the application of a standard of preponderance can be seen even in cases where a jury had to be instructed.[66] This choice made matters of instructions to the jury much simpler, thereby solving one of the core points of contention between Thayer and Morgan.

Admittedly, this clarity in position may also be due to the dearth of case law that thoroughly examines such an issue and even the 185th Law Commission Report did not comprehensively deal with the law on

[66] Public Prosecutor v. A. Thomas, AIR 1959 Mad 166.

presumptions. This lack of engagement becomes more prominent in light of the discussion on cases under Sections 113A and 113B, where the report barely scratches the surface of the potential legal issues that were discussed threadbare by Thayer and Morgan. This becomes particularly significant in criminal cases where there is little margin for error. Therefore, the importance of understanding presumptions, burdens of proof and how they shift can hardly be overstated, and a survey of decisions by Indian courts on this issue, specifically in criminal cases, obviates the need for clarity.

This is where an understanding of the nuanced discussions on presumptions by Thayer and Morgan could be helpful as it would provide a principled basis for the decisions of courts on how presumptions should work. However, as it stands today, the conclusion that one would reach on an analysis of the law on presumptions would be that anyone "…*would do great service to our law who should thoroughly discriminate, and set forth the whole legal doctrine of burden of proof*…"[67]

[67] Daniel M. Reaugh, *Presumptions and the Burden of Proof*, Vol. 36 III. L. REV. 703 (1941).

EVALUATING ISSUES REGARDING POST PENETRATIVE RAPE FROM A WOMEN'S PERSPECTIVE

Karuna Maharaj[*]

ABSTRACT

Post penetration rape deals with the issue of withdrawal of consent after sexual intercourse has commenced. This involves an ethical contestation of sexual rights and universally accepted norms of social behaviour. The understanding that humans will comply with their promises maintains harmony in society and forms the building blocks of law of contract. Social transactions presuppose equality in bargaining power unless shown otherwise. This paper will be an attempt to understand whether this holds true in sexual relations restricted to men and women. It will attempt to understand how women's sexuality has developed and what factors have contributed towards building socially accepted norms of women's behaviour and psychology. Furthermore, I will discuss the landmark judgements that have changed the definition of rape, examine theories of consent and evaluate whether rape laws in general function more as a protective shield for men and put victims in a vulnerable position. In order to do this, the paper will briefly give an introduction to the concept and then attempt to understand and analyse the relationship between 'rape' and 'victim-hood' and will subsequently scrutinise judgements and their facts wherein the concept has been accepted or rejected by courts. Further, the elements of

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proof associated with the concept shall be evaluated vis-à-vis their reliability and finality. Finally, the paper will discuss the potential effects of recognising the concept with regards to women's rights and its contribution in exploding rape myths which greatly stereotype, marginalise and hamper sexual rights of women.

I. INTRODUCTION

Control over women's sexuality has been a concern and subject for almost all societies[1]; even talking about sexual rights of women evokes moral panic from some sections. Female sexuality comes under scrutiny when men derive their prestige, honour and dependency to perpetuate their lineage from the reproductive power of women to protect *inter alia* caste, class and racial purity within strict and controlled structures of reproduction. Therefore, monitoring this power of the female sex and repressing and shielding it from women themselves by creating a carefully articulated system of right, wrong, immoral, moral, good, bad becomes necessary to enforce "discipline", "purity" and rigidness of a social order.

Sexual violence is one such form of female subjugation which deprives women of their right to choose their sexual partner. Gender based violence removed from the act of sex for pleasure can also be motivated by power, control and domination; an act which reinforces the superior position of men

1 GEORGE BUHLER, LAWS OF MANU, AT 206 (2009). Manu clarifies the essential and innate nature of women as "*Knowing their disposition, which the Lord of creatures laid in them at the creation, to be such, (every) man should most strenuously exert himself to guard them.*"

in the power relations between men and women. For example, a recent United Nations Report[2] has revealed that the South Sudanese government has conducted a "scorched earth policy" against civilians caught up in the country's civil war, allowing its soldiers and allied militias to rape women in lieu of wages, torture and murder suspected opponents and deliberately displace as many people as possible[3].

The Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") defines rape as "*violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty".*[4] Apart from causing immense immediate physical and mental harm, it may damage the psyche of the victim irreversibly in some cases and may severely jeopardize their reproductive success.[5] Sexual domination and subordination is a way of sexualizing gender inequality.

The threat of sexual violence manifests itself in all spheres of a woman's life, at the workplace, in public places and even at home. A large percent of violent attacks on women are committed by persons known to

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2 Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: Detailed findings at 49, U.N. Doc. A/HRC/31/CRP.6 (March 10, 2016).

3 Sam Jones, *UN report: South Sudan allowed soldiers to rape civilians in civil war*, The Guardian, (March 11, 2016 15.01 GMT), https://www.theguardian.com/global-development/2016/mar/11/south-sudans-soldiers-allowed-to-rape-civilians-civil-war-says-un-government-torture

4 General Recommendation No. 19 (11th session of CEDAW, (1992).

5 DONALD SYMONS, THE EVOLUTION OF HUMAN SEXUALITY, AT 35 (1979).

them. According to a UN report, 78 percent of all rape victims knew their attacker[6]. Like all forms of violence in society, addressing sexual violence comes within the domain of politics but in a patriarchal society addressing it effectively becomes tricky as sexual oppression and violence is both a symptom and means of oppressing women.

Moreover, while trying to penalize rape, the law and lawmakers deal with sex itself, which brings them in confrontation with sex roles, differentiated perceptions and ideas of masculinity, femininity and of sexuality; all of which may present themselves differently to men and women. Further, there may be variations in their outlook shaped by their lived realities. The dominant view of the people in power and their socialization then defines rape for all; only to be adhered to.

Human Rights also comprise of sexual rights and it should be the duty of every just society to ensure that women are able to freely exercise their right to make choices with respect to their sexuality, reproductive and sexual health unencumbered by any external control, discrimination or coercion[7]. The crime of rape has evolved through the ages yet, both historically and currently, rape law has been chiefly reflective of male standards and perspectives, and has thus

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6 UN Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective-Violence Against Women* at 31(2003).

7 "..[*i*]*t is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights."* NHRC Order dated April 1, 2002 in Case No. 1150/6/2001-2002.

entrenched sexism in the way society perceives women. Sexism is inherent in rape law and has proved to be a roadblock for women to obtain justice when someone violates their bodily integrity. In English Common law, rape was initially seen as a property crime where a father or husband's property was devalued through a possible dilution of family lineage that was the basis of establishing and determining patriarchal inheritance rights[8]. Gradually with the codification of rape law, twin concepts of *force* and *consent* emerged which further compromised and attenuated the stance of women[9].

Even though both are interrelated, courts demanded separate proof for each thereby putting women in a vulnerable position. If they did not resist and arrived in court with minor or no injuries there were chances of them being disbelieved and if they chose to put up a fight with the accused they made themselves vulnerable to physical harm or death. Such outlooks and standards for judging and legislating on rape also got reinforced by men in positions of political, medical and legal power. For example, Justice Matthew Hale stated that "*rape is an accusation easily to be made and hard to be proved and harder to defended by the party accused, though never so innocent*[10]" An understanding needs to emerge that demanding greater sexual freedom over our bodies is not "uncooperative behaviour" but a statement of political resistance.

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8 Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, at 1465, 1478 (2003).

9 In Tuka Ram And Anr v. State Of Maharashtra, 1979 AIR 185 the Supreme Court of India held that the offence was not rape as "*no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair.*"

10 SUSAN BROWNMILLER, AGAINST OUR WILL: MEN , WOMEN AND RAPE, AT 369 (1975).

The law does not always segregate or recognize the categories of acquaintance and stranger rape and the elements of both continue to remain the same. It thus becomes extremely difficult for the victim to provide evidence for proving 'non-consent' and 'force' as the usual stereotypical signs associated with stranger rape like bruises, injuries and aggravated mental distress might not be present in situations of acquaintance rape. In situations where the woman consented to some degree of sexual activity, proving rape involves going into the questions of integrity and credibility of the parties involved, specifically for women[11].

Full development of sexuality is essential for individual, interpersonal, and societal wellbeing[12]. Rape hinges on attacking and attenuating a person's sexual worth and sexual esteem. The right to sexual freedom, sexual integrity, autonomy and safety, emotional and sexual equity are of utmost importance. With the advent of women's liberation and advancement in the socio-economic sphere, these rights and their contours have evolved with the changing times. Newer dimensions have been added to rape laws. The crime of rape has many dimensions to it; that of racism, sexism, class, culture, socio-economic factors etc. but this paper would try to understand it from the vantage point of *consent.*

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11 The now repealed Section 155(4) of the Indian Evidence Act, 1872(which deals with impeaching the credit of the witness) was often used by the defense which allows them to cross-examine the rape victim in order to prove that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally "immoral character."

12 World Health Organization, Department of Reproductive Health and Research, *Developing sexual health programs: A framework for action* at 1(2010),WHO/RHR/HRP/10.22.

Post penetration rape deals with the issue of withdrawal of consent after sexual intercourse has commenced. It is a new and emerging understanding of actions that is now being perceived as forceful sexual activity which needs to be penalized. A valid defense to many criminal acts is consent but the laws governing rape does not see non-consent on the part of the woman as an intellectual act, but demands proof of the non- consent in the form of physical resistance.[13] Post penetration rape tries to wrest the power of self-determination from the male perspective and places it with the "victim" by challenging this idea of non-consent and questioning the 'power' that suppresses all sex beyond the heterosexual marital bed.

For many, it is hard to imagine rape once consent is initially given owing to a universal acceptance of sexual male aggression and feminine female impassiveness, therefore, this paper will also attempt to clarify for readers the process involved by analyzing the facts of a central case (in *re John Z*) in detail and a few other cases wherein courts have conceded to the factum of the existence and reality of this new understanding of rape. The law that we make for ourselves makes a difference in our lives and this paper is conceived as an intellectual exercise towards discussing and thinking about our sexuality and sexual rights and the extent to which we will allow our rights over our bodies to be violated or protected by law.

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[13] Explanation 2 to Section 375 of the Indian Penal Code, 1860 vide the Criminal Law(Amendment) Act, 2013 has enlarged and defined the meaning of 'consent' in the following words- "*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act."*

II. RAPE AND VICTIMHOOD

Post penetration rape can only happen with persons a woman knows to varying degrees. Therefore, it is under the category of acquaintance rape which is mostly presumed to be consensual and even if it isn't, the system attaches less significance to this type of rape because there is a belief that the trauma associated with it is lesser. Rape as perceived by laws is very technical, mechanical and rigid. The law perceives the psychic structure of consent as binary viz. "yes" and "no" and the crime of post-penetration rape exposes the insufficiencies and limitedness of these binaries and forces us to explore other mixed forms of consent. The ability to give a valid consent is legally thought to be a measure of intellectual sophistication. The law doesn't recognize it as also being a very emotional and experiential transition of the mind and not solely cognitive.

In this domesticated and structuralized system of perceived outrage, stranger rape becomes the politically central axis of "victimhood" and the sufferers of post- penetration rape get pushed to the margins. This breeds a "one size fits all" understanding of the "authenticated" rape victim where women fight for their rights and "ladies" get protection. This politics of sexuality creates an environment where rights might be subverted with an obsession with the law which requires specificity, certainty, taxonomy and precision. The voice of a particular type of a rape victim, as created by the state, society, intellectuals and funders of the civil society then becomes the sole representative of a gamut of lived experiences and realities. Victimhood

thus is created strategically which is then imposed by society and the law even on those persons who might not want the tag.

The image of a "good victim" of rape is manufactured and then becomes the sole criteria of marginalization. The *Nirbhaya* case is a good example of labelling the woman as a "good victim". For example, an article written on her mentions that all the trips she took with her then male partner were to holy places like Vaishno Devi, Haridwar etc. and even when they stayed together, all they did was hold hands.[14] Therefore, in order to get legitimacy from the state, women have to portray themselves as perfect/good victims. Still, the crime of rape is surrounded by a silence which is equally deafening for both; women who were "really" raped and also for those who got raped because they were "asking for it".

Power structures between men and women force us and the systems that we make to take sides. In a patriarchal society, men always wield greater power in terms of their privileged positions. Moreover, patriarchy enforces the "boys will be boys" mentality and makes us believe that the privileged persons can and will never change. This results in concretizing the understanding of a "good victim" and when we try to challenge it, we end up challenging all institutions of a patriarchal society viz. the family, economy, education, health etc.

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[14] Krishna Pokharel, *India Rape Victim's Friend Describes Their Love Story,* The Wall Street Journal, (Jan. 30, 2013, 4:46 a.m. ET), http://www.wsj.com/articles/SB10001424127887323829504578271810720960682.

There is also a flip side to this in which the "good" victimhood becomes a source of power and the right to choose a particular type of victimhood is taken away from women and the nuances of their experiences are lost in the narrative. Also, while imposing victimhood, one superior identity of the "victim" comes to the fore and engulfs and underplays other contours of selfhood. So, when a Dalit woman is raped, her identity as a Dalit becomes supreme and all her limitations as a woman get side-lined and her experience of outrage is fused with the atrocities on Dalits.

Coming back, not every forceful and non-consensual sexual act may be termed as rape and laying down an objective standard for judging whether the bodily integrity of a woman has been violated or not may not always result in just decisions. Women should have the right to decide which sexual acts and from which point onwards constitute rape and the law must lay down only a standard and not a norm for judging this. By having rigid norms and standards and black and white segregation of the elements of rape the law ends up protecting men from criminal punishment for rape rather than protecting women.

Further, demonizing flirtatious behaviour on the part of men can also be viewed as aggression and oppression as it forces women to take all the risks associated with relationships. The dichotomy between the binaries of pleasure (sexual) and danger (e.g. pregnancy) is falsely created when in reality they are part of the same conversation. Patriarchy gives a solution to this in the form of the institution of marriage which is a cure to the fears of dangers associated with pleasure.

The legal and social understanding of acquaintance rape is seen to be heavily sexist in nature, a manifestation of male perceptions, standards and perspectives. The law seeks corroboration of a victims testimony, ponders upon the amount and method of resistance offered, linking it to a woman's race, ethnicity, class, caste[15] and convolutes the meaning of "consent" and "force," with a male centred understanding. The medico-legal understanding of rape through interpretations of medical jurisprudence textbooks[16] in India also further reinforces gender stereotypes and sexism in legal trials. An example is the "scientific" two finger test which is a medical examination to test the elasticity of a woman's vagina and thereby deduce her "habituation" to sexual intercourse. The test entrenches a skewed understanding about women that they are innately deceitful and works against justice dispensation.[17]

The two finger test in rape trials has proved to be imperative in deducing whether a woman was "habituated" to sexual intercourse; such test based on the medical jurisprudence in India brings in past sexual history of

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15 In JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY AT 938 (2008) it says *"[I]t is necessary to take into consideration the relative strength of the parties and the community to which the victim belongs. It is obvious that a woman belonging to a laboring class who is accustomed to hard and rough work will be able to offer a good deal of resistance and to deal blows on her assailant and will thus succeed in frustrating his attempts at violation. On the contrary, a woman belonging to middle class or rich family might not be able to resist for long, and might soon faint or be rendered powerless from fright or exhaustion."*

16 The history of evolution of medical jurisprudence textbooks in India can be traced to *"A Manual of Medical Jurisprudence for Bengal and the Northwest Provinces"* written by Norman Chevers in 1856. Lyon published another book called the *Medical Jurisprudence for India: With Illustrative Cases textbook* which heavily influenced Dr. Jaising Modi in writing his seminal book in 1920 called *A Textbook of Medical Jurisprudence and Toxicology* which has proved to be a primary scientific source in legal adjudication of rape.

17 Durba Mitra, Mrinal Satish, *Testing Chastity, Evidencing Rape Impact of Medical Jurisprudence on Rape Adjudication in India*, XLIX no 41, Economic and Political Weekly, 52-55 (2013).

victims which influence favourable decisions against the victims[18]. The Supreme Court of India in the recent case of *Lillu v. State of Haryana*[19] held the test and its implications to be violative of the dignity and integrity of the victim. It said that even if the test was "positive" it bears no inference on consent. But the court did not rule the test illegal and merely gave an instruction to not consider the test while formulating judicial opinions in rape cases.

Again, the *utmost resistance requirement* came into the legal system because according to men, chastity of women should be paramount and must be protected even at the cost of her life. The centre of attention in such a scenario is the victim, not the accused. The judiciary puts the onus on women to show *"appropriate*" or *"reasonable*" resistance as proof of non-consent and refrains from finding out whether the accused committed the crime with ill intentions[20].

Although it is no longer the law but authoritative books on medical jurisprudence in India necessitate proof of physical resistance in order to corroborate accusation of rape. For example, one textbook lays down that *"[i]t is necessary to prove that the resistance offered by the woman was up to her utmost capability*

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18 The test is also conducted on small female children (Syed Pasha v. State of Karnataka 2004 Cri L J 4123 (Kar)) and married women (The Public Prosecutor, High Court of Andhra Pradesh v. Badana Ramayya 2004 Cri L J 3510 (AP)).

19 AIR 2013 SC 1784.

20 In Brown106 N.W. 536, 536 (Wis.1906), the accused raped a 16 year old girl after attacking her in a field and pushing her down on the ground. The victim screamed and shouted and struggled as hard as she could. Despite this the court acquitted the accused as it came to the conclusion that the prosecution failed to establish non-consent. It stated *"[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person."*

and that every means, such as shouting, crying, biting, or beating had been tried to prevent the successful commission of the act.'[21] Therefore, the perspective through which a woman's actions are scrutinized and judged are male-centric. The requisite *mens rea* on the part of the defendant is not corroborated by his actions, but is deduced by judging the reactions of the victim.

By completely focusing on the victim; factors like her each move, her sexual past, her clothes, her gestures, her body[22], the aptness of her behaviour etc. become the fulcrum of judicial adjudication about whether she was raped or not thereby putting the victim on trial instead of the accused. Physical reactions to rape have a rigid standard digressing from which may prove fatal to a rape accusation. The individuality of a woman is taken away and her unique way of reacting is dismissed as irrelevant. Therefore, even though the victims of rape are often women but men get to decide the meaning of that term.

III. POST-PENETRATION RAPE

The term post- penetration rape was coined by Amy McClellan, a student at Santa Clara Law School in 1991.[23] It pertains to the *timing of withdrawal of consent.* A woman will be deemed to be a victim of post-

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21 JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY AT 898 (2008).

22 The importance and features of breasts like roundness, plumpness and elasticity have been adduced as evidence in rape cases to prove virginity (e.g. *Nanda vs State of Madhya Pradesh*, MANU/MP/0543/2009). IN JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY AT 277 (1945) photos of breasts belonging to virgins as compared to women who have not indulged in sexual intercourse are presented.

23 Amy McClellan, *Post-Penetration Rape-Increasing the Penalty* 31, Santa Clara Law Review at 780 (1991).

penetration rape if she initially consented to sex but during the act withdraws it but is made to continue using force despite her non- consent. However, because it involves initial consent it carries with it the tendency to be prone to sexist stereotypes and sexualisation of gender roles.

In 2003, Illinois became the first state to statutorily recognize post penetration rape under the category of acquaintance rape[24]. It enjoins upon the man a duty to cease sexual intercourse once consent is withdrawn or be liable to be charged for rape. Apart from this statue , analysing a few leading cases on post penetration rape to understand the way courts perceive rape, rape myths and decide on questions of sexual freedom and autonomy for women becomes imperative.

A. Decisions curtailing Woman's Sexual Rights

In *State v. Way*[25], the court held that once consent is given for sexual intercourse, it cannot be unilaterally withdrawn. It enunciated that if initial penetration happened with the free consent of a woman and later was withdrawn, accused cannot be held guilty of rape, but he may be charged with other offences. The victim and accused were on their first date, after which they went to his house where he threatened her with death if she did not participate in sexual acts with him. The defendant only ceased the intercourse

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24 720 ILL. COMP. STAT. 5/12-17 (2002), *amended by* Act of July 25, 2003, P.A.93-389, § 5. "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."

25 254 S.E.2d 760, 762 (N.C. 1979).

after the victim started experiencing extreme stomach pain. However, the North Carolina Supreme Court held that consent can only be withdrawn for subsequent sexual acts and not for the one which has already begun.

Similarly in *Battle v. State*[26], the Court of Appeals held that consent once given cannot be revoked and becomes unqualified. The court reasoned that rape occurs when penetration happens without initial consent and even if later the woman concedes, it would still fall under the definition of rape, ergo, if a woman consents before sex, and even if she withdraws it in the middle, it does not amount to rape.

Both the court decisions concluded that there is no such thing as post penetration rape. Even though the reasons for arriving at their decisions were different, the conclusion was similar that once a woman submits herself to a man sexually, then he acquires the rights over her body to sexually satisfy himself.

B. Decisions Recognizing Women's Right to Say No

In *State v. Robinson*[27] the Supreme Court of Maine took a critical view of the reasoning adopted by the court in *State v. Way*. The court brought in the critical element of compulsion which the victim undergoes to continue sexual intercourse which gives it the character of rape and withdrawal of consent is not the only decisive factor. The court held-*"[i]t becomes rape if and when the*

[26] 414 A.2d 1266 (Md. 1980).
[27] 496 A.2d 1067 (Me. 1985).

prosecutrix thereafter submitted to defendant's sexual assault due to threat of physical force or another form of compulsion"[28].

In 2003, the Supreme Court of California in *In re John Z*[29] upheld the validity of post-penetration rape and overruled *People v. Vela*[30] a case decided by California Court of Appeals, and held that withdrawal of consent following initial penetration, must be heeded to by the other party to take it outside the purview of rape.

In *Vela*[31], the court was faced with the question of post penetration for the first time. The case involved the issue of rape by a 19 year old of a 14 year old girl. The defendant stated to the police that the victim initially consented to having sexual intercourse with him but in the midst of the act withdrew her consent and communicated it to the defendant. He continued the act of penetration without terminating the sexual act against the will of the victim.

The court relied on cases from Maryland[32] and North Carolina[33], and came to the conclusion that it was not rape. The court rested its reasoning on the subjectively determined *outrage* experienced by a rape victim and held that it would be less for a victim who had initially consented to sex. It stated-

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28 *Robinson,* 496 A.2d at 1070.
29 60 P.3d 183 (Cal. 2003).
30 Cal. Ct. App. (1985).
31 218 Cal. Rptr. 161 (Cal. Ct. App. 1985).
32 Battle v. State, 414 A.2d 1266 (Md. 1980).
33 State v. Way, 254 S.E.2d 760 (N.C. 1979).

> *"the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the non-consensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial non-consensual violation of her womanhood.*"

In 2000, the First District Court of Appeal in California in *People v. Roundtree*[34] was again faced with a situation of post penetration rape. It rejected the reasoning of *Vela* and upheld the feasibility of post-penetration rape. It followed the reasoning adopted by the court in *State v. Robinson*[35] and several other cases[36] which held that that-

> *"[t]he dramatic change from the role of a voluntary participant to that of a victim compelled involuntarily to submit to the sexual intercourse is a distinct one. When a victim is forced to submit to continued intercourse for a period after she has revoked her original consent, the crime of rape is committed".*

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34 91 Cal. Rptr. 2d 921 (Cal. Ct. App. 2000).

35 496 A.2d 1071.

36 McGill v. State, 18 P.3d 77, 84 (Alaska Ct. App. 2001); State v. Siering, 644 A.2d 958, 963 (Conn. 1994); *Robinson,* 496 A.2d at 1071; State v. Crims, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995); State v. Jones, 521 N.W.2d 662, 672 (S.D. 1994).

In re John Z., the Supreme Court of California again faced the issue of post penetration rape. The court rejected the reasoning of *Vela* and said that outrage experienced by a victim is only a reason for punishing rape and is not a decisive factor in concluding the occurrence of the crime. It further held that the outrage felt by a victim of post penetration rape must be substantial. It stated that, "*we have no way of accurately measuring the level of outrage the victim suffers from being subjected to continued forcible intercourse following withdrawal of her consent. We must assume the sense of outrage is substantial.*"[37]

It articulated two principles which would convert initial consent to non-consent and make the forced sexual act rape. *First*, the victim must clearly communicate her withdrawal of consent to the opposite party after sexual intercourse has begun with consent. After this the defendant must ignores her wishes and to judge this, the subjective standard of a '*reasonable person'* would be used to assess whether he acted prudently for a man in his position in ascertaining whether she withdrew her consent. *Second,* the defendant continues to have intercourse with substantially greater force than is necessary to commit the rape itself.

The court applied these principles to the case at hand. It said that the first was satisfied as Laura (victim) told John to stop continuously and communicated her desire to go home. The court held that no reasonable person could have mistaken this for continuing consent. For the second element to be satisfied the court relied on the testimony of the victim when

[37] People v. John Z 29 Cal. 4th 756.

she said that "*John stayed inside of me and kept basically forcing it on me*." This according to the court met the force requirement of the second principle.

The court also rejected the *"primal urge"* or the *"unstoppable male"* theory which was raised by the defence contending that John should have been given a *reasonable amount of time to withdraw* and stop the sexual intercourse because all males have this basic primal instinct which makes it hard to control their sexual urges if told to stop immediately. The court held that *"'[w]hen consent is withdrawn; continuing sexual intercourse for 4 to 5 minutes is not reasonable and constitutes rape*." The court therefore acknowledged the invasive, disturbing and horrific effect of rape which exists even if consent was given prior to the act of sexual intercourse.

IV. ELEMENTS OF PROOF

Although post penetration rape is a noble way of advancing women's sexual right it would still function under a patriarchal socio-legal system which will look for some corroborative evidence of non-consent apart from verbal withdrawal of consent. Even though, the law has practically given up on the "utmost resistance" criteria, yet, courts while interpreting and balancing the legal and practical requirements of *consent* and *force* in rape law would ask for proof of *reasonable resistance* on the part of the victim.

As sexual activity in post penetration rape is initially consensual there will be lesser signs of physical distress or trauma. There may be no or little injuries on the bodies of the parties such as those associated with initial non-

consensual rape such as genital wounds and bruises. Therefore, there is a need to look at evidence of mental trauma or emotional distress to ascertain occurrence of rape. To do this, *Rape Trauma Syndrome* ("RTS") becomes paramount and can be cited as evidence to prove rape besides the testimony of the victim. This was a result of feminist- oriented research towards understanding what women go through after rape[38]. Judith Herman, a psychiatrist from Harvard has been credited with forming a connecting theory between trauma and feminism.

RTS falls within the category of Post-Traumatic Stress Disorder ("PTSD"), a medical diagnosis of psychic harm which the physiologists associated with veterans of war and those who had experienced some traumatic event. PTSD was included in the 1980 edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, known as DSM-III[39]. According to Judith Herman, it was *"clear that the psychological symptoms seen in survivors of rape, domestic battery, and incest was essentially the same as the syndrome seen in survivors of war."*[40] During the process of revising the DSM in the 1980s, women's groups successfully urged incorporation of abused women's experience into the text.[41]

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38 Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974).

39 John P. Wilson, *The Historical Evolution of PTSD Diagnostic Criteria: From Freud to DSM IV*, 7 J. Traumatic stress. 681 (1994).

40 JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR AT 32 (1992).

41 LISA APPIGNANESI, MAD, BAD, AND SAD: WOMEN AND THE MIND DOCTORS AT 425-26 (2007).

Victims of sexual assault experience symptoms which include depression, insomnia, nightmares, anxiety, nausea, numbness, anger, crying, sobbing, and even smiling[42]. Some victims may even respond in a different or unexpected way by being in complete control of their reactions and being calm, subdued and silent by hiding their feelings.[43] Some may experience situations where they feel like they are reliving the rape[44] or may react by developing phobias or by developing a general sense of nervousness called the "startle response".[45]

Therefore, presenting evidence of RTS would greatly help in arriving at the right decisions and deciphering false cases from genuine ones. Moreover, the entire burden of proving that consent was withdrawn and was properly communicated despite of which the defendant did not stop sexual intercourse will be on the prosecution. This will help in weeding out false cases.

Another means by which false accusation may be prevented is by way of providing for criminal prosecution of anyone who is found to have made a false charge. Furthermore, the element of *force* may be examined. Usually, force is seen to be physical to which resistance is given which signifies non-consent. Moreover, the force so applied is seen in respect of the sexual act and not in a holistic manner. For example, a woman may submit to sex in a situation and later withdraw consent but it may not be physical force which subjugates her

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42 Arthur H. Garrison, *Rape Trauma Syndrome: A Review of Behavioural Science Theory and its Admissibility in Criminal Trials,* 23 AM. J. Trial ADvoc.591, 596 (2000).

43 *Id.*

44 *Id* 637.

45 *Id* 598.

to continuance. It might not even be related to anything said or done on that day but may relate to past experiences with the man. In such situations, exploring the accused's past behaviour with the victim, removed in connection with the victim must be scrutinized.

