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Contents

EDITORIAL

We are proud to present Volume 13(1) of the NALSAR Student Law Review (NSLR), the flagship journal of NALSAR University of Law, Hyderabad. At the outset, we owe immense gratitude to our authors, whose contributions make our journal possible, and our peer reviewers, who volunteer their time and efforts to help us assess articles and whose invaluable insights enhance the quality of the pieces. Hoping to bring more rigorous scholarship and diverse perspectives, for the first time, this edition features articles from non-student as well as student authors. This issue includes a range of pieces, spanning diverse fields including constitutional law, contract law and intellectual property law.

The first article, *"Obscenity and the Depiction of Women in Pornography: Revisiting the Kamlesh Vaswani Petition"* by Siddharth S Aatreya, explores the arguments of the 2013 petition filed before the Supreme Court of India argued for a ban on pornography to tackle sexual violence and objectification of women. The paper undertakes a comparative analysis of obscenity jurisprudence and draws from feminist theory to argue that Indian courts should shift to a Canadian-style harms approach which could address the harms associated with pornography without unreasonably restraining free speech.

Naman Lohiya and Sakshi Pawar examine the legal framework regulating gambling and betting in India in "*A Gamble of Laws: Reconciling the Conflicting Jurisprudence on Gambling Laws in India.*" In the context of the Telangana Ordinance & Amendment Bill, which outlaws gambling on games of both chance and skill thus differing from the Supreme Court jurisprudence which only restricts gambling and betting on games of chance, the paper identifies policy issues that need to be settled at the central level. Further, the paper also questions the constitutionality of restrictions imposed by states on gambling on games of mere skill.

In "*Section 434(1) (a) of Companies Act, 2013: A Conundrum of Retrospective Application of Companies Act, 2013 on Pending Petitions Transferred from Company Law Board to National Company Law Tribunal,*" Himanshu Pabreja considers the conflicting jurisprudence from the National Company Law Tribunal and National Company Law Appellate Tribunal on the question of

the law applicable to petitions transferred to these bodies after the enactment of the Companies Act, 2013.

Paridhi Poddar makes a thoughtful case for reforming the Indian contract law on undisclosed agency relationships in "*The Rationalisation of Third Party Rights Under the Law of Undisclosed Agency*." The paper critically analyses certain exceptions evolved by courts which limit the right vested in third parties by common law to hold an undisclosed principal liable for contracts made by their agent. The paper compares the Indian position to English and American common law, advocating for the need to correct the balance between the rights of the third parties and that of the undisclosed principal needs to make the law more equitable, given that the secrecy inherent in the law of undisclosed agency endorses favours the principal and his agent rather than the third party.

Delving into arbitration law, Harshad's "*A Principled Enquiry into the Waiver of Annulment Proceedings*" considers the question of whether parties to an arbitration agreement should be permitted to waive their right to annul an arbitral award. While such waivers may ostensibly seem to make arbitration a more attractive option to litigants, the paper highlights the drawbacks of annulment. To this end, the paper considers the role of annulment proceedings in the overall arbitral process and the implications of waiving them based on principles of arbitrability, which determines which disputes may be settled by arbitration, and *compétence-compétence*, which gives the power to an arbitral tribunal to rule on its own jurisdiction, including objections to the existence or validity of the arbitration agreement.

On a similar question in a different area of law, Anupriya Dhonchak considers the enforceability of contracts restricting user rights under the Indian Copyright Act, 1957 in her essay "*Can User Rights Under Section 52 of the Indian Copyright Act Be Contractually Waived?*." Dhonchak argues that user rights under copyright law are statutory rights based on public interest which cannot be contractually waived off. The essay discusses the enforceability of contractual waivers of user rights by delving into the purposes of free speech, copyright and the exceptions to it. It also discusses the relevance of the case law on unfairness in adhesion contracts, those which are offered on a "take it or leave it" basis characterised by onerous terms and inequality of bargaining power between parties.

Finally, Nehaa Chaudhari and Smitha Krishna Prasad's case comment on *Timothy Ivory Carpenter, Petitioner v. United States*, where the Supreme Court of the United States held that government access of mobile phone records is limited by a reasonable expectation of privacy, offers a timely comparative perspective in the aftermath of the *Puttaswamy* judgement, in which the Indian Supreme Court held that the right to privacy was a part of the right to life under the Indian Constitution. Chaudhari and Prasad reflect on *Carpenter* in light of the possibility of near perfect State surveillance through mobile phone tracking, arguing there is a need for adequate safeguards to protect citizens' right to privacy.

Thank you

Editorial Board

OBSCENITY AND THE DEPICTION OF WOMEN IN PORNOGRAPHY: REVISITING THE KAMLESH VASWANI PETITION

Siddharth S Aatreya[*]

ABSTRACT

India is widely regarded as one of the most unsafe countries in the world for women. Legislative efforts of increasing punishments for acts of sexual misconduct have had limited success in tackling this problem. Consequently, Kamlesh Vaswani's 2013 petition before the Supreme Court of India argued that a ban on pornography would attack the root of the problem – a culture that has normalized sexual violence and objectification of women. While the petition's prayer of seeking a ban on access to all pornography in India has faced wide criticism, this paper proposes a framework to address the harms accruing to women within the contours of the Indian Constitution. In doing so, it will locate these harms in Catharine Mackinnon's work, and then argue that a shift in India's approach to obscenity from an American-style offense to community standards approach to a Canadian-style objective harms approach is both possible under the Indian Constitutional scheme and would address these harms without creating an unreasonable restraint on free speech.

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I. INTRODUCTION

Kamlesh Vaswani's 2013 petition before the Supreme Court of India, which called for a complete ban on accessing all pornography,[1] is a classic example of a problem-solution mismatch. Couched in hyperbole that, *inter alia,* refers to pornography as a "*moral cancer that is eating our entire society*",[2] are some legitimate, albeit poorly established concerns around the abuse of children and women who are the subjects of this pornographic content.[3] The solution it proposes to this (a complete ban on the consumption of pornography), however, leads to an excessive constraint on the freedom of expression guaranteed under the Constitution.[4] The petition has left the challenge of dealing with the harms it has highlighted within the contours of the Constitution open.

In the proceedings in court that have followed the presentation of the petition, inordinate focus has been placed on the harms of child pornography.[5] Consequently, it appears that the concerns it raised around the

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1 Kamlesh Vaswani v. Union of India, WP 177/2013 (Supreme Court, 30 August 2013). A copy of the petition is available at https://docs.google.com/file/d/0B-e-lXh7NmVmbGNXT1BraHF5RUU/edit (Last accessed May 1, 2018).

2 *Ibid,* 6.

3 *See generally* Geetha Hariharan, *Our Unchained Sexual Selves: A Case for the Liberty to Enjoy Pornography Privately* 7 NUJS L. REV. 89, 89-93 (2014).

4 *Ibid,* 96.

5 *Supra* note 1. On February 26, 2014, the Supreme Court passed orders in respect of an Interlocutory Application for intervention filed by the Supreme Court Women Lawyers' Association. In its prayer, the Association sought directions to protect *both women and children*, who it Identified as being victims of pornography. However, the court's order is limited to seeking a report on the measures being taken by the Government to protect children who appear in or are forced to consume child pornography. Similarly, in its most recent order in respect of the above Interlocutory Application, passed on August 21, 2017, the court only sought a status report from

depiction of women in pornography have been swept under the rug. Crucially, however, this has not been the case in other jurisdictions, whose Constitutional courts have developed rich jurisprudence on the trade-off between the harms of violent pornography and the freedom of speech and expression. In doing so, the Supreme Court of the United States and the Supreme Court of Canada have applied offence-based standard and a harms-based standard respectively.[6]

Comparing the standards adopted across the United States and Canada can help determine how the issues highlighted in the Vaswani petition can be tackled in India. Crucially, all three jurisdictions vest explicit constitutional rights to free speech and expression with their citizens – through the First Amendment to the Constitution in the United States, Sec. 2(b) of the Canadian Charter of Rights and Freedoms and Art. 19(1)(a) of the Indian Constitution. While the Canadian and Indian rights also come appended with the right for the State to place *reasonable restrictions* on these rights (Sec. 1 of the Charter and Art. 19(2) of the Constitution respectively), the American right is provided for in the absolute.

