NALSAR

STUDENT LAW REVIEW

Vol.8 2013

student bar council | nalsar university of Law

NALSAR

STUDENT LAW REVIEW

Vol. 8 2013

EDITORIAL BOARD

This issue shall be cited as 2013 (8) NSLR <page no.>
ISSN 0975 0216

Contents

FROM THE FACULTY ADVISOR

Nalsar Student Law Review is the University's flagship publication catering to the latest legal developments and legal trends across the world. NSLR was first launched in the year 2005 as a student initiative and was conceptualised to mirror the law school's commitment to student writing and research. By encouraging participation from the student community, the NSLR has been a constant vehicle for academic publishing in the field of law.

This present edition, i.e. Vol.8 of the NSLR has continued to be an effective platform to foster student scholarship through various methods. The editorial board engaged with law students within India as well as those present in the SAARC countries by extending the 4th Ashurt NSLR Contract Drafting competition to the same. Diverse methods such as Legal Essay Writing Competition for the sophomore batch, a workshop for reviewing research ideas, inculcating the discipline of legal writing and familiarising the students with the Bluebook manner of citation were also undertaken. Research topics dealing with socio-legal, socio-political themes were also introduced in the competition in an attempt to sensitize the students.

To quote *James R. Nielsen, My Turn: The Flaw in Our Law Schools, Newsweek, June 11, 1984*: "It is a fact that a student can graduate from United States, without ever having written a pleading, a contact, a will, a promissory note or a deed. It is a fact that such students and those similarly trained at most other schools do pass the bar exam and are certified as competent to render advice and to represent others in court. Whatever else may be said about this license issued by the state bar, let it be said that for these students and their clients it is a cruel hoax." NSLR endeavours to curtail this habit and to popularise, in a scholastic fashion, the need for deliberation over pertinent issues.

NSLR has the unique characteristic of being published *by the students* and *for the students*. It is the achievement of this goal which makes it our *flagship publication*. The editorial board bears the task of proving the NSLR's mettle each year and of publishing exceptional student contributions by following the four step procedure of - selection, peer-review, editing and proofing. I am proud to associate myself with the NSLR and share the editorial board's unwavering efforts and values. I wish them the very best in the release of yet another engrossing compilation of student works in Vol.8 of the NSLR.

Dr. Aruna B. Venkat
(Faculty Advisor)

EDITORIAL

Education is the most powerful tool which you can use to change the world.
~ Nelson Mandela

The aforementioned quote most aptly captures the essence of scholastic contributions published in the latest edition of the *NALSAR Student Law Review*. While the problems of social change are more complex than implied, an attempt has been made to tailor the responses to such social change in an erudite fashion. It has been the primary goal of the NSLR to strive to bring together articles dealing with the most contemporary and contentious issues both at the Indian as well as the global fore. The editors for Vol.8 of the NSLR have solicitously reviewed articles dealing with changing legal landscapes and bearing reflection on the steady metamorphosis of the established legal order we conform to.

It has been hotly debated that piracy lies at the bottom of the Italy-India dispute and has also emerged as a 'business' for many located in the Horn of Africa. Anindita Pattanayak & Kartikeya Dar have critiqued the Indian legal framework pertaining to the issue of piracy. Alongside analyzing the loopholes in the Piracy Bill introduced before the Indian Parliament, the authors have adopted an interdisciplinary approach towards the issue of piracy and made references to the provisions of UNCLOS as well as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

Divyanshu Agrawal has ventured to provide an informed answer to the question - '*do international human rights treaties protect the poor*'*?* The author has selected four situations which evidence how different human rights interact with different stakeholders – he critically examines the engagement of the *citizen*, on one hand, with the Host State, other states, international financial institutions, and multinational corporations, on the other.

In his article *Mandatory CSR in the Companies Bill, 2011 - Are we there, yet?*, Arpit Gupta studies the change of Corporate Social Responsibility from a mere 'voluntary' initiative to a 'mandatory' one, and illustrates the large number of problems which have been left unaddressed by the legislators in framing this particular clause. He critiques a seemingly 'socialist' Companies Bill and discusses the issue of constitutional validity of the same.

Malavika Prasad and Devdeep Ghosh have raised jurisprudential justifications for the latest and most controversial amendment to the Income Tax Act, 1961 - the General Anti-Avoidance Rule. This is done in the backdrop of the *Vodafone* case and the theoretical foundations supporting such a rule have also been examined.

In his note, Rishabh Shah has explored, in a rather unusual and satirical fashion, the tendencies of students studying the law at national law schools located in India. While tracing the academic life of a student, the author undertakes an interesting analysis using the Lockean theory as well the 'idea-expression' dichotomy as discussed in the US Supreme Court case of *Baker v. Seldon*.

Rupali Samuel critiques the doctrine of '*Responsibility to Protect*' in her article and she focuses on the concept of sovereignty alongside examining the problematic situation in Syria. Her analysis of the situation in Syria exposes the redundancy of the doctrine.

The State's unnecessary encroachment of the private domain of its citizens has caused much furore in social media. Anees Backer's article critically examines the law relating to obscenity in India. He makes an informed argument for the rejection of moral harm by focusing on the most aggravated form of obscenity – pornography.

Finally, three articles dealing with environmental law have also been published in this edition. The issue of environment protection is a pressing matter and hence NSLR is delighted to publish the same. We have maintained our policy of dedicating the annual issue to student authors and sincerely hope that Vol.8 is well received as an impassioned contribution to the contemporary legal developments.

Editorial Board

ADDRESSING PIRACY THROUGH THE INDIAN LEGAL FRAMEWORK

Anindita Pattanayak & Kartikeya Dar *

ABSTRACT

In October 1999, MV Alondra Rainbow was hijacked by a group of armed Indonesian pirates who were captured by the Indian Coast Guard in the Arabian Sea. However, prosecution of these criminals proved difficult due the absence of specific legislation recognising piracy as an offence. Indian waters are still plagued by several such incidents whose perpetrators are tried under provisions of the Indian Penal Code and archaic colonial admiralty law. The Piracy Bill introduced recently in Parliament attempts to address this issue, but suffers from various shortcomings. The definition of 'piracy' in the Bill, reproduced from the United Nations Convention on the Law of the Sea, leaves ambiguity concerning situations that come under the ambit of the proposed legislation. Given that 'piracy', according to the Bill, is committed only on the high seas or outside the jurisdiction of any state, such acts committed within territorial waters remain unrecognised. Requiring these acts to be committed only for 'private ends' limits the scope of acts constituting piracy. Also, whether 'hijacking' can be recognised as 'piracy' remains controversial. Additionally, the Bill fails to distinguish acts of piracy from discrete, individual offences committed on sea without any piratical intent. This paper argues that the Piracy Bill should incorporate some modifications modelled on the Suppression of Unlawful Acts against Safety of Maritime Navigation Act, 2002,to act as a better instrument to tackle piracy.

I. INTRODUCTION

Battling the crime of piracy has been an ongoing struggle for nations across the world and has been recognised as a crime of universal jurisdiction in international law.[1] Despite the sharp rise in instances of piracy, there is no legislation in India specifically dealing with the crime of piracy. In order to address this situation, the External Affairs Minister, S. M. Krishna, introduced the Piracy Bill in the Lower House of Parliament on April 24, 2012. It has been reviewed by

* V[th] Year, BA/LLB Hons, National Law School of India University.

1 M Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82(2) American Journal of International Law 269, 290 (1988).

the Parliamentary Standing Committee attached to the Ministry of External Affairs. It recognised the 1982 United Nations Conventions on the Laws of the Sea ["UNCLOS"] to which India is a signatory.

Without any recognised offence of 'piracy' in India, pirates have so far been charged under sections of the Indian Penal Code [hereinafter "IPC"]. The hijacking of *MV Alondra Rainbow* is a case in point. A Panama registered ship, the *MV Alondra Rainbow*, belonging to Japanese owners, was hijacked by pirates in September 1999. Within a month, the Indian Coast Guard and Navy captured the pirates and India assumed jurisdiction for their prosecution. The Mumbai Sessions Court tried and convicted the pirates under various sections of the IPC. However, on 18 April 2005, the Mumbai High Court overruled the lower court's decision and acquitted all the accused.[2] The sections they were charged under included trespassing under Sections 441 and 447, Waging War Against the Country under Section 121, Attempt to Murder under Section 307 and Armed Robbery or Dacoity under Sections 397 and 398 of the IPC along with other laws such as the Foreigners Act, 1946, the Passports Act, 1967, and the archaic British Admiralty law which was sought to be repealed in 2005.[3] This indicates the shortcomings of the existing legislation that can be made applicable to piracy.

This paper attempts to analyse the efficacy of the Bill and possible issues that may arise with regard to its interpretation. In the first part, the lacunae in the definition of the offence have been highlighted. The incorporation of the UNCLOS definition of 'piracy' has brought with it, the various legal loopholes that exist in this definition. Furthermore, simply transposing this provision in the Indian context creates further issues and that have been discussed. The second part attempts to interpret the Bill in the light of the doctrine of harmonious construction. Its relevance is discussed vis-a-vis the provisions of the Indian Penal Code, 1908, and the enactment, recognising the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation ["SUA Convention"] to which India is a signatory and which deals with an area of crime that overlaps with piracy. Such construction is done with a view to preserve the

2 K Zou, *New Developments in the International Law of Piracy*, 8(2) Chinese Journal of International Law 323, 344.

3 R Mishra, *Draft Indian Piracy Bill – Preliminary Assessment*, National Maritime Foundation,http://maritimeindia.org/article/nmf-exclusive-draft-indian-piracy-bill-preliminary-assessment-raghevendra-mishra (last accessed Dec. 5, 2012).

universal jurisdiction granted to India under international law with respect to piracy.

II. LACUNAE IN THE DEFINITION OF PIRACY

Several interpretational issues surround Article 101 of the UNCLOS, which has been reproduced in the Piracy Bill. Most of these issues are now transmuted to the problem of tackling piracy in the Indian scenario. Article 101 of the UNCLOS, which reads the same as Section 2(e) of the Piracy Bill, defines piracy as follows,

> "(*a) any illegal acts of violence or detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:*
>
> *(i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;*
>
> *(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;*
>
> *(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;*
>
> *(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."*

Section 2(e)(iv) of the Piracy Bill adds to this definition. According to this clause, "*any act which is deemed piratical under the customary international law*" is to be considered piracy under the Bill. However, this definition proves problematic in several ways, as it severely limits the applicability of the Bill to the following situations which ought to be addressed through this Bill.

a. Clandestine acts

The definition provided under Article 101 of UNCLOS has been criticised for not including non-violent piratical acts of the kind that are rampant in the South-East Asian region. The description of the acts seems to suggest that all acts covered by the UNCLOS definition require an element of violence, and hence do not address these newer forms of piracy, which often involve non-violent

clandestine theft.[4] The wording of the definition, "*any illegal acts of violence **or** detention **or** any act of depredation*" suggests piracy is either an act of violence or detention or depredation. Black's Law Dictionary defines 'depredation' as 'plunder or pillage' and, further, defines 'pillage' as "the forcible seizure of another's property".[5] Given this understanding, it does seem to require an element of violence or forcible deprivation of property. In Collins' words, "*another common form of attack....is a clandestine attack where attackers board the vessel at night-whether steaming or at anchor-and steal cargo, equipment or cash without the knowledge of the crew. This type of attack would therefore not fall within the definition of violence, unless the act of trespassing is considered depredation*."[6] For the purpose of clarity and comprehensiveness, 'trespass' and 'theft' should be included within the definition of piracy. Further, as will be discussed later in this paper, the punishment imposed for acts of piracy indicates that such acts of piracy are not addressed by the Piracy Bill.

b. High seas

The definition places a limit on the geographical area in which any such act can be considered 'piracy' by restricting piracy to acts of violence, detention or depredation on the high seas and excluding acts committed in the territorial waters of any nation. However, most piratical acts occur within territorial waters.[7] Of late, there have been several incidents of piracy in Exclusive Economic Zones (EEZs) as well.[8] Thus, unless municipal legislation recognises the acts as piracy within territorial waters, the acts cannot be termed piracy according to the definition.[9] The issue of EEZs is addressed by the Piracy Bill, which states, in Section 14 (1) that "*for the purposes of geographic scope, the provisions of this Act shall also extend to the exclusive economic zone of India*." The expression 'Exclusive Economic Zone' is defined in the Territorial Water, Continental Shelf,

4 R Collins and D Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40(1) Journal of Maritime Law & Commerce 89, 96 (2009).

5 'Depredation', Black's Law Dictionary 473 (8th ed., 2004); 'Pillage', Black's Law Dictionary 1185 (8th ed., 2004).

6 Collins and Hassan, *supra* note 4 at 97.

7 Zou, *supra* note 2 at 329.

8 H Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 University of Miami International and Comparative Law Review 1, 6 (2009).

9 T Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 Tulane Maritime Law Journal 257, 265(2002).

Exclusive Economic Zone and Other Maritime Zones Act, 1976 as "*an area beyond and adjacent to the territorial waters, and the limit of such zone is two hundred nautical miles from the baseline*."[10] Thus, the EEZ excludes and is beyond the limit of territorial waters of India, which is defined as "*the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline.*"[11] The Piracy Bill makes no mention of territorial waters. This implies that only acts of violence, detention and depredation on the high seas or in the Exclusive Economic Zone of India can be recognised as 'piracy' under the Piracy Bill and not any such activities in the territorial waters of India.

It can be argued that such omission is deliberate so as to enable prosecution under the IPC for piratical acts committed in territorial seas. In fact, Dutton highlights several instances where if attacks occur within a state's own territorial waters, the state can apply its domestic law such as those governing robbery or assault to prosecute the pirates. In such a situation, the piracy legislation incorporating the UNCLOS definition of piracy need not be applicable to the piratical act committed in territorial waters.[12] However, the statement of objects and reasons of the Bill clearly highlights the inadequacy of the IPC provisions to deal with such situations. It mentions that,

> *[t]he provisions of the Indian Penal Code pertaining to armed robbery and the Admiralty jurisdiction of certain courts have been invoked in the past to prosecute pirates apprehended by the Indian Navy and the Coast Guard but in the absence of a clear and unambiguous reference to the offence of maritime piracy in Indian law, problems are being faced in ensuring prosecution of the pirates.*

It can be gleaned that the purpose of the Bill is to encompass all situations that are currently being tackled with the provisions of the IPC and the Bill is intended to be a comprehensive legal framework to tackle all instances of piracy.

---

10 Section 7, Territorial Water, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

11 Section 3(2), Territorial Water, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976.

12 Y Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will*, 86 Tulane Law Review 1111, 1156 (2012).

c. Two ships

The next concern that most scholars have about the definition of piracy in the UNCLOS and is also debatable in the Indian context is the requirement of two ships for any act to be recognised as piracy. The definition requires the piratical act to be committed by the crew or the passengers of a private ship or private aircraft, and be directed against 'another ship or aircraft.' Most scholars interpret this definition to mean that there should be two ships for such an act of piracy to take place.[13] Thus, the act of hijacking, whereby the passengers of a ship forcefully take control of that ship and commit acts of violence, detention and depredation on that ship, cannot be classified as 'piracy'. In fact, in the *Achille Lauro* incident in 1985, Palestinian terrorists posing as passengers on an Italian cruise ship later held the ship's crew hostage and murdered one of the passengers.[14] The accused in that case could not be prosecuted under UNCLOS provisions because the incident failed to meet the two-ship requirement.[15] Thus hijacking is not covered by the definition of 'piracy' in the Piracy Bill.

The two-ship requirement might be dispensed with if both components of Section 2(e) are read together. The act can be directed against (i) **another** ship or aircraft, or against persons or property on board such ship or aircraft **or** (ii) against **a** ship, aircraft, persons or property in a place outside the jurisdiction of any State. Thus while Section 2(e)(i)(A) addresses attacks against another ship, Section 2(e)(i)(B) could include an attack against the same ship with the pirates on board. If such a reading of the definition is to be accepted, there is no two-ship requirement. However, this is contentious and needlessly ambiguous. In order to lend clarity to the Bill, it is suggested that 'another' in Section 2(e)(i)(B) be replaced

13 *See* generally, Collins and Hasan, *supra* note 4; Zou, *supra* note 2 at 326; Halberstam, *supra* note 1 at 290; JM Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 American University Law Review 1267, 1283 (2010); GD Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 Tulane Law Review 1433, 1443 (2007).

14 Halberstam, *supra* note 1 at 269.

15 Australian Law Reform Commission, *Criminal Admiralty Jurisdiction and Prize*, ALRC Report 48 (1990), p. 46-47 <*http://www.austlii.edu.au/au/other/alrc/publications/reports/48/48.pdf*> (last accessed Dec. 5, 2012).

with **'a'**. Australian anti-piracy legislation, for instance, amended the clause to avoid this ambiguity while incorporating the UNCLOS definition of piracy.[16]

d. Private ends

One of the most contentious issues in constructing a legal regime to tackle piracy is whether terrorism on the sea should be regarded as piracy or should be regulated separately. The definition adopted by the Piracy Bill requires an illegal act of violence or detention, or any act of depredation to be committed for 'private ends'. The exact intent behind the drafting of this definition can be gauged from the *travaux préparatoires* of this article, which can be found in the Harvard Research Draft which incorporated the condition of 'private ends' to exclude situations where the crew of a ship have a political purpose such as mutiny or the ship is utilised for terrorist activities.[17] In fact, attack on vessels with a political aim, such as highlighting a state's struggle for independence has been accepted as a defence to piracy.[18] While in international law, piracy and terrorism are seen as distinct offences,[19] national regimes such as in the United States of America have prosecuted terrorists at sea under the charge of piracy.[20]

However, some scholars argue that, in contemporary times, terrorism and piracy have become more closely related. There have been instances of terrorist ships that wish to make a political statement but rob and plunder the ship.[21] An authority on piracy law, Malvina Halberstam, interprets the expression 'private ends' broadly to include acts of terrorism. She argues that 'private ends' can be interpreted to mean personal motives arising from "*real or supposed injuries done by persons or classes of persons or by a particular national authority*."[22] It remains

16 DA Lavrisha, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 University of Toledo Law Review 255, 265 (2010).

17 *Harvard Research Draft Convention on Piracy*, 26 American Journal of International Law 739 (Supp. 1932).

18 Collins and Hassan, *supra* note 4 at 99.

19 Garmon, *supra* note 9 at 258.

20 United States v. The Ambrose Light, 25 F 408, 412-13 (SDNY 1885).

21 LM Diaz and BH Dubner, *On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforecement of Jurisdiction* ,13 Barry Law Review 175, 189 (2009); DR. Burgess, Jr., *Piracy is Terrorism*, NewYork Times, Dec. 5, 2008 http://www.nytimes.com/2008/12/05/opinion/05burgess.html (last accessed Dec. 5, 2012).

22 Halberstam, *supra* note 1 at 282.

ambiguous whether the expression 'private ends' excludes terrorist activities on sea from the definition of piracy. In the opinion of the researchers the expression is to be interpreted with due regard to the Indian context and existing legislations dealing with terrorism. This dimension will be further explored in the next part in relation to other Indian statutes dealing with the matter.

e. Piratical acts

One of the potentially contentious provisions in the Piracy Bill which is not found in UNCLOS is Section 2(f), which includes "*any act which is deemed piratical under the customary international law*" under the definition of piracy. The term 'piratical' is itself a term of pervasive vagueness if put in context of international customary law since no authoritative definition of 'piracy' exists under customary international law.[23] The question of inclusion of terrorist activities at sea is one of the many controversies in the definition.

The United States of America followed a similar provision which stated that, "*[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.*"[24] This created several problems as there was no fixed definition of privacy in the law of nations. Section 4 of the same statute stated that, "*whenever any vessel or boat, from which any* ***piratical*** *aggression, search, restraint, depredation or seizure....the Court shall thereupon order a sale and distribution."* Justice Story in the case of *United States* v. *Brig Malek Adhel*[25] was faced with the task of ascertaining the meaning of the term 'piratical' constrained by the definition of 'piracy' as per law of nations, and said:

> *"Where the act uses the word 'piratical,' it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences*

23 Garmon, *supra* note 9 at 260, Halberstam, *supra* note 1 at 272-73.

24 Section 5, An Act to protect the commerce of the United States and punish the crime of piracy, 1819 < http://www.brymar-consulting.com/wp-content/uploads/piracy/Protection_against_piracy_18190303.pdf> (last accessed Dec. 5, 2012).

25 43 US 210 (1844).

> *which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power."*

This is clearly a wide interpretation of the term despite the condition that it is to be interpreted according to the law of the nations. In the present context, such wide interpretation could even lead to treating terrorist activities as acts of piracy. Given the uncertain description of the offence in customary international law, Indian courts are bound to face difficulty in the interpretation of Section 2(f) of the Piracy Bill.

It is argued by some scholars that the definition of piracy that is most widely regarded as custom in contemporary times is the UNCLOS definition.[26] Even if this argument was to be accepted, it makes Section 2(f) redundant as the UNCLOS definition of piracy is already incorporated into the Piracy Bill.

III. RECONCILING THE BILL WITH EXISTING MUNICIPAL LAW

The interpretation of the Piracy Bill with regard to existing legislation governing similar or overlapping offences in the territory of India can prove problematic. In the international sphere, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation [the "SUA Convention"] is an important move towards battling piracy through an effective legal framework. It was framed as a response to the *Achille Lauro* incident which the UNCLOS did not apply to.[27] Thus, the SUA Convention was aimed at effectively addressing maritime piracy.

The SUA convention was ratified by India and has been given effect through the enactment of the Suppression Of Unlawful Acts Against Safety Of Maritime Navigation and Fixed Platforms On Continental Shelf Act, 2002. [the "SUA Act"] This act, incorporating the wording of the SUA Convention,

---

26 DP Paradiso, *Come All Ye Faithful: How the International Community has Addressed the Effects of Somali Piracy but Fails to Remedy its* Cause, 29 Penn State International Law Review 187, 198 (2010); M Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy* Operations, 40 Vanderbilt Journal of Transnational Law 1, 10 (2007); Garmon, *supra* note 9 at 275.

27 Garmon, *supra* note 9 at 271; BH Dubner and K Greene, *On the Creation of a New Legal Regime to Try Sea* Pirates, 41 Journal of Maritime Law and Commerce 439, 460 (2010).

recognises the following acts as offences:

> *"(a) an act of violence against a person on board a fixed platform or a ship which is likely to endanger the safety of the fixed platform or, as the case may be, safe navigation of the ship*
> *(b) destruction of a fixed platform or a ship or causes damage to a fixed platform or a ship or cargo of the ship in such manner which is likely to endanger the safety of such platform or safe navigation of such ship*
> *(c) seizure or exercise of control over a fixed platform or a ship by force or threat or any other form of intimidation*
> *(d) placing or causing to be placed on a fixed platform or a ship, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or that ship or cause damage to that fixed platform or that ship or its cargo which endangers or is likely to endanger that fixed platform or the safe navigation of that ship*
> *(e) destruction or damage to maritime navigational facilities or interference with their operation if such act is likely to endanger the safe navigation of a ship.*
> *(f) communication of information which the offender knows to be false thereby endangering the safe navigation of a ship*
> *(g) attempt to commit any of the above."*

a. Overlapping legislation

The provisions of the SUA Convention can be used to prosecute acts of piracy.[28] At the SUA Convention, the Special Representative of the UN Secretary General noted the fact that piracy is covered within the offences in the Convention.[29] Thus, acts of piracy do fall under the offences provided in the SUA Convention[30] The Act provides a comprehensive coverage of offences committed at sea, along with a more detailed and fine list of penalties specific to each offence. This is in contrast with the Piracy Bill, which only recognises a punishment of imprisonment for life for 'any act of piracy' other than those resulting in the death

28 *See generally* Halberstam, *supra* note 1; Diaz and Dubner, *supra* note 21 at 189.

29 The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea*, ¶ 57, delivered to the General Assembly, Mar. 10, 2008, U.N. Doc. A/63/63, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/266/26/PDF/N0826626.pdf?OpenElement>.

30 Tuerk, *supra* note 8 at 31.

of a person for which the pirates maybe sentenced to death.[31] Any attempt to commit piracy or any unlawful attempt intended to aid, abet, counsel or procure for the commission of an act of piracy is to be punished with imprisonment up to fourteen years with a fine.[32]

Thus, only a few of the provision that pirates can be charged with under the IPC, i.e., the gravest offences, are covered under the Piracy Bill. A finer gradation based on the varying gravity of the piratical offence has not been made. Charges of murder under Section 300 and 302 of the IPC, punishable with imprisonment for 10 years up to life imprisonment, can be seen to be envisaged by the Bill. Similarly, attempt to murder under Section 307, punishable with imprisonment up to 10 years or life imprisonment, and rape under Sections 375 and 376, punishable with imprisonment for up to 10 years or life imprisonment, are covered. Robbery or dacoity while armed with a deadly weapon or with an attempt to cause grievous hurt under Sections 397 and 398, punishable with imprisonment of not less than seven years, may be seen to be covered under the Piracy Bill if piracy is seen as an aggravated offence Waging War against the State under Section 121 of the IPC is a problematic provision to use for acts of piracy as the act is done for a political end. The definition of privacy which is restricted to offences committed for 'private ends' is to be interpreted in such a manner so as to exclude politically motivated acts, as will be discussed subsequently.

However, less serious offences such as trespass under Sections 441 and 447, punishable with imprisonment for three months and a fine, along with theft under Sections 378 and 379, punishable with imprisonment for three years and a fine, is clearly not envisaged as piracy under the Piracy Bill. Thus, clandestine thefts of the type already discussed earlier have not been included within the Piracy Bill and the pirates engaging in such theft will have to be charged under the IPC. Wrongful confinement to extort property under Section 347, punishable with imprisonment for three years, voluntarily causing hurt to extort property under Section 327, punishable with imprisonment for up to ten years, and simple robbery under Section 382, punishable with imprisonment for up to ten years, are other offences pirates can be guilty of but are not envisaged by the Piracy Bill. For these offences,

31 Section 3, Piracy Bill, 2012.
32 Section 4, Piracy Bill, 2012.

pirates will have to be tried under the IPC. However, the jurisdiction of the IPC to try such offences committed on the high seas is questionable.

It is argued that the SUA Act itself cannot be used to prosecute acts of piracy. This is because the SUA Convention covers terrorist activities and therefore has a different purpose than to simply address piracy. The difference between acts of terrorism at sea and piracy has been highlighted earlier. While piracy is committed with the essential purpose to rob and avoid being captured, acts of terrorism have no or more than a financial motive and are aimed at garnering attention.[33] An obvious feature of a piratical act is that pirates always try to take away what they have robbed without being captured. Similar to other ordinary crimes, their acts are often planned and executed in ways that can help them to avoid identification and apprehension. By contrast, in order to put the public into a state of heightened fear, terrorists will try to publicise their violence, although sparingly. Thus, while terrorism may involve similar acts, these acts are entirely different in nature and need to be treated as separate crimes. In Xu's words, "*in order to have more efficient control over the crimes, the legal regime and public policy must be designed in a way that the distinction between piracy and terrorism is adequately appreciated and the key areas are targeted where the law and policy can function in a better way*."[34] Treating piracy and terrorism as crimes of the same nature by prosecuting them both under a specialised statute will undermine both the piracy and terrorism control regimes.[35]

More importantly, piracy and terrorism are treated differently in international law, resulting in difference of the jurisdiction India exercises over these crimes. While piracy is a crime of universal jurisdiction,[36] terrorism is not, and Indian officials can only capture terrorists in territorial waters.[37] Thus the SUA Act can be used only to prosecute terrorists. Further, it is seen that when an Indian legislation is enacted to recognise its treaty obligations, the *travaux* of the relevant international treaty are used to interpret the legislation. For example, in the recent

33 J Xu, *Piracy as a Maritime Concern: Some Public Policy Considerations*, Journal of Business Law 639, 645 (Sept., 2007).
34 Xu, *supra* note 34 at 644.
35 Collins and Hassan, *supra* note 4 at 100; Tuerk, *supra* note 8 at 27.
36 *See generally* Collins and Hassan, *supra* note 4;Halberstam, *supra* note 1.
37 Gabel, *supra* note 13 at 1445; Garmon, *supra* note 9 at 271; Isanga, *supra* note 13 at 1292, 1293.

case of *Hari Singh* v. *State*,[38] provisions of the Anti-Hijacking Act recognising the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, were to be interpreted. The Delhi High Court took into account the *travaux* and purpose of the Convention to interpret the legislation. As has already been discussed, the Harvard Draft was designed with the intent of excluding acts driven by political consideration from the purview of piracy.[39]

For these reasons, 'private ends' in Section 2(f) must be interpreted to exclude acts of a political nature and thus, all terrorist activities from the definition of piracy. Further, though piracy under customary international law may recognise terrorist activities on sea as a part of piracy,[40] under Section 2(g), that version of the understanding of 'piratical' acts in customary law must be accepted which does not include terrorist activities within the meaning of piracy. Finally, there are arguments to suggest that the offence of piracy can be subsumed within terrorist activities and be prosecuted under SUA Convention.[41] Even if this argument is to be accepted, once the Bill is enacted and a law dealing with piracy is in force, the courts will be compelled to apply the more specific statute and the SUA Act, though having piracy within its ambit, will not be applied to cases concerning piracy.[42]

b. Improvement of the definition of piracy with regard to the SUA Act

While the SUA Act cannot be used to prosecute acts of piracy, it provides a more comprehensive definition of piratical acts and a better gradation of quantum

38 Crl. A 598/2001, MANU/DE/1289/2011.

39 MC Houghton, *Walking the Plank: How United Nations Security Council Resolution 1816, While Progressive, Fails to Provide a Comprehensive Solution to Somali Piracy*, 16 Tulsa Journal of Comparative and International Law 253, 274 (2009).

40 "There is substance in the view that, by continuous usage, the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed." L Oppenheim, International Law (8th ed., 1955) *c.f.* Halberstam, *supra* note 1 at 289. Diaz and Dubner, *supra* note 21 at 189.

41 Diaz and Dubner, *supra* note 21 at 189.

42 In case of overlapping criminal offences, the Supreme Court has applied *generalia specialibus non derogant* and in Godawat Pan Masala Products IP Ltd. v. Union of India, (2004) 7 SCC 68, upheld the application of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, over the Prevention of Food Adulteration Act, 1954; in Dilawar Singh v. Parvinder Singh, (2005) 12 SCC 709, the Prevention of Corruption Act was the specific statute.

of punishment. It can, therefore, be used to craft a better definition within the Piracy Bill. For instance, Japanese anti-piracy legislation incorporates clauses from the SUA Convention in addition to a modified version of the UNCLOS definition to provide a more comprehensive legal framework.[43]

A legal obstacle to such modification of the UNCLOS definition is that it may cost the universal jurisdiction acquired by Indian law with respect to piratical acts. The principle of universal jurisdiction *"provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended."*[44] Universal jurisdiction over piracy was initially recognised under customary law.[45] Now, however, it is recognised under treaty law. Thus, in order to punish pirates in exercise of universal jurisdiction, the definition of piracy should be in accordance with international law.[46] If the act is considered piratical under domestic law but not international law, universal jurisdiction cannot be exercised. The UNCLOS definition of piracy is the most widely accepted definition of piracy in international law. A departure from this definition may strip Indian law of universal jurisdiction.

However, the UNCLOS definition is widely criticised and the definition of piracy under the SUA Convention addresses its shortcomings. States like Australia and Kenya continue to exercise universal jurisdiction despite having modified the UNCLOS definition in their domestic legislation.

c. Universal jurisdiction of the provisions of the IPC applicable to piracy

As per Section 9(2) of the Bill, , *"[w]hile trying an offence under this Act, a Designated Court may also try an offence other than an offence under this Act, with which the accused may, under the Code be charged at the same trial."* This provision necessitates an examination of universal jurisdiction exercisable under the IPC. Randall posits that all states can use their domestic legislation in order to prosecute piracy.[47] However, universal jurisdiction cannot be exercised unless the

43 Article 2, Law on Punishment of and Measures Against Acts of Piracy (Japan).
44 KC Randall, *Universal Jurisdiction Under International Law*, 66 Texas Law Review 785, 788 (1987-88).
45 Aban Loyd Chiles Ltd. v. Union of India, (2008) 11 SCC 439.
46 Randall, *supra* note 45 at 795.
47 Randall, *supra* note 45 at 791.

state proposing to exercise it has enacted the treaty provisions expressly granting such universal jurisdiction.[48] Further, it has been held by the Supreme Court of India that if a treaty provision modifies or affects the rights of a citizen or any other person, it has to be expressly enacted.[49] Thus, unless provisions of the UNCLOS are enacted by the legislature, universal jurisdiction cannot be exercised under Indian law and the sections of the IPC cannot be used to prosecute piratical acts on the high seas.

In order to address this situation, it is suggested that all possible piratical acts be covered under the Piracy Bill, including a gradation of punishments to address these offences. Upon such expansion, the IPC will not be required to prosecute additional acts that may not be covered under the current Piracy Bill and universal jurisdiction can be exercised to prosecute such acts.

IV. CONCLUSION

Thus the definition of 'piracy' as given in the Piracy Bill suffers from various shortcomings. This definition is the same as that in the UNCLOS which has been extensively critiqued and has faced problems in interpretation. The definition should be reframed keeping these criticisms in mind. First, piratical acts of a less serious nature, such as clandestine thefts, should be incorporated into the definition. In order to facilitate this, a wider set of penalties should be assigned so that less grave crimes of piracy can also be prosecuted under the Bill. The IPC cannot be used to prosecute such crimes committed on the high seas because its application does not extend beyond territorial waters. Second, the two–ship requirement has been bothersome in various other jurisdictions. This defect should be cured in the definition adopted in the Bill. More importantly, a glaring limitation of the Bill is that it fails to cover piratical acts covered within the territorial waters of India. The Kenyan definition of piracy involves acts committed on territorial waters. Such a provision should be introduced in the Piracy Bill as well.

For harmonious interpretation with the SUA Act, it must be utilised solely to prosecute crimes of terrorism on sea even though it can include acts of piracy

48 Javor et al. (Tribunal de Grande Instance de Paris), (2005) 127 ILR 126; Dutton, *supra* note 12 at 1155.
49 Union of India v. Azadi Bachao Andolan, (2004) 10 SCC 1.

within its ambit. In order to facilitate this, 'private ends' in Section 2(f) should be interpreted to exclude acts of terrorism so that these are dealt with exclusively under the SUA Act. While interpreting 'piratical acts' as per customary international law that is deeply divided on the issue, that interpretation must be favoured that excludes acts committed with a political agenda.

The Piracy Bill affords the Indian criminal justice system the advantage of universal jurisdiction by expressly enacting its UNCLOS obligations. Allowing for any piratical act to be prosecuted under the IPC erodes this benefit, and therefore, the Bill should be comprehensive enough to encompass all conceivable piratical acts.

DO INTERNATIONAL HUMAN RIGHTS TREATIES PROTECT THE POOR?

Divyanshu Agrawal[*]

ABSTRACT

This paper attempts to fill the lacunae in the voluminous academic literature analysing the relationship between human rights and poverty – the failure to engage with the existing international human rights law framework and articulate legal arguments vis-à-vis the responsibility of particular duty holders for violating enunciated human rights. It is not the author's claim that international law alone can provide all the solutions. Instead, international law may be only one of the ways to focus on this issue of serious concern. Accordingly, the merits and demerits of a rights-bases approached as compared to other approaches are first examined. The author has then selected four situations which evidence how different human rights interact along with different stakeholders – the citizen on one hand and the host state, other states, international financial institutions, and multinational corporations on the other. While there appears to be a case for international responsibility of host states in most circumstances, the limitations of the present legal framework are also exposed in undertaking this exercise. In particular, it is ambitious to attach legal responsibility to international institutions and private actors. This, however, aids in formulating adequate reforms to remedy the drawbacks in international human rights law. Only then can it be possible to have an informed answer to the question - 'do international human rights treaties protect the poor'?

I. INTRODUCTION

The latest Millenium Development Goals report of 2011 places the world's 'poor' population at 1.4 billion.[1] Since the 1990s, the United Nations has been unequivocal in suggesting that eradication of poverty is a priority and a pre-requisite in achieving development.[2] In fact, at the World Summit for Social

* III year, B.A. LL.B., National Law School of India University, Bangalore.

1 This is according to World Bank's calculated standard of $ 1.25 a day. United Nations, *Millennium Development Goals Report*, 6 (2011) *available at* http://www.un.org/millenniumgoals/11_MDG%20Report_EN.pdf (last visited August 19, 2012).

2 *See* United Nations General Assembly Resolution 51/178, First United Nations Decade for the Eradication of Poverty, UN Doc. A/RES/51/178 (1996) – "*Recognizing that the international*

Development, 117 heads of State and Government and the representatives of 186 countries stated that the eradication of poverty was an "*ethical, social, political and economic imperative of mankind*".[3] These efforts culminated in the formulation of the first millennium development goal – 'Eradicate extreme poverty and hunger'.[4] More significantly, it was recognised that the eradication of poverty was a key requirement in the achievement of other goals identified by the United Nations.[5] As a corollary to this resolve to eradicate poverty, there was a debate on the best possible method to achieve the same. The international financial institutions stressed on the need for 'sustained economic growth' as the *sine quo non* of poverty reduction.[6] Other United Nations Agencies advocated for a 'human rights based approach' to poverty reduction. Notably, the Commission on Human Rights appointed an independent expert to "*to evaluate the relationship between the promotion and protection of human rights and extreme poverty…*"[7]

The global fascination with the human rights based approach to poverty eradication was not restricted to the United Nations. This approach by the United Nations has led to vast academic scholarship on the subject. Consequently, it is very important to define the scope of the present paper in order for it to contribute to existing academic literature. Paul Collier's 'the Bottom Billion' is reflective of the economic approach to eradicating poverty. In the book, he advocates for the opening of markets and considers global poverty in mainly aggregative terms. It is his opinion that trade liberalisation is vital for development in the poorest states.[8] In

---

community, at the highest political level, has already reached a consensus on and committed itself to the eradication of poverty through declarations and programmes of action of the major United Nations conferences and summits organized since 1990…"

3 *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development*, UN Doc. A/CONF.166/9, chapter I.

4 United Nations General Assembly Resolution 55/2, United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000).

5 Secretary General's Millennium Report, Freedom from Want, 19 (2000) *available at*http://www.un.org/millennium/sg/report/ch2.pdf (last visited August 19, 2012).

6 World Bank, *Development and Human Rights: The Role of the World Bank*, 8 (1998) available at http://www.fao.org/righttofood/kc/downloads/vl/docs/HR%20and%20devlopment_the%20role%20of%20the%20WB.pdf (last visited August 19, 2012).

7 United Nations Commission of Human Rights (as it then was) Resolution 1998/25, Human rights and extreme poverty, UN Doc. E/CN.4/1998/25 (1998).

8 Collier, The Bottom Billlion: Why the poorest countries are failing and what can be done about it 155 - 163 (2008). Other than trade liberalisation, he also suggests more radical measures like military intervention. For a brief analysis of his submission, *see* Susan Marks, Human rights and the bottom billion, 2009(1) European Human Rights Law Review 37, 37-39.

contrast with this, the Commission on Human Rights [hereinafter "OHCHR"] approached the issue of poverty eradication by formulating the 'principles and guidelines for a human rights approach to poverty reduction strategies.'[9] The objective of these guidelines was to emphasize on the relevance of human rights in poverty reduction. It remarked that the strategies of governments to tackle poverty must not solely be concerned by aggregated growth and development but should also consider rights-related matters like equality, non-discrimination, participation et al.[10] On a related note, some scholars have examined the philosophical, moral, ethical foundations of a human right to freedom from poverty.[11] Such scholars opine that the legitimacy of a human rights regime and corresponding duties depends on its conformity with independent moral standards. Once these standards are complies with, positive duties on part of states to provide basic necessities can be derived.[12] These positive duties are distinct from the imperfect (unenforceable) duties of charity, humanity or solidarity.[13] On the other hand, the 'libertarian' school strongly stresses on the voluntary nature of any development aid or positive action on behalf of the state. The only human rights justiciable, according to this view, are negative rights and states cannot be forced to benefit certain people.[14]

These academic writings do not consider the international human rights regime and how existing human rights, as provided in treaties, interact in causing poverty and its consequences. Ethical and moral underpinnings apart, scholars have failed to base their arguments in international human rights law and treaty interpretation which, according to the author, reduces the legitimacy of their claims. Indeed, as elaborated below, proving a '*violation*' of an international norm

9 Office of the United Nations High Commissioner for Human Rights, Principles and guidelines for a human rights approach to poverty reduction strategies, UN Doc. HR/PUB/06/12 (2006) [hereinafter "UNHCHR Guidelines"].

10 Office of the United Nations High Commissioner for Human Rights, Human Rights and Poverty Reduction A Conceptual Framework, UN Doc. HR/PUB/04/1, 9-12 (2004).

11 *See* Tasioulas, *The Moral Reality of Human Rights* in Freedom from poverty as a human right 75 (Pogge ed., 2007).

12 Caney, *Global Poverty and Human Rights: The case for positive duties* in Freedom from poverty as a human right 275 (Pogge ed., 2007).

13 Gewirth, *Duties to fulfill the Human Rights of the Poor* in Freedom from poverty as a human right 219 (Pogge ed., 2007).

14 Patten, *Should we stop thinking about poverty in terms of helping the poor?*, 19(1) Ethics and International Affairs 19, 19 – 21 (2005).

would at least call for international reprimand if nothing else.[15] Likewise, the OHCHR's guidelines emphasises the importance of taking these human rights seriously while formulating strategies but fall short of the violation of the same human rights that it professes. In any event, they adopt a very 'state-centric' approach of eradicating poverty through implementation of national strategies.[16] Furthermore, it does not examine existing institutional arrangements and their contribution to poverty.[17]

An approach which has exemplified the role of international institutional arrangements in contributing to poverty can be seen in the works of Thomas Pogge. He argues that the existing normative and institutional international order in the form of WTO, World Bank and the IMF systematically violates the international human rights regime along with which it co-exists.[18] In fact, he even suggests that the affluent countries are in violation of their 'negative duties' by constructing an institutional structure that creates poverty in the least developed nations.[19] He explains: "*the poor are systematically impoverished by present institutional arrangements and have been so impoverished for a long time during which our advantage and their disadvantage have been compounded…*"[20] However, Pogge's writings, it is humbly submitted, suffer from similar flaws outlined above – *first*, in his pursuit to prove violations of human rights, he frequently *conflates* the minimalist stance of 'negative duties', that he professes to abide by, and a more substantive view of justice which includes 'positive duties';[21] *secondly*, while he insists on the '*responsibility*' of the affluent nations, he does not specifically identify

15 Sengupta, *Poverty Eradication and Human Rights* in Freedom from poverty as a human right 323 at 326 (Pogge ed., 2007).

16 For a comparative constitutional analysis of the relationship between poverty and fundamental rights, *see* Bilchitz, Poverty and Fundamental Rights, The Justification and Enforcement of Socio-Economic Rights 47 – 74 (2007); *see also*, Ferraz, *Poverty and Human Rights*, 28(3) Oxford Journal of Legal Studies 585 (2008).

17 Susan Marks, *Human rights and the bottom billion*, 2009(1) European Human Rights Law Review 37, 42.

18 Pogge, World Poverty and Human Rights 26-26, 215-216 (2002).

19 Pogge, *SeverePoverty as a violation of negative duties*, 19(1) Ethics and International Affairs 55 (2005).

20 Pogge, *Recognized and Violated by International Law: The Human Rights of the Global Poor*, 18 Leiden Journal of International Law 717, 741 (2005).

21 *Supra* note 14, at 27. Patten concludes: "I don't see, therefore, that Pogge has succeeded at deriving a strong conclusion about our duties to the global poor from a minimal normative injunction against causing harm. He may be able to reach the strong conclusion from *an* injunction against causing harm, but it is not the *minimal* injunction that libertarians acknowledge. Instead, it is an injunction that has built into it the moral imperative of assisting people who are in dire need."

the duty holders which are responsible for a particular violation or the specific human right violated in a particular case; *thirdly*, once he successfully establishes the causal relationship between the institutional order and the suffering of peoples, he assumes a violation of human right and passes over complicated questions of extra-territoriality and other issues of interpretation. In other words, while Pogge claims that there is a violation of a right, he fails to clarify who has violated what right and how.

The question that follows this brief survey of existing academic literature on the issue is what are the scope, aim and objectives of the present paper? The paper attempts to fill the lacunae identified in the preceding paragraphs –the failure to engage with the existing international human rights law framework and articulate legal arguments vis-à-vis the responsibility of particular duty holders for violating enunciated human rights. It is not the author's claim that international law alone can provide all the solutions. Instead, as UNDP has put it: "*If international law can be one way of focusing attention on the need for action, then so much the better?*"[22] Accordingly, the author selects four situations which evidence how different human rights interact along with different stakeholders. In doing so, the limitations of the present legal framework are also exposed. This, in turn, aids in formulating adequate reforms to remedy the drawbacks in international human rights law. Finally, it would be possible to answer the question - '*do international human rights treaties protect the poor*'? But this question assumes that human rights treaties *should* protect the poor. Therefore, *first*, it is important to examine the merits and demerits of a rights-based approach vis-à-vis other approaches.

II. EVALUATING A RIGHTS-BASED APPROACH

This section explores the added value, if any, of adopting a rights-based approach. The apparent advantages of a rights-based approach are three-fold. *First*, a rights-based approach draws links between otherwise disparate issues and gives legal bases to many of the concepts that are traditionally analysed through the rubric of development, management, or welfare.[23] The corollary of entitlement and

22 United Nations Development Program, *Human Development Report*, 25 (1996) available at http://hdr.undp.org/en/media/hdr_1996_en_chap1.pdf (Last visited August 19, 2012).

23 Henry Steiner, *Social Rights and Economic Development: Converging Discourses* (1998) 4 Buffalo Human Rights Law Review25, 38.

obligation is the identification of rights and duty-holders.[24] 'Duties' engage the responsibility of states and other international actors in international law. Indeed, as one scholar notes, "[*r*]*ights rhetoric provides a mechanism for re-analysing and renaming 'problems' as 'violations' and, as such as something that need not and should not be tolerated.*"[25] Nor is poverty 'natural and inevitable' but rather a denial of rights in the implementation of deliberately chosen policies.[26] As such it can be reversed by the same means. Denial of rights also attracts international admonishment.[27] Accordingly, government actions must be considered in the light of the obligations inherent in human rights that are those of individual entitlement and accountability for failure to perform.[28]

Secondly, an economic approach tends to emphasize averages and not individuals. Economic success is measured by the total average growth, such as a rise in gross domestic product or per capita income. However, a focus on averages may not reveal that "*economic growth is rarely uniformly distributed across a country*."[29] On the other hand, a rights-based approach is premised on the notion that each and every individual can lay claim to basic rights and basic services. For instance, Sen has pertinently observed that efforts to combat hunger must focus on the 'entitlement' that each person enjoys over food, rather than the total food

24 Office of the UN High Commissioner on Human Rights, Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation, UN Doc.HR/PUB/06/8, 16 (2006). A recent example from Malawi provides an excellent illustration of the rights-based approach, particularly because it linked village level rights education and activism with Government-level legal advocacy. In this way, the campaign worked with (a) duty-bearers, to ensure that the necessary rights were enshrined legally at national and local levels; and (b) rights-holders, to inform them of what rights they had, how those rights related to their food security and how they could go about claiming those rights. Finally, the campaign culminated into a legally enforceable right to food for all citizens.

25 Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights* (1999) 21 Human Rights Quarterly 56, 59.

26 Chinkin, *The United Nations Decade for the Elimination of Poverty: What role for international law*? 54 Current Legal Problems 553, 565 (2001).