In cases where the power relations between the accused and the victim are skewed heavily in favor of the accused and there might not be any evidence of force used.[46] In India, Dalit women repeatedly get raped by men even though they submit to the sex. No physical force in its traditional sense is used and consequently, some may even be disbelieved owing to the fact that they are untouchables.[47]

In all situations, where a woman is beaten, or subjugated in any manner, with whom lies no power to assert herself; *force* must be assumed and must not become a road block to justice. The distinction between power and force must be understood in the realm of real human relationships where the oppressor might not need to resort to *force as understood by law* to sexually make

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[46] A point of departure is the case of State of North Carolina v. Matthew Douglas Lester 321 S.E.2d 166 (Ct. App.1984). The defendant in this case was a violent man who beat his wife and daughters and indulged in sexual activities with all of them. On one occasion, he took his daughter to his trailer and asked his daughter "once or twice" if she wanted "to do it," and she answered that she did not. He then told her to take off her pants and panties, and the victim refused. When she perceived that her father was angry, however, the victim "finally gave in," undressed, and lay down in the seat of the car in compliance with her father's directions. The court in this case held "*there is no evidence, however, that defendant used either actual or constructive force to accomplish the acts with which he is charged. The victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant forcibly raped his daughter on 25 November and 18 December.*"

[47] Maham Javaid, '*How India's "Untouchable" Women Are Fighting Back Against Sexual Violence'* Refinery29, (October 15, 2015, 6:00 p.m), http://www.refinery29.com/2015/10/95759/dalit-untouchable-women-india-sexual-violence.

a woman submit to his authority. The lawmakers and interpreters of it should understand that in many situations, *force* and *non-consent* is not something that is patent but many women agree to sex because they feel that they do not have the power to say "no". Similarly, post penetration rape victims do not lose their right to say "no" if they said "yes" initially. It is critical to appreciate that not recognizing this structure of consent and deeming it an aberration from the usual construct of consent translates into suppressing the individual sexuality of women.

V. EFFECTS OF RECOGNIZING POST-PENETRATION RAPE

Rape victims are usually the target of societal sympathy or apathy which forces them to keep reliving their traumatic experiences and makes it difficult for them to feel normal. To give women more power over their sexuality, the man who ignores the woman's decisive "*no"*, ignores the tears falling down her face, ignores her requests to stop, howsoever meek, must be punished, provided that the law lays down in clear terms the consequences.

Moreover, many much needed reforms in society must not be based on statistical evidence of effect of change in criminal law over society or *vice versa* by analyzing reporting of cases of convictions. By trying to find out some numerical data on how much "effect" bringing in a law has on society, we end up diminishing the experiences of many women and men. Recognizing a sub category of rape and adding it to law books, or changing the focus on rape from the victim to the accused might not change the data associated with rape but it will affect the lived realities of many women.

Legally recognizing post penetration rape will help in changing societal attitudes towards women, sex, gender roles, and sexuality and go a long way in debunking rape myths (discussed later). We can take a cue from the campaign for removing Section 377 of the Indian Penal Code. The total number of cases registered under Section 377 in 2014 was a mere 778[48] all over India while that of rape was a whopping 36,735.[49] The numbers are extremely low but that is not a criterion for not supporting its abolition as it deals with securing the dignity of people in society.

A law dealing with post penetration rape will cast a legal duty on every man to act with caution when it comes to sex, to respect women and their desires, to believe that women have complete agency over their decision. However, it has its own limitations and is not a panacea for bringing about complete change in law and society. Even if we think of its impact as subtle and largely symbolic, it will have a positive effect on women's right to sexual autonomy and the way we perceive women in sexual power relations.

When consent/non-consent are understood in a holistic women centric manner, focus on the victim's past sexual relationships, resistance, corroboration etc. would lose importance and victims will feel unburdened with the past. The idea is to broaden the understanding of rape, to desecrate the image of the "good victim" and to place some power in the hands of

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[48] Lok Sabha Unstarred Question No. 4883, http://mha1.nic.in/par2013/par2014-pdfs/ls-231214/4883.pdf.

[49] Crime In India – 2014, *Chapter 5- Incidence and Rate of Violent Crimes During 2014*, National Crimes Record Bureau, Ministry of Home Affairs, http://ncrb.gov.in/StatPublications/CII/CII2014/Table%203.1.pdf.

women when it comes to their bodies. The notion that some rapes matter more than others, is a fundamental flaw in the system which needs to be corrected.

Adopting an alternate perspective, the state and society can be compelled to take note of gender violence is to look at the costs associated with the current approach. When we place the power to regulate their own safety in their hands, the state can also draw back from incurring the *inter alia* continuous cost of surveillance. The need is to devise a strategy in which women can be on an equal footing in terms of discussions and contributions as far as it relates to their own safety. One of the problems many victims of sexual assault face is that even though they suffer physical or mental consequences, they are not able to judge for themselves if they have been victims of a crime. Due to social conditioning and trivializing of the notion of sexual freedom for women, many women do not report incidents of a sex crime. There is a general acceptance in society of sexually aggressive and assertive men. Men are believed to be not able to control their sexual desires and women are expected to understand this by not taking their sexual misbehaviour seriously.

Similar problems arise in cases of acquaintance rape where the victim is often unable to categorize her experience of sexual violation into any definition under law and therefore refrains from reporting. This is due to the stereotype associated with "real rape" or stranger or traditional rape where the woman is violently raped by a stranger and in order to defend her sustains injuries and wounds. Post penetration rape deals with all these issues of victims who consented initially to sexual intercourse but were made to forcefully have

sex after they withdrew consent. They may even feel that they have no right to withdraw consent because they initially consented. Therefore, by legally recognizing post penetration rape, women will be enabled to come out and report cases.

Rape myths further constrict the sexual rights of women and aggravate and encourage the tendency in society for putting the blame on the victim of sexual assaults. For example, one rape myth is that *"[o]nce women entice men; the men are absolved, of their moral responsibility to control their sexual appetites*."[50] This suggests that because a woman did not behave 'appropriately' she invited sexual wrath and hence should be solely responsible for it and face consequences. It also implies that a man's sexuality is dormant and he only becomes aroused or his sexuality is awakened when a woman entices him and therefore the blame falls on the women.[51] Recognizing post penetration rape will rightly hold a man responsible for his sexually aggressive actions and for controlling his sexual desires no matter how aroused he is.

Another problem associated with acquaintance rape is that society is more sympathetic towards victims of stranger rape and view acquaintance rape victims with doubt and distrust.[52] Such myths deny women freedom of sexual choice and portray women as confused about their sexual desires or hiding them which a man must find out by employing even physically aggressive

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50 Katharine K. Baker, *Sex, Rape, and Shame,* 79 B.U. L. REV. 663,683 (1999).

51 MARTHA R. BURT, RAPE MYTHS AND ACQUAINTANCE RAPE*, 32* HIDDEN CRIME(1991).

52 David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System,* 87 J. Crim. L. & Criminology, 1204 (1997).

means. Recognizing post penetration rape may help in slowly eradicating such preconceived notions about women. Since post penetration rape happens once consent initially given is withdrawn, therefore the stereotypical signs or signals that men think women give out to communicate their consent non-verbally become redundant in judging whether a woman was in fact consenting or not.

VI. CONCLUSION

Sexual violence needs to be construed as a political problem and not one resulting of the morality of women and society. We also need to prioritize the agency of women in the face of violence and give them the freedom to react in whichever way they deem fit instead of bracketing their responses in the moral and legal sufficiency norms. The civil society and the larger framework of the women's movement needs to embrace the marginalized lived realities of the victims of post penetration rape and legitimize the violation of their sexual rights and the rights over their bodies.

The prosecution in post penetration rape cases will have to give victim friendly interpretation of critical elements of rape i.e. to the meaning of *consent* and *force* which have historically been constructed in favour of accused. Changing societal and legal attitude towards women is a gradual process and although recognizing post penetration rape legally will help in dissipating sexist perception of women and gender stereotypes, it has its own limits of functioning.

It provides legal sanction to the fact that sexual rights of women are to be respected and upheld and that forced sex with a woman is not a right if she granted consent initially but a privilege. In other words initial consent to sex is not a license to rape a woman. This understanding of rights of women is also a process of introspection which individuals need to observe when delineating the limits of their own behaviour.

Deconstructing and demolishing rape myths will prove to be highly effective because they give legitimacy to certain types of behaviour detrimental to both men and women. Therefore, stranger rape becomes the norm and anything short of fulfilling its conditions becomes unrecognizable as rape. Recognizing post penetration rape poses a serious challenge to a very central rape myth that *"rape is perpetrated by unknown persons"*.

SECTORAL REGULATOR AND COMPETITION COMMISSION: ENVISAGING A MOVEMENT FROM TURF WAR TO RECONCILIATION

Sahithya. M & Abhik Chakraborty[*]

ABSTRACT

In the backdrop of the Government of India's efforts to simplify the process of doing business in the country, this paper becomes significant because a competition law and the Competition Commission of India ("CCI") play a key role in regulating business. In the last few years, CCI has played a pivotal role in ensuring the operation of markets in a fair and efficient manner imposing huge fines and undertaking suo moto investigations. However, along with the CCI, India has also witnessed the mushrooming of various regulatory agencies such as Telecom Regulatory Authority of India ("TRAI"), Petroleum and Natural Gas Regulatory Board ("PNGRB") and Central Electricity Regulatory Commission ("CERC") who are also responsible for ensuring fair competition in their respective sectors. This scenario has led to jurisdictional conflicts between sector specific regulators and the CCI in the domain of disputes related to competition law. These jurisdictional conflicts raise pertinent issues of duplication of time and efforts, forum shopping by market participants and dulling of investment climate amidst regulatory complications. This paper shall discuss such jurisdictional conflicts in general and focus in detail on

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two sectors, namely telecom and petroleum to extricate the loopholes in the current system of addressing regulatory overlaps in competition issues. Further, based on the international experience and the recommendations of Financial Sector Law Reforms Commission Report of 2013, the authors in this paper propose a collaborative model which addresses instances of regulatory overlap as well as seeks to inculcate cross-institutional collaboration between the sectoral regulators and CCI.

I. INTRODUCTION

A balance of payments crisis forced India to embrace liberalization in 1991 allowing the entry of private players into previously public sector dominated industries like petroleum, telecom etc.[1] However, free markets are more susceptible to a commonly known phenomenon called 'market failure'.[2] Market failures occur when free markets fail to operate efficiently due to real world problems like information asymmetries, externalities or public goods.[3] Further, market failures which lead to significant deviations from the competitive market due to deceptive collusive practices or certain firms exercising significant market power may call for government intervention to correct the failure through regulation and antitrust laws.[4] Thus, the potential fear of market failure created the need to regulate, even the apparently free

1 Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism worked?,* 16(3) JOURNAL OF ECONOMIC PERSPECTIVES 67 (2002).

2 *See* Francis M. Bator, *The Anatomy of Market Failure,* 72(3) THE QUARTERLY JOURNAL OF ECONOMICS 351, 352 (1958).

3 Janusz R. Mrozek, *Markey Failures and Efficiency in Principles Course,* 30(4) THE JOURNAL OF ECONOMIC EDUCATION 411 (1999).

4 *Id.*

market such that resources were allocated with a view to achieve economic efficiency.[5]

Such a market failure had occurred in India when a massive securities fraud was unearthed in 1992 and this incident gave birth to the first sector specific regulator in India, the Securities Exchange Board of India ("SEBI").[6] SEBI was set up with the power to regulate the securities market and impose penalty for market violations.[7] Following this trend, the government has set up various sector-specific regulators to correct the market imperfections and prevent market failures.[8] Some of these are TRAI (1997), CERC (1998) ("CERC"), Airports Economic Regulatory Authority (2009) etc. The functions of these regulators include granting licenses, deciding license fee, determining the number of players in the industry.[9]

Interestingly, often legislations creating these regulators by definition require them to meet the mandate of ensuring fair competition and promotion of consumer interest in their respective sectors.[10] For example Electricity Act, 2003, allows CERC to issue directions where a 'licensee abuses its dominant

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5 Relationship between regulators and Competition Authorities 7 (OECD Report, DAFFE/CLP(99)8, June 24, 1999).

6 *Securities Scam: The systematic Origins,* 27(36) ECONOMIC AND POLITICAL WEEKLY 1891, 1892 (1992) http://www.jstor.org/stable/4398839 (last visited June 23, 2015).

7 Murali Patibandla and Ramkanta Prusty, *East Asian Crisis as Result of Institutional Failures: Lessons for India,* 33(9) ECONOMIC AND POLITICAL WEEKLY 469, 471 (1998).

8 *See* Vijay Vis Singh, *Regulatory Management and Reform in India: Background Paper for OECD,* CUTS INTERNATIONAL, 1, 16 http://www.oecd.org/gov/regulatory-policy/44925979.pdf (last visited July 19, 2015).

9 *See* Petroleum and Natural Gas Regulatory Board Act, 2006, Section 11.

10 Harmonizing Regulatory Conflicts: Evolving a Co-operative Regime to address conflicts arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities 1, 3 (CUTS INTERNATIONAL AND INDIAN INSTITUTE OF CORPORATE AFFAIRS, New Delhi, July 2012).

position or enters into combination that has adverse effect on competition in the sector.'[11]

This becomes problematic because the CCI was created in 2002 "to promote and sustain competition in the market and to protect interest of consumers and competitors".[12] Apart from overlap of competition goals many decisions of the regulators such as decision on licensee fee, tariff or the number of players in the market may have direct implications on the competition in the sector.[13] Further, there are bound be overlaps as CCI and sector specific regulators were established at different periods of time and given the function to instil competition in their respective markets.[14]

This opens up the possibility of jurisdictional overlaps between both CCI and sector specific regulators when a dispute arises. In the Indian context such overlap is common between TRAI, CERC,[15] PGNRB and CCI.[16] Jurisdictional overlap is problematic for mainly three reasons. The most important consequence is that it leads to duplication of efforts when two

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11 The Electricity Act, 2003, Sections 23, 60.

12 The Competition Act, 2002, Preamble, § 3 prohibits anti-competitive agreements and § 4 prohibits abuse of dominant position in the market.

13 National Competition Policy and Economic Growth in India- Electricity Sector Study 1, 21 (NATHAN ECONOMIC CONSULTING INDIA PVT. LTD. AND CUTS INTERNATIONAL, October 9, 2013).

14 *See Competition and Regulatory Overlaps: The Case of India* (CUTS, IICA COUNTRY PAPER- INDIA) www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf (last visited July 19, 2015).

15 *Regulators ensure fair play, no 'great incoherence': CCI chief,* BUSINESS LINE, January 14, 2013, http://www.thehindubusinessline.com/industry-and-economy/regulators-ensure-fair-play-no-great-incoherence-cci-chief/article4307017.ece (last visited July 15, 2015).

16 *See* Samir R. Gandhi & Rahul Rai, *CCI and TRAI- Regulating in Harmony,* BUSINESS LINE, April 24, 2009 http://www.thehindubusinessline.com/todays-paper/tp-opinion/cci-and-trai-regulating-in-harmony/article1049961.ece (last visited June 7, 2015).

bodies invest time, effort and resources to adjudicate the same dispute.[17] Second, it creates an unclear investment environment for potential investors especially because the penalty imposed by CCI can be phenomenally higher than what regulators are allowed to impose.[18] Finally, lack of clarity can be used beneficially by existing players by indulging in forum shopping. Thus, there is a need to clarify jurisdictional limitation of CCI and sector-specific regulators.

This paper shall seek to highlight the constant turf war between regulators and CCI and seek to propose a workable solution to the existing jurisdictional conflicts by addressing the flaws of the current model. Part II shall introduce the readers to the difference in core competencies between regulators and competition agencies which gives scope for jurisdictional conflict. Part III shall seek to analyse the shortcomings of the current model in resolving this conflict as specified in the Competition Act, 2002 ('The Act').

It shall give specific instances of jurisdictional conflict between CCI and two regulators namely TRAI and PNGRB. The authors have used these two regulators because their interaction with CCI highlights different shortcomings of the approach taken by CCI in case of overlap. Further, seeking to fill the gaps in the Indian approach, in Part IV, the authors have sought to draw on international experience in dealing with jurisdictional

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17 *See* Hemant Singh & Radha Naruka, *Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflict,* SOCIAL SCIENCE RESEARCH NETWORK 1, 35 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252530 (last visited May 18, 2015).

18 *See generally* Apoorva & Shreeja Sen, *CCI has recovered less than 10% of penalties imposed by it: Ashok Chawla,* MINT, November 20, 2014, http://www.livemint.com/Politics/hBj3ys7T2spmbkViUhkc2J/CCI-has-recovered-less-than-10-of-penalties-imposed-by-it.html (last visited July 25, 2015).

conflicts between Competition and Regulatory agencies. Finally, borrowing from the international experience the authors in Part V shall suggest the model that would be best suited to the Indian context. This part also makes the central argument of the paper that resolving the conflict requires a concurrent approach involving both bodies with a clearly defined structure of co-operation and institutional collaboration.

II. CONFLICT BETWEEN REGULATORS AND COMPETITION AGENCIES: DIFFERENCE OF MEANS AND GOALS

An appreciation of jurisdictional conflict between both bodies would require an understanding of their divergence with respect to their goals and approach towards achieving these goals. In contrast to competition agencies that have the sole mandate of maintaining standards of competition and protecting consumer interest in the market, regulators have a wide variety of goals. Their goals can be categorized under four heads namely access, economic, technical and competition regulation.[19] Access regulations concern non-discriminatory access to necessary inputs and infrastructure; economic regulations ensure measures to control monopoly pricing in the interest of consumers.[20] Competition regulations seek to curb the anti-competitive behaviour of firms and technical regulation includes aspect such as safety and environmental protection concerns.[21]

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19 *See Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 8.

20 *Id.*

21 *Id.*

Thus, regulators may have other policy goals which might not be shared by competition agencies e.g. protection of environment.[22] While it has been widely agreed that technical regulations must remain with the regulators, there is substantial scope for overlap in respect of the other three functions which have a competition angle to it.[23]

Further, though they share the common goal of ensuring efficient market functioning, their methods differ vastly. Regulators follow an *ex ante* approach of regulation by framing detailed policies which are necessary to promote competition and players are required to abide by these regulations.[24] On the other hand competition agencies (except merger cases) adopt an *ex post* approach of holding players liable for distorting competition.[25] Additionally, sector specific regulators focus on behavioural remedies such as regulation of prices for subsequent years which require constant monitoring; while competition agencies focus mostly on structural remedies like striking down the unfair condition, penalty etc. which does not need future monitoring.[26]

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22 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 9.

23 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 32 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

24 *See* Conference Report, Third ICN Annual Conference, Antitrust Enforcement in Regulated Sectors Working Group (April 2004, Seoul) http://www.internationalcompetitionnetwork.org/uploads/library/doc377.pdf (last visited July 1, 2015).

25 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

26 Best Practices for defining respective competencies and settling cases, which involve joint action by Competition Authorities and Regulatory Bodies, UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, Report on its 7th session, October 31-November 2, 2006, 1, 4, TD/B/COM.2 /CLP/44/Rev.2 (August 17, 2006).

This difference of approach in the means and the goals between both bodies has posed the question worldwide, as to who is competent to exercise jurisdiction regarding the competition issues arising in the regulated sector.[27] Proponents of sector specific regulators argue that the sector specific knowledge of the regulator makes them more suitable even while dealing with competition issues.[28] However, the core area of knowledge of competition agencies is competition enforcement and their institutional culture in dealing with competition issues makes them more appropriate to exercise jurisdiction in case of an overlap.[29] In the subsequent sections this paper shall seek to highlight the overtly simplistic manner in which The Act has sought to deal with these overlaps leaving it to the bodies to decide on the specificities. Further, it shall demonstrate the problem of the current approach by illustrating CCI's approach in claims overlapping with the competence of TRAI and PNGRB.

III. ANALYSIS OF CONFLICT BETWEEN CCI AND SECTORAL REGULATORS

The authors shall at the outset point out the theoretical flaws of the reference mechanism proposed by the Act. They shall then proceed to give two practical examples of how these flaws have played out in practice when

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27 *See generally Competition and Sectoral Regulation Interference* (CUTS Centre for Competition, Investment & Economic Regulation, Briefing Paper No. 5, 2003).

28 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 8.

29 *Id.*

CCI has dealt with cases involving overlap with jurisdiction of TRAI and PNGRB.

A. The Act's Perspective to Resolving Jurisdictional Conflict

The CCI can *suo moto* or on application exercise jurisdiction in matters of abuse of dominance, anti-competitive agreements and combinations.[30] Section 21 prescribes a mechanism of reference to CCI from the statutory authority in case the decisions on an issue before it might be contrary to the provision of the Act.[31] Similarly, Section 21A allows the CCI to make a reference to statutory authorities under similar circumstances.[32] In both cases the body to which reference has been made has to give its opinion within 60 days of reference and the referring body shall consider it while deciding the issue.[33]

At the outset it is pertinent to note that there were two options available to the policy framers. First, they could have granted exclusive jurisdiction in all cases of overlap to only one body. Second, co-operation could have been ensured between both bodies which were involved in case of overlap. The framers of The Act chose the latter but while doing so failed to define the details of this co-operative arrangement.[34] Leaving the finer details

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30 Competition Act, 2002, Section 19-20.

31 Competition Act, 2002, Section 21.

32 Competition Act, 2002, Section 21A.

33 Competition Act, 2002, Section 21(2)-22(2).

34 *See* Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 35 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015) (The author points out that Planning Commission

ambiguous has led to failure to co-operate in case of overlap as seen from the sporadic use of Sections 21 and 21A.[35]

This is because making the reference depends on the satisfaction of the body hearing the dispute that there is a potential for overlap with sector regulations. In this regard, the Madras High Court accepted the viewpoint that making a reference under Section 21 is qualified by use of the word 'may' and therefore is not mandatory.[36] Further, Section 62 of the Act provides that provisions of the Act shall only be in addition to and not in derogation of any law in force.[37]Interestingly, Section 62 is irreconcilable with Section 60 of The Act which is a non-obstante providing for supremacy of competition law with respect to competition enforcement.[38] This confusion only adds to the existing ambiguity while resolving instances of overlap.

Additionally, often regulators or CCI do not want to let go of their jurisdiction. There have been instances when both CCI and sectorial regulators have out-rightly rejected the contention for reference without assigning any

in 2006 reviewed major approaches to resolving this conflict and recommended concurrent framework of mutual co-operation between competition commission and sector specific regulators).

35 *See* Reliance Infrastructure Ltd. v. Maharashtra Electricity Commission, (2013) ELR APTEL (Del.) 661, ¶ 27 (The state electricity regulator had made a reference to Competition Commission in this case to delineate relevant market and assess abuse of dominance).

36 Vikash Trading Company v. Designated Authority, Directorate General of Anti-Dumping and allied duties, Ministry of Commerce and Industry, (2013) 1 MLJ (Mad.) 907, ¶ 33 (The court here rejected the contention that the Designated Authority ought to have referred the matter to Competition Commission of India due to the wording of the provision).

37 *See Id.*

38 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 7 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

cogent reasons regarding the absence of any overlap.[39] Finally, even if external pressure forces them to seek a reference, the adoption of the opinion is entirely at their discretion.[40] These flaws make the reference mechanism toothless as against what was contemplated by the Act.

B. Practical Application of Section 21 Vis-à-Vis Jurisdiction of TRAI and PNGRB

1. TRAI and CCI: A Progressing Turf War

Co-operation is pivotal in the telecom sector due to the need for different network providers to use each other's cables and tower networks through imposition of interconnectivity charges. Interestingly, it has been observed that in a free market private players do not co-operate with each other, charge competitors exorbitant interconnectivity charges and engage in predatory pricing to discourage new entrants.[41] It is against this background that co-operation and competition was sought to be enforced externally through the creation of a regulator i.e. TRAI.

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[39] *See, e.g.*, Association of Power Producers v. NTPC Ltd., Unreported Judgments, Petition No. 125/MP/2011, Central Electricity Regulatory Commission, ¶ 31; Jyoti Swaroop Arora v. Tulip Infratech Ltd., (2015) CompLR 109 (CCI), ¶ 249.

[40] Rahul Singh, *The Teeter-Totter of regulation and Competition: Why Indian Competition Authority must trump Sectoral Regulators,* 1, 5, (December 15, 2007) http://www.cci.gov.in/images/media/completed/interface_sr_ca_20080508112129.pdf (last visited July 10, 2015); *But c.f.* Reliance Infrastructure Ltd. v. Maharashtra Electricity Commission, (2013) ELR APTEL (Del.) 661.

[41] Ashok V. Desai, INDIA'S TELECOMMUNICATIONS INDUSTRY: HISTORY, ANALYSIS, DIAGNOSIS 51 (2006).

The TRAI Act, 1997 empowers the regulator to make suggestions to the Department of Telecom regarding the quality of the service, interest of the new entrants, licensing policy, spectrum allocation and measures to facilitate competition and efficiency in the sector.[42] It also has the power to call for information and conduct investigation and issue directions to any service provider.[43] Further, as per the TRAI Act, the members and head of the authority are to be experts in telecommunication, finance, management but are not expected to be knowledgeable in competition law.[44]

Overlap between the goals and means of TRAI and CCI have been observed in various areas. Illustratively, under Section 11, of the TRAI Act, the regulator is empowered to make recommendations regarding the need for new service providers, spectrum allocation terms and condition of licenses to service providers, which has a direct impact on the intensity of competition. Recently, the CCI has criticized the TRAI's unilateral recommendations to the Department of Telecom regarding review of license terms and capping of number of access providers and has requested discussion on the issue as it has competition implications.[45] Further, the issue of monopoly pricing and tariff fixation by TRAI is problematic.

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42 Telecom Regulatory Authority of India Act, 1997, Section 11.

43 *Id.* Section 12

44 Telecom Regulatory Authority of India Act, 1997, Section 4.

45 Harsimran Singh, *TRAI and CCI fighting the turf war,* THE ECONOMIC TIMES, 18 July 2007, http://articles.economictimes.indiatimes.com/2007-07-18/news/28461865_1_consultation-paper-number-portability-trai-chairman (last seem on December 8, 2014).

Keeping the consumer in mind, TRAI may fix extremely low tariffs. Although it will benefit the consumers in the short run, in the long run it will create a barrier on new entrants and hamper better competition in the market.[46] Finally, in cases of merger control, TRAI recommends that at any point of time the total number of service providers should not be less than four or the merged entity's market share exceeds 40%.[47] However, the CCI while reviewing a merger does not have any such bar and will disallow a merger only if it feels that the merged company will cause an appreciable adverse effect on competition.[48]

Interestingly, the proviso defining the jurisdiction of Telecom Dispute Settlement Appellate Tribunal (the adjudicatory arm of TRAI) ('TDSAT') states that "nothing in this provision will apply to any dispute subject to jurisdiction of Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP")."[49] The MRTP Act was repealed and the Competition Commission was put in its place through the Competition Act, 2002, but the corresponding amendment was not made in the TRAI Act to replace the words 'MRTP' with 'The Competition Act'. This lack of corresponding amendments in the TRAI

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46 Hemant Singh & Radha Naruka, *Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflict,* SOCIAL SCIENCE RESEARCH NETWORK 1, 35 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252530(last visited May 18, 2015).

47 *See* Samir R. Gandhi & Rahul Rai, *CCI and TRAI- Regulating in Harmony,* BUSINESS LINE, April 24, 2009 http://www.thehindubusinessline.com/todays-paper/tp-opinion/cci-and-trai-regulating-in-harmony/article1049961.ece (last visited June 7, 2015).

48 *Id.*

49 Telecom Regulatory Authority of India Act, 1997, § 14- Provided that nothing in this clause shall apply in respect of matters relating to - *"The monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969."*

Act has created a grey area regarding the jurisdictional limitations between TDSAT and CCI during overlapping disputes.

This legislative ambiguity has given room for interpretation and the CCI and TDSAT have answered these questions differently. In *Sea T.V Ltd.* v. *Star India Ltd.* the petitioner in TDSAT challenged the actions of Star Network as being in violation of TRAI Act and Interconnectivity Regulations issued by TRAI.[50] The Respondent opposed the jurisdiction of the commission relying on the proviso to Section 14 of TRAI Act arguing that the matter was about monopolistic practices. This led to a conflict between the TRAI and the now defunct MRTP Commission. The court took a very simplistic view that the present claim was about violation of regulation and not any anti-competitive practice.

It held that the MRTP Commission cannot adjudicate a dispute based on the rights and liabilities arising out of TRAI Act or Regulations even if it incidentally involves the subject of monopoly and restrictive practices.[51] Such a broad view of the TDSAT's jurisdiction would exclude practically every case from the ambit of MRTP Act because it would be always connected to some Guideline or Regulation issues by TRAI. This decision could be justified because TRAI is a special legislation it should always be prioritized over general legislations like the Competition Act, 2002. Moreover, TRAI consists of experts in the field of telecom and markets and it should be entitled to

50 Sea T.V Network Ltd. v. Star India Pvt. Ltd., (2006) 2 CompLJ (Telecom DSAT) 487, ¶ 10 (Telecom Dispute Settlement & Appellate Tribunal).

51 *Id.* ¶14

decide even when disputes have certain competition angle to it, considering that the proviso to Section 14 has not been amended yet to include CCI.[52]

Contrarily, the CCI has expressed an opposite view in *Consumer Online Foundation* v. *Tata Sky Ltd.* where the Dish TV operators were alleged to have intentionally agreed to prevent interoperability of set top boxes with other DTH operators.[53] This created hardship for the consumer to switch from one service provider to another. On a challenge to its jurisdiction, the Commission held that even though TRAI is the special regulator, competition in the market is within the exclusive jurisdiction of CCI.[54]

TRAI had recommended an up gradation of technology in set top boxes as well as adopting the regulations for interoperability.[55]The Commission in fact referred to these regulations on inter-operability of set top box and found that these guidelines were not enforced by service providers.[56] This view of the Commission would indicate that even if there is a trace of competition issues in the telecom sector on the basis of non-compliance of TRAI regulations the Commission has the exclusive jurisdiction over competition issues.

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52 *See* Hemant Singh & RadhaNaruka, *supra* note 16, 6.

53 Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶2, Competition Commission of India (March 24, 2011).

54 *Id.* ¶ 27.