Despite the absence of a textual limitation on free speech under the American Constitution, its judicially developed restrictions on pornographic content adopt an offense-based approach to restricting pornography, focusing on whether a depiction offends the majority's sentiments.

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the Government on the blocking of *child* pornography on the internet, with no mention whatsoever of the other kinds of pornography mentioned in the petition.

6 Bret Boyce, *Obscenity and Community Standards* 2(33) YALE J. INT. L. 299, 302 (2008).

Interestingly, a similar approach has been adopted by Indian courts under Art. 19(2) in the context of pornographic/explicit content, despite the existence of a textual limitation allowing for "reasonable restrictions" on free speech rights. Per contra, Canadian courts have interpreted a similar textual limitation allowing "reasonable restrictions" in a harm-based fashion, focusing on the harms caused to women as a class of citizens by certain kinds of pornographic depictions.

Given the shortcomings of the American and Indian offense-based approach (since it allows extremely harmful pornographic depictions of women to flourish) and the textual Constitutional similarities between free speech rights in the Indian and Canadian Constitutions, this paper will argue that a shift from an American style offense-based to a Canadian style harm-based restriction on pornographic content is both possible and desirable under Art. 19(2) of the Indian Constitution. In doing so, it will demonstrate that the harms caused to women due to the proliferation of violent pornography pointed out in the Vaswani petition can be sufficiently addressed without placing unreasonable restraints on the right to free speech and expression in India.

This paper is divided into three parts. Part A will lay down the American offence standard for obscenity and demonstrate the manner in which this standard has been applied to violent pornography. Part B will compare this standard with the Canadian harms approach to obscenity, and demonstrate the manner in which the harms accruing to women out of violent pornography have been accounted for in it. Part C will locate these harms to

women in the Indian Constitution, and argue that reading the statutory definition of obscenity in India in a manner that accounts for these objective Constitutional harms would address the Vaswani petition's concerns without unreasonably restricting the right to free speech and expression.

II. HISTORICAL DEVELOPMENT OF OBSCENITY

Sexual explicitness has not always been a ground for states to suppress speech. From the *Kama Sutra* and explicit murals in the Indian subcontinent,[7] to graphic depictions of sex as being integral to love in Sumerian and Babylonian literature, sexual explicitness was a widely prevalent form of artistic expression. As a consequence of this cultural acceptance of sexually explicit expression, seditious and blasphemous speech alone was banned and punished in the city-states of Greece and Rome, with no offence of "obscenity" that placed feters on sexually explicit speech.[8]

Obscenity first arose as an offence and a legitimate ground for the state to curb speech and expression in Britain. With this step, the State took on the burden to protect its citizens' religious sensibilities, through the enactment of a law in 1662 that prohibited the publication of any *"…offensive books or pamphlets wherein any doctrine of opinion shall be asserted or maintained which is contrary to the Christian faith".*[9] While armed to clamp down "un-Christian" expressions of sexuality, it wasn't until 1772 that Britain first convicted an

7 *See generally* Ben Grant, *Translating/The "Kama Sutra"* 26 TH. W. QUART. 509, 511 (2005).
8 Geoffrey R. Stone, *Origins of Obscenity* 31 NYU REV. L. SOC. CH. 711, 712 (2007).
9 *Ibid.*

individual on these grounds. In *The King v Curll,*[10] the publication *Venus in the Cloister*, which graphically described scenes of voyeurism and female masturbation was challenged under this provision. The court held that the publication was punishable in common law for *"…weakening the bonds of morality"*. The punishment prescribed, however, was merely a modest fine.[11]

In the century following the *Curll* judgment, Britain saw obscenity convictions coupled with increasingly harsh punishments, but a curious lack of clarity on the exact elements of the offence. The same was clarified only in 1868, with the decision in *R v Hicklin.*[12] Per this decision, any material that *"tend(s) to deprave or corrupt those whose minds are open to such immoral influences"* was obscene.[13] Right from its origin, therefore, the obscenity restriction on free speech was grounded in offence and a moral regulation was imposed on the kinds of sexual expression permissible in society. Whether religious or otherwise, the restriction arose as a consequence of the State taking on the burden to protect its citizens from *offensive* sexual depictions, irrespective of the degree to which they were harmful.[14] As the first concrete formulation of what obscene material was, it is this *Hicklin* test that formed the starting block of obscenity jurisprudence in the USA, Canada and India.

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10 The King v Curll, 2 Stra. 788 (1727).

11 Stone, *supra* note 8 at 714.

12 Stone, *supra* note 8 at 714. R v Hicklin [1868] 3 LR 360 (QB).

13 Rosen v. United States, 161 US 29 (1896) where this test was first formally imported into American jurisprudence by the Supreme Court of the USA, despite its use by lower courts in the USA prior to this.

14 Cass R. Sunstein, *Pornography and the First Amendment,* 4 DUKE L. J. 589, 592 (1986).

III. THE AMERICAN OFFENSE APPROACH

Unlike § 294 of the Indian Penal Code, 1860, the USA does not have a uniform statutory basis for the obscenity restriction on the First Amendment right to free speech and expression.[15] In judicially developing this restriction, the American courts have developed rich jurisprudence on the relationship between obscenity and pornography.

A. The Modern American Position on Obscenity

The beginning of the United States' own obscenity jurisprudence started with its decision in *Roth v. United States.*[16] In the period prior to that, lower courts in the USA merely used the above mentioned *Hicklin* standard to restrict speech on the grounds of obscenity.[17]

The *Roth* case came down on this standard heavily, holding that the *Hicklin* test was overbroad in requiring that speech be regulated on the basis of the effect it may have on any potential receiver whose mind may be open to an immoral influence.[18] The court observed that accounting for the psyche and vulnerability of *every individual potential receiver* of information led to subjectivity in determining the basis of obscenity. The *Hicklin* test essentially

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15 The Constitution of the United States of America, First Amendment, which reads as follows: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*"

16 Roth v. United States, 354 US 476 (1957).

17 Sunstein, *supra* note 14 at 593.

18 Sunstein, *supra* note 14 at 595.

required the obscene material to always cater to the least common denominator – a burden it classified as unfair. In doing so, however, it replaced each individual potential receiver with the "contemporary standards" of the community as the unit of analysis in determining whether content was obscene and therefore undeserving of the First Amendment protection. Its definition was thus: *"whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest"*.[19]

Roth brought about a change in the old *Hicklin* test on two levels. First, it changed the impact that obscene material was to have – *Hicklin* sought to ban material that would "corrupt" any potential receiver of the material, while *Roth* sought to ban material that would offend the community's standards. Second, *Roth* required the material to have an impact on the community in general, while the negative effect on any one particular receiver, as prescribed in the *Hicklin* case was abandoned.

While there was a clear shift from *Hicklin*, the test in *Roth* remained unclear on the balance between obscenity and artistic freedom. This issue was taken up in the Supreme Court's subsequent decision in *Memoirs of a Woman of Pleasure v. Massachusetts.*[20] Here, the court held that any offensive depiction of sexual interaction could be excused as long as the material had some redeeming social value. With this, the Court excused the content in the

19 Chris Hunt, *Community Standards in Obscenity Adjudication* 66 CAL L. REV. 1277 (1978).
20 Memoirs of a Woman of Pleasure v. Massachusetts 383 US 413 (1966).

Fanny Hill book (which contained detailed descriptions of sexual acts) on the basis of its literary significance. However, the larger part of the test, which required application of community standards to determine whether material appealed to the prurient interest, remained the same as it was before.[21]

This clear prioritization of the community's standards on how sex should be depicted was concretized by the Supreme Court in a test crafted in *Miller* v. *California,*[22] laid down in 1973. The court reiterated that the purpose behind the obscenity restriction on the First Amendment was to ensure that depictions of sex that offended the prevailing view of sexual matters in society were prevented. As a result, the Court created the following three-pronged test:

> *(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.*

In *Miller,* therefore, the court diluted the redeeming social value exception into a markedly less liberal one of serious literary, artistic, political or scientific value.[23] The positive part of the test remained the same – an

21 *Ibid.*
22 Miller v. California 413 US 15 (1973).
23 Sunstein, *supra* note 14 at 596.

appeal to the prurient interest and an offensive depiction of sexual conduct would continue to be a requirement for the material to be obscene. The language used in prong (b) of the test did not explicitly indicate whether the offensiveness of the sexual conduct depicted was to be decided on the basis of community standards or otherwise. As a matter of practice, however, subsequent decisions of the US Supreme Court have applied community standards in determining whether both prong (a) and (b) of the *Miller* test are satisfied.[24]

While the American standard of strict scrutiny applies to the grounds of obscenity as restriction to free speech,[25] this narrowly constructed restriction can only ever be made on the grounds that the material offends society's collective view of sex, and not on the basis of the harm caused by such speech.