27 Campbell, *Poverty as a violation of Human Rights: Inhumanity or Injustice?*,Ethical and Human Rights Dimensions of Poverty: Towards a new paradigm in the fight against poverty, 2 – 4 (2003) *available at* http://portal.unesco.org/shs/en/files/4412/10797127961Campbell.pdf/ Campbell.pdf (Last visited August 19, 2012).

28 Economic and Social Council, Human rights and extreme poverty, UN Doc. E/CN.4/1999/48 at ¶34 (1999).

29 Sachs, The End of Poverty: Economic Possibilities for Our Time 194 (2005) *as cited in*Narula, *The right to food: holding global actors accountable under international law*, 44 Columbia Journal of Transnational Law 691 (2006).

supply in the economy.[30] An economic approach also tolerates negative short-term consequences in return for long-term progress.[31]A rights-based approach does not tolerate such trade-offs; it cautions against any trade-off that leads to the retrogression of a human right from status quo at least.[32]

Thirdly, the rights based approach places poverty alleviation and associated demands for rights in a forum in which the right-holder and the duty-holder are on an equal footing.[33] These '*sites of dialogue*' ensure that claim rights are not overlooked when priorities are considered and resources allocated.[34] Indeed, they provide an opportunity for actual stakeholders to participate in the formulation of policy and its enforcement. As a corollary, this also ensures the accountability of the duty-holder.[35]

In spite of the merits of the rights-based approach evident from the preceding paragraphs, there have been various criticisms levied on the same. Sen responding to these criticisms classifies them under three main critiques that of 'legitimacy', 'coherence' and 'cultural imperialism'. The *legitimacy* critique argues that human rights confuse consequences of legal systems, in which people enjoy legally ascertained rights, with pre-legal moral rights that do not bestow justiciable entitlement.[36] However, once there is a *legally-binding* instrument in the form of a human rights treaty, it is submitted that the first part of the argument is moot. As regards the issue of justiciability, it is now well settled that socio-economic rights are not merely aspirational goals but may be violated.[37] There is an increasing body of jurisprudence on the enforcement of such rights in national courts most notably

30 Sen, Development as Freedom 161-62 (1999).
31 Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 World Development 465, 473 (2004).
32 UNHCHR Guidelines at ¶¶ 22, 50 (2006).
33 Supra note 26, at 566.
34 Bueren, *Alleviating Poverty through the Constitutional Court* 15 South African Journal on Human Rights52(1999).
35 Office of the United Nations High Commissioner for Human Rights, Summary of the Draft guidelines for a human rights approach to poverty reduction strategies ¶¶22–25 (2004) *available at* http://www2.ohchr.org/english/issues/poverty/guidelines.htm (Last visited August 19, 2012).
36 *Supra* note 30, at 227.
37 Danilo Turk, The realization of economic, social and cultural rights, UN Doc. E/CN4/Sub2/1992/16 at ¶ 184 (1992).

South Africa, India and Philippines.[38] According to the *coherence* critique, socio-economic rights are open-ended and there content remains indeterminate and vague at best.[39] Philosophically, the Kantian idea of perfect-imperfect obligations is utilised to rebut this criticism -[40] Kantian contractualism focuses on the recipient's perspective which can even justify a positive duty to provide basic necessities as sufficiently morally justified. Legally, the content of these rights have been reduced to settled legal standards like the 'minimum core obligation'.[41] Additionally, the duty bearers, as illustrated below, have been properly identified. *Last*, the *cultural imperialism* critique argues that human rights are essentially a Western construct which are inapplicable to essentially different social orderings in other parts of the World.[42] While Sen's starting point is that even the concept of an Asian's values is simplistic and meaningless, it is another commentator who most pertinently notes:[43] "*the tackling of poverty ought to be one of the less challenging areas of human rights as most aspects of poverty eradication do not raise issues of cultural hegemony. Access to water is not culture specific but is a universally embraced value.*"

In conclusion, it is apposite to suggest that the rights-based approach to poverty eradication is indeed justified and even necessary.

III. INTERNATIONAL HUMAN RIGHTS TREATY REGIME AND ITS INTERACTION WITH POVERTY

Contemporary international human rights law consists of a massive body of individual and group rights proclaimed in a large number of international and regional human rights instruments as well as a voluminous human rights jurisprudence emitted by international courts and quasi-judicial bodies interpreting and applying these instruments.[44] The centre-piece of this effort was the

38 For an extensive survey of the enforcement of economic, social and cultural rights, *see* International Commission of Jurists,*Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative experiences of justiciability* 107 – 116 (2008).

39 *Supra* note 30, at 230.

40 *Supra* note 13, at 213.

41 Vizard, Poverty and Human Rights: Sen's 'Capability Perspective' Explored 141 (2006)

42 *See* Gai, *Human Rights and Governance: The Asia Debate* 15 Australian Yearbook of International Law5 (1994).

43 *Supra* note 34, at 54.

44 Buergenthal, *Human Rights*, Max Planck Encyclopaedia of Public International Law at ¶10 (2007).

proclamation of the Universal Declaration of Human Rights in 1948.[45] On 16 December 1966, after twelve years of discussion, the United Nations completed the drafting of two treaties designed to transform the principles of the Universal Declaration of Human Rights into binding, detailed rules of law:[46] the International Covenant on Civil and Political Rights,[47] and the International Covenant on Economic, Social and Cultural Rights.[48] Both Covenants came into force in 1976.

It is submitted that the denial of human rights is both a cause and a consequence of poverty.[49]Admittedly, no provision in the aforementioned treaties expressly provides for a right to be free from poverty. Nevertheless, many provisions are relevant. First of all, there is the 'extraordinary assertion'[50] of the right to social security and adequate livelihood in the UDHR.[51] Understandably, this was subsequently diluted in the ICESCR. Still, Articles 9 and 11 of ICESCR continue the theme by recognising *the right of everyone to an adequate standard of living*.[52] Furthermore, in the language of rights, one may say that a person living in poverty is one for whom a number of human rights remain unfulfilled—[53]such as the rights to food, health, political participation and so on. Such rights have *constitutive* relevance for poverty if a person's lack of command over economic resources plays a role in causing their non-realization.[54] Some human rights are such that their fulfilment will help realize other human rights that have constitutive relevance for poverty. For instance, if the right to work is guaranteed, it will help empower the people to realise the right to food themselves. Such rights can be said to have

45 Universal Declaration of Human Rights, General Assembly Resolution 217A(III), UN Doc. A/810 at 71 (1948) [hereinafter "UDHR"].

46 Malanczuk, Akehurst's Modern Introduction to International Law 215 (7th edn., 1997).

47 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 19 December 1966, entered into force 23 March 1976) [hereinafter "ICCPR"].

48 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976) [hereinafter "ICESCR"].

49 Imbert, *Rights of the Poor, Poor Rights? Reflections on Economic, Social and Cultural Rights* (1995) 55 The Review 85, 93.

50 *Supra* note 26, at 559.

51 Article 25, UDHR: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

52 Article 11, ICESCR.

53 UNHCHR Guidelines at ¶7.

54 Campbell, *Poverty as a Violation of Human Rights*in Freedom from poverty as a human right 55, 59 (Pogge ed., 2007).

instrumental relevance for poverty.[55] The same human right may, of course, have both constitutive and instrumental relevance.

The matrix of human rights, engaged with the poor – constitutive or instrumental, begs the question as to the nature and scope of the correlative obligations on the state or other actors vis-à-vis these human rights. The exercise to ascertain the nature of these obligations must be based primarily in principles of treaty interpretation.[56] Article 31(1) of the Vienna Convention on the Law of Treaties requires a provision to be interpreted in the ordinary meaning of the words understood along with the context (*in light of the object and purpose*) in which the provision was drafted.[57] Additionally, the Committee on Economic, Social and Cultural Rights [hereinafter "CESCR"] published general comments, discussions and reports from time to time. The opinion of such treaty bodies have to be given 'great weight', according to the International Court of Justice in *Diallo*,[58] in the course of interpreting treaties.

The CESCR has consistently endorsed a tripartite typology of obligations first suggested by Eide -[59]obligations to *respect*, *protect* and *fulfil* human rights.[60] These obligations are explained by taking the right to water[61] as an illustration. Indeed, the CESCR has recognised the inextricable relationship between the right to water and poverty – "*the continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty*."[62] The obligation to *respect* entails obligations not to interfere with the enjoyment of human rights. Respecting

55 Osmani, *Poverty and Human Rights: Building on the Capability Approach*, 6(2) Journal of Human Development, 205, 206 (2005).

56 The customary law principles relating to the interpretation of treaty provisions have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties; AUST, MODERN TREATY LAW AND PRACTICE 188-189 (2000).

57 Article 31, Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

58 Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Repblic of Congo) (Merits), 2007 ICJ General List No. 103 at ¶66.

59 Eide, *The Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23 at ¶66 (1987).

60 This has even been followed in other human rights court. *See eg.* The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, Communication 155/96 (2001) *African Human Rights Law Reports* 60.

61 In fact, right to water has not been explicitly provided in the ICESCR. Nevertheless, Article 11 says 'including…' and this was interpreted by the ICESCR in its General Comment No. 6 (1995) UN Doc.E/1996/22 at ¶¶5, 32.

62 CESCR, General Comment No. 15, Right to Water, UN Doc. E/C.12/2002/11 at ¶1.

ESC rights obliges states parties, inter alia, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programmes that do not conform to ESC rights protected by human rights treaties.[63] For instance, the right to water includes the right to maintain access to existing water supplies, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies through waste from State-owned facilities or through use and testing of weapons.[64]

The obligation to *protect* requires states to take measures that prevent third parties including individuals, groups, corporations and other entities from interfering in any way with human rights.[65] This generally entails the establishment of a framework of laws, regulations and other measures so that individuals and groups are able to realise their rights and freedoms.[66] With regard to water, the obligation would require states to implement laws to prevent pollution of water by corporations and facilitating access to water where there is discrimination by a private party.[67] Lastly, the obligation to *fulfil* requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure full realisation of human rights to those who cannot secure these rights through their personal efforts.[68] Indeed, this is most relevant for poverty eradication wherein the poor are unable to access clean water.[69]

Additionally, the CESCR has also formulated a '*minimum core obligation*' -to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être.[70] In other words, the absence of such a standard would frustrate its object. At the same

63 Ssenyonjo, Economic, Social and Cultural Rights in International Law 23 (2009).
64 CESCR, General Comment No. 15 at ¶¶10, 21.
65 Both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) have interpreted the obligation to protect in regional human rights treaties in a similar manner - Velasquez Rodriguez v Honduras, judgment of 29 July 1988, Inter-AmCtHR (Ser C) No 4 (1988); E and Others v United Kingdom(App No 33218/96), judgment of 26 November 2002 [2002] ECHR 763.
66 *Supra* note 63, at 24.
67 Pejan, *The right to water: the road to justiciability*, 36 George Washington International Law Review 1181, 1189 (2004).
68 *Supra* note 63, at 25.
69 Skogly, *Is There a Right Not To Be Poor*? 2(1) Human Rights Law Review59, 79–80 (2002).
70 CESCR, General Comment No. 3, The nature of States parties obligations, UN Doc. E/1991/23 at ¶10 (1991).

time, whether a country has discharged this obligation must be considered in light of the resource availability.

In light of the nature and scope of obligations discussed above, the following section seeks to analyse the interplay of these different obligations through actual scenarios witnessed in the past.

A. Case Study I – Zimbabwe and the right to food

In early 2000's, the Zimbabwean government assisted landless citizens to invade agricultural fields. This was accompanied by a strong drive of compulsory land acquisition.[71] Along with a drought in 2002, the food supplies inside the nation were disproportionately less to its population.[72] Additionally, the government restricted the entry of international food aid and denied it completely to its political opponents. Finally in May 2005, it altogether refused any help from the international community.[73]

Zimbabwe is a state party to the ICESCR. Clearly, the acts of the Zimbabwean government constituted a violation of the right to food.[74] The correlative duty to this right required the government not to interfere with the rights of people to get adequate food.[75] Instead, the State actively adopted measures to violate this most basic duty. Furthermore, the government violated the direct mandate of the CESCR not to use food as an instrument of political and economic pressure.[76]

---

71 Amnesty International, Zimbabwe: Power and Hunger--Violations of the Right to Food 10-14, 18-29 (2004) *available at* http://web.amnesty.org/library/pdf/AFR460262004ENGLISH/$File/AFR4602604.pdf.

72 The U.N. Food and Agriculture Organization (FAO) and U.N. World Food Programme assessments indicated that about half of Zimbabwe's population was "food insecure." UN FAO, Global Information and Early Warning System on Food and Agriculture, Food Supply Situation and Crop Prospects in Sub-Saharan Africa, 65 (Dec. 2002) available at ftp://ftp.fao.org/docrep/fao/005/y8255e/y8255e00.pdf.

73 *Zimbabwe Halts Emergency Food Aid*, BBC News, May 11, 2004, http://news.bbc.co.uk/1/hi/world/africa/3704211.stm

74 Article 11, ICESCR.

75 CESCR, General Comment No. 12, The Right to Adequate Food, UN Doc. E/C.12/1999/5, 106 ¶15 (1999).

76 *Id* at ¶37.

What is the relevance of the above example? *First*, international human rights treaties *do* guard the rights of citizens against oppressive measures of their own governments. Thus, in a way, the international human rights treaties *did protect* the poor. However, more significantly, *the treaty regime failed to provide a mechanism to these victims for redressal against such egregious violations*. It seems ironic that it failed to abide by its own standard of '*protect*'. Indeed, this critique is shared more broadly with other areas of international law.[77] Nevertheless, it is submitted that this argument cannot be used in defence of the treaty regime. The drawback is best tackled through the establishment of regional human rights treaties regimes. Judicial forums, established by such treaties, allow individuals to bring a claim against the state.[78] The international community, in its attempt to remedy this defect, has formulated the Optional Protocol to the ICESCR to establish a complaints mechanism.[79] At this time, due to only a few ratifications, the success of this move remains uncertain.

B. Case Study II – India and Housing the Urban Poor

Before analysing the situation below, it is important to note that the right to adequate housing has both *constitutive* and *instrumental* relevance for poverty. Lack of secure and safe shelter is an indicator of poverty and leads to denial of other rights like access to health, social services, employment *et al*. Conversely, protecting the right to adequate shelter not only addresses a condition of poverty but also facilitates actions for the alleviation of poverty such as acquiring employment.[80]

The situation considered by the Delhi High Court in *Sudama Singh v. Government of Delhi*[81] is examined here. The government of Delhi, in pursuance of construction for the Commonwealth Games, had demolished the 'jhuggies' (hutments) of slum-dwellers living in a particular area. The aggrieved people filed a petition before the Court seeking its intervention to rehabilitate and relocate them to a suitable place and providing them alternative land with ownership rights. The Master Plan for Delhi-2021 envisaged the relocation (by provision of alternative

77 *Supra*note 26, at 567.
78 From Bilateralism to Community Interest: Essays in Honour of Bruno Simma 1132 (2011).
79 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. Doc.A/63/435 (2008).
80 *Supra* note 26, at 574.
81 Sudama Singh and Ors.v.Government of Delhi and Anr. MANU/DE/0353/2010 (Delhi High Court).

accommodation) of the dwellers if the land on which their jhuggies exist was required for a public purpose.

The present example differs from the previous one in two key respects. *First*, here, the aggrieved party had approach a judicial forum which gives us an insight into how national courts deal with international human rights treaties. *Secondly*, while the previous situation involved a direct application of the duty to respect [a negative duty];here, there is a conflation of negative and positive duties which gives rise to important questions – is the state's duty not to interfere independent of the legality of the settlement?; correspondingly, is there also a positive duty on the state to provide alternative housing?; if so, can such a duty be enforced in a domestic court?

The CESCR had the occasion to consider a similar situation in Philippines. It told the government that it did not condone illegal use of property but "*in the absence of concerted measures to address these problems [squatters] resort should not be had in the first instance to measures of criminal law or to demolition.*"[82] This indicates that the Committee advocates for a positive duty for the state to provide adequate housing to the people.[83] Such a positive duty begs the question of the degree of compliance required by the treaty of the government. In the landmark *Grootboom* case,[84] the South African Constitutional Court considered the enforceability of economic and social rights under its Constitution. The Court accepted that the government could not immediately provide shelter for all those without accommodation but issued a declaratory order requiring the government to 'devise and implement' within its available resources a comprehensive and co-ordinated programme progressively to realize the right of adequate housing.[85]

Previously, the Indian Supreme Court, in *Olga Tellis*,[86] recognised the right to shelter. However, at the same time, it held that the government had the right to clear the illegally occupied streets and the duty to provide alternate shelter, if any,

82 Observations to the Initial Report of the Government of the Philippines, 29th meeting, 19 May 1995 at ¶15.

83 CESCR, General Comment No. 4, UN Doc. E/1992/23 at ¶¶11-12.

84 Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 1169.

85 Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law 243 (2008).

86 Olga Tellis v. Municipal Corporation of Greater Bombay AIR 1986 SC 180 at ¶51.

was not legally enforceable before the court. Subsequently, in *Ahmedabad Municipal Corporation*,[87] the Court only allowed the petitioner to avail himself of the right to alternative housing. This kind of judicial strategy has been termed as '*Individualized Enforcement*' by Landau in a recent article.[88] He convincingly argues that such individualised enforcement, in fact, goes against the rubric of human rights and benefits the advantaged groups even more. In this judicial background, the Delhi High Court *boldly* held that since the government had already initiated a policy plan to provide adequate housing to the aggrieved people, it was the government's duty to provide *that* alternate housing as a pre-requisite for eviction.[89] In fact, in reaching this conclusion, the Court took into account India's international obligations including Article 11 of the ICESCR.

C. Case Study III –Niger and the famine – can global actors be held accountable?

The 2005 famine in Niger is an example of the negative impact of policies implemented by global institutions on the human rights of people. While the first two illustrations have been restricted to the relations between the state and its citizens, the present case provides an opportunity to examine the possible responsibility of actors other than the 'home state'. Droughts and locusts struck western and central Africa in 2004 reducing adversely the harvest of the affected countries. An NGO contended that the effects of these natural events could have been mitigated but for the subsequent inaction of the government.[90] In fact, Mali which reacted promptly by diverging from market-based approaches and distributing free-millet was not struck by the famine.[91] Instead, the Nigerian government was persuaded by the international financial institutional and key donor nations to abide by their bilateral agreements.[92]

---

87 Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan (1997) 11 SCC 121.

88 Landau, *The reality of social rights enforcement*, 53 Harvard International Law Journal 189, 209 (2012).

89 Sudama Singh and Ors.v.Government of Delhi and Anr. MANU/DE/0353/2010 (Delhi High Court).

90 *August Will Be the Worst Month in Niger*, Médecins Sans Frontières News, Aug. 8, 2005, available at http://www.msf.org/msfinternational/invoke.cfm?objectid=949B295A-E018-0C72-099A049D222E25A1&component=toolkit.article&method=full_html.

91 U.N. Office for the Coordination of Humanitarian Affairs, *Mali: No Famine, But a Perennial Problem of Poverty*, Integrated Regional Information Network News [IRIN News], Aug. 15, 2005, available at http://www.irinnews.org/report.asp?ReportID=48586&SelectRegion=West_Africa.

92 JeevanVasagar, Don't Blame the Locusts, Guardian (U.K.), Aug. 12, 2005, available at http://www.guardian.co.uk/famine/story/0,12128,1547852,00.html.

Niger committed a violation of its obligation to fulfil the right to food which requires the State to directly provide food or make it more accessible by increasing subsidies and so on.[93] Niger essentially faced *a conflict* between its obligations to comply with binding human rights commitments and its obligations under the agreements with the international financial institutions.[94] In such a situation, a government like Niger may be left with no choice but simply to "*ignore the human rights treaty obligations, as the pressure from largely donor-imposed [IFI] conditionality is stronger. Countries may be punished for violating IFI and WTO conditions, but not those of the UN.*"[95] However, it is submitted that in international law, it is human rights obligations which take precedence over all other obligations. The International Law Commission noted that due to the special character of human rights treaties seeking to regulate all other laws in force in a particular nation, all other treaty commitments need to be circumscribed by a state's human rights obligations.[96] Indeed, this is consistent with the jurisprudence of regional human rights courts.[97] Hence, abiding by other treaty obligations is not a defence to the violation of a human rights treaty. Indeed, this is one of the merits of the rights-based approach as outline above – prioritization.

a) International Financial Institutions and Powerful Developed States

International financial institutions are not bound by international human rights treaties. Hence, the treaty regime cannot protect the violations of human rights attributable to such organisations. This clearly is a lacunae in state-centric international law. Nevertheless, the World Bank's Senior Counsel notes that "*[b]ecause governments are the owners of the institutions like the World Bank, and are bound to comply with the treaties they have ratified, multilateral financial institutions must be careful to ensure that if these treaties are implicated in their projects, the treaties are appropriately taken into account* …"[98] This suggests that it

93 CESCR, General Comment No. 12 at ¶15.

94 *Supra* note 29, at 717-718.

95 Canadian Council for International Co-operation, Reality of Aid 2004 (2004), available at http://www.ccic.ca/e/docs/002_aid_roa_2004.pdf.

96 International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, UN Doc. A/CN.4/L.682 at ¶¶ 246-247 (2006).

97 Slivenko v. Latvia, ECtHR, Application no. 48321/99, ¶120 (2003); Case of the Moiwana Community v. Suriname, Serie C No. 124, Inter-American Court of Human Rights (IACrtHR), 15 June 2005.

98 Leva, *International Environmental Law and Development*, 10 Georgetown International Environmental Law Review 501, 501-02 (1998)

may be possible to hold strongly influential nations responsible for the conduct of the international financial institutions. This is particularly true for International Financial Institutions where not every nation has equal votes but the votes are weighted in accordance with the member's donations. It is submitted that these member states may be held responsible as: *first*, negative obligations have extraterritorial application; and *secondly*, the conduct of states in the functioning of another international organisation may attract responsibility.

First, in conformity with the fundamental principle of 'universality' of human rights protection, acts producing effects *outside the State's territory* also give rise to State's obligations under such treaties. It may be contended that extra-territorial application is premised on a narrow construction of 'effective control'.[99] However, the ICESCR, unlike other human rights treaties, does not make any reference to its scope of application. In fact, the ICJ in *Wall* held that Israel was "*under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.*"[100] Thus, the Court drew a distinction between positive and negative obligations extending the latter *even beyond territorial control*.[101] The CESCR also adopts this distinction to extend negative obligations extra-territorially.[102]

Secondly, conduct of states in the working of international organisations may attract responsibility if it is contrary to its obligations under other agreements. The ICJ had occasion to consider such a situation in *Greece v. Macedonia*[103] wherein it held that Greece, by even voting against a resolution inducting Macedonia in the NATO was contrary to the bilateral agreement between the two countries. Similarly, if a powerful state votes in favour of an IFI resolution which

99 Loizidou v Turkey (Preliminary Objections) (App No 15318/89) 1995 20 EHRR 99, ¶¶52,62.

100 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136 at ¶112.

101 Milanovic, Extraterritorial Application of Human Rights 210 (2011).

102 CESCR, General Comment No. 8, *Economic Sanctions on ESC Rights* UN Doc. E/C.12/1997/8 ¶3 (1997); Craven, *The violence of Dispossession- Extra-territoriality* in Economic, Social and Cultural Rights in Action 75, 77 (2010); In fact, Ecuador in the *Aerial Herbicides Case* has specifically alleged that the Columbian authorities, acting within their territory, violated the rights of its nationals under the ICESCR - Ecuador - Application to institute proceedings - Areal Herbicides (ICJ) p. 26 (31 March 2008).

103 Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), 2009 ICJ General List No. 142; Also *see*Matthews v. U.K., 1999-I Eur. Ct. H.R. 251 at ¶32.

leads to human rights violations in the 'home' state, an argument can be made for its indirect responsibility.

D. Case Study IV – Bangladesh and 'the hidden face of globalisation'[104]

In the documentary, it is shown how American multi-national corporations have outsourced their manual work to factories in Bangladesh. From the conditions in the factories and the interview of the workers, it appears that the right to work of these people is being continuously violated. For the purposes of the paper, it is presumed such human rights violations are indeed occurring. The stakeholders involved in this institutional arrangement are the home state – Bangladesh, a transnational corporation and its state of origin – a developed country.

a) Transnational Corporation and its state of origin

Obviously, transnational corporations are not bound by human rights obligations.[105] The question that arises is whether the state of origin is under any obligation to regulate the outsourcing activities of companies incorporated on its own territories. As previously submitted, the extra-territorial obligations of states only extend to negative obligations of states. On the other hand, an obligation to regulate would come within the ambit of the duty to protect – a positive duty. Hence, it is difficult to argue for an obligation on part of the state of origin.[106] At the same time, however, CESCR urges nations "*to promote the right to work in other countries as well as in bilateral and multilateral negotiations*."[107]

b) Bangladesh

Understandably, Bangladesh has a duty to protect its citizens by establishing a legislative framework that protects the workers' rights. However, two concerns are voiced by developing countries on this count. *First*, any regulation would decrease the chances of investment in the nation which would further deteriorate the

104 This refers to a documentary Hidden Face of Globalization available at http://www.youtube.com/watch?v=8Bhodyt4fmU.

105 But there are soft law guidelines to regulate their behaviour: *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

106 *Supra* note 29, at 751.

107 CESCR, General Comment No. 18,Right to Work UN Doc. E/C.12/GC/18 at ¶30 (2005).

employment rates. In fact, in the documentary, it is shown that Walt Disney withdraws its investment from Bangladesh after some regulations are put in place. However, a rights-based approach does not offer the state the opportunity to make such trade-offs as was elaborated above. *Secondly*, bilateral investment treaties reduce the scope of state intervention in investment related activities. However, as previously submitted, human rights treaties take precedence over other international commitments. Particularly in the case of investment law, there is recent writing in support of including human rights standards in substantive obligations in BITs.[108]

IV. CONCLUSION

"*Poverty is the gravest human rights challenge facing the world today.*"[109] Poverty may be both the cause and the consequence of a human rights violation. Since 1990's when the United Nations was actively seized with the idea of a rights-based approach to poverty eradication, there has been a continuous growth in the volume of academic scholarship on the subject. In that scholarship, the author has attempted to carve out a niche area by viewing the issue through the rubric of international law. Accordingly, different situations were selected to identify the duty-holders and the nature of their obligations. The suggestion that this is an all-encompassing solution to the problem is not made in the paper. On the contrary, drawbacks have been seen through the interaction of human rights treaty regime with actual situations.

The inferences that can be drawn are the following. *First*, the home state is responsible to respect and protect the human rights of all its citizens. While the obligation to fulfil is subject to the available resources, in some cases, courts are willing to enforce even such positive duties. Furthermore, human rights obligations take precedence over other commitments like those to IFIs or investors. *Secondly*, international financial institutions are not directly accountable for any human rights violations. However, an argument may be made to hold the powerful states in such organisations accountable. In any event, the extra-territorial application of negative duties of such states may even be attracted independently. *Thirdly*, there

108 See *'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration* in Human Rights in International Investment Law and Arbitration 423 (Dupuy *et al* eds., 2009).

109 UNHCHR Guidelines, 1.

are certain limitations to the human rights treaties regime in protecting the poor – the absence of a complaints mechanism in ICESCR makes it difficult for victims to get redressal or even voice their concerns; and international financial institutions and transnational corporations are not bound by human rights law; and a state's extraterritorial obligations are only restricted to the duty of respect and does not extend to positive duties.

In sum, while a rights-based approach has a definite edge over other approaches in tackling poverty, the answer to "whether international human rights treaties protect the poor?" remains uncertain.

MANDATORY CSR IN THE COMPANIES BILL, 2011: ARE WE THERE, YET?

Arpit Gupta [*]

ABSTRACT

This essay examines the debate around clause 135 of the Companies Bill, 2011, which makes it compulsory for companies to spend 2% of their profits towards Corporate Social Responsibility ('CSR') initiatives. While it is a welcome change to turn CSR from a mere 'voluntary' initiative to a 'mandatory' one, this essay illustrates the large number of problems which have been left unaddressed by the legislators in framing this particular clause. It seems that in their eagerness to create a 'socialist' Companies Bill, the legislators have forgotten the main stakeholders for whom the Bill has been made – the companies themselves. Though the clause is mainly aimed at the lack of CSR initiatives being carried out by India Inc., it seems to be working 'against' them, rather than in 'cooperation' with them. Even from a legal viewpoint, there are some glaring loopholes in the clause.

The essay finally concludes that while the wording of the clause, even after so many deliberations amongst the various bodies of the Government, may seem to be a 'knee-jerk' reaction to the problem of CSR initiatives, the implementation of certain suggestions may curb the problems identified by a large extent.

It is to be noted that this essay proceeds on the assumption that Corporate Social Responsibility initiatives should be a legitimate concern of companies, and it does not indulge in the debate as to whether CSR activities should be carried out by companies in the first place itself.

I. INTRODUCTION

On December 18, 2012, the Lok Sabha passed the much-awaited and much-debated Companies Bill, 2011 ('the Bill').

[1]While the Bill makes a series of overhauls to the Companies Act, 1956, one of the most debated clauses of this Bill is the proposed clause 135, which will make

* III Year, B.B.A, LL.B. (Hons.), National Law University, Jodhpur.

it mandatory for certain companies to set aside 2% of their profits for Corporate Social Responsibility ('CSR'). The clause applies to three types of companies – a) those with a net worth of rupees five hundred crore or more, b) those with a turnover of rupees one thousand crore or more and c) those with a net profit of rupees five crore or more. These companies would be subject to the following obligations under the aforementioned clause –

a. Mandatorily setting up a CSR Committee consisting of members from the Board of Directors, which will formulate a CSR policy.
b. Ensuring that at least 2% of the average net profits of the company for the past three years are spent in accordance with the CSR Policy.
c. Where the companies fail to spend the abovementioned amount, furnishing reasons for the same in the Directors' Report under clause 134 of the Bill.

In the deliberations which follow, this Article will examine the practical and legal implications of such a law coming into existence, and whether the same should be allowed or not.

II. THE PRESENT LEGAL POSITION ON CSR INITIATIVES

Presently, there is no concrete legislation with respect to 'Corporate Social Responsibility' for companies in India. Official notifications by the Government have been released earlier in the form of 'guidelines' – some mandatory, some voluntary. The first indication of an official notification on CSR guidelines was issued by the Ministry of Petroleum and Natural Gas, whereby public sector oil-companies had agreed to spend at least 2% of their net profits on CSR initiatives.[2] This was followed by a notification titled 'Corporate Social Responsibility Voluntary Guidelines', which was issued in December 2009 by the Ministry of Corporate Affairs.[3] Further guidelines were issued for Central Public Sector Enterprises (CPSEs) in April 2010, whereby the creation of a 'CSR Budget' was

1 *Lok Sabha passes Companies Bill*, Economic Times, Dec. 19, 2012 *available at* http://articles.economictimes.indiatimes.com/2012-12-19/news/35912646_1_csr-activities-companies-bill-concept-of-class-action.

2 Press Information Bureau, Ministry of Petroleum and Natural Gas, Government of India, *Oil PSUs agree to spend two per cent of profits on Social Responsibilities*, Feb. 2, 2009 *available at* http://pib.nic.in/newsite/erelease.aspx?relid=47172.

3 Ministry of Corporate Affairs, *Corporate Social Responsibility Voluntary Guidelines, 2009*, *available at* http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

made mandatory.[4] The latest notification is the 'Guidelines on CSR and Sustainability for Central Public Sector Enterprises', which came into effect from April 1, 2013.[5]

Thus, currently there is no statutory obligation on companies to contribute towards CSR initiatives, with the exception of Central Public Sector Enterprises.[6] Clause 135 of the Companies Bill, 2011, if passed, would be the first of its kind in India, and the second in the world after Indonesia, wherein a statutory obligation will be imposed on companies to compulsorily spend 2% of their average profits on CSR initiatives.

III. 'MANDATORY' CSR V. 'VOLUNTARY' CSR

One of the principle contentions raised against this provision is that CSR is essentially a 'voluntary' exercise. CEOs of major Indian companies have stated that the process should be more 'democratic' and the decision regarding allocation of a public company's profits towards CSR should be subject to the shareholders' vote, not the government's legislative powers.[7] The following points highlight the debate on this issue.

IV. 'ASPIRATIONAL LAW' – A THEORETICAL ARGUMENT

Scholars argue that law cannot be 'aspirational' – it is not within the scope of law to statutorily mandate positive action; it can only enforce minimum standards.[8] Thus, whereas law can ban companies from using child labour, it cannot force companies to build excellent schools or be as environmentally

4 Press Information Bureau, Ministry of Corporate Affairs, Government of India, *Corporate Social Responsibility*, 11 Aug. 2011 *available at* http://pib.nic.in/newsite/erelease.aspx?relid=74428.

5 Department of Public Enterprise, *Guidelines for CSR and Sustainability for Central Public Sector Enterprises, available at* http://www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf.

6 *Supra* note 2 at 4.

7 *See Azim Premji against law on mandatory CSR spending by corporates*, The Economic Times, Mar. 24, 2011 *available at* http://articles.economictimes.indiatimes.com/2011-03-24/news/29181451_1_csr-spending-corporate-affairs-murli-deora-azim-premji; *Also see IT CEOs back Premji, against mandatory CSR*, Times of India, Mar. 26, 2011 *available at* http://articles.timesofindia.indiatimes.com/2011-03-26/software-services/29191926_1_csr-azim-premji-corporate-social-responsibility.

8 Aneel Karnani, *Mandatory CSR in India: A Bad Proposal*, Stanford Social Innovation Review Blog (May 20, 2013) *available at* http://www.ssireview.org/blog/entry/mandatory_csr_in_india_a_ bad_proposal.

conscious as possible.[9] However, the above contention is ill-founded, both on technical legal grounds, as well as on practical considerations.

As far as the legal strength of this argument is concerned, the Constitution of India itself offers a prominent example of such 'aspirational law' being enforced, in the form of Article 21-A of the Constitution.

Technically speaking, the Directive Principles of State Policy are non-justiciable, as per Article 37 of the Constitution i.e. they cannot be enforced in a Court of Law, because these Principles impose positive obligations on the State. However, there have been instances where these principles have been realised in the form of a right. A major example and thereby proving an exception to this constitutional principle lies in the form of Article 21-A,[10] which was consequently given the shape of a legislation through the Right of Children to Free and Compulsory Education Act, 2009 ('RTE Act'). The RTE Act, read with Article 21-A of the Constitution, guarantees to every child of the age of six to fourteen years a right to 'full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.'[11] Thus, the 'Grundnorm' of our country itself has imposed positive obligations, and to state that the law cannot do the same is a fallacious argument.

Even from a practical viewpoint, there is a need for CSR to be mandatory. Though certain large companies such as Tata, Infosys and Mahindra & Mahindra are active participants when it comes to CSR activities, the performance of India Inc. has not been very impressive when it comes to taking up CSR initiatives. Even though Reliance India Limited is the largest CSR spender amongst Indian companies, even then its expenditure does not amount to 2% of the Profit After Taxes (PAT), as will be required under the Companies Bill, 2011. According to a survey carried out by Forbes India, only 6 out of the top 100 companies of India (ranked on the basis of net sales figures) contributed more than 2% of their profits

9 Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 Asian-Pacific L. & Pol. J. 280 (2011-2012).

10 Inserted by the Constitution (Eighty-Sixth) Amendment Act, 2002.

11 Ministry of Human Resource Development, Government of India, *Right to Education*, *available at* http://mhrd.gov.in/rte.

after taxes towards CSR initiatives.[12] Also, only 16 out of the top 100 companies published a separate Sustainability Report for the financial year 2011-2012.[13] Similarly, a study indicates that 60% of the participants of the Global Compact Society (GCS), India's counterpart of the United Nations Global Compact (UNGC), had not submitted a 'Communication on Progress' or COP Report, which is the UN's version of a Sustainability Report by the company, stating the various CSR initiatives taken by it for the benefit of its various stakeholders.[14]

The above facts clearly indicate that what India Inc. does is 'corporate compulsion responsibility', and not CSR. Companies take up minimal CSR initiatives in order to follow what has been termed as the 'check-box' approach – they just want to tick the box of fulfilling their CSR obligations. Hence, from a practical viewpoint, the Companies Bill, 2011 has actually taken a smart move by bringing in the '2% of PAT' provision. Companies will now be forced to not merely 'tick the box', but to explore such areas where they can effectively implement various CSR initiatives because they have to statutorily spend a minimum of 2% of their PAT, irrespective of whether they would prefer to do the same or not.

V. DIFFERENCES BETWEEN 'MANDATORY CSR' AND 'TAX'?

Venu Srinivasan, Chairman of TVS Motors, has stated that this measure would be similar to imposing a tax; so have others.[15] However, this is a flawed argument, both from a legal and practical aspect.

From a legal viewpoint, the primary purpose of a 'tax' is the collection of revenue. When the Government imposes a tax, it need not identify a specific

12 *CSR Report Card: Where Companies Stand*, Forbes India, Mar. 18, 2013 *available at* http://forbesindia.com/article/real-issue/csr-report-card-where-companies-stand/34893/1.

13 *India Inc. needs to wake up to its social responsibilities*, Forbes India, Mar. 18, 2013 *available at* http://forbesindia.com/article/boardroom/india-inc-needs-to-wake-up-to-its-social-responsibilities/34891/1.

14 Anil Kumar Sharma & Rupal Tyagi, *CSR and Global Compact: The Indian Perspective*, IX (3) IUP J. of Corporate Gov. 38-68 (July 2010) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656196.

15 *India Inc. questions mandatory CSR*, The Indian Express, Dec. 20, 2012 *available at* http://www.indianexpress.com/news/indian-inc-questions-mandatory-csr/1047785/.

benefit accruing from the same.[16] However, that is not the purpose of clause 135 of the Companies Bill, 2011 – the money being used by the companies in CSR initiatives would not be filling the coffers of the Government. Also, the said money would be directed towards specifically earmarked activities.

From a practical viewpoint, money given as 'tax' goes to the State, and not directly to the community. For what purpose that money is used is left to the discretion of the Government. Also, in a country like India, where often the money does not percolate to the grassroot level due to various reasons such as corruption, bureaucracy, population etc, mere payment of taxes cannot be a means of ensuring that social good is being done. On the other hand, the measure under clause 135 is much more effective than a tax – companies have full freedom to give priority to social causes they want to support, and because the money is directly pumped into CSR initiatives, the impact is much higher. Clause 134 provides for mandatory disclosure of the implementation of the CSR Policy, and provides for penalty in case of failure to do the same. Hence, not only does the measure under clause 135 not amount to a 'tax', it is also more effective than a taxation scheme.

Thus, it is submitted that 'voluntary CSR' is no longer sufficient to ensure that companies realize their obligations towards various stakeholders (both at a micro and macro level) – it is only through 'mandatory CSR' that companies would take up CSR initiatives in a more streamlined manner. However, as has been examined below, there are certain problems with the way in which clause 135 has been drafted, resulting in various loopholes which would render this measure redundant.

VI. HINDRANCES CAUSED BY CLAUSE 135 OF THE COMPANIES BILL, 2011

a) Constitutional Validity

Clause 135 of the Companies Bill creates a classification amongst the existing companies in India. It divides companies into two categories –

a. Companies having a net worth of five hundred crore rupees or more, OR a turnover of rupees one thousand crore rupees or more OR a net profit of rupees five crore or more.

16 Jindal Stainless Steel Ltd. and Anr. v. State of Haryana and Ors., AIR 2006 SC 2550.

b. Other remaining companies.

Now, clause 135 is applicable only to companies in category (a) as stated above. Since this clause creates a 'classification', it would attract the tests of being valid on the threshold of Article 14 of the Constitution of India i.e. equality before law.

The Supreme Court has laid down the following two tests for any classification to be held to be valid under Article 14: [17]

a. The classification must be based on an intelligible differentia i.e. the groups created through the classification must be easily distinguishable from each other.
b. The classification created must have a rational nexus to the object sought to be achieved by the Act.

While clause 135 easily satisfies the first test, it is the second test where it fails. As has been stated by the Minister for Corporate Affairs, the purpose of this clause is to ensure that 'corporate entities contribute meaningfully' towards the growth and prosperity of the nation.[18] A similar concern had been raised by the Standing Committee on Finance.[19] However, nowhere is there a mention as to how these figures have been arrived at, or why only these particular companies should be subjected to such an obligation. Such a categorization of companies seems 'arbitrary', so to speak – and there might be allegations that the Ministry of Corporate Affairs might be inclined towards bringing only 'big' companies in the ambit of this clause. However, is no definition, legal or otherwise of a 'big' company? Why cannot companies having a net worth of four hundred crores, or a turnover of rupees nine hundred crores, or a net profit of rupees four crores qualify as 'big' companies and have the same legal obligation as under clause 135?

Moreover, the factors on the basis of which the three classes of companies have been created under this clause are bound to create confusion.[20] On examining

17 In Re: Special Courts Bill, 1978, AIR 1979 SC 478.
18 *Infra* note 23.
19 *Supra* note 8.
20 See *supra* "Introduction".

the Economic Times' list of the top 500 companies of India for 2012,[21] there are certain companies which have revenues exceeding rupees one thousand crore, but have incurred a net loss. However, if we are to look at the language of clause 135, then even such a company, after incurring losses, would also be required to mandatorily undertake CSR obligations, as the word 'or' has been used i.e. if a company falls in either of the three categories, then clause 135 will apply to it. Though such a company may give the incurring of a net loss as a reason in its Directors' Report for not undertaking CSR obligations (as required in the proviso (5) to clause 135), whether the same would be accepted as a valid reason or not can only be decided by adjudication by the courts, as the clause or Bill is silent about the same.

Thus, the various discussions on the Bill have failed to show a nexus between the classification created by the clause and the object of clause 135 of the Companies Bill, as there is nothing to suggest that only these categories of companies can afford to undertake CSR obligations. Thus, this clause would be liable to be struck down as violative of Article 14 of the Constitution, if subject to judicial review.

b) Absence of A Monitoring Body

When one reads clause 135 of the Companies Bill, 2011, a question which strikes out is this – 'how does the Government expect to ensure compliance of the companies'?

Clause 135(5) states that when the company fails to spend 2% of its three years' average profits on CSR initiatives, the Board of Directors are required to state the reasons for the same in the report required to be produced under clause 134(3)(o). The latter clause states that the CSR policy and the initiatives taken thereby must be stated in the report under clause 134. Strangely, there is no mention of the report being submitted to the Government or to a monitoring body – the clause only talks about the report to be submitted by the Board of Directors in the general meeting. Also, because a large number of companies would fall within the ambit of this clause, it would be a monumental task for the said

21 *ET 500 List – India's top companies 2012*, The Economic Times, *available at* http://economictimes.indiatimes.com/et500list.cms.

monitoring body to ensure that each company has complied with the said provisions.

Though only to some extent, the Companies Bill does provide for measures to ensure compliance. Clause 134 lists a number of details which the Board of Directors is mandatorily required to furnish in the Directors' Report. One of such details required to be furnished is that about the CSR policy developed and initiatives taken in accordance with the same, as mentioned in clause 134(3)(o). There is a provision for penalty in clause 134(8), which states that where a company fails to meet any of the provisions stated in clause 134, it would be subject to a minimum fine of fifty thousand rupees, which may extend up to twenty five lakh rupees, along with the imprisonment of the defaulting company officer for a maximum period of three years. Reading clause 134(8) with clause 135(5), it can be deduced that where a company fails to state the reasons for not contributing 2% of its average profits towards CSR initiatives, then the same would be subject to the penalty under clause 134(8) of the Companies Bill, 2011. This deduction can be inferred from the rule of statutory interpretation that a statute must be read as a whole, so as to be construed with reference to other clauses of the same.[22] While the Standing Committee on Finance has indicated that this 'self-disclosure' policy is sufficient to ensure compliance on behalf of the companies,[23] it is submitted that the same would not be sufficient and a monitoring body should be setup.

It is also noteworthy that in order to ensure compliance, clause 135(1) provides that at least one member of the CSR Committee must be an independent director i.e. a person who has no pecuniary relationship with the company, amongst other requirements.[24]

VII. TAX BENEFITS UNDER CSR – MAKING MANDATORY CSR 'PROFITABLE'

Under the Income Tax Act, 1961, there are a number of sections which provide for deduction of certain CSR-related expenses –

22 G. P. Singh, Principles of Statutory Interpretation 35 (12th edn., 2010).

23 *The Companies Bill 2009 – Twenty First Report*, Standing Committee on Finance (2009-2010), Ministry of Corporate Affairs *available at* http://www.icsi.edu/webmodules/linksofweeks/21_Report_Companies_Bill.pdf.

24 *See* clause 149(5), Companies Bill, 2011.

a. Payments which are made towards eligible projects or schemes approved by the National Committee for Promotion of Social and Economic Welfare, which functions under the Department of Revenue. (S.35AC)
b. Payments made to associations or institutions for carrying out rural development programmes (S.35CCA)
c. *Profits or gains earned from newly established industrial undertakings or hotel business in backward areas (S.80HH).*

Other sections include Sections 35CCB, 80G and 80GGA.

As can be seen, the Income Tax Act provides only for certain categories of CSR expenses to be treated as tax-deductible. As expected, India Inc. has been strongly demanding for making the 2% CSR expenditure a tax-deductible expense, as they are being 'forced' to fork out 2% of their profits by the Government.[25]

However, a major problem with this demand is the lack of the definition of a 'CSR initiative'. It is a commonly accepted fact among scholars that CSR is very difficult to define.[26] Taking an example from the Income Tax Act itself, one may argue that point (c) stated above should not qualify as a CSR expenditure as setting up an industrial undertaking or hotel business is a commercial activity, irrespective of the company's intention. At the same time, it can also be argued that because the said activity is taking place in a backward area, it will generate employment for the people of the said area, thereby qualifying as a CSR initiative. Thus, this would result in litigation, which neither the company nor the government desires.

Assuming that the above limitation can be tackled to some extent, it is the Government's duty to bring in such policy which fosters a healthy attitude amongst companies with respect to fulfilling their CSR obligations.[27] Because only a certain class of companies would be covered by clause 135 of the Companies Act, their competitive standing in comparison to the other companies who are not covered by

25 *Mandatory CSR: India Inc. asks for tax breaks in return*, The Financial Express, Dec. 5, 2012 *available at* http://www.financialexpress.com/news/mandatory-csr-india-inc-asks-for-tax-breaks-in-return/ 1040519. *India Inc. for tax sops on CSR,* Business Standard, Dec. 20, 2012 *available at* http://www.business-standard.com/article/companies/india-inc-for-tax-sops-on-csr-112122000202_1.html.

26 *Supra* note 9 at 275.

27 *Tax and Corporate Social Responsibility*, David F. Williams, KPMG, UK, Sep. 2007 *available at* http://www.kpmg.co.uk/pubs/Tax_and_CSR_Final.pdf.

this clause would be affected, as they are the ones who have to spend 2% of their profits. Thus, they must be compensated in some manner for this expenditure, in order to encourage companies to take up such CSR intiatives 'wholeheartedly', and not just for the sake of complying with the law.

It must be noted here that it is not within the jurisdiction of the Ministry of Corporate Affairs to decide the tax-deductibility of CSR expenditure under clause 135, and thus, outside the scope of the Companies Bill, 2011. The deductibility of such CSR-related expenditure, if any, can only be provided for by the Finance Bill, when it is introduced in the Budget i.e. it would fall within the jurisdiction of the Ministry of Finance. Considering that the Finance Act, 2013 has already been passed on May 10, 2013,[28] the benefit to the companies, if any, can only be provided in 2014, when the Finance Bill will be discussed in the Union Budget for 2014-15.