55 Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶12, Competition Commission of India (March 24, 2011).

56 *Id.*

In the same case, the Commission was put in a precarious position when it was asked to decide two technical issues. The first issue was that whether providing for interoperability among set top boxes among different DTH providers was technologically and commercially feasible. The second issue was that whether the agreement between DTH operators to mutually abstain from providing such interoperability signalled towards anti-competitive practices.[57] The Commission dismissed the complainant's case and avoided any comment on telecom technology.

It held that even if interoperability was possible, the complainant could not show that there was an agreement between the DTH operators to mutually avoid providing interoperability demonstrating an anti-competitive practice.[58] The helpless commission distanced itself from taking any decision on feasibility of the interoperability on the ground that those recommendations of TRAI were yet to be adopted. This case could have been better decided if both bodies were on board sharing their expertise.

2. Conflict of jurisdiction between CCI and PNGRB

Another instance of the implication of legislative ambiguity on interaction between regulators is that of CCI and the Petroleum and Natural Gas Regulatory Board ('PNGRB'). The Petroleum and Natural Gas Regulatory Board Act, 2006 established the Petroleum and Natural Gas Regulatory Board

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[57] Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, at 75, Competition Commission of India (March 24, 2011), *available at* http://www.cci.gov.in/menu/MainOrderConsumer250411.pdf (last visited June 23, 2015).

[58] *Id.* at 109.

to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum products and natural gas.[59] The functions of the Board include regulating access to common carriers[60] or access to common gas distribution networks[61] while fostering fair trade and competition among the entities.

The PGNRB Act provides for civil penalties in cases of violations of the directions of the Board not exceeding one crore rupees.[62] However, if the complaint is on restrictive trade practices[63], the amount of the civil penalties may be multiplied by five times of the unfair gains made by the entity or rupees ten crores, whichever is higher. It is interesting to note that the PNGRB Act, 2006 has used the same definition of "restrictive trade practices" as given in the Monopolies and Restrictive Trade Practices Act.[64] The Competition Act, 2002 has repealed the Monopolies and Restrictive Trade Practices Act and created a special legislation for dealing with competition issues. However, in spite there being a gap of four years between the Competition Act that was passed in 2002 and the PNGRB Act passed in 2006, it is quite astonishing to notice the legislature's failure in reconciling both the acts.

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59 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 1(4).

60 *See* Petroleum and Natural Gas Regulatory Board Act, 2006, Sections 2(j), 11(e)(i).

61 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 11(e)(iii).

62 Petroleum and Natural Gas Regulatory Board Act, 2006, Section 28.

63 Petroleum and Natural Gas Regulatory Board Act, 2006, §2(zi) (This section defined restrictive trade practice. It means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular).

64 *See* The Monopolies and Restrictive Trade Practices Act, 1969, § 2(o).

As the Board has been entrusted with the responsibility to promote competition policies, there have been increasing jurisdictional conflicts with the Competition Commission in the cases where the complaints are based on anti-competitive practices in the petroleum, oil and natural gas sector. The Competition Commission's decisions, though inconsistent, do lean towards ceding the jurisdiction to the regulatory authority.

In *Shri Awadh Singh v. Petroleum and Natural Gas Regulatory Board*[65] it was alleged that the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2013 issued by the PNGRB encouraged anti-competitive practices. The CCI noted that the PNGRB Act gave powers to the Board to issue the said regulations as a form of subordinate legislation and thus, the commission did not have the jurisdiction to hear the matter.[66]

In *Faridabad Industries Association v. Adani Gas,*[67] the CCI held that that the issue of compliance with the regulations framed by the PNGRB was beyond its scope.[68] However, the Commission did go into the allegation whether the gas prices were being fixed arbitrarily under the Gas Supply Agreement albeit holding against the complainant. Through this case, the CCI

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65 Shri AwadhBihari Singhv.Petroleum and Natural Gas Regulatory Board, Case No. 75 of 2013,MANU/CO/0002/2014, Competition Commission of India (January 2, 2014) .

66 *Id.* ¶ 4.

67 Faridabad Industries Associationv.Adani Gas Limited, Case No. 71 of 2012, MANU/CO/0063/2014, Competition Commission of India (July 3, 2014).

68 *Id.* ¶ 102.

has carefully tried to demarcate competition issues from other issues concerning the oil and gas sector, although a strict demarcation is not possible.

The CCI has often faced cases where the Fuel Supply Agreement is called into question for anti-competitive practices and abuse of dominance. In the *Gujarat Textile Processing v. Gujarat Gas Company,*[69] the allegation was that the opposing party was abusing its dominant position by imposing unilateral, unreasonable and arbitrary conditions in the supply of gas under the Gas Supply Agreements. The Commission sought an opinion of the PNGRB but the latter threw the ball back in the CCI's court by stating that it can adjudicate on the matter after considering relevant regulations.[70]

The CCI, while acknowledging its powers to punish for abuse of dominance noted that the Agreements in question are in the purview of the PNGRB Act and since the latter is a specific provision and empowered the regulator to constantly monitor the price and take corrective measures.[71] Thus, the CCI exempted itself from giving any remedy in this case by asking the complainant to pursue remedy before PNGRB. However in *Notice for Acquisition of Equity* case and *Tata Power Distribution v. GAIL,*[72] the CCI discussed the PNGRB regulations and on that basis adjudicated the absence

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69 Gujarat Textile Processors Association, Surat, Gujaratv.Gujarat Gas Company Ltd., Ahmedabad, Gujarat, Case No. 50 of 2011, MANU/CO/0114/2011, Competition Commission of India (December 12, 2011).

70 *Id.* ¶ 15.

71 *Id.* ¶ 22.

72 TATA Power Delhi Distribution Limitedv.M/s. GAIL (India) Limited, Case No. 94 of 2013, MANU/CO/0038/2014, Competition Commission of India (March 11, 2014).

of abusive conduct of the respondent due to their compliance with the regulations and allowed the losing party to approach the regulator for remedy.[73]

Few years ago, three public sector enterprises had approached the Delhi High Court challenging the jurisdiction of the CCI[74] with regard to cases pertaining to the oil and petroleum sector.[75] Reliance had filed a complaint before the CCI alleging that the State Public Sector Enterprises had formed a cartel in the market for supply of aviation fuel to Air India.[76] The High Court, interestingly, disallowed the CCI from hearing the issue as an order on this issue had already been passed by the PNGRB. It is pertinent to note that the PNGRB does not have exclusive jurisdiction on the matter and any dispute involving competition concerns is also under the jurisdiction of CCI. This order begs the question that if a complaint is filed before both the Sectoral regulator and the CCI, whether the passing of an order on the issue by one of them bars the other body from exercising jurisdiction.

The above cases show that that the CCI has never taken a consistent approach to cases where overlap of jurisdiction can occur, sometimes seeking reference, in others refusing to step into domain of PNGRB. Further, another complicated issue that arises is whether the jurisdiction of one body is precluded if another parallel authority passes an order on the same matter. The

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73 *Id.* ¶¶ 12-14.

74 Nikhil Kanekal, Sangeeta Singh &UtpalBhaskar, *Competition watchdog faces fresh challenge to jurisdiction*, MINT HT MEDIA, January 23, 2011.

75 M/s Royal Energy Ltd. v.M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd. and M/s Hindustan Petroleum Corporation Ltd (2012) CompLR 563 (CCI).

76 *See RIL moves CCI against public companies Aviation Turbine Fuel Cartel,* THE ECONOMIC TIMES, July 15, 2010.

confused approach of CCI with respect to PNGRB is in contrast to its activist stand taken with respect to overlap with TRAI.

The case study of CCI's overlapping cases with TRAI and PNGRB illustrate the different approaches that CCI has taken towards overlap in different sectors. Thus, there is an increasing need to clarify this confusion and outline the structural relationship between the regulatory bodies such as TRAI, PNGRB and Competition Commission. With a view to clarify this confusion the next section shall seek to map out the different approaches taken internationally to highlight the key takeaway points that could be used in the Indian Context.

IV. INTERNATIONAL EXPERIENCE IN ADDRESSING CONFLICT OF JURISDICTION

International Experience reveals that countries have broadly implemented two approaches to harmonize conflict between sectoral regulator and competition agencies. The first approach has been to entrust only one body with the exclusive jurisdiction to deal with overlapping issues. The second approach has recognized the need for both bodies to have concurrent jurisdiction in overlapping cases.

A. Exclusive Jurisdiction Model

The essence of this model lies in the fact that it provides power to only one body i.e. either regulator or competition agency to circumvent the problem

of overlapping jurisdiction powers.[77]The implementation of this model has been done worldwide in two ways. Firstly, competition enforcement in the sector can be exclusively allocated to the concerned sector regulators in addition to technical, economic and access regulation.[78] Secondly, certain aspects of economic and access regulation along with competition enforcement can be vested solely with the competition agencies leaving the sector regulator to undertake only technical regulation.[79]Even though the model can be broadly implemented in the above mentioned ways, many countries have implemented the essential characteristics of this model with varying effect.

Australia provides an excellent illustration of the implementation of this model. It has sought to give the sole mandate in dealing with overlapping cases to its competition agency called the Australian Competition and Consumer Commission. In addition to the competition function, it has transferred some aspects of access and economic regulations from sectoral regulators to the Australian Competition and Consumer Commission.[80]Thus, its functions range from competition enforcement to setting terms for

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77 Best Practices for Defining Respective Competencies and Settling of Cases which involve joint action of competition authorities and Regulatory Bodies, November 14-18, 2005, *United Nationals Conference on Trade and Development,* ¶ 7, TD/RBP/CONF.6/13, TD/B/COM.2/CLP/44/Rev.1 (September 15, 2005).

78 *Cooperation for Competition: The Role and Functions of a Competition Authority and Sectoral Regulatory Agencies* 12 (Department of Justice Office for Fair Competition, OFC Policy Paper No. 1, July 2013).

79 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 23,TD/RBP/CONF.7/L.7 (August 30, 2010).

80 *Cooperation for Competition: The Role and Functions of a Competition Authority and Sectoral Regulatory Agencies* 21 (Department of Justice Office for Fair Competition, OFC Policy Paper No. 1, July 2013).

licensing conditions or fixing prices in select sectors such as gas and electricity.[81]

There are inherent advantages of this approach because it reduces the potential of regulatory capture to which sector specific regulatory bodies are more susceptible as against a national competition authority.[82]Regulatory capture encompasses a situation where the regulator instead of acting in public interest advances the commercial interest of specific companies that dominate the industry due to corruption or interest group lobbying.[83]Further it is often seen that sector specific regulators get involved in complex technicalities of their respective sectors, thus ignoring the competition issues involved.[84] Finally, this model will ensure competition is enforced in a uniform and consistent manner by single body across sectors while saving time, money and duplication of effort.

On the contrary, the disadvantage of conferring exclusive mandate to competition agencies is twofold. First, there is lack of sector specific knowledge on the part of competition agency and in such overlapping cases it would constantly have to seek assistance of the knowledge of the regulator.[85]

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81 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

82 *Id.* 3.

83 Jean-Jacques Laffont and Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 (4) THE QUARTERLY JOURNAL OF ECONOMICS 1089-1127 (November 1991).

84 *See* Maher M. Dabbah, *The Relationship between competition authorities and sector regulators,* 70(1) THE CAMBRIDGE LAW JOURNAL 113, 119 (March 2011).

85 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 188.

Second, taking up this responsibility may lead to dilution of their primary competition functions when they get embroiled in complex regulatory processes. For instance concerns have arisen in New Zealand where there are no industry specific regulators but the sole mandate lies with Commerce Commission.[86] The competition law framed by it is very generic in nature and this has often caused ambiguity due to lack of clarity on industry specific issues like interconnection and pricing.[87]

Another manner of enforcing the exclusivity model is by giving the power to enforce competition concerns to the industry specific regulator apart from the economic, access and technical regulation they already handle. Countries like Kenya entrust the regulator with the exclusive mandate of enforcing competition in the sector.[88]Although it may seem like doing away with the powers of one body i.e. competition agency would be more convenient than reducing the powers of multiple regulators, this option too suffers from disadvantages.

Firstly, the lack of knowledge of regulator with respect to complex competition matters may lead to an over simplified analysis of competition disputes in the sector. Secondly, the presence of multiple regulators may create a non-uniform threshold for the enforcement of competition law in different sectors across the country. Thirdly, this approach leaves room for cross-

86 *Id.* 215.

87 Rakesh Basant, *Interface between sector-specific Regulatory bodies and Competition Agencies: A case of the Indian Telecom Sector,* INDIA INFRASTRUCTURE REPORT 63, 66 (2001).

88 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008, at 1, 2.

sectorial conflict between different regulators when faced with overlapping competition issues which is detrimental to the economic health of the country. Fourthly, overburdening them with competition concerns will cause them to deflect from other regulatory/statutory obligations.[89] Keeping the advantages and disadvantages of this model in mind, the authors will now proceed to examine a second scenario where the competition agencies work in coordination with the regulators for the enforcement of competition law.

B. Concurrency Model

As stated above regulation performed by any regulator consists of access, economic, technical and competition regulation in the sector.[90] The economic and access regulation of a particular sector has a close nexus with competition issues and this makes it difficult to draw watertight compartmentalization of the functions of regulators and competition agencies. For instance, TRAI's act of fixing tariff rates (economic regulation) has direct impact on the intensity of competition in the sector.[91]

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89 For instance in UK, the Office of the Gas and Electricity Market (OFGEM) itself has commented that there is a risk of marginalizing competition law as it has a lot of social and environmental concerns to deal with as well. *See* Report of the House of Lord Select Committee on "UK Economic Regulators" (2007), available at http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf. And the Memorandum produced by British Energy (February 2007) towards the Report, available at http://www.british-energy.com/documents/Hofl_SCR_0207.pdf (last visited August 31, 2015).

90 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 10,TD/RBP/CONF.7/L.7 (August 30, 2010).

91 *See Competition Laws and Telecom war-fare,* 3 PSA COMMERCIAL LAW BULLETIN (January 2010), available athttp://psalegal.com/upload/publication/assocFile/CommercialLawBulletin-IssueIII.pdf (last visited on August 10, 2015).

As the particular sectorial regulator does not have the expertise over competition issues and vice versa, it is important to have a system of coordination between the two which will amplify the advantages of both bodies. Thus, this model aims to combine the best of both bodies and put them to use in overlapping issues. By this approach, the sector specific regulator can be ably guided by the competition agencies to enforce competition law. On the other hand, the competition agencies will also get help from the sectorial regulators to navigate the complex technicalities of a particular sector.

However, this model is not free from problems. One of the major drawbacks is the problem of overlapping jurisdiction. If both the regulator and the competition body have the mandate over competition matters, naturally there will be disputes as to who will adjudicate on an overlapping issue. In Part III, we have already shown how these problems come to the fore in India with respect to the telecom and petroleum sector. Thus, any concurrent model will have to keep the above shortcomings in mind. Some of the countries which follow a concurrent model but with varying degrees/structure of cooperation include UK, US, Netherlands South Korea, Brazil, Turkey, Argentina, Mexico, Zambia, Finland, South Africa and Ireland. Hereafter, we will examine the different ways in which this model has been adopted in these countries.

In the United Kingdom, the Competition Act 1998 (Concurrency) Regulations, 2004 laid down the working framework for relationship between

sectoral regulators and Office of Fair Trading ("OFT").[92] The structure provided for the OFT and the sectoral regulator to agree on which would be the appropriate forum and against this decision of OFT/regulator the aggrieved party could approach the Competition Appellate Tribunal.[93] However, in practice it was found that the regulations were ineffective as the OFT would often refrain from exercising jurisdiction in regulated sectors instead of actively making an effort to consult with the concerned sectoral regulator. This had resulted in only two competition violations decided by the sectoral regulators from the inception of the concurrency regulations.[94]

The first violation decided by the Office for Gas and Electricity Market ("Ofgem") was with respect to the abuse of dominance by *National Grid* in the market for provision and maintenance of domestic sized gas meters.[95] The second violation was found by the Office of Rail Regulation ('ORR') *vis-à-vis* the conduct of *English Scottish Railway Limited* in concluding contracts whose terms had the effect of excluding competitors from the market.[96] The ORR in this case considered the OFT Guidelines on market definition, assessment of market power while delineating the relevant market and dominance of the enterprise.[97] Thus, there were some reservations about the efficient

92 The Competition Act 1998 (Concurrency) Regulations 2004.
93 *Id.* Regulation 5.
94 House of Lords, Select Committee on Regulators, 1st Report Session 2006-07 UK Economic Regulators, Volume I: Report 68 (2007).
95 Case CA98/STG/06, Investigation into National Grid, Decision of the Gas and Electricity Market Authority (2001).
96 English Welsh and Scottish Railway Ltd., Decision of the Office of Rail Regulation (2006).
97 English Welsh and Scottish Railway Ltd., Decision of the Office of Rail Regulation, ¶ 207 (2006).

functioning of the concurrency system envisaged which was one of the factors for reforming the concurrency regime.[98]

In 2014 a renewed working arrangement between the regulators and the Competition and Market authority ("CMA") was established through the Competition Act 1998 (Concurrency) Regulations 2014. As per the Regulation, if a regulator or the CMA believes that they have concurrent jurisdiction over a case, then such a competent body should inform the other competent regulators in writing if it intends to exercise its powers.[99]

After notifying the other competent body/bodies, all such competent regulators have to reach an agreement to decide who is to exercise jurisdiction on the matter and which regulators will have advisory role in the same.[100] If the bodies fail to reach an agreement within a reasonable time, then the CMA will determine which competent body has the mandate.[101] There is also a provision for transferring the dispute from one competent regulator to another.[102] Nevertheless, if the CMA feels that it is best suited to adjudicate on the issue, then, it can transfer the case from the concerned regulator to itself.

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98 *See* House of Lords, Select Committee on Regulators, 1st Report Session 2006-07 UK Economic Regulators, Volume I: Report 68 (2007) (This report raises questions about the assiduousness of the regulator in investigating competition issues, for example the Competition Appellate Tribunal set aside Office of Water's decision in the Albion Water and Aquavitae case and in spite of this decision Office of Water was resistant to making the changes required by the appellate order).

99 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(1).

100 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(2).

101 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 5(1).

102 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 7.

In the process, it has to hold consultations with the said regulator and also inform all the stakeholders involved that it is taking up such a dispute.[103]

This framework effectively takes care of the problems mentioned above which may be associated with the concurrent model. The system provides overarching powers to the competition agency, thus, recognizing its expertise on the matter. To further co-operation, a Concurrency Working Party was also formed by the regulators and the Office of Fair Trading with the objective to create an atmosphere of collaboration and consistency in approach toward competition law.[104]

In 2015, CMA published its first report on concurrency highlighting the increased use of market studies/investigations into the regulated sectors and progress on MOUs and information sharing between CMA and regulators.[105] Further, there has been satisfactory co-operation in the case allocation between CMA and Regulators, where based on the Concurrency guidelines the regulators have taken responsibility of 5[106] out of 6 overlapping cases seeking support of CMA's complementary skills.[107] The 2016 Concurrency Report echoes similar patterns of co-operation in line with the

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103 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 8.

104 John McInnes, *Concurrent Exercise of Competition Powers by the Sectoral Regulators: Is It time for a more radical change of approach?* COMPETITION LAW 37, 40 (2012).

105 Annual Report on Concurrency, Competition & Markets Authority, CMA43, 9 (2015).

106 *See* Annual Report on Concurrency, Competition & Markets Authority, CMA43, 14 (2015) (These 6 cases include: ORR's investigation into suspected infringements of prohibition in connection with the carriage of freight; Ofwat's investigations into abuse of dominance by Bristol Water and Angilian Water Company; Ofcom's investigation into the suspected infringement on prohibition of abuse of dominance by Royal Mail and anti-competitive agreement by the Football Association Premier League; CMA's investigation into the health services sector for anti-competitive agreements).

107 *Id.* 9.

concurrency guideline whereby two new disputes were agreed to be decided and investigated by the sectoral regulators namely Ofgem and Financial Conduct Authority.[108]

In the United States, antitrust agencies namely the Federal Trade Commission ("FTC") and the Antitrust division of Department of Justice ("DOJ") constantly share jurisdictions with many sector specific regulators such as the Federal Communications Commission ("FCC") and Federal Energy Regulatory Commission ("FERC"). With respect to antitrust disputes the sole body for enforcement is competition agencies i.e. FTC and DOJ. However, the antitrust courts have developed a principle of 'primary jurisdiction' to stay cases of overlap pending before the initial agency. The application of this principle is on a case by case basis depending on the disputes at hand, value of the regulators' expertise and knowledge regarding competition laws in the specific sector and is used to stay the proceeding pending resolution of overlap by federal court.[109]

However, this system is not completely efficient. For instance, the Supreme Court of the United States in the case of *Verizon v Trinko* was asked to decide whether DOJ or the FCC had the jurisdiction to determine anti-competitive conduct *vis-à-vis* access to network. The court refused to allow intervention of the antitrust bodies because it felt that the dispute was the

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108 Annual Report on Concurrency 2016, Competition & Markets Authority, CMA54, 3 (2016).

109 *Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 266.

mandate of the FCC.[110] The court reached this decision as it felt that there was already an existing regulatory structure designed to deter competitive harm as enforced by the FCC, leaving little space for DOJ to hear the dispute.[111]

Prior to the case reaching the Supreme Court, the same complaint regarding anti-trust was filed before both the DOJ and the FCC.[112] This shows that jurisdictional conflicts on this issue of overlap can arise in the US because under the present collaborative mechanism, determination of jurisdiction is at the discretion of the Court which is hearing the matter. Similarly, in the electricity sector, both the DOJ and the FERC arrived at different conclusions while deciding on whether the merger between two Electricity Companies namely Exelon Corp. and Public Service Enterprise Group was anti-competitive.[113] This is despite the fact that the FERC had adopted the merger guidelines issued by the antitrust agencies in 1996.[114]

Despite these shortfalls, the United States has developed efficient informal mechanisms to garner co-operation and create a cross-institutional culture between both bodies. The first initiative involves the establishment of many inter-agency working groups to ensure informal co-operation between both regulators and competition agencies. In various instances the FTC staffs

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110 *Verizon Communications Inc. v Law Offices of Curtisv Trinko,* LLP 540 U.S. 682, (2004).

111 Damien Geradin & Robert O'Donoghue, *The Concurrent Application of Competition Law and Regulation: The case of margin squeeze abuses in the Telecommunications Sector,* 1 JOURNAL OF COMPETITION LAW AND ECONOMICS 355, 417 (2005).

112 *Id.*

113 See Proposed Final Judgment in *U.S. v. Exelon Corp. and Public Service Enterprise Group, Inc.*, available athttp://www.usdoj.gov/atr/cases/f216700/216784.htm

114 See Merger Policy Statement, FERC Order No. 592 (December 18, 1996), available at http://www.ferc.gov/industries/electric/gen-info/mergers/rm96-6.pdf

have prepared reports[115] where they have applied their competition knowledge to assess the competition impact of a specific proposed regulatory decision e.g. methods to determine allocation of airport landing space.[116]

Further, constant staff transfers between both bodies create an interdependent environment for resolving potential overlaps. For example there have been instances where there has been exchange of economic staff or when Chief of Staff of FTC has been transferred to FCC as a commissioner and later elevated to the post of FCC Chairman.[117] In respect of certain sectors especially energy sector, more channels for avoiding isolated decisions is provided by allowing competition agencies to appear before sector specific regulators in regard to proceedings before them.[118] This allows the FTC to offer their insights on competition angle of a dispute.

Dutch competition policy is based on the notion of prohibition rather than abuse of the system and the principle authority for competition enforcement is the National Competition Authority ("NMa"). The competition rules are applied by NMa across all sectors irrespective of whether there is a regulator. The government on the Secretariat's submission has set up

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115 *See* Federal Trade Commission Act, 1914, 15 U.S.C., § 6 (This provides the power to co-operate with other agencies and gather information and prepare reports for assistance with investigation).

116 Ishita Gupta, *Interface between Competition & Sector Regulations: Resolution of the clash of Regulators,* Internship Report 1, 30 (Competition Commission of India, July 27, 2012) http://cci.gov.in/images/media/ResearchReports/Interface%20between%20CCI%20and%20Sector%20Regulators.pdf (last visited June 21, 2015).

117 Press Release, FCC Commissioner Mignon L. Clyburn announces Staff Change, News Media Information 2020/ 418-0500 (April 17, 2015), available at https://www.fcc.gov/document/fcc-commissioner-mignon-l-clyburn-announces-staff-changes (last visited August 15, 2015).

118 *See* Deep water Port Act, 1974, § 7(a); Outer Continental Shelf Lands Amendment At, 1978, §205(b).

chambers within the competition authority for sectorial regulation.[119] In some other cases like Office of Transport, instead of having NMa supervise it, it has been set up as a separate chamber of NMa. A chamber model allows highly specialized technical knowledge related to sectors to exist within the structure of competition authority which focuses on broad issues of improving competition.[120]

In Canada, the Canadian Radio-television and Telecommunications Commission ("CRTC"), decided in the *Review of Regulatory Framework case*, that it would not encroach upon the domain of competition law.[121] This decision brought about a call to reconcile the issue of jurisdictional overlap between the CRTC and the Competition Bureau. In 1999, they issued a joint statement detailing the structure of collaboration that they would undertake to prevent such future disputes.[122] After 1999, the competition bureau has signed multiple Memorandums of Understanding including those with the Radio and Telecommunication regulator and Ontario Securities Exchange Commission defining binding structures to address information exchange, knowledge and transfer of staff between different regulators.[123]

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119 *See Relationship between Regulators and Competition Authorities*, OECD COMPETITION POLICY ROUNDTABLES (Directorate For Financial and Enterprise Affairs Committee on Competition Law and Policy), DAFFE/CLP(99)8, June 24, 1999, at 1, 189.

120 Model Law on Competition (2010)-Chapter VII: The relationship between competition authorities and regulatory bodies, November 8-12, 2010, *United Nationals Conference on Trade and Development,* ¶ 24,TD/RBP/CONF.7/L.7 (August 30, 2010).

121 Review of Regulatory Framework, Telecom Decision CRTC 94-19, Canadian Radio and Telecommunications Commission (16 September 1994), available at http://www.crtc.gc.ca/eng/archive/1994/dt94-19.htm.

122 *See* Neil Campbell & Mark Opanishov, *Untangling the Web of the Canadian Telecommunications and Competition Regimes*, 30 INT'L BUS. LAW. 305 (2002).

123 *See* Memorandum of Understanding for Co-operation, Co-ordination and Information sharing, October 22, 2013, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03643.html (last

In Ireland, there exists a cooperation agreement between the competition agency and the sectorial regulator. By virtue of this agreement, the mechanism of mandatory consultation exists if a regulator decides to adjudicate a matter which was already before another agency.[124] Further, in South Africa, the Competition Act entrusts a responsibility on the Competition Commission to enter into agreements with different regulators so as to devise a concurrent methodology in order to ensure a uniform threshold of enforcement of competition law.[125]

In the telecom sector, such an agreement has been negotiated with the regulator and the Memorandum of Understanding specifies co-operation regarding merger transactions, steps for exercise of concurrent jurisdiction including notifying the regulator and discussing how the complaint should be managed under the agreement.[126] Further, it also seeks to constitute a joint working group consisting of members from both bodies for institutional

visited on August 15, 2015); Press Release, Ontario Securities Commission and Competition Bureau Sign Memorandum of Understanding, November 25, 2014, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03847.html (last visited on August 31, 2015).

124 Harmonizing Regulatory Conflicts: Evolving a Co-operative Regime to address conflicts arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities 1, 15 (CUTS INTERNATIONAL AND INDIAN INSTITUTE OF CORPORATE AFFAIRS, New Delhi, July 2012)

125 *See* Competition Act, 1998, Section 3(1A): *'In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct Further, The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21(1)(h) and 82(1) and (2).'*

126 Memorandum of Agreement entered into between the Competition Commission of South Africa and the Independent Communications Authority of South Africa, ¶ 2-3, September 20, 2002, available at http://www.compcom.co.za/wp-content/uploads/2014/09/ICASA.pdf (last visited on August 20, 2015).

exchange of expertise to advice on a policy level.[127]Turkey imposes a statutory obligation on its Competition Board to consider the regulator's opinion while dealing with competition matters in the telecommunications sector.[128]In Zambia, a Competition Commission's representative acts as an ex-officio member of the boards of different regulators which helps him/her to provide technical inputs relating to competition law.[129]

A common thread that runs across the concurrency model adopted by various countries analysed above are first, these countries have sought to allay confusion by clearly defining the structure of co-operation between both bodies either by giving notice, playing advisory role or appearing in proceeding before the regulator. Second, countries have taken efforts to implement this model of co-operation by promoting an institutional culture between both bodies either through staff transfers, Memorandum of Understandings, Interagency periodic meetings. The authors believe that these two distinct characteristics highlighted by the various models analysed should be evaluated in the context of India ensuring that there are suitable modifications to suit the Indian legal landscape.

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127 *Id.* ¶ 4.

128 Electronic Communications Law No. 5809, November 11, 2008, § 6(1)(b) imposes duty to take the opinion of Competition Authority on the issues regarding the breach of competition in electronic communications sector and § 7(2) specifies that the Competition Board while taking decision shall take into consideration primarily the Regulators view and regulatory procedures of the Authority.

129 Voluntary Peer Review of Competition Law and Policy, Zambia, United Nations Conference on Trade and Development, 1, 15, UNCTAD/DITC/CLP/2012/1 (OVERVIEW) Zambia (2012).