B. Offence and Community Standards

While it has adopted and repeatedly affirmed its offence to community standards test for obscenity, the US Supreme Court has not offered a cogent justification for it.[26] In his dissenting opinion in *Miller*, Justice Douglas observed that by the court's own jurisprudence, offence to community standards would not be a justification for the imposition of a

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24 *See e.g.,* Ashcroft v. Free Speech Coalition 535 US 234 (2002), where the court applied contemporary community standards to the second prong of the Miller test, in addition to the first prong; J. Todd Metcalfe, *Obscenity Prosecutions in Cyberspace: The Miller Test Cannot go where no [Porn] has Gone Before,* 74 WASH. U. L. REV. 81, 87 (1997).

25 *See generally* John Galloto*, Strict Scrutiny for Gender*, 93 COLUM. L. REV. 518 (1993).

26 Hunt, *supra* note 19 at 1280.

restriction on political and religious speech.[27] He then based a part of his dissent on the majority opinion's inability to differentiate obscenity from the other instances in which it had rejected offence to community standards as a justification for a First Amendment restriction.[28] While the majority bench attempted to side-step this by painting "protecting the community from the commercial exploitation of sex" as the goal achieved by the restriction,[29] it was still unable to justify the use of community standards to prevent this exploitation.

By their very nature, community standards are incapable of being specifically defined.[30] In *Miller*, the court grappled with this question, only to conclude that community standards were to be judged at the state level since no uniformity in standards could be expected across the country. In *Hamling* v. *United States,*[31] these imprecise community standards were coupled with an average person test, requiring that they be applied as an average member of the community would determine whether the subject-matter is obscene or not. In effect, the *Hamling* test therefore boiled down to the majority decision of a jury – if most jury members, who constituted *"average members of the community"* found the material to be obscene, its dissemination could be restricted.

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27 *Supra* note 21 at 430.
28 *Supra* note 21 at 435.
29 *Supra* note 21 at 420.
30 Hunt, *supra* note 19 at 1297.
31 Hamling v. United States 418 US 87 (1973).

Consequently, *Hamling* modified the *Miller* test to require that individual jurors ascertain the community's standards for themselves and then apply them in determining whether material is obscene or not. However, no individual would normally be capable of independently determining what the abstract "community standards" on the depiction of sex are.[32] In practice, the test would result in individuals simply determining whether material offends their own standards on the depiction of sex to adjudge whether material is or isn't obscene.[33] On an average, with juries being roughly representative of the societies within which they operate, the *Miller* test provided a tool for imposition of majoritarian values on sexual depictions on the rest of society.[34]

This imposition has had a well-documented impact on the expression of deviant sexualities.[35] Equally insidious, however, is its exclusion of harms arising out of certain depictions of sex to members/classes of society - a direct consequence of the test's singular focus on *offence* to community standards. Consequently, a community in which a vast majority have heavily internalized patriarchal biases that justify women being depicted as submissive sexual objects upon whom degrading and violent sexual acts may be performed, may not find that such depictions offend the community's

32 Catharine Mackinnon, *Not a Moral Issue* 2 YALE L. POL. REV. 321, 324 (1984).

33 *Community Standards, Class Actions and Obscenity in Miller v California*, 88 HARV. L. REV. 1838 (1975).

34 Hunt, *supra* note 19.

35 *See e.g.,* C. Peter Magrath, *The Obscenity Cases: Grapes of Roth* 7 SUP. CT. REV. 7, 14 (1966) discussing the effect of community standards on a homosexual pornographic publication.

standards on sexual depiction.[36] These would, therefore, receive full Constitutional protection, despite the harm caused to women as a class of citizens by such depictions.

C. Harms of Violent Pornography and American Obscenity

Attempts to statutorily tackle the harms arising out of certain depictions of women in pornography are not alien to the US courts. Relying heavily on the views of prominent feminist academic Catharine Mackinnon, the city of Indianapolis, Indiana enacted an anti-pornography Civil Rights Ordinance in 1984. While Mackinnon's position is aligned towards supporting a complete ban on all forms of pornography,[37] the ordinance was directed towards merely effectuating a ban on certain kinds of pornography that were deemed to be excessively harmful. These included graphic and sexually explicit depictions of women enjoying pain, rape, torture or other forms of sexual violence and the penetration of women by objects or animals.[38] The ordinance failed to fulfil its primarily intent of curbing the unique impact such depictions had on women, men and transsexuals being depicted in an oppressive manner.

The ordinance was grounded in Mackinnon's three gendered harms of pornography and was applied specifically to the context of violent pornography. These are harms to those participating in it, to those affected

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36 Mackinnon, *supra* note 31 at 326-328.

37 Andrea Dworkin and Catharine Mackinnon, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 35-47 (1988).

38 Indianapolis Civil Rights Ordinance 1984, §5.

by violent sexual acts committed as a consequence of it and to society, whose attitudes towards women in matters of sexual relations are corrupted by it.[39]

The first harm arises out of the creation of a legitimate market for pornography. A vast majority of women who enter the pornography industry do so out of economic and social compulsion and are compelled to do so simply because the market exists.[40] However, a market for violent pornography especially affects them once they are within the industry. This is because growing demand for violent pornography creates a specific demand for women to participate in it instead of non-violent porn. With no other option, a large number of them are forced to migrate to violent porn. In this manner, the market's demand directly impacts the women participating in such pornography, resulting in severe abuse and injuries to them in many cases.[41]

In general, pornography positions itself as being representative of reality and the way sexual relations normally take place.[42] Most of its consumers are teenagers and young adults, who are vulnerable to be influenced by the manner in which sexual activity is depicted in pornographic films.[43] Consequently, violent depictions of sex in pornography have the effect of normalizing sexual violence – which is Mackinnon's second harm. A

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39 Boyce, *supra* note 6.

40 Report of the President's Commission, *Obscenity and Pornography*, 235-300 (1986).

41 *E.g.,* New York v. Ferber, 458 U.S. 747, where the US Supreme Court adopted a similar perspective in upholding a complete ban on child pornography in the State of New York.

42 Ann Ferguson, *Pleasure, Power and the Porn Wars*, 3 WOM. REV. BOOKS 11 (1986).

43 *Ibid.*

variety of studies have concluded that a strong link exists between the consumption of violent pornography and the proclivity of an individual to commit acts of sexual violence.[44] While no conclusive proof of such a link can be provided,[45] it must be acknowledged that continued exposure to such material pushes the narrative that a woman's pain is a source of sexual pleasure for a man. When coupled with the third harm, of a shift in the perception of women in society, the harmful effects of such male entitlement over women's bodies becomes clear.

Pornography is created in a manner that does not seek to trigger any reflection on the content in it from those receiving it. Instead, it is merely created to sexually arouse its recipient, often by portraying women as objects designed just for that purpose.[46] As a consequence, constant exposure to such material distorts expectations that men and women have from sexual relations. Thus, while all kinds of subservient depictions carry a negative message, especially violent and degrading depictions of women not only reinforce male dominance in society, but also create a sense of complete entitlement over female bodies in male consumers. The biases so created, therefore, have implications both within and outside the realm of sexual

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44 *See e,g.,* Jae Woong Shim and Bryant M. Paul, *The Role of Anonymity in the Effects of Online Pornography among Young Adult Males*, 42 SOC. BEH. PERS. 823, 830 (2014).