VIII. NO DEFINITION OF 'CSR'

Nowhere does the Companies Bill, 2011 provide a concrete definition of what amounts to 'CSR'. This becomes a problem because the scope of the term 'CSR' is extremely wide – while certain issues such as environment, healthcare, education etc. are commonly accepted as part of CSR activities, there is much confusion with respect to the definition of Corporate Social Responsibility.[29] If the scope of the CSR activities is not clearly defined, then this would result in disastrous consequences with respect to the implementation of clause 135, as well as increased litigation for both the companies and the governing body. This can be seen from the illustration given above, with respect to provision of tax benefits.

This is only the first half of the problem – the second half of the problem is the creation of 'Schedule VII'. Schedule VII, as laid down in the Companies Bill, gives a list of activities which '*may be inlcuded*' by companies in their CSR Policy, as the language of the Schedule itself states i.e. the list of items given in the

28 *Finance Act 2013*, Tax India Online.com *available at* http://www.taxindiaonline.com/RC2/union_budget/finance_act/finance_act_13/index.htm.

29 *Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure*, Justine Nolan, UNSW Law Research Paper No. 2007-15; *See also* Enhancing Corporate Accountability: Prospects and Challenges Conference Proceedings 1 (March 20, 2007) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=975414>.

Schedule should be indicative, and not exhaustive. However, clause 135 seems to state otherwise. Sub-clause 3(a) of clause 135 states that the CSR Committee shall indicate such activities '*as specified in Schedule VII*'. Which would mean that if a company does any activity beyond the scope of Schedule VII, it would not qualify as a CSR initiative.

This could have been a viable proposal, had it not been for the narrow scope of CSR activities that Schedule VII provides for – it lists only 9 activities in total, none of which cover any CSR activities carried out within the company i.e. micro-level activities. For example, the Schedule does not provide for any employee/worker welfare activities. One can also find a number of macro-level activities (carried outside the company) which have not been included. An example can be activities undertaken to promote awareness against drugs, liquor and other harmful substances. Thus, this would leave scope for litigation to arise, as there would be disputes regarding what amounts to CSR and what does not. Also, it robs companies of their due freedom to decide as to which area of CSR they would like to contribute to.

A possible answer to this question may lie in the previous CSR guidelines issued by the Government. For instance, SEBI had released a circular on 'Business Sustainability Reports', which made it mandatory for the top 100 listed entities on the BSE and NSE to disclose initiatives taken from the perspective of 'Environmental, Social and Governance' (ESG) norms. This circular contains an Annexure titled 'Principles to assess compliance with ESG Norms',[30] which gives a definite, yet broad scope as to what kind of activities can be considered to be 'responsible business practices'. Similarly, a reference can be made to the Voluntary Guidelines issued in 2009.[31] All these sources, when read with Schedule VII, can give a somewhat defined scope as to what constitutes CSR activities, with enough freedom for companies to decide which area they would like to work upon.

30 *Business Sustainability Reports*, Circular no. CIR/CFD/DIL/8/2012, Securities and Exchange Board of India (SEBI), Aug. 13 2012 *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf.

31 *Supra* note 3.

IX. CONCLUSION

Though the aim which clause 135 of the Companies Bill, 2011 seeks to achieve is worthy of appreciation, even from a practical viewpoint, the manner in which the Bill has sought to achieve the same is fraught with errors. It seems like a 'knee-jerk' reaction to the problem of CSR not being followed with enough fervour by companies in India. The Government, it seems, has followed a 'socialist' approach in framing this clause, rather than making it 'company friendly' – this is the reason why it has been met with so much opposition from India Inc. The following solutions can be suggested in order to make this Bill more effective and more 'company friendly':

- *Amend Schedule VII to include a broad definition of CSR.* As has been suggested earlier, reference can be made to the earlier guidelines issued by the Central Government for this purpose. Because the Bill seeks to restrict the scope of CSR activities to those which have been enlisted in Schedule VII of the Companies Bill, 2011, it should provide a vast definition for CSR, in order to provide companies with the freedom to select from a large number of areas.

- *Tax sops must be provided for this expenditure.* As has been discussed in much detail earlier, this will provide a positive environment for the companies to function in, with respect to CSR activities.

- *Appoint a separate body for overlooking compliance with the obligations under clause 135.* This measure is bound to result in administrative difficulties, and the presence of a separate body which would monitor the CSR expenditure would ensure a higher and more effective degree of compliance. Leaving it only in the hands of the shareholders would not be sufficient.

This still leaves us with the problem of constitutional validity, which is something that cannot be solved so easily. Research, studies and a report will aid the Government in order to decide as to which class of companies should be covered by this clause. All in all, a lot of introspection is required before clause 135 can finally turn into Section 135 of the new Companies Act.

JURISPRUDENTIAL JUSTIFICATIONS FOR THE PROPOSED GENERAL ANTI-AVOIDANCE RULE

Malavika Prasad & Devdeep Ghosh[*]

ABSTRACT

The General Anti-avoidance Rule is a landmark amendment to the Income Tax Act, 1961 that would serve as a 'catch-all' provision vis-a-vis instances of undesirable tax avoidance. In this paper, the authors seek to understand the jurisprudential motivations behind such an amendment along with a comprehensive analysis of similar Rules in other jurisdictions.

I. INTRODUCTION

Tax avoidance has been recognized as a problematic issue in many jurisdictions. It is a gray area of law located between outright prohibition i.e. tax evasion and explicit permission i.e. tax mitigation. Tax avoidance refers to measures employed to reduce one's tax liability within the boundaries of law, but in a manner that is not encouraged by the law. Frustrating tax avoidance measures through specific legislation[1] have mostly failed as taxpayers consistently innovate new devices that allow them to escape the black letter of the law.[2]

The problem is augmented in common law jurisdictions where the general rule of thumb is that the subjects may enforce their strict legal rights even when the resultant outcome is unfair to others[3] as opposed to civil law countries where the abuse of law doctrine accommodates a purposive interpretation of legislations.[4] In the context of tax law, common law jurisdictions allow for a tax to be imposed only

---

* Students, NALSAR University of Law, Hyderabad. The authors are grateful to Ms. Shreya Rao for her guidance and insight into the subject. However, any errors are the authors' alone.

1 Specific anti-avoidance provisions in Indian tax laws have been found to be inadequate to tackle all forms of tax-avoidance. P. Mo, Tax Avoidance and Anti-Avoidance Measures in Major Developing Economies 107 (Praeger 2003).

2 D.M. Schizer, *Sticks and Snakes: Derivatives and Curtailing Aggressive Tax Planning*, 2000 Southern California Law Review 73.p. 1339, 1349.

3 Z Prebble & J Prebble, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law*, 2008 Bulletin for International taxation 152.

4 Z Prebble, *Approaches to Tax Avoidance Prevention in Seven Asian Jurisdictions: A Comparison*, 2009 Asia-Pacific Tax Bulletin 31.

when it is explicitly mandated by the law.[5] Strict interpretation of taxing statutes is often used as a defence by tax avoiders to frustrate the object of the law.

Consider the case of *Boawater Property Developments v. IRC*[6] where the taxpayer sought to defeat a tax on the profits from a sale of land that exceeded a threshold limit by dividing the land into five pieces and selling them separately through an intermediate party for profits below the threshold. The Duke of Westminster principle, laid down in *IRC v. Duke of Westminster*,[7] allows for every man to reduce his tax liability within the confines of the law. The application of this principle would legitimize the actions of the taxpayer in the *Boawater.* However, the question whether it should be permitted in light of the detriment caused to both the Revenue as well as a similarly situated taxpayer who has paid the applicable tax transforms the debate.[8]

General Anti-Avoidance Rules ("GAAR") have found differential statutory recognition in several jurisdictions. Australia's approach has been to identify several prerequisites that must be met by an arrangement in order to infer that the taxpayer intended on obtaining a tax benefit.[9] On the other hand, the South African GAAR broadly states certain indicia possessed by a tax avoidance arrangement.[10] These indicators are extrapolated from common attributes shared by avoidance arrangements. The Indian GAAR has adopted a similar approach as explained later in this article. At the other end of the spectrum, the New Zealand GAAR thrusts discretion upon the courts to evolve principles to identify avoidance arrangements.[11]

---

5 See A.V. Fernandes v. State of Kerala, AIR 1957 SC 657.

6 1988 3 All ER 495.

7 [1935] All ER 259 (HL), [*"Duke of Westminster"*].

8 Consider the findings of the Australian Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report which revealed that a wealthy businessmen and some entrepreneurs had a minimal tax liability due to the employment of tax avoidance measures. Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, Final Report (1984) Vol 1 at 100-102.

9 J Cassidy, *Badges of Tax Avoidance: Reform Options for the New Zealand GAAR*, 17 New Zealand Business Law Quarterly 467, 468.

10 The present South African GAAR contained in Part IIA of the Income Tax Act, 1962 mandates a purposive interpretation of its provisions as opposed to the literal interpretation required by its earlier GAAR contained in section 103. This change was necessitated after the decision in Commissioner of Inland Revenue v. Conhage (Pty) Ltd, (1999) (4) SA 1149 which nullified the effect of the GAAR by adopting the Duke of Westminster principle.

11 See the Draft Report of the Victoria University of Wellington Tax Working Group *Improving the Operation of New Zealand's Tax Avoidance Laws* (2011) at [1.4], [4.2] and [4.18] as in J Cassidy, *supra* n

The object of the researchers is two-fold: *first,* to put forth a theoretical basis to establish the necessity of the GAAR in the Indian tax framework by contextualizing anti-avoidance within the scheme of the Hohfeldian analysis of rights (Part III) and *second*, to address some of the concerns that are oft-repeated with regard to the Indian GAAR (Part IV). Before this though, to set the stage for analysis in this paper, the researchers attempt to briefly summarise the position of law prior to and on adoption of the GAAR (Part II).

II. INDIA'S JUDICIAL GAAR AND THE PROPOSED SHIFT

In England, the Duke of Westminster principle was followed by English courts till the case of *WT Ramsay Ltd. v. IRC*,[12] where the House of Lords held that the Revenue had the power to disregard an arrangement if it has no commercial purpose except for the avoidance of tax. Judicial discourse in the Supreme Court of India has wavered in its identification of tax avoidance. The Supreme Court initially endorsed the Duke of Westminster principle in *CIT v. A Raman*[13] and *Bank of Chettinad Ltd. v. CIT*.[14] However, in *McDowell& Co. v. CTO*,[15] a Constitutional bench of the Supreme Court held by a four to one majority that the use of colourable devices to avoid the payment of taxes was unlawful.[16] Justice Chinappa Reddy, in a separate but concurring judgment went so far as to say that "*the ghost of Westminister had been exorcised in England. Should it be allowed to rear its head in India?"* - words which expressed his understanding that *Ramsay* had overruled *Duke of Westminster* in England.[17] His judgment effectively stated that obtaining any tax benefit was impermissible tax avoidance unless the benefit was explicitly granted by law. Furthermore, *Ramsay* did not overrule the *Duke of Westminster* but sought to carve out an exception to it, in that a transaction had to be genuine in order to qualify as permissibly tax avoidant. This was an aspect of Justice Reddy's judgment that courted controversy. Another perplexing aspect of *McDowell* was that the majority agreed with Justice Reddy's

9, 467, 468. See also *Ben Nevis Forestry Ventures v. Commissioner of Inland Revenue* (2009) 24 NZTC 23, at 188

12 (1982) AC 300 HL, ["*Ramsay*"].

13 [1968] 67 ITR 11 (SC).

14 [1940] 8 ITR 522 (PC).

15 154 ITR 148 SC, ["*McDowell*"].

16 *Id.* at 254.

17 *Id.* at 241.

judgment despite having reached the conclusion that all tax avoidance was not illegal unless implemented through a colourable transaction.

The Revenue was emboldened by the decision in *McDowell* and used it as a tool to pursue all tax planning initiatives. Concerns of an extraordinarily aggressive tax machinery were raised in *Union of India v. Azadi Bachao Andolan*[18] where a Division bench of the Supreme Court sought to demilitarize the Revenue by categorically enforcing the taxpayer's right to mitigate tax by all means that have not been explicitly declared to be illegal by legislation. In *Vodafone International Holdings B.V. v. Union of India*,[19] the Apex Court held that the "look at" test must be implemented in that the Revenue must look at the entire transaction holistically rather than "look through" the transaction to assess individual components.[20] *Azadi* and *Vodafone* mandated that the Revenue permit avoidance arrangements unless the arrangement when holistically viewed was a sham.

It was in this backdrop that the Government of India decided to include the GAAR in Chapter XA of the Income Tax Act, 1961 ("IT Act"). Section 95 of the IT Act is the omnibus provision that allows the application of the GAAR to any arrangement entered into by an assessee. It contains a non-obstante clause and gives the provisions of Chapter XA an overriding effect over other provisions of the Act.

Section 96 (1) contains the indicia that the Parliament has identified as the common trait of avoidance arrangements. Clause (2) states that Chapter XA may apply to an entire arrangement or a part of it thereby allowing the Revenue to "look through" a transaction instead of simply "looking at" it.[21] Section 96 (1) of the IT Act proposes the following two-pronged requirement for an avoidance arrangement to be impermissible:

(i) The "main purpose or one of the main purposes" of the arrangement must be to obtain a tax benefit (the "main purposes" test); and

18 2003 132 Taxmann 373 SC ["*Azadi*"].
19 (2012) 6 SCC 757, ["*Vodafone*"].
20 *Id.* at ¶60.
21 This directly overrules the judgment in *Vodafone* where it was held that the Revenue should look at a transaction i.e. assess the tax liability of a transaction holistically rather than look through the transaction and consider individual components of the arrangement.

(ii) The arrangement must fulfil one or more of the four conditions specified in clauses (a) to (d) (the "tainted elements" test).[22]

A plain reading of Section 96 (2) would make it appear that the burden of proof is on the taxpayer to establish that the impugned arrangement has not been entered into in order to obtain a tax benefit. However, the Draft Guidelines have clarified that the onus to establish both prongs of the test in Section 96 shall lie on the Revenue[23] which is a welcome change as it would serve as a safeguard against the indiscriminate application of the GAAR.

After establishing that the main purpose or one of the main purposes of the arrangement was to obtain a tax benefit, the Indian GAAR requires the Revenue to categorize the avoidance arrangement within one of four categories of impermissible arrangements which are informally referred to as "badges of indicia" or the "tainted elements" test.[24] The avoidance arrangement must be one that:

(i) creates rights or obligations that are not at arm's length (the 'arm's length' element);
(ii) misuses or abuses the law (the 'abuse of law' element);
(iii) lacks commercial substance (the 'commercial substance' element); or
(iv) is entered into or carried out in a manner or by means which are not ordinarily employed for *bona fide* purposes (the '*mala fide* purposes' element).

III. DO WE NEED A STATUTORY GAAR?

In this part, the researchers seek to better understand the jurisprudential justifications for the GAAR. Before we deliberate on whether we need the GAAR, we need to develop a nuanced understanding of what changes would be introduced with a statutory GAAR. Hohfeld's analysis of rights goes a long way in explaining the juridical relationship between the taxpayer and the Revenue. Hohfeld, in his much celebrated article titled 'Fundamental Legal Conceptions'[25] derides the

22 The Act does not use the term 'tainted elements'. It has been derived from the Explanatory Memorandum to the South African Revenue Laws Amendment Bill 2006 at 62.
23 Draft Guidelines Regarding Implementation of GAAR in terms of Section 101 of the Income Tax Act, 1961, accessible at http://pib.nic.in/newsite/erelease.aspx?relid=85066.
24 *Ibid,* 467, 482.
25 (1913) 23 Yale Law Journal 16.

ubiquitous practice of loosely using the terms 'right', 'privilege' and 'duty' among others in an unscientific manner.[26] He typifies juridical relationships into 4 pairs of relationships. We shall only concern ourselves with two of these pairs - that of "right - duty" and "privilege - no right".

A right is defined in relation to the duty it creates in another person. Therefore wherever a right exists in one person, a duty must exist in the other.[27] If A holds a right to enter B's land, it is B's duty to allow A to freely ingress into his land. This relationship has been termed as a correlative by Hohfeld.

A privilege, on the other hand, is defined as the negation of a duty.[28] A privilege to commit an act necessarily implies the absence of a duty to not commit it on the privilege holder i.e. A has a privilege to enter a park but no duty to keep out of it.

Just as a duty is the correlative of a right, a 'no-right' or the absence of a right is the correlative of a privilege. If both A and B simultaneously see a hundred rupee note on the street, they both have the privilege of seizing the note and neither has the right to prevent the other from trying. Therefore, wherever A has a privilege to do an act, B has "no right" to stop him.

Below is a table depicting the relations in the scheme of jural correlatives:

If **A has** a…	**Right**	…then some person **B has** a	**Duty**
If **A has** a…	**Privilege**	…then some person **B has**	**No right to prevent**

Post *Azadi*, the taxpayer was empowered to use any scheme that reduced his or her tax exposure as long as it was not explicitly proscribed by the law i.e. the taxpayer possessed the liberty or the 'privilege' to employ any tax avoidance measure he deemed fit. This principle was articulated by Justice Srikrishna in the following words:

26 *Id.* at 16 - 23.
27 *Id.* at 31. Therefore when a right is invaded, a duty is violated.
28 *Id.* at 32.

> *The principle does not involve, in my opinion, that it is part of the judicial function to treat as nugatory any step whatever which a taxpayer may take with a view to the avoidance or mitigation or tax. It remains true in general that the taxpayer, where he is in a position to carry through a transaction in two alternative ways, one of which will result in liability to tax and the other of which will not, is at liberty to choose the latter and to do so effectively in the absence of any specific tax avoidance provision such as s.460 of the Income and Corporation Taxes Act, 1970.*[29]

Azadi also approved of the judgment in *Banyan and Berry v. Commissioner of Income Tax*[30] where the Gujarat High Court held as under:

> *The facts and circumstances which lead to McDowell's decision leave us in no doubt that the principle enunciated in the above case has not affected the freedom of the citizen to act in a manner according to his requirements, his wishes.. in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law.*[31]

According to Hohfeld's conception of rights, a privilege is the negation of a duty.[32] Post *Azadi*, the taxpayer enjoyed a privilege to avoid tax as he had no duty not to employ a tax avoidance scheme. The application of Hohfeld's definition of 'privilege' finds ample support in *Azadi* as the judgment effectively granted a privilege to tax payers to employ any means to reduce their tax liability which is not prohibited by law by way of an accompanying duty not to indulge in a tax avoiding schemes. Furthermore, a privilege must necessarily have a no-right as its correlative. In *Azadi*, it was held that while the taxpayer had the liberty to engage tax-avoidance means, the Revenue, unless specially granted a right by enacted legislation to prevent a particular type of avoidance has no right to prevent the taxpayer from avoiding such tax. In fact *Azadi* stated that legal reality was a "far cry" from Justice Reddy's assessment that the revenue had an inherent right to prevent tax-

29 Azadi, *supra* n 23, ¶144.
30 (1996) 222 ITR 831.
31 *Id.* at 850.
32 W. Hohfeld, *Fundamental Legal Conceptions Applied in Judicial Reasoning*, (1913) 23 Yale Law Journal, p. 16, 17.

avoidance.[33] *Azadi* stated that the Revenue must expressly be empowered to prevent tax-avoidance through a legal prohibition on the avoidance arrangement at which point the tax avoidance would become unlawful. Therefore, it is beyond doubt that post *Azadi*, the taxpayer had a privilege to enter tax-avoidance arrangements where the Revenue had no right to prevent such schemes.

On the other hand, the statutory GAAR expressly divides the entire spectrum of tax-avoidance arrangements into permissible and impermissible avoidance arrangements. Simply put, if a tax payer employs an arrangement that meets the criteria of section 96 (1), the Revenue is empowered to carry out any of the steps specified in section 98. This effectively transforms the privilege to indulge in tax-avoidance schemes that was enjoyed by taxpayers post *Azadi* into a right as envisioned by Hohfeld. In this juridical relationship, the taxpayer has a right to employ any arrangement that fails to meet the criteria of section 96 (1) and is therefore permissible, while the Revenue has the duty to allow the taxpayer to enter such arrangements.

Now that the change ushered in by a statutory GAAR is evident, we are in a position to address the question of whether we need such rules. The researchers are of the opinion that a GAAR would benefit the Indian tax system on two closely linked but equally important grounds. *First*, this shift from a "privilege - no right" relationship to a "right - duty" relationship as between the taxpayer and the Revenue would serve the purpose of tax equity as has been elaborated upon earlier in this article. Protecting the tax-base is not important solely because it prevents the erosion of the Government's revenue but also because it ensures that all taxpayers enjoy a level-playing field commensurate to their incomes. Consider a free market situation with only two competitors - one that has employed a highly fraudulent but legal scheme to reduce its tax liability and one that hasn't. To allow an unfair advantage to accrue to the former would militate against the interests of the latter as well as society as a whole. *Second*, it is evident even post *Azadi*, that the Tribunal and the Authority for Advance Rulings have relied on *McDowell* to employ the 'substance over form test' in order to protect the tax-base for the abovementioned reasons. For example, the CBDT came out with Circular 789 where it stated that a 'Tax Residency Certificate' was sufficient proof for a Mauritius resident to benefit

33 Azadi, *supra* n 23, ¶143.

from the Indo-Mauritius DTAA but the Revenue, the Tax Tribunal[34] and several AAR[35] decisions continued to deny treaty benefits to corporations holding Mauritian TRCs even after the validity of Circular 789 was upheld by the Supreme Court in *Azadi*. A "right-duty" relationship between the taxpayer and the Revenue would serve to permanently resolve this uncertainty and also to legitimize the efforts of the Revenue to protect its tax base.

IV. COMBATING THE CONCERNS

The GAAR across jurisdictions has been a subject of much controversy for several reasons. The researchers, in this part, offer reasons for why most of these concerns are not justified while suggesting proposed changes to address the ones that are.

[A] Is the GAAR 'too uncertain'?

Primarily, a statutory GAAR is said to fall prey to the vice of uncertainty, by creating rules that are far too ambiguous to fulfil the rule of law requirement of certainty.[36] However, uncertainty is integral to the GAAR for two reasons *first,* specific modes and methods of tax evasion can never be exhaustively laid out or defined, given the myriad number of ways in which the principle of tax equity can be flouted[37]; *second,* whatever certainty may be achieved by formalism in legislation creates scope for "creative compliance" which is a term used to describe the act of

34 See Saraswati Holding Corporation v. Deputy Director of Income Tax, 2007 111 TTJ Delhi 334.

35 E* Trade Mauritius Ltd.(AAR No 826 of 2009); D B Zwirn Trading No 3 Ltd. (AAR No. 878 of 2010).

36 See Price Waterhouse Cooper's assessment of the Indian GAAR accessible at http://www.publications.pwc.com/DisplayFile.aspx?Attachmentid=5747&Mailinstanceid=24703; ASSOCHAM strongly opposes GAAR, Press Release, Thursday, August 16, 2012, accessible at http://www.assocham.org/prels/shownews.php?id=3650.

37 Here, it may be useful to draw an analogy from Dworkin's thought experiment in *Taking Rights Seriously,* Dworkin distinguishes constitutional *concepts* from competing *conceptions* of the said concepts, by demonstrating that when a father instructs his children not to treat people unfairly, while he may have had specific instances of unfairness is his mind at the time of issuing the instruction, he would not intend to restrain the applicability of the instruction to just those situations in his contemplation. Instead, he would want his children to follow the instruction in situations that he may not have foreseen or contemplated thus far. Also, he would not oppose a contravention of the instruction if his child can put forth a reasoned defence of his or her acts. He concludes with the statement that he meant for his children to be guided by the concept of fairness and not by any specific conception of fairness. Similarly, he argues that constitutional principles are designed to be abstract constitutional *concepts*. *See* Ronald Dworkin, Taking Rights Seriously 134 (Cambridge, MA: Harvard University Press, 1977).

devising new and ingenious ways to avoid tax when more detailed rules are available to manipulate and circumvent.[38]

[B] Must tax statutes always be interpreted literally?

The researchers believe that the GAAR can only be effective if interpreted purposively i.e. through the adoption of a principle-based rather than rule-based approach to reading the GAAR.[39] Evidence that GAAR provisions ought not to be treated as rules to be interpreted literally can be found in the failure of the original Australian GAAR in Section 260 of the ITAA, 1936 owing to the judicial exemptions that were formulated by way of the 'choice principle' and the 'antecedent transactions test', which only served to legitimize tax avoidant practices, as they were then.[40] Moreover, there is ample evidence to show that the literal interpretation of GAAR provisions has failed in several countries[41] and countries are now moving towards a purposive interpretation of GAAR provisions alone.[42]

---

38 Doreen McBarnet, *When Compliance is Not the Solution but the Problem: From Changes in Law to Changes in Attitude*, as in Valerie A. Braithwaite, Taxing Democracy: Understanding Tax Avoidance and Evasion, 229-244 (Ashgate Publishing, Ltd., 2003); D. McBarnet and C. Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*; (1991) 54 MLR 848.

39 A "principle", as understood by Dworkin, is a standard that is observed not because it advances some social, economic or political goal (i.e. a "policy") but because it is a "requirement of justice or fairness or some other dimension of morality". A rule on the other hand is "applicable in an all-or-nothing fashion" i.e., if the conditions it stipulates are met by a fact situation, then the rule is considered valid and the situation is answered on application thereof. Principles on the other hand do not result in a consequence automatically attaching to a situation once the conditions of the principle are met. For instance, sometimes, depending on specific facts of the situation at hand, the principle will admit of derogations – a telling example is the principle that 'no man can benefit of his own wrong' and its obvious counter-instance in the form of the rule of 'adverse possession'. Dworkin then argues that use of terms like "unreasonable", "unjust", "significant" renders legal rules' application dependent to some extent on the principles or policy justifications underlying the rule, thus making the "*rule itself more like a principle*." But the fact of it being a rule implies that the confining terms therein used *"restricts the kind of other principles and policies on which the rule depends". See* Ronald M. Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 24-28, 1967-1968.

40 The choice principle states that a taxpayer who merely made a choice between two amounts of liability, to pay a lesser tax, such act was not unlawful under Section 260: Slutzkin v FCT, (1977) 140 CLR 314; Brambles Holdings Ltd v. FCT, (1977) 138 CLR 467; Cridland v. Federal Commissioner of Taxation, (1977) 140 CLR 330 (HCA) at 339 and 340. The antecedent transactions test forbade the recharacterisation a step in the arrangement to reconstruct the income: FCT v. Kareena Hospital Pty Ltd, (1979) 10 ATR 525; Europa Oil (NZ) Ltd v. Commissioner of Inland Revenue, [1976] 1 WLR 464 (PC) at 475; Mullens v Federal Commissioner of Taxation, (1976) 135 CLR 290 (HCA) at 294.

41 Australia: Mullens v. Federal Commissioner of Taxation, (1976) 135 CLR 290 (HCA); Patcorp Investments Ltd v. Federal Commissioner of Taxation, (1976) 140 CLR 247 (HCA); Slutzkin v. Federal

The GAAR must thus be interpreted keeping in mind the morality captured by the principle of horizontal tax equity among taxpayers[43] as well as achieve the policy objective of crafting a "narrow spectrum GAAR" i.e. one that seeks to protect the tax base and not to expand it.[44]

The distinction between impermissible and permissible tax avoidance, an oft neglected detail in Indian writing on the GAAR may also be conceptualised as a principle. The test employed in *Commissioner of Inland Revenue v Challenge Corporation Ltd.*[45] serves well to lay out the principle underlying all avoidance rules. The Privy Council drew from the principle justification for tax mitigation in taxation laws to lay down the test for deciphering tax avoidance that is permissible:

> *Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to reduction in his tax liability.*[46]

Thus, the legitimacy of mitigation is derived from the fact that the tax benefit that accrues is due to the reduction of income which he suffers or the expenditure which he incurs and not from an "arrangement".[47] Thus, the taxpayer

---

Commissioner of Taxation, (1977) 140 CLR 314 (HCA); Cridland v. Federal Commissioner of Taxation, (1977) 140 CLR 330 (HCA); Federal Commissioner of Taxation v. Westraders Pty Ltd., (1980) 80 ATC 4357 (HCA); South Africa: Commissioner of Inland Revenue v. Conhage (Pty) Ltd, (1999) (4) SA 1149 at 1155.

42 Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, at para. 44; See also, "Statutory Purpose Element" in Legal and Policy Division, South African Revenue Service, Tax Avoidance and Section 103 of the Income Tax Act, 1962: Revised Proposals, September 2006 at 15-16.

43 Richard E. Krever, Structure and Policy of Australian Income Taxation, in Australian Taxation: Principles And Practice 1, 11 (Richard E. Krever ed., 1987).

44 R. Prebble and J. Prebble, *supra* n 56, 40.

45 Privy Council, 20 October 1986, [1987] 2 W.L.R. 24, [1987] A.C. 155 ["*Challenge Corporation*"].

46 *Ibid*, 167

47 *See* Challenge Corporation *supra* n. 45 at 168-169: "*Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.…In an arrangement of tax avoidance the financial position of the taxpayer is unaffected (save for the costs of devising and implementing the arrangement) and by the arrangement the taxpayer seeks to obtain a tax advantage without suffering that reduction in income, loss or expenditure which other taxpayers suffer and which Parliament intended to be suffered by any taxpayer qualifying for a reduction in his liability to tax*"

must suffer a detriment in order to claim a deserved tax benefit that mitigates his liability.

It is essential to keep in mind that the detriment that ought to be suffered must be substantial and not be the mere cost that is suffered in "devising and implementing the arrangement". Thus, this detriment must not be one that can be fabricated or orchestrated for the sole purpose of claiming entitlement to the tax benefit.[48]

[C] Why we should not retain a broad-spectrum GAAR.

The GAAR, while fulfilling its purpose of being a catch all provision, must also ensure that it does not stifle legitimate commercial transactions that accommodate a tax benefit. To this end, the Indian GAAR as it presently stands, is arguably too broad in its ambit, and ideally ought to have its scope narrowed down.[49] This change in the GAAR may be effectuated through two changes:

48 The facts in this case exemplify this distinction. The taxpayer company in the Challenge group sought to defend the buying out of a loss-making subsidiary of the Merbank group to offset the group profits by using S. 191 of the Income Tax Act, 1976 of New Zealand that allowed the setting off of losses of a subsidiary against the profits of other companies in the same group. The Privy Council recognised that the principle of group profits was that members of the group must not be made liable to tax when the group makes neither a profit nor a loss, as a whole, owing to losses of some members of the group negating profits of others.[48] In that case however, the loss made by the company that the Challenge group bought out was borne by the Merbank group and not by the Challenge group. Therefore, acquisition of a company *after the fact of its loss* amounted to an attempt to merely use the loss reflected in the company's balance sheet to negate the profits in the Challenge group. The Challenge group itself had suffered no detriment in terms of an expenditure or reduction of income that entitled it to claim the tax advantage. The consideration to buy out the loss making subsidiary of the Merbank group does not qualify for a detriment that creates entitlement to a tax benefit as it is the mere cost of implementation of the arrangement devised to obtain that tax advantage.

49 The shortcomings of a broad-spectrum GAAR were a motivating factor behind the formulation of the draft UK GAAR. Graham Aaronson, an eminent tax practitioner who spearheaded the UK GAAR study, stated the following: *"....[I]ntroducing a broad spectrum GAAR would not be beneficial for the UK tax system. This would carry a real risk of undermining the ability of business and individuals to carry out sensible and responsible tax planning.[I]ntroducing a moderate rule which does not apply to responsible tax planning, and is targeted at abusive arrangements would be beneficial for the UK Tax system...."*Graham Aaronson QC, Study to Consider Whether a General Anti-Avoidance Rule Should be Introduced Into the UK Tax System, ¶ 3 available at http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.PDF.

i. By omitting the "main purposes" test

The first limb of Section 96 states that "the main purpose or one of the main purposes" of the arrangement must be to obtain a tax benefit in order to bring the arrangement under the scope of the GAAR. This is problematic in light of the globally accepted practice of structuring commercial transactions in a manner that creates an accompanying tax benefit. Therefore, if a tax benefit accompanies an otherwise commercially motivated transaction as one of its main purposes, GAAR would be attracted regardless of whether the transaction was chosen out of panoply of options available to the taxpayer solely due to the existence of the tax benefit.[50] Similar concerns have been raised in the recently released Shome Committee Report.[51]

In the opinion of the researchers, the most efficacious method of narrowing the Indian GAAR is by omitting the phrase 'or one of the main purposes' from the wording of section 96 (1). By changing the existing test to a 'main purpose' test, the GAAR would circumscribe the power of the Revenue by stating that only those arrangements which have a tax benefit as their dominant purpose would fall within the ambit of GAAR. If the arrangement was entered into for both commercial as well as tax reasons, GAAR should not be applicable.

ii. By eliminating subjectivity

A change to a "main purpose" test would not *ipso facto* result in a more narrowed spectrum GAAR. The main purpose test may be either objectively or subjectively determined depending on whether it is attributed to the arrangement itself or the taxpayer's intentions in entering the arrangement.[52] The researchers

50 The Australian GAAR, on the other hand, requires the "sole or dominant" purpose of the GAAR to be the receipt of a tax benefit as is evident in Section 177D of the Income Tax Assessment Act 1936. This Section must be read with Section 177A(5) which further states that if a transaction has several purposes, receiving a tax benefit must be the dominant purpose i.e. the most 'influential' purpose. See Federal Commissioner of Taxation v. Spotless Services Ltd, [1996] HCA 34, 96 ATC 5201, 5206, 5210. See also; Federal Commissioner of Taxation v. Spotlight Stores Pty Ltd, 2005 ATC 4001, 4015; Hart v. Federal Commissioner of Taxation, [2004] HCA 26, 2004 ATC 4599, 4613 as in J Cassidy, *supra* n 9, 467, 478.

51 Report on the GAAR in the Income Tax Act, 1961, p. 4, 5.

52 The South African and the New Zealand GAAR requires the main purpose of the *arrangement* to be considered while the Australian GAAR looks at *the mindset of the taxpayer*. J Cassidy, *supra* n 9, 467, 474, 478.The Australian approach has proven to be very litigious. See Federal Commissioner of Taxation v. Spotless Services Ltd., (1996) 95 ATC 4775 (HC).

argue that if the GAAR is interpreted subjectively, there exists the possibility of a tax-payer with commercial motives being brought into the ambit of GAAR. While it is appreciated that the onus is on the Revenue to satisfy the main purpose test,[53] the researchers are of the opinion that eliminating the subjective element would prove to be another efficacious safeguard from an indiscriminately applied GAAR. In order to prevent this, reference may be had to the approach adopted by New Zealand courts which have held that a transaction with a valid commercial objective with an accompanying tax benefit, however substantial, cannot be brought within the ambit of GAAR.[54] The test evolved by the courts is *whether the parties to the transaction would have entered into the transaction had it not been for the resultant tax advantage*.[55]

V. CONCLUSION

In this paper, the motives of the researchers were not to defend the GAAR or deride it but to assess the tenability of some of the concerns that have been voiced in the recent past. After analyzing the changes brought about by a statutory rule, the researchers have sought to test the GAAR against the anvil of Hohfeld's celebrated rights analyses.

The researchers also put forth that uncertainty is of inherent value in a statutory GAAR and the temptation of crystallizing the terminology used therein ought to be resisted. A purposive and principle based interpretation ought to be adopted while dealing with the GAAR as opposed to a strict interpretation to complement and capitalise on the value of uncertainty in the GAAR.

The researchers find merit in the stance adopted by certain critics on the ground that the Indian GAAR was too broad and could bring within its ambit, several legitimate transactions that have a tax benefit as one of its motivations. Such an inhibitive approach would certainly have a lasting impact on the manner in which India and transactions with Indian entities were commercially viewed. However, in the researcher's opinion, this reason by itself is not sufficient to

53 Draft Guidelines, *supra* n 28.

54 See Challenge Corporation; Accent Management Ltd. v. Commissioner of Inland Revenue, [2007] BCL 728 (CA); Peterson v. Commissioner of Inland Revenue, [2006] 3 NZLR 433 (PC).

55 Challenge Corporation; Case V20, (2002) 20 NZTC 10, 233 (TRA).

completely debunk the established benefits of a well reasoned GAAR. In order to correct this discrepancy, the researchers suggest a two prong remedy:

- the "main purposes" test in Section 96 ought to be redrafted into the proposed "main purpose" test; and
- the subjective element present in the "main purpose" test ought to be eliminated through the objective assessment of whether the taxpayer would have entered the arrangement had there been no tax advantage.

In summation, the researchers conclude that while a lot has been written about the GAAR, some of the concerns are misplaced. The Indian GAAR as it currently stands is far from perfect but those who are most vocal in their absolute opposition to a GAAR of any form would find that it might just be in their interests to have in place a GAAR that is judicious in its application.

LAW IN THE CONTEXT OF LAW STUDENTS

*Rishabh Shah**

ABSTRACT

This article focuses on the academic aspect of national law schools in general, albeit in a satirical way. It seeks to extrapolate key issues, observations and trends using legal principles taught in class. It also attempts to break away from all the conventional modes of legal writing and thus attempts to question and dialogue about the practises followed religiously in law schools. In this process the piece explores how the law when applied in a certain context to a student's life can often create amusing annotations and inferences.

I. INTRODUCTION

We, collectively referred to as the "students of national law school," including but not limited to our heirs, successors, assignees, legal representatives/doppelgangers, affiliates, agents, members of "the law school", in part or in whole, unless otherwise repugnant to the context or subject in which the abovementioned word is used, are considered to be a rather elitist group by the legal fraternity, outside the protective ambit of our four walls. Many of us, during our internships, have been rebuked by partners, associates, and lawyers alike who usually remark, "*you students think that after five years of an expensive education you know the law. The law cannot be fathomed or grasped without learning on the streets, practicing in pits of subordinate courts, or working one's way up to the top from the bottom.*" This prevalent opinion, though substantially correct, has a certain degree of falsehood attached to it. This is because it stands atop a faulty syllogism, which is, "*just because all experienced lawyers know the law, does not mean all lawyers who know the law are experienced.*" Such an error is a hasty generalization that suffers from the logical fallacy of the single cause.[1] The same involves making an inductive generalization based on a single characteristic in the

* IV year, B.A. L.L.B (Hons.) student at NALSAR University of Law. I would like to thank Late Prof. Vepa P Sarathy for indirectly inspiring me to write this article. His witty anecdotes as well as musings on law and humour were what gave me the idea to write this piece. I would also like to thank my batch mates Abhishek Singh, Vishal Binod, and Umang Singh for their valuable contributions to this article.

1 Judea Pearl, Causality, Models Reasoning And Inference, 283 (2000); If *A causes B* it does not mean *B causes A* (there cannot be bidirectional causation).

major premise (i.e. experience) without considering all the variables which make up a characteristic (i.e. a good lawyer), in the minor premise.[2] Furthermore, even any student preparing for the common law entrance test who spends a lot of time on networking sites like CLATgyan could tell you that correlation (of experience with good lawyers) cannot imply causation.

On a more logical plane, it could be said that we probably lack the experience which is an indispensable ingredient to be a successful "legal-eagle", but it would be imprudent to say that we do not know the law. This is because we not only know the law (in its various shapes, sizes and forms), as an elephant, a blind-folded woman with scales, a foul mistress, an unruly horse or well, an ass, but we also apply it, often subconsciously, with great fervour and utility in our lives. You will find this paper replete with many such instances of application of the law to the life of a student, along with several redundant footnotes. The latter have been copiously added because I was told by my peers and seniors alike that footnotes are the elixir of a paper or project which is to be considered for publication. I have even albeit secretly, heard an editor of a student law review remark, "*we can't publish this! This paper has only 30 footnote*s". Thus, we poor students have no other option but to fraudulently supplant our writings with authorities even though the same are unwarranted or irrelevant. Amusingly, even though we emphasize on footnotes, we never actually read them, allowing such superfluous citations to go unnoticed.[3] This is because editors require a paper to "look authoritative" even if actually isn't. Thus, even if a line or statement is common knowledge, this is how it should be footnoted in "publish worthy" manuscripts:

> "*Furthermore the Court held that the setting up of such a Tribunal would inevitably involve a wholesale transfer of powers but that could in no way invalidate the setting up of a particular tribunal*."[4]

See, *Union of India* v *Delhi High Court Bar Association*, 2002 (4) SCC 275; *State of Karnataka* v *Vishwabharathi House Building Cooperative Society and Ors*. 2003 (2) SCC 412, HLA Hart, THE CONCEPT OF LAW, (2nd ed., , 1997), p.

2 *Id.*
3 Chuck Zerby, The Devil's Details: A History Of Footnotes, 13 (2003),
4 *See generally*, Rishabh Shah and C Nageshwaran, *R Gandhi v. Union of India*, INDIAN J. CONST.L. 219. (2011).

23; *S. P. Sampath Kumar* v *UOI*, AIR 1987 SC 386; *L Chandra Kumar v. Union of India*, AIR 1997 SC 1125.[5]

The "*Sampath Kumar* case"[6] which has been most brazenly relied upon by authors was prospectively overruled for holding that tribunals are merely supplementary to High Courts. Furthermore, since the sentence only uses the word Court, I believe that reliance upon a single case should have sufficed. However, the national law school[7] academic culture would abhor a line to that effect, and construe it as an un-authoritative misstatement despite it being backed by a constitutional bench of India's apex judicial body.Hence, solely on utilitarian grounds I am going to footnote lines in my article most loquaciously even if they are superfluous, lest the editors decide not to publish this piece for want of the same in the following sections that deal with how prevalent legal concepts are subconsciously applied to the life of a law student, thus making up for the idiosyncrasies and trends so often found in national law schools.

II. EXAM AVOIDANCE, EXAM EVASION AND EXAM PLANNING

My first analysis begins with exams which follow a law student's life like the fearful bubonic plague. This dreaded system of exams and how an ordinary law student tackles with it can be viewed through a prism of tax law principles. The tax avoidance, tax evasion and tax planning quandary has plagued the minds of judges, lawyers and students alike even before law schools were established in India. The difference between the three is as thin as our tax revision notes but the volume of material on the subject is as thick and complicated as all of Shakespeare's plays put together, especially since our counterparts in England cannot stop writing on the subject and we cannot stop borrowing from them.

For those of you who have not been exposed to this confounding debate: tax planning occurs when an assessee is availing of provisions within the law to gain

5 Pardon me, if the footnotes do not confirm to the uniform style of footnoting that is so lucidly and illustratively detailed in the latest edition of the Harvard Bluebook, which is more dynamic and persistently evolving than our legal regime itself. I could not despite my best efforts, stick to the uniformity or the lack thereof in the Bluebook as it was too complex an endeavour.

6 AIR 1987 SC 386.

7 I will repeatedly use the word "national law school" given that a certain section of students believe that "law school" is no longer a generic word and are still under the byzantine belief that there exists only one academic institution that teaches law.

exemptions and rebates, thus paying lesser taxes to the government. Tax avoidance, on the other hand, involves utilizing loopholes within the law to avoid payment of taxes, and tax evasion occur when the assessee is simply not paying taxes and evading tax authorities[8].

However, the problem is not that pedestrian as you may think, because it is difficult to distinguish between the three, in specific fact situations. Judges and authorities alike are at a fix in many situations. This may happen if a businessman is engaging in tax planning or tax avoidance by shell company[9] in Mauritius in order to avail of tax benefits in that country,[10] or when a transfer of capital goods that has its *situs* in India is controlled by two offshore entities (that do nothing except effect such transfers, for people looking to save tax in India).[11] The answers to such questions differ from jurisdiction to jurisdiction.[12] Thus, a lot of students have difficulty in comprehending the distinction between the three, which has recently

8 *See generally*, Lord Leonard Hoffman, *Tax Avoidance*, British Tax Review, Vol.2(2005) and Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613.

9 Azadi Bachao Andolan v. Union of India, [2003] 263 ITR 707 (SC); *Re*: Dynamic India Fund, AAR 1016/2010; *Re*: Moody's Analytic AAR 1186 to 1189/2011; Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, Congressional Research Service Report R40623, (2013).

10 Assesses can claim certain benefits if their income is subject to Tax in two jurisdictions by availing the benefits of a Double Taxation Avoidance Agreement(DTAA) under Section 90 of the Income Tax Act, 1961. Hence Income arising from Capital Gains in India and Mauritius will be taxable in Mauritius (which imposes no taxation on the same) as per the Indo-Mauritius DTAA. Many individuals and companies thus take benefit of this tax arbitrage by setting up offshore Companies or re-domiciling (changing residence) in tax-havens, despite having their assets and major source of Income in India. *See*, Robert Couzin, Corporate Residence And International Taxation, 216 (2002); Karsten Ensig Serensen and Mette Neville, *Corporate Migration in the European Union*, 6 Colum.J.Eur.L., 181 (2000);

11 Indofood International Finance v. JPMorgan, [2006] EWCA Civ 158; Aditya Birla Nuvo Limited v. Deputy Director of Income Tax, (2011) 263 ITR 706; Barclays Mercantile Business Finance Limited v. Mawson, [2002] EWCA Civ 1853; Re: SmithKline Beecham Port Louis Ltd, [2012] 24 taxmann.com 153 (AAR).

12 A Jurisdiction may adopt a "look at" or a "look through" approach to transaction attempting to avoid tax. The former approach merely examines whether the transaction as a whole is legal, while the latter purposively examines the scope of the transaction and what it intends to achieve. Thus in the event a transaction is wholly or substantially just a device to avoid tax, then it may be subject to tax. India adopts the "look-at approach", however the implementation of General Anti Avoidance Rules ("GAAR") may change this position and erase the difference between avoidance and evasion to a large extent. The United Kingdom already has such anti-avoidance rules in place enabling it to "look through" transactions and deny treaty benefits. *See generally*, Genevieve Loutinsky, *Gladwellian Taxation: Deterring Tax Abuse Through General Anti-Avoidance Rules*, Houston Business and Tax Law Journal, Vol. 12(2011;) Priyesh Sharma and Siddharth Dang, *Myth and reality of the imbricating concepts of tax avoidance and evasion*, Journal of Accounting and Taxation Vol. 3(2011).

been further exacerbated by the debate on Anti-Avoidance and Controlled Foreign Corporations especially before the Taxation exam.

To settle this confusion, a wise man simplified the quandary by virtue of a marvellous analogy: He said tax planning is akin to exam planning in national law schools, which is employed by the more studious of our peers to excel in exams. Such exam planning includes, but is not limited to using techniques like using colour pens to beautify an answer script, frequenting the corridors of the faculty room after class is over to uncover those secrets which cannot simply be revealed or deliberated upon in class, and diving into the dustiest archives of the library to find the rich repository of previous years' question papers. This lot actually complete their syllabi a day before the exam. Most of them actually listen to what is being said in class and finish their coursework beforehand just like a good tax-payer who remains abreast with the recent changes, files his returns on time and regularly has tax deducted at source. Exam planners are also aware of all the "shortcuts to success" and are able to study and execute their papers in the most efficient, effective and least time consuming manner. Their techniques are akin to a samaritan tax payer who knows exactly how much rebate he or she must file for, and which schemes are to be availed of to pay as less tax as possible.

Then there are the exam avoiders. These folks manage to not appear in the examination at all by strategically picking their moot court competitions, exchange study semesters and conferences in such a manner that the events/competitions clash with the exams they do not wish to appear for. Thus, they are, pursuant to official permission, outside college when the exams take place and are not obligated to attend them at least on a particular date. Companies by incorporating themselves in tax-havens use a similar defence by arguing that since the company is not based in India, it cannot be taxed.[13] Hence, it can be inferred that both, tax and examination systems are based on rules of residency.