V. SOLUTION FOR RESOLVING THE CONFLICT IN THE INDIAN PERSPECTIVE

In India, as mentioned above, the reference mechanism is toothless and rarely used, thereby diluting the atmosphere of co-operation intended by the framers. This loophole has been exploited by both the competition commission and the regulators to unilaterally take action thereby diluting the atmosphere of cooperation intended by the legislation. Apart from duplication of work it also gives scope to parties for forum shopping and the resulting confusion creates a bad climate for investment in India. Therefore, to address these concerns it is imperative that a structured and well-defined model of co-operation is laid down by the law. Further, to ensure successful implementation of this model it is essential to take measures that garner a culture of institutional co-operation between both bodies which is visibly absent in India.

With respect to the exclusivity model, the authors feel that it should be shunned as the disadvantages of the model outweigh the advantages. If the competition commission is designated as the sole body to take charge of enforcement of competition issues in regulated sectors, the issue of lack of knowledge of the technicalities of a particular sector emerge.[130] Further, it is not practically feasible to abruptly reduce the enforcement power, staff strength and authority of multiple sectoral regulators.

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[130] *See* Maher M. Dabbah, *The Relationship between competition authorities and sector regulators,* 70(1) THE CAMBRIDGE LAW JOURNAL 113, 119 (March 2011).

Similarly, if the competition commission's role is reduced in regulated markets, there will be an apprehension regarding the correct application of the competition policy by the regulators whose members are not always experts in the field of antitrust law. Moreover, there will also be risk of a non-uniform standard of application of competition law in the country if different sectors are entrusted with the task of enforcing competition law. Therefore, in order to extract the advantages, expertise and knowledge of the sector specific regulator and the competition commission, the authors feel that a concurrent model will be the most apt for India. Finally, the legislative intent in passing Sections 21 and 21A of the Competition Act, 2002 prescribing a reference mechanism signals the intention of the framers to adopt a concurrent model as compared to the exclusive jurisdiction model.[131]

The authors propose a concurrent model based on two foundations which will be rooted in the international best practices discussed above and the Financial Sector Law Reforms Commission Report of 2013 ('FSLRC Report').[132] Firstly, there should be a well-defined mechanism of cooperation between the regulators and the commission which will settle cases of overlap, forum shopping and the disputes between the two bodies. Secondly, there should be an apparatus to harvest institutional collaboration at the time of drafting regulations and policies as well as at the stage of adjudication. This will ensure a harmonious and symbiotic relationship between the two agencies.

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131 Competition Act, 2002, Section 21-21A.

132 GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

A. The Structure of Co-operation between CCI and Sectoral Regulators

This model will focus on the need to have a detailed working relationship between the regulators and the competition commission. The quantity of conflicts between the two bodies is directly proportional to the extent of ambiguity of the wording of the legislature. Therefore, the authors suggest the following mechanism to overcome the problem of overlap. If a matter comes before the competition commission and if one of the parties is a player in any of the sectors regulated by sectoral regulator, then the commission must inform the concerned sector regulator.[133]

For example, if Vodafone is one of the parties before the Commission, the latter must inform TRAI that it is hearing the dispute regarding a player regulated by it. Similarly, if there is a case before the regulator which has competition implications then the competition commission should take the lead and issue a notice to the regulator to resolve the issue of overlap of jurisdiction. This procedure of notice will address the confusion in the present reference mechanism which depends on the referrer's opinion of overlap.

After the issue of notice, there should be an internal meeting between the two bodies to decide jurisdictional aspect of the case and who is better suited to adjudicate the dispute.[134] If an agreement cannot be reached, the Competition Appellate Tribunal should have the mandate to decide which body should hear the case or if a joint bench with representatives from both

133 *Id.* ¶ 5.9.
134 *See* The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(2).

institutions would be necessary. This suggestion is based on the success of the United Kingdom Concurrency Regulations discussed above.[135] Further, there would be no question of forum shopping because once it is decided which body is to exercise jurisdiction, the other body will not have a chance to adjudicate upon the matter. This would avoid a situation where CCI would refuse to comment on TRAI Regulations alleging them to be technical issues.

FSLRC Report deals with reforms in the financial sector, but it comments on the interaction between financial sector regulators and competition commission.[136] Thus, the model proposed by this report is equally relevant in the context of conflict between CCI and any industry specific regulator. This report suggests that CCI should submit a report reviewing the draft regulations of industry specific regulators highlighting the potential competition implications.[137] The regulator must consider the recommendation and it must give valid reasons when it decides to deviate from the recommendation.[138]

Further, if the commission feels that the regulator through its policy actions has caused a 'negative effect' for competition in the industry, the Commission can submit a report in this regard and the regulator should consider it and respond to it.[139] If it fails to respond within a reasonable time

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135 The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 5(1).

136 GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

137 *Id.* ¶ 5.9

138 *Id.*

139 *Id.*

the commission can issue binding directions to neutralise the negative effect caused in the regulated market.[140] Even, though this model is not directly relevant to jurisdictional conflict, the authors feel that it would create much needed balance between the two bodies by involving them together right from the stage of formulating the policy.

B. Institutional Collaboration between CCI and Sectoral Regulators

The second foundation of our model will be built on an institutional collaboration between the regulators and the Commission. To promote an exchange of information and technical expertise on a regular basis, it is required that there should be a working party group similar to the one adopted in the United Kingdom, where the regulators and the commission have periodic meetings to discuss overlapping issues so that both sides can benefit from a thorough discussion on overlapping issues.

This interaction could be an important aspect of the competition advocacy function of CCI which includes training professionals on competition issues.[141] Similarly, the commission will gain valuable technical knowledge about the sector from the regulators. Such a working party group can also organise workshops together to better understand the interlinking issues between the sector regulation and competition law. Such efforts have worked in countries like UK, Canada, USA because both sides have tried to

[140] Draft Law on Indian Financial Code, 2013, Section 134.
[141] The Competition Act, 2002, Section 49.

maintain cordial relationships through regular periodic meetings and staff transfers.[142]

The authors also feel that the Act should be amended to include a provision which mandates that the CCI has MOUs with the sector regulators which will promote a harmonious relationship. This is evident in many countries like UK, Finland, Ireland and South Africa. MOU's have the advantage that both bodies can freely tailor the ambit of co-operation policy regarding investigation, adjudication and institutional collaboration. Even the FSLRC report has a provision which emphasises on the need for such MOUs.[143]

Further, even the planning commission in its Working Group on Competition Policy made pertinent suggestions to promote this institutional culture by coordinated staff transfers on deputation basis as well as sharing of experts by both bodies.[144] Similar policy of staff transfers is followed in United States, Australia and Zambia amongst others and has garnered a co-operative culture between both institutions. This suggestion is important in the context of India where we have witnessed turf war between regulators and CCI regarding policy formulation and adjudication of overlapping disputes. Thus, a clear delineation of co-operation and collaborative culture may usher a sea

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142 *Competition Authorities and Sector Regulators: What is the best operational framework,* VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008.

143 Draft Law on Indian Financial Code, 2013, Section 138.

144 Chapter VII, Report of the Working Group on Competition Policy, Planning Commission, Government of India, February 2007, 43.

change from the current turf war to a collaborative environment where competition law is enforced by both bodies.

VI. CONCLUSION

Worldwide policy makers have been faced with questions over enforcement of competition law in regulated sectors. While regulators and competition agencies share their own strengths and weaknesses, legislative ambiguity has rendered the reference mechanism under the Act dormant. The confusion has given way to different responses by CCI while handling overlapping cases of different sectors. With regard to PNGRB, the CCI has mostly passed the buck, while with respect to TRAI it has sought to retain jurisdiction. This disturbing trend ought to be replaced by certainty and collaborative environment.

Global experience reveals two important elements of a successful policy to resolve jurisdictional conflict. First is defining the contours of co-operation between bodies. In this vein, India must adopt the model of issuing notice by the interested regulator in overlapping instances to resolve within themselves or in cases of failure by the COMPAT, regarding who is better suited to exercise jurisdiction. Second defining feature is the institutional collaboration that can reduce the potential of a turf war between regulators and CCI. This could be done through various mechanisms including regular staff transfers, entering into Memorandum of Understanding, and having regular Working Party Meeting between both sides etc.

For harvesting the full benefit of this co-operation, India must adopt a combination of these measures and ensure they are implemented effectively. The authors believe that these two measures would usher not only better administration of competition law in regulated sectors, but also eventually extend to co-operation in framing regulatory policies, similar to the model envisaged by the FSLRC Report. An example would be TRAI cooperating with CCI while deciding the spectrum allocation or the number of players suitable for the market. Co-operation at policy level can have a great impact of reducing the number of jurisdictional challenges and regulatory showdowns by ensuring co-operation at the very nascent stage of policy making.

TWO MINUTE EXPERIMENT GONE BAD: STARS TO BEAR LIABILITY?

Raghavi Viswanath and Twinkle Chawla[1]

ABSTRACT

From hyperbolic claims of increased concentration to fairness or perfect shape in 5 days; advertisers today have resorted to desperate measures to outrun their competitors in this era of sensationalization. Further, celebrities have become the biggest grossers in this industry by capitalizing on the impressionable public perception. The Maggi controversy has progressively gained notoriety for opening up a can of worms and unsettling the insulated position which the celebrity endorsers previously donned. Despite having encountered several instances of potential liability for celebrity endorsers, Indian law has not yet explicitly recognized this concept.

This essay seeks to answer three fundamental questions: (a) whether celebrities can be held liable for their involvement in misleading advertisements under the current legal framework; (b) If not, whether such a liability should be imposed and the modalities of the determination of the extent of this liability and (c) how is the balance between publicity rights and social responsibility of the celebrities to be arrived at.

The authors have argued for a joint and several liability of the endorser and manufacturer/advertiser accruing on the proof of knowledge of the defect or lack of due diligence. Although it is true that introduction of

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endorser liability should not be viewed as a dilution of the restitutionary obligations of the manufacturer, the exact determination of the contours of these responsibilities remains to be seen.

I. INTRODUCTION

Being a country where Bollywood actors and cricketers are elevated to the status of gods, it is natural that India is a haven for celebrity endorsements. However, the recent Maggi controversy, wherein celebrities like Madhuri Dixit, Amitabh Bachchan and Preity Zinta are being subjected to legal scrutiny for promoting Maggi noodles,[2] demonstrates that celebrity association does not insulate a brand from its legal obligation of ensuring good quality. This essay aims at understanding the legal contours and ramifications of the liability that accrues to celebrity endorsers for their involvement in misleading advertisements.

The twenty-first century was the harbinger of a wave of consumerism which brought about a paradigm shift in the legal responsibilities of the buyer and the seller. Consequently, the rule of caveat emptor was replaced with a higher duty of disclosure on part of the seller with respect to the quality of the product. It was at this time that advertisements were conceived as an accessible medium for dissemination of product information. However, with increase in competition, the focus of advertisements came to be dictated by commercial success alone.

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2 *Court orders against Amitabh, Madhuri, Preity over Maggi row*, THE HINDU (Jun. 2, 2015).

One of the tools adopted by the advertisers in this regard was puffery. Right from instant glow in five minutes, to assured returns in real estate, advertisers have increasingly exaggerated the efficacy of their products in the bid to outrun their competitors. Initially, India followed the English position of permitting puffery.[3] In 2008, the Madras High Court condemned this practice and held that: "*Recognizing such rights of the manufacturers would amount to de-recognizing the rights of the consumers.*"[4] However, the consumers continue to be misled by this sensationalized advertising.

In order to lend credibility to their hyperbolic claims, advertisers often hire celebrities as endorsers. Cadbury's Cocoa advertisement featuring Queen Victoria was the first to embrace this trend, which has today become a popular means of increasing viewership.[5] Most consumers intuitively buy into the brand name associated with the celebrity.[6] In fact, a study reveals that 50% of the advertisements in India feature a celebrity[7] which lends credit to the conclusion that the presence of a celebrity has a substantial influence on consumer choice as well as the degradation of consumer rationality.

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3 Mohammed Imranullah, '*Courts cannot permit puffery in advertising*', THE HINDU (Sep. 29, 2008).

4 (2008) 7 MLJ 1119.

5 George Cheriyan, Deepak Saxena & Amarjeet Singh, *Study on the Status of Law Enforcement for Misleading Advertisements in India and its impact on consumers*, CONSUMER UNITY AND TRUST SOCIETY (2012).

6 Kertz, Consuelo Lauda and Ohanian, Roobina, *Recent Trends in the Law of Endorsement Advertising: Infomercials, Celebrity Endorsers and Nontraditional Defendants in Deceptive Advertising Cases*, HOFSTRA LAW REVIEW VOL. 19, ISS. 3, Article 3 (1991) ["Kertz"].

7 WARC, *Use of celebrities has mixed results in India* (Feb. 4, 2010) available at http://www.warc.com/LatestNews/News/ArchiveNews.news?ID=26276 [last accessed on July 10, 2015].

II. LEGAL FRAMEWORK OF MISLEADING ADVERTISEMENTS

The general understanding that prevails with respect to misleading advertisements is that it is a representation which "*is false in substance and in fact*".[8] The representation is to be judged by ascertaining whether the discrepancy between the fact as represented and the actual fact, is such as would be considered material by a reasonable representee.[9]

Indian courts have applied this test in determining the fact of misrepresentation. For instance, in the case of *Lakhanpal National Ltd. v. M.R.T.P. Commission*[10], Godrej was asked to remove the words "total safety" from its hair dye advertisement where the dye was known to cause breast cancer amongst women.

There is no codified legislation that exclusively monitors the veracity of advertisements in India. Hence, the regulation of this arena is extremely scattered, with largely, sector specific legislations prohibiting misleading advertisements with respect to their respective products. Accordingly, the regulatory bodies established under these laws have been empowered to issue directions, regulations and rules to regulate misleading advertisements.

However, to an extent, the Consumer Protection Act, 1986 ("COPRA") provides for a general condemnation of misleading

8 Halsbury Laws of England, ¶¶ 1044, 1045 (4th edn., 1998).
9 AIR 1989 SC 1692.
10 *Id.*

advertisements, in as much it deals with goods and services[11]. COPRA classifies the issuance of a misleading advertisement as an unfair trade practice ("UTP"). Section 2(1) (r) states that when a trader:

> *"(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;*
>
> *(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services";*

then such an act will be deemed to be a UTP. The District Collector can, *inter alia*, award compensation to the consumer for the injury suffered, or order withdrawal of the advertisement,[12] or direct the issuance of corrective advertisement at the defaulter's cost.[13]

Additionally, Section 6 of the Cable Television Networks (Regulation) Act, 1995 prohibits the transmission of advertisements which are not in conformity with the advertisement code, as set out under Rule 7 of the Cable Television Network Rules, 1994. Rule 7(9) was amended to incorporate the Advertising Standards Council of India Code[14] ("ASCI Code"), which obligates the advertiser to ensure that the advertisements do not distort facts or mislead the consumer by means of implications or omissions.[15]

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11 COPRA, Section 1(4).
12 COPRA, Section 14.
13 Consumer Protection (Amendment) Act, 2002, Section 10.
14 An amendment to the Cable Television Network Rules, 1994, notified on Aug. 2, 2006, incorporated the ASCI code.
15 The Code for Self-Regulation in advertising 2007, Declaration of Fundamental Principles, PrincipleI.

Further, Rule 7(1)(l),(g),(h) of the Bureau of Indian Standards (Certification) Regulations, 1988 which are framed under the Bureau of Indian Standards Act, 1986 prohibits advertisements wherein a person *claims or implies* that product manufactured by him has been approved by Bureau of Indian Standards ("BIS") when he does not hold a *valid license* for that product under the recognized product certification scheme of the BIS.

While the above legislations are applicable across all kinds of products, certain laws dealing with a specific category of products also exist. For instance, an advertisement pertaining to drugs cannot purport or claim *to prevent or cure or convey to the intending user thereof any idea that it may prevent or cure* certain *specified* diseases, as stipulated under Rule 106 of the Drugs and Cosmetics Rules, 1945[16]. Such specified diseases span from genetic disorders, baldness, diabetes, obesity to life threatening diseases such as AIDS, cancer etc.

Similarly, Section 4 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, prohibits advertisements relating to a drug if it contains any matter which directly or indirectly gives a false impression regarding the true character of the drug or makes a false claim about the drug or is otherwise false or misleading. Additionally, under Section 3 of The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 ("Infant Foods Act") a person cannot *advertise or take part in the publication of an advertisement* pertaining to infant milk

[16] Framed under Sections 6(2), 12, 33, 33N of the Drugs and Cosmetics Act, 1940.

substitutes, infant foods and feeding bottles which *creates a belief* in or *gives an impression* to the consumers that such products are better than or equivalent to the mother's milk.

Further, Section 5 (1) of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 ("2003 Act") prohibits all persons from taking part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.[17] Section 5(3) clearly states that no person under a contract or otherwise shall agree to promote the use or consumption of such products. Although the 2003 Act and Infant Foods Act also deals with consumable products, the target area is restricted to tobacco products and infant foods respectively.

Hence, in order to deal with all kinds of food products, the Government enacted the Food Safety and Standards Act, 2006 ("FSSA"). The FSSA prohibits misleading advertisements pertaining to food products,[18] and imposes a penalty which may extend up to Rs.10 lakhs in case of default[19]. In addition to the aforementioned legislations, the regulatory bodies established under different sector specific legislations have also brought out guidelines, regulations and rules that regulate misleading advertisements.

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17 Section 5(1), Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003.

18 FSSA, Section 24.

19 FSSA, Section 53.

For instance, the Telecom Regulatory Authority of India, through its Direction on Preventing Misleading Tariff Advertisement, 2012 has obligated all telecom service providers to *only* make advertisements that are unambiguous, transparent and non-misleading. An advertisement is considers misleading by TRAI if it is likely to induce the consumer to a tariff plan which he would not have otherwise subscribed or if it contains an untrue statement or omits a material fact or fails to disclose attached limitations and restrictions.

The service providers are also required to submit a compliance report in this regard to TRAI on a half yearly basis. Similarly, the Insurance Regulatory Development Authority ("IRDA"), under the IRDA (Insurance Advertisements and Disclosure) Regulations, 2000 has prohibited insurers, intermediaries and insurance agents from making misleading advertisements.[20] Such persons also have to adhere to the ASCI Code while making and publishing the advertisement.[21] Further, the IRDA is empowered to direct the person to publish a corrective advertisement in case his advertisement is found to be misleading.[22]

Additionally, in respect of securities, the Securities and Exchange Board of India ("SEBI"), has been empowered to prohibit misleading advertisements. SEBI classifies a misleading advertisement or which contains distorted material facts as a fraudulent and unfair trade practice and prohibits

[20] As defined under Regulation 2(d) of the IRDA (Insurance Advertisements and Disclosure) Regulations, 2000 ("IRDA Regulations").
[21] IRDA Regulations, Regulation 12.
[22] IRDA Regulations, Regulation 11.

such practice.[23] The Reserve Bank of India is also empowered to suppress the use of misleading advertisements by financial institutions.[24]

These restrictions have been deemed to be consistent with the principles of reasonableness enshrined under Article 19(2) of the Indian Constitution. In the case of *Hamdard Dawakhana v. Union of India*[25]*:*

> *"An advertisement is no doubt a form of speech but its true character is reflected by the object for the promotion of which it is employed…When it takes the form of a commercial advertisement which has an element of trade or commerce, it no longer falls under the concept of freedom of speech."*

The freedom of speech and expression conferred on the advertisers is counter-balanced by the consumers' right to receive accurate information, which is inherent in Article 19(1)[26] and bolstered by Section 6 of COPRA.[27] The National Consumer Disputes Redressal Commission (NCDRC), has also made its position with regards to misleading advertisements clear. In the case of *MR Ramesh v. M/S Prakash Moped House*,[28] the Commission warned against the use of fine print to conceal crucial information that might mislead the consumers. The Commission has used its powers to issue corrective advertisements for instances of misleading advertisements which squarely fell

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23 Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, Regulation 4(k).

24 Reserve Bank of India Act, 1934, Section 45J.

25 AIR 1960 SC 554.

26 Secretary, Ministry of Information and Broadcasting, Government of India v. The Cricket Association of Bengal (1995) 2 SCC 161.

27 COPRA, Section 6.

28 RP No. 831 of 2001.

within the definition of unfair trade practices (aside from misrepresentation) according to the COPRA.[29]

III. LEGAL DIMENSIONS OF THE MAGGI CONTROVERSY

The instant Maggi controversy arose when the Uttar Pradesh Food Safety and Drug Administration collected samples of the instant noodles subsequent to a complaint and found that the noodles contained lead and monosodium glutamate ("MSG") in excess of the prescribed limits.[30] Further, a First Information Report ("FIR") was also filed under various provisions of the Indian Penal Code ("IPC") relating to cheating[31] and noxious food[32] against Nestle India and the three brand endorsers before the Chief Judicial Magistrate in the Muzaffarpur district court.[33] The FSSAI, in its order dated June 5, 2015 found that Nestle India had violated *inter alia*:

- Section 20 of the Food Safety and Standards Act, 2006- This section mandates that the food product should not contain any toxin or heavy metal in excess of the prescribed limit. However, the FSSAI found that Maggi contained 17 parts per million lead, exceeding the prescribed limit of 2.5 part per million. Section 48 of the FSSA also makes it an offence to

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29 M/S Cox & Kings Pvt Ltd v. Mr Joseph A. Fernandes & Anr., RP No. 366 of 2005; Tesol India v. Shri Govind Singh Patwal, RP No. 2501 of 2010; United Breweries Limited v. Mumbai Grahak Panchayat, FA No. 491 of 2005.

30 FSSAI Order dated June 5, 2015 available at http://www.fssai.gov.in/Portals/0/Pdf/Order_Nestle.pdf.

31 IPC, Section 420.

32 IPC Section 270 (malignant act likely to spread infection of disease dangerous to life), Section 273 (sale of noxious food or drink) and Section 276 (sale of drug as a different drug or preparation).

33 Amarnath Tewary , '*Maggi case: Bollywood actors face FIR'*, THE HINDU (June 3, 2015).

add substances to food which may make it toxic or injurious to health. Hence, Nestle was found to have violated both of these provisions.

- Section 23 of the FSSA Act- This section prohibits the misbranding of products and display of false and misleading information on the packaging. Here, the FSSAI found that MSG was found in the tastemaker of the Maggi noodles while "*No Added MSG"* was advertised on the Maggi packet. On account of this default, Nestle India's actions attracted a fine of Rs. 3 lakhs for misbranded food products as prescribed by Section 52 of the FSSA Act.

- Section 24 of the FSSA Act- As aforementioned, this Section read with Section 53 prohibits misleading advertisements made with respect to food products. It was found that the claim of Maggi being both "healthy and tasty" was misleading in the light of the proven adverse effects of excessive lead and presence of MSG. Nevertheless, the FSSAI did not examine whether the endorsers are also qualifying as persons who 'made' the advertisements, sufficient enough to bear joint responsibility, as required by the provision.

- Section 26 of the FSSA Act- This section enjoins a food business operator to ensure that the food articles manufactured/sold by him are *inter alia* not unsafe and misbranded. Nestle India was found guilty of violating this obligation. Additionally, Section 27 which stipulates that the manufacturer or packer of an article of food shall be liable for such article of food if it does not meet the requirements of the FSSA was also attracted. However,

while these provisions could easily be invoked in the case of manufacturers, their application was more complicated with respect to endorsers. This is because conventionally, persons concerned with the advertisement of such defective products are not liable to the same degree as the manufacturers or sellers or even the distributors.

The FSSAI ordered the recall of nine previously approved products of Maggi from the market. However, this order was set aside by the Bombay High Court vide its order dated August 13, 2015 which held that the principles of natural justice had not been adhered to. The court had allowed Nestle to go in for fresh testing of five samples of each variant of the noodles at three independent laboratories in Punjab, Hyderabad and Jaipur which were accredited with National Accreditation Board for Testing and Calibration Laboratories ("NABL") pursuant to which Nestle India resumed the sale of Maggi noodles.[34] The FSSAI later moved the Supreme Court challenging the Bombay High Court's decision and the sanctity of the samples provided to the government labs for retest.[35]

IV. LIABILITY OF CELEBRITY ENDORSERS

In the recent past, a number of celebrities have been embroiled in legal disputes, leaving the legal fraternity divided on the issue of their liability in reference to misleading advertisements. Celebrities have been a popular choice

[34] *Bombay High Court puts Maggi back on menu, but after 6 weeks of tests*, THE ECONOMIC TIMES (Aug. 14, 2015).

[35] *FSSAI challenges Bombay HC order in Maggi noodles case*, THE INDIAN EXPRESS (Nov. 17, 2015).

for advertisers, who aim to capitalize on the tendency of the public to associate celebrity involvement with credibility. The fiduciary implications of this association make it imperative for celebrities to be accountable for their endorsements.

The Federal Trade Commission ("FTC") which is the primary consumer protection agency in the USA, has defined an endorsement as,

> *"an advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser".*[36]

The characterization of a representation as an endorsement in the USA is based upon the status of the endorser and not the content of the representation. Hence, a popular automobile racer who promotes a brand of engine oil, by emphasizing on its "smooth ride, strength, and long life" will be considered to be an endorser even if he does not state that this is his personal opinion.[37]

American jurisprudence seems to be the most coherent in terms of endorser liability. Section 5 of the FTC Act[38] declares unfair or deceptive acts

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36 Guides Concerning Use of Endorsements and Testimonials in Advertising 16 C.F.R. § 255 (1980) ["Guides"].

37 Kertz, *supra* note 5.

38 15 USC 45.

or practices to be unlawful, while Section 12 specifically prohibits false advertisements likely to induce the purchase of food, drugs, devices or cosmetics. These provisions have been made applicable not only to manufacturers but also to retailers, advertising agencies and endorsers.[39] In *Porter & Dietsch* v. *FTC*[40], a drug store retailer was held liable for false claims about a diet pill as he had a fair and reasonable opportunity to evaluate the appropriateness of the claims made, despite not being involved in generating the advertisement himself.

Further, in *FTC v. Publishing Clearing House, Inc.*[41], the Court held that in order to hold a celebrity liable for a misleading advertisement as a direct participant, it must be proved that the individual either (1) had actual knowledge of material misrepresentation; or (2) was recklessly indifferent to the veracity of the representation. However, the celebrity is not required to conduct statistical or clinical investigations in order to satisfy the criteria of substantiation.[42] It is sufficient if (a) the representation reflects his honest opinion, findings or beliefs,[43] and (b) he has a good reason to believe that the representation is true on the basis of a perusal of the government accreditations and certifications of the product.

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39 Kertz, *supra* note 5; United States of America v. Nu Skin International 297-CV-0626G.
40 605 F 2d 294.
41 106 F.3d 407.
42 *Id.*
43 *Id.*

This test was applied in *FTC v. Garvey*[44], wherein the Court did not hold the celebrity liable because the endorsement was based on his own experience and honest personal opinion. To combat the menace of celebrity endorsements, the FTC adopted the "Guides Concerning Use of Endorsements and Testimonials in Advertising".[45] Although the Guides lack the force of law, they are taken to have significant persuasive value.[46] They require that:

1. The accuracy of the celebrity's claims must be substantiated by the advertiser;

2. If the advertisement claims that the celebrity uses the product or service, the celebrity must in fact be a bona fide user; and

3. The advertiser must use the endorsement so long as he believes in good faith that the celebrity continues to hold the views expressed in the advertisement.[47]

China, in comparison, addresses the issue of endorser liability in a more rigid manner. Article 38 of the Advertisement Law of the People's Republic of China, 1995, provides that-

> "*if an advertising agent or advertisement publisher, who knows clearly or ought to know that the advertisement is false, still designs, produces and*

44 383 F.3d 891 (9th Cir. 2004) ["Garvey"].
45 Guides, *supra* note 19.
46 Garvey *supra* note 27.
47 Guides, *supra* note 19.

> *publishes the advertisement, it shall bear joint and several liability according to law."*

Additionally, the fifth provision of the Food Safety Law propounds that any person who actively participates in the misleading advertising of food products will bear equal responsibility if the consumer's legitimate interests are harmed.[48] Therefore, the consumer can choose to sue the manufacturer/advertiser of the product or the celebrity who endorsed it.

Such a standard was adopted by China due to the calamitous effect of misleading celebrity endorsements. In 2007, a popular Chinese actress, Deng Jie, endorsed the Sanlu infant milk, assuring its trustworthiness. However, it was later found out that the milk contained melamine, which caused kidney stones in infants.[49] Consequently, the Chinese Government heightened the stringency of its position in 2009, when five national ministries jointly issued a circular, banning actors and social celebrities from hosting nutritional, medical and health care media programs.[50]

The reason for such a position was the risk of the erosion of rationality in the perception of the public due to the fact that products were being endorsed by celebrities. It was this need to protect the public from the adverse effects of such unwavering belief that overweighed the personality rights of the endorser, and subjected them to a higher threshold of accountability.

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48 Mingqian Li, *On Regulation of Celebrity Endorsement in China*, JOURNAL OF POLITICS AND LAW, Vol. 4, No. 1 (March 2011) ["Li"].

49 *Id.*

50 Li, *supra* note 47.

Nevertheless, it is important to acknowledge that the concept of fiduciary liability is implied and has not *stricto sensu* acquired the force of law. In this context, the FTC enforcement Guides and the Chinese law operate as the only jurisprudential models for the imposition of fiduciary liability for endorsers, until it receives formal legal citation.