45 *See* Michael Castleman, *More Porn, Less Sexual Assault* PSYCHOLOGY TODAY (2016), arguing that an outlet for release without requiring any physical action reduces actual manifestations of violent sexual urges; Thomas Everson, *Pornography and the First Amendment: A Reply to Professor Mackinnon* 13 YALE L. POL. REV. 130 (1984).

46 Richard Moon, *R v. Butler: The Limits of the Supreme Court's Feminist Re-Interpretation of Section 163*, 25 OTT. L. REV. 361, 379 (1993).

relations, since they reinforce gendered power dynamics in the society. This shift in perceptions about the female body is Mackinnon's third harm.

Despite its stated motive in preventing such harms, the ordinance was challenged as being unconstitutional. The final decision in this respect was rendered by the US 7th Circuit Court of Appeals in *American Booksellers Association Inc. v. Hudnut.*[47] Here, the court tested the ordinance against the *Miller* test, and held that it was unconstitutional on the ground that it did not account for the exceptions for work with serious merit and that it was not in conformity with the community offence standard.[48]

The court's analysis on the latter ground highlights the *Miller* tests' inability to account for harmful speech. The court called the ordinance "thought control", holding that it legitimized only a "particular view" of women and would consequently amount to viewpoint discrimination - an established ground of non-interference under the First Amendment.[49] In protecting this "viewpoint", the court refused to engage in any analysis of the harms caused by such speech. It used *Miller* to cop out of this, holding that only "offensive" sexual depictions were exempted from First Amendment protection, not "harmful" ones.

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47 American Booksellers Association Inc. v. Hudnut 771 F.2d 323 (1985).

48 *Ibid.*

49 Cynthia Stark, *Pornography, Verbal Acts and Viewpoint Discrimination* 12 PUB. AFF. QUART. 429, 440 (1998).

IV. THE CANADIAN HARMS APPROACH

Canadian obscenity jurisprudence began with the *Hicklin* test, much like the United States.[50] Unlike the United States, however, its departure from this test arose out of an amendment to the criminal statute that defined obscenity, as opposed to a change in judicial interpretation. Following this 1959 amendment, obscenity was defined as a publication whose dominant characteristic was the *undue exploitation* of sex. Consequently, the Canadian application of the undue exploitation standard operated along American lines, testing the depictions of sex in material against the offense caused to the community's contemporary standards (at a national scale) on sexual depiction.[51]

In 1985, the Canadian Supreme Court took the first step towards creating its own unique obscenity jurisprudence with its decision in *Towne Cinema Theatres Ltd. v. The Queen*.[52] Here, the court changed its earlier standard of *offence* and community standards to a standard of *tolerance*. This meant that offense *personally* caused to members of the community would no longer justify suppression of free speech – the line was now to be drawn at materials that Canadians would not *tolerate other Canadians* being exposed to. While the implications of adopting tolerance over offence as a standard were unclear

50 Moon, *supra* note 46.

51 *E.g.,* Brodie v. The Queen [1962] SCR 681; Dominion News & Gifts Ltd. v. The Queen [1964] SCR 251.

52 Towne Cinema Theatres Ltd. v. The Queen [1985] 1 SCR 494.

then, subsequent interpretations of the term yielded results very different from those seen in the USA.

A. R v. Butler

While a clear shift away from a pure offence based standard, *Towne Cinema's* community tolerance test still required the "community" to determine the kinds of sexual depictions it would not tolerate other Canadians being exposed to. In practice, this could have very well taken the majoritarian route the American interpretation had, with jury members using their own personal convictions to define these abstract community standards of tolerance.[53] However, in its landmark decision in *R v. Butler*,[54] rendered in 1992, the Canadian Supreme Court revolutionized its approach to obscenity, observing that the fundamental purpose of the obscenity restriction on free speech was not to preserve the morality of the society, but instead to avoid *harm* that may accrue to members of society out of certain kinds of speech.

The court began with the "undue exploitation" standard, observing that previous decisions had not clearly established what it would constitute. It then imported two objective tests into it – the internal necessities test and the degradation or dehumanization test.[55] The former simply provided an "artistic defense" to harmful depictions of women. In applying the test, the courts would be empowered to determine whether a harmful depiction of

53 Hunt, *supra* note 19.

54 R v. Butler [1992] 1 SCR 452.

55 Richard Jochelson and Kirsten Kramar, *Obscenity and Indecency Law in Canada after R v. Labaye*, 36 CAN. J. SOC. 283, 290 (2011).

women was necessary for the purposes of the work, and would only apply the obscenity ban to work that contained *"dirt for dirt's sake"*.[56] Centrality to a piece of art would continue to be a ground of absolute protection.

The *Butler* court's unique contribution is the degradation or dehumanization test. The court observed that the undue exploitation standard would require it to determine whether the depiction of women in pornography had the effect of "degrading or dehumanizing" them in reinforcing prevalent harmful narratives around their role in sexual relations. These would include depictions that painted women as sexual objects who enjoyed acts of painful domination/outright humiliation. The court observed that merely requiring consent between actors in pornographic films would not solve this problem since even consensual material could push the narrative that causes discomfort/pain to women, depicts them as a source of sexual pleasure for men and normalizes the practice of objectifying women – all this would have had a significant tangible harm for women.[57]

Butler relied heavily on Mackinnon's analysis of the harms of pornography to establish the pressing need for its ban.[58] Much like the application of her ideas to only violent kinds of porn in the Indianapolis Ordinance, the court made limited observation about the harms of degrading

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56 *Supra* note 54 at 455.
57 *Supra* note 54 at 460.
58 Jochelson and Kramar, *supra* note 55 at 285.

and dehumanizing pornography which showcased women in violent porn, and legitimized a sense of male entitlement over female bodies.[59]

Having established the degradation or dehumanization test and the harms it sought to avoid, the court was faced with two challenges – first was locating the test within the established community standards of tolerance and second, ensuring that the test proportionally restricted free speech.[60] On the former, the court held that depictions of women that met the degrading or dehumanizing test would always be deemed intolerable by Canadian society's standards. In essence, the court completely abolished any offence-based standard for obscenity, and replaced it with a purely harms-based standard instead.[61] In doing so, it emancipated the obscenity restriction from the hands of the majoritarian moral values that caused harm to different members of society. This replacement was subsequently concretised in *R v. Labaye*,[62] where the court held that community standards were wholly irrelevant in the determination of obscenity. Instead, it held that the degrading or dehumanizing harms-based test was the only *independent* test to be used.

The second task for the court was locating the standard within its proportionality test. This required the court to determine whether the infringement of the fundamental right to free speech and expression was

59 *Supra* note 54 at 471.
60 Jochelson and Kramar, *supra* note 55
61 Jochelson and Kramar, *supra* note 55
62 R v. Labaye [2005] 3 SCR 728.

proportionate. To do this, it divided pornography into three heads – (a) one with explicit sex with violence, (b) one with explicit sex without violence but which subjects people to degrading or dehumanizing treatment and (c) pornography with explicit sex without violence that is neither degrading nor dehumanizing. It then restricted the scope of the obscenity to the kind of pornography which would "always constitute undue exploitation of sex" under (a) and those that caused substantial harm mentioned in head (b).[63] In tailoring the restriction in this specific manner, the court was able to bring it within the "minimum interference" requirement of proportionality, since it interfered with the fundamental right to free speech only to the extent it was necessary to prevent the identified harms.[64]

B. The Aftermath of Butler

Butler's deviation from the American offence-based standard was very polarizing. Within the feminist movement, concerns were raised by pro-pornography feminists, who argued that the decision would further push representations of female sexuality under the rug.[65] An example of such a concern was a possible restriction on the depiction of urolagnia – the use of urine as a sexual stimulant. In fact, banning such depictions would also have a chilling effect on depictions of female orgasms (often pictured through urination by women at the end of sexual intercourse which was considered

63 *Supra* note 54.

64 *See generally* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence* 57 U. TOR. L. J. 383 (2007).

65 Justine Juson and Brenda Lillington, *R v. Butler: Recognising the Expressive Value and Harm in Pornography* 23 GOLD GATE U. L. REV. 651 (1993).

"degrading" and "dehumanizing"), thereby reinforcing the male-pleasure centric nature of all pornography.[66] In addition, *Butler* also drew flak for restricting the terms of engagement on the role of women in sexual activity – the state would now control the manner in which women were to be displayed and curtail deviant depictions that it deemed "harmful".