Some students also regularly manage to fall sick or "cultivate" infections in the most unlikely parts of their body at a particular time of the year and then get a doctor's certificate which is conclusive proof that they are not in a condition to give exams. Such a certificate is akin to a Tax-Residence Certificate (TRC) which is

13 Supra n. 7.

considered as an authoritative and indisputable proof of the fact that the person is not eligible to any Capital Gains Tax in India.[14]

Exam avoidance is surprisingly a safe strategy that maybe undertaken, as the university, just like the morally upright and legally correct adjudicators in England and India does not "pierce the veil"[15] or look into the actual nature of the "exam leave application". It therefore considers a doctor's certificate (certifying that a student is ill) conclusive proof of a student's inability to appear for the exam, irrespective of what his health actually is. This approach is best illustrated by the *Ramsay Principal*[16] (recently recapitulated in the *Vodafone International Holdings BV* v. *Union of India*[17]). Thus, a student may be going for the most inconsequential, poorly organized and legally irrelevant conference or moot court competition, but he will still be entitled to an exemption as the Administration will only "look at[18]" whether the competition is actually a moot or a conference. This is notwithstanding the fact that the same was picked solely for the purpose of gaining exemption, making exam avoidance a favoured strategy for students.

Last, there is the more brazen and ostentatious class who, simply don't give exams/pay their taxes at all. The procedure to avail of this benefit is to simply not show up in the examination hall. The obvious consequence of this is that the student will receive an F/the taxpayer will be prosecuted by the tax department. However, both the government and our national law schools enact special schemes for such people. The Special Bearer Bonds (Immunities and Exemptions)

14 Azadi Bachao Andolan v. Union of India, [2003] 263 ITR 707 (SC).

15 W.T. Ramsay Ltd. v. Inland Revenue Commissioners, (1981) 1 All E.R. 865, examined a sale-lease back transaction in which gain was counteracted by establishing an allowable loss. The appellant company entered in a self-cancelling transaction in order to avoid tax. Lord Wilberforce likened the two self-cancelling assets to particles in a gas chamber "*one of which is used to create the loss, the other of which gives rise to an equivalent gain that prevents the taxpayer from supporting any real loss and whose gain is intended not to be taxable*". The Court said that the transaction was subject to tax and held, "*It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded.*"

16 *Id*, "*The task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is the series or combination which may be regarded*".

17 (2012) 6 SCC 613, "*In this connection, we may reiterate the principle enunciated in Ramsay in which it was held that the Revenue or the Court must look at a document or a transaction in a context to which it properly belongs to. It is the task of the Revenue to ascertain the legal nature of the transaction.*"

18 Supra n. 10.

Ordinance, 1981 was one of many[19] such infamous schemes. Clause 3(a) of the ordinance gave protection to such a purchaser from being required to disclose, the character and source of acquisition of the Bonds. This investment in Bearer Bonds was subject to tax, albeit a lower one as these bounds were not considered capital assets.

Thus, these Bonds were an excellent way of allowing not only tax-payers to convert black money into white money, but also of avoiding penalties and paying lesser taxes. This encouraged tax evasion in a sanctioned manner. Professor Upendra Baxi, most eruditely articulated the Ordinance as a having a "countervailing effect" on honest tax payers incentivizing them to cut-corners and evade taxes.

This countervailing effect is to a certain extent also produced by repeat examinations in law school. The system of repeats was originally designed to provide a second chance for those students who genuinely fell ill or could not clear the paper in the first attempt. Since the latter gradually grew in number, the repeat examination papers were, in the opinion of some, slightly simplified. This had a countervailing effect on the rest of the populous who thought, they could avoid/evade giving one or two of the relatively tougher exams and instead appear for the easier repeat exams creating a vicious and disappointing cycle of procrastination. Another instance of this countervailing effect is the new policy in certain colleges that makes it "even more impossible" for students to fail by allowing them to retake their entire course's evaluation all over again, enabling students to convert their black F's into white grades.[20] A policy to this effect has only one benefit to the extent that it truly endorses and vilifies the latin maxim *lex non cogito ad impossibilia*.

Such a perspective on Taxation ought to have made the entire lineage of Judges from Lord Fraser to Lord Denning roll in their graves. Alas, taxation would have been so much simpler if they were students of our pristine institutions. This analogy would have greatly simplified their judicial conundrum especially since it is

19 See T.N. Pandey, *Why bond with the bad*, Hindu Business Line,< http://www.thehindubusinessline.com/todays-paper/tp-opinion/why-bond-with-the bad/article2193760.ece?textsize=large&test=1> last visited on 3/07/13.

20 The "**F**" grade is always represented in Bold in the NALSAR Grade sheet for reasons unknown.

likely that they would have been under the influence of certain, more popularly renowned "Lord of Coke" who is oft quoted and heavily relied upon by our lot.

Though a morally upright person would abhor exam avoidance done solely in order to not write exams, I opine that we lawyers just like our equally vicious political fellowmen *should be allowed some play in the joints, because we have to deal with complex problems which do not admit of solution through any doctrine or straight jacket formula* (like our byzantine question papers for instance).[21] However, from both, a more disciplinary and policy-based perspective, the strict "look-at" approach must be modified to identify sham transactions and transactions with a deliberate malicious intent to abuse the system. Though it is debatable whether the General Anti-Avoidance Rules ought to be enacted, not having General Exam-Avoidance Rules would be an *argumentum ad ignoratiam*.

III. ACADEMIC DEBT RESTRUCTURING

Exam avoiders and evaders are not the only ones who write repeat examinations. There is also another class of students who are unable to clear their exams, and thus have to appear for the exams once again. This is the class of students for whom the repeat exam system was created in the first instance.

The entire system of repeat examinations is akin to Corporate Debt Restructuring (CDR). CDR involves reducing the burden of debts on the company and increasing the time a company has to pay back its debts.[22] Thus, it involves reorganization of the company's outstanding obligations. Common measures of CDR include conversion of debt into equity, waiver of interest payable on loans, conversion of un-serviced portions of interest into term loans, and giving haircuts on loans.[23]

Companies with an outstanding exposure of 10 crore are allowed to adopt the CDR mechanism subject to consent of 60% of the creditors.[24] However,

21 R.K. Garg v. Union of India 1982 133 ITR 239, Federation of Tax Practitioners & Ors. vs UOI & Ors..,1998 231 ITR 24.

22 Suresh Padmalatha, Management Of Banking And Financial Services, 186 (2010).

23 *Id.*

24 RBI Master Circular on *Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances*, RBI/2012-13/39.

companies indulging in fraud or malfeasance are not permitted to take this route.[25] The CDR mechanism allows the creditors to enter into an agreement with the company in order to permit some of the abovementioned measures as well as have a legal standstill for ninety to one-eighty days. Furthermore, all the parties involved along with certain government appointed bodies formulate a scheme for the revival of the company.

In the event that: a) a company's accumulated losses exceed 50% of its average net-worth[26] during 4 years of its existence or, b) it fails to repay debts to its creditors in 3 consecutive quarters on demand, then it is declared "sick" and is required to submit a scheme for revival and rehabilitation to the Bureau of Industrial and Financial Reconstruction (BIFR).[27] Given that the BIFR was instituted in 1985, many of its procedures and mechanisms are outdated, as a result of which many companies either end up being wound up or suffering huge losses. Some companies also use the BIFR to their advantage and use the tribunal as a safe-haven in order to stall their creditors, and thus remain "sick" for as long as possible.[28]

Giving a repeat examination is akin to restructuring one's academic debt. Thus, an aspect of the relationship between a student and an institution is similar to one between a lender and a borrower. The institution is supposed to promote legal and ethical values, improve the ability to analyse and present contemporary issues, and confer degrees upon students.[29] Given that the institution completes only a negligible part of its obligation, all a student must do is comply with the prescribed credit requirements (i.e. pay his academic debt) and obtain his degree. By failing in a particular subject, a student defaults upon payment of a return that

25 *Id.*

26 As per Section 3(1)(ga) of the Sick Industrial Companies Act, 1985 (SICA) Net worth means sum total of paid up capital & free reserves.

27 See Section 3(1)(o) and Section 15 of the SICA, 1985.

28 The BIFR is seen as a safe haven for defaulting companies since it gives a stay on the proceedings takes at least three to four years to sanction a scheme for rehabilitation. *See generally*, Sumant Batra, *Insolvency Laws in South Asia: Recent Trends and Development*, OECD Fifth Forum for Asian insolvency Reform (2006). The current Companies Bill, 2012 seeks to replace the BIFR along with several other tribunals and introduce the National Company Law Tribunal in order to overcome procedural and enforcement related hurdles. However the Supreme Court vide its decision in R Gandhi v. Union of India, JT 2010 (5) SC 553 has stayed the creation of such tribunals till certain legislative changes are made.

29 See Section 4 of the National Academy of Legal Studies and Research University Act, 1998.

he owes to the institution. The fees payable by the student acts as a form of collateral for repayment of academic debt and can even be waived or reduced in certain circumstances. The institution is thus akin to a lender who does not bother as to whether the money he has lent to a borrower actually benefits the borrower, as long as it is paid back adequately, on time.

In the event the student defaults upon payment of his debt, the restructuring mechanism of repeat examination kicks in upon payment of a fee by the student. The student thus enters into an informal agreement with the professor acting on behalf of the institution as a result of which the date on which he is to repay his debt (i.e. the date of the exam) is extended. Furthermore, the student can also receive a "haircut" in the syllabi or the difficulty of the exam. However, the same is dependent upon his negotiation skills. He may also offset his academic debt by re-submitting a project or re-writing a mid-term exam as collateral. Unfortunately, our Constitution prohibits slavery,[30] thus making the divesture of any individual ownership interest in favour of another, illegal. Our Constitution, if interpreted progressively, may thus prohibit conversion of academic debt into equity. Hence, the "shylockian professor" as much as he is inclined to, cannot demand "a pound of flesh," proverbially or otherwise, if a student does not pass his exam.

A student who fails his repeat exam is declared a sick unit and is given a year to repay his dues. Such a student gets caught in a vicious cycle as he must not only work towards payment of outstanding dues but also ensure that he is prepared to pay his ongoing debt as well. As a result of the huge burden on the student a simpler scheme/paper is devised for the student in order to pass his exams. However, given that his ongoing payments are not frozen, it is still an uphill task for a student to pass all his exams. Furthermore, the procedure for sanctioning such a scheme is tedious and it does not really benefit the student. However, many students, by avoiding or evading exams, have themselves declared as sick (often literally) so that they can benefit from the schemes devised for sick units.

From the analysis above, it can be gathered that our examination system is probably similar to our insolvency laws. Thankfully, we do not have a procedure akin to the one prescribed in the Securitization and Reconstruction of Financial

[30] Article 23 of the Constitution of India, 1956.

Assets and Enforcement of Securities Act, 2002 (SARFAESI) that allows a financial institutional to seize all collateral assets upon giving a 30 day payment notice.[31] However, borrower sensitized laws along with procedural efficiency in order to benefit lenders should not harm the credit system in anyway. Maybe a cue from Chapter XI of the United States Bankruptcy Code is in order.

IV. THE IDEA EXPRESSION DICHOTOMY IN QUESTION PAPERS

In *University of London Press Ltd* v *University Tutorial Press Ltd* [32] the Court of Chancery held that question papers published by Oxford Professors are copyrightable subject matter. Alas, this decision was given in 1916 and the Chancery division had no opportunity to review Question Papers set by our esteemed professors. If such a review were possible the law of copyright might have taken a different route and legal history could have been altered.

Question papers in law schools seem to suffer from the oft quoted and theorized Idea-Expression Dichotomy[33], an argument that is frequently used to debunk intellectual property rights. This doctrine originated in the case of *Baker* v. *Selden*[34], wherein the plaintiff published a book on accounting and book-keeping that was similar to a book published by the defendant. The defendant's argument was that Baker had copied his system of book-keeping. The defendant however did not allege that the forms and charts in his book were copied by Baker. The Court ruled in favour of the plaintiff holding that there is a distinction between the book and the art (the method of accounting). The former was held to be copyrightable as it was expression while the latter was not because it was only an idea. This doctrine was also relied upon by the Court to hold that the maker of piano roll could not have a claim against a producer of song even though the song was composed relying on the piano roll.[35]

---

31 Section 13 of the SARFAESI Act, 2002.

32 [1916] 2 Ch 601;

33 See Abinava Sankar and Nikhil Chary , *The Idea-Expression Dichotomy: Indianizing an International Debate*, Journal of International Commercial Law and Technology, Vol. 3 Issue 2(2008); The article relies upon Section 105 of the US Copyright Act, 1976 to explain the Idea-Expression Dichotomy thus,,"*In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.*"

34 101 U.S. 99, 107 (1880).

35 White-Smith Music Publishing Co. v. Apollo Co, 209 U.S. 1 (1908).

However it is difficult to distinguish what is an idea and what is an expression. For instance this Article is inspired from Professor Gordon's tongue in cheek piece, *"How Not to Succeed in Law School*."[36] Professor Gordon believes that the Harvard Bluebook is founded on the principal of "nature aboreth a vaccum"[37] and advocates that standard rules of footnoting are irrational. His piece also discusses the idiosyncrasies, fallacies, obsoleteness of the "Law School System/Culture" in a satirical manner. Then can my Article be said to be plagiarized from his? The idea-expression dichotomy comes to my aid in this situation. Even though this Article discusses the above mentioned subject-matter it merely (partially, actually) borrows Professor Gordon's idea and not the manner in which he has expressed the same. Because my work is not "substantially similar"[38] to Professor Gordon's Article I am outside the ambit of NALSAR's Academic misconduct policy and Copyright laws (as I would most conveniently like to presume).

The Idea-Expression Dichotomy was enunciated in India by the Supreme Court in *R.G. Anand* v. *Deluxe Films*[39] which used the below mentioned example to illustrate the difference between an Idea and an Expression.

> "*Shakespeare most of whose plays are based on Greek-Roman and British mythology or legendary stories like Merchant of Venice, Hamlet, Romeo Juliet, Jullius Caesar etc. But the treatment of the subject by Shakespeare in each of his dramas is so fresh, so different, so full of poetic exuberance with elegance and erudition, as a result of which the end product becomes an original in itself*".[40]

---

36 James Gordon, *How Not to Succeed in Law School*, The Yale Law Journal , Vol. 100(1991).

37 Given the number changes made to it every year, and the plethora of classification and methods of footnoting provided therein.

38 Some Judges believe that the test of substantial similarity and the Idea-Expression Dichotomy are applicable in different contexts. The former is more relevant in cases of literal infringement whereas the latter is applicable in deciding whether immaterial variations are plagiarized. See Nichols v. Universal Pictures Corporation, 45 F.2d 119.

39 1978 AIR 1613 in which that judge had to determine as to whether a film-maker vide his motion picture "New Delhi" had substantially copied from a play titled "Hum Hindustani." Both the play and the motion picture were based on the central idea of provincialism and parochialism. However the treatment and expression of these ideas was done differently in the film. The Court thus dismissed the action infringement holding that the two works of art were not substantially similar.

40 *Id.*

In *NRI Film Production Associates* v. *Twentieth Century Fox Film Corporation*[41] the Karnataka High Court held that certain stock ideas, or scenes which must be done, are considered *Scenes a faire* and cannot be said to infringe a copyright[42]. *Scenes a faire* are so common, that the manner of expression of the idea mergers and become associated with the very idea itself.[43] Hence given the complex interplay of facts and the proximity between an idea and an expression it often becomes difficult to distinguish between the two.[44]

The difficulty of determining what is an idea and what is an expression becomes pedestrian when one looks at the Question Papers set out in our esteemed institutions. If a book containing syllabi for a subject and the question paper for the same subject were two distinct copyrightable pieces it would be impossible to tell the similarity between the two. Though the "underlying idea" (which is covering what is taught in class) is reflected in both, the manner of expression of this idea (in the question paper) is so materially different from the syllabi that it almost makes you laugh/or cry while writing the examination. In certain instances, some professors get so involved in the challenging task of paper-setting that they often seem to forget the underlying idea itself, thus making the paper from an all-together different syllabus. Furthermore the manner of weighing the importance of and distributing marks for tested topics in questions papers in law school is as efficient as the Whole Sale Price Index that still uses the quantum of type-writer sales in its weighted average basket of goods to compute inflation.

The question papers in our institutions flagrantly violate the sanctity of the copyright law more as they continue to seamlessly rely on the text of recent

---

41 2005 (1) KCCR 126; in this case the plaintiff filed a suit for a declaration that the Movie Independence Day made by the defendants infringes the copyright of the film script Extra Terrestrial Mission. Both films involved Aliens coming to earth and subsequently engaging in a war with the United States in a similar manner. The idea and portrayal of sequences like traffic jams, disruption of communication, dazzling effects of the nuclear missiles were considered *Scenes a Faire* as they were concomitant effects of every science fiction film. The Court considering the same and broad dissimilarities between the two films ultimately dismissed the suit.

42 For instance all motion pictures in which Salman Khan plays the lead role are similar to the extent they involve a scene wherein he 1) exhibits partial nudity, 2) fights off a hundred men 3) dances with an actress who has introduced in the motion picture only for one song 4) has a final fight scene with the villain of the motion picture that culminates with the retrieval of the lead female role. Such scenes are considered *Scenes a faire* to all Salman Khan Starrers.

43 Melvile Nimmer And David Nimmer, Nimmer On Copyright, 75 (1993).

44 *Id.*

judgments in their questions. The text of these papers is so "substantially similar" to Supreme Court judgments that it would amputate Justice Hand[45] if he were to either decide originality of the same or even attempt such a paper- given that the time for writing such papers and the sheer quantum of matter expected, share an inversely proportional relationship.

Despite the best attempts of our Professors to express the Shakespearean text of Indian Judgments with further elegance and erudition to make it fresh and indistinct, the questions still substantially resemble judgments. Some would deem such similarity reasonable as there isn't much one can do with Shakespearean text except borrow from it. Hence extensive and generous reliance upon judgements of Indian Courts has become so common and indispensible that it could be considered *scenes a faire* (i.e. stock idea)[46] to a question paper.

Members of the House of Lords or even our own *sentinel de qui've* would tremble if they were given the facts of a borrowed yet obscure judgment and asked to decide by relying upon recent case laws in a span of thirty minutes to one hour. To add to their misery there is also an unwritten condition precedent to writing such papers which is also the *jus cogens* norm[47] in scoring at least average marks in such examinations. Though it has different variations, it can be reduced to this- All answers must be structured, neatly written, overtly verbose, highly repetitive, and heavily reliant on only case law and materials discussed in class.

There is another unwritten rule to the effect that every student must ensure that at least one pine tree goes down every time he or she sits to write exams. In my four years at NALSAR I have seen students who take this rule too seriously and have thus become strong enough to consume an entire forest with their paper writing skills, despite the impending time crunch. It is a pity that no Judge will ever be able to excel in our exams. While our Indian Judges would miserably fail to comply with the first norm, our British counterparts would baulk and break

45 Justice Hand was the Judge who laid down the substantial similarity/abstractions test in Nichols v. Universal Pictures Corporation, 45 F.2d 119.

46 A *Scenes a faire* question would normally read thus: *Given below is a specific fact situation. Based on relevant materials, recent case laws and discussions in class- Decide.*

47 M.N. Shaw, International Law, 118 (2008), *Jus Cogens* refers to norms that command peremptory authority, superseding conflicting treaties and custom from which no derogation whatsoever can be permitted.

themselves into a sweat over the second. It is no surprise that many students do not wish to take up adjudication as a profession after five years of studying in a national law school.

Thus all laws relating to copyright and principles relating to ingenuity must be forgotten while writing papers. Unless your answer is either exactly identical or concurrent to the materials/cases that you have relied upon, odds are against you. Your law school is the only place where ignorance of law may be actually forgiven, making the maxim read thus for five years -: *ignorantia juris excusat*. Aristotle who coined the inverse could safely be presumed to have not attended law school as he did not know that when the law on a particular subject is brief or terse, it is better not to know the law than to harm oneself by learning it.

V. APPLICATION OF THE LOCKEAN THEORY TO PROJECTS

In the Renaissance age, when most jurists were debating about the origin of property, John Locke, came up with an excellent theory to justify how man acquired ownership of land[48]. He argued that all Property initially existed within "the commons," or the public domain. An individual by applying his own labour and effort to property could transfer the same from the commons to his own private domain[49]. The extent to which he could do this was however limited by two riders. They were-: consume only so much that there is an equal amount left for others (equality for all principal) and consume only that which is necessary (no-spoilage principal)[50]. This theory was promulgated in 1690, a time of conflict when the sovereign exercised a lot of political control in England[51]. The immediate as well as intended benefit of this theory was that it established an absolute right of an

48 John Locke, Second Treatise On Civil Government, 45 (1960).

49 Daniel Russell, *Locke on Land and Labor*, Journal of Philosphical Studies, Vol. 117, 325 (2012). Daniel Russell has recently suggested that for Locke, labour is a goal-directed activity that converts materials that might meet our needs into resources that actually do.

50 Supra n. 36.

51 In the 17th century the overlapping conflicts between Protestants, Anglicans and Catholics swirled into civil war in the 1640s. With the defeat and death of Charles I, there began a great experiment in governmental institutions including the abolishment of the monarchy, the House of Lords and the Anglican church, and the establishment of Oliver Cromwell's Protectorate in the 1650s. The collapse of the Protectorate after the death of Cromwell was followed by the Restoration of Charles II and the return of the monarchy, the House of Lords and the Anglican Church. This period lasted from 1660 to 1688. It was marked by continued conflicts between King and Parliament and debates over religious toleration for Protestant dissenters and Catholics.

individual over his own private property that could not be under any circumstances taken away or violated by the government.

Little did the father of classical liberalism know about the ridiculous proportions to which his theory would be stretched. Locke's theory was capable of elasticity by virtue of analogies as Locke, deliberately did not define the extent of labour required to transfer property from the public to the private domain. Hence the Lockean theory of private property was ludicrously relied upon by Courts to give a copyright, which requires at least a "minimum degree of creativity,"[52] to a phone-directory publisher who merely published addresses and numbers by relying upon other directories, and to question-papers made by Professors.[53] Both these activities are universally opined to suffer from a lack of originality and creativity in most scenarios.

National law school students familiarize themselves with Locke's theory of Property in their first year itself by virtue of studying Political Science. They are thus quick to defend heavily plagiarized projects, and vehemently argue for higher marks on the ground that the project is their original work, as it was made from their own labour. Consequently, due to the existence of the "Lockean Loophole" a twenty page Wikipedia article becomes the original work of a student after he or she labours to add his name to the document and remove the hyperlinks from the data. Unfortunately after going through the abovementioned tedious tasks most of us don't have the time to format our projects given our tight schedules, leading to easy detection of our sources by Professors.

However in our defence, since we extract information from the public domain (by virtue of our labour) into the private domain we exercise an absolute right, over our projects and research papers. This right cannot be taken away as long as we have the necessary and indispensible cover page with our name and the university logo on it. In addition to Locke's theory the two riders of Locke are also most religiously complied by our lot. This is because none of the projects exceed the minimum word/page limit even by a word thus endorsing the no-wastage principle. Furthermore since we rely upon the most limited and often a singular

52 Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1.
53 University of London Press Ltd. Case, (1916) 2 Ch 601.

source of public data that is available to everyone the equality principle cannot be violated under any circumstances.

Hence the abovementioned "Lockean argument" in my opinion stands tall, albeit tenuously, against the vice of plagiarism that has terrorized our lot since the inception of legal institutions. I do however sincerely hope that this paper is not published by someone else by striking my name and throwing theirs on it.

VI. THE DEEMED TO BE HEARING THAT NEVER COMES CLOSE TO A HEARING

Any article on the idiosyncrasies of law school would be incomplete without a section on mooting. Mooting has been described by a wise man to be one of the most glamorous albeit arbitrary activities in law school.

Fortunately mooting suffers from a poverty of definition despite being referred to constantly in various books and across the World Wide Web, thus saving me from the clutches of "a necessary" yet redundant authoritative footnote. Hence before I proceed to completely disparage the very logic behind this activity I believe as a national law school student it is my duty define it. We lawyers much like the drafters of our constitution (who even went to the extent of saying that the word "part" refers to part of the constitution) like to give lengthy and confusing definitions. This is because verbose and lengthy constructions are likely to give rise to contentions regarding the import of particular word. This keep the wheels of litigation of churning, thus giving our profession much envied self-sustainability.

However before defining the word "mooting" it is important to understand its meaning and history. The etymology of term can be traced to Anglo-Saxon times, when a moot was considered to be a congregation of prominent men in a particular area to discuss matters of local importance. The extent to which the addition of gerund can change the character and import of a word is an apt example of the vagaries of the English language. The addition of the gerund to the word moot thus results in a simulated albeit fictitious hearing before a Bench in which practices and procedures followed in Court are adhered to as far as possible.

In my opinion, mooting is best described using a tool of statutory of interpretation known as a legal fiction. The word legal fiction has been defined in the most complex manner possible by Jeremy Bentham who said,

> "*A fiction of law may be defined as a wilful falsehood, having for its object the stealing of legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it*[54]".

Thus an imposition of a legal fiction involves alteration of a particular fact in order to change the effect/consequence of particular law[55]. Corporate personality, according to which a corporation can sue or be sued and is regarded as a separate person[56], is an instance of application of legal fiction. Section 82 of the Indian Penal Code, 1860 according to which nothing committed by a child under the age of seven is a crime also creates a legal fiction, as it presumes that children under the age of seven do not possess *mens rea*. Thus the fact that we are lowly group untrained, arrogant and inexperienced law students is a trifle altered to make us senior counsels arguing over matters involving public interest, constitutional interpretation or national sovereignty. Though most teams significantly alter the effect or consequence of a particular law by reading it as they please, the team that deviates the least from the correct position of law is usually the team that performs well.

At this point it must be noted that a legal fiction can be used to alter facts whimsically. In order to prevent this problem of whimsical alteration the learned Judges fired another one of their canons of statutory interpretation which read thus-: *A legal fiction must be stretched only as far as its logical consequence*.[57] Thus even though a corporation is regarded as a person it cannot be vested with fundamental rights under Part III of the Constitution of India.[58]

However it is likely that mooting seems to either pre-date or disregard the above mentioned canon, as it is more akin to legal fictions of equity employed by

54 Ck Ogden, Bentham's Theory Of Fictions, 8(1932), .

55 Vepa P Sarathi, The Interpretation Of Statutes, 102(2008).

56 Salomon v A Salomon & Co Ltd, [1897] AC 22; Colt Group Ltd. v. Couchman, [2000] I.C.R. 327, Collector of Central Excise, Ahmedabad v. I TEC (P.) Ltd., (2002) 112 Com Cases 470 (SC); Associated Cement Co. Ltd. v. Keshavanand (1997) 7 Scale 734 (SC).

57 Re East End Dwelling co Ltd., 1952 AC 109; Hughes v Metropolitan Railway Co, (1877) 2 AC 439; Central London Property Trust Ltd v. High Trees House Ltd, (1947) KB 130; Bengal Immunity Co. v. State of Bihar [1955] 2 SCR 603.

58 The State Trading Corporation of India v. The Commercial Tax Officer, 1963 AIR 1811;Chiranjit Lal Chowdhuri v. Union of India, [1950] S.C.R. 869.

jurists such as Lord Denning, who used fictions to enhance the scope the legal doctrines to achieve substantive justice and fill legal lacunaes.[59] Upon such usage the elasticity of a legal fiction was made subject to a lot of debate. In my opinion the extent to which legal fictions can be stretched is best explained by relying upon *Hookes Law* which states that "*the stress imposed on a solid is directly proportional to the strain produced, within the elastic limit*."[60]

Hence the extent to which one can stretch a particular fact is directly proportional to the expansion of the law, thus increasing its scope in order to fill up loopholes. However what went wrong with mooting was that the amount of "fiction" applied on a "legal matter" exceeded the latter's elastic properties creating an entirely different compound altogether. Thus mooting for the purposes of this article is defined as a woeful attempt to conduct a simulated trial using a set of illogical rules or conditions. (explained below).

A typical moot always has a moot problem. In order to give the fair opportunity everyone to become the Devil's Advocate and play turncoat within a limited span of fifteen to thirty minutes, it miserably tries to create a balanced fact situation. In order to reach this equilibrium, that is an indefensible pre-requisite, of any moot problem it decides to omit material facts in the most inconspicuous manner. Such omissions often create a "Catch-22 situation" for participants. Many "mooters" tend to thrive on such illogical omissions as it gives them an epinephrine rush more colloquially referred to as a "kick" whilst they burn the midnight oil deliberating upon the numerous interpretations of an unrealistic byzantine problem with a woefully incomplete set of facts.

A criminal law moot confirms to the abovementioned definition of mooting most robustly. It turns the most fundamental tenet of our criminal law system i.e. its adversarial nature on its head. As a result proceedings in the moot become akin to those followed by the *Cour de Cassation* of France which follows the inquisitorial system.[61] Thus fact-finding which is supposed to be the domain of

59 In Hughes v Metropolitan Railway Co, (1877) 2 AC 439 and Central London Property Trust Ltd v High Trees House Ltd, (1947) KB 130, Lord Denning applied legal fictions to equitable remedies like estoppel, so that they could be used not only as a defence but also as a means to gain equitable relief.

60 RV Shukla, Practical Physics, 56 (2007).

61 Loïc CADIET, *Introduction to French Civil Justice System and Civil Procedural Law,* Recueil des lois et reglements, p. 333, 2011.

the lawyer is seamlessly encroached upon by Judges in Moot court. In an ideal adversarial system the judges are supposed to examine the evidence and arguments presented by the parties, and then come to a decision.[62] However in a moot court competition Judges become tend to become strangely proactive and often present evidence, examine parties and advance arguments making the trial inquisitorial in nature. Some judges even go to the extent of giving their inquisition a medieval zest[63] often denying the parties the right to fully represent their client or complete their arguments. Participants most note that such judges look upon the most trifle deviations as heresy and can subject participants to corporal punishments if given the liberty to do so.

Unlike the "real deal" wherein litigators must comply with time-crunching deadlines, mooters are given a ridiculously long time to prepare their briefs. Though written submissions were originally referred to as "briefs," the word was subsequently changed to "memorial" given the sheer discrepancy between the nature of the document and its meaning. Memorial drafting has one golden rule-: Unless the percentage of footnotes in a memorial is greater than that of the words in a memorial it deemed to be of poor quality irrespective of the submissions it contains. Hence not a single line must be left without source unless it forms a part of a submission or prayer. As a result of the above, mooters effectively create the mother of authoritative documents, authoritative enough to rival our Constitution itself. As a result of their sheer size, memorials are seldom read, even by the participants themselves. Hence they are used only for the sake of referral or in order to mock participants who contradict themselves and are insistent on writing silly things. It is for that very reason that the decision of awarding best memorial reflects an inconsistency that can only rivalled by our Personal Laws.

The final and most important stage of this tedious process is the oral round wherein the participants are to argue before a bench. The only similarity between most of our Indian Judges and the Judges of moot courts are that both of them receive the file and facts on very short notice, as a result of which they are unable to

62 Harry R. Dammer, Jay S. Albanese, Comparative Criminal Justice Systems, 120 (2011), ;Stewart Field, *Judicial Supervision and the Pre-Trial Process,* Journal of Law and Society, Vol. 21, p. 125 (1994); Geraldine Szott, P*rosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, Buffalo Criminal Law Review, Vol. 8, 220 (2004),

63 See, Henry Charles Lea, A History Of The Inquisition Of The Middle Ages, 28(2012), in relation to the nature of inquisitions in the 12th -13th century by the Church.

devote a lot of time to it. It is also expected that a Mooters argument must cease on the exact minute his prescribed time expires, irrespective of whether it is a matter of constitutional importance that is to decide the fate of the teeming millions, or the number of petulant questions that may be asked.

Unfortunately the manner of adjudication in Moots is markedly different from that used in Courts. The team that wins the round is usually the team that possesses the best manner, method and knowledge of law. Thus irrespective of the veracity and efficacy of one's arguments he may still lose in a moot court if he does not fit the three criteria. Some argue that the criterion of evaluation makes mooting a very elitist activity that prefers articulation and presentation over real substance.

However I disagree with the aforesaid view. This is because mooting allows for a large extent of arbitrariness, as it makes sure that the stronger side/better side does not always come out victorious. In doing so it prepares us for life outside law school and for situations in which weeks of research can be disregarded because the Judge hearing the matter doesn't consider it to be important or, a situation when a lawyer is only given five minutes to make an impression. Hence Mooting despite all its deficiencies, unreal simulations and inconsistencies prepares a law student for such arbitrary situations.

VII. CONCLUSION

The academic life of a law student in most instances revolves around examinations, projects and Mooting. When we enter national law schools or "the law school" we sign an unwritten contract with the institution. This contract is in standard form or akin to a boiler plate contract in the sense that only one party decides the rules of the contract and it is offered to us on a "take it or leave it" basis. The terms of these unwritten contracts regulate the academic life of a student. As a result of the same unfortunately or fortunately we have very little control over the rules that dictate our academic performance. Nevertheless, as I have exhibited through various illustrations, we ingeniously use the law to side-step rules, prepare for results, or maybe look at things in a different way. Such application often occurs at a sub-conscious level and is evident by the manner in which the legal jargon creeps into our language making it "common usage."

People often consider law as a dull and arid field of study, however the author submits that it has a colourful side that most of us are unaware of. This colourful side exists in the laws itself and is often exhibited when it is put in a historical or contemporary context, however ridiculous the context maybe. Late Prof. Vepa P. Sarathy often made it a point to expose us to the colourful side of his with his jokes on phrases like "testimonial confession" whose origin was derived from actions akin to those performed in a scene from the movie "*Casino Royale.*" By exposing oneself to this colourful side not only does one find humour in mundane activities like examinations and evidence law, but also cultivates a capacity to think out of the box and apply the law, albeit differently. It is a shame that people think we do not know the law!

RIGHT TO PROTECT IN INTERNATIONAL LAW: PROTECTION OF HUMAN RIGHTS OR DESTRUCTION OF STATE SOVEREIGNTY?

*Rupali Francesca Samuel**

ABSTRACT

Responsibility to Protect was introduced at the turn of the millennium as the solution for permanently ending situations of widespread human rights abuses. It attempted to create a uniform set of principles to govern intervention into states for the purpose of preventing mass atrocity crimes and thus address the greatest criticism against its predecessor humanitarian intervention – that it violated state sovereignty. I argue that it fails in this project in three ways. First, it does not effectively address the international regime on 'use of force' and so its very legality is suspect. Secondly, it fails to take into account that conflict occurs in complex situations that often involves competing claims of sovereignty by two or more groups and is hence uninformative as a principle of intervention. Thirdly, it does not take into consideration that international decision making, particularly in the context of the Security Council is motivated by a range of interests. I consider the recent events in Syria as an example of how these three problems can result in a complete collapse of the doctrine itself.

I. INTRODUCTION

Responsibility to Protect was introduced at the turn of the millennium as *the* solution for permanently ending mass atrocity crimes. Conceptualised at a time when the international community was reeling from the effects of the large scale humanitarian abuses of the 1990s, it captured a sense of urgency and determination to hold humanity to a heightened standard of responsibility for the protection of human rights. The genocides in Rwanda and Srebrenica had shaken the confidence of the United Nations[1].[2] The then Secretary General, Kofi Annan, commissioned Canadian based research group, the International Commission on Intervention and State Sovereignty[3] to design a policy that would prevent such conscience shaking

* III Year, B.A. LLB (Hons.), NALSAR University of Law, Hyderabad.

1 Hereinafter UN.

2 Gareth Evans, Responsibility to Protect: Ending Mass Atrocities Once and For All 27 (2008).

3 Hereinafter ICISS.

incidents from ever happening again. The result was a doctrine that has since been the subject of much debate in international law - 'The Responsibility to Protect'[4].

R2P proponents stress its comprehensive approach to the issue of mass atrocity crimes.[5] Expanding beyond mere intervention, R2P is designed to operate at three levels[6] – the responsibility to prevent,[7] the responsibility to react[8] and the responsibility to rebuild.[9] The doctrine envisages a continuous engagement with volatile societies, right from pre-conflict dissipation of tensions to rebuilding institutional capacity post large scale human rights violations.[10] Packaged in 'humanitarian' rhetoric, military intervention still features prominently in this catalogue of remedies. R2P then has to confront *jus ad bellum* and the guarantee of sovereign equality of states under Article 2(1) of the UN Charter. It identifies six principles that must be fulfilled so as to allow use of force - *right authority, just cause, right intention, last resort, proportional means* and *reasonable prospects.*[11] R2P claims that intervention within the four (six) corners of these principles would avoid any problems of sovereignty or unlawful interference in the internal affairs of a state.[12] In this comment I examine whether these principles are a sufficient answer to the question of state sovereignty in R2P.

Part I of the paper looks at sovereignty as a principle and how R2P reconceptualises the entire notion of sovereignty as control to sovereignty as responsibility. In Part II, I argue that this does not address the question of legality of the doctrine and point out how it falls foul of the international regime on Use of Force. In Part III, I look at the 'Right Intention' and 'Proportionality' principles as safeguards for state sovereignty in the context of the intervention in Libya. In Part IV, I use the recent events in Syria to demonstrate how R2P relies on mismatched incentives and can completely fail in its objective to safeguard human rights. And,

---

4 Hereinafter R2P.
5 Gareth Evans, *supra* note 2, at 81; Ramesh Thakur, United Nations: Peace and Security 247 (2006)
6 Gareth Evans et al., *The Responsibility to Protect,* International Commission for Intervention and State Sovereignty 17 (2001).
7 This involves addressing both the root causes of conflict and preventing events that trigger conflict.
8 This involves the creative use of diplomacy, sanctions and finally intervention to prevent mass atrocity crimes.
9 This involves actions taken to consolidate peace so as to prevent a relapse of conflict.
10 Gareth Evans, *supra* note 6.
11 Gareth Evans, *supra* note 6, at 32.
12 Gareth Evans, *supra* note 6, at 32.

Part V concludes by describing the real flaws with the doctrine and suggesting changes.

II. RECONCEPTUALISING STATE SOVEREIGNTY

State sovereignty, the right of a state to complete control over its internal affairs free from external interference, is the bedrock principle of international law.[13] The principle of non- intervention is codified in Article 2(7) of the Charter and also holds the status of customary international law.[14] A corollary to this rule is the principle of non use of force.[15] Firmly embodied in Article 2(4) of the Charter, the prohibition on the use of force by States in the conduct of their international relations[16] is widely recognised as the corner stone of the Charter[17] and holds the status of a peremptory norm.[18] State sovereignty then, in the classic understanding, is only invoked in the context of external relations of a state.

Responsibility to protect begins with a re-conceptualization of the entire notion of sovereignty by turning it inward.[19] ICISS borrowed from two ideas prevalent at that time to redefine sovereignty so as to place human rights at its heart. The first was a phrase used in internal displacement discourse – '*sovereignty as responsibility*',[20] which attaches the responsibility of governments to protect their citizens to sovereignty.[21] The second is the idea of '*individual sovereignty*'

13 Malcolm Shaw, International Law 6 (2008).
14 Antonio Cassese, International Law 48 (2005).
15 *Ibid.*
16 Charter of the United Nations (adopted on 20 December 1971, entered into force 24 September 1973) 1 UNTS XVI ['UN Charter'], art 2(4).
17 C M Waldock, *The Regulation of the Use of Force by Individual States in International Law* 81 Rec. des Cours 451, 492 (1952-II) The Charter of the United Nations 66 (Bruno Simma ed., 2nd edn.,Vol I, 2002); Nikolas Sturchler, Threat of Force in International Law 63 (2007); Oscar Schachter, *Entanlged Treaty and Custom*, International Law at a Time of Perplexity 717-38, 734 (Yoram Dinstein ed., 1989); Henkin. L., *The Reports of the Death of Article 2(4) are Greatly Exagerrated*, 65 Am. J. Of Int'l L. 544 (1971).
18 Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects,* 10 Eur. J. Int'l Law 5 (1999) *Commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties*, II ILC Yearbook 247 (1966); Military and Paramilitary Activities in and against Nicaragua (Nicar. vs. U.S.), Merits, 1986 ICJ Rep. 14, at ¶ 190; Jimenes de Archaga, E., El derecho internacional contemporaneo 108 (1980); The Charter of the United Nations: A Commentary 66 (Bruno Simma et al eds.,Vol I, 2002).
19 Gareth Evans, *supra* note 6, at 13.
20 Francis Deng, Sovereignty as Responsibility: Conflict Management in Africa (1996).
21 Gareth Evans, *supra* note 2, at 36.

articulated by Kofi Annan.[22] He proposed that there were two sovereignties, 'national sovereignty' and 'the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties' or 'individual sovereignty'. R2P combines these two principles to re-characterize sovereignty as *control* to sovereignty as *responsibility*.[23]

ICISS describes this as having three repercussions. First, it imposes on governments the responsibility of the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it implies that national governments are internally responsible to their citizens and also externally responsible to the international community through the United Nations. Thirdly, it means that national political authorities can be held accountable for their acts and omissions.[24] The next big step that R2P makes is to espouse that when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities, this 'responsibility deficit' triggers an international responsibility of the same nature.[25] By defining sovereignty in such terms, R2P claims to successfully deflect legal challenges of non interference in the internal affairs of states. But does it really?

III. R2P V. STATE SOVEREIGNTY: THE LEGAL STATUS OR THE 'RIGHT AUTHORITY' QUESTION

R2P formally asserts legality, but its normative framework does not support such a claim.[26] It has only two routes for legality under the Charter. The first is the collective security mechanism outlined in Chapter VII of the UN Charter. Article 39 allows the Security Council[27] to determine a threat to 'the' peace.[28] But, can large scale human rights violations constitute a threat to the peace? Theorists like Lori

22 Kofi Annan, *Two Concepts of Sovereignty*, The Economist, September 18, 1999, at 49–50.
23 Gareth Evans, *supra* note 6, at 13.
24 Gareth Evans, *supra* note 6, at 13.
25 Hugh Breakey, *The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Review and Analysis* 8 available at http://www.griffith.edu.au/__data/assets/pdf_file/0007/333844/Responsibility-to-Protect-and-the-Protection-of-Civilians-in-Armed-Conflict-Review-and-Analysis.pdf.
26 Some would argue that the normative claim of R2P is indisputable, in that it seeks to address mass atrocity situations. The normative framework that I refer to here is not the moral claim of the doctrine, but the legal principles on which it is based.
27 Hereinafter SC.
28 UN Charter, Article 39.

Damrosch and Bruno Simma do not think so.[29] However, the UN's interventions in Somalia (1992), Rwanda (1994), and Haiti (1994) seem to indicate that the Security Council believes itself to have such a power under Chapter VII.[30] ICISS cites this fact and "sources that exist independent" of the UN Charter to justify R2P. On the first point, the General Assembly, in locating R2P under paragraphs 138 and 139 of the chapter on Human Rights as opposed to the chapter on Collective Security of the World Summit Outcomes document, explicitly acknowledged that R2P is distinct from the collective security mechanism of the UN.[31] On the second point, there is neither consistent state practice nor *opinion juris* to indicate that humanitarian intervention is a part of customary international law.[32]

Though publicists have argued for a right of humanitarian intervention, this claim is heavily contested on the ground that there neither sufficient status practise, nor a belief in formal right of intervention.[33] The isolated instances where the unilateral right of humanitarian intervention has been claimed do not constitute sufficient state practice so as to create a new rule of customary law as each of these was severely contested by the international community. Moreover, the UN GA has repeatedly rejected the existence of such a right in, for example, the UNGA, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Sovereignty, GA Res 2131, GAOR 20th Session and others[34]. Even when situations of humanitarian distress have been recognised, states

29 The Charter of the United Nations: A Commentary, *supra* note 18, at 729; Lori Fisler Damrosch, *Commentary on Collective Military Intervention to Enforce Human Right* in Law and Force: In the New International Order 219 (Damrosch et al eds., 1991).

30 J Holzgrefe, *The Humanitarian Intervention Debate* in Humanitarian Intervention 41 (Holzgrefe ed., 2003).

31 United Nations General Assembly, *Integrated And Coordinated Implementation Of And Follow-Up To The Outcomes Of The Major United Nations Conferences And Summits In The Economic, Social And Related Fields* GA Res 60/1, 60th sess., UN Doc. A/RES/60/1.

32 Ralph Zacklin; *Beyond Kosovo: The United Nations and humanitarian intervention* in Contemporary Issues in International Law: A Collection of Josephine Onoh Memorial Lectures 221 (David Freestone et al, eds., 2002); Christine Gray, International Law And The Use Of Force 17 (3rd ed. 2008); Jonathan I Charney, *Anticipatory Humanitarian Intervention in Kosovo* 93 Am. J. Int'l L. 834,841(1999).

33 *Ibid.*

34 Other such examples are UN Doc A/RES/20/2131 (1965); UNGA, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res 2625, GAOR 25th Session, UN Doc A/8082 (1970); UNGA, Declaration on Strengthening of the Co-ordination of Humanitarian Emergency Assistance of the UN GA Res 61/134, GAOR 61st Session, UN Doc. A/RES/61/134UNGA, Declaration on the Enhancement

have strived to maintain a distinction between humanitarian aid and intervention and considered the later as unlawful. Further, the absence of *opinio juris* is indicated by the fact that States have rarely ever invoked humanitarian intervention as a legal justification for intervention, instead choosing to invoke exceptions contained within the rule of illegality of use of force which thereby strengthens it.[35]

Moreover, R2P clearly distinguishes itself from the 'right of humanitarian intervention.'[36] Being a new doctrine, it cannot source its legality in an independent claim to customary international law status.[37]

Some R2P theorists have drawn on the Security Council's power to authorize intervention from Article 24 directly.[38] However, Article 24 only refers to 'international peace and security'. Read with the collective security mandate of Article 1(1) and the prohibition of use of force in Article 2(4), it is still unclear whether the SC does in fact have the power to propound a doctrine like R2P. The second route is the inherent right of self defence, something that R2P makes no mention of.[39]

Even if the claim that protection of human rights is within the ambit of Chapter VII action can be legally sustained, R2P discounts an important fact. Situations of mass atrocities against civilians that require intervention arise in complex conflict scenarios. These often involve competing claims of sovereignty by various groups over a particular. This can be within the recognised paradigm of self determination for an ethnic group as was the case in East Timor (1999),[40] Kosovo

---

of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/22, UN Document A/RES/42/22; UNGA, Declaration on the Definition of Aggression, GA Res 3314, GAOR 29th Session and UN Doc. A/RES/29/3314.

35 *Supra* note 32.

36 Gareth Evans, *supra* note 2, at 56.

37 Custom requires the dual criteria of 1) State practice that is settled, widespread and consistent [North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits) [1969] ICJ Rep 3 77] and 2) *Opinio juris* the subjective requirement that state practice is accepted as law. Neither of these principles is demonstrable for R2P. Despite its prima facie endorsement at the World Summit 2005, the principle has attracted great opposition to inter alia, the Security Council's authorising and determinative power in instances involving use of force.

38 Ramesh Thakur, *supra* note 5, at 255.

39 Gareth Evans, *supra* note 4.

40 Ryan Liss, *Responsibility Determined: Assessing the Relationship between the Doctrine of the Responsibility to Protect and the Right of Self-Determination* 57 (2011) available at http://ssrn.com/abstract=2028782.