As opposed to USA and China which follow a liability regime, the European Union[51] and Malaysian legal framework[52] propose a prohibitory mechanism, wherein by means of a self-imposed voluntary advertising code, celebrities are precluded from endorsing products like drugs, medicines, tobacco, alcohol and food items. In India, a consumer can generally, seek relief under the following statutes:

A. COPRA

A consumer, consumer organisation or the State or Central Government can file a complaint with the District Forum, in respect of a UTP committed by a trader under Section 12 read with section 2(c). It is to be noted that the Government took aid of this provision while filing the complaint against Nestle in the Maggi case.[53]As discussed above, misleading advertisements fall within the ambit of UTP. However, the term trader has

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51 Sudipto Dey, *Making Celeb Endorsers Liable,* BUSINESS STANDARD (Jun. 7, 2015) available at http://www.business-standard.com/article/opinion/making-celeb-endorsers-liable-115060700745_1.html [last accessed on July 10, 2015].

52 MALAYSIAN CODE OF ADVERTISING PRACTICE, Advertising Standards Authority Malaysia (3rd edn., 2008).

53 *Maggi row: In a first, Centre moves Consumer Forum*, THE HINDU (Jun. 3, 2015).

been defined to include the seller, distributer, manufacturer and the packer.[54] This definition is exhaustive, signifying thereby that middlemen,[55] dealers[56] and endorsers do not fall within its purview. Hence, currently, a consumer cannot proceed against an endorser under the COPRA.

B. FSSA

As discussed, Section 24(2)(c) of the FSSA imposes liability on any person who makes a representation and gives to the public a guarantee of the efficacy of a product unaccompanied by any scientific or adequate justification. The ambit of the term 'person' is extremely wide and not restricted to a manufacturer or a trader. Hence an endorser can be held liable under FSSA.

C. ASCI Code

The Advertising Standards Council of India ("ASCI") is a non-governmental initiative started in 1985 with an aim to regulate the content of advertisements.[57] This self-regulatory body deals with complaints from consumers or the industry against advertisements that are in contravention of the ASCI Code, which is a voluntary, self-imposed code.[58] The ASCI can also take *suo moto* action[59] and in general, works towards increasing consumer

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54 COPRA, Section 2(1)(q).

55 Kuldip Singh Kalra v. Roshan Lal Pal, II (1993) CPJ 170 (171) (NC).

56 Chairman, Ajara Urban Co-operative Bank v. VJ & Sons II (1993) CPJ 974 (977) (Mah.).

57 Survey on Advertising Standards, FICCI (2011) available at http://m.ficci.com/sectorDetail.asp?secid=80 [last accessed on July 10, 2015].

58 *Id.*

59 PUSHPA GIRIMAJI, MISLEADING ADVERTISEMENTS AND CONSUMER 10 (2nd edn., Centre for Consumer Studies, 2013).

awareness. The Department of Consumer Affairs has given tacit recognition to ASCI by launching the Grievances against Misleading Advertisements, an online portal in collaboration with the ASCI, with a view to process consumer complaints.[60]

V. LIABILITY OF PAST ENDORSERS

The Maggi controversy also poses questions regarding the liability of an erstwhile endorser of a product when the advertisement is found to be misleading. Although Preity Zinta had endorsed Maggi 12 years ago[61] and Amitabh Bachchan had stopped endorsing the product in 2013, yet they were also impleaded in the FIR filed against Nestle and Madhuri Dixit.

General practice elucidates that the rights and liabilities of the parties to the contract extinguish with the performance of the contract.[62] However, the expiry of the period of the contract does not preclude tortious claims or criminal liability for the alleged misrepresentation.[63] Section 270 of the IPC punishes a defaulter with imprisonment extending up to 2 years for malignant acts likely to spread infection or diseases dangerous to life. Similarly, Section 273 prohibits the sale of noxious food or drinks by a seller who knows or has reason to believe that such items are noxious, whereas section 420 imposes

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60 Press Information Bureau, Ministry of Consumer Affairs, Food & Public Distribution (Mar. 18, 2015) available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=117262 [last accessed on July 11, 2015].

61 *Amitabh Bachchan: Stopped endorsing Maggi two years ago,* INDIA TODAY (Jun. 3, 2015), available athttp://indiatoday.intoday.in/story/maggi-noodle-amitabh-bachchan-nestle-india-msg-lead/1/441979.html [last accessed on July 11, 2015].

62 *Sarda Prasad v. Lala Jumma Prasad* AIR 1961 SC 1074.

63 Marakkar v. State of Kerala A.S. No. 918 of 1997.

punishment for the offence of cheating and dishonestly inducing any person to deliver property or valuable security.

In order to attract liability under the aforementioned sections, *mens rea*, though in varying degrees, has to be mandatorily present. The offence of cheating requires proof of an intention on the part of the accused to cause wrongful loss to the other person or wrongful gain to himself,[64] whereas the presence of malice along with reason to believe needs to be proved to attract Section 270[65]. Section 273, in comparison, requires only knowledge of the noxious nature of the product or a reason to believe the same.[66]

Although the aforementioned provisions were invoked in filing an FIR against the endorsers of Maggi, it is highly improbable for them to be successfully prosecuted under them. In India, in the absence of a legal duty imposed on the endorsers to make an independent inquiry into the quality of the product, it is unlikely for the celebrities to do so voluntarily. Likewise, without proof of explicit disclosure of the defect by the manufacturer to the celebrity (which is unlikely to happen as it would be against commercial sense), the fulfilment of *mens rea* is a distant possibility.

Nevertheless, an alternative possibility of affixing liability lies under the tort of misrepresentation. When a person makes a false statement with the intention to defraud the plaintiff and the plaintiff suffers detriment as a result

64 IPC, Section 420.
65 State of Orissa v. Dr. R.C. Chowala AIR 1966 Ori 192.
66 Kailash Chand Gupta v. State 2005 CriLJ 2846.

of relying on the representation, such an act qualifies as misrepresentation.[67] The intention is presumed if the defendant wilfully used language calculated to induce a person in the circumstances of the case to act as the plaintiff did.[68] In the claim for damages arising out of a tort, the commission of the tortious act and the damage suffered form part of the cause of action.[69] In this context, the concept of limitation period comes into play. The Limitation Act, 1963 prescribes a three year period during which the right to sue for the tort of misrepresentation persists.[70]

Applying this limitation to the case of Preity Zinta, it can be reasonably concluded that no action can lie against her. However, with respect to the liability of Amitabh Bachchan, the situation seems to be murkier. A market survey reveals that a packet of Maggi can be consumed for a period of nine months from the date of manufacture.[71] Considering that cause of action is a "bundle of facts",[72] and that damage is a prerequisite in order to prove accrual of right to sue, it can be presumed that a cause of action against the representation made by Amitabh Bachchan could have arisen latest in 2014 (assuming that the last packet was bought in 2013).

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67 JEB Fasteners v. Marks Bloom & Co. [1983] 1 All ER 583.

68 Richardson v. Silvester (1873) LR 9 QB 34.

69 P.K. Kalasami Nadar v. Alwar Chettiar & Ors. AIR 1962 Mad. 44.

70 Limitation Act, 1963, Schedule, Article 113, Part X.

71 *Nestle inches up after clarification on reports of recall of Maggi noodles*, BUSINESS STANDARD (May 22, 2015) available at http://www.business-standard.com/article/news-cm/nestle-india-inches-up-after-clarification-on-reports-of-recall-of-maggi-noodles-115052200449_1.html [last accessed on July 11, 2015].

72 State Bank of India v. B.S. Agricultural Industries JT 2009 (4) SC 191.

A claim against him will be barred by limitation only it if it is brought in or after 2017. A pragmatic evaluation of this scenario will lead us to the understanding that such a claim is highly improbable but not legally impermissible. However, the approach which the Courts will adopt remains to be seen since the rules of limitation are not meant to destroy the rights of the parties but to ensure that they do not resort to deliberate tactics and seek their remedy promptly.[73]

VI. CONCLUSION AND SUGGESTIONS

In the absence of a stringent law, commercialization has overhauled the rights of the consumers. For instance, popular actor Govinda was questioned by the Food and Drugs Administration in relation to his endorsement of a herbal oil Sandhi Sudha Plus which was violative of the provisions of Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955. In his reply, Govinda pleaded ignorance of the law.[74] Similar accusations were made against Genelia D'Souza[75] and Mithun Chakroborthy[76] who were brand ambassadors for real estate companies which consequently embezzled the investor funds. Both of them refuted the charges of collusion.

Regardless of the veracity of the defense, these incidents are reflective of the reluctant attitude of endorsers towards bearing social responsibility for

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73 State of Jammu and Kashmir v. Ghulam Rasool Rather AIR 1989 SC 2125.

74 *Govinda in legal trouble over misleading ad*, HINDUSTAN TIMES (Aug. 23, 2012) available at http://www.hindustantimes.com/tabloid/govinda-in-legal-trouble-over-misleading-ad/article1-918139.aspx [last accessed on July 11, 2015].

75 Bharathi Pradhan, *Look before you endorse,* THE TELEGRAPH (Mar. 25, 2012).

76 Mr. Sajjan Khaitan & Ors. v. Mr. Sanjoy Das & Ors. Case No. 16 of 2011.

their actions. There is a need to enforce the Hohfeldian idea of correlativity of rights and duties.[77] Considering that the personality rights of celebrities have been recognized in Indian jurisprudence[78], it is only fair that such rights be accompanied by an affirmative duty towards the public. This duty can be manifested in the form of a liability in case of non-compliance. As discussed above, an endorser cannot be made liable under COPRA. On the other hand, though the FSSA does not qualify the defendant who can be made liable, its applicability is restricted to food items.

While prima facie it may seem that the problem exists due to a lack of binding advertising norms, a deeper analysis reveals that most advertisers capitalize on the loopholes in the related legislations, thereby taking actions which are not contrary to law per se but defeat the spirit of the law. Hence, introduction of liability alone will not rectify the systemic failure. For instance, Cadbury advertises Bournvita as a drink which restores the vitamins which are lost in the process of boiling milk.

It presumes that the pasteurized milk is stored at the suitable temperature till the point of usage. However, the law mandates the storage of the milk at that temperature only till the milk is stored in the dairy; leaving the quality of milk during transportation unregulated.[79] In such a situation, Bournvita cannot substitute for the nutritional value that is lost; thereby

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77 Arthur Corbin, *Rights and Duties*, YALE LAW SCHOOL FACULTY SCHOLARSHIP (1924).

78 ICC Development (International) Ltd. v. Arvee Enterprises 2003 VII AD (Delhi) 405.

79 Jyotsna Singh, *Celebrities liable for commercials*, DOWN TO EARTH (Feb. 14, 2014) available at http://live.downtoearth.org.in/news/celebrities-liable-for-commercials-43523 [last accessed on July 11, 2015].

making the claims of the advertisement baseless. We believe that the following recommendations would be a step in the right direction to tackle the aforementioned problems:

A. Expansion of the Definition of "trader" under COPRA

Section 2(1)(q) should be amended to include advertising agencies and endorsers. This step will serve two purposes: (a) clear identification of culpability of celebrities and (b) extending the scope of this liability across all products. However, COPRA should be suitably amended to make the liability of the endorser joint and several. Emulating the Chinese model, we believe that while ensuring that there is no deflection of blame from the manufacturer, the consumer at the same time should not be denied the right to restitution by the celebrity.

Such a proposal had also been discussed by the Sub-Committee set up by the Central Consumer Protection Council under the Chairmanship of K.V.Thomas.[80] The standard of culpability in order to evaluate the celebrity's conduct should be imported from the USA. The celebrity should be held liable in cases where he/she has knowledge of the defect, or has been recklessly indifferent to it. Further, there must be a reversal of the burden of proof,[81] thereby presuming knowledge on part of the endorser and placing a corresponding burden on him/her to disprove it.

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[80] Agenda for the 28th Meeting of the CCPC (Feb. 2014) available at consumeraffairs.nic.in/consumer/writereaddata/Agenda.pdf [last accessed on July 11, 2015].

[81] Indian Evidence Act, 1872, Section 102.

The Consumer Protection Bill, 2015 which was introduced in the Lok Sabha on August 10, 2015 is a positive step in this direction. The Bill seeks to establish the Central Consumer Protection Authority that is tasked with inquiring and investigating into consumer complaints, issue directions and impose penalties.[82] Commenting on the reforms that the Bill seeks to usher, the Parliamentary Standing Committee on Food, Consumer Affairs and Public Distribution (Headed by MP JC Divakar Reddy) in its report, submitted on April 26, 2016, stressed that the misrepresentation of a product especially a food product should be taken very seriously considering the influence of celebrities and high net-worth individuals or companies.[83]

The Committee, assisted by the FSSAI and the Health Ministry, recommended that a for first time offence of misleading advertisement, the offender may be penalized with either a fine of Rs 10 lakhs or imprisonment up to two years or both; for second time offence, a fine of Rs 50 lakhs and imprisonment of five years. This has been encapsulated in Section 17(2) of the Consumer Protection Bill 2015 which imposes a penalty on all persons who were party to the publication of the misleading advertisements, thereby ensuring that celebrity endorsers are within the reach of the law.

B. *Increasing Awareness about the Different Remedies Available to the Endorser*

[82] Consumer Protection Bill 2015, Section 11.
[83] *Parliamentary panel suggests fine or jail for celebrities for misleading ads*, THE INDIAN EXPRESS (Apr. 26, 2016).

While considering the culpability of celebrity endorsers, the formulation of a legal redressal mechanism to accommodate the grievances of celebrities against the indiscriminate actions of the advertisers and manufacturers is equally important. The rationale for introducing this concept is to create an amicable environment where the interests of all stakeholders are accommodated without restricting the legal avenues for the consumer. The principle of restitution can be applied in situations where the consumer has directly proceeded against the celebrity for the misleading advertisement without the latter having any knowledge of the falsity of the representation.

In the USA, a majority of the endorsement contracts contain clearly demarcated rights of indemnification to deal with such situations.[84] Aside from the contractual remedies, the endorser can claim damages for the tort of misrepresentation. A manufacturer is equally bound by the duty of full disclosure towards the celebrity with regards to the product and hence legal costs or amounts paid off as compensation are capable of being indemnified.[85]

There can be situations wherein there is no contract between the endorser and the manufacturer/advertiser, with the advertising agency being the intermediary. In such situations, the celebrity can file for damages against the agency which in turn can recover the same from the manufacturer. It is suggested that a homogenous standard for celebrity endorsement contracts be

[84] Kertz, *supra* note 5.
[85] *Swiss Marien Services SAA* v. *Gupta Coal India Pvt. Ltd.* [2015] EWHC 265.

adopted which clearly delineates the rights and liabilities of the manufacturers/advertisers and the endorser.

C. Ensuring Greater Transparency in Advertising

In order to prevent the advertisers from taking undue advantage of the discrepancies of the law, no claim regarding the efficacy of the product should be permitted to be dependent on the existence of a circumstance which is practically unfeasible. This regulation shall deter claims like the ones made by Bournvita. Further, advertisements should not be allowed to use the disclaimer of "conditions apply". Putting a greater burden on the manufacturers/advertisers will be in line with the publicity rights of the celebrities and the recommendations of the Seminar on Law and the Consumer, 1980 which argued for greater responsibility at the behest of the media houses[86].

This need to inculcate advertising ethics among the advertisers can be tackled either by creating advertising codes for each media house (as is the case with Doordarshan[87]) or making membership of the ASCI mandatory for advertisers. The Department of Consumer Affairs has also suggested that the ASCI be conferred with greater powers to issue corrective advertisements under the Consumer Protection Bill, 2015. [88]

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86 V.B. ERADI, CONSUMER PROTECTION JURISPRUDENCE 234 (1st edn, Lexis Nexis Publishers, 2004).

87 Code for Commercial Advertising on Doordarshan, 1995.

88 Standing Committee on Food, Consumer Affairs and Public Distribution, Ninth report on the Consumer Protection Bill, 2015.

In the recent past, the Indian milieu has become more receptive to the idea of increasing transparency in the public fora. Consequently, laws, now donning a protective gear, are being tilted in the favour of the common man. Hence, we believe that the time is ripe for introducing social liability of the celebrities for their involvement in misleading advertisements.

THE AADHAR SCHEME- AMBITIOUS PLAN FOR INDIA'S FUTURE OR VIOLATION OF THE RIGHT TO PRIVACY?

Rudresh Mandal[*]

ABSTRACT

This essay seeks to provide a brief understanding of the right to privacy – whether it is enshrined in the fundamental rights guaranteed by the Constitution of India, if so, whether it can be waived voluntarily and other allied questions. It also seeks to examine the Aadhar Act, 2016 in light of such understanding. However, the primary focus is on certain provisions in the Act which could be construed to violate one's right to privacy and whether disclosures made by an individual under the Act are truly voluntary or not. The essay concludes not only by suggesting certain measures for reform of the Act but also by showing that the Aadhar Act, which has great potential, needs to stay true to its stated goal of swift delivery of benefits to various sections of society.

I. INTRODUCTION

A. The Jurisprudence around the Right to Privacy

In *Ram Jethmalani v. Union of India* [1], the Supreme Court of India held that the *"right to privacy is an integral part of right to life"* calling it a *"cherished*

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1 Ram Jethmalani v. Union of India, (2011) 8 SCC 1.

constitutional value" and noting that individuals should be entitled to realms of freedom which are not subjected to public scrutiny. The Court further said that the Court being "constitutional adjudicators" would strive to preserve,

> *"the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by governments or private citizens, howsoever well-meaning they may be, have to be necessarily very carefully scrutinized."*

Yet, in the Aadhar hearings, the Attorney General of India has contended that the right to privacy was in fact, not a fundamental right granted by the Constitution. He seems to have based his arguments on two cases, *MP Sharma v Satish Chandra* [2] and *Kharak Singh v. State of UP.* [3] These two cases had laid down that the fundamental right to privacy was not explicitly present in the Constitution. A superficial reading of the Constitution may confirm this, but on a factual basis only. However, "*a constitution is also its unwritten text in the penumbra of judicial decisions"* and the jurisprudence of privacy has progressed ever since Kharak Singh was decided in 1963. [4]

Following the case of *Maneka Gandhi,* [5] the Supreme Court has continually reiterated that the rights guaranteed under Article 21[6] are multi-

2 MP Sharma v. Satish Chandra, AIR 1954 SC 300.

3 Kharak Singh v. State of UP, 1964 SCR (1) 332.

4 Jhuma Sen, *Why Aadhar's Backers are Wrong to Say Privacy Rights Can be Voluntarily Waived*, THE WIRE, http://thewire.in/2015/10/09/why-aadhars-backers-are-wrong-to-say-privacy-rights-can-be-voluntarily-waived-12769/, (Last updated 9 October, 2015).

5 Maneka Gandhi v. Union of India, 1978 SCR (2) 621.

6 Article 21of the Constitution of India, 1950.

dimensional and the words, "life and liberty" should not be subject to a narrow construction, but a broad meaningful one. A change in social realities and the spheres of politics, the economy and society in general often require the law to develop along with it. "*Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law*." [7]

It is ironically the minority opinion in *Kharak Singh*, where Justice Subba Rao laid down that it was, "*true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty"* [8] which served as a foundation for later developments with regard to expanding Article 21.

In the case of *Gobind v. State of Madhya Pradesh,* [9] the Apex Court laid down that the right to privacy is a fundamental right emanating not only from Article 21, but also from Article 19(1) (a) and (d). However, here it was also held that the right to privacy was not absolute and such restrictions had to be made in lieu of compelling public interest. It is this restriction which the Government has relied on to justify its intrusion into the privacy (the intrusions have been explained subsequently) of individuals under the Aadhar Act.[10]

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7 AHARON BARAK, THE JUDGE IN A DEMOCRACY, PRINCETON UNIVERSITY PRESS, 1-3, (2009).

8 *Supra* note 3.

9 Gobind Singh v. State of Madhya Pradesh, AIR 1975 SC 1378.

10 The Aadhaar (Targeted Delivery Of Financial And Other Subsidies, Benefits And Services) Act, 2016, available at : https://uidai.gov.in/images/targeted_delivery_of_financial_and_other_subsidies_benefits_and_services_13072016.pdf.

In cases such as *R. Rajagopal v. State of TN* [11] and *PUCL v. Union of India* [12](albeit in the context of freedom of the press and phone tapping, respectively), the Court has interpreted the right to privacy broadly to mean the right to be let alone, and have held it to be a fundamental right. Yet in each case the court has reiterated that this right is subservient to the interests of the state and the state can infringe the same if a reasonable basis for such infringement is present.

While in each of the above cases, the Courts have interpreted privacy in terms of territory and spatiality, in *Selvi v. State of Karnataka* [13], the right to privacy has been understood to exist "*in persons, not places"* facilitating a well-rounded understanding of the right. Further, in the above case it was held that an individual had the liberty to decide whether he wanted to disclose a personal fact or not, free from State interference.

The question that now arises is whether the Aadhar scheme is a reasonable basis for intrusion. The jurisprudence so far has dealt with information that was extracted from the individual through coercion, without consent, such as phone tapping in the PUCL case. The Aadhar scheme claims to involve only voluntarily disclosed information by the individual, but since crucial details such as who will use the data, for what ends will it be used and

11 R Rajagopal v. State of Tamil Nadu, 1994 SCC (6) 632.
12 PUCL v. Union of India, AIR 1997 SC 568.
13 Selvi v. State of Karnataka, (2010) 7 SCC 263.

which agencies can access the data, remain ambiguous ,the issue that arises is whether the consent of the individual will be taken in all such cases.[14]

The Aadhar Act also does not incorporate consent when disclosures are made by the Unique Identification Authority of India ("UIDAI"). The Act could learn from the US Privacy Act of 1974 as well as the UK's Data Protection Act, 1998 both of which emphasise the consent of the individual. The question of whether the Aadhar scheme is actually voluntary or not will be dealt with subsequently, but even if we progress assuming that the scheme is voluntary, this would not exclude the possibility of breaches of privacy.

II. SUSPICIOUS LINKS

The link between the National Population Register and the Aadhar scheme (that the NPR will forward its data to the UIDAI) is one which also raises apprehension due to its potential to endanger privacy, and seems to have gone relatively unnoticed in the larger debate surrounding the invasions of privacy in the Aadhar Act itself. Similarities have often been drawn between the activities carried out under the Census Act, 1948 and the Aadhar Act and both aim at collection of data from the populace.

The Census Act accords utmost importance to the privacy of the citizens in Section 15[15] where it states that the *"records of census are not open to inspection or admissible in evidence."* The National Identification Authority Bill

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14 Amba Kak and Swati Malik, *Privacy and the National Identificaion Authority of India Bill: Leaving Much to the Imagination*, 3 NUJS Law Review, p. 499. (hereinafter Amba Kak)

15 Section 15, The Census Act, 1948.

however, enables the Government to examine data about its citizens in the Central Identities Data Repository, which actually constitutes the National Population Register; and this is where controversy ensues. The National Population Register is not sanctioned by the Census Act of 1948 and derives its legitimacy from the Citizenship Act and the Citizenship Rules. [16]

The problem which subsequently emerges is two-fold:

1) Provisions relating to confidentiality are completely absent in the Citizenship Bill, thereby rendering the data contained in the NPR vulnerable to unauthorised entities. On the other hand, it is an explicit aim that the data collected will be made available to the UIDAI.

2) The Citizenship Bill and Rules also makes such national identity numbers for every individual an essential legal requirement under Rule 7(3) and also provides for a fine upon failure of fulfilling this requirement. Thus, by linking the UID with the Citizenship Bill and Rules, the Aadhar scheme is made mandatory. [17]

To sum the differences up, while the Census Act enables the collection of information so that the state has a profile of the individual; it is not to expressly profile the individual (which is what the UID and the Aadhar do). The Supreme Court has, in its interim order relating to the Aadhar scheme prevented the sharing of the data between the NPR and UIDAI, but only until

[16] Usha Ramanathan, *A Unique Identity Bill*, 45/30 Economic and Political Weekly (2010), p.10. (hereinafter Unique Identity Bill/UID Bill)

[17] *Ibid.*

the matter is heard finally.[18] It is of paramount importance that the Court should prevent such linkages between the NPR and the Aadhar database permanently, to ensure the safety and eliminate possibilities of misuse of personal data.

III. CONTROVERSIAL PROVISIONS OF THE AADHAR ACT

A. Sections 3(1), 2(i),2(o)and 37.

Section 3(1) stipulates that *"Every resident shall be entitled to obtain an Aadhaar number by submitting his demographic information and biometric information*" to the UIDAI. In reality this burden of accepting and recording data is on the various enrolment agencies and registrars, who derive their power from Section 2(i) and 2(o) and have been appointed by virtue of the MoUs signed with various State Governments and other entities.

This delegation of a crucial duty casts aspersions on the confidentiality of such sensitive information. Further, while intentional disclosure of data by these enrolment agencies and registrars are penalised under Section 37, utter negligence (as opposed to malicious intent) is left out of its purview. Given that the UIDAI is engaging in a project centred on personal information, the protection of the same should have been of paramount importance; else privacy of individuals would be risked. Leaving negligence out of the scope of

[18] Dr. Usha Ramanathan, *Decoding the Aadhaar judgment: No more seeding, not till the privacy issue is settled by the court*, The Indian Express, New Delhi, 12th August, 2015.

punishment reflects the complacent attitude of the Government, and the UIDAI towards privacy rights of individuals.

B. Sections 23 and 33

Sections 23 and 33 provide for certain rules and processes relating to the authentication of the Aadhar numbers. However, while this is present in the Act, there are still some vital flaws. The primary flaw which arises is the silence on the source from where the request for authentication of Aadhar numbers can emerge. Given that the Aadhar Act is a welfare scheme, aiming at swift delivery of necessities to the population, it would seem safe to thus infer the kinds of people and organizations who might request for such authentication.

However, when one reads Section 33, the above inference seems to be far from certain. Section 33(b) mentions national security being an interest due to which private records may be disclosed under this Act – something which has in fact not been explicitly disregarded as an objective of the UID programme.

In light of this finding, the type of people and organization from whom such requests for authentication might come, suddenly seems precarious vis-à-vis one's privacy which might manifest itself in the form of state surveillance and tracking of its citizens.[19] Thus, information in the Central Identities Data Repository ("CIDR") may be disclosed to third parties if it is

[19] AMBA, *supra* note 14.

in *"*the interests of national security*"*. The term 'national security' is vague, and is neither defined in the Aadhar Act, or in the General Clauses Act.[20]

Generally speaking, individuals often are subjected to numerous restrictions due to larger interests of the country and the interest which must prevail (in the case of a clash of interests) is that of the *"*mass of men*"*. [21] While national security might override individual privacy on certain occasions, it is imperative that guidelines be laid down for when this can occur and more importantly it is required that national security is defined, so as to limit the power of the Government.[22]

An amendment to substitute national security with *"public emergency or in the interest of public safety"*[23], terms which appear in the section 5(2) of the Indian Telegraph Act dealing with wire-tapping, was rejected by the Lok Sabha. Further, the Indian Telegraph Act prescribes that only "urgent situations" could necessitate the Joint Secretary ordering tapping of phones.[24]

The Aadhar Act offers almost unbridled power to the executive in this regard. Due to the existence of this national security clause in Section 33, some have expressed the apprehension that-

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20 Shreeja Sen, *National security clause in Aadhaar bill under scanner*, Live Mint, 16 March, 2016.

21 *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*, (1973) 4 SCC 225.

22 Shweta Sengar, *Expand Aadhaar only after 'national security' is defined: Pavan Duggal on the contentious Bill*, CATCHNEWS, http://www.catchnews.com/national-news/aadhaar-must-be-expanded-only-after-national-security-is-defined-pavan-duggal-takes-a-closer-look-at-contentious-bill-1458536635.html. (Last updated March 21,2016)

23 BS reporter, *5 changes RS wanted in Aadhaar Bill, legal challenge next*, Business Standard, 17 March,2016.

24 PUCL vs Union of India, AIR 1997 SC 598.

> *"the government will get sweeping power to access the data collected, ostensibly for efficient, transparent, and targeted delivery of subsidies, benefits and services as it pleases in the interests of national security, thus confirming the suspicions that the UID database is a surveillance programme masquerading as a project to aid service delivery."* [25]

Section 33 also states that the UIDAI may disclose personal data in light of a court order demanding the same. However, here the consent of the individual is done away with it, despite the information being highly sensitive. There is no mechanism through which he can prevent such disclosure, or at least be made aware of the disclosure beforehand. [26]

Finally, Section 33 also enables the establishment of an Oversight Committee to supervise the disclosure of information under the said section. While prima facie this seems like an adequate protection afforded by the Bill to privacy, and a check on executive action, the shortcoming which arises is the fact that the members of this Committee are all members of the executive. Therefore, members of the executive will have to review executive decisions, [27]which is problematic at the very least due to a clear conflict of interest.

It bears noting that an amendment passed by the Rajya Sabha to include the Comptroller and Auditor General and Central Vigilance

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25 Amber Sinha and Pranesh Prakash, *Privacy concerns overshadow monetary benefits of Aadhar scheme*, Hindustan Times, New Delhi, 12th March, 2016.

26 AMBA, *supra* note 14, p.504.

27 Anumeha Yadav, *Seven reasons why Parliament should debate the Aadhaar bill (and not pass it in a rush)*, SCROLL.IN, http://scroll.in/article/804922/seven-reasons-why-parliament-should-debate-the-aadhaar-bill-and-not-pass-it-in-a-rush, (Last updated 12 March,2016).

Commission in the Committee to ensure greater independence from the executive and thereby facilitating a higher degree of protection to sensitive data was rejected by the Lok Sabha. [28]

C. Sections 37 and 47

Section 37 provides for certain offences such as intentionally stealing and altering data located in the CIDR and so on, which are ambiguous at best. However, the Bill provides for no mechanism using which an individual whose data has been compromised can know that an offence has been committed. In essence, to add insult to injury, an individual whose privacy has already been violated, would find it exceedingly difficult to discover this fact.