In addition to these concerns, other sexual minorities also expressed reservations with *Butler,* especially since the material depicting homosexual acts accounting for a disproportionate 75% of all material charged.[67] These issues, however, are not a function of the law laid down in *Butler* and are merely examples of biases around the "violent" and "unnatural" nature of homosexual pornography impacting the way the new obscenity standard was applied. In fact, Justice Sopinka's opinion recognized the importance of creating a space for the expression of female sexuality and forms of sexuality that did not conform to the societal "norm" in pornography.[68]

The only test prescribed in *Butler* is that of harm – expressions of female sexuality that do not contain harmful depictions of other persons would not meet that threshold, whether they contain urolagnia or not. Consequently, blanket bans on depictions like urolagnia are merely a result of poor implementation, and have consequently not withstood further judicial

66 Tristan Taormino *et al*, THE FEMINIST PORN BOOK 65 (2013).

67 Jamie Cameron, *Abstract Principle v. Contextual Conceptions of Harm: Comment on Butler* 37 MCGILL L. J.1135, 1140 (1992).

68 *Supra* note 54.

scrutiny.[69] The second concern is also unfounded in law, since *Butler* ensured that the state could not interfere with the publication of any material that contained artistic merit. In any case, the court's decision was restricted to violent or particularly harmful forms of sexual depiction, a standard that would not be met simply because an expression of sex was "deviant", even if it lacked artistic merit.[70] Illustratively, the display of fetishes of any kind, even in a purely pornographic film, would not be affected by the decision in *Butler*, unless they are of an especially violent nature.

V. THE INDIAN APPROACH

As has been observed on many occasions,[71] applying foreign constitutional rights standards across jurisdictions must always account for differences in impact owing to changed social and legal contexts. Thus, when attempting to apply an obscenity standard for pornography in India that is premised on the harms it causes to women, the Indian social and legal context must be clearly understood.

India faces an acute women's rights crisis.[72] Traditional norms and patriarchal values perpetuate strong gender stereotypes that significantly

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69 Catharine Mackinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 237 (1987).

70 Cameron, *supra* note 67 at 1140.

71 *See generally* Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law* 13 IND. J. GL. L. ST. 37, 67 (2006).

72 For a comprehensive report on the state of womens' rights in India, judged against the touchstone of the UN Convention on the Elimination of all forms of Discrimination Against Women, *see* Madhu Mehra, *India's CEDAW Story* in WOMEN'S HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW (Anne Hellum and H.S. Assen eds., 2013). *See also* Aruna Kashyap, 'Indian Women Have the Right to Life Without Fearing Sexual Assault'

restrict women's choices and freedoms. These norms have normalized varying degrees of sexual violence directed at women across India, including its largest metropolises. While an estimated 37,000 rape cases were registered in India in 2015,[73] it has been suggested that the real number of such incidents is exponentially larger. This discrepancy exists due to barriers to reporting that operate on two levels – social and institutional.[74] The social barrier operates first, owing to a strong taboo that exists on matters of rape and sexual assault, and a culture of victim blaming that severely dissuades victims from seeking remedies in the law. In fact, a vast majority of Indian sexual violence victims face it at the hands of a close relative or neighbour, making the social barriers even more difficult to surmount.[75] However, even for those who manage to overcome them, the biases entrenched in the patriarchal society play out at the institutional level. For instance, authorities display great hesitance in registering FIRs or launching investigations into such matters.[76]

The law, however, has not been stagnant in this regard. Following the horrific Delhi Gang Rape Case in 2012, the Justice J.S. Verma Committee recommended changes to the Indian penal code to address institutional

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(Human Rights Watch, 5 May 2017) *available at* https://www.hrw.org/news/2017/05/05/indian-women-have-right-live-without-fearing-sexual-assault (Last accessed May 1 2018).

73 National Crime Records Bureau, *Report on Crimes Against Women available at* http://ncrb.nic.in/StatPublications/CII/CII2015/chapters/Chapter%205-15.11.16. (Last accessed May 1 2018).

74 *E.g.* Human Rights Watch, *"Everyone Blames Me"* (8 November 2017) *available at* https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors (Last accessed May 1, 2018).

75 *Ibid.*

76 *Supra* note 72.

problems in cases of sexual assault.[77] Indeed, the amendments and the nation-wide outcry that followed the incident have marginally improved the extent to which women remain protected from sexual violence in India.[78] However, increased criminal sanctions have not attacked the root of the problem, which is a culture that has normalized sexual violence. Thus, with a society and a legal system already rigged against sexual assault victims (and indeed women in general), pornography that justifies violent sexual aggression against women simply exacerbates an already serious problem.

A. Mackinnon's Harms and the Vaswani Petition

It is in the context of the prevailing socio-economic situation in India that the Vaswani petition was presented. The petition assumes that the State's approach is limited to increasing sanctions for sexual violence, a tactic that is premised on the assumption that such a threat would deter individuals from committing such acts. Armed with evidence of the scope of the problem in India despite changes in the law,[79] it argues that higher penalties can only have a limited positive impact and that the long-term solution lies in changing the available imagery and narratives that drive individuals to commit such acts in the first place.[80]

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77 Zoya Hasan, *Towards a gender-just society* (*The Hindu* 1 April 2013) *available at* http://www.thehinducentre.com/the-arena/article4569377.ece (Last accessed May 1 2018).

78 *Ibid.*

79 *Supra* note 1 at 28-32.

80 *Supra* note 1 at 37.

In its analysis of pornography in this backdrop, the Vaswani petition may be compared to the harms of pornography that had been identified by Catharine Mackinnon. Specifically, its analysis mirrors the approach adopted by Mackinnon in her second and third harms, referred to previously. This is because her first harm – of individuals being coerced into the production of especially violent pornography, is of limited relevance in India where a strict bar exists on the creation of any pornographic material.[81] Furthermore, as the Vaswani petition itself observes, a vast majority of the pornography consumed in India is produced in the United States and the EU, where such production is legal.[82] Despite an acknowledgement of the fact that many participants in pornography are not in a position to validly consent to the acts they perform on screen or are filmed without their consent, the Court fails to make this a ground to justify the reliefs it seeks.

Mackinnon's second harm, which is alluded to on multiple occasions in the petition, draws a direct link between instances of sexual violence directed at women and an "addiction" to pornography that has developed among Indian men. It does so by observing that "brutal" forms of pornography are widely available and publicized on the internet, and have a tendency to entice consumers to repeatedly consume them.[83] This brutal pornography comes in a variety of forms, ranging from outright non-consensual acts being performed on women to excessive physical injury and

81 *See* Indian Penal Code 1860, § 293; Information Technology Act 2000, § 67 which make the creation of such content in India punishable as a crime.

82 *Supra* note 1 at 32.

83 *Supra* note 1 at 5.

bodily harm being exacted on them during sexual intercourse. The petition argues that in allowing consumers to access such material freely, the state has permitted publication of the narrative that a woman's pain in such situations should be a source of a man's pleasure, which in turn results into a culture that normalizes sexual violence.[84] The petition further argues that making such material easily accessible to children and young adults is uniquely harmful, since their thoughts and perceptions in this regard get clouded at a young, impressionable age.

Mackinnon's last harm which states that pornography changes the perception of women in society, is also alluded to on multiple occasions. The petition observes that pornography has reduced women to objects upon whom acts of any nature may be performed to fulfill male sexual desire.[85] The constantly degrading depictions of women has the effect of reducing their dignity.[86] The petition then locates this harm in the context of everyday disadvantages women face, arguing that the constant presence of a narrative that reinforces their subservience in sexual matters would affect their status in society, along with creating unfair and unrealistic expectations for them in sexual relations.[87]

Much like Mackinnon's original work, the Vaswani petition's identification of harms is used to justify a blanket ban on all pornography.

84 *Supra* note 1 at 50.
85 *Supra* note 1 at 5.
86 *Supra* note 1 at 33.
87 *Supra* note 1 at 80.