(1999)[41] and Bosnia and Herzegovina (1995).[42] The more controversial kind of conflict is a secessionist movement by a minority group. More relevant in today's political climate is a third scenario – rebel movements seeking regime change. 'Humanitarian interventions' in the Cold War era and just after were enmeshed with coups, civil war and regime change. Intervention in Cambodia was in a civil war against the Khymer Rouge (1978)[43]; in Sierra Leonne (1998) and Liberia (1990) against other dictators;[44] in Haiti (1994),[45] Panama (1989)[46] and Grenada (1983) to restore democracy;[47] in East Pakistan (1971) a secessionist movement from President Yakhya Khan in West Pakistan.[48] Thus, history proves that intervention to protect human rights is embroiled in larger political conflict the interference in which is a clear violation of state sovereignty. The perfect incident to demonstrate this fact is Libya (2011) – the United Nation's sole intervention under R2P.

IV. R2P IN PRACTISE: RIGHT INTENTION AND PROPORTIONALITY IN THE LIBYAN EXPERIENCE

The Arab Spring, beginning in late 2010, saw the mass uprising of people in countries all across the Middle East against tyrannical governments.[49] Protests erupted on the streets with people coming out in large numbers to demand a more participative political process. These protests were soon organised into fully fledged rebel groups that launched armed rebellion against the state. The despots didn't sit back. They responded by unleashing their militaries against their own citizens.

41 *Ibid.*
42 Gareth Evans, *supra* note 2, at 27.
43 Thomas Franck, *Interpretation and change in the law of humanitarian intervention* in Humanitarian Intervention 218 (Holzgrefe ed., 2003).
44 James Mayall, *Humanitarian Intervention and International Society: Lessons from Africa* in Humanitarian Intervention and International Relations 131 (Jennifer Welsh ed., 2004).
45 J Holzgrefe, *The Humanitarian Intervention Debate* in Humanitarian Intervention 42 (Holzgrefe ed., 2003).
46 Anthony D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny,* 84 Am. J. Int'l Law, 520 (1990).
47 Karin Von Hippel, Democracy by Force US Military Intervention in the Post-Cold War World 27 (2004).
48 Gareth Evans, *supra* note 2, at 23.
49 Columm McCainn, *Arab Spring*, The New York Times (December 23, 2011) available at http://www.nytimes.com/2011/12/25/opinion/sunday/arab-spring.html.

While the situations in Tunisia[50] and Egypt[51] resolved rather quickly and successfully, in early February, 2011, Libya was fast growing into a situation that amounted to the perpetration of crimes against humanity by the state.

The Libya case followed the R2P rule book to the core. On 17th February, 2011 the Libyan rebels declared a 'Day of Rage' – with ordinary people from all over the country taking to the streets to protest Muammar Gaddafi's rule.[52] The Libyan security forces came down heavily on the protestors, using snipers, helicopters and contract killers and even attacking hospitals and funeral processions.[53]The protests escalated with the rebels taking up arms. They seized control over the cities of Misrata and Benghazi from the Gaddafi rule.[54] The state responded with detentions and killings of citizens believed to be a part of the opposition. This drew vocal condemnation from various international organisations. The UN High Commissioner for Human Rights and the Office of the Secretary General's Special Advisors on the Prevention of Genocide and the Responsibility to Protect called for protection of all civilians, cautioning that 'widespread and systematic attacks against the civilian population may amount to crimes against humanity', and that national authorities would be held accountable.[55]

The Arab League, Organisation for Islamic Cooperation and the African Union all condemned the attacks.[56] On 25th February, 2011, the SC adopted *Resolution S-15/1* calling on Libya to meet its responsibility to protect its

50 Ian Black, *Zine Al-Abidine Ben Ali Forced To Flee Tunisia As Protesters Claim Victory,* The Guardian (January 15, 2011) available at http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country- protests.

51 Jack Shenker, *Hosni Mubarak Resigns,* The Guardian (February 11, 2011) available at http://www.guardian.co.uk/world/2011/feb/11/hosni-mubarak-resigns-egypt-cairo;

47 *Deadly Day of Rage in Libya*, Aljazeera (February 18, 2011) available at http://www.aljazeera.com/news/africa/2011/02/201121716917273192.html.

53 *Ibid.*

54 Alexander Dziadosz, *Benghazi, Cradle Of Revolt, Condemns Gaddafi,* Reuters (February 23, 2011) available at http://thestar.com.my/news/story.asp?file=/2011/2/24/worldupdates/2011-02-23T222628Z_01_NOOTR_RTRMDNC_0_-550982-4&sec=Worldupdates.

55 Spencer Zifcak, *The Responsibility to Protect After Libya and Syria* 13 Mel. Journ. Int'l Law 3 (2012).

56 Organisation of Islamic Cooperation, *OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya* (Press Release, 22 February 2011); African Union Peace and Security Council, *Communiqué*, 261st mtg, AU Doc PSC/PR/COMM(CCLXI) (23 February 2011).

population and to immediately put an end to all human rights violations.[57] On the 26th of February, the SC adopted *Resolution 1970* where it recalled the Libyan authorities' responsibility to protect its population, demanded an immediate end to hostilities and free passage for humanitarian aid and medical supplies. It further imposed sanctions in the form of an arms embargo, a freeze of assets and a travel ban on key figures in the Libyan administration.[58] The Libyan government denied all charges while attacks on civilians intensified.[59] On 17th March, 2011 the SC adopted *Resolution 1973* which stated that '*all* necessary measures' could be taken to protect civilians and civilian populated areas under threat of attack. It further resolved that a no-fly zone be established over Libya and authorised NATO to take '*all* necessary measures' to enforce the same.[60] On 19th March, NATO's intervention began.[61] Libya's air defence system was taken down. Tanks and other security forces leading the attack were targeted.

R2P seemed to be working perfectly. The 'right intention' criteria might have been suspect, but 'proportionality' was adhered to. However, things soon changed when NATO began targeting government officials. Air strikes directed at Gaddafi's residence resulted in the death of his son and two grandchildren.[62] It began arming the rebels who then demanded its support to take down Gaddafi.[63] The NATO intervention soon adopted the goal of regime change.[64]By August, 2011, Gaddafi was killed and his regime overthrown.[65] The National Transitional Council (NTC) was placed in power.[66] Was this allowed in international law?

---

57 Security Council, *Resolution S-15/1*, UN SCOR, 66th session, UN Doc A/HRC/RES/S-15/1 (25 February 2011) ¶2.

58 Security Council, *Resolution 1970*, UN SCOR, 66th session, UN Doc S/RES/1970 (26 February 2011)

59 Paul D Williams, *Briefing: The Road to Humanitarian War in Libya* 3 Global Responsibility to Protect 248, 251 (2011).

60 Security Council, *Resolution 1973*, UN SCOR, 66th sess, UN Doc S/RES/1973 (17 March 2011) at ¶12.

61 Spencer Zifcak, *supra* note 55, at 7.

62 Robert Vercaik, *Bomb Hits Gaddafi's Home,* The Daily Mail (May 1, 2011) available at http://www.dailymail.co.uk/news/article-1382341/Libya-Nato-strikes-kill-Gaddafis-son-grandchildren.html.

63 United Nations General Assembly, *supra* note 31, at 13.

64 Eric Schmitt & David E Sanger, *As Goal Shifts in Libya, Time Constrains NATO,* The New York Times (May 26, 2011) available at http://www.nytimes.com/2011/05/27/world/africa/27policy.html?pagewanted=all&_r=0.

65 Barry Malone, *Gaddafi Dies In Hometown, Libya Eyes The Future,* Reuters (October 20, 2011) available at http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020.

66 *Libya's Rebels to Govern from Tripoli,* Al Jazeera (August 26, 2011) available at http://www.aljazeera.com/news/africa/2011/08/201182623316261938.html.

Spencer Zifcak quotes the Ambassador to India, Brazil and South African Dialogue Forum (IBSA) to summarise what was problematic about NATO's actions.

> *The resolution was always concerned with the protection of civilians. It did not mean that NATO could decimate one side, arm rebels, worsen tribal animosities, declare victory and look the other way from extrajudicial killings.*[67]

South Africa, India, Brazil, China and Russia expressed intense displeasure at the outcome of the intervention.[68] South Africa avowed that the intention was 'never regime change; nor was it the targeting of individuals'.[69] International law clearly prohibits the support of rebels engaged in a civil war as the unlawful use of force that violates the non intervention guarantee of the UN Charter.[70] The R2P authors idealistically set the outer line:

> *Over throw of a regime is not, as such, a legitimate objective, although disabling a regime's capacity to harm its own people may be essential to discharging the mandate of protection and what is necessary to achieve that will vary from case to case.*[71]

Libya shows us that in reality, even a perfectly followed R2P mission cannot maintain that fine line. In effect, R2P authorised the toppling of a government and the institution of another. It prevented the mass slaughter of thousands of people. But achieving that meant that the international community had to choose the government in Libya – or at least that is what the interveners claimed. This is a clear violation of the non intervention principle in international law and state sovereignty.

---

67 Spencer Zifcak, *supra* note 55, at 11.
68 Spencer Zifcak, *supra* note 55, at 11.
69 Spencer Zifcak, *supra* note 55, at 11.
70 Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), (Jurisdiction) 1984 ICJ Rep. 392 at 95.
71 Gareth Evans, *supra* note 2, at 143.

V. THE 'SOLUTION' UNRAVELS: TAKING THE 'SIX PRINCIPLES' TO THE OTHER EXTREME IN SYRIA

Libya is considered a success for proponents of R2P as it proved that the doctrine could protect civilians from mass atrocities.[72] However, an analysis of the situation thus far in Syria tells a different story.

Peaceful protests in Syria against President Bashar Al-Assad began in late February 2011. Security forces opened fire on people protesting the torture and killing of certain children.[73] The protestors then took up arms. By April, they were facing the full brunt of the Syrian military.[74] On 25th April, 2011, the SC met to discuss Syria but could not pass any resolution on the same.[75] Russia refused to intervene in a matter that was essentially internal. India stressed that the Council should be taking measures to bring peace between the two factions. On 25th May, the United States attempted to pass a resolution condemning the vicious attacks on civilians and recalling Syria's responsibility to protect its population.[76] Though Russia and China no longer claimed that the conflict was merely an internal matter, they cited the Libyan example to express reservations about authorising an intervention for the protection of civilians. On 5th October, a revised draft[77] of the resolution that incorporated the call for an inclusive Syrian-led political process and placed responsibility on the Arab League for cessation of the humanitarian crisis was vetoed by Russia and China.[78] The day after the Syrian authorities began launching rockets into cities,[79] another resolution calling for free movement of humanitarian aid, an inclusive Syrian led political process and allowing the Arab League to take control of certain cities was again vetoed by Russia and China.[80]

---

72 Spencer Zifcak, *supra* note 55, at 13.

73 *Syrian Police Seal Off City Of Daraa After Security Forces Kill Five Protesters,* The Guardian (March 19, 2011) available at http://www.guardian.co.uk/world/2011/mar/19/syria-police-seal-off-daraa-after-five-protesters-killed.

74 Spencer Zifcak, *supra* note 55, at 15.

75 UN Security Council, SCOR, 66th session, UN Doc S/PV.6524 (27 April 2011) at ¶ 2.

76 UN Security Council, SCOR 67th session, UN DOC S/PV.6711 (4 February 2012).

77 *France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution*, UN SCOR, 66th session, UN Doc S/2011/612 (4 October 2011).

78 UN Security Council, UN SCOR, 66th session, UN Doc S/2011/612 (4 October 2011).

79 Niel Millard & Ben Cusack, *200 Dead On Bloodiest Day In Syria,* The Sun (February 5, 2012) available at http://www.thesun.co.uk/sol/homepage/news/4109078/At-least-200-dead-as-regime-launches-rocket-attacks-on-opposition-in-Homs-Syria.html.

80 UN Security Council, UN SCOR, 67th session, UN DOC S/PV.6711 (4 February 2012).

The Syria case is certainly not as straightforward as Libya. The rebels are fractioned, Russia has military and trade interests in Syria, there is the Sunni-Shia divide and there is the fact that Assad has threatened to use chemical weapons in case of foreign intervention. However, the SC has still not been able to take any action whether military or not under the R2P doctrine despite the death toll crossing 70,000 people.[81] R2P continues to fail to ensure the protection of civilians who are the subject of crimes against humanity in Syria. Thus in the Syria case, private incentives of some permanent security council members, such as trade and diplomatic ties along with concerns of state sovereignty completely paralyzed the functioning of the doctrine, even when it was watered down to is least interfering tactics. This demonstrates that the R2P project is incomplete. Even the claim that it protects human rights is open to question.

VI. CONCLUSION

R2P is an ambitious project. It recognises a very serious problem for humanity - that states can kill their own people. It attempts to comprehensively outline a set of responsibilities that would prevent such a thing from happening, stop it when it erupts and rebuild after. The six principles for intervention aim at ensuring that intervention happens only in the narrowest of circumstances. However, the application of the doctrine has pointed out certain essential flaws. First, it does not give us guidelines for assessing and analyzing conflict. It fails to realise that conflict occurs in complex situations, and accordingly determine clear rules for the context of civil war and regime change. It fails to analyse and predict the role of the Security Council in an intervention or realise that as a non-democratic body, there are inherent shortcomings of the council. It fails to account for the real incentives that motivate decision making in the Security Council, particularly amongst the P5. These gaps mean that it is possible for R2P to neither protect state sovereignty nor human rights.

No one wants another Rwanda. However, what Rwanda and the numerous cases where intervention was not resorted to[82] tell us (other than for the fact that

81 Michelle Nichols, *Syria Death Toll Likely Near 70,000, Says U.N. Rights Chief,* Reuters (February 12, 2013) available at http://www.reuters.com/article/2013/02/12/us-syria-crisis-un-idUSBRE91B19C20130212.

82 The killing and forced starvation of almost half a million Ibos in Nigeria (1966–70); the slaughter and forced starvation of well over a million black Christians by the Sudanese government (since the late

non-intervention can be as bad) is that intervention is essentially a political act. A lot of factors go into the decision to be involved in the affairs of another country and another people. One of these is the extent to which such an involvement will violate the sovereignty of that state. Hence, great care needs to be taken to introduce more details to the doctrine so that it reflects a realistic understanding of today's conflict scenarios. As a policy that authorises intervention, it needs to reflect participative and accountable processes, democratic choice making and neutrality. Whether this means that such decisions need to be removed from the control of the P5 or that the UN needs a separate neutral force is a question to be examined. Despite its intention to 'do good', without underlying support structures, R2P remains another abstract principle with no guarantee of reaching its objective but yet creating opportunities for exploitation by powerful states. Now what it needed is a policy that is less idealistic and more reflective of the unbalanced power structures and corresponding incentives that direct international decision making.

1960s); the killing of tens of thousands of Tutsis in Rwanda (early 1970s); the murder of tens of thousands of Hutus in Burundi (1972); the slaying of 100,000 East Timorese by the Indonesian government (1975–99); the forced starvation of up to 1million Ethiopians by their government (mid-1980s); the murder of 100,000 Kurds in Iraq (1988–89); and the killing of tens of thousands of Hutus in Burundi (since 1993).

REJECTING "MORAL HARM" AS A GROUND UNDER OBSCENITY LAW

Anees Backer[*]

ABSTRACT

Indian society is still considerably puritanical when it comes to matters of sex, and the tendency to condemn any sexually explicit material as obscene, regardless of its context or purpose, is fairly widespread. The law relating to obscenity reflects this paranoia, expressing a paternalistic concern for the depravity and moral corruption of the consumers of allegedly obscene material, even when such material is received voluntarily by adults. The assumptions of moral harm underlying the existing legal regime on obscenity are constructed by judicial instinct, with little regard for its comportment with empirical reality. This paper argues for the rejection of moral harm, which forms the bedrock of obscenity law, as a ground for declaring materials as obscene.. This approach is promoted as better acknowledging human subjectivity, accounting for the subtle utility of sexually explicit material, and as being more conducive to a revolution in contemporary artistic enterprise.

Part I briefly describes the statutory provisions on obscenity in India and traces the judicial interpretation of the subject, signalling why the law in its present form poses a problem. Part II makes a case for the rejection of moral harm by choosing to focus on what is considered as the most aggravated form of obscenity – pornography. It foregrounds empirical findings on the effect of pornography on the consumer to expose its dissonance with judicial instinct, and goes on to describe why the law is incapable of countering the non-consequential harm of pornography. Part III speaks of the chilling effect of obscenity law, and analyses Indian cases on obscenity to demonstrate that there exists sufficient analytical weapons in the Court's armoury to prohibit much of contemporary art as obscene. Part IV concludes the paper by emphasizing the unsuitability of prohibition as a strategy, and putting forth more speech as an alternative.

* Final Year Student, B.A. LLB. (Hons.), NALSAR University of Law, Hyderabad.

I. THE INDIAN LAW ON OBSCENITY

The Indian law on obscenity is primarily found in Section 262 of the Indian Penal Code[1], which declares any form of representation, including those in the form of books, pamphlets, paintings, drawings or any other object obscene if it is "lascivious or appeals to the prurient interest" or if its effect, when taken as a whole, is such as to "tend to deprave or corrupt persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."[2] The provision relates to sale, hire, distribution and public exhibition of such material, as well as the import, export and the mere possession of such material for any of the aforementioned purposes.[3] There are exceptions for publications made for the public good, such as those "in the interest of science, literature, art or learning or other objects of general concern" as well as materials kept bona fide for religious purposes.[4] The provision as its stands today was the result of substantial amendments introduced by the Obscene Publications Act, 1925 to give effect to India's commitments made at the International Convention for Suppression of Traffic in Obscene Literature, 1923[5] and further amendments made in 1969 to exclude publications in public good.

Likewise, the Indecent Representation of Women (Prohibition) Act, 1986 prohibits the publication and exhibition of any advertisements containing indecent representation of women,[6] as well as the production, sale, letting for hire, distribution and circulation of indecent representation of women in any form.[7] "Indecent representation" is defined as "depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals."[8] The exceptions available under S. 292 apply here as well.[9] Incidentally, the Act was fiercely criticised by a segment of

1 Hereinafter IPC.
2 S. 292(1), IPC, 1860.
3 S. 292(2) and 292(3), IPC, 1860.
4 Proviso to Section 292, IPC, 1860.
5 Vishnu D. Sharma and F. Wooldridge, *The Law Relating to Obscene Publications in India,* 22 The International and Comparative Law Quarterly 632, 634 (1973).
6 S. 3, Indecent Representation of Women (Prohibition) Act, 1986.
7 S. 4, Indecent Representation of Women (Prohibition) Act, 1986.
8 S. 2, Indecent Representation of Women (Prohibition) Act, 1986.
9 Proviso to S. 4, Indecent Representation of Women (Prohibition) Act, 1986.

Indian feminists, especially the publishers of the magazine *Manushi,* who objected to the vague and all-encompassing definition of indecent representation and the wide-ranging powers given to administrative authorities to search and seize material that they deemed obscene. They worried that "treating women with respect" could have the effect of treating them as sexless beings, and the extraordinary focus on sexually explicit material could take attention away from other derogatory stereotypes of women that abound in popular media.[10] These are valid concerns, and will be explored further in the sections below.

Finally, S. 67 of the Information Technology Act, 2000 punishes anyone who publishes or transmits material that is "lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons" who are likely to view the material.[11] The punishments prescribed are onerous, with imprisonment of upto five years and fine which may extend to one lakh rupees on first conviction, and imprisonment of upto ten years and fine which may extend to two lakh rupees on second conviction.

In deciding cases on obscenity, Indian courts s have rejected a single test. The approach of the Courts have been different in different cases, in line with the Supreme Court's observation that there can be no uniform test of obscenity and that each case will have to be judged on its own facts.[12] However, the Court in *Ranjit D. Udeshi* adopted the judicial test laid down in *R.* v. *Hicklin*[13] by Chief Justice Cockburn, which reads as follows:

> *". . . I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.*"

10 *India: Feminists Criticise Porn Law,* (Issue No. 17(3)) Off Our Backs 9 (March, 1987).
11 S. 67, Information Technology Act, 2000.
12 Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881.
13 (1868) L.R. 3 Q.B.

The Court further interpreted the word "obscene" to mean something "offensive to modesty or decency; lewd, filthy and repulsive."[14] But the Court added another modification to the *Hicklin Test,* and held that regard must be had to "our community mores and standards" and whether the material "appeals to the carnal side of human nature, or has that tendency."[15] Formulating explicit standards of mores, the Supreme Court in *Director General, Directorate General of Doordarshan and Ors.* v. *Anand Patwardhan and Anr.*[16] considered and used part of the test laid down in the US Supreme Court case of *Miller* v. *California.*[17] The Court imported the aspect of the test that states that "contemporary community standards" are to be used in determining what is obscene. This concretized the idea that where morality or decency is concerned, the community as a whole should be considered instead of parts in isolation. The concept adopted from *Miller* paved the way for the decision in *Ajay Goswami* v. *Union of India*,[18] which created a category of material that while unsuitable for children, is perfectly acceptable when it comes to adults. The Court endorsed the position in America which does not allow for suppression of speech and expression solely for the sake of protecting children from potentially harmful materials.[19]

---

14 *Ranjit D. Udeshi*, *supra* note 12, 885; Madhavi Goradia Divan, Facets of Media Law 57 (Eastern Book Co., 2006).

15 *Ranjit D. Udeshi*, *Ibid,* 889.

16 AIR 2006 SC 3346.

17 13 U.S. 15 (1973) [This case expanded the scope of Roth v. United States, 354 U.S. 476 (1957), which ruled that the *Hicklin* test was inappropriate and introduced the aspect of contemporary community standards. The Supreme Court in *Miller* acknowledged "the inherent dangers of undertaking to regulate any form of expression," and stated that "the State statutes designed to regulate obscene materials must be carefully limited." In order to determine the limits to be set, the Court devised a set of three criteria which must be met in order for a work to be legitimately subject to state regulation:
"1. whether the average person, applying contemporary community standards (not national standards, as some prior tests required), would find that the work, taken as a whole, appeals to the prurient interest;
2. whether the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and
3. whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
The third part of the test is clearly of the same type as that employed by the Indian Courts in searching for exceptions to the offense of obscenity. The first part is a new consideration where it now expressly used, whereas initially it was impliedly used in the sense that when concepts like morals were considered, the standard is the community as a whole].

18 AIR 2007 SC 493.

19 Alfred E. Butler v. State of Michigan, 1 LED 2d 412 [The Supreme Court held that "The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare.

On the question of obscenity and art, it has been determined that "art must be so preponderating as to throw the obscenity into a shadow, or the obscenity so trivial and insignificant that it can have no effect and may be overlooked."[20] This was approved in *K.A. Abbas* v. *UoI,*[21] which held that "the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average man would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things, ideas having redeeming social or artistic value must also have importance and protection for their growth."[22] In some cases, the judiciary has built in a number of safeguards, such as in *Samaresh Bose* v. *Amal Mitra*,[23] wherein the Court held that the judge is required to place himself first in the position of the author to understand what he seeks to convey and whether it has any artistic value, then in the position of the reader of every age group into whose hands the book is likely to fall to study the influence the book is likely to have on the reader, and then apply his judicial mind dispassionately to determine whether the book is obscene, drawing on views expressed by reputed authors where appropriate.[24] However, the reliance on expert evidence is not a mandate, and is to be done only in "appropriate cases" to eliminate the judge's personal predilections from affecting a "proper objective assessment."[25]

It is submitted that in all its myriad formulations judicial tests for obscenity are different means to achieve the same end, animated by a fear of corruption or

---

Surely, this is to burn the house to roast the pig." The stance was upheld in later cases. In Janet Reno v. American Civil Liberties Unio*n,* 138 Led 2d 874, the court held that, "The Federal Government's interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults, in violation of the Federal Constitution's First Amendment; the Government may not reduce the adult population to only what is fit for children, and thus the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into the statute's validity under the First Amendment, such inquiry embodies an overarching commitment to make sure that Congress has designed its statute to accomplish its purpose without imposing an unnecessarily great restriction on speech."].

20 Ranjit D. Udeshi v. State of Maharashtra, *supra* note 12, 889.

21 (1970) 2 SCC 780.

22 K.A. Abbas v. UoI (1970) 2 SCC 780, 802.

23 (1985) 4 SCC 289.

24 K.D. Gaur, Commentary on the Indian Penal Code 703 (Universal Law Publishing Co. Pvt. Ltd., 2006).

25 *Samaresh Bose, supra* note 23, 314.

"moral harm". While the need for contextualizing the judicial assessments of obscenity has been introduced, including the need to review the work as a whole and the requirement to judge the likely impact with reference to the community as a whole, the judiciary's understanding of obscenity is still defined primarily in terms of sexual explicitness, regardless of the attitude the work invites the viewer to adopt in relation to the work. Of course, such representation in art is excused where it reveals a preponderating social purpose, but the purpose must be of a kind that is palatable to the judiciary's understanding of what is socially useful. This is of particular concern as art in this day and age is increasingly pushing the envelope, and is not necessarily purposive. Even where it makes a statement, a constructivist view of art is at odds with the essentialist view of art favoured by the Supreme Court. This will be discussed in detail in the following sections. Thus, the current law on obscenity will allow judges to hold potentially controversial speech hostage, with the consequence that the freedom of speech and expression will be significantly limited. It is clearly time for a revision in the law.

II. THE MORAL HARM OF PORNOGRAPHY

An argument against the use of moral harm as a ground in obscenity law is best made by focussing on the debate at the margins, and by demonstrating that it is not a valid ground even with respect to what is perceived as the most aggravated form of obscenity– pornography. If we are to conceptualise the moral harm basis of pornography law, we need to take a closer look at the fear of "depravity" and "corruption of minds" that sustains the modern law of obscenity. The conservative argument will likely draw on an attenuated form of nineteenth century fears that the availability of pornographic material will induce young boys (and it was assumed that they were mostly boys) to masturbate, thereby causing laziness, lowered productivity and even hastened death.[26] However, these theories stand discredited in today's scholarship, and are rarely to be heard in anti-pornography advocacy except from the extreme right.[27] As a matter of academic integrity then, any rebuttal to the idea of moral harm caused by pornography should be offered to the best defence of pornography in contemporary thinking. Some consider Chief Justice Burger's opinion in the US Supreme Court decision of *Paris Adult Theatre I*

26 Sharon Hayes, Belinda Carpenter and Angela Dwyer, Sex, Crime and Morality 39 (Routledge, 2012).

27 Whitney Strub, Perversion for Profit: The Politics of Pornography and the Rise of the New Right 2 (Columbia University Press, 2010).

v. *Slaton*[28] to be this defence,[29] wherein he argued that just as good books, plays and art lift the spirit and improve the mind, obscene publications have a tendency to exert a corrupting and debasing impact leading to antisocial behaviour, a crass attitude to sex and consequently debasement and distortion of sex.[30]

Thus, it stands to reason that in its best form, the moral harm of pornography can either be conceptualised as a consequential harm, leading to increased proclivities towards sexual aggression or as non-consequential harm that leads to the degrading representation of human beings, particularly women. The truth of these claims as well as the possible justification that it offers for legal intervention are analysed below.

a. Consequential Harm and Empirical Reality

Various reports commissioned by governments around the world have debunked the illusory causal link between pornography and sexual aggression. These reports carry out or draw from extensive psychological studies on the effects of pornography viewing. The report of the Committee on Obscenity and Film Censorship headed by Prof. Bernard Williams, appointed to review the working of obscenity laws in England and Wales in 1977, deals with the same. Holding that there is a presumption in favour of individual freedom, the report considered that the law is justified in restricting such freedom only when the "harm condition" is fulfilled - that is, if it is proved beyond reasonable doubt that harm will be caused unless restrictions are imposed by law.[31] After extensive research in Britain and abroad, the Committee concluded that there is hardly any evidence demonstrating a causal link between pornographic or violent material and sexual violence. What's more, the Committee found little evidence of any attitudinal effects at all as a result of pornography, much less that which has been established beyond reasonable doubt.[32] Likewise, the President's Commission on Obscenity and Pornography set up by US President Lyndon B. Johnson in 1969 reached essentially the same conclusions. In general, the Commission concluded that legislation "should not

28 413 US 49 (1973).
29 Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1640 (2005).
30 *Paris Adult Theatre,* at 63.
31 Simon Coldham, *Reports of the Committee on Obscenity and Film Censorship*, 43 MLR 306, 308 (1980).
32 Simon Coldham, *Ibid.*

seek to interfere with the right of adults...to read, obtain, or view explicit sexual materials." The Commission applied a large part of its two million dollar budget on funding original research on the effects of sexually explicit materials, and found no causal connection between viewing pornography and delinquent or criminal behaviour. In one experiment, the repeated exposure of male college students to pornography was found to have "caused decreased interest in it, less response to it and no lasting effect".[33] The findings of the Commission kicked up a storm in political circles, provoking President Richard Nixon to call them "morally bankrupt".[34] The report was emphatically rejected by the US Senate.

The Attorney General's Commission on Pornography ordered by Ronald Reagan published its report in 1986, and reached rather different conclusions, which have been assailed by psychologists since. For instance, the Commission's finding that violence in pornography had increased since 1970 is not true. Its impression possibly arises from the greater prevalence of pornography in the US; the few studies on the levels of violence in pornography are inconclusive, and if liberally interpreted, actually suggest a decline in violence in mainstream pornographic fare.[35] The Commission found a causal relationship between violent pornography and attitudinal changes and increased aggression towards women, but expert opinion claims that this is true only of laboratory studies examining the effect of sexually violent images.[36] Further, studies suggest that the sexual imagery accompanied by violence need not be of an obscene or pornographic nature to produce the observed effect – rendering the conclusions which confound sexual explicitness with suspected violence.[37] The point is bolstered by the fact that "slasher" movies produced a more aggravated effect on the viewer than violent pornography did.[38] Further, there are several questions regarding the extrapolations that may be made from laboratory findings to real world situations. The Surgeon

33 David M. Edwards, *Politics and Pornography: A Comparison of the Findings of the President's Commission and the Meese Commission and the Resulting Response,* available at http://home.earthlink.net/~durangodave/html/writing/Censorship.htm.

34 Richard Nixon, *Statement About the Report of the Commission on Obscenity and Pornography* (October 24, 1970) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2759.

35 Daniel Linz, Steven D. Penrod and Edward Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and "Facts"*, 12 American Bar Foundation Research Journal 713, 718 (1987).

36 Daniel Linz, et al., *Ibid,* 719.

37 Daniel Linz, et al., *Ibid,* 720-721.

38 Daniel Linz, et al., *Ibid,* 721.

General's report expressed this scepticism and was cautious about its conclusions. But it was ultimately excised and did not make it to the Final Report.[39] The Commission Report goes on to conclude that the effects of viewing non-violent pornography in which women play roles that are humiliating, degrading or purely instrumental are similar to those found in respect of violent pornography.[40] However, the studies that the Commission relied on produce no consistent evidence for these conclusions, and to infer direct causation between non-violent pornography and rape from a finding of correlation between callous attitudes towards rape and viewing of non-violent pornography in a *single* study indeed requires leaps of logic.[41]

Likewise, other laboratory studies by Edward Donnerstein at its most indicting, suggest that exposure to certain violent pornography shows an increase in attitudinal measures known to correlate with rape. However, when the same men were later given a pro-feminist debriefing session in which rape myths were busted and the harms suffered by women on account of rape were described, they were shown to have a more positive, less stereotyped attitude towards women than they did before the experiment.[42] As for representative field studies, the most thorough study has as its most adverse finding a *correlation* (as opposed to a cause-effect relationship) between pornography exposure and sexual aggression levels in a small class of high risk men – more specifically, a total of 0.84% of the population – who reported four times the levels of sexual aggression as the subjects who did not use pornography.[43] This tells us nothing about the direction of causation, and we do not know whether high-risk men who are predisposed to employing aggression against women are more likely to watch pornography or whether pornography is the cause of the heightened level of aggression.[44]

---

39 Avedon Carol, *The Harm of Porn: Just Another Excuse to Censor available at* http://www.fiawol.demon.co.uk/FAC/harm.htm.

40 Daniel Linz, et al., *Supra* note 35, 723.

41 Daniel Linz, et al., *Ibid,* 723-24.

42 Edward Donnerstein et al., The Question of Pornography: Research Findings and Policy Implications 4 (1987) *as cited in* Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1666 (2005).

43 Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can we Understand Them*, Ann. Rev. Sex. Res. 85 (2000) *as cited in* Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1666 (2005).

44 Andrew Koppelman, *supra* note 29, 1667.

Further, there are several therapeutic effects of fantasy and pornography that are routinely undervalued or plainly ignored. Michael Bader, a psychotherapist, explains the predicament of one of his female patients – an outspoken feminist – who could not achieve an orgasm with her husband without imagining a large, repulsive man holding her down and forcing sex on her. Bader explains this psychoanalytically by saying that the patient's fantasy was a way of resolving her belief that men are fragile and the guilt that expressing her sexuality fully would threaten and intimidate them. The vision of a large, aggressive man created the circumstances for her to escape this guilt and engage in sexual activity freely.[45] There are also significant studies of how gay adolescents, facing bigotry and alienation from the rest of society, find in gay pornography sexual possibilities that are not shameful or debased, the sort that shatters the negative stereotypes that are regularly fed to them.[46] The sexually explicit character of such representation is necessary to achieve this positive effect, especially in countries like India where it could be the only visibility for such sexual encounters – a necessary prerequisite for acknowledgment and self-liberation.[47] Indeed, sexual self-determination is an essential component of the capabilities approach touted by such thinkers as Amartya Sen and Martha Nussbaum, and it has been argued elsewhere that the ability to make choices about sexuality is necessary for an individual's fulfilment of what Aristotle calls the *ergon* – that is, his function, or better still, his work in being alive.[48]

The ambiguity in the findings of these studies is evidence that the response evoked by the receipt of any form of communication is mediated and controlled by a number of factors. Sexual stimulation, for instance, is not uniform across individuals – it depends on the stimulus, the culture, individual tastes and desires of the observer.[49] Likewise, we cannot predict the effect of any kind of pornography on a particular individual since it is so inherently tied to his upbringing, relationships, cultural interactions and personal history. The second problem in regulating

45 Michael J. Bader, Arousal: The Secret Logic of Sexual Fantasies 51-55 (2002) *as cited in* Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 Colum. L. Rev. 1635, 1660 (2005).

46 Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography,* 47 Stan. L. Rev. 661, 681-82 (1995).

47 Jeffrey G. Sherman, *Ibid,* 685.

48 Michael Weinman, *Living Well and Sexual Self-Determination: Expanding Human Rights Discourse About Sex and Sexuality,* 7(1) Law, Culture and the Humanities 101, 103 (2011).

49 Craig B. Bleifer, *Looking at Pornography Through Habermasian Lenses: Affirmative Action for Speech,* 22 NYU Rev. Law and Soc. Change 153, 165 (1996-97).

pornography – even on the basis of favourable empirical data – is that we have no conception of what it is about certain pornography that could lead to attitudinal changes or anti-social tendencies. What is the "active ingredient"? This is unlike the regulation of tobacco or alcohol where we need not worry about fine distinctions because there is no such thing as non-carcinogenic tobacco or non-impairing alcohol; on the other hand, it is impossible to draw a line between harmful and harmless pornography.[50] Indeed, in the face of empirical data that attribute greater violence-inducing tendency to otherwise non-controversial material such as "slasher" movies, a prohibition only on pornography, while slasher-movie representations continue to flourish, will amount to a mere moralistic knee-jerk reaction. However, on final analysis, psychological research enables us to upset the snap judgments that courts make about empirical reality in a cavalier manner. Even if we accept the argument that the decision whether to regulate pornography or not is ultimately a philosophical choice, this expose' will make sure that it will not have the scaffolding of social science research to support the adequacy of its theory.

b. Non-Consequential Harm and the Impossibility of Targeted Prohibition

The second concern of Chief Justice Burger that pornography may lead to a crass attitude towards sex and the debasement of sex could be interpreted as a concern regarding dehumanising representation of individuals in pornography, which, in a patriarchal universe would mean predominantly women. This harm is not consequential in the sense of how we used it in the previous sub-section, although it may contribute to a misogynistic culture and reinforce negative stereotypes about women. The point of analysis in this issue is not the question of harm, but whether the law is equipped to exclusively regulate pornography that is degrading to women, and whether such a move makes sense when degrading representations of women that are not pornographic continue to circulate freely.

The difficulty begins with the very definition of pornography. Is pornography merely sexually explicit material, or should something more be present to qualify any work as pornography? Since this paper attempts to provide a response to the best defence of pornography, for the purposes of our analysis, pornography can be defined as sexually explicit material designed to titillate the viewer in a manner that is *bad* in some way – this means that there is also sexually explicit

50 Andrew Koppelman, *supra* note 29, 1669.

material that is not objectionable in the relevant way.[51] Objectification, or the dehumanising representation of women has been dealt with in detail by Martha Nussbaum in her seminal work, *Sex and Social Justice.*[52] To objectify is to treat a non-object as an object. There are at least seven different ways in which you can treat a person as an object: *first,* instrumentality, wherein the object is merely a tool, or a means to an end that the objectifier has in mind; s*econd,* denial of autonomy, in which the object is treated as lacking in autonomy and self-determination; *third,* inertness, wherein the object is treated as devoid of agency, and perhaps also activity; fourth, fungibility, in which the identity of the object does not matter because it is substitutable with other objects of the same type, or objects of other types; *fifth,* violability, by which the object is considered as lacking in boundary integrity, thereby leaving it open to be broken up, smashed or otherwise destroyed; sixth, ownership, wherein the object is treated as something that can be freely bought and sold or exchanged; *seventh*, denial of subjectivity, wherein it is considered that there is no need to take into account the experience and feelings of the object, if any.[53] It is not necessary that all of these features be present in any given case of objectification, though more than one is usually to be found. The treatment of a person as an instrument is the most morally egregious position since it automatically paves the way for several of the other features to manifest themselves. Indeed, it is disrespectful enough to treat as valuable an object as an inanimate Monet painting as a mere instrument; the moral repugnance of treating a human being that way increases manifold.[54] However, even instrumentalisation by itself does not result in a reprehensible form of objectification. The context of any instance of objectification is supremely

51 *Pornography and Censorship*, May 5, 2004, *available at* http://plato.stanford.edu/entries/ pornography-censorship/ [Feminists like Catherine MacKinnon acknowledge that there can be sexually explicit material that are not derogatory to women – presumably such material falls within what is commonly known as erotica, or what could alternatively be coined "gender-sensitive" porn. By not putting too fine a point on this, the paper will engage with anti-pornography advocates on their specific concern regarding degrading sexual material].

52 *Objectfication* in Martha C. Nussbaum, Sex and Social Justice 213 (OUP, 1999).

53 Martha C. Nussbaum, *Ibid,* 218 [Nussbaum presents extracts from six different works and invites us to analyse the attitude the text takes towards the represented conduct with reference to her seven-point typology. This way she gives us examples of texts that objectify women in a perverse sense as well as objectification that celebrates desire and love]..

54 Martha C. Nussbaum, *Supra* note 53, 221.

important, and in a situation of equality, respect and mutual trust, objectification can even be a wonderful part of sexual life.[55]

However, any judgment of the nature of objectification in a represented work must respect the creator's liberty to express in any form that he wishes, and must make distinctions between the morality of the "conduct that consists in representing, as well as with morality of represented conduct."[56] In order to embark on ethical criticism of the text consistent with deference to literary form, we must train our eyes on the *implied author* – that is, the voice in which the text as a whole speaks to us, and the kind of interaction it promotes in us as readers. When looked at this way, it becomes apparent that the intense focus on genitalia by the protagonists in such a text as *Lady Chatterley's Lover* represents a surrender of agency and subjectivity in a world of rigid sexual mores, translating it into a celebration of freedom and a simultaneous concern for the subjectivity of the partner.[57] This form of objectification is benign, and indeed, desirable.

Several questions remain as to the viability of this exercise in a court of law. As held by the Seventh Circuit Court of Appeals in *American Booksellers Association v. Hudnut,*[58] to identify pornography that has the power to "subordinate" living human beings requires a "certain sleight of hand" to be incorporated as a doctrine of law. The determination of the meaning of any sexualised presentation relies heavily on context, specifically on such factors as, *inter alia,* the purpose of the presentation, the size and nature of the audience, the surrounding messages, the expectation and attitude of the viewer and the location where the presentation takes place.[59] Such assessment is particularly difficult in the case of sexual imagery, the impact of which on the viewer is "often multiple,

55 Martha C. Nussbaum, *Ibid,* 214.\

56 Martha C. Nussbaum, *Ibid,* 217.

57 Martha C. Nussbaum, *Ibid,* 230.

58 598 F. Supp. 1316 [The decision struck down the anti-pornography ordinance drafted by feminists Catherine MacKinnon and Andrea Dworkin for the City of Minneapolis. The Court viewed the Ordinance as permitting only one "correct" and "approved" view of women and silencing all other perspectives. Government cannot ordain preferred viewpoints this way, however pernicious the silenced viewpoint may be. The decision was affirmed by the US Supreme Court in *Hudnut v. American Booksellers Association, Inc.*, 475 US 1132].

59 Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Task Force Et Al., in* American Booksellers Asssociation v. Hudnut, 21 U Mich. J. L. Reform 69, 107 (1988).

contradictory, layered and highly contextual."[60] Thus, there can be stark disagreements over what sexual imagery is degrading to women. Some might consider the image of a woman lying on her back provocatively, inviting intercourse as an illustration of women's subordination, while others might see in the same image women's sexual emancipation, independence and initiative.[61] Others may consider any sadomasochistic sex involving women as subordinating women, despite several studies demonstrating that the submissive partner retains control in such situations,[62] and Nussbaum's cautious statement that the mutual trust placed in each other in such an act can render it an example of benign objectification.

Further, anti-censorship feminists worry that the any objective standard that courts are required to apply to judge what images degrade women will lead to the imposition of a majoritarian view of "correct" sexuality which would marginalise the least conventional and privileged within a diverse sexual community.[63] This interferes with the right to "moral independence" as postulated by Dworkin, which is the "the right not to suffer disadvantage in the distribution of social goods and opportunities...just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong."[64]

Again, such paternalistic positioning by anti-pornography feminists on behalf of women as a whole fails to take account of the possibility that even pornography which is problematic, can be seen as providing a libratory experience for women long considered sexless or whose sexuality had been tethered to religious and social dicta. By a single stroke it ends sexual repression and creates spaces for the expression of female sexuality in the public imagination. To the extent pornography endorses male supremacy, it is a corrosive influence - but it also represents a radical impulse by rejecting sexual expression.[65] The importance of such a space cannot be overemphasized in India, where women's sexuality is constantly policed. For instance, the now banned online porno comic strip '*Savita Bhabi*'

60 Nan D. Hunter and Sylvia A. Law, *Ibid,* 106.
61 Nan D. Hunter and Sylvia A. Law, *Ibid,* 108.
62 Jeffrey J. Sherman, *supra* note 46.
63 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 109.
64 Ronald Dworkin, *Do We Have a Right to Pornography* in A Matter of Principle 353 (Harvard University Press, 1985).
65 Nan D. Hunter and Sylvia A. Law,*supra* note 59, 121.

depicted an attractive, middle-class Indian housewife who is sexually promiscuous. Her casual attitude to sex and her ability to get away with her escapades every single time blazes a trail of sexual transgressions.[66] A survey of other pornographic material of Indian origin will reveal that its remarkable character is its ordinariness, its ability to visibilize women who do not meet socially accepted standards of beauty. What we see is a reversal of the mainstream obsession with slender, fair women, pointing to a schism between the body we desire socially and that we yearn for sexually.[67]

Finally, the most pressing concern with the targeting of sexually explicit material alone is its sheer arbitrariness. Mainstream media are awash with images and representations of women that are derogatory, but not necessarily sexually explicit. While, "pornography may *sexualise* women's inequality, but advertising and romance novels plausibly *glamorise* and *romanticize* it respectively; and hence may celebrate, authorize and legitimise women's inequality in the same way as pornography."[68] In the Indian context, this has taken the form of particularly obnoxious articulations of gender roles in advertisements and cinema. Indeed, we need to apply a more rigorous standard of scrutiny with respect to such images because they come clothed in the garb of "culture" and "propriety" and make women complicit in their own subordination. Moreover, commercial images are available for unrestricted viewing, including to impressionable young children during prime time hours, and the conditioning effect of representations that portray women as beings solely interested in inconsequential, "womanly" matters incapable of taking on leadership roles should surely be more worrying.[69] The advertisement of products promising to enhance complexion provide us an acute and culturally specific insight into the formation of such attitudes. Products such as 'Fair and Lovely' are promoted with the message that only women of fair skin can succeed at the workplace or find an eligible suitor. Likewise, a recent advertisement for vaginal bleach sparked outrage from various women, and feminist websites such as Jezebel, for portraying a woman whose husband was dissatisfied

66 ShohiniGhosh, *The Pleasures and Politics of Pornography,* September 2009, *available at* http://himalmag.com/component/content/article/617-the-pleasures-and-politics-of-pornography.html.

67 Shohini Ghosh, *Ibid.*

68 J. Cocks, *The Oppositional Imagination* (Routledge, London, 1989); M. Valverde, *Sex, Power And Pleasure*, (The Women's Press, Toronto, 1985) *as cited in* Stanford Encyclopaedia of Philosophy. *Pornography and Censorship* 30 May 5, 2004, *available at* http://plato.stanford.edu/ entries/pornography-censorship/.

69 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 101.

with her because – well, her vagina was too dark – only to later discover the joys of 'Clean and Dry' "Intimate Wash" as they frolicked in the house with renewed lust and family members watched with approval.[70] Thus, the fear of sexually explicit material, while imagery that is derogatory to women surround us everywhere, is perhaps rooted in a disgust of the female body, more than anything else.[71] Catherine MacKinnon, who is one of the most well-known proponents of the feminist anti-pornography movement, rationalises this distinction by arguing that pornography, as opposed to any other form of degrading representation of women, is not merely symptomatic of the subordinate position of women caused by other material social and economic conditions – rather, it is the central cause of women's oppression so that for as long as pornography exists, women will be unfree.[72] With all due respect to MacKinnon, it is submitted that such sophistry does not provide the "best understanding of the complex, deep-seated and structural causes of gender inequality."[73] Although this is far too massive an exercise to undertake within the limited scope of this paper, the factors that feminist scholars have identified for the asymmetrical position of women range from the gendered labour market, ascription of child-rearing and other care-giving roles to women along with the absence of systemic assistance for these tasks, impediments to reproductive autonomy and freedom, devaluation of work traditionally required to be done by women, segregation and lack of access in education and athletics, etc. Suffice it to say that "factors far more complex than pornography produced the English common law treatment of women as chattel property and the enactment of statutes allowing a husband to rape or beat his wife with impunity."[74] The point that is being urged is that anti-pornography advocates have not demonstrated a qualitative difference between pornography and less explicit forms of degrading representation of women that are also likely to reinforce and fortify negative stereotypes of women. Therefore, to prohibit pornography solely, is to act on prejudice, and to threaten the transmission of a whole lot of communication that skirts the margins of the pornography definition. The latter point is explicated in the next section.

---

70 Alexandra Sifferlin, *Skin-Lightener for Woman's Private Parts Sparks Controversy*, Time Healthland, April 17, 2012 *available at* http://healthland.time.com/2012/04/17/skin-lightener-for-womens-private-parts-sparks-media-controversy-and-safety-concerns/#ixzz2B0o4nGH9.

71 Martha C. Nussbaum, Hiding from Humanity: Disgust, Shame and the Law 134-47 (2004).

72 MacKinnon, C., 1984, Brief, Amicus Curiae, American Booksellers Association Inc. et al. v. William H. Hudnut III, US District Court, Southern District of Indiana, Indianapolis Division.