Further, according to Section 47, only an officer clothed with authority under this Bill can file a case and launch prosecution proceedings. Reading Section 28 and 47 together however, leads to the inevitable thought that it may be in the interest of the UIDAI to not disclose infringements on privacy of individuals whose data it stores. The law does not expressly provide for a machinery to solve grievances of an individual. The individual instead has to instead depend on proactive regulation by the authorities under this Act, which in effect allows for the Government to dodge accountability and responsibility.

[28] PTI, *Lok Sabha Rejects Rajya Sabha Recommendations, Passes Aadhar Bill*, The New Indian Express, March 16, 2016.

"Experience has revealed the failure of regulation, yet it is on regulation by the authority that a whole population is asked to place its trust."[29] Thus, while the Bill takes notice of the fact that there is a possibility that private individual information might reach unscrupulous entities, both within and beyond the territory of India, the mechanism for redressal seems to be ambiguous at best.

D. Section 57

Section 7 of the Aadhar Act enables the assimilation and usage of individual data to fulfil the "*"condition for receipt of a subsidy, benefit or service"*. Seemingly therefore, the Act would purport to cover the interaction between the State and its citizens only. However, Section 57 dismisses the above notion by extending use of the UID database to corporate entities for their own uses. Thus, while the objects of the Act limit it to identifying people for swift delivery of benefits, in blatant conflict, Section 57 extends the ambit of the Bill to allow companies also to use the data for any lawful purpose.

Due to this vast coverage of the Aadhar Act, when applications such as TrustID have access to the Aadhar database,[30]it has serious implications concerning the personal data of individuals and their right to privacy. The fact that our information can be accessed by corporate houses, let alone the Government is frightening as far as privacy is concerned.

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29 UID BILL, *supra* note 16, p.13.

30 Usha Ramanathan, *The future is here: A private company claims it can use Aadhaar to profile people*, SCROLL.IN, http://scroll.in/article/805201/the-future-is-here-a-private-company-claims-to-have-access-to-your-aadhaar-data. (Last updated 16 March,2016)

IV. MISCELLANEOUS PROBLEMS ARISING OUT OF THE AADHAR ACT

Apart from the Sections in the Act itself, another problem that arises is that of data convergence into a central repository. Over the course of our daily existence, in exchange for certain services (such as taking loans, seeking admittance into a hospital, obtaining a license etc.) we often provide personal information such as our names, addresses, dates of birth and so on. These organizations will not be able to track or profile an individual with this limited data, and hence privacy and personal security will be victorious. The information that we provide in exchange for a specific end is held in distinct silos, or towers of data, and this in itself does not seem to be of particular concern.

However, if bridges were established between these towers or silos, it would facilitate State or even corporate surveillance over the individual and enable the State to track the movements of a citizen at the press of a button.[31] The United Nations has in the past been accused of misusing the biometric information of Iraqi and Syrian refugees to facilitate attempts of various countries to track them.[32] Such data convergence also creates fears for ethnic cleansing[33] on the basis of ID cards, as was done in Rwanda.[34]

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31 *Ibid*, p.11.

32 PTI, *Opposition alleges Aadhar data could be used for 'mass surveillance, ethnic cleansing'*, The Indian Express, 11 March, 2016.

33 IANS, *Lok Sabha passes Aadhaar bill to further empower citizens*, The Economic Times, 11 March,2016.

34 Jim Fussell, *Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing*, SEMINAR SERIES OF THE YALE UNIVERSITY GENOCIDE STUDIES PROGRAM, http://www.genocidewatch.org/images/AboutGen_Group_Classification_on_National_ID_Cards.pdf

It is the UID number (also known as Aadhar numbers) which would serve as this bridge, since it is a largely universal number which can be used in multiple, unconnected databases. Not only the state, but private business organizations can access these now connected silos to profile an individual, harass and invade his privacy through intrusive marketing strategies and render him insecure.[35]

In response to such allegations of convergence, RS Sharma, UIDAI's Director General stated that since the Aadhar scheme did not require information such as race or caste, individual profiling was impossible.[36] However, the fact remains that the UID number may be used as a common denominator by organizations to link the data each of them hold separately, ultimately leading to easy profiling. [37]

Functionality creep, or function creep is a phenomena under which the original intent with which data was collected is expanded to include within its purview purposes differing from the initial prescribed purpose. Often, this expansion takes place without the approval of the individual who provides the information. The Aadhar Act, being phrased and implemented in its existing form runs the risk of eventually being used as a tool of discrimination along the lines of identity. The Indian Government and the UIDAI could learn from the American experience with regard to the Social Security Numbers.

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35 Usha Ramanathan, *An attempt to kill the Right to Privacy*, The Statesman, 9th September, 2013.

36 RS Sharma, *Identity and the UIDAI : A Response*, 45/35 Economic and Political Weekly (2010).

37 Ruchi Gupta, *Justifying the UIDAI : A case of PR over Substance?,* 45/40 Economic and Political Weekly (2010), pp.135-136.

While the SSNs started off as a venture relating to taxation, today it has broadened its ambit to include everything ranging from driving licenses to employment. The phrase "not for identification" used initially during the promulgation of the SSN is now redundant, as the SSN is the country's foremost identification number. [38]The database of information about individuals could be used by the State as a weapon against the citizens as long as threats of oppression and victimization of marginalised segments of the populace using this database cannot be ruled out. This goldmine of data could also facilitate surveillance by the State and investigation by the police.[39] For example, both the Goa and Kerala police have used the UID's biometric database to further their own investigations.

A continuous and widespread access to biometric information by the police could lead to large scale violations of human rights.[40] Dissenters or public intellectuals expressing views against the dominant political narrative may also be victims of this misuse of the UID database. With the Government already lending its support to encounter killings and other methods not permitted by the Constitution being adopted by the police and the Army, the environment seems ripe for the State and its instruments to misuse the UID

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38 Dr. Valsamma KM, *Aadhaar, Function Creep and The Emerging Symbiotic Relationship between Society and Technology*, 3 Paripex - Indian Journal of Research 8,184-85 (2014).

39 R. Ramakumar, *Suspend Aadhar, it is leading India to a surveillance state*, Deccan Herald, 29 September,2013.

40 R. Ramakumar, *Identity Concerns*, Frontline, 19 December, 2011.

database, which was originally collected for confirming identity, and to enhance social welfare of the people.[41]

V. QUESTIONS ON VOLUNTARINESS

A. If the Aadhar Scheme is Voluntary, Can one waive his Fundamental Right to Privacy to avail of the same?

In the case of *Behram v. State of Bombay,*[42] the Apex Court laid down that the Constitution containing fundamental rights was not to ensure that the individual could benefit from them. Fundamental rights are a subset of public policy, and hence it is beyond the power of the individual to give up his fundamental rights. This ruling established that the doctrine of waiver of rights would be inapplicable when the rights in question were fundamental rights. In *Bashehar Nath v. The Commissioner of Income Tax*[43], Justice Bhagwati held that the Constitution was *"sacrosanct"* and that *"it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America",* which allowed fundamental rights to be waived when the right ensured individual benefit. Thus the rule that fundamental rights cannot be waived is well established in Indian constitutional

41 Nivedita Menon, *Eight reasons why you should oppose Unique Identification: Stop UID Campaign*, KAFILA, https://kafila.org/2010/10/04/eight-reasons-why-you-should-oppose-the-uid-stop-uid-campaign/. (Last updated 4 October, 2010).

42 Behram v. State Of Bombay, AIR 1955 SC 123.

43 Bashehar Nath v. The Commissioner of Income Tax, 1959 SCR Supl. (1) 528.

jurisprudence, and has later been upheld in *Muthiah v. Commissioner of Income Tax* [44]*, Suraj Mall Mehto v. A.V. Visvanath Sastri* [45] and so on.

In the context of government schemes, another crucial case to analyse here is *Ahmedabad St Xavier's College v. State of Gujarat* [46] where the Supreme Court, echoing Justice Sutherland in *Frost & Frost Trucking Co. v. Railroad Commission* [47] upheld the doctrine of unconstitutional conditions describing it as, *"any stipulation imposed upon the grant of a governmental privilege which in effect requires the recipient of the privilege to relinquish some constitutional right."* The choice between relinquishing the necessary financial benefits and giving up the right to privacy is nothing more than a choice *"between the rock and the whirlpool."*[48]

To narrow it down further, Das CJ in *In re: The Kerala Education Bill v. Unknown*[49] speaking in the context of establishing minority educational institutions stated that, "*financial necessities should not force anyone to concede their fundamental rights under Article 30(1) of the Constitution."* What the Aadhar Act purports to do is in striking contradiction to Das CJ's opinion, as it compels people to give up their right to privacy in exchange for financial necessities which are especially indispensable for the poor section of society. In other words, the Aadhar Act makes it mandatory for the poor to give up their privacy

44 Muthiah v. Commissioner of Income Tax ,AIR 1956 SC 269.
45 Suraj Mall Mehto v. A.V. Visvanath Sastri ,AIR 1954 SC 545.
46 Ahmedabad St Xavier's College v. State of Gujarat , 1975 SCR (1) 173.
47 Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926).
48 *Ibid.*
49 In re: The Kerala Education Bill v. Unknown , 1959 1 SCR 995.

rights, lest they be deprived of financial benefits. The Aadhar Act*, "though in form voluntary, in fact lacks none of the elements of compulsion."*[50]

The Aadhar scheme is a clear violation of the fundamental right to privacy of an individual, and the argument that the scheme be permitted since an individual can voluntarily waive his fundamental rights (doctrine of waiver of rights) cannot be accepted. It would fall under the doctrine of unconstitutional conditions as laid down by the Apex Court. The trade-off between the waiving of the right to privacy and the Aadhar scheme is simply not a trade off at all, since the State cannot promulgate a scheme which requires the citizen to surrender his/her right to privacy.

The individual is faced with a *"false choice"* since he/she has to decide between the fundamental right to privacy and certain benefits that are crucial to his/her livelihood. The choice that the individual is faced with is not 'free' since access to privileges is contingent upon surrendering of rights. It would thus be beyond the power of the State to invoke the doctrine of waiver of fundamental rights as an essential pre-requisite for acquiring the stipulated benefits. [51]

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[50] *Supra* note 48.

[51] Gautam Bhatia, *Aadhar, Waiver of Fundamental Rights, and the Doctrine of Unconstitutional Conditions*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, https://indconlawphil.wordpress.com/2015/10/06/ aadhar-waiver-of-fundamental-rights-and-the-doctrine-of-unconstitutional-conditions/ (Last updated 6 October, 2015).

B. Is the Aadhar Scheme Really Voluntary?

Further, the Aadhar Act is not supported by an opting out mechanism; and the citizen has to waive his fundamental right to privacy without any hope of apparently reclaiming it. Rule 5(7) of the Information Technology Rules stipulate that when an entity seeks information or data from an individual, it must provide the individual with a procedure for opting out of the database. However, the *"irrevocable nature of alienation of privacy rights by surrendering biometric information means that the opt-in mechanism is not supported by an opt-out one."*[52] The existence of an opt out process in the context of the Aadhar Act is crucial, given the sensitiveness of our personal information, and the pervasiveness of an individual's biometric data. [53]

While the official documents relating to the Aadhar scheme specify that obtaining a UID number required to avail of the benefits the same is purely voluntary, the implementation of the scheme tells us a different story altogether. While Section 3 deems acquiring the Aadhar number to be a voluntary exercise, the implication of Section 7 of the Aadhar Act is that once the Government makes receiving benefits contingent upon compulsory authentication of the Aadhar number, then citizens would be forced to acquire the number.[54] Further, the marginal note to Section 7 lays down that acquiring

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52 JHUMA, *supra* note 4.

53 USHA, *supra* note 30.

54 Vanya Rakesh, *Aadhaar Act and its Non-compliance with Data Protection Law in India*, THE CENTRE FOR INTERNET & SOCIETY, http://cis-india.org/internet-governance/blog/aadhaar-act-43a-it-rules (Last updated 14 April, 2016).

the Aadhar number cannot be bypassed to avail of certain benefits or subsidies.[55]

As a form of consolation, Section 7 also ensures the provision of alternate means of identification for delivery of benefits to the individual in the event that he/she is not assigned an Aadhar number. Such vague phrasing leads to the possible interpretation that these alternate means will be accessible merely to those who have not been assigned an Aadhar number, despite applying for the same.[56] Thus, application for an Aadhar number is made mandatory in the sense that is essential in order to receive benefits.

As Jean Dreze put it, *"This (the Aadhar scheme) is like selling bottled water in a village after poisoning the well, and claiming that people are buying water voluntarily."*[57] Various states have mandated that the UID number be required to obtain various services. Not only gas and PDS, but the issuance of RuPay ATM cards, filing RTI requests, booking seats in the railways and registration of vehicles all require the UID number today.[58] Just recently, the University Grants Commission made the usage of Aadhar numbers compulsory for the purposes of scholarships.[59] The interim order of the Supreme Court forbidding such services depending on the UID number has not been complied with, "*in letter*

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55 Express News Service, *Aadhar Voluntary...Mandatory*, The New Indian Express, 20 March, 2016.

56 Amber Sinha, Press Release, March 15, 2016: The New Bill Makes Aadhaar Compulsory!, THE CENTRE FOR INTERNET & SOCIETY, http://cis-india.org/internet-governance/blog/press-release-aadhaar-15032016-the-new-bill-makes-aadhaar-compulsory (Last updated 16 March, 2016).

57 Jean Dreze, *Unique Facility or recipe for trouble?* , The Hindu, 25th November, 2010.

58 The Centre for Internet and Society, Unique Identification Scheme (UID) & National Population Register (NPR), and Governance, cis-india.org/internet-governance/blog/uid-and-npr-a-background-note (Last accessed on 7th May, 2016).

59 PTI, *Aadhar now must for UGC scholarship*, The Tribune, 21 July, 2016.

and spirit".[60] If such essential services require the Aadhar number, it is evident that today an individual cannot live without this number. Thus, is it actually voluntary? The gap between precept and practice provides us with the answer.

VI. CONCLUSION

At the outset, the reason why a clause on *"national security"* is present in an Act which seeks to provide for efficient, transparent, and targeted delivery of subsidies, benefits and services is unclear, and suspicious at the very least since it raises justifiable concerns of mass surveillance, profiling and tracking of citizens.[61] As has been mentioned earlier, the Aadhar Act fails to define *"national security"*. In this context, a look at jurisprudence on national security and fundamental rights in the European Union might prove helpful.

In *Leander v. Sweden* [62] the Court, while interpreting 'national security' in Article 8 of the European Convention on Human Rights held that law which places its reliance on national security considerations had to be precise in relation to the circumstances and conditions under which the State could rely on this *"secret and potentially dangerous interference with private life"*. Thus, laws which have a tendency to intrude on privacy need to be precise with *"clear and detailed"* guidelines.[63] In *Rotaru v. Romania* [64] the Court expressed its disapproval at a

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60 Aadhar Related Articles, aadhaar-articles.blogspot.in/2016/02/9353-press-statement-national-security.html (Last accessed on 7th May, 2016).

61 Jean Dreze, *The Aadhar coup*, The Hindu, March 15, 2016.

62 Leander v. Sweden , 9 EHRR 433.

63 Kruslin v. France, (1990) 12 EHRR 547 ; Huvig v. France, (1990) 12 EHRR 528.

64 Rotaru v. Romania ,(2000) ECHR 192.

Romanian law related to the collection and storage of personal information on grounds of national security, since sufficient safeguards were not provided for.

Under Section 33 of the Aadhar Act, private data can be disclosed pursuant to an order passed by the Joint Secretary of the Government of India, subject to review of an Oversight Committee, as mentioned earlier. However, no guidelines are given as to the circumstances in and conditions on which private data will be disclosed, except for the blanket national security clause.

It is imperative that national security be defined in the Act to prevent misuse of the same.[65] However, given that despite repeated demands for the same, nothing has been done and with the Lok Sabha rejecting the substitution of national security with an apparently narrower clause of *"public emergency or in the interest of public safety"*[66], the author, placing reliance on *Al-Nashif v. Bulgaria* [67] would like to suggest the incorporation of adversarial proceedings in Section 33.

The implementation of measures having a detrimental impact on rights such as privacy (such as the disclosure of private data under Section 33) should be contingent upon adversarial proceedings between the individual who's data it is and the State which seeks to justify disclosure in the name of national security. A body, independent of Government officials, in contradistinction to

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65 SHWETA, *supra* note 22.

66 Express News Service, *Aadhaar bill is through after Opposition scores a few brownie points*, The Indian Express, 17 March, 2016.

67 Al-Nashif v. Bulgaria, (2003) 36 EHRR 655.

the current Oversight Committee should be established to hear such proceedings.

Section 7 of the Aadhar Act, as it stands is in conflict with the interim order of the Supreme Court which stated that no one should be denied access to benefits in the absence of an Aadhar number. The section is phrased in a manner such that it appears as though enrolment or application under the Aadhar scheme is essential in order to identify oneself for the delivery of benefits.[68] It should be remembered that Aadhar *"is an entitlement, and not a compulsion."*[69]

A welfare state, such as India[70] is required by default to ensure the economic and social well-being of its citizens[71] through inter alia, the provision of benefits, subsidies and so on. Despite the cost-cutting impact of the Aadhar programme,[72] the requirement of the number to avail of the benefits should be purely voluntary. The phrase 'alternative means' as used in Section 7 should also be clarified, in order to lessen the degree of ambiguity present.[73] In this context, it is also crucial that an opt-out mechanism is provided for under the

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68 AMBER, *supra* note 57.

69 SFLC_Admin, *Evaluating the Aadhar Bill against the National Privacy Principles*, SOFTWARE FREEDOM LAW CENTRE, http://sflc.in/evaluating-the-aadhaar-bill-against-the-national-privacy-principles/ (Last updated 11 March, 2016).

70 Kapila Hingorani vs State Of Bihar, 2003 Supp(1) SCR 175.

71 The Editors of Encyclopædia Britannica, *Welfare State*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/welfare-state (Last updated 21 August, 2015).

72 PTI, *Aadhaar ID saving Indian govt. about $1 billion per annum: World Bank*, The Economic Times, January 14,2016.

73 AMBER, *supra* note 57.

Act, which would provide for the deletion of all the data of the individual from the database. As of now, no such mechanism is stipulated. [74]

Further, Section 57 is problematic to the extent that it allows a *"body corporate"* to access the Aadhar database, excluding core biometric information, for the purposes of identification. Here, it is crucial that the Bill be amended to incorporate consent of the individual while handing such data over to a private company. Allowing private companies entry into the Aadhar database has serious implications with regards to the privacy of individuals apart from potential harassment through telemarketing and so on, and hence it is imperative that their consent is included.

The Aadhar Act is one with huge potential in terms of socio-economic welfare benefits delivery. The Aadhar number provides the foundation upon which delivery of all benefits – ranging from healthcare, to food and nutrition to education could be drastically improved.[75] It could lead to large-scale innovation both at the level of government and the private sectors. Financial inclusion at a level, which would be unthinkable a decade ago, may soon be a reality and leakages in Government subsidies totalling Rs. 50,000 crore annually could possibly be eliminated.[76]

However, the fact that the information accumulated under the Aadhar Act might be shared with other parties, or even worse, stolen by entities both

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74 PTI, *Centre opposes in SC Jairam Ramesh's plea on Aadhaar Bill*, Business Standard, May 10, 2016.

75 Unique Identification Authority of India, *Frequently Asked Questions - Use of Aadhar*, UIDAI,https://uidai.gov.in/faq.html?catid=28.

76 Nandan Nilekani, *Basis of a Revolution*, The Indian Express, 9 March, 2016.

within and beyond the boundaries renders the privacy of the individual supplying the information highly vulnerable. Intelligence agencies may also use the data to trace patterns of behaviour, identify an individual as a threat, possibly incorrectly, and harass him, violating his right to be let alone (privacy). The possibilities for violations of privacy are endless, especially with no mechanism for redressal of grievances.

The Aadhar scheme has far reaching effects on the fundamental rights of an individual and his security apart from the relationship the State shares with its citizens. It is imperative that the project be suspended and such considerations be taken into account while fine tuning the project. Public debates should ensue; constitutional experts consulted, thus ultimately inspiring trust and confidence amongst the people.[77] The aim should be to reach a stage where the monetary benefits far outweigh the privacy concerns, if any. Only upon reaching such a stage, should the Aadhar scheme, the world's largest biometric identification programme[78] be implemented.

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77 Upendra Baxi, AP Shah et al, *On the UIDAI*, 45 Economic and Political Weekly 43,5 (2010).

78 TNN, *Aadhar world's largest biometric ID system*, The Times of India, 27 April, 2015.

BOTTLING FAME, BREWING GLORY AND TAXING THE TRANSFER OF INTANGIBLES

Balaji Subramanian and Amritha Kumar[1]

ABSTRACT

With the advent of the knowledge based economy, transactions involving transfer of intangible property have increased manifold. However, the problems that were faced in taxing these transactions since the 1960s have still not found concrete solutions. There has been a constant and unsettled debate as to whether such transactions would qualify as sales or as rendition of services, the answer to which will severely affect its taxability. A Constitutional Amendment was promulgated to clarify the position. This amendment, however, resulted in further complicating the issue by creating a possibility of opposing interpretations. Thus the trend of judicial interpretations needed to be relied on for some clarity even though this trend has not been strictly linear. This paper is aimed at exploring these issues by providing the relevant aspects of law, tracing the jurisprudential history and critiquing the most recent judgment on the matter. The paper will also explore the possible alternatives to overcome these issues by discussing the appropriate interpretation of the existing statutes and the implication of the new reforms proposed in the form of the Model GST Act.

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I. INTRODUCTION

A. The importance of Intellectual Property ("IP") Transactions

The supply of intangible goods and services has fast become one of the biggest drivers of economic growth.[2] What has now come to be known as the knowledge economy[3] is powered, in large part, by transactions involving purely intellectual assets. With the transfer of intangibles accounting for ever-increasing fractions of commercial revenue, it is only natural for states to tax these transactions with renewed focus.

As we will see over the course of the following parts, India's federal structure throws up unique challenges when taxing the transfer of divisible rights, especially when the underlying subject matter that these rights cover is no more tangible than a lawfully granted monopoly. Predominant among these challenges is the fact that the extant tax regime is premised on the classification of taxable subject matter into goods and services. Given that IP transactions usually straddle this distinction [see, for example, the Software as a Service ("SaaS") business model,[4] poised to rake in billions of dollars in revenue],[5]

2 Alessandro Sterlacchini and Francesco Venturini, *Assessing the Knowledge Economy: GDP, Productivity and Employment Growth in EU developed Regions*, THE IUP UNIVERSITY JOURNAL OF KNOWLEDGE MANAGEMENT (2009), available at: http://works.bepress.com/francesco_venturini/17/.

3 *The Knowledge-based Economy*, OECD, 1996. Doc. Ref. OCDE/GD(96)102, available at https://www.oecd.org/sti/sci-tech/1913021.pdf.

4 Gianpaolo Carraro and Fred Chong, *Software as a Service (SaaS): An Enterprise Perspective*, MICROSOFT DEVELOPER NETWORK, https://msdn.microsoft.com/en-us/library/aa905332.aspx.

5 *Indian SaaS – The Next Big Thing*, NATIONAL ASSOCIATION OF SOFTWARE AND SERVICE COMPANIES (May 2016), available at http://www.nasscom.in/indian-saas-next-big-thing.

market players have found themselves staring down the business end of the trigger-happy Indian taxman's barrel.

This paper seeks to examine the manner in which India's tax regime has responded to these challenges, and evaluate whether it has been successful in evolving a framework that adequately accommodates the knowledge economy in the digital age. Specifically, this article focuses on the assignment and licensing of intellectual property.

IP producers are essentially the first line of vendors in the market – their products are repackaged and resold successively until they either reach the end user or the point at which they are converted into physical goods. Examples are readily available: an author produces a manuscript (say, a book of bedtime stories) and assigns it to a large publication house in return for an up-front payment. This publisher could have a number of imprints, each catering to a distinct demographic of the reading public.

The publisher then assigns the book to one of its imprints that publishes children's stories, in exchange for a portion of the royalties. The imprint (usually a subsidiary of the publisher) undertakes the costs of printing, marketing and promoting the book, and puts the book on the market from which parents may purchase them to read to their insomniac offspring.[6]

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[6] For a more detailed overview of the value chain in publication, *see* Richard Watt, *Copyright law and royalty contracts* and Nicola Searle and Gregor White, *Business Models*, in Ruth Towse and Christian Handke (eds.), HANDBOOK ON THE DIGITAL CREATIVE ECONOMY (Edward Elgar, 2013).

Alternatively, a university research centre could discover a ground-breaking new gene therapy for chronic hepatitis C, file for a patent, and assign it to a small pharmaceutical company in exchange for a fixed payment. This company could be acquired by a major international player, sometimes with the sole intent of acquiring control of its ongoing research. The larger player could now develop the therapy and embody it in the form of a drug, and put this drug on the world market for doctors to prescribe.[7]

The importance of licensing in the knowledge economy cannot be understated. Since intellectual assets are non-exclusive, commerce in IP is much more likely to take place through licensing agreements that allow a downstream party to commercially exploit the asset without necessarily excluding the upstream party (or anyone else, for that matter). Thus, a patentee could, in order to augment her supply of patented drugs to the market, enter into licensing agreements with numerous other manufacturers to supply the market globally.[8]

Such "technology transfer" agreements can spur economic growth and industrial development in low and middle income countries, acting as a

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7 This example closely resembles the manner in which the "block-buster" hepatitis C drug sofosbuvir (marketed by Gilead Sciences as Sovaldi) was developed and marketed. *See* Ivan Gentile, et. al., *The discovery of sofosbuvir: a revolution for therapy of chronic hepatitis C*, 10(2) EXPERT OPINION ON DRUG DISCOVERY 1363 (2015).

8 This, too, has occurred in the Sovaldi saga. *See* CH Unnikrishnan, *Gilead to license Sovaldi to Indian generics drug firms*, MINT, 15 Sep. 2014, http://www.livemint.com/Industry/no7AnbJi4dRkjJY7dn4SOI/Indian-companies-to-sign-generic-licensing-deal-for-Hepatiti.html.

vital equalising force in the international economy.[9] Global ramifications aside, the most basic upshot of the "licensing economy" is the huge amount of revenue that is generated by market players that deal in intellectual assets.[10] From a taxing perspective, this revenue represents both a valuable resource and an intricate challenge, especially when attempting to apply legacy tax statutes to the ground realities of an entirely new set of business models.

B. Sale v. Service: Constitutional Implications

The federal structure of India's constitution provides for a distributed scheme of legislation and taxation,[11] in which the states are given a broad power to tax sales (but not services), while the union is given a broad power to tax services and inter-state sales. This is achieved through a combined reading of the entries in the Seventh Schedule. In the Union List:

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9 *See generally* Adam Liberman, et. al., INTERNATIONAL LICENSING AND TECHNOLOGY TRANSFER: PRACTICE AND THE LAW (Wolters Kluwer, 2008).

10 *See generally* CORPORATE COUNSEL'S GUIDE TO LICENSING (Thomson Reuters, 2014).

11 Article 246 of the Constitution reads:
"246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

> *"92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.*
>
> *92C. Taxes on services."*[12]

In the State List:

> *"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I."*

The upshot of this scheme is that an IP transaction will generally be taxed by the Union if it is classed as the rendering of a service, and taxed by the States if it is classed as a sale of goods. This has led to the development of a considerable body of jurisprudence, in which assessees have attempted to dodge either a central or a state levy on the ground that the nature of the transaction put it outside the scope of the imposing power's constitutional authority.[13]

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12 The Constitution was also amended in 2003 to insert Art. 268A, which reads as follows:
"268A. (1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India and the States in the manner provided in clause (2).
(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be—
(a) collected by the Government of India and the States;
(b) appropriated by the Government of India and the States, in accordance with such principles of collection and appropriation as may be formulated by Parliament by law."

13 Sudhir Chandra Nawn v. Wealth Tax Officer, 1969 AIR 59,Union of India v. H.S. Dhillon, 1972 AIR 1061, Federation of Hotel Association of India v. Union of India, (1989) 3 SCC 634 are some instances of cases where the competency of the taxing authority was challenged citing that the respective entry fell outside its constitutionally granted taxing jurisdiction.

In Part II, we examine the evolution of Indian jurisprudence concerning the taxation of intangible assets, with a focussed eye on how case law could be interpreted to guide the taxation of divisible right transfers through licensing transactions. In Part III, we turn our attention to a case in which the Bombay High Court got it all wrong. We investigate what can only be termed a jurisprudential train-wreck, piecing together the sequence of events that led a Division Bench of the most respected High Courts of our country to deliver a ruling that unceremoniously brushed aside all precedent, singlehandedly swinging a juridical wrecking-ball to reduce a towering body of common law to rubble. In Part IV, we evaluate the options before the Supreme Court and Parliament, especially in light of the GST Bill which has sought to mitigate the effects of this disaster by proposing a regime that altogether rejects the need for classification of IP transactions

II. THE EVOLUTION OF INDIA'S IP TAXATION REGIMEN

A. State of Madras v. Gannon Dunkerley

One of the first cases to deal with the conflict of classification was *State of Madras v. Gannon Dunkerley* (1958),[14] where the Supreme Court observed that works contracts, such as construction contracts, were indivisible and therefore could not be separately taxed for their sale and service components. It devised the *dominant intention test*, observing that the primary intention of the parties was to render and accept services, rather than to sell or purchase goods that were

14 AIR 1958 SC 560.

merely incidental to the contract. Therefore, on facts, the court held that sales tax was not attracted. More pertinent for our purposes, the court also enumerated the essential conditions of a sale:

> "*...to constitute a valid sale, there must be a concurrence of the following elements, viz., (1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised.*"[15]

B. AV Meiyappan v. Commissioner of Commercial Taxes

Just over a decade later, the Madras High Court dealt with a similar conflict, this time with respect to a copyright transaction. The question under consideration in *AV Meiyappan v. Commissioner of Commercial Taxes*[16] was whether the "lease"[17] of the copyright in certain cinematograph films. The court firstly held that a copyright would qualify as moveable property capable of being transferred despite its intangible, incorporeal nature. However, it went on to observe that in the particular transaction in question, the transfer was only for a period of 49 years, thus it was temporary and in the nature of a lease and therefore does not fulfil the conditions of a valid sale.