However, to arrive at a constitutionally reasonable restriction, the harms must be applied to the context of violent porn alone, as was done by the *Butler* court[88] and during the framing and passing of the Indianapolis ordinance.[89] In fact, in support of *Butler's* position on the more onerous nature of Mackinnon's harms when looked at from just a violent porn perspective, the Vaswani petition itself earmarks "brutal" porn as being primarily responsible for the second kind of harm, which is that of increased sexual violence.[90]

B. The Current Indian Position on Obscenity

The statutory basis for the offence of obscenity is borne out of § 294 of the Indian Penal Code. This definition reflects the English position on obscenity at the time of the *Hicklin* decision which has been as discussed earlier. In *Ranjit Udeshi v. State of Maharashtra*,[91] decided in 1965, Justice Hidayatullah (as he was then) held that D.H. Lawrence's book *Lady Chatterly's Lover* was obscene within the definition in the IPC, since it had material that would tend to corrupt or deprave those most vulnerable to such influences. In doing so, the court adopted the most repressive possible test of obscenity – the *Hicklin* test which required that the most vulnerable actor's reaction be used to censor speech.

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88 *Supra* note 54.
89 Dworkin and Mackinnon, *supra* note 36.
90 *Supra* note 1 at 79.
91 Ranjit Udeshi v. State of *Maharashtra* AIR 1965 SC 881.

Gradually, however, the standard was liberalized in India, with the most vulnerable actor test being changed into an 'average person test'.[92] The positive part of the test, however, remained the same – material would be tested on the basis of its tendency to deprave or corrupt individuals, with most of these terms remaining undefined. This was cleared up in the court's decision in *Aveek Sarkar v. State of West Bengal*.[93] Rendered in the context of a German magazine with a picture of a famous male tennis player posing nude with a woman while covering her breasts with his arm being challenged as "obscene", the court abandoned the *Hicklin* test, aligning the Indian position with that in the USA by adopting the American *Roth* test, of testing obscene material against community standard. This brought the concept of "contemporary community standards" into Indian jurisprudence, requiring the courts to determine whether the effect of any material, taken on the whole, was to *offend* the contemporary community standards on sexual depiction.[94]

A necessary consequence of the community standards test was putting courts in a position to determine the standards of obscenity on case-by-case basis. In the United States, as noted earlier, this discretion given to the court took on a majoritarian colour. In India too this test left it to the

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92 *See* DG Doordarshan v. Anand Patwardhan (2006) 8 SCC 433 where the court explicitly used the average person test to determine whether the impugned content in that case was obscene.

93 Aveek Sarkar v. State of West Bengal (2014) 4 SCC 257.

94 Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin Test* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG, 7 February 2014 *available at* https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/ (Last accessed May 12018).

discretion of the court. In effect, this has resulted in an imposition of its own right whereby the "community standards" were evolved through case laws with judges applying their own conceptions to different fact situations before them.[95] Given the severe lack of diversity in India's higher judiciary,[96] these judges were more likely to be male and thereby conform to a societal norm that doesn't necessarily view all harmful depictions of women as "offensive" – a criticism Mackinnon also relies on in explaining the hesitance for Courts in the US to view harmful depictions of women in pornography as offensive.[97] This predisposition was made most clear by the Delhi High Court's decision in *Vinay Mohan Sharma v. Delhi Administration,*[98] where it observed that obscenity convictions were moulded by the degree of offence caused by any material to the sensibilities of an "average member of society" only, and not the unique impact of such a depiction on any one section alone.

This singular focus towards preventing offence alone is also borne out of the provisions of the Indecent Representation of Women (Prohibition) Act, 1986. § 2(c) of the Act defines an "indecent representation" both as one that is derogatory/denigrating to women *and* one that deprives, corrupts or injures public morals. The language, therefore,

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95 Japreet Grewal, *Perumal Murugan and the Law on Obscenity*, CENTRE FOR INTERNET AND SOCIETY BLOG 21 July 2016 *available at* https://cis-india.org/internet-governance/perumal-murugan-and-the-law-on-obscenity (Last accessed May 1 2018).

96 Aditya AK, *Through the Glass Ceiling: Woman Judges (or lack thereof) in the Higher Judiciary* BAR AND BENCH 4 November, 2017 *available at* https://barandbench.com/woman-judges-higher-judiciary/ (Last accessed on May 1, 2018).

97 Dworkin and Mackinnon, *supra* note 36.

98 Vinay Mohan Sharma v. Delhi Administration 2008 CriLJ 1672.

seems to include both an objective harms approach and a subjective offence to public morals approach. However, in practice, harm to public morals is often not used to try and justify restriction on content under the statute, reinforcing the state's singular focus on protecting community standards instead of preventing harm to its female citizens.[99]

C. Adopting a Harms-Based Approach in India

As demonstrated above, India's American-style offense approach to obscenity has lacked the ability to deal with harms accruing to women. However, Indian courts have not been oblivious to such harms. Illustratively, in *Bobby Art International v. Om Pal Singh*,[100] the court observed that a scene depicting men stripping a woman and humiliating her for pleasure caused harm to women as a class, but did not interfere with it owing to its centrality to a wider story in the film that condemned such practices.

A move towards a harms-based approach would most fundamentally require an acknowledgement of the Vaswani petition's harms. The closest the Supreme Court has come to this has been in its decision in *Ajay Goswami v. Union of India.*[101] Here, the court was faced with a prayer for a restriction on the manner in which women were depicted in newspapers, since such

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99 *See* Monika Gulati and S. M. Begum, *Advertisement and Dignity of Women in India: A Study of Indian Print Advertisement Laws,* 5(4) JOURNAL OF BUSINESS THEORY AND PRACTICE 315, 317-320, describing the manner in which offensive depictions of women alone have been clamped down on under the Indecent Representation of Women (Prohibition) Act, 1986; Jogendra Das, *Reflections on Human Rights and the Position of Indian Women,* 64(3) INDIAN JOURNAL OF POLITICAL SCIENCE 203, 210 (2003).

100 Bobby Art International v. Om Pal Singh AIR 1996 SC 1846.

101 Ajay Goswami v. Union of India AIR 2007 SC 493.

depictions would corrupt the minds of children who have easy access to them. The court acknowledged that sustained exposure to such imagery could negatively impact the perception of women among such children, but ultimately held that the harm was too remote to justify a restriction under Art. 19(2).

Unlike *Ajay Goswami's* approach, any justification for action to prevent these harms would require that they be elevated to the status of a fundamental rights violation. Thus, a reading of the harms contained in it as amounting to a violation of Art. 21 rights would empower the Court to take necessary steps to prevent the harm. This is especially true in the context of the wide powers the Supreme Court has arrogated to itself on many occasions to cure perceived violations of fundamental rights.[102] A relevant example is that of *Vishakha v. State of Rajasthan*,[103] where the court acknowledged that any sexual harassment or violence meted out to women was a violation of their rights under Art. 21 of the Constitution and actively laid down guidelines to be followed at the workplace to prevent that harm.

In the present context, a reading of § 294 of the IPC to tackle the identified harms would suffice. In particular, the words "deprive and corrupt an individual" contained in it may be read to mean any negative shift in the perception of women and the normalization of sexual violence, instead of the current reading of the phrase which deems an individual to be "depraved or

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102 *See generally* Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court* 8 WASH. U. GL. ST. L. REV. 1(2009).

103 Vishakha v. State of Rajasthan AIR 1997 SC 3011.

corrupted" if (s)he is exposed to an offensive sexual depiction. In this fashion, the court could read the objective harms test from *Butler* into the IPC, and abandon the current offense-based standard in the process.[104]

As a restriction on free speech rights contained in Art. 19(1)(a), this new standard would have to conform with the grounds contained in Art. 19(2). On the face of it, it would seem that this standard clearly falls within the exception to free speech on the grounds of decency and morality provided in Art. 19(2), given that the proposed interpretation involves reading §294 of the IPC in a way that addresses harms instead of the offence caused. Indeed, from *Ranjit Udeshi* onwards, the court has utilized this part of Art. 19(2) to justify the IPC's obscenity restriction, reading decency and morality in conjunction with one another. However, in *Ramesh Prabhoo v. Prabhakar Kashinath Kunte*,[105] the court re-shaped the meaning of decency in Art. 19(2), holding that it would extend to all kinds of "decent" conduct as envisioned under the constitution. This means that the decency restriction is not limited to the term morality used after it in Art. 19(2), but can independently account for restrictions on speech that do not meet general constitutional goals. If violent pornography is identified to be a violation of Art. 21 rights in the manner described above, this reading of "decency" would bring a *Butler* type restriction that bars only a certain class of especially harmful pornography within the scope of Art. 19(2).