73 Nan D. Hunter and Sylvia A. Law, *supra* note 59, 124.

74 Nan D. Hunter and Sylvia A. Law, *Ibid.*

III. THE BAN ON PORNOGRAPHY AND THE CHILLING OF SPEECH

The problem of vagueness in the definition proposed by anti-pornography feminists and the interpretive difficulties in implementing a prohibition in an objective form have already been commented upon. The danger that such vagueness poses to socially useful speech is best understood through the lens of "chilling of speech". The chilling effect is the deterrent effect produced on any person against engaging in an activity that is constitutionally protected, by a government regulation that is not specifically directed at that activity.[75] Litigation is *per se* an uncertain process, and we cannot repose much faith in our ability to predict the outcome of any proceedings;[76] in this context, judicial preference must be for a view that sees the harm of overbroad restriction as outweighing the harms of the overextension of freedom of speech.[77] Pursuant to this logic, the expression most likely to be chilled is expression at the margins of protection. Thus, speakers engaging in vitriolic political advocacy, disseminating unflattering information about a public official, or producing sexually explicit art are all likely to think twice before expressing themselves, fearing that their speech might constitute incitement, defamation and obscenity respectively. This fear is well-founded particularly in the context of obscenity, wherein judicial imagination may struggle to view expression on the borderline as useful, especially when it appears in forms hitherto unseen or unheard.[78] However, there is an interest in protecting this speech because free expression is necessary for human development and we cannot predict what kind of intellectual or moral development is possible from any manner of speech.[79] Besides,

75 Frederick Schauer, *Fear, Risk and the First Amendment: Unravelling the "Chilling Effect"*, 58 B.U.L. Rev. 685, 693 (1978).

76 Hermando Rojas, Dhavan V. Shah and Ronald J. Faber, *For the Good of Others: Censorship and the Third Person Effect,* 8 International Journal of Public Opinion and Research, 163, 167 (1996) [Psychological research tells us there is sufficient reason to be wary of judicial decision-making on obscenity on account of the *Third Person Effect*, which is said to be at the heart of the increasing support for censorship. The effect is characterized by an exaggerated expectation of media impact on others, as compared to the impact on the self. The cause behind the phenomenon is fundamental attribution error – when we view the message as negative, we attribute it to have more influence on others; When the message is positive, we attribute more effects to the self since we believe we are smart enough to recognise its value].

77 Frederick Schauer, *Supra* note 75, 687-88.

78 Leslie Kendrick, Speech, *Intent and Chilling Effect* presented at Legal Theory Workshop 42 (UCLA School of Law, Marh 22, 2012) *available at* http://www.law.ucla.edu/home/index.asp?page=817; Hin Yan Liu, *Pornography as Protected Speech? The Margins of Constitutional Protection*, 2 UCL Human Rights Review 224, 235 (2009).

79 Ronald Dworkin, *supra* note 64, 338.

it can be argued that rights are most in need of being defended not where they are uncontested, but where they are in danger of extinguishment.

To use one example, one might refer to the character of Post-Modern art and its fit within the existing contours of obscenity law. Post-Modern art emerged as a rebellion against the assumptions of Modern art which believed in the distinction between good and bad art, requiring of good art that it be pure, sincere, original and serious.[80] Post-Modern art, on the other hand, rejects the notion that art has to be pure or sincere in anyway; it embraces the inevitability of derivation, mocks ideas of originality and replaces sincerity with cynicism.[81] When one of the early seeds of Post-Modern art, Marcel Duchamp's *Fountain* – which consisted of a toilet bowl placed upside down in a gallery - was first exhibited before an audience, it provoked shock and outrage. Thus, the movement attacks the very criterion that courts believe art must satisfy in order to justify the use of sexually explicit imagery, in that it undermines the very idea that art should have a purpose, be expressed in a particular form or reflect certain values. If this is subversive for the art community, it is bound to be near incomprehensible for courts of law. It is important to appreciate the nature of the threat from the judiciary - the danger is not that *Ulysses* will be banned again, but that a second-rate *Ulysses* that the Court does not regard as sufficiently "serious" will be banned.[82]

A survey of Indian case-law will demonstrate that even where the Court has rendered outcomes that are laudable, it has adopted reasoning that has no room for boundary-pushing art or anything that does not profess a social purpose as traditionally understood. In *Ranjit D. Udeishi,* the Court begins with a sufficiently nuanced idea by stating that "treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michaelangelo should be made to wear breeches before they can be viewed."[83] However, the Court goes on to say that

---

80 Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YLJ 1359, 1363 (1990).

81 Amy M. Adler, *Ibid,* 1364.

82 H. Kalven, A Worthy Tradition 50 (1988) *as cited in* Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YLJ 1359, 1367 (1990)

83 *Ranjit D. Udeishi, supra* note 12]However, this has not always been the case. In *Suo Motu Rajasthan*, the court took *suo motu* action against television programmes that were allegedly telecast in violation of Rule 6(1)(k) of the Cable Television Networks Rules, 1994, and where found to be indecent or derogatory to women, or likely to deprive, corrupt or injure public morality or morals. The Court specifically directed that "using scantily clad female models for products like car batteries, tobacco, electric inverters, shaving

"where obscenity and are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked." The Court goes one step further and holds that the objective of the law is not to protect those who can protect themselves, but the most vulnerable whose "prurient minds" find in the text not poetry and incisive social criticism, but secret sexual pleasure. This is an unreasonably low threshold that expands the boundaries of obscenity law much beyond the standard of S. 292 which judges obscenity with reference to those who are likely to see the text, and will expose most representations in popular culture to the sceptre of obscenity prosecution. (Eventually, only the expurgated copy was made available in this case) To the Court's credit, this standard has been revised in subsequent cases. In *K.A. Abbas,* while interpreting the powers of the Censor Board, the Court held, "Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read." This standard was repeated in *Samaresh Bose* (in which the Court expressed the fear that the only material available for viewing will eventually be only that which is suitable for adolescents or texts that are purely religious.),[84] *Chandrakant Kalyandas v. State of Maharashtra*,[85] *Ajay Goswami v. UoI,*[86] and *Anand Patwardhan*.[87] Even then, the concern for a paternalistic state to protect the infantile public from corruption is evident. In some cases, this has manifested as a fear of the moving image that has gripped the Court in several cases.[88] In *K.A. Abbas*, the Court held: "the reason for treating cinema or moving image differently is that the motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief

---

appliances and other advertisements should be stopped forthwith", thereby walking into the pitfall of equating degrading representation with explicit representation in all cases].

84 *Samaresh Bose, supra* note 23.

85 (1969) 2 SCC 687.

86 (2007) 1 SCC 143 ["Therefore, we believe that fertile imagination of anybody especially of minors should not be a matter that should be agitated in the court of law. In addition we also hold that news is not limited to Times of India and Hindustan Times. Any hypersensitive person can subscribe to many other Newspaper of their choice, which might not be against the standards of morality of the concerned person."].

87 (2006) 8 SCC 433 ["Therefore, one can observe that, the basic guidelines for the tier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."].

88 Namita Malhotra, Pornography and the Law 15 (Center for Internet and Society).

than mature men and women".We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but a documentary from them as a practical sexual guide would be abhorrent."

Although the court advocates substantial freedom and creative license, it does so conditioned upon acceptable form and delicacy. In the court's view, "carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadir Shah may be permissible, *if handled delicately* and as part of an artistic portrayal."[89] In *M.F. Hussain* v. *Raj Kumar Pandey*[90], the Court, even while upholding the artist's right to depict Bharat Mata in the nude, proceeded to set forth its judgment on what are aesthetic ways to depict nudity. Whether a nude/semi nude picture of a woman is obscene "would depend on a particular posture, pose, the surrounding circumstances and background in which woman is shown." In this case, "the aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked. The nude woman was not shown in any *peculiar kind of posture*, nor her surroundings painted so as to arouse sexual feelings or lust. The placement of the Ashoka Chakra was also not on any particular part of the body of the woman that could be deemed to show disrespect to the national emblem." The day the Court starts dictating the form that art should take, it is only a matter of time before art that does not conform to that mould is rejected as obscene. In other cases, the Court has also defined obscenity in terms of an argument of cultural nationalism, as it did in *Rangarajan v Jagjivan Ram*,[91] "the Censor Board should exercise considerable circumspection on movies affecting the morality or decency of our people and the cultural heritage of the country. The moral values, in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation". Thus, though the Supreme Court has provided valuable outcomes by allowing the unrestricted exhibition of *Bandit Queen* and *A Tale of Four Cities*, the free circulation of *Prajapati* and of adult content in newspapers and the exhibition of M.F. Hussain's paintings, the kind of reasoning that the Court has adopted may not serve us well in hard cases in the future. Further, the decisions cited above have all been handed down by the Supreme Court. The attitudes of the various High Courts to the obscenity question

89 *K.A. Abbas, supra* note 21.
90 Delhi HC judgment dated 8/5/2008 under Criminal Revision Petition No. 280 and 282/2007.
91 (1989) 2 SCC 574.

is another story altogether. To illustrate, even though the Supreme Court held the fictional story at issue in *Samaresh Bose* as non-obscene, the Calcutta High Court stated otherwise: "Pornography it is and with all the gross taste because it has sacrificed the art of restraint in the description of female body and also because in some part it has indulged in complete description of sexual act of a male with a female and also of lower animal."

We have seen that even the judiciary is incapable of formulating a theory of pornography that does not exclude benign representations that are sexually explicit. We don't have any reason to believe that the various administrative authorities who are tasked with determinations of obscenity in India are any more competent in this respect than judges. There are several laws in the country that require administrators or statutory authorities to make such evaluations, such as The Post Office Act, 1893, which prohibits the transmission of obscene matter over post, The Dramatic Performances Act, 1876, which prohibits the performance of obscene plays, the Sea Customs Act, 1878, which proscribes the import of obscene literature, the Cinematograph Act, 1952, which provides for pre-censorship of films and the Press Act, 1951, which proscribes grossly indecent, scurrilous or obscene publications.[92] Most of these laws enable officials to impose prior restraint, with the consequence that the material deemed obscene may never be seen. The existence of moral harm as a ground for obscenity will inform these administrative acts that do not bring to bear the analytical rigour of the judicial mind, and will be grossly damaging to the cause of free expression.

IV. CONCLUSION

The fundamental agenda of the paper is to argue that even though there is much popular imagery that is degrading or belittling, we can never enact a law that embodies a theory of moral harm sufficiently precise that it does not flush out benign speech. It is also sought to be impressed that many popular representations that appear obscene at first blush may serve invisible therapeutic functions, or seek to make a political point, sometimes by challenging our deepest convictions regarding the definitions of art and obscenity. The appropriate legal response to this is not prohibition of the degrading speech; on the contrary, as evidence from

92 Vallishree Chandra and Gayathri Ramachandran, *The Right to Pornography in India: An Analysis in Light of Individual Liberty and Public Morality,* 4 NUJS L. Rev. 323, 323 (2011).

debriefing sessions conducted in pornography research shows us, the solution is to have more speech, so that we can expose the fallacies and myths that offensive speech conveys.[93] To conclude, it would be opportune to refer to the findings of a recent empirical study. The results of the study rebutted the assertions of anti-pornography feminists that pornography diminishes equal opportunities for women in all spheres of society and relegates them to second class citizens,[94] and found instead that pornography is associated with a cultural environment that is more conducive to cultural equality.[95] Of course, this is not to say that pornography causes gender equality – rather, pornography is freely available in politically tolerant societies that are also more likely to lend greater support for the equality of the sexes, thereby showing us that the circumstances to be created for both are the same.[96] The point we need to take away from this is that the interests of free speech and the rights of women are aligned in the same direction. The rejection of moral harm as a ground for obscenity signals a step in precisely that direction.

93 Nadine Strossem, *A Feminist Critique of "the" Feminist Critique of Pornography,* 79 Virginia Law Review 1099, 1185 (1993).

94 Andrea Dworkin and Catherine A. MacKinnon, Pornography and Civil Rights 33 (1988).

95 Larry Baron, *Pornography and Gender Equality: An Empirical Analysis*, 27 The Journal of Sex Research 363, 377 (1990).

96 Larry Baron, *Ibid.*

A COMPARATIVE ANALYSIS OF ENVIRONMENTAL JUDICIAL ACTIVISM IN INDIA AND THE U.S.

Salmoli Choudhuri[*]

ABSTRACT

Till a few years back, the impact of neo-liberalism and indiscriminate harm to the environment as an adjunct to economic growth and progress was being largely ignored. With the proclamation of the precarious state of our ecology by the environmentalists and the scientists pronouncing the idea of 'sustainability' at the Stockholm Conference, there was no option but to chart out a blueprint for the future course of Sustainable Development. With the gradual decline of the concept of 'sovereignty', an international regime for protection of environment is being established. Judiciaries across the globe have played a critical role, with varying degrees of indulgence. This comparative study of judicial environmental activism in the United States of America and India is set in such background. Though existing in different constitutional set-ups, the attitude of the judiciary has shaped the law in a particular mould.

I. INTRODUCTION

From a historical perspective, the protection and preservation of the environment has been integral to the cultural and religious ethos of most communities. Comprehensive awareness and understanding of the prevailing environmental crisis across the globe is a prerequisite to facilitate framing of effective national policies to deal with domestic problems.[1] The rapidly increasing public acceptance of the ecological urgency and the resulting willingness of politicians across the political spectrum to put environmental protection high on their agenda do raise hopes.

Institutional settings and procedural arrangements are imperative for just decisions and distribution of burdens and benefits.[2] John Rawl's *Principle of Justice* provides an Archimedean point for appraising existing institutions as well as the aspirations

* B.A., LL.B. (Hons.), V[th] Year, National Law University, Delhi

1 Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 Michigan Law Review 3 (1996), pp. 570-653.

2 Jonas Ebbesson & Phoebe Okowa, Environmental Law And Justice In Context (2009), Cambridge University Press, p. 12.

generated by them, giving an independent standard for guiding the course of social change.[3] 'Access to justice' is essentially perceived as access to a fair review procedure, whereby decisions, acts and omissions by the public administration, and also by private persons should be challengeable in a court of law or other impartial tribunal.[4] Access to the judiciary in environmental concerns links it to human rights law.[5] The minimum standards on access to legal review procedures were set out in the *UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 1998*[6].

In 1996, the *United Nations Environment Programme* (UNEP) acknowledged the central role played by the judiciary in promoting environmental governance. Subsequently, it developed a program to engage the judiciaries of all countries in pursuit of rule of law in environmental and sustainable development.[7] It has, in the past, partnered several other groups such as the *International Union for Conservation of Nature* (IUCN), to develop environmental resources for the judiciary. From 1996 to 2002, UNEP collaborated with the IUCN to convene six regional symposia on the judiciary's role in promoting sustainable development.[8] The judges who participated in the Global Judges' Symposium on Sustainable Development and Rule of Law acknowledged that, "the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law" at the national and local levels.[9]

---

3 John Rawls, A Theory Of Justice (1972), Oxford University Press, p. 520.

4 Jonas Ebbesson, *Introduction: Dimensions of Justice in Environmental Law,* in Environmental Law And Justice In Context, Cambridge University Press, (J. Ebbesson & Okowa, eds., 2009) p. 13.

5 Jonas Ebbesson, *The Notion Of Public Participation In International Environmental Law*, in 8 Yearbook of International Environmental Law 51; Right to access to courts or other independent or impartial tribunals mentioned in 1948 Universal Declaration of Human Rights, UNGA Res 217, UN Doc A/810(1948).

6 United Nations Declaration on Environment and Development, UN Doc. A/CONF.151/26/Rev.1 (1992), 31 ILM (1992) 1416.

7 United Nations Environment Programme, UNEP Global Judges Programme, vi (2004), http://www.unep.org/delc/EnvironmentalLaw/tabid/54403/Default.aspx

8 *Id* at p. 18.

9 *Id* at p. 14.

In 2009, Pace University School of Law along with other partnerships began the groundwork for creation of the *International Judicial Institute for Environmental Adjudication (IJIEA)* to support the judiciary in addressing contemporary environmental issues.[10] IJIEA is an independent, non-profit research and advocacy organization with a mission to facilitate international collaboration for strengthening the environmental Rule of Law while addressing concerns raised by the Johannesburg principles.[11]

Laws are ineffective unless they are implemented, and much environmental law exists only on paper.[12] Judicial activism has witnessed huge strides inter alia, due to lack of legislations or their ineffective implementation.[13] Domestic courts worldwide are playing an increasingly important role in development of environmental law.[14] India has been suffering from myopic policy-making and implementing in environmental matters and thus, court has posed to be *sentinel qui vive*.[15] Although the legal systems of India and USA are dissimilar, yet their respective judiciaries share some similitude in their attitude.

II. ENVIRONMENTAL JUDICIAL ACTIVISM IN THE UNITED STATES

David Sive claims that in no other political and social movement has litigation played such a dominant role than in the environmental movement in the US.[16] The notion of 'environmental justice' first appeared at the US Federal level in

10 http://www.law.pace.edu/international-judicial-institute-environmental-adjudication-ijiea

11 http://www.law.pace.edu/lawschool/judicialinstitute/WRIPaceFinalreport.pdf

12 The Chief Justice of South Africa, Arthur Chaskalson (Paul Brown, *Judges Pledge to Champion Environment*, The Guardian, August 28, 2002, http://www.guardian.co.uk/environment/2002/aug/28/worldsummit2002.internationalnews1

13 In its Law and Policy Reform, Brief No. 1, April, 2010, the Asian Development Bank mentions, Many DMCs have accepted international obligations under new or amended international environmental laws, yet these have not been sufficiently reflected in national legislation or translated into implementing rules and regulations at national, provincial, and local levels. Even where DMCs have appropriate policy, legal and regulatory frameworks, effective implementation, enforcement and compliance continue to pose challenges.

14 Louis J Kotzé, A. Paterson, The Role Of Judiciary In Environmental Governance: Comparative Perspectives (2009).

15 *See,* Obayya Poojari v. Karnataka State Pollution Control Board, AIR 1999 Kar 15 and Gujarat Water Pollution Board v. Kohinoor Dyeing & Printing Works, 1993(2) Guj. L.R. 1306.

16 In the TVA v Hill [437 US 153 (1978)], the Tennessee Valley Authority indulged in the construction of a dam on the Little Tennesee River which had the potential to cause considerable harm to a particular fish species called snail darter. The relevant provision of law, i.e. Section 7 of the Endangered

the Presidential Executive Order 12898 of 1994.[17] Historically, the mainstream environmental movement in the United States has revolved around the causes of preservation of nature, resource management, and pollution abatement.[18] In 1980s, the multiracial environmental justice movement emerged[19] and demolished the earlier prevalent notion that communities of colour are not 'environmentalists'.

II. CONTRIBUTION OF THE US JUDICIARY

While seeking legal relief for violations of environmental laws the plaintiffs can, by filing a complaint, either approach the court or a particular administrative agency. However, the action of administrative agency is limited in scope.[20]

2.1 Law of standing and class action:

Standing concerns the sufficiency of the plaintiff's stake in an otherwise justiciable dispute.[21] It focuses primarily on the party seeking access to the courts while regarding the issues sought to be adjudicated as secondary.[22] The doctrine of standing derives from Article III of the Constitution, which restricts courts to hearing only cases or controversies.[23]

Standing has been subjected to widespread scholarly criticism[24] primarily directed at erratic application by the Supreme Court.[25] It has been difficult to justify

---

Species Act was quite explicit and the violation of the same occurred in this case. The US Supreme Court observed that the Congress intended that the endangered species be afforded the highest of priority and halted and reversed the trend toward species extinction because the value of endangered species was "incalculable." Thus, injunction was granted to the dam project. Unfortunately, after the case was decided, several amendments were made to the statute which introduced several exceptions to the law. The construction of the dam was accomplished and the fish died out. This case is the striking instance where judicial activism has failed because of legislative restraint on action.

17 Executive Order 12898 of 11 February, 1994.

18 Robert D. Bullard, *Environmental Justice for All*, 110(1) The Crisis 25 (2003).

19 D. Taylor, *Environmentalism and the Politics of Inclusion*, in Confronting Environmental Racism, p. 53, (Robert D. Bullard ed., 1993).

20 EPA Title VI Regulations, 40 CFR, Sec 7.120 (2005)

21 Sierra Club v. Morton, 405 U.S. 727, 731--32 (1972)

22 Flast v. Cohen, 392 U.S. 83, 99 (1968)

23 7 U.S. CONST. art. III, § 2. *See* G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 207 (3d ed. 1986) [*hereinafter* Robinson].

24 Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 Yale Law Journal 425 (1974); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?,* 78 Yale Law Journal 816 (1969); Currie, *Misunderstanding Standing,* 1981 Supreme

the reluctance of legislators to recognize the contribution of environmental groups to the protection of the environment by giving them legal standing. The obstacle seems to be a pretext used by the Crown to paralyze legal action by NGOs rather than a measure intended to repress the abuse of the judicial forum.[26] It is felt that at times the principal effect of the Law of standing is not to screen unmeritorious cases but to delay and increase the cost of proceedings brought up by litigants who are not the principal or traditional users of the courts.[27] Examination of the cases on standing reveals that the majority of the standing challenges are brought not by private parties but by government department and Crown agencies implicating that they are part of the corporate culture of the Crown litigation bureaucracy.[28]

From 1966 to the early 1980s, the plaintiffs tended to prevail in class action certification[29] under Rule 23 of the Federal Rules of Civil Procedure in context of desegregation suits and various shareholder actions.[30] However, for toxic torts and environmental matters, the courts were less willing to accept that the plaintiffs had met the requirements for certification[31], even under the less restrictive form provided by a Rule 23(b)(3) class action.[32] Due to allegation by the plaintiffs of

---

Court Law Review 41; Nichol, *Abusing Standing: A Comment on Allen v. Wright,* 133 University of Pennsylvania Law Review 635 (1985); Nichol, *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint,* 69 The *Kentucky Law Journal* 185 (1980-81); Nichol, *Rethinking Standing,* 72 California Law Review 68 (1984); Sax, *Standing to Sue: A Critical Review of the Mineral King Decision,* 13 Nat. Resources J. 76 (1973); Scott, *Standing in the Supreme Court-A Functional Analysis,* 86 Harvard Law Review 645 (1973); Stewart, *The Reformation of American Administrative Law,* 88 Harvard Law Review 1669, 1723-47 (1975).

25 *E.g.,* Nichol, *Abusing Standing: A Comment on Allen v. Wright, supra* note 11, at 635.

26 Sven Deimann & Bernard Dyssli, Environmental Rights: Law, Litigation And Access To Justice (1995).

27 A.J. Roman, Pikkov, *Public Interest Litigation in Canada*, in Into the Future (1990), p.180 (A.J. Roman, Pikkov, eds.).

28 *Ibid.*

29 Class And Public Interest Litigation: The Raffles Town Club Saga, http://www.aseanlawassociation.org/9GAdocs/Singapore.pdf

30 *See generally,* Cypress v. Newsport News Gen. & Nonsectarian Hosp. Assoc., 375 F. 2d 648 (4th Cir. 1967) (certifying suit in the context of discrimination against an African physician and his patients); Bragalini v. Biblowitz, No. 67 Civ. 4988, 1969 U.S. Dist. LEXIS 12992 (SDNY Dec 16, 1969) (certifying a stockholder suit under Rule 23(b)(3))

31 In Sierra Club v. Morton, 405 US 727 (1972), it was laid down that a non-profit organization which worked for environmental causes did not have a standing in a court of law and for the purposes of litigation, a certain individual must prove injury. The dissenting Judgment by William O. Doughlas, J., however, was remarkable. He expressed grief over the prevalent law: 'Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land'.

32 Charles W. Schwartz and Lewis C. Sutherland, *Toxic Tort Symposium: Class Certification For Environmental And Toxic Tort Claims*, 10 Tulane Environmental Law Journal, pp. 187, 192-94, (1997).

differing types of exposure at different times as well as frequently changed products or productive procedures of the defendants, individual issues were seen as predominating while class actions were viewed as inappropriate.[33] Class action became predominant after 1980s.[34] However, the decision in *Students Challenging Regulatory Agency Procedures*[35] was a much welcome deviation of the existing trend.[36] *Scenic Hudson Preservation Conference*[37] reflects another story of success.

Justice Scalia's 'slash and burn' method' gave a severe blow to the reform measures.[38] The Supreme Court has observed that the law of standing is a complicated specialty of federal jurisdiction, the solution to the problems of which is, in any event, more or less determined by specific circumstances of individual situation.[39] In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.,* the law on 'standing' again underwent a cataclysmic transformation as FOE was granted legitimate standing before the court of law.[40] With the recent Massachusetts decision[41], the law related to 'standing' has become relatively flexible.

---

33 *Id.*

34 In Re: Agent Orange Product Liability Litigation, (818 F. 2d. 145-280) 2nd Circuit, 1987, exemplifies the large class action lawsuit. In this case, thousands of Vietnam veterans collectively sued the manufacturers of toxic chemical and as a defoliant in the Vietnam War. They claimed that the chemical, commonly named Agent Orange – a form of dioxin – caused them to suffer long term chronic physical injury and also emotional injury. The litigation was complicated by the fact that there was no incontrovertible evidence that Agent Orange actually caused any of the claimed disability. In this case, litigants formed factions, and fought among themselves. This factionalism did not, however, derail the judge-administered settlement; the judge was strong and decisive, and refused to let that happen. The settlement award was to be distributed in two ways, namely, cash awards to those who appear to have suffered the most severe injuries; and the delivery of rehabilitative services and health care to all other present and future claimants.

35 *United States* v. *Students Challenging Regulatory Agency Procedures*, 412 US 669 (1973).

36 In the instant case, few students of a law schools alleged collusion between state machinery and corporate bodies. The question of standing had again come up and the majority of the judges observed that each of the students were 'aggrieved' or 'adversely affected' and could prove 'specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected'. Thus, the suit was maintainable. However, the court maintained that standing is not confined to one who can show economic harm, but extends to safeguard 'environmental and aesthetic wellbeing'. The Court further opined that the judicial order of suspension of the administrative order of Interstate Commerce Commission (due to non-compliance of NEPA) by means of grant of injunction was not appropriate.

37 SHPC v. Federal Power, 407 US 926 (1972).

38 Discussed later.

39 US ex rel. Chapman v. Federal Power Comm, 345 US 153

40 (98-822) 528 U.S. 167 (2000).

41 549 U.S. 497 (2007); discussed later.

2.2 Causation

Prior to the decision in *Duke Power Co. v. Carolina Environmental Study Group Inc.*[42], the court sought a stricter relation between cause and consequences.[43] However, subsequent to the judgment, the norm was relaxed.[44] The court granted an order of injunction against a nuclear power plant in the case, disregarding that none of the consequences had direct or proximate relation. This was done despite the harm caused being primarily aesthetic and environmental.

2.3 Recent trend:

The law has developed both on the *legislative* and *judicial* fronts.

The recent amendments introduced to Rule 23 in 2003 with respect to availability of opt-out opportunities for class members, appointment of attorneys, scrutiny of fee awards, judicial review of settlements, and mechanical details of class certification and notice, have indeed opened vast new opportunities for toxic tort litigation and provided a smorgasbord of new options for the federal judiciary.[45]

The *Massachusetts* case[46] has, perhaps, revolutionized the entire arena of environmental jurisprudence in US.[47] Not only did the notion of 'standing' get liberalized, but the 'precautionary principle' was also adequately emphasized.[48]

---

42 438 U.S. 59 (1978).

43 *Flast,* 392 U.S. at 102.

44 John D. Echeverria, Standing Up For The Environment: Justices Should Welcome Green Groups To Court, http://www.gelpi.org/gelpi/research_archive/standing/StandingUp WelcomeGreen.pdf

45 Kenneth S. Rivlin and Jamaica D. Potts, *Proposed Rule Changes To Federal Civil Procedure May Introduce New Challenges In Environmental Class Action Litigation*, 27 Harvard Environmental Law Review, pp. 523-29.

46 549 U.S. 497 (2007)

47 *Read* Michael Sugar, *Massachusetts V. Environmental Protection Agency*, 31 Harvard Environmental Law Review, pp. 531-44 (2007).

48 The court mentioned that it is not appropriate for a court to indulge in rule-making when the power has already been vested with a separate body; however, the statute under consideration provided the court with such a power and moreover, 'While regulating motor-vehicle emissions may not by itself *reverse* global warming, it does not follow that the Court lacks jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. *See* Larson v. Valente, 456 U. S. 228 , n. 15. Because of the enormous potential consequences, the fact that a remedy's effectiveness might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant'; *see,* the text of the judgment.

Massachusetts along with eleven other states and three cities, sued the Environmental Protection Agency (EPA) for an injunction requiring the agency to regulate carbon dioxide emissions from new motor vehicles using its authority under § 202(a)(1) of the Clean Air Act, found in 42 U.S.C. § 7521(a)(1). Massachusetts had petitioned the EPA to regulate greenhouse gases because of global warming concerns, while the EPA denied having the statutory authority to regulate greenhouse gases.[49] The Supreme Court held that such citizens' groups had standing, hence no evidence of personal injuries was required, and that the EPA was duty bound to regulate tailpipe emissions of greenhouse gases. The court paying reverence to the opinion of Justice Holmes in the case of *Georgia v. Tennessee Copper Co*[50] said that 'the State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain'.

Justice Stevens had penned the majority decision, with Justice Scalia dissenting. The latter's decision ultimately had a great negative influence on environmental litigations on the question of 'standing'[51] as they mainly relate to review of administrative orders. However, it did not come as a surprise since his ideology was that of neo-conservatism and judicial restraint[52]. Justice Stevens, on the other hand, rejected that environmentalism was some sort of a transcendental force which gave authority to the judges to overrule statutory agencies.[53]

---

49 http://law.duke.edu/publiclaw/supremecourtonline/certgrants/2006/masvenv

50 206 U.S. 230, 237 (1907)

51 *See,* Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk University Law Review 881 (1983)*;* he appreciates the fact that 'standing' must be interpreted strictly to adhere to the principle of 'separation of powers'.

52 *See Chief Justice Burger to Retire From Supreme Court; Reagan Nominates Rehnquist as Successor, Scalia to Fill Vacancy,* 17 Environment Reporter (BNA) at 217 (June 6, 1986). *See also,* Boyd, *Bork Picked for High Court; Reagan Cites his 'Restraint'; Confirmation Fight Looms,* New York Times, July 2, 1987, at 1, col. 6; *See* R. Posner, THE FEDERAL COURTS 208 (1985); *See Two Nominees, One Philosophy,* National Law Journal, June 6, 1986, at 15, col. 1.

53 *Chevron v. NRDC* (1984), he wrote a majority opinion for the Court that sternly rebuked the D.C. Circuit for substituting its judgment for that of the Reagan EPA, which had sought to give industry more flexibility in meeting their Clean Air Act obligations. Though a bitter defeat for environmentalists, *Chevron,* which holds that judges must defer to agencies when they make a reasonable judgment about an ambiguous law, is rightly hailed today as a landmark of both administrative law and judicial restraint; *see,* http://grist.org/article/2010-04-14-justice-stevens-pro-environmental-legacy-embodies-a-simple-appro/

III. ENVIRONMENTAL JUDICIAL ACTIVISM IN INDIA

Public Interest Litigation or Social Action Litigation has vigorously flourished since 1979.[54] Post-emergency judicial activism has been inspired by a philosophy of constitutional interpretation that looked at the Constitution not as a mere catalogue of rules, but as statements of principles of constitutional governance. The basic structure of the Constitution being an inarticulate premise of the Indian Supreme Court, its articulation requires reference to the Preamble and the principles that emanate from it.[55]

Ramchandra Guha claims that the environmental movement in India is a child of the sixties that has stayed its course.[56] The judiciaries in South Asian countries are said to lead the world as a guarantor of sustainable development and the environment.[57] PIL presented the green activists with an opportunity to knock at the doors of judiciary, seeking its intervention in acts of commission and omission on the part of the Executive in environmental matters. With the adoption of the Rio Principles in June 1992, particularly the Precautionary Principle, the scales weighed heavily against development. This was liberally interpreted to mean that the possibility of an adverse outcome, however remote, was enough to stall or put on hold a project. Any possibility of trade-off between ecology and economic welfare, even when possible, were shunned.[58] At the climate change conference in Cancun, India not only played a leading role in the negotiations but also ensured that most of its concerns were addressed.[59]

International legal experts have been unequivocal in terming the Indian courts of law as trailblazers, both in terms of laying down new principles of law and

54 Upendra Baxi, *Who bothers about the Supreme Court: The Problem of Impact of Judicial Decisions*, http://www.conectas.org/IBSA/whobothersabouttheSupremeCourt.pdf ,

55 S.P. Sathe, Judicial Activism in India: Transgressing Borders And Enforcing Limits, Oxford Publication.

56 Ramachandra Guha, Environmentalism: A Global History, Oxford University Press, 2000.

57 Nicholas A. Robinson, *A Common Responsibility: Sustainable Development and Economic, Social and Environmental Norms*, 4 Asia Pacific Journal of Environmental Law 195, 195 (2000); *See also* Parvez Hassan, *In Pakistan, the Judiciary Leads the Way*, 15 The Environmental Forum 48 (1998). All cited in Parvez Hassan and Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 The *Virginia Environmental Law Journal* 215.

58 Jairam Ramesh, *Stress On Community Forest Rights*, Pioneer, 4th January, 2011.

59 This relates to the shift of the 'peak year' and escape from voluntary pledges to 'legally binding' commitment on reduction of level of green-house gases emission; *India escapes heat at Climate meet*, Indian Express, 12th December, 2010.

in the introduction of innovations in the justice delivery system.[60] The increasing interest and a sense of inevitability in approaching the corridors of justice for every conceivable environmental problem, by public interest groups and individuals, bear witness to this unprecedented trend.[61] 3

3.1 Contribution of the Indian Judiciary

'No one can tell what the law is until the Courts decide it.' (C. J. Hamson)

3.1.1 Relaxing the requirements of locus standi and promoting access to justice:

A combination of variables, both internal (domestic environmental and social variables) and external (international trade factors) has brought about a positive change in the attitude towards environmental protection in India. The cue of PIL was taken by the Indian judiciary from the US Supreme Court[62]. In the Judges' Assets case[63], the court held that a letter written by public spirited person to it would be treated as a petition. PIL is aptly called the brain child of Krishna Iyer, J. and Bhagwati, J. The Apex Court opined in *Bandhua Mukti Morcha*[64] that Article 32 of the Constitution alongside empowering it to issue writs and direction, also authorized it to forge new remedies and strategies. After 1990s the environmental movement in India was virtually led under the aegis of Kuldip Singh, J., who liberally imported the PIL jurisprudence into the environmental sphere.

3.1.2 Forging remedies and planning strategies, thus, creating rights:

Citizens have a choice of three civil remedies to obtain redress:

(1) a common law tort action against the polluter[65];

60 *See* Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in Human Rights approaches to Environmental Protection, Alan E. Boyle and Michael R. Anderson (eds.) (1st ed., 1998).

61 M.K. Ramesh, *Environmental Justice Delivery in India: In Context*, 2 Indian Journal of Environmental Law No. 2, (2001).

62 *Refer to,* Gideon v. Wainwright (1963) 372 US 335, where a postcard from the prisoner was treated as a petition.

63 S.P. Gupta v. Union of India, 1981 Supp SCC 87 at 210

64 AIR 1992 SC 38

65 In Vellore Citizen's Welfare Forum v. Union of India, AIR 1996 SC 2715, the Supreme Court traced the constitutional and statutory provisions that protect environment to the 'inalienable common law right'.

(2) a writ petition to compel the agency to enforce the law and to recover the clean up or remedial cost from violator; or
(3) in the event of damage from a hazardous industry accident, an application for compensation under the Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995.[66]

Additionally, criminal remedies are provided under, Sec 133 to 144 of the Code of Criminal Procedure, Sec 268 of the Indian Penal Code, Sec 19 of the Environmental Protection Act, 1986, while Sec 91 of the Code of Civil Procedure provides for civil remedy. The Indian courts have built an entire environmental law jurisprudence based on fundamental rights of the citizens under the writ jurisdiction.[67]

The tort actions are of little practical utility due to the abysmally low rate of compensation. However, in cases where injunction had been granted, the relief provided had met the needs of the aggrieved.[68] The evolution of principles like 'polluter pays', 'strict liability'[69], 'absolute liability'[70], 'precautionary principles' in environmental law can be traced to intermingling of common law doctrines and reports framed and treaties signed in International conventions.

Judicial recognition of environmental jurisprudence, in the backdrop of industrialization, reached its peak with the pronouncement of the Supreme Court that the right to wholesome environment is a part of Article 21 of the Constitution.[71] *Rural Litigation and Entitlement Kendra vs. State of UP*[72] was the

66 Armin Rosencranz, Shyam Divan & Martha Noble, Environmental Law And Policy In India, (1991), pp.87-111

67 Dr B.R. Ambedkar had called Art 32 as the 'heart and sole of the Indian Constitution'; Mahendra Singh (ed.), V.N. Shukla's Constitution of India (2010), p.936.

68 Injunctions are regulated by Sections 94 and 95 and Order 39 of the Code of Civil Procedure, 1908; they have been granted in very few situations; *refer to,* Ram Baj Singh v. Babulal, AIR 1982 All 285 and Manohar Lal Chopra v. Rai Baja Seth Hiralal, AIR 1962 SC 527

69 Rylands v. Fletcher, (1868) LR 3 HL 330

70 MC Mehta v Union of India, AIR 1987 SC 1086; the absolute liability principle so adopted was first applied by the Madhya Pradesh High Court to support its award of interim compensation to the Bhopal victims; Union Carbide Corporation v Union of India (Civil revision No. 26 of 1988, 4th April, 1988). In light of *Shriram,* Justice Seth of the High Court described the liability of the enterprise to be 'unquestionable'.

71 Indrajit Dube, ENVIRONMENTAL JURSIPRUDENCE: POLLUTER'S LIABILITY (2007), Lexis Nexis, Butterworths, New Delhi.

72 AIR 1985 SC 652.

first case where Supreme Court made an attempt to look into the dilemma between environment and development. The case concerned limestone quarrying in the Doon Valley which was causing ecological imbalance and health hazards. The court ordered its closure while acknowledging that though it would undoubtedly cause hardships, it was a price which had to be paid for protecting and safeguarding the right of people to live in healthy environment.

The M.C. Mehta's cases decided subsequently by the Supreme Court, indirectly approves the right to a healthy environment. In *Subhash Kumar v. State of Bihar*[73], the Supreme Court stated that the right to life includes the right of enjoyment of pollution free water and air for full enjoyment of life. Various High Courts across in India declared that the right to a clean environment was included in the right to life under Article 21. *Damodhar Rao v. S.O Municipal Corporation Hyderabad*[74] is a land mark case in this regard. Courts in India have slowly but steadily enlarged the scope of the right to environment.

In *Vellore Citizens Welfare Forum v. Union of India*[75], Kuldip Singh, J., stated that in view of the constitutional and statutory provision, the 'Precautionary Principle' and Polluter Pays Principle' are part of the environmental law of our country. In *M.C. Mehta v. Kamal Nath*[76], the Supreme Court made 'Public Trust Doctrine' a part of the law of the land. This doctrine enjoins upon the government to protect the resources for the enjoyment of the general public. The apex court in *Indian Council for Enviro-Legal Action v. Union of India*[77] stated that even though it is not the function of the court to see the day to day enforcement of the law, the failure of enforcement agencies to implement the law to protect the fundamental rights necessitated judicial activism.

The Court has also weighed the right to wholesome environment against other fundamental rights, like, right to practice religion[78], right to speech and

73 AIR 1987 SC 985, AIR 1987 SC 982, AIR 1987 SC 1086.
74 AIR 1987 AP 170
75 (1996) 5 SCC 647
76 (1997) 1 SCC 388
77 1996) 5 SCC 281
78 Church of God (Full Gospel) v. KKR Majestic Colony Welfare Association Air 2000 SC 2773; Om Birangana Religious Society v. State, (1996) 1000 CWN 617; Maulana Mufti Syed Mohd. v. West Bengal, AIR 1999 Cal 15.

expression[79], right to trade and commerce[80] and articulated the supremacy of the former. The jurisprudence behind Articles 48A[81] and 51A (g)[82] have also been injected in framing environmental justice.

3.1.3 Creating newer institutions of justice:

The concept of 'Green bench' has been the brain child of the Supreme Court of India. In *Vellore Citizens' Welfare Forum v. Union of India*[83], the Apex Court noted that such institutions must be set up with powers similar to those of the higher judicial bodies to tackle all the environmental issues. As a result of this, the National Green Tribunals Act…

3.2 Impediments challenging judicial activism in India today

India, like most developing countries, is faced with the daunting task of rapid development, while at the same time preserving and protecting its environment.[84] The Bhopal gas tragedy remains a dark blot on the environmental jurisprudence in this country.[85] With the retirement of Justice Kuldip Singh, the dynamism has also substantially reduced. Though the Supreme Court with its all good intentions has tried to strike a balance between the development and protection of environment, in several decisions it has failed to deliver the ideals it

79 P.A. Jacob v. Superintendent of Police, AIR 1993 Ker 1; Rajnikanth v. Study, AIR 1958 All 360.

80 Abhilash Textiles v. Rajkot Municipality, AIR 1988 SC 57; Wing Commander Utpal Barbara v. State of Assam, AIR 1998 Gau 78; S. Jagannathan v. Union of India, (1997) 2SCC 87; M C Mehta v. Union of India, AIR 1988 SC 1037.

81 Article 48A states, 'Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'; Virender Gaur v. State of Haryana, 1995 (2) SCC 577; Indian Council for Enviro-Legal Action v. Union of India, AIR 1996 SC 1446; RLEK, Dehradun v. State of UP, AIR 1985 SC 652.

82 Article 51A(g) states, 'It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;; MC Mehta v. Union of India, AIR 1992 SC 382, L K Koolwal v. State of Rajasthan, AIR 1988 Raj 2.

83 AIR1996SC2715; the Supreme Court had passed similar orders for states other than that of Tamil Nadu in view of increasing number of petitions relating to disputes over environment and forest issues.

84 Ayesha Das, *Judicial Activism in The Development And Enforcement Of Environmental Law: Some Comparative Insights From The Indian Experience*, 6, Journal of Environmental Law, Issue2, p. 243-262 (1994).

85 Even after 25 years justice has not been meted out to the victims. Not only the criminal liabilities have been deflected, but the civil penalties have also not been seriously harped on.

conceived. Cases like *N.D. Jayal v. Union of India*[86] and *Narmada Bachao Andalon v. Union of India*[87] are the best examples of this failure.

The administrative and legislative barriers pose obvious hurdles to judicial remedies. There is no direct co-relation between the State Pollution Control Board's[88] mandate and staff strength; the ratio of technical to non-technical staff is also asymmetrical; chairman and member-secretary are not adequately qualified; human resource planning is not strategic; the laboratories and regional offices are not planned; the staff do not undergo sufficient training; the environmental standards are not met with in most of the cases as the penalties imposed by the law are too high to be imposed on environmental matters.[89] Shyam Divan has stated that if the Supreme Court's activism is to have a lasting impact, a new political will in the form of budgetary allocations at the municipal level and greater community pressure on board officials is necessary. Left to themselves, the PCBs will revert to a culture of slipshod enforcement.[90]

VI. COMPARISON

The confluence of Indian and American environmental jurisprudence, perhaps reached a dramatic tenor at the UCC trial at Justice Keenan's court when the 'ambulance chasing lawyers'[91] from India, in order to retain the American forum for trial, dug up the filth of Indian judiciary and exposed its tarnished image, whereas UCC highlighted the magnificence of 'Indian legal system, its development and innovations'[92].

4.1 Class action:

Though the Indian judiciary had taken this as a cue from the American legal system, yet its efficacy has outdone the latter. The factum of 'standing' has

86 2003 (7) SCALE 54.
87 Writ Petition (civil) 328 of 2002.
88 The governing authority constituted by the Government to look into the environmental matters
89 Armin Rosencranz and Videh Upadhyay, *Some Suggestions and Recommendations towards a Model State Pollution Control Board (SPCB) In India*, 1, Environmental Law and Practice Review (2011).
90 Shyam Divan, *Cleaning the Ganga*, Economic and Political Weekly, p. 1557, 1st July, 1995,.
91 C.M. Abraham and Sushila Abraham, *The Bhopal Case And The Development Of Environmental Law in India*, 2 The International and Comparative Law Quarterly (1991), p. 340.
92 *Id.*

often come in the way of pro-active judicial reforms. Order I rule 8[93] of the Code of Civil Procedure and Rule 23 of the Federal Rules of Civil Procedure and 28 USCA Section 1332 (d) lay down the law for class action. Unlike India, there are strict standing rules which are to be followed before courts in US.[94] While filing a suit, it is important to determine whether the same is to be filed in the state or the federal court.[95] Prudential standing requirements[96] are also to be met in the US as a necessary outcome of strict compliance of 'separation of power'. The mechanism is put in place to check that the courts do not usurp the jurisdiction of legislature and executive.

4.2 Procedure for framing rules for court administration and management:

Judicial Conference constitutes the rule-making body in the US[97]. The rules formulated by it are scrutinized by the Supreme Court and later amended by the Congress if any changes are required. These rules are mainly with regard to the management of the working or administration of the federal courts. This is due to the federal structure in the US.

4.3 Rule making procedure:

In the US, the Congress delegates the rule making power to an expert agency which publishes its proposal of rule making in the Federal Register which is accessible to the public.[98] Any interested person can propose amendments to it.[99] After taking all the comments the agency brings out the final rule, after which the people can again approach the court and challenge the constitutionality of the same. The rules are given similar force and effect as that of legislations.

---

93 Kodika Gounder v. Velandi Goundar, AIR 1955 Mad 281, 286.

94 The requirements of 'standing' have been discussed previously.

95 28 USC Sec 1331 (2005), conferring jurisdiction to federal courts for federal question cases and controversies, and 28 USC Sec 1332 (2005), conferring jurisdiction to federal courts for cases or controversies between citizens of different states.

96 This is not found in the Constitution, but comprises of judicially self-imposed limits on the exercise of federal jurisdiction; Lujan v defenders of Wildlife, 504 US 550, 560 (1992).

97 *Refer to,* http://www.uscourts.gov/FederalCourts/JudicialConference.aspx

98 *See,* http://www.lectlaw.com/files/env02.htm

99 http://www.lectlaw.com/files/env02.htm

In India, the Parliament does not vest any specialized institution with the power to frame rules. There have been agencies which have been set up by statutes like the Pollution Control Board, the regulation of which stays in the hands of the Central and State Government. No such parallel rule-making body has been established. Moreover, the extant committees and sub-committees are not functional.[100] There prevails lack of adequate staff, asymmetry between number of technical and non-technical staff; centres of monitoring bodies and laboratories are also not sufficiently diffused in their functioning. In this condition the courts find it difficult to address matters requiring scientific and technical evaluation.[101]

4.4 Judicial review:

In US, there are specific statutes laying down standards of judicial review in different matters.[102] However, the process of judicial review[103] in India is absolutely judicial discretion. Section 151 of the Code of Civil Procedure and Article 142 of the Constitution give ample power to the civil courts and Supreme Court to do 'complete justice' respectively.

4.5 Penalties:

In the US, the violators are required to pay compensation as per the National Environment Policy Act, 1969. However, there are no provisions for imprisonment. Thus, there are hardly any arrests for environmental violation.[104] In

---

100 Armin Rosencranz and Videh Upadhyay, op. cit.

101 M.C. Mehta v. Union of India, Supreme Court of India, Judgment of 17 February 1986, (1986) 2 SCC 176, 201-202, Indian Council for Enviro Legal Action v. Union of India, Supreme Court of India, Judgment of 13 February 1996, (1996) 3 SCC 212, 252, A.P. Pollution Control Board v. Prof. M.V. Nayadu (Retd.) & Ors, Supreme Court of India, Judgment of 27 January 1999, (1999) 2 SCC 718,730-731[hereafter A.P. Pollution Control Board I case] and A.P. Pollution Control Board v Prof. M.V. Nayudu (Retd.) & Ors., Supreme Court of India, Judgment of 1 December 2000, (2001) 2 SCC 62, 84-85 [hereafter A.P. Pollution Control Board II case].; the lack of appropriate scientific outlook and technical inputs to solutions to environmental problems had been pointed out by the Supreme Court in Oleum Gas Leak Case (Air 1987 SC 965).