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15 *Ibid.*

16 AIR 1969 Mad 284.

17 Although the parties to the contract styled it as a lease, the transaction was more properly in the nature of a time-limited non-exclusive licence.

C. Legislative response: the Forty-Sixth Amendment

Parliament enacted the Forty Sixth Amendment to the Constitution of India in 1982. This amendment expanded the base of Entry 54 of List II by introducing the concept of 'deemed sales'. The Amendment included under Article 366(29A) all those transactions which were sales "in substance".[18] The legislature argued that the amendment was necessary to nullify tax avoidance resulting from *Dunkerley* jurisprudence, which effectively freed indivisible contracts from sales tax.[19] Thus, the dual requirements of dominant intention of the parties to effect a sale and of an actual transfer of title in order for a transaction to qualify as sale were effectively negated through the Amendment.

D. State of Andhra Pradesh v. Rashtriya Ispat Nigam Limited ("RINL")

State of Andhra Pradesh v. Rashtriya Ispat Nigam Limited (2002)[20] discussed the meaning of the words "transfer of right to use". Third party contractors hired machinery from RINL for the sole purpose of using this machinery to execute the contract they had entered into with RINL. The question was

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[18] The Constitution (Forty Sixth Amendment), 1982. See: https://india.gov.in/my-government/constitution-india/amendments/constitution-india-forty-sixth-amendment-act-1982.

[19] "This position [stemming from *Gannon Dunkerley*] has resulted in scope for avoidance of tax in various ways." *Statement of objects and reasons appended to the Constitution (Forty Sixth Amendment) Bill, 1981 which was enacted as the Constitution (Forty Sixth Amendment) Act, 1982*. The Statement of Objects and Reasons also specifically engages with tax avoidance in copyright transactions – a consequence of *Meiyappan*, no doubt – in the following words: "Device by way of lease of films has also been resulting in avoidance of sales tax. The main right in regard to a film relates to its exploitation and after exploitation for a certain period of time, in most cases, the film ceases to have any value. It is, therefore, seen that instead of resorting to the outright sale of a film, only a lease or transfer of the right to exploitation is made."

[20] (2002)3SCC 314

whether such hiring would amount to a transfer of the right to use the machinery.

The Supreme Court observed that the effective control of the machinery remained with RINL as the contractors could not use the machinery in any other manner or for any other purpose other than those mentioned in the RINL contract; they could not move the machinery away from RINL's premises and the contractors merely had 'custody' while the 'control and possession' remained with RINL. The Court thus established that in order for a transaction to qualify as 'transfer of a right to use', there has to be transfer of exclusive and effective control.

E. BSNL v. Union of India

Most important in the series of cases that have diverged from the *Duke* position is *BSNL v. Union of India,*[21] which examined whether the rendition of mobile telephony services (accomplished in large part through the distribution of SIM cards) would qualify as a deemed sale. In his separate and concurring opinion, AR Lakshmanan, J. clearly laid out the essential conditions for a transaction to qualify as a transfer of the right to use goods:

> *"a. There must be goods available for delivery;*
>
> *b. There must be a consensus ad idem as to the identity of the goods;*

[21] (2006) 3 SCC 1.

c. The transferee should have a legal right to use the goods - consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

d. For the period during which the transferee has such legal right, it has to be the exclusion to the transferor -this is the necessary concomitant of the plain language of the statute - viz. a "transfer of the right to use" and not merely a licence to use the goods;

e. Having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."[22]

It is of vital importance to note that Lakshmanan, J.'s opinion is *ex facie* wide in its scope – the above cited paragraph does not restrict itself to telecommunications transactions, but purports to be applicable to *all* transfers of the right to use goods.

F. Post-BSNL: Ripples in the Juridical Pond

While it is true that the *BSNL* test has served to dispel several issues that were earlier faced while deciding whether transactions fell under the purview of Article 366(29A)(d), there have been cases even after *BSNL* that have relied upon *Duke* to return judgement contrary to the Supreme Court's settled position. Exemplary are the cases of *Jojo Frozen Foods v. State of Kerala*[23]

22 *Ibid.* Para 96.
23 (2009) 24 VST 327.

and *Kreem Foods v. State of Kerala.*[24] The question in both these cases was whether the royalty received by the assessee from its franchisees for the non-exclusive and temporary use of its trademark attracted sales tax. The High Court of Kerala, in both the cases, relied on *Duke* to hold that such transactions amounted to deemed sales under Article 366(29A)(d) and thus attracted sales tax.

G. The Ripples Settle Down South: AGS and Malabar Gold

A constitutional challenge to Section 65(105)(zzzzt) of the Finance Act, 1994 arose before the Madras High Court in *AGS Entertainment Pvt. Ltd. & Ors. v. UoI & Ors.*[25] The relevant provision reads as follows:

> *"In this Chapter, unless the context otherwise requires, --"taxable service" means any [service provided or to be provided],- to any person, by any other person, for— (a) transferring temporarily; or (b) permitting the use or enjoyment of, any copyright defined in the Copyright Act, 1957, except the rights covered under sub clause of clause (1) of section 13 of the said Act;"*

Challenging this, AGS Entertainment argued that transfers of divisible interests in a copyright, being deemed sales under Article 366(29A)(d) and therefore subject to state sales tax, could not be covered by a central service tax. In a nutshell, the petitioners questioned Parliament's power to tax as a

24 (2009) 24 VST 333.
25 (2013) 262 CTR 471.

service, transactions that were specifically deemed to be sales by the Constitution.

The High Court, however, relied on the *BSNL* test to hold that Article 366(29A)(d) would only cover permanent and exclusive transfers, leaving temporary, non-exclusive transfers of divisible interests under a copyright free to be taxed as services by the Finance Act. Merely two days before Madras woke up to *AGS*, a division bench of the Kerala High Court arrived at a nearly identical finding in *Malabar Gold v. Commercial Tax Officer*.[26].

III. TATA SONS V. STATE OF MAHARASHTRA

It is this context that *Tata Sons*[27] must be viewed in. Coming as it did in 2014, there was really just one way it should have been decided. For reasons we explore in this part, a Division Bench of the Bombay High Court chose to obstinately turn a blind eye when confronted with compelling precedent. The transaction in question here was the TATA Brand Equity and Business Promotion Agreement, entered into between Tata Sons and its group companies, through which the subsidiaries were allowed to use the 'Tata' trademark in respect of their products, subject to the fulfilment of certain standards.

The Bombay High Court cited abundant case law on the proposition that a trademark is "goods" for the purposes of taxation, and then interpreted

26 (2013) 32 S.T.R. 3 (Ker.)
27 (2015) 80 VST 173 (Bom)

the Agreement as transferring a right to use the trademark to the subsidiary companies. While the first limb appears to be sound, the second is seriously suspect, and on more than one ground.

For one thing, the court bases its entire analysis on its elucidation of the law in *Commissioner of Sales Tax v. Duke and Sons Pvt. Ltd.*[28] In itself, this would not have been a problem. However, the *Duke* court seems to have had a particularly difficult time navigating the intricacies of trademark law, especially the difference between the transfer of rights to a trademark and the grant of a license to use one. In pertinent part, BP Saraf, J. holds:

> *"There is a distinction between transfer of right to use a trade mark and assignment of a trade mark. "Assignment" of trade mark is taken to be a sale or transfer of the trade mark by the owner or proprietor thereof to a third party* inter vivos. *By assignment, the original owner or proprietor of trade mark is divested of his right, title or interest therein. He is not so divested by transfer of right to use the same. Licence to use a trade mark is thus quite distinct and different from assignment. It is not accompanied by transfer of any right or title in the trade mark. The transfer of right to use a trade mark falls under the purview of the Maharashtra Sales Tax on the Transfer of Right to use any Goods for any Purposes Act, 1985 ("Act of 1985") and not the assignment thereof. The manner of transfer of the right to use the goods to the transferee would depend upon the nature*

[28] 1999 (1) Mh.L.J. 26.

> *of the goods. For transfer of right to use a trade mark, permission in writing as required by law may be enough."*[29]

We humbly submit that it is at this point that the *Duke* court has made a right little mess of the law – having recognised that assignment and licensing are two different things, Saraf, J. promptly goes ahead to snatch defeat from the jaws of victory, holding that a "permission in writing" would suffice for a "transfer of [the] right to use" to take place. All the monkey bridge-builders in the Ramayanic army cannot traverse the logical leap contained in the span of that single sentence, as is evident from its plain words.

A license is plainly and conceptually different from the transfer of a right. In simple terms, a license is a permission or an authorisation that is, in effect, a legally enforceable promise by the licensor not to sue the licensee.[30] A license does not create, nor does it transfer, any right to the underlying property itself (whether intellectual or real) – it merely creates a right that protects the licensee from legal proceedings in respect of the property, as long as the licensee is in compliance with any other requirements that the license sets out.

This distinction is further buttressed by a plain reading of the relevant statute – the Trade Marks Act, 1999. Section 45 of the Act requires assignees to register their title in the prescribed manner, and is conspicuous in its omission of licensees. The simple explanation for this omission is that

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29 Id., para. 7.

30 Raman Mittal, LICENSING INTELLECTUAL PROPERTY: LAW & MANAGEMENT (2011).

licensees do not have *title* in the mark, and therefore no cognizable interest in the eyes of the Registrar under Section 45. In the alternative, a licensee must approach the Registrar along with the licensor under Section 49 to be recorded as a registered user of the mark.

Assignees become the registered proprietors of the mark in question, thus stepping into the shoes of the assignor. It is this element of exclusive substitution that is absent in a license, and the Act draws this distinction by providing for licensees to be treated as registered users, rather than proprietors. Elsewhere, it can be argued that the assignment-license distinction can be drawn in an even sharper manner in copyright law.[31]

The position in *Duke*, we submit, is wholly unsupported by law or reason. From a perusal of the preceding part,[32] it is clear that jurisprudence has evolved substantially since. The world's leading cosmologists admit the viability of forward time travel via time dilation in a relativistic environment, but confidently rule out the possibility of travelling back in time.[33] This merely serves to prove that it would not only be ill-advised, but also impossible for the *Tata* court to move back to the law as it stood in 1998.In order to appreciate the true failings of the *Duke* judgement (and therefore the failings of its

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31 Section 18(2) of the Copyright Act, 1957 provides that as respects the rights assigned, the assignee shall be treated as the owner of copyright. Section 30, which provides for licenses, makes no mention of a change in ownership.

32 *See* Part II, *infra.*

33 Stephen Hawking, *How to build a time machine*, THE DAILY MAIL, 27 Apr. 2010, http://www.dailymail.co.uk/home/moslive/article-1269288/STEPHEN-HAWKING-How-build-time-machine.html.

approval by the division bench in *Tata Sons*), it is important to try and trace the line of reasoning employed by the bench.

It is easy to see the beginnings of the approach taken by Saraf, J. in *Duke*. There exists considerable jurisprudence, as well as statutory backing, to support the proposition that IP is "goods" for the purposes of taxation.[34] In consequence, the right to use a trademark must undoubtedly constitute the right to use goods, and the transfer thereof must be (naturally) the transfer of a right to use goods. Once the court arrives at this point, the attraction of Article 366 of the Constitution is hard to resist.[35] For our purposes, the pertinent portion is Article 366(29A)(d), which reads as follows:

366. Definition

> *In this Constitution, unless the context otherwise requires, the following expressions have, the meanings hereby respectively assigned to them, that is to say*
>
> …
>
> *(29A) tax on the sale or purchase of goods includes*

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[34] This position would be further bolstered by future rulings, such as the decision of the AP High Court (later quoted with approval by the Supreme Court) in *Tata Consultancy Services v. State of Andhra Pradesh*, [2001] 122 STC 198. There, when deciding the applicability of sales tax on computer software, the court held:
"A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software, whether customised or non-customised, satisfies these attributes, the same would be goods."

[35] *See* Section 2.3, *infra*.

…

> *(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration*

The transfer of a right to use any goods, for the purposes of taxation, is deemed to be a sale by the Constitution. The existence of Article 366(29A)(d) means that once the court glosses over the transfer/licensing distinction, it can comfortably slip into a rabbit-hole whose only conclusion is the holding that trademark licensing is subject to sales tax.

Despite its wholly illogical application of the law and its plain misreading of the English language, the bench in *Duke* can be forgiven (to a limited extent) for its errors. With the judgement being delivered in 1998, it can be argued that the bench was not confronted with compelling precedent to interrogate the distinction between a transfer and a license with greater rigour. *Tata Sons*, being delivered in 2014, can hide behind no such defence.

A. What might have been: Re-imagining Tata Sons in light of Alternative Approaches

In 2000, a five-judge bench of the Supreme Court comprehensively enumerated the characteristics of a transfer for assessing the applicability of sales tax in *Twentieth Century Finance Corp. v. State of Maharashtra.*[36] There, the

[36] (2000)6 SCC 12.

court understood the necessity to interpret Art. 366(29A)(d) in a manner that retained fidelity to the plain meaning of the word "transfer", and held:

> *"Coming to the question that a transaction in question is in the nature of a contract of bailment, it is true that the High Court of Bombay in the judgment under appeal has taken the view that the transactions of the transfer of the right to use goods are in the nature of bailment. If such a view is taken then the State would not have the power to levy sales tax on such transactions. Unless such transaction is held to be a sale or deemed sale in law and it is only then the State legislature would be competent to enact law to levy tax under Entry 54 of List II of Seventh Schedule. The levy of tax is not on use of goods but on the transfer of right to use goods. The High Court proceeded on the footing that the transfer of right to use is different from sale or deemed sale without considering the legal fiction engrafted in clause (29A) of Article 366 of the Constitution."*[37](emphasis supplied)

Having set up the framework for its reasoning above, the Supreme Court goes on to lay down the law on the scope of Article 366(29A)(d) "deemed sales" as taxable events:

> *"The 'deemed sale' envisaged in Sub-clause (d) involves not only a verbal or written transfer or right to use any goods but also an overt act by which the transferor places the goods at the disposal of the transferee to make*

[37] Id., para. 32.

> *their use possible. On this construction, it is explicit that the transfer of right to use any goods involves both passing of a right in as well as domain of the goods in which right to use is transferred."*[38] (emphasis supplied)

The immediate consequence of this ruling must be the realisation that IP licensing transactions do not constitute sales because they contain neither the passing of a right, nor the passing of the domain of the goods themselves. In addition, another precedent from the Supreme Court was ignored by the bench in *Tata Sons – BSNL v. Union of India*.[39] The paragraph of Lakshmanan, J.'s judgement in which he laid out the essential features of a sale was brought to the notice of the *Tata Sons* bench, which addressed it as follows:

> *"Para 98 is relied upon by Mr. Chinoy. However, that cannot be read in isolation and out of context. It must be read in the backdrop of the underlying controversy, namely, relationship between a telephone connection service provider and its customer. Such a transaction is essentially of service.*
>
> *It is in relation to such a controversy that the observations, findings and conclusions must be confined. We do not see as to how they can be extended and in the facts and circumstances of the present case to the enactment that we are dealing with. Going by the plain and unambiguous language of the Act of 1985 we cannot read into it the element of exclusivity and a transfer*

[38] Id., para. 66.
[39] *See* Section 2.6, *infra.*

> *contemplated therein to be unconditional. Therefore the tests in para (d) and (e) cannot be read in the Act of 1985."*[40]

The *Tata Sons* court seems to hold the opinion that *BSNL*'s interpretation of "transfer" in Art. 366(29A)(d) must be restricted to its facts – where there exists what is plainly the rendition of a service rather than a sale of goods. What the court does not say is *why* the interpretation taken by the Supreme Court cannot be applied to the transaction between Tata Sons and its subsidiaries, especially given that paragraph 98 of *BSNL* was, in fact, worded generally and broadly, and the applicability of *BSNL* to IP licensing agreements was affirmed in *AGS Entertainment*[41] and *Malabar Gold*.[42] There exists an argumentative burden upon the court to provide sound justification where it ignores or reads down principles laid down by a court of higher standing, and this burden has plainly not been discharged by the *Tata Sons* bench where it has distinguished itself without making any concrete distinction between the facts of the two cases.

Applying the *BSNL* test to the facts of *Tata Sons*, it is clear that there is no conceivable way in which the TATA Brand Equity and Business Promotion Agreement could be construed to transfer any right – requirements (d) and (e), which provide for exclusivity of the transferred good from the buyer and from any third party, are obviously unmet. A plain application of

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40 *Tata Sons*, supra n. 29 at paras. 51-52.
41 Supra n. 27
42 Supra n. 28

BSNL, therefore, would result in a ruling diametrically opposed to the one arrived at by the division bench.

Another consequence of applying the *BSNL* test *simpliciter* is that exclusive licenses (regardless of how short the time period of the license is), in situations where the license excludes all third parties including the licensor himself, would constitute transfers of the right to use goods, and therefore fall within the definition of a "deemed sale" under Article 366(29A)(d), with sales tax becoming applicable on the transaction.

In all instances where there exists even an iota of non-exclusivity, however, we submit that *BSNL* lays down the law that no taxable event has occurred for the levy of sales tax, since the deeming provision in Article 366(29A)(d) cannot be interpreted in such an overbroad manner. For this reason, we argue that *Tata Sons* is bad law and liable to be overturned.

The wrongness of the bench in *Tata Sons* has had serious effects on IP transactions, with the Commissioner of Sales Tax, Mumbai issuing a Trade Circular in July 2015 in which he extends the ruling of the division bench to the Maharashtra VAT Act, thus making trademark licensing transactions VAT-able.[43]

[43] Trade Circular No. 11T of 2015, *Bombay High Court judgement in the case of Tata Sons Ltd., Writ Petition No. 2818 of 2012 decided on 20.01.2015*, available at http://www.mahavat.gov.in/Mahavat/MyFold/KNOWLEDGE%20CENTER/TRADE%20CIRCULARS/DateWise/KNOW_TRADEC_DW_MVAT/KNOW_TRADEC_DW_MVAT_07_13_15_4_38_19PM.pdf

B. Wrong on every Aspect

If one last piece of clinching evidence is required to condemn *Tata Sons* to the purgatory of bad law, it is contained in the direct conflict of law created by the interpretation of licensing as a deemed sale with the provisions of the Finance Act dealing with service tax. Section 66E(c), which contains a list of "declared services", provides as follows:

> *"c. temporary transfer or permitting the use or enjoyment of any intellectual property right"*

It is therefore undeniable that legislative intent at the Union level was to deem temporary IP transactions or permissive transactions (such as licensing) as services, for which service tax liability is incurred. If the interpretation taken by the *Tata Sons* court is adopted, then parties to IP licensing transactions will suffer double taxation – once as a service, and once as an instance of sale. Such double taxation would be impossible to justify, since the licensing of an IP right does not involve multiple taxable aspects. The transaction is not divisible into a sale aspect and a service aspect, since the entire licensing transaction is a single event that cannot be split to accommodate the vagaries of any aspect theory-based defence of the taxation regime.

IV. THE WAY FORWARD

Over the course of this paper, it has (hopefully) become clear that the *Tata Sons* ruling is egregiously bad law. However, this does not solve the

underlying problem: how must a taxation regime account for the temporary vesting of divisible rights in intellectual assets? Clearly, deeming them as sales is not the correct answer, and deeming them as a service also seems to be an incongruous solution – an attempt to force the round peg of licensing transactions into the square hole of the sale/service distinction. Another possible solution could be in the form of judge-made law through the route of Article 141 of the Constitution. Tata Sons, the aggrieved petitioner, has already appealed the judgement discussed in this paper, and the outcome will hopefully lay down the law on this matter.

While Article 141-based interventions are in the nature of delicate surgical procedures, it appears that the taxability of IP licensing will ultimately be decided by a policy intervention more in the nature of an amputation in its scope and ambit. In an effort to overhaul the indirect taxation regime of the country, the Union Government recently rolled out the Model Goods and Services Tax Law[44] which attempts to resolve the sale/service conflict. Section 2(48) of the act defines 'goods' and explicitly provides that intangible property shall not qualify as 'moveable property' and hence will not be considered goods; Section 2(88) defines 'services' and specifically includes intangible property within its ambit.

Further, Entry 5 under Schedule II annexed to the draft deals with transactions that will be treated as 'supply of services" and includes *'temporary*

[44] Available at http://www.finmin.nic.in/reports/ModelGSTLaw_draft.pdf.

transfer or permitting the use or enjoyment of any intellectual property right'.[45] And finally, Section 3 that deals with the meaning and scope of 'supply' provides that supply includes all forms of transactions such as sale, transfer, license, lease etc. A cumulative reading of these provisions will lead us to conclude that all transfers of intellectual property rights, whether permanent or temporary, divisible or otherwise, will be considered as 'supply of services' and accordingly taxed as services. In its present form, the Model Act does seem to aid in overcoming the issues faced in taxing intangibles by providing a clear categorization that greatly reduces the potential for double taxation.

While the current regime constantly grapples with the problem of categorising IP transactions into sales and services, the GST regime seems equipped to end such confusion by eliminating the very need for such categorisation. With the passage of the Constitution (122nd Amendment) Act, 2016,[46] the GST regime is ever closer to materialising. The aim of academic research is to highlight deficiencies and lacunae in the law with an aim to correct it. In a sense, legal criticism only succeeds at the point when it is rendered redundant by a change in the regime. To that end, we hope that the speedy adoption of the GST will limit the relevance of our scholarship at the earliest.

45 Entry 5(c), Schedule II, Model GST Law.

46 Act no. __ of 2016. *See http://www.prsindia.org/billtrack/the-constitution-122nd-amendment-gst-bill-2014-3505/*.

COMMENT ON THE PHILIP MORRIS ASIA LIMITED V. THE COMMONWEALTH OF AUSTRALIA

Sourav Roy[*]

ABSTRACT

Sovereign states, which regulate or legislate or make policies based on grounds of public health, environment, and general welfare of the public, have to tread a very careful line nowadays, because of the possibility of disputes filed by foreign investors under the investor-state dispute settlement regime. One such example of this is the recent dispute between Philip Morris Asia Limited v. the Commonwealth of Australia[1] *This dispute took shape after the latter introduced laws that imposed restrictions on the tobacco industry. The investor- state dispute settlement mechanism, is by no means perfect, and is plagued by criticisms concerning legitimacy but it provides an avenue to foreign investors to directly sue a sovereign nation by invoking treaty standards and international law, more generally. How the tussle between states and foreign investors will play out in various sectors, remains to be seen, but this piece is an attempt to provide answers to the issues that will arise in the context of disputes that emanate from the sovereign nations' regulation of the tobacco industry (and foreign investors thereof).*

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1 PCA Case No. 2012-12.

I. INTRODUCTION

Last December, an arbitral tribunal[2] ("Arbitral Tribunal") ruled on the dispute between Philip Morris Asia Limited (a Hong Kong entity) as claimant and the Commonwealth of Australia ("Australia"), a sovereign state, as respondent. The dispute emanated from the enactment and enforcement of the Tobacco Plain Packaging Act 2011 (the "TPP Act") and related regulations by Australia after which Philip Morris Asia Limited (the "Claimant"/ "PM Asia") commenced arbitration[3] pursuant to the Hong Kong-Australia Bilateral Investment treaty[4] ("BIT").

Pertinent issues relevant to both (i) jurisdictional questions and (ii) alleged violation of substantive treaty standards were raised in this dispute. In the end, however, the tribunal declined to exercise jurisdiction at the preliminary stage itself as it found that the Claimant had committed an "abuse of rights". As a result, the decision didn't rule on the point of alleged violation of treaty standards at all. What was supposed to be a watershed moment in terms of a tribunal authoritatively ruling on whether a state indeed had a right

2 The tribunal was presided over by Professor Karl-Heinz Böckstiegel (President), Professor Gabrielle Kaufmann-Kohler and Professor Donald M. McRae. UNCITRAL Rules (2010) were applicable and the arbitration was under the aegis of the Permanent Court of Justice. On 18 December 2015, the tribunal issued a unanimous decision. On 17 May 2016, the tribunal published the decision after redacting the confidential information.

3 On 22 June 2011, the Claimant served upon the Respondent a Notification of Claim in accordance with Article 10 of the Treaty. Thereafter, the Claimant served a Notice of Arbitration dated 21 November 2011 as the parties couldn't settle the dispute.

4 Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments dated 15 September 1993.

to regulate the tobacco industry (and foreign investors thereof), and if yes, to what degree, left much to be desired.

This Comment will critically evaluate the decision of the Arbitral Tribunal ("**Award**") on the point of "abuse of rights". Further, this piece will look at the claims about the violation of substantive treaty standards as alleged by the Claimant and will estimate what the answer to those questions would have been, if there was no finding of "abuse of rights".

II. BRIEF BACKGROUND TO AUSTRALIA'S TOBACCO RELATED LAWS AND POLICIES

In 2008, the Australian Government established an independent taskforce of leading Australian and international public health experts to develop strategies to tackle the health challenges caused by tobacco, alcohol and obesity. After considering the recommendations of this taskforce, the government of Australia decided to take a series of tobacco control measures as part of a comprehensive strategy to promote public health and awareness of the risks of smoking which culminated in the TPP Act[5]. The measures included, *inter alia*:

1. Restrictions on tobacco advertising;
2. Introduction of plain packaging;
3. Updated and expanded graphic health warnings.

[5] The TPP Act received Royal Assent on 1 December 2011 and the related regulations came to force on 7 December 2011.

It is pertinent to mention here that Australia is a signatory of the WHO Framework Convention on Tobacco Control ("FCTC")[6].

A. Nature of the claims-

The Claimant raised the following claims:

1. By introducing plain packaging, the TPP Act and regulations had eliminated intellectual property and goodwill of the Claimant. As a result, the value of Claimant's investment had substantially diminished. This deprivation was tantamount to Expropriation;

2. Where effective alternative measures were available, the TPP Act and regulations were disproportionate. Further, that the measures frustrated the legitimate expectation of the investor that Australia will respect Article 20 of the TRIPS Agreement. This amounted to breach of the Fair and Equitable Treatment ("FET") standard.

3. Additionally the claimant also raised the following claims:

    a. That the measures constituted an unreasonable impairment;

    b. That the measures constituted a denial of full protection and security to a foreign investor.

[6] The FCTC was adopted by the 56th World Health Assembly in May 2003, was opened for signature on 16 June 2003, and entered into force on 27 February 2005. There are 174 States Parties to this treaty.

B. The Claimant as a foreign investor

The Claimant, incorporated in Hong Kong, asserted that the plain packaging measures had an adverse impact on investments that it owned or controlled in Australia. These investments were the shares that the Claimant held in Philip Morris Australia Limited ("PM Australia"), as well as the shares that were held by PM Australia in Philip Morris Limited ("PML"), and the intellectual property and goodwill of PML. The Claimant had acquired its shareholding in PM Australia (and hence a purported indirect interest in the shares and assets of PML) only on 23 February 2011. Only on 23 February 2011 did it qualify as an investor under the BIT in question, to bring a dispute as a foreign investor against Australia.[7]

C. Jurisdiction and the question of "abuse of rights"

A conduct amounts to an "abuse of rights" if a tribunal reaches a finding that an investment has been restructured only in order to gain jurisdiction under a BIT. There must have evidently been no other reason for the restructuring. Such disputes amount to "*an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs*"[8].

The question of abuse of rights arose because of peculiar facts of the present case- At the time the plain packaging measures was announced by the

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7 Supra, note 1, at ¶533.

8 Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, at para 204.

Australian government (on 29 April 2010), PM Asia did not hold any shares or interest in PM Australia or PML. The Claimant had acquired its shareholding in PM Australia (and hence a purported indirect interest in the shares and assets of PML) only on 23 February 2011. Prior to 23 February 2011, Philip Morris Brands Sari, a Swiss company, owned the shares in PM Australia, and PM Australia in turn owned the shares in PML. There was therefore no 'investment' as defined under the BIT prior to 23 February 2011 as PM Asia only acquired its interest in PM Australia on 23 February 2011.

These facts were relied upon by Australia in alleging that there was an "abuse of rights": namely, that the Claimant had restructured its investment only to qualify as a foreign investor so as to take benefit of the dispute resolution mechanism under the BIT.[9]

The following questions were before the tribunal- (i) does restructuring itself amount to an abuse of rights? (ii) Can an entity restructure its shareholding/ control to take benefit of a BIT dispute resolution mechanism? (iii) If it is permissible to restructure so as to take benefit of a BIT dispute resolution mechanism, to what extent is such a practice allowed? (iv) Is there a fine line between restructuring that amounts to an abuse of rights and one which doesn't amount to an abuse of rights?

[9] Australia's response to the Notice of Arbitration, at ¶7: "*Article 10 of the BIT does not confer jurisdiction on an arbitral tribunal to determine pre-existing disputes that have been re-packaged as BIT claims many months after the relevant governmental measure has been announced*".