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104 *Supra* note 54 at 465.

105 Ramesh Prabhoo v. Prabhakar Kashinath Kunte, AIR 1996 SC 1113.

However, in addition to falling within the grounds contained in Art. 19(2), the restriction itself must pass the test of reasonability. In its 1952 decision in *State of Madras v. V.G. Row,*[106] the court held that the nature of the right infringed, the extent and urgency of the evil sought to be remedied and the prevailing conditions at the time would have to be considered in evaluating the validity of a restriction on a fundamental right. While there are, indeed, examples of this test simply being ignored in the evaluation of a restriction,[107] it has generally been the yardstick against which restrictions are tested. Illustratively, Justice Shetty in *S. Rangarajan v. P. Jagjivan Ram*,[108] held that a restriction under Art. 19(2) would be reasonable as long as it (a) clearly delineated the kinds of speech being restricted and (b) was made to prevent a real harm that had a proximate nexus with such speech

The first of these requirements would be met by applying the *Butler* court's three-pronged classification of pornography (explicit sex with violence, explicit sex without violence but which subjects people to degrading or dehumanizing treatment and explicit sex without violence that is neither degrading nor dehumanizing) and the limitation of its ban to the first and the second kind, in some instances.[109] In clearly identifying the categories of pornography that are banned, the restriction would meet Art.

106 State of Madras v. V.G. Row AIR 1952 SC 196

107 *See* Society for Un-Aided Private Schools v. Union of India, (2012) 6 SCC 1, where the court's pre-occupation with the desirability of imposing a requirement for private schools to allot 25% of their seats to children from under-privileged backgrounds resulted in them simply ignoring the need to justify this restriction on the freedom of trade and commerce in Art. 19(1)(g) as being proportionate under Art. 19(6).

108 S Rangarajan v. P Jagjivan Ram (1989) 2 SCC 574.

109 *Supra* note 54.

19(2)'s specificity requirement, much like the manner in which it was held to have met the Canadian constitutional requirement of proportionality and minimal interference.

The second requirement would require an acknowledgement of a nexus between the above-mentioned Art. 21 harms and violent pornography. In the USA, the *Hudnut* court refused to draw this link, relying on the lack of conclusive evidence of any relationship between the consumption of violent porn and the commission of acts of sexual violence.[110] In India, drawing such a link along the lines of the *Butler* court's approach would not be entirely without precedent. In *Reepik Ravinder* v. *State of Andhra Pradesh*,[111] the High Court of Andhra Pradesh held that continued exposure to violent pornography was partially responsible for the defendant's proclivity to commit acts of rape. While it wrongly used this to justify a lower sentence for the crime, its underlying logic affirms Mackinnon's ideas of a link between violent porn and sexual violence. Since such pornography would now result in a clear violation of Art. 21 rights of female Indian citizens, the court would be in a position to borrow from this analysis and mirror *Butler*'s approach in allowing it to justify a harms-based restriction on violent pornography under Art. 19(2). In doing so, however, it must take care not to repeat *Reepik Ravinder's* mistake of equating a factor influencing the commission of a crime

110 *Supra* note 46.

111 Reepik Ravinder v. State of Andhra Pradesh 1991 CriLJ 595.

with a ground that justifies reducing the extent of culpability accorded to the perpetrator of such a crime.[112]

Outside the strict legal bounds of the test, the court in *V.G. Row* observed that the surrounding circumstances in which such a restriction is proposed must be taken into account when assessing its validity. In that light, the context laid out above describing women's rights crisis in India with growing instances of sexual violence would lead to the conclusion that *Butler's* restriction is a reasonable way of attacking the problem. Whether the court has the power to use the *Vaswani* petition in its current form (as a Public Interest Litigation) to change the reading of a statutory provision is unclear[113] (although the decision in *Vishakha* was borne out of a PIL). Thus, the argument made in this context takes a more general approach to justifying a different reading of § 294 of the IPC to serve the interests of India's female population. Through the proceedings in *Kamlesh Vaswani* or otherwise, such a re-shaping of the word "obscenity" under the IPC is the only way to tackle the harms highlighted in the petition within the Indian constitution.

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112 Geetanjali Misra and Radhika Chandiramani, SEXUALITY, GENDER AND RIGHTS: EXPLORING THEORY AND PRACTICE IN SOUTH AND SOUTH-EAST ASIA 37 (2005).

113 *See generally* Avantika Mehta Sood, *Gender Justice in India: Case Studies from India,* 41 VANDERBILT J. TRANSNAT. L. 832 (2008) for a detailed explanation of the manner in which the court has limited its power to some extent when dealing with the interpretation of a statute in a Public Interest Litigation.

VI. CONCLUSION

Owing to its unique origin, the obscenity restriction on free speech stands alone in protecting citizens from "offensive" speech, without accounting for any harms that such speech may cause. In contemporary times, subjective application of the evolving standards of obscenity have resulted in restrictions that have taken on a dangerous majoritarian colour, excluding the harms caused by such speech from its decision-making calculus.

In this paper, the author has located this harm in the depiction of women in pornography of an especially violent nature. In doing so, a comparative approach was used by looking at the way free speech rights under the American and Canadian Constitutions have been moulded to account for the harms of violent pornography. It was found that the American approach, which focuses on the offence caused by expressive content and not its impact, protects most forms of violent, harmful pornography. On the other hand, the Canadian approach evaluates the harms of expressive content and not the degree of offense it causes, adopts a more reasonable approach in banning extreme versions of harmful, violent pornography. Upon comparing the position in India with these jurisdictions, it was found that the current position in India is closer to the American offense approach.

It is in this context that the Vaswani petition was discussed. While riddled with moral outrage and broad, unconstitutional proposals, the petition highlights a significant concern with the increased proliferation of and easy access to violent pornography in India. This paper built from that base, highlighting the similarities in the Indian and American approaches to obscenity, which enables us to draw parallels between the harms identified by the Vaswani petition and those raised by Catharine Mackinnon. It therefore suggests that based on observations made in the American context, the Indian courts should shift to a Canadian-style harms approach in order to ensure that violent forms of pornography are banned in India without causing chilling effect to other forms of pornographic content.

Despite being an obvious deviation from the norm of harm-based restrictions on fundamental rights prescribed in the law, the obscenity restriction's deviance has no cogent justification. Thus, the Vaswani petition can form the starting point for a shift towards the Canadian approach, that focusses on the harm caused by pornography instead of the offence caused. Relying on Art. 19(2) of the Constitution and its subsequent interpretation by Indian Courts, this paper has presented a way for this shift to be effectuated in the Indian context. However, while the Vaswani petition forms a good starting point for this shift, it is alone incapable of causing any change. Thus, a petition that relies on the Vaswani petition's identified harms, does away with its use of moral outrage and broad prayers and incorporates a specific prayer for the adoption of a harms-based restriction on only certain kinds of

pornography (as provided for in *Butler*) must be presented before the Indian courts. Indeed, this is the only way to strike the delicate balance between free speech and women's rights that pornography requires within the confines of Art. 19(2) of the Constitution.

A GAMBLE OF LAWS: RECONCILING THE CONFLICTING JURISPRUDENCE ON GAMBLING LAWS IN INDIA

Naman Lohiya & Sakshi Pawar[*]

ABSTRACT

Gambling and betting aren't uncommon in India. The questions regarding their legality have resurfaced in light of the incumbent government's policy of promoting business on one hand and greater societal control on the other. The Telangana Ordinance & Amendment Bill has not only outlawed gambling and betting on games of pure chance, but also on games of mere skill, which were previously allowed by the Supreme Court. Additionally, the Gujarat High Court in the Dominance Games case declared poker to not be a game of skill. All these incidents have occurred in the backdrop of highly out-dated laws shaping an inconsistent and unstable central policy. This article seeks to address three key questions. First, in the context of the creation of a different conception of mere skill in Telangana Ordinance, than that of Supreme Court; whether such conception has any basis in law and rationality. Second, in the wake of direct conceptual clash between the Supreme Court's decisions and state laws, determining the regulatory and

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policy issues that need to be settled. Third, in the light of express restriction by state laws, whether protection under Article 19(1)(g) is accorded to betting or gambling on games of mere skill. Through discussion of these three questions, the authors seek to propose an alternate and (in their opinion), a more rational conception of the dominant factor test, evaluate the correctness of regulatory decisions by the state, centre and the judiciary, and its implications.