102 See, e.g., CAA, 42 U.S.C. sec. 7607; RCRA, 42 U.S.C. sec. 6976; TSCA, 15 U.S.C. sec. 2618

103 'Judicial review' forms a part of the Basic Structure of the Constitution; *see,* Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461; Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, Minerva mills v. Union of India, AIR 1980 SC 1789, Waman Rao v. Union of India, AIR 1881 SC 271, IR Coelho v. State of Tamil Nadu, MANU/SC/1031/1999, etc.

104 Virginia Waste Water Treatment Operators were imprisoned under the Clean Water Act in 2003; *see* http://www.ehso.com/ehso3.php?URL=http%3A%2F%2Fyosemite.epa.gov/r3/press.nsf/

India, the statutes impose high penalties which are not realizable. This trend should be curtailed and effective amendments should be brought in which would follow the 'deep pocket' principle and extract cost from the polluters for restoring the lost balance in ecology and human lives.[105] The sentencing policies under different environmental laws swing from one extreme to another – from being too liberal to the other extreme of being too exacting. Both have had negative impacts in terms of effectiveness of enforcement.[106]

4.6 Environmental justice – circumferential aspects:

J. Mijin Cha observes,[107]
Environmental justice in the US looks at cases of environmental harm not just as a purely environmental concern, but also as a civil rights concern. This is in direct contrast to access to justice movements that do not discuss the social and economic concerns behind environmental justice. To an American audience, the term 'environmental justice' goes beyond just access to courts. The term carries significance and weight of its own. It addresses the combination of social inequity and harmful environmental effects that creates this idea of 'environmental justice'.

V. CONCLUSION

Gus Speth and Peter Haas, in their book *Environmental Governance,* formulated three important conclusions that are beyond controversy:
(1) The conditions related to global environment are worsening;
(2) Current responses to address these conditions are grossly insufficient; and
(3) Major new initiatives are needed to address the root causes.[108]

7f3f954af9cce39b882563fd0063a09c/41af08476ea984b485256dc900672598 ; the extant provisions for imprisonment are also moderate in their scope as in most cases the maximum amount of imprisonment is 1 year.

105 Nicolas de Sadeleer, Environmental Principles: From Political Slogans to Legal Rules, (2002), Oxford University Press; www.bizjournals.com/sanjose/stories/1997/09/22/ editorial4.html

106 M.K. Ramesh, op.cit.; Sec 15 of the Environmental Protection Act lays down that for every violation there could be a prison term of five to seven years and a fine up to Rs. 1,00,000. Further, there could be an additional fine upto Rs. 5000, for every day continuing violation.

107 J. Mijin Cha, *Access to Environmental Justice in the United States,* in Access To Environmental Justice: A Comparative Study (2007), p. 319 (Andrew Harding, ed.)

108 Speth & Hass, GLOBAL ENVIRONMENTAL GOVERNANCE (2007), Island Press, Washington DC, p. 139.

The requirement has been partially met through the activism of the judiciary, both in the US and India. Judge Jerome Frank has rejected the suggestion that 'in a democracy it can ever be unwise to acquaint the public with the truth about the…shortcomings of our judiciary…the judiciary is not the least dangerous branch of the government'.[109] 'Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions'.[110] Thus, inspite of the progressive trend of judicial activism, the lapses are also required to be widely discussed, preferably through public participation at a wide scale. The United Nations Conference on Environment and Development was of the view that that one of the fundamental prerequisites for the achievement of sustainable development was extensive public participation in decision-making. The Conference further emphasized, in the specific context of environment, "the need for new forms of participation" and "the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in (pertinent) decisions."[111]

109 Justice VR Krishna Iyer, Off The Bench (2001), Universal Law Publishing Co. Ltd., New Delhi, p 13.
110 *Id.*
111 A/CONF.151/4 (Part III), chap. 23, paras. 23.1 and 23.2; http://www.un.org/esa/dsd/agenda21/res_agenda21_23.shtml

THE BT BRINJAL DEBATE - A FEW COMMENTS ON GM CROPS AND FARMERS' RIGHTS

John Sebastian and Apoorva Sharma[*]

ABSTRACT

In India, currently, the crisis of biodiversity is also the crisis of democracy. It reflects a larger failure of the government to respond to the true interests of the people. This crisis is reflected in the massive public debate over the issue of Bt Brinjal, something that highlights the need for a new perspective on the laws governing farmers' rights, biodiversity and genetically modified organisms. The first part of this essay seeks to analyse the various scientific, ethical, economic and social problems associated with the spread of the cultivation of Bt Brinjal in particular, and of transgenic varieties in general. The second part focuses on two important issues that are inextricably linked- first, issue of farmers' rights, which include the right to traditional knowledge and plant varieties, storing of seeds, etc.; and second, the issue of ownership of food in India. This is of particular importance to a country where a majority of the population is still directly dependent on agriculture as a basis of their livelihood.

The issue also reflects an inherent conflict between the promotion of biotechnology, and the protection of farmers' interests. The authors disagree with the common perception that one has to choose between the two. A number of measures have been proposed to protect farmers' rights in a system which also promotes the development of biotechnology; which include, inter alia, subsidies, 'rewards' based on seed returns, and promotion of research in public institutions.

The authors have hypothesised a new precautionary principle in cases of genetically modified seeds, which imposes stricter liabilities and shifts the burden of proof upon the breeder. The final segment analyses India's apparent move towards the UPOV while examining the possible outcomes of the same, concluding that India's farming sector is not yet ready for such policy decisions and that the adoption of such a system will lead to a repetition of the Vidharbha Bt Cotton

* John Sebastian & Apoorva Sharma are V[th] year students pursuing B.A., LL.B. at National Law University, Delhi.

fiasco all over the country, opening channels for the transfer of wealth from farmers to breeders and loss in crucial biodiversity.

I. INTRODUCTION

Bt Brinjal is a transgenic species of the brinjal or eggplant family, created by artificial genome introduction or genetic engineering. It derives its name from the Bt gene (or the Cry1Ac toxin)[1] artificially introduced into the brinjal genome, which allegedly makes the plant resistant to certain pests like the Brinjal fruit and the shoot borer which is said to destroy over 40 percent of the crop every year. The creation of Bt Brinjal can be traced to the process of insertion of the Bt gene into a number of local varieties mainly from Karnataka, by introgressing.[2] It was adopted by Mahyco, a company based in Maharashtra; Monsanto, and the University of Agricultural Sciences, Dharwad.[3] Some of the genetically modified varieties produced include the Malpur loca, Manjari gota, Kudachi local, Udupi local, Pabkavi local, and 112 GO.[4] Mahyco had applied for the approval of two of its hybrid brinjal plants for commercialization, but the approval was stayed at the last moment by the Environment Ministry, and an indefinite moratorium declared, on mass protests by NGOs, citizens, and civil society over concerns regarding the safety of Bt Brinjal and its impacts on food security and farmers' rights.[5].

It is this issue and its wider implications which this essay endeavours to address. A few questions sought to be answered are: (a) Are genetically modified plants desirable from a social, economic and moral point of view? (b) What is the current legal position on genetically modified plants? (c) Are farmers' rights sufficiently protected by the current legal regime in India? and (d) What measures need be adopted to protect farmers' rights without stifling research and innovation in the field of plant varieties?

---

1 Also called the Cry1Ac protein. Arjula B. Reddy et. al, *Report of the Expert Committee (EC-II) on Bt Brinjal Event EE - 1,* Developed by Mahyco et. al, Submitted to the Genetic Engineering Approval Committee, October 8, 2009, at 11.

2 *Id.*

3 *Id.*, at 14, 39.

4 Bhagrath Chaudhary and Kadambini Gaur, *The Development and Regulation of Bt Brinjal in India,* ISAAA Brief No. 38. ISAAA: Ithaca, NY, 48.

5 *See* the submissions of the Environment Support Group in this matter, *available at* http://www.esgindia.org/sites/default/files/campaigns/brinjal/press/esg-karbioboard-btbrinjal-petition-12021.pdf. (Last visited April 21, 2013)

The first chapter introduces the essay topic. The second chapter gives details of the problems on hand and encapsulates the relevant laws, both Indian and International, used in our analysis. The third chapter is oriented towards understanding and dissecting the problem and analysing what remains. A few suggestions have been put forth towards the end. The fourth chapter concludes the essay, answering the research questions.

II. ISSUES AND PROBLEMS

2.1. The Current Situation

The advancement in biotechnology and the creation of the Bt Brinjal has brought to the forefront a host of issues related to biodiversity, protection of plant varieties and traditional knowledge, and farmers' rights. The debate over Bt Brinjal is, hence, in a way *not specifically* about Bt Brinjal alone anymore. The debate has now assumed larger dimensions and encompasses greater problems relating to the use of bio-engineered plants. There are, consequently, *two* primary concerns related to artificially developed varieties:
(a) Technological and economic: whether such plants will be safe, economically viable and so on.
(b) Socio-political[6]: this consists of a number of questions, which hinge on the crucial issue of - Who controls Indian agriculture and, food security in India?

The first concern is the more commonly highlighted concern relating to the various negative effects that GM crops have upon the health of consumers relating to the ingestion of the toxin that makes Bt Brinjal, for example, and the inability of studies to conclusively rule out long-term side effects of such toxins. Economically, the concern is that these crops might not actually be profitable to farmers in the country, and force more economically viable domestic crops out of the ecosystem.

This brings us to the second concern[7]: especially since most GM crops are developed by foreign companies with vested interests in continued profits, GM

6 The socio-political concerns are considered by many critics to be far more vital than the technological concerns. *See* Prabir Purkayastha & Satyajit Rath, *Bt Brinjal: Need to Refocus the Debate*, Economic & Political Weekly, May 15, 2010, at 42.

7 Something that has not received as much media attention as the first one largely because it relates more to farmers, as opposed to the middle class that forms the large majority of news consumers, who are concerned more with the health impacts of Bt Brinjal, for example.

crops can make the self-sustaining Indian farmer dependent upon foreign multinationals.[8] This can have serious repercussions on the issue of people having control over the food they produce, and on food security and food sovereignty[9] in the country. There is little point in food security at the cost of food sovereignty i.e. control over one's food resources, as the food security can be snatched away anytime without the support of strong mechanisms to ensure social control over food resources.[10]

2.2. The Laws

This part of the essay seeks to state and understand the current position in the law concerning Bt Brinjal. For this purpose, the issue has been split into two components: Biodiversity Laws (related to technological and economic concerns) and Farmers' Rights (related to socio-political concerns). In both parts, the position in international law has been analysed owing to the reason that many of the laws in India in this field are derived from, or drafted in accordance with international obligations.[11]

2.2.1. Biodiversity Laws

2.2.1.1. International Law

International Law is by and large known to follow a rights-based approach when it comes to dealing with issues related to biodiversity. Given the far-reaching implications on a variety of rights- including but not limited to, the right to environment, right to health, right to equal share in profits, and the right to

8 This is especially problematic because of the tendency of GM crops to even contaminate the crops of farmers not using such crops. See Section 3.1. of this essay for more details on this.

9 Food sovereignty is the ability to *control* the food resources of the nation, as opposed to food security, which merely means that one *produces* enough food to feed the populace, irrespective of the mechanisms of control which might put all that food into the hands of a powerful interest group, for example. *See* Raj Patel, *What Does Food Sovereignty Look Like?*, The Journal of Peasant Studies, Vol. 36, No. 3, 663–706 (July 2009).

10 *Id.*, at 665.

11 The following laws are illustrative of this statement: Biodiversity Act, 2002 (in conformity with the Convention on Biological Diversity); the Indian Patents Act, 1970 and the Protection of Plant Varieties and Farmers' Rights Act, 2001 (in conformity with the Agreement on the Trade Related Aspects of Intellectual Property Rights).

information- that this subject involves, this article deliberates on the specific conventions dealing with the subject matter of this essay.

Biodiversity conventions deal with a spectrum of rights pertaining to the capacity of developing countries to have access to and control over biological resources and the finance, technology and markets etc. relating to these resources.[12] By far, the most important convention in this respect is the 1992 United Nations Convention on Biological Diversity (or CBD)[13] that was negotiated at Rio de Janerio at the United Nations Conference on Environment and Development (UNCED), and to which 193 nations are party.[14] The CBD reiterates the sovereign rights of states on their biological resources.[15] The purpose of the convention was to elaborate strategies and measures to halt and reverse the effects of environmental degradation and to promote sustainable development.[16] What is notable, however, is the lack of an implementation mechanism, or even an overseeing authority. Implementation provisions are few and far between, being largely based on *'reciprocity'*,[17] *'subject to mutual agreement'*,[18] and so on. This is in high contrast to the strong implementation procedures and watchdog mechanisms in the World Trade Organization, highlighting the comparative non-importance associated with this particular convention. It is widely agreed upon that this is due to a number of factors, which include the interests of developed nations, corporate interests, and neo-capitalism.[19]

12 Shalini Bhutani & Ashish Kothari, *The Biodiversity Rights of Developing Nations: A Perspective from India*, 32 Golden Gate U.L.R 600 (2002).

13 Convention on Biological Diversity, June 5, 1992 [hereinafter CBD], 1760 U.N.T.S. 79, *available at* http://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf (Last visited April 21, 2013).

14 CBD, National Information, *List of Parties*, http://www.cbd.int/information/parties.shtml (Last visited April 21, 2013).

15 *See* CBD, Preamble.

16 *Ibid.*

17 CBD, Article 14.

18 *Id.*, Article 18.

19 This arises from the normative conflict between the International Trade and Human Rights regimes, respectively. The relatively strict mechanisms of the WTO Dispute Settlement Mechanism, for example, contrast heavily with the mechanisms available for the enforcement of Human Rights Law. *See* Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, Brooklyn Journal of International Law, Vol. 51, No. 1, 51-56 (1999).

Apart from the United Nations CBD, Agenda 21 on *Recognizing and Strengthening the Role of Indigenous People and Their Communities*, adopted at the same conference (i.e., the UNCED), emphasises that indigenous peoples have a vital role to play in environmental management and development because of traditional knowledge and practices.[20] It recognizes such rights as inherent in the larger 'right to development.'[21]

Other than providing principles for adaptation and use by various courts and legislatures, these 'laws' have largely failed to make any substantial change. This failure is very aptly summarized in the words of former U.N. Secretary General, Mr. Kofi Annan: *"Ten years ago at the Earth Summit in Rio de Janerio, Governments committed themselves to a transformation… But commitments alone have proved insufficient to the task. We have not yet fully integrated the economic, social and environmental pillars of development, nor have we made enough of a break with the unsustainable practices that have led to the current predicament."*[22]

2.2.1.2. India

India's current position in law on the Bt Brinjal issue stems from two primary sources- first, international treaties and obligations and second, the Constitution. There are a number of legislations relating to environmental matters like the Indian Forest Act, 1980, the Environment Protection Act, 1986, the Forest Dwellers' Act, and so on. But the most significant for the purpose of this article is the Biological Diversity Act, 2002.

The Biological Diversity Act in India very closely follows the provisions of the Convention on Biodiversity. The Preamble of the Act states that it is an *'act to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological*

20 UNEP, Agenda 21, Article 26, *available at* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52 (Last visited April 21, 2013).

21 The Right to Development is a compendium of many sub-rights relating to development and capacity-building. *See* Arjun Sengupta, *The Right to Development as a Human Right*, Economic and Political Weekly, July 7, 2001, Vol. XXXVI, No. 27, at 2527.

22 World Summit on Sustainable Development, Report 2002, http://www.johannesburgsummit.org/html/brochure/brochure12.pdf (Last visited December 26, 2012)

resources, knowledge and for matters connected therewith or incidental thereto.'[23] The focal provision in issue in the current case is Section 3 which makes it compulsory for any non-Indian seeking to obtain any biological resource to get the approval of the National Biodiversity Authority (hereinafter the NBA) for the same.[24] Section 4 further lays down that no person shall transfer the results of any research relating to any biological resource in India *'for monetary consideration or otherwise',*[25] to any non-Indian person or corporation. Section 5 provides an exemption to the application of Sections 3 and 4, stating that these provisions shall not apply to *'collaborative research projects involving transfer or exchange of biological resources or information relating thereto between institutions,'*[26] which conform to policy guidelines and are approved by the Central Government. Section 7 prohibits the obtaining of any biological resource for commercial utilization without informing the State Biodiversity Board.[27] Section 21 mandates the NBA to ensure the equitable sharing of benefits, joint ownership, and so on.[28] Section 24 gives the NBA the power to prohibit or restrict any activity if it thinks such activity to be detrimental to biodiversity or equitable sharing of benefits.[29]

Keeping the Biodiversity Act aside, another noteworthy legal provision relates to the Panchayati Raj, introduced (or rather, recognized) via the Constitutional Amendment in 1992. It is important in as much as it has the potential to empower local village communities to make decisions regarding their natural resources, and consequentially, on issues such as biodiversity and Bt Brinjal. However, it is important to note here that mere consultation does not amount to participation. What is desired is a more wholesome democratic process, similar to Amartya Sen's participatory democracy, to strengthen local communes.

2.2.2. Rights of Farmers and Breeders

There exists a major difficulty with understanding the position in international law owing to the vast number of agreements and conventions which

23 Biological Diversity Act, 2002 (No. 18 of 2003), Preamble.
24 *Ibid*, Section 3.
25 *Id.,* Section 4.
26 *Id.,* Section 5.
27 *Id.,* Section 7.
28 *Id.*, Section 21.
29 *Id.*, Section 24.

present themselves with *prima facie* inconsistencies if attempted to be understood as a whole. Therefore, for ease of understanding, a twin pronged approach may be adopted. This bifurcation focuses on identifying the issue in terms of two *regimes* or poles:

(a) The pro-breeder regime spearheaded by the WTO and developed nations; and
(b) The pro-farmer regime spearheaded by the developing nations.

A recognition of the position in International law as essentially a *conflict* between these two parties gives greater clarity as to what the position is both in India and in the broader international context.

The source of both these regimes is essentially the Agreement on Trade-Related Aspects of Intellectual Property Rights[30] and more specifically, Articles 27.3 (b) and 27.2 (b).[31] Article 27.2 (b) of the TRIPS Agreement excludes *"plants and animals other than micro-organisms"* from patentability.[32] However, member countries are required to provide *"for the protection of plant varieties by patents or by an effective sui generis system or by any combination thereof."*[33] This divergence is what has essentially defined the conflict between the two opposing parties. Article 27.3 (b) of the TRIPS led to the formation of the *Union Internationale pour la Protection des Obtentions Végétales* (UPOV)[34] or the International Union for the Protection of New Varieties of Plants in 1961, which represented the consensus among five European countries[35] on how to introduce Plant Breeders' Rights (PBRs).[36]

30 Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

31 Cristoph Antons, *Sui Generis Protection For Plant Varieties And Traditional Knowledge In Biodiversity And Agriculture: The International Framework And National Approaches In The Philippines And India*, 6 Indian J. L. & Tech. 89 (2010).

32 M.S. Swaminathan, *Farmers' Rights and Plant Genetic Resources*, Biotechnology and Development Monitor, No. 36, 7 (1998).

33 TRIPS Agreement, Article 27.3(b).

34 The International Union for the Protection of New Varieties of Plants Convention now has 71 members. *See* UPOV, Membership, http://www.upov.int/members/en/ (Last visited April 21, 2013).

35 All developed countries and hence, pro-breeder.

36 Rachitta Priyanka, *UPOV and Rights of Farmers – An Indian Perspective*, National Law Institute University, Bhopal, (unpublished manuscript on record with authors).

India, at least initially, gave preference to the sui-generis system over the patent protection system.[37] In pursuance of this, India enacted the Protection of Plant Varieties and Farmers' Rights Act which sought to protect breeders' rights (but in a diluted form), recognizing parallel and competing farmers' rights at the same time.[38] However, this Act did not come into force as it was not notified by the Central Government as per Section 1(3) of the Act.[39]On the other hand, the Government has reportedly taken a decision[40] to join the UPOV, and a petition in the Delhi High Court challenging the same has been rejected.[41] What becomes apparent from this situation is the hypocrisy within the government itself.

Moving on to an analysis of the provisions of the UPOV representing the pro-breeder party- There are two Acts of the UPOV; first, the Act of 1978, which was less breeder friendly and second, the Act of 1991, which took into account breeders' interests to a greater extent. We shall be analyzing the 1991 Act presently. The pro-breeder nature of the Act is evident from Article 2, which mandates that each state shall *"grant and protect breeders' rights."*[42]A breeder is defined as *"the person who bred, or discovered and developed, a variety."*[43] Any new member to the Union is required to provide immediate protection to at least 15 varieties, and within ten years, to all varieties.[44]

A new variety is defined as a variety that is new, distinct, uniform and stable.[45] Article 14 provides for an exhaustive list of breeders' rights which include, the requirement of his authorization in the cases of production or reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, selling or other marketing, exporting, and importing of the plant variety.[46] It further

37 The Indian Patents Act, No. 39 of 1970, Section 3.

38 Vasudha J. Mehta, *UPOV, India and the World – Common Knowledge and Uncommon Wisdom*, ALG India Law Offices, www.algindia.com/publication/article2300.pdf (Last visited April 21, 2013).

39 *Ibid.*

40 *Government Decision to Join UPOV Criticised*, The Times of India, June 7, 2002, *available at* http://timesofindia.indiatimes.com/india/Govt-decision-to-join-UPOV-criticised/articleshow/12203841.cms (Last visited April 21, 2013).

41 Order dated 5.5.2004 in WP (C) 6428/2002.

42 International Convention for The Protection Of New Varieties Of Plants, March 19, 1991 [hereinafter UPOV, 1991], Article 2.

43 *Id.*, Article 1(iv).

44 *Id.*, Article 3.

45 *Id.*, Article 5.

46 *Id.*, Article 14(1).

specifies that even plants created from an *'unauthorized use'*[47] of the variety cannot be used except with the permission of the breeder.

Article 15 encompasses some exceptions to breeders' rights in the form of use of the variety for non-commercial or experimental purposes.[48] Article 15(2) permits farmers to *"use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety."*[49] Article 16 defines the limits of the breeders' rights by prohibiting the sale of propagating material *to any country not signatory* to the Convention. Other provisions include the time limit for protection,[50] restrictions and equal remuneration[51] and so on.

On the same plain, in India we have the Protection of Plant Varieties and Farmers' Rights (PPVFR) Act, 2001. This Act (which has effectively been annulled by the Government's decision to join the UPOV) was designed to be in conformity with India's TRIPS obligations and also derived support from the general thrust and declaratory provisions of some international treaties and materials.[52] It claims to be an Act *"to provide for the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants."*[53]

In the area of rights granted to farmers and exceptions thereby made to the rights of plant-breeders, it has very few peers. It defines farmers[54] as:

(i) self-cultivators or direct supervisors of cultivation; and
(ii) someone who tends (conserves, preserves or adds value through selection and identification) of wild species and traditional varieties of plants.

---

47 *Id.*, Article 14(2).
48 *Id.*, Article 15.
49 *Id.*, Article 15(2).
50 *Id.*, Article 19.
51 *Id.*, Article 17.
52 Some of the international treaties and materials include The International Treaty on Plant Genetic Resources For Food and Agriculture (FAO), Convention on Biodiversity, The OAU (Organization for African Unity) Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.
53 Protection of Plant Varieties and Farmers' Rights Act, No. 53 of 2001 [hereinafter PPVFR Act], Preamble.
54 *Id.*, Section 2(k).

If a variety has been traditionally cultivated by farmers or is a wild relative or land race of a variety about which farmers possess common knowledge, it is a farmers' variety.[55] This provision further calls for an authority to do the needful without active prosecution of a claim as by a business-motivated breeder. A breeder is defined as someone who has *'bred or evolved or developed any variety.'*[56] A discoverer of a natural variety is excluded from the purview of this definition. However, the definition of breeder is not restricted to a *'person'*, but includes a *farmer*, *'group of persons or farmers,'* or an *institution*.[57]

The PPVFR Act provides for the registration of all farmers' varieties.[58] The most striking feature of the Act is the codification of farmers' rights.[59] These include the rights to save, use, sow, resow, exchange, share or sell produce including seed of a variety protected. Further, Section 39 (2) provides that a breeder shall give compensation to any farmer when the propagating material fails to provide the promised performance. The rights of communities are enlisted in Section 41. It allows any person or group of persons, including NGOs, to apply for a share of the benefits where such community has contributed to the evolution of the particular variety. The breeder is under an obligation to pay the appropriate compensation[60] to such local communities or farmers who have helped in the preservation or evolution of such varieties, and this amount is required to be deposited in the National Gene Fund constituted for this purpose, from whence it shall be distributed to the appropriate community/farmers.

In addition to these protections, The Seeds Bill, 2004 has been drafted for the purpose of regulation of seeds, and is similar to the Plant Varieties and Farmers' Rights Act in terms of protection to farmers.[61]

55 *Id.*, Section 2(l).
56 *Id.*, Section 2(c).
57 *Id.*
58 *Id.*, Section 39(1)(ii).
59 *Id.*, Section 39.
60 *Id.*, Sections 41, 43, 45, 26.
61 The Seeds Bill, 2004, Sections 25 & 43.

III. BREAK DOWN OF THE ISSUE

3.1. Understanding the Problem

More than two-thirds of the population of India is based on agriculture,[62] and consequentially is directly dependent on natural resources and plants for livelihood and sustenance. The significance of the fact that the remaining one-third of the population is also dependant on these two-third for food and other services (like cheap labour, keeping inflation in check etc.), cannot be stressed enough.

Understanding the economics of a particular issue is crucial to deliberations on the same. For this purpose, what is required is a scrutiny of the overall macro and micro economic impact of the possible use of Bt Brinjal, and not just a mere simplistic cost-benefit analyses advocated by multinational corporations., Such an analysis would be impossible without a comparison between the use of traditional seeds versus the use of the proposed variety. Traditional seeds are particularly adapted to local conditions, and even though they may have a lower output, they need not rely on as intensive an application of pesticides and fertilizers as Bt crops. Further, despite the low produce, there are less chances that the farmers will take on debts because the seeds they use are nearly free. Noteworthy in this particular regard is the analysis made by students of a top national law university in India- NLSIU, Bangalore, on the causes of farmers' suicides in India.[63] In their report, a strange concurrence was noted between suicide rates and the use of Bt Cotton in the region. It was noticed that, whereas erstwhile produce was low, there was however, no reason for debts because of the availability of seeds. After Bt Cotton, farmers had to take out loans for the seeds, causing rural indebtedness. Time and evolution also saw new resistant pests introduced into the environment. The sum of all factors led to the Vidarbha tragedy,[64] the effects of which are still felt.

---

62 National Commission on Enterprises in the Unorganized Sector, *The Challenge of Employment in India: An Informal Economy Perspective*, Report No. 10, 2009 [hereinafter NCIOS Report], at 231, *available at* http://dcmsme.gov.in/The_Challenge_of_Employment_in_India.pdf (Last visited April 21, 2013).

63 Kamath, Nandan *et. al*, *The Plight of Farmers in Bidar*, National Law School University of India, Bangalore (1998) (unpublished manuscript on record with authors).

64 The Vidarbha crisis is probably one of the most documented and tragic examples of the havoc to farmers that GM-crops can cause. Farmers in Vidarbha were amongst the first to use Bt Cotton, a GM crop touted to revolutionise cotton farming, with claims of drastically increased yields and resistance to pesticides. However, a few years of use has left the region in the throes of a crisis, with over 250,000 farmers reported to have committed suicide due to a host of problems intrinsically related to Bt Cotton,

Another concern is that the wide use of transgenics in agriculture reduces the diversity of the species available in the gene pool.[65] This argument is simple. When one introduces a common, supposedly high-yielding variety of a plant into the market, all farmers switch to that and eventually this reduces the use of the region-specific plant. Even if most farmers do not switch to the new variety, the local variety gets corrupted and eventually destroyed due to cross-pollination with the alien species.

The green revolution has often been criticised due to this particular fallacy as well, because, though it led to increased produce, it also led to the loss of biodiversity and the replacement of local varieties with high-yielding, and high water and pesticide-consuming varieties. This is probably why it has been noticed that, in Kerala, many local varieties of rice have nearly gone extinct. For instance, a certain species of rice, called 'njavara' used to be grown in Kerala. This particular variety of rice is known to have numerous medicinal qualities and is even effective at combating carcinogens.[66] After the green revolution, with the introduction of transgenic varieties, this species has all but disappeared, causing a heavy loss to society and the local populace.

The perpetual problem of the current predicament is the imbalance between corporations who advocate transgenic crops and farmers, on the one hand; and non-cooperative governments, on the other hand. With the government either unwilling or unable to protect the farmers (as is apparent in the inaction of the NBA in the current Bt Brinjal fiasco),[67] the negotiations are doomed to lead to inequitable results. It is strange indeed that the government policy, i.e., the National Agriculture Policy of 2000, remarks that the situation for Indian farmers

---

especially the loss of control over seeds, and the high investment that Bt Cotton requires in terms of pesticide use and purchasing seeds on the market. *See* P. Sainath, *Men of Letters, Unmoved Readers*, The Hindu, May 5, 2010, *available at* http://www.thehindu.com/opinion/columns/sainath/men-of-letters-unmoved-readers/article422651.ece (Last visited April 21, 2013).

65 *See* generally, Maria Alice Garcia and Miguel A. Altieri, *Transgenic Crops: Implications for Biodiversity and Sustainable Agriculture*, Bulletin of Science, Technology & Society, Vol. 25, No. 4, 335-353 (August 2005).

66 *Njavara rice facing extinction*, The Hindu, December 21, 2007, http://www.hindu.com/2007/12/21/stories/ 2007122152740300.htm (Last visited April 21, 2013).

67 The probe against various agribusinesses and universities in this matter began in June 2010. No concrete steps have been taken in furtherance of prosecution as the NBA has only signalled its intent to begin proceedings. *See* Priscilla Jebaraj, *NBA to take action against Bt Brinjal biopiracy*, The Hindu, August 10, 2011, http://www.thehindu.com/news/national/article2340768.ece (Last visited April 21, 2013).

would deteriorate with globalization and the invasion of the Intellectual Property Regime, but at the same time advocates that agribusiness should be encouraged.

3.2. Farmers' Rights and UPOV

As noted above, it is interesting to analyze the laws regarding farmers' rights in terms of two camps i.e. pro-breeders and pro-farmers. India is a peculiar case-in-point, reflecting the influence of both camps-The Indian legislature appears to be on the side of the latter, passing pro-famer laws like the Protection of Plant Varieties and Farmers' Rights Act, 2004; while the executive seems to favour the former, by not only delaying the notification of the said Act but also taking a decision to join the UPOV.

From a look at the UPOV Act of 1991, several conclusions can be drawn. Firstly, the Act is pro-breeder in nature, which is obvious from Article 2 which mandates that each state shall *"grant and protect breeders' rights."*[68] Secondly, even *'discoverers'* are identified as breeders.[69] This essentially opens up the doors for many foreign corporations to 'discover' varieties in ecologically diverse countries (largely underdeveloped), and take advantage of a lack of registration of varieties in these countries. Third, it specifies that even plants created from *'unauthorized use'*[70] of the propagating material cannot be used without permission. Thus, if even a neighbour's field gets accidentally contaminated with the pollen from a registered variety, he cannot use this product. This effectively forces all farmers of a region to buy the seeds of the registered variety.

Fourth, Article 15(2) provides an exception permitting farmers to *"use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety."*[71] This would ultimately result in the collapse of the farm economy, where farmers often exchange or buy seeds from each other. Such a provision makes farmers independent consumers of seeds instead of community consumers, forcing a farmer to buy new seeds at inflated prices from the breeder, rather than his neighbour in case of crop failure. This problem is exacerbated by the fact that over 75 percent of

68 UPOV, 1991, Article 2.
69 *Id.,* Article 1(iv).
70 *Id.,* Article 14(2).
71 *Id.*, Article 15(2).

the seeds planted in India are from saved seeds from earlier plantings.[72] Fifthly, and significantly, the ban on selling propagating seeds to non-member countries[73] is probably the *only* inducement which a developing country such as ours has to join the UPOV. The UPOV through such a provision seeks to form a monopoly of seeds, and consequentially induce countries like India to become members for access to the seeds in the UPOV bank. If India does join, then within 10 years she will have to grant protection to all varieties registered with the UPOV[74] as a quid pro quo. Taking a different tangent is the Plant Varieties and Farmers' Rights Act, 2001. This act is diametrically opposed to the UPOV in as much as it gives priority to farmers' rights over those of the breeders. It envisages a nation-wide campaign for the registration of farmers' varieties, and other wild and naturally occurring varieties.[75] The scheme of the Act is that it expects a community based cooperative type movement in tandem with the government and participation from non-profit bodies in this endeavour. A Gene Fund corpus would support[76] tribals and indigenous peoples who tend to traditional varieties and wild races. The real cut to seed companies is the statutory preservation of a farmer's right to continue to deal in (save, use, sow, resow, exchange, share or sell) material produced on his farm (so long as it is not branded) of a variety, notwithstanding that it may become protected.[77] This measure has obviously been adopted to protect the interests of farmers in the rural agricultural economy who rely heavily upon such exchanges for their basic sustenance.

Consequently, what we are faced with is the present conundrum: Should we protect farmers' rights or should we conversely promote the development of biotechnology by ensuring breeders' rights? Can these two ends be met at the same time? And consequentially, what should be done? This is what the next section of this essay attempts to answer.

72 Priyanka, *supra* note 36, at 3.
73 UPOV, 1991, Article 16.
74 *Id.*, Article 3.
75 PPVFR Act, 2001, Chapter III.
76 *Id.*, Section 39(1)(iii).
77 PPVFR Act, 2001, Section 39(1)(iv).

3.3. Suggestions

3.3.1. Technological-Economic

The simple precautionary and polluter pays principles can and ought to be applied to the situation of Bt Brinjal and other genetically modified varieties. The precautionary principle, in simple terms, provides that when there are threats of serious and irreversible damage, lack of full scientific certainty shall not be used as a reason to allow these certain practices to continue, and that the burden of proving that the process or product is safe is upon the person who seeks to propagate it.[78]

The polluter pays principle, lays down that once an activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact that he took reasonable care while carrying on his activity.[79] Hence, it can be seen that there is no scarcity of judicial precedent in the matter. All that is required is true implementation (and the slightest amount of judicial activism).

True implementation of these simple principles can go a long way in the prevention and protection of the community when it comes to the dangers of transgenic plants. The principle is simple– if you seek to introduce a potentially dangerous plant variety, you had better pay for *any* damage caused by it. Take the Bt Cotton issue, for instance. Imagine if the producers of the seeds were made liable for the huge losses to the farmers, consequent indebtedness, damage to livelihoods and even the suicides of thousands of farmers. Imagine further that the companies were made to pay to restore the environment to its pre-Bt Cotton state. Picture that the burden of proof is put on the person who introduces the crop to prove that his seed did not cause the particular damage. Imagine further that the lack of absolute scientific certainty as to the fact that the particular seed has caused the damage will not impede the awarding of compensation, based on a balance of probability.

The formulation of such a principle with regard to introduction of Bt Brinjal and other genetically modified plants in the market is extraordinary in its

78 Vellore Citizens' Welfare Forum v. Union of India, AIR 1996 SC 2715.

79 This principle has been recognised by the Indian Supreme Court in M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

simplicity: *if anyone introduces a genetically modified seed into the market, or into the environment in general, he shall be absolutely liable for any damage to people and the environment, and on the establishment of a reasonable nexus between the introduction of the seed and the damage, the burden of proof is upon him to show that the particular damage has not been caused by his seed.* Such a principle, vigorously implemented, will completely alter the cost-benefit analyses of multi-national corporations such as Monsanto. They will be forced to withdraw products of an uncertain nature by the sheer power of economics and the balance sheet.

It is amply clear that we cannot stop the development of technology just because there are chances of damage. Almost all technological progress is hinged on some risk, and a complete ban on risk will only deter technological progress. An example of this is the large hadron collider (LHC).[80] Doomsday theorists had argued that high energy particle bashing in the LHC could let loose forces which could unravel the space-time continuum and therefore even the universe. Since we do not know enough about high-energy particle physics (which is why the LHC has been built), a strict interpretation of the precautionary principle would have meant that such a project should not go ahead. A more reasoned application of the precautionary principle would say that such high energy particle collisions do take place in the stars and therefore the order of risks involved can be worked out from observing such phenomena. Therefore, it is safe to build such a device even though we do not know everything about high-energy particle physics. But, if damage ensues, there needs to be compensation.

Also, the trials must not be too stringent. This is because the more onerous the trials, the more difficult it is for the smaller companies to secure approvals. Only companies with deep pockets can then get the necessary approvals, making all GM crops a monopoly of large agribusinesses.[81] It is clear therefore, that a balance needs to be drawn- one that the researchers feel will be satisfied by the extension or adaptation of the abovementioned principles in the case of GM crops as well.

80 Purkayastha *et. al., supra* note 5, at 43.
81 *Id.*, at 45.

3.3.2. Farmers' Rights

Breeders' interests and famers' rights might seem antithetical *prima facie*. After all, it is in the farmers' interests to stop being dependant on the breeder, and the breeder's only desire is to increase this dependence. India cannot ignore the fact that she is an agricultural economy. Though middle and upper class interests may control the government, it cannot deny justice to over two-thirds of her population dependant on agriculture.[82] The introduction of termination genes, and ban on storing seeds is antithetical to every principle of social justice in the Indian Constitution and ethos, against every pro-poor law, and contrary to all policies to remove rural indebtedness and lift agricultural livelihoods.

So, it is clear that between the two conflicting interests, to favour the breeders' would be wrong and unjustifiable. Then what is the solution? There are four possible courses of action:

i) Join the UPOV, and reject the PPVFR Act; *or*
ii) Adopt the PPVFR Act, preferring a *sui generis* system to the UPOV; *or*
iii) Implement the PPVFR Act for a certain period, and then, when ready, implement the UPOV; *or*
iv) Reject the UPOV, but modify the PVFR Act to make it more conducive to breeders.

Solution (i) can only be adopted if the government provides huge subsidies to the breeders to offset the prices to farmers. But this is essentially putting money in the pockets of breeders, and will lead to huge problems. It is interesting to note the comparison between India and China in this regard. China reduced the cost price of genetically modified seeds by huge subsidies.[83] In India, however, farmers tended to buy these seeds at a high price. Now once such huge capital has been invested, they would naturally want to protect their investment. This they did by increasing their use of pesticides conveniently provided by the seed companies. Hence, farmers using Bt Cotton actually *increased* pesticide use even though the

82 57 per cent of the total employment and 73 per cent of rural employment is generated in the agricultural sector. *See* NCIOS Report, *supra* note 62.

83 Joshua Emmanuel Lagos & Zhang Lei, *People's Republic of China Planting Seeds Annual, 2010*, Global Agricultural Information Network (GAIN) Report No. CH11003, published by the US Department of Agriculture, Foreign Agriculture Service.

plant was supposed to be pest resistant,[84] which among other reasons, lead to huge losses. Whereas in China pesticide use dropped and profits increased.

Let us analyse (ii), (iii) and (iv). If we adopt the PPVFR Act as it stands, then we continue to protect farmers in our economy, but forego forever access to the 100,000 varieties in the UPOV seed bank. But does this necessarily preclude development and research in this sector? No. Firstly, there is no reason as to why the state cannot develop such varieties on its own, in public institutions. This was, after all, what led to the green revolution. Further, in actual practice, unlike particle physics, biotechnology is far less capital-intensive. In any case a continent-sized economy like India's has no excuse regarding costs when it comes to food security.[85] Secondly, there is nothing that precludes the government from providing appropriate 'rewards' or 'grants' to breeders who have developed seeds, based on an assessment of the impact the breeders' seeds have had on the economy. And thirdly, even private breeders have no reason to stop development– the large agricultural economy in India makes even a one-time sale a huge profit.

When it comes to solution (iii) it seems like a very plausible solution at the first glance. After all, it the PPVFR Act is implemented for a period of, say 10 years, and then India signs up for the UPOV, this provides India a good 20 years (keeping in mind Article 3 of the UPOV Act of 1991) to register all varieties and sufficiently develop biotechnology to prevent the takeover by foreign companies. However appealing this may seem, it is clear that it is close to impossible to register all varieties of plants in India for protection even in 10 years. Further, the Indian agricultural economy hasn't changed much since independence, and to envisage such a drastic change in 20 years is plain foolish. Farmers will, in all probability, still be as susceptible to exploitation in 20 years as they are now, and there is no need to open the gates for this to happen.

Solution (iv) seems mildly plausible. The certain changes being 'rewards' to breeders and boosts to biotechnology development in public institutions, as already discussed above.

84 Kamath *et. al.*, *supra* note 63, at 45.
85 *Id.*

VI. CONCLUSION

Today the battle for Bt brinjal reflects many larger issues of governance and participation. In India today, the crisis of biodiversity is also the crisis of democracy. It reflects a larger failure of the government to respond to the true interests of the people. The government tends to tailor-make laws to conform to international treaty obligations dominated by corporate interests, hence putting the onus of upholding equity and democracy on a host of NGOs like ESG, civil society organizations and on citizens.

Hence, answering the questions this essay sought out to answer, it can be said that: First, genetically modified plants are desirable from a general social, economic, and moral point of view, but *only* with appropriate and stringent regulatory mechanisms. Second, answering the question of whether farmers' rights are adequately protected by the Indian legal regime, it can be said that the answer to this question is not straightforward. The PPVFR Act does sufficiently protect the interests of farmers, if one includes a subsidy system,[86] but the same has been effectively nullified by the decision to join the UPOV. And lastly, a number of measures in the form of subsidies, 'rewards' based on seed returns, and promotion of research in public institutions can be adopted in order to protect farmers' interests. We are also of the opinion that the government should immediately change its decision to join the UPOV and implement the PPVFR Act.

86 Discussed in Chapter III of this paper.

INDIA'S STAND AT THE INTERNATIONAL CLIMATE SUMMITS: COPENHAGEN, CANCUN, DURBAN

Arunav Kaul[*]

ABSTRACT

Environmental issues and climate change have become a huge threat in the present world. Treaties have been signed, summits have been organised, but to no avail. The crack between the developed and the developing world on the issue of "per capita emission" cap only seems to grow deeper. India, on this issue, is one country which is under everyone's watchful eye. The stand of India at the recent international climate summits has proven to be an achievement as well as a failure. The paper gives a brief background of the past summits and the accountability of the Kyoto protocol. The paper further deals with the three recent climate summits held in Copenhagen, Cancun and Durban respectively. The whole argument revolves around the stand which India took in these summits and also the extent to which it has proved beneficial for it. This analysis is further narrowed down to two major principles which are the "per capita" approach and the "common but differentiated responsibility" principle. The paper concludes with recommendations and measures which should be adopted keeping in mind the present scenario. It brings to light a mechanism which can ensure proper emission distribution. Emission distribution has been the bone of contention in all the summits, with Kyoto protocol even failing to realise its gravity. Hence, its critical evaluation is the need of the hour. Overall, the paper examines the feasibility of India's stand and its repercussions in today's world.

I. INTRODUCTION

The world today is starkly different from what it was a few centuries ago- a change which need not be celebrated. The earth, however, hasn't quite adapted itself to such a rapid change. Mankind, in his quest for rapid development, has constantly ignored the earth and the environment around him, leading to disastrous results.

* Student of Christ University

The problems related to environmental issues were dealt with for the first time in 1972 when Stockholm, Sweden hosted the first United Nations conference on the human environment.[1] A total of 113 delegates and two Heads of State (Olaf Palme of Sweden and Indira Gandhi of India) attended the conference.[2] It also led to the establishment of United Nations environment program (UNEP).[3] This was one of the first of its kind. A lot of conferences and meetings have been held since the Stockholm conference with a number of countries joining the UN program, but to no avail. At this point, as one of the leading developing economies of the world and one of the key international players, one would want to shift focus to India and question its role in this debate.

It all started with the summits which took place in Copenhagen,[4] Cancun[5] and Durban[6] where a clear rift between the developed countries and the developing countries was visible. The developed countries, with their pro-development stance, went on to dominate the summit in spite of the urgent need to tackle the problem

1 Stephanie Meakin, *The Rio Earth Summit: Summary of the United Nations Conference and Environment, available at* http://publications.gc.ca/collections/CollectionR/LoPBdP/BP/bp317-e.htm (Last visited November 16, 2012).

2 *Id.*

3 *See* United Nations Environment Programme, *Organization Profile,* http://www.unep.org/PDF/UNEPOrganizationProfile.pdf (Last visited November 16, 2012) (It is an international organization that coordinates United Nations environmental activities, assisting developing countries in implementing environmentally sound policies and practices. It was founded as a result of the United Nations Conference on the Human Environment in June 1972 and has its headquarters in the Gigiri neighbourhood of Nairobi, Kenya. UNEP also has six regional offices and various country offices).

4 *See* United Nations Framework Convention on Climate Change (UNFCCC), *Copenhagen Climate Change Conference- December 2009, available a*thttp://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php (Last visited November 16, 2012)(The summit was held from December 7-18, 2009 and it dealt with various important aspects of climate change, such as the Clean Development Mechanism of the Kyoto Protocol, the Copenhagen Accord and the Green Climate Fund).

5 *See* UNFCCC, *Doha Climate Change Conference- November 2012,available at* http://unfccc.int/meetings/items/6240.php (Last visited November 16, 2012)(The summit took place from November 29- December 10, 2010. The meeting produced the basis for the most comprehensive and far-reaching international response to climate change the world had ever seen to reduce carbon emissions and build a system which made all countries accountable to each other for those reductions).

6 *See* UNFCCC, *Durban Climate Change Conference- November/December 2011*, *available at* http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php (Last visited November 16, 2012)(The summit took place from November 28 - December 9, 2011. It delivered a breakthrough on the international community's response to climate change. In the second largest meeting of its kind, the negotiations advanced, in a balanced fashion, the implementation of the Convention and the Kyoto Protocol, the Bali Action Plan, and the Cancun Agreements. The outcomes included a decision by Parties to adopt a universal legal agreement on climate change as soon as possible, and no later than 2015.).

of climate change.[7] The debate revolved around the need for countries to take on a legally binding treaty for the reduction of carbon emissions, a main component of greenhouse gases[8] (GHG), which are highly detrimental to the environment. India was always opposed to a legally binding treaty in the face of refusal by the developed countries to accept similar norms. However, it is interesting to note a change in India's stance in recent events, an aspect which would be dealt with subsequently in the paper.

India, at the international level, has a key role to play with respect to environmental issues. BASIC[9], which consists of Brazil, South Africa, India and China, has been in the middle of a number of conflicts on the issue of adoption of a legally binding treaty.[10]Neither the Copenhagen summit nor the Durban summit could reach a consensus regarding the issue. The lack of a proper legal framework was felt in all the summits, a concern which the developed countries, most notably, failed to appreciate.[11]Today the USA stands second in terms of its carbon emissions.[12] With a nominal population and a disproportionate rate of emission, USA's carbon emissions are a serious concern. However, the UN summits and conferences have failed to impose any legal obligation on it; and the USA is only one such example among several other countries.[13]India, on the other hand, does

7 Praful Bidwai, *Durban Green wash*, Frontline, December 31, 2011-January 13, 2011, Volume 28-Issue 27,*available at* http://www.hindu.com/fline/fl2827/stories/20120113282709400.htm (Last visited November 16, 2012).