But before discussing the merits of the Award rendered in this particular case, it is worth referring to some of the earlier tribunals' decisions which shed light on the following points concerning the "abuse of rights".

1. Restructuring is per se not Illegitimate

The *Tidewater v. Venezuela* tribunal held[10]:

> "*It is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host State in this way*."

2. Restructuring may be Illegitimate in Certain Cases

The *Tidewater v. Venezuela* tribunal went on to hold that though restructuring in general is not illegitimate, it may amount to an abuse of process if it has been carried out only to obtain BIT benefits in respect of a foreseeable dispute[11].

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[10] Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, at ¶184.

[11] Tidewater, supra note 10: "*At the heart, therefore, of this issue is a question of fact as to the nature of the dispute between the parties, and a question of timing as to when the dispute that is the subject of the present proceedings arose or could reasonably have been foreseen… If the Claimants' contentions are found to be correct as a matter of fact, then, in the view of the Tribunal, no question of abuse of treaty can arise. On the other hand, if the Respondent's submissions on the course of events are correct, then there may be a real question of abuse of treaty. […] But the same is not the case in relation to pre-existing disputes between the specific investor and the [S]tate. Thus, the critical issue remains one of fact: was there such a pre-existing dispute?*"

This has been reiterated by the *Mobil Corporation v. Venezuela* tribunal as well[12]:

> *"205. With respect to pre-existing disputes, the situation is different and the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute, to take the words of the Phoenix Tribunal, "an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs".*

3. Dividing Line

According to the *Pac Rim v. El Salvador,* there is a dividing line between a legitimate restructuring and one that amounts to an "abuse of rights"[13]:

> *"2.99. […] In the Tribunal's view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy."*

4. Manipulative Conduct

The principle that a restructuring undertaken to gain treaty protection in light of a specific dispute can constitute an abuse was reiterated in *Lao Holdings v. Laos*[14]*:*

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12 Mobil, supra note 8, at ¶204.

13 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012 ("Pac Rim decision on the Respondent's Jurisdictional Objections"), at ¶2.13.

14 Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, at ¶70.

> *"70. The Tribunal considers that it is clearly an abuse for an investor to manipulate the nationality of a company subsidiary to gain jurisdiction under an international treaty at a time when the investor is aware that events have occurred that negatively affect its investment and may lead to arbitration. In particular, abuse of process must preclude unacceptable manipulations by a claimant acting in bad faith who is fully aware prior to the change in nationality of the "legal dispute," as submitted by the Respondent."*

The Arbitral Tribunal in PM Asia v. Australia contributes to the above jurisprudence by distilling the law further on the question of abuse of rights and by providing clarity on the following issues - *Firstly,* the Award elucidates that though under certain circumstances, a restructuring may constitute an abuse, a high threshold needs to be discharged before reaching a finding on abuse of process. However, the high threshold is calibrated. The foreseeability of a dispute need not be a very highly probable dispute. As long as there is a reasonable prospect of a dispute, a dispute is foreseeable. In such a case, a restructuring done with the intention of bringing an investment within the scope of a BIT would amount to an "abuse of rights".

Secondly, there is no 'one size fits all' approach in discerning whether restructuring amounts to an "abuse of rights". Therefore, each case will require proof of the foreseeability of the claim, which will in turn depend on the particular circumstances of each case. *Thirdly,* the abuse is subject to an objective test and not a subjective one.

In the present dispute, the Arbitral Tribunal found that this was indeed a fit case of "abuse of rights". The Claimant/ investor was aware as early as 2010 that the plain packaging measures would be implemented by 2012.[15] There was never a doubt that these measures would eventually be implemented. Thus the restructuring in 2011 was done with the sole aim to take benefit of the BIT dispute resolution mechanism.

It is pertinent to note that the Claimant did plead before the Arbitral Tribunal that the restructuring was done for other reasons, most notably, for tax purposes and that it was a part of a global restructuring dating back at least a decade. However, the Arbitral Tribunal was not satisfied by the evidence tendered on this point. The Claimant couldn't establish, in terms of evidence that this was indeed for tax benefits and not for the sole purpose of accessing a favourable BIT dispute resolution mechanism[16].

III. THE SUBSTANTIVE TREATY STANDARDS IN QUESTION

As the Arbitral Tribunal reached a definitive conclusion on "abuse of rights", it declined jurisdiction. Therefore, it was no longer necessary to consider the questions about the violation of substantive treaty standards. However, this article will briefly discuss the course that would have ensued, should the Arbitral Tribunal have not declined jurisdiction. The following

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15 Supra, note 1, at ¶557- 569.

16 Supra, note 1, at ¶581- 584: "*Therefore, the Tribunal finds that the Claimant has not been able to prove that tax or other business reasons were determinative for the restructuring. From all the evidence on file, the Tribunal can only conclude that the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty, using an entity from Hong Kong.*"

discussion looks primarily at the claims of (a) Expropriation; (b) breach of FET standards.

A. Expropriation

This piece argues that in international law, not all deprivations of property amount to expropriation. The Police Powers doctrine recognizes that a state may take property and property owners may suffer significant economic losses without giving rise to state responsibility in certain cases[17]. Quoting the *Saluka v. Czech Republic* tribunal in this regard[18]:

> *"It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."*

According to this view, Police Powers is a part of sovereignty itself and therefore, is always available to the state to justify a certain measure[19]. As Schreuer puts it, "*in investment law "the 'all or nothing' principle is applied. This means that investors are entitled to full compensation in case of an expropriation and to nothing if*

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17 CME v. Czech Republic, UNCITRAL, Final Award, 14 March 2003; Saluka v Czech Republic, UNCITRAL, Partial Award, 17 March 2006; Methanex v. USA, UNCITRAL, Final Award, 3 August 2005; Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Award, 3 March 2010.

18 Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006.

19 Jorge E. Viñuales, *Customary Law in Investment Regulation,* (2013/2014), 23 ITALIAN YEARBOOK OF INTERNATIONAL LAW 23; JORGE E. VIÑUALES, *Sovereignty in Foreign Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, at p. 317-362, (Douglas, J. Pauwelyn and J. E. Viñuales, The Foundations of International Investment Law (Oxford University Press, 2014).

a legitimate regulation is found to have occurred."[20] Police powers rule flows from customary international law and therefore, its application does not depend upon a clause incorporating it into the treaty, unless the treaty otherwise excludes it[21]. This interpretation is consistent with the Vienna Convention on the Law of Treaties[22].

Based on the above, it is submitted that a non-discriminatory measure, taken on grounds of public health, after following due process, would not qualify as expropriation. Whether Australia would eventually have satisfied the tribunal as to the fulfilment of those conditions is not something that can be foretold. What this piece rather argues is that, should it have satisfied these conditions, the measures would not amount to expropriation.

B. *FET Standard*

For lack of a uniform definition of the FET standard, this piece uses one of the various forms in which this standard has been defined by tribunals. A breach of the FET standard was defined in *Waste Management v. Mexico*[23] as: "*involv[ing] a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process*".

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20 C REINER AND CH SCHREUER, *Human Rights and International Investment Arbitration,* in PM DUPUY, EU PETERSMANN AND F FRANCIONI, HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2009), at p. 95.

21 Jorge E. Viñuales, *Customary Law in Investment Regulation,* (2013/2014), 23 ITALIAN YEARBOOK OF INTERNATIONAL LAW 23.

22 Article 31(3)(c) VCLT: "[i]n interpreting a treaty, account has to be taken of 'any relevant rules of international law applicable in the relations between the parties'".

23 ICSID Case No. ARB(AF)/00/3.

The *Total v. Argentina*[24] tribunal was emphatically clear while stating that it is difficult to give an exact definition of the scope of this provision. Since this standard is inherently flexible, it is difficult, if not impossible, "*to anticipate in the abstract the range of possible types of infringements upon the investor's legal position*"[25]. What constitutes the exact contours of the FET provision is a separate matter of scholarship altogether[26]. What is relevant for us here is to keep in mind the context in which the FET argument was raised by the Claimant in this case.

It was the Claimant's argument that the measures in question were not the least restrictive measures and because there were other measures that the state could have taken, without introducing plain packaging, the FET standard is breached. Such an argument flows from the awards like *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. the Republic of*

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[24] Total v. Argentine Republic, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010).

[25] Supra, note 24, at ¶104; C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Trade,(2005/3), 357, 365.

[26] In a first line of cases, certain tribunals have been willing to extend protection under fair and equitable treatment to the State's duty to maintain a stable framework. Often, this sub-element of the standard has been buttressed by reference to the BIT's preamble, which may refer to stability as one of the goals of the treaty. Examples of references to BIT preamble for FET/ stability- CMS v. Argentina, ICSID Case No ARB/01/08, Award (12 May 2005); LG& E v. Argentina LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006) ¶125; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No ARB/01/3, Award (22 May 2007) ¶260. In contradistinction, certain tribunals have stressed that, as a matter of principle, the State's right to regulate cannot be considered frozen or restricted as a result of the existence of investment treaties. These include Parkerings-Compagniet AS v. Lithuania, ICSID Case No ARB/05/8, Award (11 September 2007); Total v. Argentine Republic, ICSID Case No ARB/04/01, Decision on Liability (27 December 2010). As held in Parkerings v. Lithuania: "*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment*."

Ecuador[27], where the tribunal held that administrative/ legislative measures that are more stringent that the least restrictive measures/ alternative measures, constitute a breach of the FET standard on grounds of proportionality[28].

However, such a concept is neither a general principle nor part of customary law and therefore, a measure that otherwise satisfies public purpose; is non-discriminatory and has been taken after following due process is unlikely to be compensated for[29].

IV. CONCLUDING REMARKS

The Award in question didn't rule on the point of alleged violation of treaty standards at all. We haven't heard the last word yet on a sovereign nation's right to regulate the tobacco industry (and foreign investors thereof), on grounds of public health. Similar actions are underway against other countries like Uruguay and will probably be initiated against other countries that impose plain packaging. The degree to which such anti-tobacco measures constitute a valid regulation thus remains to be seen. What is certain is that in the other cases, the "abuse of rights" issue will be less thorny and eventually we will have a decision on merits that looks at expropriation and FET in the context of anti- tobacco regulations.

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27 ICSID Case No. Arb/06/11.

28 AES Summit Generation v. Hungary, Award, ¶ 10.3.7–9; KINGSBURY AND SCHILL, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest-The Concept of Proportionality*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (Schill ed., 2010), at p. 97.

29 JONATHAN BONNITCHA, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, chapter 4(Cambridge University Press, 2014).

This article is therefore a pointer to the arguments that the sides will take and develop in those cases and it concludes by saying that it is more likely than not that a legitimate exercise of the state's regulatory powers to protect the health of its citizens by taking measures that are non-discriminatory and abide by due process, will neither constitute expropriation, nor a breach of the FET standard.

THE DRAFT ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) BILL, 2014: A LEGISLATIVE ANALYSIS

Ipshita Bhuwania[1]

ABSTRACT

The use of Assisted Reproductive Technology ("ART") in India has seen steady but unregulated growth. The placeholder Indian Council of Medical Research ("ICMR") Guidelines of 2002 have been sought to be replaced by a succession of Draft ART (Regulation) Bills, from 2008-2013 but none has attained the force of law. The 2014 Draft ART Bill was released in September 2015 for the purpose of receiving stakeholder comments.

This paper analyses significant provisions of the Bill to gauge their implications on stakeholders: the surrogate, the child, the commissioning parents and the ART clinics and banks. Furthermore, lacunae within the Bill as to what remains to be done to protect the rights of vulnerable parties have been highlighted as well. The merit of the 2014 Draft Bill lies in having safeguards in place, albeit to varying extents, for all of its stakeholders. The vulnerable position of the surrogate, prejudice against certain kinds of parents, insufficiency of measures to ensure child welfare and overwhelming bias towards ART clinics are contentious issues that still seek to be resolved.

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I. INTRODUCTION

IVF clinics have been mushrooming across India since the birth of the first test tube baby in India in 1986.[2] These clinics went mostly unregulated until the ICMR developed draft National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India in 2002. However, even after, these guidelines were not being followed, as they are not legally binding.

Alarmed by the burgeoning, and mostly unregulated, growth of this industry, the first Draft ART (Regulation) Bill was released for public comment in 2008. Based on comments received from various stakeholders, revised versions of this draft Bill were released first in 2010 followed by one in 2013. While the 2008 and 2010 drafts were subjected to intense public debate, the 2013 Draft Bill was never circulated or put in the public domain for discussion, which is why the latter has not been discussed here.[3]

The 2014 Draft ART Bill was released in September 2015 for a thirty-day comment period. This paper analyses the rights and obligations for each stakeholder under this legislation and attempts to present an objective analysis of the legislative intent behind this Bill. There is a possibility of overlap between the different categories. An effort has been made to highlight only the main provisions affecting the particular stakeholder category.

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2 R. S. Sharma, *Social, Ethical, Medical & Legal Aspects Of Surrogacy: An Indian Scenario*, 140(1) INDIAN JOURNAL OF MEDICAL RESEARCH 13-16 (November 2014).

3 Anil Malhotra, *Rewriting Surrogacy Law,* LAWYERS UPDATE (June 2014).

II. THE SURROGATE

The surrogate mother must be 21-35 years of age. This narrow age gap is intended by the legislature to ensure that the surrogate does not undergo pregnancy at a particularly young or old age, so her health is not compromised and there are fewer chances of medical complications.[4]The 2014 Bill has curtailed the number of cycles of medications (three) that the surrogate can be expected to undergo during her surrogacy.[5] This protects the surrogate from the whims of paranoid parents. While the number of live births is restricted to one (i.e. a surrogate may only participate in one surrogacy agreement in her life),[6] there is no limit placed on how many times a surrogate can unsuccessfully undergo ART cycles. It would prove beneficial to curtail this as too many rounds of ART cycles are harmful for the surrogate's health.[7]

The surrogacy agreement is, arguably, the most crucial part of the surrogacy as it determines the monetary compensation to be paid to the surrogate. However, as the weaker party[8] in the transaction, the surrogate stands a good chance of accepting terms without fully understanding the consequences and/or consenting to an insufficient amount as compensation

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4 Priyattama Bhanj**,** *The Assisted Reproductive Technologies (Regulation) Bill, 2010: A Case of Misplaced Priorities?* Journal of Indian Law and Society Blog (July 17, 2014), *available at* https://jilsblognujs.wordpress.com/2014/07/17/the-assisted-reproductive-technologies-regulation-bill-2010-a-case-of-misplaced-priorities/#_ftn1 (Last visited on March 12, 2016).

5 Section 60(5)(b), Draft ART Bill, 2014.

6 Section 60(5)(a), Draft ART Bill, 2014.

7 Aarti Dhar, *Gaps in Surrogacy Bill,* THE HINDU (October 27, 2013). *See* SAMA 2010 Report, *supra* note 25, at 3.

8 Amrita Pande, WOMBS IN LABOUR-TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA, 16-25 (Columbia University Press, 2014).

out of desperation. No mandatory or stipulated terms of contract have been provided by the Draft Bill, meaning that the parties are free to contract as they please[9] although, an appropriate formula and compensation mechanism is due to be given by the Rules.[10] Another issue that should be provided for is that no part of the promised payment must be forfeited due to miscarriage or still births or other medical complications.[11]

This is an area where interests appear to be unbalanced. A couple commissioning surrogacy must enter into a surrogacy agreement with the surrogate. There is no provision in the law for the surrogate to have state-provided legal aid in case she is unable to afford legal help of her own (a likely scenario, considering the usual economic demographic of commercial surrogates).[12] It is however provided that the ART bank shall act as the surrogate's legal representative and also fight any legal case which arises during the course of surrogacy agreement, free of cost.[13] However, from the perspective of the surrogate, there arise two issues.

First, a surrogate can participate in only one successful live birth in her life,[14] and will thus not be of any utility to the ART bank after that surrogacy. Therefore, can the ART bank be deemed to have any interest in the surrogate's

9 Section 60(3)(a), Draft ART Bill, 2014.
10 Section 60(3)(b), Draft ART Bill, 2014.
11 *Surrogate Motherhood,* CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19.
12 Staff Reporter, *Surrogate Mothers Underpaid, Undercared for* (July 17, 2013), *available at* http://www.deccanherald.com/content/345338/surrogate-mothers-underpaid-uncared-for.html (Last visited on March 11, 2016).
13 Section 60(28), Draft ART Bill, 2014.
14 Section 60(5)(a), Draft ART Bill, 2014.

welfare? Hence, is it thus an able legal representative for the surrogate? *Second*, the bank's period of liability can arise only during the subsistence of the surrogacy agreement. While this suits the ART bank as it puts a cap on its period of legal representation, this is disadvantageous for the surrogate as there could be medical issues related to the surrogacy which arise in the future also. There should be a provision for legal representation or legal aid for this period too.

A greatly affected stakeholder in surrogacy transactions is the surrogate's own family as both the spouse and child/children of the surrogate struggle to manage without her. The surrogate also emotionally suffers as she is often far from her family.[15] The legislature has tried to safeguard at least the child(ren)'s rights by requiring the surrogate's spouse to give an undertaking that he will take care of their existing child/children during the subsistence of the surrogacy agreement.[16] However, more elaboration on what 'taking care' of the child/children will legally entail is desirable.

Another provision meant to strengthen the position of the surrogate is that of the insurance cover. The surrogate is insured for medical expenses in the eventuality of any medical emergency (this will also be extended to the oocyte donor) or any medical complications that have arisen during pregnancy and appropriate compensation to the family of the surrogate in the case of her

15 Pande, *supra* note 33, at 267-270.
16 Section 60(19)(b), Draft ART Bill, 2014.

death.[17] It is, however, unclear as to what is 'appropriate' and who will decide so.

Possibly the most contentious issue in the Bill has been the question of the parental rights of the surrogate. The Bill has unequivocally denied any parental rights to the surrogate.[18] This has been a stand consistently taken right from the 2008 Draft Bill. To foreclose the possibility of any competing claims over the baby, the Draft ART Bill 2014 has made it clear that the only kind of surrogacy permitted under the Bill is 'gestational surrogacy'[19] or 'in vitro fertilization surrogacy' (IVF) or 'host uterus surrogacy'.[20] This means that the egg involved in the pregnancy is not from the surrogate,[21] thus ensuring that she has no genetic links with the child she is carrying.

However, it must be noted that gestational surrogacy is more invasive than artificial insemination and will take a greater toll on the health of the surrogate. While this definitely puts an end to the ambiguity in this area, concerns have been raised about this. Many surrogates form emotional bonds with the child in their womb.[22] Such a scenario raises questions surrounding what might be the best way to accommodate the surrogate's emotions along with the parental rights of the commissioning couple.

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17 Section 2(w), Draft ART Bill, 2014.

18 Section 60(4), Draft ART Bill, 2014.

19 Jwala D Thapa, *Analysing the status of the surrogate mother under The Assisted Reproductive Technologies (Regulation) Bill, 2010*, NUJS Working Paper Series NUJS/WP/2012/01 (2012), *available at* http://www.nujs.edu/workingpapers/analysing-the-status-of-the-surrogate-mother-under-the-assisted-reproductive-technologies-regulation-bill2010.pdf (Last visited on March 11, 2016).

20 *Id.*

21 Section 2(zq), Draft ART Bill, 2014.

22 Pande, *supra* note 33, at 264-267 and 271-281.

Even an oocyte donor, who actually shares genetic linkages with the baby, has no parental rights. This means that only the commissioning couple, who is paying money to obtain a child, can claim to be parents. From a long-term policy perspective, anthropologists fear that this essentialized perspective of parenthood might lead to the process of birth being viewed as a mere manufacturing process, thus commodifying the baby and creating a business of 'baby-selling'.[23]

III. THE CHILD

In case of an OCI/PIO/foreigner married to Indian, the commissioning parents must appoint a local guardian. He/she will be responsible for the well-being of the baby, in case the couple fails to take delivery of the child. The guardian may decide to bring up the baby or give it up in adoption if the commissioning couple has not claimed the baby within a month.[24] In addition, the 2014 Bill provides for a penalty provision for the commissioning couple who neglected to take custody of the child without sufficient cause.[25] However, this is merely a stop-gap measure as, ideally, the welfare of the child should not be the sole discretion of the guardian. A mechanism should be put in place by the state to objectively gauge the best course of action to be taken, along with provisions for follow-up and

23 *Surrogate Motherhood,* CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19.
24 Section 60(21)(c)(i)(a), Draft ART Bill, 2014.
25 Section 60(21)(c)(i)(d), Draft ART Bill, 2014.

monitoring.[26] At all points, the child's best interests should be the paramount concern as it is the vulnerable party in this equation.[27]

The law has mandated provision of insurance for the development and growth of *only* a child in whom abnormalities are detected during the gestation period.[28] While the legislative intent behind this is clear, in as far as ensuring that a child with unique medical needs does not languish for want of care in case of death of commissioning parents, it would be beneficial to extend insurance cover for all children, up to a certain age. What happens in the case of death of commissioning parents (Indian citizens or NRIs) before custody of child? There is no provision for insurance cover or appointment of guardian, like there exists in the case of OCI/PIO/foreigner married to Indian citizen.[29] It seems that while legislature is being over-cautious vis-à-vis non-Indians, it is failing to adopt the same strict scrutiny for Indian couples.

Additional safeguards have been adopted in the 2014 Bill, such as that the foreigner must necessarily be visiting on a medical visa[30] (and not on a tourist visa, as was the norm) and OCIs, PIOs and foreigner married to an Indian citizen will require an 'exit' permission from the concerned authorities for the child or children born through surrogacy before leaving India.[31] Children born to these three groups of persons will not be considered citizens

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26 SAMA 2010 Report, *supra* note 26, at 3.
27 Article 3, United Nations Convention on Rights of the Child, 1990.
28 Section 60(11)(c), Draft ART Bill, 2014.
29 Section 60(21)(a)(v), Draft ART Bill, 2014.
30 Section 60(12), Draft ART Bill, 2014.
31 Section 60(15), Draft ART Bill, 2014.

of India, and will bear the citizenship of the place of residence of their parents. They shall be entitled to Overseas Citizenship of India under Section 7A of the Citizenship Act, 1955.[32] Clarifying this has ensured that the parties will not suffer from the hassles of having an indeterminate nationality.[33]

IV. ART CLINICS & BANKS

The Bill intends to set up ART Boards at the State and Central level. The National Advisory Board is expected to (1) develop new policies in the area of ART and (2) assist the State Boards in accreditation and regulation of services of ART clinics and banks in the country.[34] The State Board is supposed to lay down the policies for assisted reproduction in the State.[35]

A supplementary institutional measure is the creation of the National Registry to act as a central database of ART clinics and banks in the country.[36] The Registration Authority, constituted by the State government,[37] is instrumental in this, as it will grant a certificate of registration to ART clinics and banks, without which neither can practice.[38] Anyone aggrieved by the Registration Authority can appeal to the State Board[39] and then to the National Board for relief.[40]

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32 Section 61(7), Draft ART Bill, 2014.
33 *See* Jan Balaz v. Anand Municipality, Letters Patent Appeal No. 2151 of 2009 in Special Civil Application No. 3020 of 2008 (Gujarat HC).
34 Section 17(1), Draft ART Bill, 2014.
35 Sections 33(1) and (2), Draft ART Bill, 2014.
36 Section 18 r/w Section 21, Draft ART Bill, 2014.
37 Section 35(1), Draft ART Bill, 2014.
38 Section 36, Draft ART Bill, 2014.
39 Section 44, Draft ART Bill, 2014.
40 Section 45, Draft ART Bill, 2014.

An ART clinic is one which can provide infertility treatment,[41] use, create, process and store embryos and carry on research in the area of ART.[42] An ART bank, on the other hand, acts mainly as a repository of sperm or semen, oocytes or oocyte donors and links surrogate mothers to the ART clinics or their patients.[43] ART Clinics and banks are additionally obligated to maintain the confidentiality of their patients and surrogates.[44] They are allowed to advertise for surrogates, once registered.[45] These provisions clearly intend to make ART clinics a central figure in all surrogacy-related activity.[46]

V. THE COMMISSIONING PARENTS

This Bill restricts the option of availing ART procedures to only a married couple consisting of a man and woman, where the woman has been proven to be unable to conceive by natural means.[47] This excludes four categories of potential parents: homosexual couples, single men or women, couples in live-in relationships and the third gender. A potential Constitutional challenge could lie under this, in the event that this Draft Bill became law, as it adversely affects the rights of fours groups of stakeholders.

41 Section 36, Draft ART Bill, 2014.
42 Section 36 (Explanation), Draft ART Bill, 2014.
43 Section 2(d), Draft ART Bill, 2014.
44 Sections 52(12), 58(4), 59(1), 60(16), Draft ART Bill, 2014.
45 Section 46(16), Draft ART Bill, 2014.
46 Dilip Rao, *The Draft ART Bill, 2008,* LAW AND OTHER THINGS (October 10, 2008), *available at* http://lawandotherthings.blogspot.in/2008/10/draft-art-bill-2008.html (Last visited on February 29, 2016).
47 *See* Sections 2(zg), 46(10) and 58(1), Draft ART Bill, 2014.

It is difficult to pinpoint the legislative intent behind this. Perhaps fears of child abuse and child trafficking (easily commissioned by single men or women or live-in couples) have triggered this. One positive motive is to not give opportunities to rich couples, who do not suffer from infertility but still choose to not undergo pregnancy and opt to conceive 'designer babies' through surrogacy.[48]

As for the national identity of the commissioning couple, they can include Non Resident Indians (NRIs), Overseas Citizens of India (OCIs), People of Indian Origin (PIOs) and foreigner married to an Indian citizen.[49] This entirely excludes a foreign couple from commissioning surrogacy in India. It is quite clear that the legislature means to avoid making India an international destination for surrogacy. In the short-term, this will greatly affect the earning capability of commercial surrogates, but in the long-term, this will reduce chances of commodification of babies, forced surrogacy and will prevent India from being viewed as a 'baby-farm' globally.[50] It is also possible that cases like *Baby Manji Yamada*[51] have led the legislature to err on the side of caution where foreign couples are concerned.

In all cases, the child born through surrogacy will be considered the legitimate child of the commissioning couple, and shall have identical legal

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48 Rao, *supra* note 15. *See Feminist Perspectives of Surrogacy,* Feminist Legal Theory (October 24, 2012), *available at* http://femlegaltheory.blogspot.in/2012/10/feminist-perspectives-on-surrogacy.html (Last visited on March 11, 2016).

49 Section 60(11)(a), Draft ART Bill, 2014.

50 *Surrogate Motherhood – Ethical or Commercial*, CENTRE FOR SOCIAL RESEARCH (2010), *available at* http://www.womenleadership.in/Csr/SurrogacyReport.pdf (Last visited on March 11, 2016).

51 Manji Yamada v Union of Indi*a* [2008] 13 SCC 518 (SC)

rights as a child born through sexual intercourse,[52] as will any child born to a woman through ART procedures.[53] This is true even if the commissioning couple separates or divorces after commissioning the surrogacy but before the child is born.[54]

Counselling for patients and surrogates has been a fixture in the previous drafts, as it is in the 2014 Bill.[55] However, counselling for the commissioning parents is a new addition under this Bill. In the interest of the couple, the ART clinic must inform the couple about all the implications and chances of success of ART procedures, the accompanying advantages, disadvantages, costs involved, their medical side effects and risks, the possibility of adoption, and any other matter which might aid the commissioning couple to arrive at an informed decision which would be in their best interest.[56] This balances the information asymmetry between the clinic/bank and the parents, and will limit chances of the former giving false hopes or misleading information to desperate couples.

However, adoption as a favourable option for infertile couples had not been given sufficient attention.[57] In fact, it has been portrayed as a *back-up*

52 Section 61(1), Draft ART Bill, 2014.
53 Sections 61(2) and 61(4), Draft ART Bill, 2014.
54 Section 61(3), Draft ART Bill, 2014.
55 *See* Sections 49(5) and 60(28), Draft ART Bill, 2014.
56 Section 46(6), Draft ART Bill 2014.
57 SAMA, *The Assisted Reproductive Technologies (Regulation) Bill & Rules (Draft) – 2010 Issues and Concerns* 1-4, at 3 *available at* http://www.communityhealth.in/~commun26/wiki/images/0/0d/Sama_ART_Bill_Policy_Brief_2010.pdf (Last visited on March 11, 2016).

measure, should the couple fail to conceive through ART.[58] It also must be appreciated that since counselling regarding the infertile couple's options is to be provided by the ART clinic,[59] and not a neutral state-appointed counsellor, there is little chance of adoption being shown in a positive light by a stakeholder who has a lot to lose or gain based on the couple's decision. But, seen objectively, adopting children reduces the use of government resources to main them in state-owned orphanages, along with a drop in population-proving beneficial to the society in the long-run.

VI. CONCLUSION

The merit of the 2014 Draft Bill lies in having safeguards and procedures in place, for a great many of the stakeholders. The prejudice against certain kinds of parents, the insufficiency of measures to ensure material well-being of children and overwhelming bias towards ART clinics and banks are contentious issues. The position of the surrogate, vis-à-vis parental rights and the surrogacy agreement particularly, appears to still be vulnerable. If the legislature has chosen the policy of allowing commercial surrogacy, it must uplift the position of the surrogate-the central figure in this highly lucrative[60] and potentially exploitative industry.

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58 *Id.*

59 Section 46(6), Draft ART Bill 2014.

60 *Surrogate Motherhood,* CENTRE FOR SOCIAL RESEARCH Report, *supra* note 19, at 3.

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