8 what are the main man-made greenhouse gases?, the guardian, February 21, 2011, available at http://www.guardian.co.uk/environment/2011/feb/04/man-made-greenhouse-gases (last visited November 16, 2012).

9 see we are not 'spoilers' of climate talks: India, December 2, 2011, *available at* http://www.dnaindia.com/india/report_we-are-not-spoilers-of-climate-talks-india_1620493 (last visited November 11, 2012) (the basic countries are a bloc of four large developing countries – brazil, south Africa, India and china which was formed by an agreement on November 28, 2009).

10 N.R. Krishnan, *the climate turned against India at Durban*, the Hindu-business line, December 12, 2011,*available at* http://www.thehindubusinessline.com/opinion/article2709519.ece? Homepage=true (last visited November 15, 2012).

11 time gore, *the Durban climate deal failed to meet the needs of the developing world*, the guardian, December 12, 2011, *available at* http://www.guardian.co.uk/global-development/poverty-matters/2011/dec/12/durban-climate-deal-developing-world (last visited November 11, 2012).

12 Simon Rogers & Lisa Evans, *World Carbon Dioxide Emissions Data by Country: China Speeds Ahead of the Rest*, The Guardian, January 31, 2011, *available at* http://www.guardian.co.uk/news/datablog/2011/jan/31/world-carbon-dioxide-emissions-country-data-co2#data (Last visited October 6, 2012).

13 *See,* Jos G.J. Olivier et al., Trends in global CO2 emissions 2012 Report, EDGAR, 2012, *available at* http://edgar.jrc.ec.europa.eu/news_docs/C02%20Mondiaal_%20webdef_19sept.pdf. (Last visited

realize the importance of a legal framework but has an objection to the inequitable distribution of legal obligations among nations.[14]India was always backed by the BASIC on this issue. However, cracks within the BASIC began to appear in the later summits.[15]

India has always been proactive in regulating activities affecting the environment at the domestic level, and it is equally important for it to pursue these matters internationally. The climate change summits, charged with the seemingly impossible task of making the developed and developing countries see eye to eye with each other, have proven to be a failure so far, with an agreement nowhere in sight. The importance of such an agreement cannot be stressed more and the approach of India towards the same is being closely watched in the international sphere. Therefore, a critical analysis of India's role in the recent summits becomes crucial at this point.

II. BACKGROUND OF CLIMATE DEALINGS

An analysis of the background of the various international summits and treaties would set the stage for further discussion. The landmark conference which is credited for a paradigm shift in the world's approach towards environmental issues was the Rio Summit or the United Nations Earth Summit which took place in Brazil in 1992.[16] This marked the beginning of the process of formulation of various deals and agreements to address the growing environmental concerns. The response to the summit was overwhelming with 108 nations represented by Heads of States in attendance.[17] The message of the summit was transmitted by different modes and heard by millions across the globe.[18] The three main agreements that were adopted in the summit were:[19]

December 6, 2012)(There are other countries too such as Russia, Japan, EU 27 etc. who are top emitters of the world and still have to go a long way in reducing their emissions.)

14 Ministry Of External Affairs Government Of India, Public Diplomacy Division, *The Road to Copenhagen-India's Position on Climate Change Issues*, *available at* http://pmindia.nic.in/Climate%20Change_16.03.09.pdf (Last visited November 11, 2012).

15 Krishnan, *supra* note 10.

16 The World Conferences, *Developing Priorities for the 21st Century*, The Earth Summit, May 23, 1997,*available at* http://www.un.org/geninfo/bp/enviro.html (Last visited November 20, 2012).

17 *Id.*at 2.

18 *Id.*

19 *Id.* at 2.

- Agenda 21 — a comprehensive programme of action for global action in all areas of sustainable development;
- The Rio Declaration on Environment and Development — a series of principles defining the rights and responsibilities of States;
- The Statement of Forest Principles — a set of principles to underlie the sustainable management of forests worldwide.

However, many of them have been weakened due to subsequent negotiations and compromises.

One of the main enforcing protocols which laid down strict principles on GHG emissions was the Kyoto Protocol. The Kyoto Protocol was adopted in Kyoto, Japan, on 11th December 1997 and it entered into force on 16th February 2005.[20] It identified 37 industrialised developed countries and laid down rules regarding regulation of their GHG emissions.[21]Its history can be traced back to the time when the United Nations Framework Convention on Climate Change (UNFCC) came into force on 21 March 1994.[22]However, it did not provide for any specific target or plan of action; nor was it legally binding.[23]A lot of agreements had come up in the interim period but none as clear and forceful as the Kyoto Protocol.

Now the uproar over the protocol was regarding the exemptions given to the developing nations.[24]The protocol divided the nations into two parts- the developed, like the USA and the developing, like India and China.[25] This distinction was based on the observation that developed nations contributed more to the increasing GHG than the developing nations and that developing nations

20 UNFCCC, *Kyoto Protocol*, *available at* http://unfccc.int/kyoto_protocol/items/2830.php(Last visited November 20, 2012).

21 *Id.*

22 UNFCCC, First Steps to a Safer Future: Introducing the United Nations Framework Convention on Climate Change, available at http://unfccc.int/essential_background/convention/ items/6036.php (Last visited October 18, 2012).

23 Jay Makarenko, *The Kyoto Protocol on Climate Change: History & Highlights*, February 1, 2007, *available at* http://www.mapleleafweb.com/features/kyoto-protocol-climate-change-history-highlights (Last visited November 20, 2012).

24 *Id.*

25 UNFCCC, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 1998, Annex B *available at*http://unfccc.int/resource/docs/convkp/kpeng.pdf (Last visited November 20, 2012) [hereinafter Kyoto Protocol]. .

would take on the legal obligations in the future.[26]However, the proposition suffered a major blow when countries like the USA and Australia, which are major contributors to GHG emissions, began to drop out of the Protocol.[27] The main objection that these countries had to the protocol was that countries like China, which was the second highest emitter of GHG, were exempted from the emission reduction targets on the ground of being developing nations.[28]It was essential for the Protocol to get ratification by at least 55 members of the UNFCC, representing a minimum of 55 per cent of global GHG emissions in 1990.[29]However, the withdrawal of USA, responsible for almost 36% of the emissions, threw a spanner in the works.[30]Despite the odds, by 2004 a sufficient number of countries had already ratified the Protocol for it to formally come into effect on February 16, 2005.[31]At that time, the member countries in support represented 44% of the global GHG as of 1990, the Protocol falling 11% short of the required target.[32] The second term of the Kyoto protocol is expected to start in January 2013.

Another historical meet was that of the UNFCC held in Bali, Indonesia in December, 2007.[33] It was attended by almost 10,000 participants from more than 180 countries.[34] The Bali road map includes the Bali action plan which aimed at a "new, comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012", with the overall objective of reaching an agreed outcome and adopting a decision at the Conference of Parties (COP) 15 in Copenhagen.[35] The plan was divided into 5 main subjects, namely shared vision, mitigation, adaptation, technology and financing.[36]

---

26 Makarenko, *supra* note 23.
27 Makarenko, *supra* note 23.
28 Makarenko, *supra* note 23.
29 Kyoto Protocol,*supra* note 25, Article 25.
30 Makarenko, *supra* note 23.
31 Makarenko, *supra* note 23.
32 Makarenko, *supra* note 23.
33 UNFCCC, ***Bali Climate Change Conference 3-14 December 2007****-Bali Road Map*, *available at* http://unfccc.int/meetings/bali_dec_2007/meeting/6319.php (Last visited November 20, 2012).
34 Id.
35 *Id.*
36 *Id.*

III. THE RECENT SCENARIO: COPENHAGEN SUMMIT

The fragile state of the environment is now common knowledge. The rising temperatures of the earth, the growing population, have all been sources of concern for some time now.[37]The Intergovernmental Panel on Climate Change (IPCC) had also urged the developing countries to join forces with the developed countries in order to tackle the ongoing climate change problem.[38] The same principles were kept in mind in the COP[39] 15 Copenhagen summit which had high hopes of dealing with these issues with a strong, binding legal framework.[40] However, this conference suffered the same fate as its predecessors. In the midst of all this, India's stand had been clear from the very beginning, that the 'right' and the resulting consequences of polluting the atmosphere should be apportioned to all the countries.[41] This per capita approach had been India's strong argument; the logic being that the responsibility for the pollution levels should be distributed person wise or per capita.[42] The reliance is on the assertion that a per capita based emission system would uphold fairness without giving an undue edge to the developed countries, while not obstructing development at the same time.[43]

Following is a table ranking different countries based on their per capita and overall emissions.

37 Makarenko, *supra* note 23.

38 David Freestone, *From Copenhagen to Cancun: Train Wreck or Paradigm Shift?*,Env. L. Rev. 2010, 12(2), 87-93, 89 (2010).

39 *See* UNFCCC, *Background on the UNFCCC: The International Response to Climate Change,available at* http://unfccc.int/essential_background/items/6031.php (Last visited November 20, 2012) (COP i.e. Conference of the Parties is the governing body of the Convention which advances implementation of the Convention through the decisions it takes at its periodic meetings. With the UNFCCC entering into force, the parties have been meeting annually to assess progress in dealing with climate change.COP 1 was held in Berlin in April, 1995); *See alsoIssues In The Negotiating Process- A Brief History of The Climate Change Process,available at* http://unfccc.int/cop7/issues/briefhistory.html (Last visited November 20,2012).

40 Ministry of External Affairs Government of India, *supra*note 14.

41 AutriSaha&Karan Talwar, *India's Response to Climate Change: The 2009 CopenhagenSummit andBeyond*, 3 Nujs L .Rev.159, 162-163 (2010).

42 *Id.* at 174.

43 *Id.* at176.

TABLE ID	RANK 2009	COUNTRY OR REGION	2008 MIL TONNES	2009 TOTAL MIL TONNES	2009 PER CAPITA TONNES	% CHANGE 2008 TO 2009
225		World	30,493.23	30,398.42	4.49	-0.3
179		Asia & Oceania	12,338.41	13,264.09	3.53	7.5
188	1	China	6,803.92	7,710.50	5.83	13.3
1		North America	6,885.07	6,410.54	14.19	-6.9
7	2	United States	5,833.13	5,424.53	17.67	-7
54		Europe	4,628.98	4,310.30	7.14	-6.9
91		Eurasia	2,595.86	2,358.03	8.32	-9.2
107		Middle East	1,658.55	1,714.09	8.22	3.3
194	3	India	1,473.73	1,602.12	1.38	8.7
102	4	Russia	1,698.38	1,572.07	11.23	-7.4
8		Central & South America	1,228.65	1,219.78	2.57	0.7
122		Africa	1,157.71	1,121.59	1.13	-3.1
196	5	Japan	1,215.48	1,097.96	8.64	-9.7
67	6	Germany	823.07	765.56	9.30	-7
3	7	Canada	598.46	540.97	16.15	-9.6
199	8	Korea, South	521.77	528.13	10.89	1.2
109	9	Iran	510.61	527.18	6.94	3.2
90	10	United Kingdom	563.88	519.94	8.35	-7.8
118	11	Saudi Arabia	455.62	470.00	18.56	3.2
169	12	South Africa	482.88	450.44	9.18	-6.7
5	13	Mexico	452.05	443.61	3.99	-1.9
17	14	Brazil	421.60	420.16	2.11	-0.3
182	15	Australia	425.34	417.68	19.64	-1.8
195	16	Indonesia	403.74	413.29	1.72	2.4
73	17	Italy	449.75	407.87	7.01	-9.3
66	18	France	428.54	396.65	6.30	-7.4
86	19	Spain	360.13	329.86	7.13	-8.4
217	20	Taiwan	301.94	290.88	12.66	-3.7
80	21	Poland	294.78	285.79	7.43	-3
105	22	Ukraine	355.48	255.07	5.58	-28.2
218	23	Thailand	253.55	253.38	3.80	-0.1
89	24	Turkey	272.90	253.06	3.29	-7.3
78	25	Netherlands	249.50	248.91	14.89	-0.2
120	26	United Arab Emirates	195.85	193.43	40.31	-1.2
138	27	Egypt	185.85	192.38	2.44	3.5
97	28	Kazakhstan	168.48	185.06	12.02	9.8
11	29	Argentina	172.47	166.92	4.08	-3.2
51	30	Venezuela	164.31	161.96	6.04	-1.4
214	31	Singapore	161.23	161.12	34.59	-0.1
202	32	Malaysia	148.30	148.01	5.32	-0.2
210	33	Pakistan	139.71	140.29	0.77	0.4

57	34	Belgium	154.76	137.36	13.19	-11.2
106	35	Uzbekistan	127.10	115.16	4.17	-9.4
123	36	Algeria	107.28	113.92	3.33	6.2
110	37	Iraq	100.00	103.70	3.58	3.7
69	38	Greece	106.04	100.37	9.35	-5.3
223	39	Vietnam	103.86	98.76	1.12	-4.9
62	40	CzechRepublic	99.10	95.32	9.33	-3.8
193	41	Hong Kong	77.92	85.98	12.19	10.3
113	42	Kuwait	79.83	84.87	31.52	6.3
82	43	Romania	96.56	80.52	3.66	-16.6
198	44	Korea, North	69.57	79.55	3.51	14.3
160	45	Nigeria	100.16	77.75	0.52	-22.4
212	46	Philippines	74.57	72.39	0.74	-2.9
111	47	Israel	67.26	70.48	9.74	4.8
20	48	Colombia	64.99	70.15	1.61	7.9
56	49	Austria	71.01	69.24	8.43	-2.5
117	50	Qatar	63.45	66.52	79.82	4.8

Source: The Guardian[44](last updated on October 6, 2012)

The list shows China at the top, followed by USA and then India. If closely observed, although India stands at number three, its per capita emission is much lower than that of its preceding countries China and USA. In fact India stands at the 122nd position in the world with respect to its per capita emission. Therefore, a different and arguably more equitable standard of assessment works more favourably for India.[45]It should be noted that India's emission levels are high due to its overpopulation, unlike that of USA and other high GHG emitters (except China) which record high emissions despite nominal populations; often called 'luxury emissions' as against the 'survival emissions' of developing nations.[46] This is one reason why the per capita emission of India is low when compared to the USA.[47]

44 Rogers & Evans, *supra* note 12.

45 Saha & Talwar, *supra* note 41, at 176.

46 Sebastian Oberthur & Hermann E. Ott, The Kyoto Protocol- International Climate Policy For The 21st Century 27 (1999).

47 *Cut Emissions to Tolerable Levels: PM to Developed Nations,* The Indian Express, October 22, 2009,*available at*http://www.indianexpress.com/news/cut-emissions-to-tolerable-levels-pm-to-developed-nations/531837 (Last visited November 20, 2012).

The whole battle in Copenhagen can be condensed to a blame game. Developed countries asserted that developing countries should take a legally binding treaty and developing countries asserted that developed countries should take the lead and accept the obligations. Many hoped that the Copenhagen conference would be able to seal the deal[48] but it only resulted in a dead deal. There was a huge impasse over the issue of per capita emission with India and other countries sticking to their grounds. India's stand on per capita emission, although logical and seemingly fair, has attracted a lot of criticism.[49]Those critical of its stand, highlight India's problem of over-population.[50] If countries like India and China have the same per capita emissions as that of the advanced nations then it would lead to high over all pollution which would ultimately destroy the earth.[51] This is one of the main arguments of the developed nations. If countries like India follow the concept of per capita emission it would attract a lot of problems due to its population. The World Bank, in its recent study, has concluded that it is impossible for India to keep up its GHG emissions by 2030 without keeping its population in poverty.[52] It arrived at this conclusion after modelling a low carbon growth pathway for the country.[53]. Further, relying on preliminary results of a modelling study, it pointed out that *"power consumption and consequently GHG emissions in India are bound to increase to 3.5 times the 2007-08 levels by 2031-32 due to increasing urbanization, electrification and household incomes. This could be brought down to 2.7 times the 2007-08 levels with stringent energy efficiency measures*."[54]

Though per capita emission gives the developing countries a fair chance to develop, these flaws cannot be underplayed. Hence the outcome of the Copenhagen summit was not unpredictable. Although no legally binding treaty was

48 International Institute for Sustainable Development, *Summary of the Copenhagen Climate Change Conference: 7-19 December 2009*, December 22, 2009, *available at* http://www.iisd.ca/vol12/enb12459e.html (Last visited November 20, 2012).

49 Saha&Talwar, *supra* note 41, at 176.

50 *Climate Change: The Per Capita Debate For India*, December 08, 2009,*available at* http://www.ndtv.com/article/india/climate-change-the-per-capita-debate-for-india-12725(Last visited November 20, 2012).

51 *Id.*

52 NitinSethi, *India's High Emission Level OK: World Bank*, Times of India, May 9, 2009,*available at* http://articles.timesofindia.indiatimes.com/2009-05-09/india/28183026_1_emissions-low-carbon-efficiency (Last visited November 20, 2012).

53 *Id.*

54 *Id.*

adopted, India promised to cut its carbon emissions by 20 to 25 per cent by 2020 over 2005 levels.[55]

3.1 Cancun Summit

The deadlock which was observed in the Copenhagen summit was expected to be resolved in the Cancun summit. It was very important for the Cancun summit to come out with some concrete outcomes. With the Copenhagen fiasco, it was believed that *"a failure to come to any agreement in Cancun would probably spell the end of the UN as a negotiating forum for climate change."*[56] With such successive failures and an evident lack of interest by the member nations to reach an acceptable solution, this day didn't seem too far. Surprisingly, the results in Cancun were to an extent, satisfactory. Though no legally binding outcomes were observed, the initiation of Cancun Agreements and establishment of the Cancun Adaptation Framework made the summit look promising as countries were slowly realising the need for a legal framework.[57] Nonetheless, few countries still refused to budge from their stances. The main source of surprise in the Cancun summit was India when a shift in its stand was noted.[58] The then Union Minister of State for Environment, Jairam Ramesh, in his speech in the summit, called the countries for commitment of "appropriate legal form."[59] This was heatedly debated by the political parties in India which thought that India had changed its position in the Cancun summit.[60] However, the Union Minister clearly defended his stance in the summit by clarifying that it was this stand that enabled him to "walk this thin line effectively."[61] He clearly said that he called for commitments in an "appropriate

55 Saha&Talwar,*supra* note 41, at 170.

56 Andrew Holland, *Climate Agreement in Cancun: Important Progress, but Difficult Questions Remain Unanswered*, *available at* http://www.iiss.org/whats-new/iiss-voices/climate-agreement-in-cancun-important-progress-but-difficult-questions-remain-unanswered/ (Last visited November 20, 2012).

57 *Gateway to the United Nations Systems Work on Climate Change, The Cancun Agreement*, http://www.un.org/wcm/content/site/climatechange/pages/gateway/the-negotiations/cancunagreement (Last visited November 20, 2012).

58 *Jairam Defends Nuancing India's Position at Cancun*, The Hindu, December 25, 2010,*available at* http://www.thehindu.com/news/national/article977270.ece (Last visited November 20, 2012).

59 Krittivas Mukherjee, *Jairam Ramesh says India May Accept Binding CO2 Cuts*, Reuters, December 10, 2010, *available at* http://in.reuters.com/article/2010/12/10/idINIndia-53474720101210 (Last visited December 6, 2012).

60 *Jairam Defends Nuancing India's Position at Cancun,* s*upra* note 58.

61 *Jairam Defends Nuancing India's Position at Cancun,* s*upra* note 58.

legal form" and not a legally binding commitment.[62] He also confirmed that India at this point would not take on any legally binding treaty unless the terms and conditions of the treaty, penalties for non-compliance and the mode of monitoring were not clarified.[63] Thus, according to him the stand of India hadn't changed. However, the minister's comments were appreciated internationally as India's deviation from its hard-line stance.[64]

The main subject of curiosity now was the reason for the dilution of the Indian stand after so many years. The Cancun summit observed a rift created in the BASIC.[65] South Africa and Brazil, which were earlier of the same opinion as that of India and China with regard to voluntary emission cuts by the developing countries, slowly agreed to a legally binding emission.[66] Their stand was further supported by several other countries.[67] This left India isolated in its hard-line stand. Apart from the above mentioned countries, most of the other countries e.g. the Alliance of Small Island States (AOSIS), least developed countries (LDCs), Africa, and four of the SAARC partners (Bangladesh, Maldives, Nepal and Bhutan) also shared the view that it was time for all countries to commit to legally binding emission cuts.[68] The only countries opposing this were the U.S., China, India, Philippines, Bolivia, Cuba, Nicaragua, Saudi Arabia and some others.[69] Thus, it can be saidthat the change in India's stand was more tactical in an attempt to not come across as the lone dissenter, entirely insensitive to the views of a large section of the global community.[70] India is in a critical position in the global scenario. While on one hand it manages, quite successfully, to put its interests on the table against those of the developed nations, on the other it realizes that climate change is a very real threat which can cause colossal damage to its poverty ridden, agrarian

62 Mukherjee, *supra* note 59.
63 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
64 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
65 meenaMenon, *India's Role in Cancun Appreciated*, The Hindu, December 11, 2010, *available at* http://www.thehindu.com/sci-tech/energy-and-environment/indias-role-in-cancun-appreciated/article945661.ece (Last visited December 6, 2012)
66 *Id.*
67 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
68 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
69 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
70 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.

economy.[71] It would be difficult to tackle such a problem without the support of the international community, thereby making it imperative for it to not be at absolute loggerheads with them regarding environmental policies.[72]

This was seen when the Union Minister justified his statement in Cancun as a stand that enabled him to "walk this thin line effectively." "This nuancing of India's position will expand negotiating options and give India an all-round advantageous standing," he concluded.[73] This shift has been quite remarkable. Before the summit, both Jairam Ramesh and the Indian Prime Minister, Manmohan Singh, signalled India's desire to be a deal maker and not a deal breaker.[74] The shift not only helped India cope with majority of the nations but also helped the Cancun summit reach a reasonable consensus.[75]

Therefore, to sum up the summit, though it dodged the Kyoto Protocol discussion, it was still able to codify the voluntary emission targets agreed to by the signatories of the Copenhagen accord.[76] This was seen as a milestone as all major economies had pledged to take part actively in emission reduction.[77]

3.1.1 Durban Summit

The COP 17 meeting, the next climate conference, took place in Durban.[78] After the failure observed in the Copenhagen summit followed by a satisfactory result generated in the Cancun summit, the world looked forward to a promising climate change summit. This was viewed as the last chance to deal in depth with the Kyoto Protocol, the term of which was coming to an end in 2012.[79] Though the summit was successful to an extent, India wasineffective in pursuing all its demands

71 ShikhaBhasin, et al., *After Cancún India's New Role as an International Deal Maker*, April, 2011, *available at* http://library.fes.de/pdf-files/iez/08145.pdf(Last visited November 20, 2012).
72 *Id.*
73 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
74 Bhasin, et al., *supra* note 71.
75 *Jairam Defends Nuancing India's Position at Cancun, supra* note 58.
76 Holland, *supra* note 56.
77 Arvind Jasrotia, *Justice at Cancun: Twilight or Dawn?*, Dilemata: International Journal of Applied Ethics, Vol. 2, No. 6, 35 (2011).
78 UNFCCC, *supra* note 6.
79 Jon Herskovitz & Agnieszka Flak, *Last Chance to Save Kyoto Deal at Climate Talks*, November 28, 2011, *available at*http://www.reuters.com/article/2011/11/28/us-climate-durban-idUSTRE7AQ0YW20111128 (Last visited November 20, 2012).

at the summit.[80]India had gone to Durban with three main motives. The first one was to seek the continuation of the Kyoto protocol, its term expiring in 2012.[81] The second was to show its concerns related to equity, intellectual property rights and unilateral trade measures which were neglected in the previous summits.[82] The third, which was the main concern for India, was to uphold the differentiation notion between the developing and the developed nations which was nothing but the "common but differentiated responsibility" principle.[83]The principle was adopted in the 1992 Rio Declaration on Environment and Development and also in the United Nations Framework Convention on Climate Change (UNFCCC).[84]

The first motive of India can be said to have been achieved, though not fully. With the support of the EU, the summit decided on the initiation of the second commitment term of the Kyoto protocol which shall begin on 1st January 2013 and will end either on 31st December 2017 or 31st December 2020.[85]The past record of the protocol reveals that its efforts to curtail emissions from the developed countries were quite ineffective. Moreover, with the initiation of its second commitment term, USA had clearly refused to ratify the treaty.[86] Canada, Australia, Japan and Russia also did not consent to the treaty.[87] It was only with the effort of EU that the treaty was still alive.[88]

The issue of equity continued to occupy centre-stage for India's incumbent Environment Minister Jayanthi Natarajan who said that the principles of "equity and common but differentiated responsibilities (CBDR)" should be adhered to.[89] However, the issues of intellectual property and unilateral trade measures were

80 Editorial, *India Lost the Plot at Durban*, The Hindu, December 13, 2011 *available at* http://www.thehindu.com/opinion/editorial/article2709756.ece (Last visited November 20, 2012).

81 Sandeep Sengupta, Opinion, *Lessons from the Durban Conference*, The Hindu, February 14, 2012*, available at* http://www.thehindu.com/opinion/lead/article2890130.ece (Last visited November 20, 2012).

82 *Id.*

83 *Id.*

84 *Id.*

85 Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Sixteenth Session, at ¶ 1, Draft decision -/CMP.7,*available at* http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_ outcome.pdf (Last visited December 6, 2012)

86 Sengupta, *supra* note 81.

87 Sengupta, *supra* note 81.

88 Sengupta, *supra* note 81.

89 Sengupta, *supra* note 81.

again neglected in the Durban summit.[90] The most heavily debated issue was the dilution of the differences between developed and developing nations. India always believed in the historical responsibility of the developed countries that have been emitting GHG for a long time and it is the same accumulation that has resulted in climate problems.[91] Therefore, it strongly believed and echoed its opinions about the stronger responsibility for emission cuts which have to be borne by the developed nations when compared to developing nations.[92] This is the main principle behind CBDR. It also speaks about emission cuts by different nations based on their standard of development.[93] This principle was strengthened under the Bali Action Plan in 2007 which started the negotiating process of 'Long-term Cooperative Action' (LCA) that maintained a firewall between the developing and the developed nations.[94] The same was upheld in the Copenhagen accord and the Cancun agreements. But in the Durban summit the LCA was decided to be terminated and the principle of CBDR was diluted by the adoption of the 'Durban Platform for Enhanced Action' (DPEA)[95]. It aims at formulating a protocol which is another legal instrument and is 'applicable to all the parties'.[96] Thus, it failed to take into account the principle of equity or CBDR.[97] However, the DPEA was seen as a historic move as the Parties had effectively approached to strengthen the 'multilateral, rule-based regime under the Convention.'[98] The parties would start working on the agreement from 2012. The agreement has to be ready for adoption by 2015 at the latest, and would come into effect from 2020.[99]

90 Sengupta, *supra* note 81.

91 Dean Nelson, *Manmohan Singh blames West for India's Climate Change Problems*, The Telegraph (U.K.), July 7, 2009, *available at*http://www.telegraph.co.uk/news/worldnews/asia/india/5768824/Manmohan-Singh-blames-West-for-Indias-climate-change-problems.html (Last visited November 11, 2012).

92 Saha&Talwar, *supra* note 41, at 164.

93 UNFCCC, *Climate Change Information Sheet 18*, *available at* http://unfccc.int/essential_background/background_publications_htmlpdf/climate_change_information_kit/items/302.php (Last visited November 20, 2012).

94 Sengupta, *supra* note 81.

95 Sengupta, *supra* note 81.

96 Sengupta, *supra* note 81.

97 Bidwai, *supra* note 7.

98 UNFCCC, *Parties Establish the Durban Platform for Enhanced Action*, *available at* http://unfccc.int/press/news_room/newsletter/items/6681.php(Last visited November 20, 2012).

99 *Id.*

Thus, with the end of the Durban summit, India was again left isolated in its stand. Although most of the countries implicitly consented to the dilution of the CBDR, India held its ground against it. With the failure of the first term of the Kyoto protocol and the second term also looking bleak, it is high time that a middle path is sought. It is highly important for the developed nations to participate in any new legal framework, as it will give the legal framework strength. The whole debate tends to revolve around the concept of per capita emission cap and the principle of CBDR. A mutual consensus on both the issues is the need of the hour to tackle global climate change and if that's not done tactfully, it would end up costing mankind.

IV. ANALYSIS OF INDIA'S OVERALL STAND

4.1. Per Capita Emission Approach

The concept of per capita traces back to the fundamental principle of fairness and equality with respect to emission cuts.[100] The emission cuts are presently based on the overall emissions of the country which tend to stir the debate. Why should a country with a population of two hundred million people be given the same emission rights when compared to a country with a population of one billion or 30 million just because all three have nearly the same emissions?[101]Thus the common notion is that everyone in the planet should have the same entitlement, and hence corresponding responsibility, irrespective of the place where they are born.[102] Hence, emission rights shouldn't be given based on the low or high emission rates of a country. The question which then comes up in light of the present emission norms is, why should a wealthy nation with high population be permitted to emit more while a poor nation with the identical population restricted to its current emission cut? Why should distribution of wealth form the basis for any climate change policies or emission cuts?[103] These are the questions which the per capita emission approach tends to resolve. Many authors also relate the per capita debate to the 'right to development.'[104] This is exactly the

100 Eric A. Posner & Cass R. Sunstein, *Should Greenhouse Gas Permits Be Allocated on a Per Capita Basis?*,97Calif. L. Rev.52, 56-57 (2009).
101 *Id.* at 52.
102 Saha & Talwar, *supra* note 41, at 175.
103 Posner & Sunstein, *supra* note 100, at 53.
104 Posner & Sunstein, *supra* note 100, at 53.

stand which India has adopted and focused on. Many opine that an agreement based on existing national emissions rate would hamper the right to development of the developing countries even if it is both efficient and effective.[105]India's arguments are also based on the same grounds as it believes that the present norms would create more problems. It believes that as a developing economy, it has a long way to go and any legally binding treaty with inappropriate measures would affect its growth.[106] Hence, according to it, a per capita approach would be most fair because it counts every citizen as no less and no more than one in a way that respects the moral irrelevance of national boundaries.[107]

With the formulation of per capita emission the concept of cap and trade has also come into effect. The cap and trade system is an indicator of economic growth as well as environmental growth. It aims at individual companies and helps to control the overall pollution of a country.[108] It curbs the emission pollutants, most notably carbon dioxide, greenhouse gases.Basically, in a cap and trade system a cap is set at a particular level and it's left for the countries to determine how to reach that cap.[109] Ideally, countries buy unused GHG emission allowances from those countries whose emissions are lower than their allowance level.[110]. To put it simply, emission rights would be distributed to the nations, which can be later traded for cash.[111] Thus, cap and trade system is very effective and efficient as it encourages the trade and finance of an industry as well as helps in curbing pollution.[112]. Cap and trade system allows for more flexibility and is easy to administer. It also benefits the markets to a large extent.[113]

Though India has been clinging to the per capita stand, it has not pushed the cap and trade approach so far. The approach has tremendous potential and

105 Posner & Sunstein, *supra* note 100, at 54.
106 Nelson, *supra* note 91.
107 Saha&Talwar, *supra* note 41, at 176.
108 Esther Duflo, et al., *Towards an Emissions Trading Scheme for Air Pollutants in India*, MOEF Discussion Paper, August 2010, *available at* http://moef.nic.in/downloads/public-information/towards-an-emissions-trading-scheme-for-air-pollutants.pdf (Last visited November 20, 2012).
109 *Id.*
110 Jason Scott Johnston, *Problems Of Equity And Efficiency In The Design Of International Greenhouse Gas Cap-And-Trade Schemes*, 33 Harv. Envtl. L. Rev. 405, 418-419 (2009).
111 Posner &Sunstein, *supra* note 100, at 52.
112 Duflo, et al., *supra* note 108, at 7.
113 Duflo, et al., *supra* note 108, at 14.

would be very helpful for India. India always wanted to tackle the climate change problem without hampering the development process and this approach would help India realise this objective.

4.1.1. Critiques of Per Capita Emission Approach

As already mentioned earlier, the per capita emission of India is very low when compared to other countries. Though overall it stands at the third position in the world, it would be worth noticing that its per capita emissions are,"less than a third of those of China, about a sixth of those of France, and about one-fifteenth of those of the United States.[114] Based on 'per-capita' emissions, India is ranked as one hundred and twenty-second in the world."[115] This can be one of the main reasons why India has held this stand for so long. Per capita emission approach may be very helpful for India but it hasn't received the support of the developed nations, the per capita emissions of which are relatively high and would be at a disadvantage.[116]In any global climate change agreement to reduce greenhouse gas emissions, some countries are always at a disadvantage as a few of them bear a greater cost than the others and few end up getting more benefits in comparison to others. In such a situation, per capita emission rights may only give the '*appearance but not the reality of fairness*'.[117]

To bring to light the few criticisms, firstly, there is the big question of its proper distribution. Since per capita approach does not hold current emission levels as the base line, a difficulty arises relating to its distribution at the global level or at least in the most of the countries. The permits would be distributed to both the 'greenhouse gas winners as well as losers.'[118]Climate change would affect different states differently with the levels of exposure and vulnerability varying not just between the rich and poor states but also within the poor states and the rich states themselves. [119]At this point Eric A. Posner and Cass R. Sunstein rightly point out that

114 Posner&Sunstein, *supra* note 100, at 64.
115 Posner&Sunstein, *supra* note 100, at 64.
116 Saha & Talwar, *supra* note 41, at 176.
117 Saha & Talwar, *supra* note 41, at 176.
118 Posner & Sunstein, *supra* note 100, at 74.
119 Posner & Sunstein, *supra* note 100, at 74.

> "if distribution is our concern, why should two highly populated poor nations receive the same number of permits from a program from which one nation would gain a lot and another a little-or from which one would gain a lot and another would actually lose? Ideally, permits should be distributed in light of these consequences but the per capita approach fails to take them into consideration."[120]

Secondly, the per capita approach seems fairer only as long as more populated states tend to be poorer but not all heavily populated states are poor, and consequently not all the scarcely populated states are rich.[121]Hence it can be said that per capita approach seems to be "a crude and even arbitrary way to redistribute wealth, especially compared to the pure redistributive approach, which gives few or no permits to rich states and all or most of the permits to poor states, regardless of population size."[122] Thus, proper distribution is a big question which highlights a major flaw in this approach. There are so many states which are small and rich, so many are large and poor and so many which fall in the middle category.[123] The approach fails to see all these aspects.

Lastly, the debatable issue can be of implementation. In most of the poor countries the permits will be handed over to the government and not to the citizens.[124] This is a problem as there is a greater chance of the wealthy class of the country influencing policy because of their impact on the government.[125] This argument can be detrimental for India too as India is immensely affected by corruption which can result in the misuse of the wealth generated out of the scheme.

Therefore, it can be concluded that the per capita approach may be beneficial for India but the same is not true for other countries. The summit should aim at providing a mechanism which helps the nations at large and not any one country in particular.

---

120 Posner & Sunstein, *supra* note 100, at 75.
121 Posner & Sunstein, *supra* note 100, at 73.
122 Posner & Sunstein, *supra* note 100, at 73.
123 Posner & Sunstein, *supra* note 100, at 74.
124 Saha & Talwar, *supra* note 41, at 177.
125 Saha & Talwar, *supra* note 41, at 177.

4.2. Common but Differentiated Responsibility

The next issue for discussion is that of the common but differentiated responsibility (CBDR). As already mentioned, CBDR was diluted to a great extent in the Durban summit which has proven to be a boon as well as a bane. The principle of common responsibility received recognition in as early as 1949 where tuna and other fish were described as a common concern by reason of continuous use by the party.[126] The emergence of common concern can also be attributed to the Biodiversity Convention which stated that "biological diversity is a common concern of humankind."[127] The Differentiated responsibility has been noted in various treaties for example 1972 London Convention which required the parties to adopt the measures "according to their scientific, technical and economic capabilities."[128] Also in the preamble to the UN Convention on the Law of the Sea which takes into consideration the "circumstances and particular requirements,"[129] and few related concepts. However the principle of CBDR, though adopted long back, still existed in a crude form. It was only in the Rio Earth summit that it got global recognition and was finally evolved. Principle 7 of the Rio Declaration which provided the first formulation of the CBDR, states that:

> "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[130]

---

126 Centre for International Sustainable Development Law, *The Principle of Common but Differentiated Responsibilities: Origins and Scope*, August 26, 2002,*available at* http://cisdl.org/ public/docs/news/brief_common.pdf(Last visited November 20, 2012).

127 Convention on Biological Diversity, Preamble, December 29, 1993, 1760 UNTS 79, *available at*http://www.cbd.int/doc/legal/cbd-en.pdf(Last visited November 20, 2012).

128 Convention On The Prevention Of Marine Pollution By Dumping Of Wastes And Other Matter, Article II, August 30, 1975, 26 UST 2403,*available at* http://www.gc.noaa.gov/documents/ gcil_lc.pdf (Last visited November 20, 2012).

129 United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 3, 397,*available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (Last visited November 20, 2012).

130 United Nations Economic and Social Council, *Rio Declaration on Environment and Development: Application and Implementation- Report of Secretary-General*, U.N. Doc E/CN.17/1997/8, February 10,

The principle was largely applied in the Kyoto protocol which formed a distinction between the developed and the developing nations.[131] Though the protocol has its own flaws and serious lacunas, the principle has proven to be a remarkable one. To further understand the correct interpretation of the word, it can be broken down into common responsibility and differentiated responsibility.

Common responsibility, as the name suggests, means the common duty which all the countries have towards climate change. It is the duty of the government to formulate policies to tackle the climate change problem.[132] Differentiated responsibility takes into account different social, economic and ecological concerns of the country while tackling the problem.[133] Though the concern of all countries is the same i.e. to tackle the climate problems, the approach has to be taken differently by different countries. To state clearly, the developed countries have to shoulder more responsibility and lead the world from the front since they are the ones who pollute the most.

This is the whole concept of CBDR and India is a great advocate of this principle. There are various reasons for this, but one main reason is the accountability that this principle generates. The principle clearly distinguishes between the developing and the developed world.[134] It burdens the developed countries with more responsibility based on their historical contributions. It is worth noting that carbon dioxide, the primary greenhouse gas, has an atmospheric lifetime of between 50 to 200 years.[135] This means that the developed countries have been the culprits since the evolution of the industrial revolution.[136] Hence, it would be unjust if developed countries aren't made to shoulder a greater responsibility than the others in contributing to solutions to the climate change

---

1997, *available at* http://www.un.org/esa/documents/ecosoc/cn17/1997/ecn171997-8.htm (Last visited November 20, 2012).

131 Mary J. Bortscheller, *Equitable But Ineffective: How The Principle Of Common But Differentiated Responsibilities Hobbles The Global Fight Against Climate Change*, Climate Law Reporter, Volume 10 Issue 249-53, 65-68,49-50 (2010).

132 Centre for International Sustainable Development Law *, supra* note 126.

133 Centre for International Sustainable Development Law *, supra* note 126.

134 Bortscheller, *supra* note 131, at 49.

135 UNFCCC, International Maritime Organization, *Study of Greenhouse Gas Emissions from Ships*, Issue No. 2, March 31, 2000, *available at* http://unfccc.int/files/methods_and_science/emissions_from_intl_transport/application/pdf/imoghgmain.pdf (Last visited November 20, 2012).

136 Friedrich Soltau, Fairness In International Climate Change Law And Policy185(2009).

problem..[137] India's stand also has been on the same principles. It strongly believes that the developed countries should be made to adopt a legally binding treaty not because they are polluting today but have been polluting since a long time. Another reason as to why India has been advocating CBDR is because it allows for both a mechanism to tackle the climate problem as well continued development in the developing world.[138] Since it distributes responsibility depending upon the social, economic, ecological, technological situation of a country, it allows for a lot of scope for development.[139] To conclude, it can be said that not only does CBDR foster partnership and cooperation among states but also promotes effective implementation of agreement.[140]

However, the developed countries beg to differ and have failed to uphold the principle. They believe that developing countries like China, which is the highest overall GHG emitter, are not compelled to accept the legally binding treaty.[141] The principle makes developed countries the first actors in reducing emissions, and allows developing countries to follow over time.[142] It can be said that though CBDR diligently distributes the responsibility among the developing and the developed nations, it has, however, not seemed to recognise those developing nations who pollute the most.[143] This is a serious flaw which has stirred a lot of unrest. Although a lot of countries have realised the fact of a legally binding treaty, India is still unmoved from its support for CBDR. Its dilution and withdrawal of support by other countries regarding its effectiveness and fairness can leave India helpless in the near future.

To sum up, it's very important for India to maintain its own stand as well as get the support of other countries. As discussed earlier, India is highly vulnerable to the climate change menace. Its economy is mainly dependant on agriculture and is hence exposed to problems of water supply, irrigation, crop cycle, weather change etc.[144] The problem of climate change is not only a question of global equity but has

137 *Id.*at 186.
138 Centre for International Sustainable Development Law *, supra* note 126.
139 Centre for International Sustainable Development Law *, supra* note 126.
140 SOLTAU, *supra* note 136,at 186.
141 Bortscheller,*supra* note 131, at 49.
142 Bortscheller,*supra* note 131, at 50.
143 Bortscheller,*supra* note 131, at 50.
144 Bhasin.et al., *supra* note 71, at 3.

also become a domestic threat for India. Since these problems can be dealt with most effectively only globally, it is highly important for India to stress the matter at the international level.[145] India should find a way to make the developed countries as well as high emitters like China accept legally binding emissions in order to increase its own carbon space.[146] India, however, hasn't yet agreed upon any legally binding treaty which could prove to be disadvantageous for the country. As long as the emission targets do not demand an overall cap on the absolute emission, it is highly favourable for India it would give it wide scope for its development.[147]

V. CONCLUSION AND RECOMMENDATIONS

To conclude, it all boils down to the question of the most suitable and viable methodology which can be adopted to make countries accept a legal binding treaty. The Kyoto protocol has already proven to be a failure with half of the countries not ratifying it. Its main flaw stems from the exclusion of the developing nations from the protocol which are heavy emitters. Hence, what is needed is a proper method of allocation of GHG which would make amends for all the flaws of the protocol and also convince the developed nations of its fairness. To achieve this, the best proposed measure would be that of dividing the countries on three basic distinctions. "Firstly, those countries which have low historical responsibility and also have low potential for future GHG emissions; secondly those countries which have high historical responsibility for emissions and also have high potential for future GHG emissions; thirdly, those countries which have low historical responsibility for emissions but have high potential for future GHG emissions."[148] Accordingly, the countries which fall in the first category should be given the highest emission rights, the countries falling in the second category should be given low emission rights and countries falling in the third category should be given moderate emission rights.[149]

The above mentioned proposal seems to be apt keeping in mind the present hassle going on between different countries. The proposal covers all the nations by upholding the principle of CBDR as it distributes the emission rights depending

145 Bhasin.et al., *supra* note 71, at 3.
146 Bhasin.et al., *supra* note 71, at 3.
147 Bhasin.et al., *supra* note 71, at 4.
148 Saha & Talwar, *supra* note 41, at 181.
149 Saha & Talwar, *supra* note 41, at 181.

upon the emission capability of a country.[150]It also covers all the countries and accordingly distributes the emission rights unlike the Kyoto protocol which was mostly a reflection of the views of the developed nations without factoring in the views of the developing nations. Thus, the said proposal places all the countries under emission reduction obligation. This would address the primary concern of the developed countries that developing nations are only asked to voluntarily cut their emissions and aren't burdened with any emission reduction obligation.[151]

In the above mentioned proposal India would fall into the third category i.e. low historical responsibility but high potential for future GHG emissions. Meanwhile, India has taken a lot of initiatives at the domestic level to tackle the environmental issues. The foremost is that of the National action plan on climate change which outlines the existing and future policies to tackle the climate change menace.[152] It runs through till 2017. "*The National Action Plan on Climate Change identifies measures that promote development objectives while also yielding co-benefits for addressing climate change effectively. It outlines a number of steps to simultaneously advance India's development and climate change-related objectives of adaptation and mitigation*."[153] Apart from the aforementioned plan there are various legislations and acts enacted by India concerning environmental issues, namely: Air Prevention and Control of Pollution Act 1981, Environment Protection Act, 1986, Ozone Depleting Substances (Regulation and control) Rules, 2000.

In addition, there are many more legislations enacted by the state and the central government to tackle environmental problems. India has domestically taken a lot of initiatives. It is only at the international level that it has to make its stand more firm and persuasive.

150 Saha & Talwar, *supra* note 41, at 181.
151 Saha & Talwar, *supra* note 41, at 181.
152 Centre for Climate and Energy Solutions, *Summary- India's National Action Plan on Climate Change*, *available at* http://www.c2es.org/international/key-country-policies/india/climate-plan-summary (Last visited November 20, 2012).
153 *Id.*

Furthermore, India has officially announced that it would cut its emissions from 20% to 25% by 2020 from 2005 levels.[154] The prime minister has also stated explicitly that India's emissions won't exceed those of the developed nations.[155]

An over view of the stand of India in the recent international COP summits can be condensed to two major issues- per capita emission rights and CBDR. However, it would be helpful for India to adopt a more flexible approach on them in the interest of the greater objective of encouraging the international community to reach a consensus.[156] Putting forth an obstinate front would help neither the process of negotiation, nor any plans of policy framing.

The world has realised India's vital position in dealing with climate change problems. India is at a very crucial stage where it's slowly transforming from a developing country into a developed one. India has to take a firm stand in order to succeed globally with matters related to climate change. For this to happen, all eyes now will be fixed on the 18th session of the Conference of Parties to the UNFCCC and the 8th session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol.[157] The summit is scheduled to be held in Doha, Qatar. It would be an important summit for the whole world and particularly for India which would be closely watched by everyone. The summit aims at discussing various issues, importantly, the reviewing of the Kyoto protocol.[158]The conference has already laid down the plan to discuss the Kyoto protocol in depth. India and various countries have given proposals for the same.[159]The summit would also look into the Report of the Ad Hoc Working Group on the Durban Platform for

154 Niklashöhne, Et Al., *UNEP Bridging The Emissions Gap 2011, Available At* http://www.unep.org/publications/ebooks/bridgingemissionsgap/portals/24168/appendix2.pdf (Last Visited November 20, 2012).

155 *Cut Emissions to Tolerable Levels: PM to Developed Nations, supra* note 47.

156 Saha & Talwar, *supra* note 41, at 189.

157 UNFCCC, ***Doha Climate Change Conference - November 2012***, *Available At* Http://Unfccc.Int/Meetings/Doha_Nov_2012/Meeting/6815.Php(Last Visited November 20, 2012).

158 UNFCCC, *Conference of the Parties Serving as the Meeting of the Parties to the 'Kyoto Protocol-Eighth Session Doha,* Item 2(a) of the Provisional Agenda, September 14, 2012, FCCC/KP/CMP/2012/1, *available at* http://unfccc.int/resource/docs/2012/cmp8/eng/01.pdf(Last visited November 20, 2012).

159 *Id.* at 8.

Enhanced Action and other committee reports.[160] All hopes are now pinned on this summit which would decide the future course for India.

160 UNFCCC, *Conference of the Parties Eighteenth Session*, Item 2(c) of the Provisional Agenda, September 14, 2012, FCCC/CP/2012/1, *available at* http://unfccc.int/resource/docs/2012/ cop18/eng/01.pdf(Last visited November 20, 2012).

nalsar student law review
nalsar university of law
post box no. 1, nisa hakimpet,
justice city, shameerpet,
ranga reddy district, hyderabad - 500078.
phone : +91 40 23498104
fax : +91 8418 245161
email : studentlawreview@gmail.com

ISSN Number: 0975-0126