I. INTRODUCTION

Gambling is deeply embedded in the roots of India and has prevailed in several forms that can be traced to Indian mythology.[1] Over time it grew in popularity and due to the resultant addiction and bankruptcy of gamblers in society, it came to be considered as a vice which needed to be regulated.[2] The first such notable regulation, the Public Gambling Act of 1867 was enacted in colonial India. [3] It implicitly justified upper class gambling while it outlawed middle class gambling, by permitting betting on gaming (game of mere skill) and not without gaming (game of chance). Such differentiation permitted *elite* gambling on horse racing but restricted several popular card games and other forms of betting commonly practiced by middle class.

1 C. RAJAGOPALACHARI, THE MAHABHARATA (57th ed. 2012).
2 LN RANGARAJAN, KAUTILYA - THE ARTHASHASTRA (Penguin Books India 1992).
3 Public Gambling Act, No. 3 of 1867 (1867). [hereinafter PGA].

After Independence, discretion to regulate gambling was given to states pursuant to List II Entry 34 of the Seventh Schedule.[4] However, in the absence of a state-specific law, the central Public Gambling Act still continues to govern gambling in some of the states. Discrepancies in regulation of gambling arise out of different state laws or state amendments made to the central Public Gambling Act. For example, states such as Karnataka,[5] Kerala[6] and Odisha[7] are governed by respective state laws, while Himachal Pradesh on the other hand, has passed a Public Gambling (Amendment) Act 1976,[8] making the requisite modifications to the central law according to its needs. While this degree of independence given to the states to customize the gambling laws appears to be a liberal policy adopted by the centre, it raises several questions pertinent to distribution of power, uniform national policy, and whether gambling is a fundamental right.

The Public Gambling Act and the Supreme Court ("SC") decisions have excluded games of mere skill from the ambit of gambling, through provisions[9] and decisions[10] respectively. Section 12 of the Public Gaming Act, 1867 states that:

4 INDIAN CONST., List II Entry 34 of Seventh Schedule.
5 Karnataka Police Act, No. 4 of 1964, Ch. VII (1964).
6 Kerala Gambling Act, No. 20 of 1960 (1960).
7 The Odisha (Prevention of) Gambling Act, No. 17 of 1955 (1955).
8 The Public Gambling (Himachal Pradesh Amendment) Act, No. 30 of 1976 (1976).
9 PGA, *supra* note 3, Section 12.
10 State of Bombay v. RMD Chamarbaugwala, (1957) AIR SC 699 [hereinafter Chamarbaugwala II].

> *"Act not to apply to certain games: Nothing in the foregoing provisions of this Act contained shall be held to apply to any game of mere skill wherever played"*

However, this exception of "mere skill" is vague and the discrepancies in state regulation are a result of individual interpretations of the exception adopted by states. It leaves the fundamental question of what constitutes gambling[11] to be settled through judicial interpretation. The SC for several games, such as Rummy,[12] horse riding,[13] Bridge[14] and video games[15] has determined the degree of skill. It has adopted the *dominant factor* test borrowed from the United States,[16] (also called the *preponderance* test) to determine a game of skill.[17] A game of skill, according to the SC, is identified through the relative dominance of degree of skill over degree of chance.[18]

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11 While betting has not been specifically mentioned under the Public Gambling Act, gambling is the broader word that has been used to encompass betting. Betting, in the true sense, implies placing stakes on an uncertain future event whereas gambling involves the player staking money on a game in which he himself participates. Since both gambling and betting refer to games of chance, which the Act intends to prohibit, the legislature has not differentiated between them. Both, gambling and betting also fall under the term "wagering", which is as prohibited by section 30 of the Indian Contract Act, 1872. Wagering is considered as the staking of money on an unforeseen event.

12 State of Andhra Pradesh v. K. Satyanarayana, (1968) 2 SCR 387, ¶ 12.

13 Dr. KR Lakshmanan v. State of Tamil Nadu, (1996) 2 SCC 226, ¶ 29.

14 Satyanarayana, *supra* note 12, ¶ 12.

15 M.J. Sivani v. State of Karnataka, (1995) 3 SCR 329, ¶ 11.

16 Lakshmanan, *supra* note 13, ¶ 27.

17 The Sports Law and Policy Centre, *Games of Skill in India: A Proposal for Reform* (Mar. 16, 2017), https://drive.google.com/file/d/0B6LE5s8UEIKGZXNKNGRnQk94ZEE/view [hereinafter Sports Law and Policy Centre].

18 Lakshmanan, *supra* note 13, ¶ 20.

Astoundingly, the promulgation of Telangana State Gaming (Amendment) Ordinance, 2017 ("Telangana Ordinance")[19] assumed its own interpretation of games of skill and games of chance, placing activities to a standstill in the state. The Ordinance, approved by both the houses, was the first law that took a contrary position to the interpretation of the Supreme Court. Through the Ordinance, the following Explanation to §15, pertaining to exemption of games of mere skill, was added:

> *"Explanation I: A skill game is a game which is totally based on skill and ability of the person and not otherwise.*
>
> *Explanation II: Any game which depends partly on skill and partly on luck or chance cannot be termed as skill game.*
>
> *Explanation III: Rummy is not a skill game as it is involved partly skill and partly luck or chance."*

The Explanation contradicted the SC on two fronts. *Firstly*, according to Explanation I, a game of skill must be entirely based on skill, leaving no room for chance. However, the SC has expressly stated that an element of chance cannot be eliminated even from a game of skill.[20] Explanation II excluded mixed games of skill and chance from exemption, even if skill dominates, thereby disregarding the *dominant factor* test in its entirety. *Secondly*,

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19 Telangana State Gaming (Amendment) Ordinance, No. 4 of 2017 (2017) [hereinafter Telangana Amendment Ordinance].

20 Lakshmanan, *supra* note 13, ¶ 3.

the Ordinance went a step ahead to absolutely clarify that even Rummy, deemed to be a game of skill and expressly allowed by the SC,[21] was made subject to prohibition by the state gambling laws on account of not being a game of skill. The Ordinance was soon challenged for violating the fundamental right to business[22] as it precluded operators and gaming houses from exhibiting games, which despite having an element of chance, required a dominance of skill to play the game.[23]

Telangana isn't the only state that has disregarded the SC's decisions. Resting under its shadows, the Karnataka Police Act, 1963 stipulates that games of chance would include mixed game of skill and chance.[24] Thus, even if skill were to be the dominant element in a game, an iota of chance would preclude the game from being exempted.

These laws raise certain questions that deserve to be outlined and analyzed. The article seeks to, *first*, determine if the Telangana Ordinance, the Amendment Bill, the Karnataka Police Act and any other law following a similar definition of mere skill have any basis in law and rationality. *Second*, in the wake of a conflict between a state law and the SC, the article seeks to determine the regulatory and policy issues that need to be settled. *Third*, the article discusses the scope of protection accorded to games with

21 Satyanarayana, *supra* note 12,¶ 12.

22 INDIAN CONST., Article 19(1)(g).

23 Jay Sayta, *SC to hear challenge to Telangana ordinance, simultaneous hearing to continue in HC*, GLAWS (Sept. 5, 2017), https://glaws.in/2017/09/05/sc-hear-challenge-telangana-ordinance-simultaneous-hearing-continue-hc/.

24 Karnataka Police Act, No. 4 of 1964, § 2(7) Explanation (ii) (1964).

preponderance of skill under fundamental rights, in light of express restrictions by state laws.

II. APPROPRIATENESS OF THE DOMINANT FACTOR TEST

Before we discuss the deviation of the Telangana and Karnataka laws from the *dominant factor* test, it is essential to explore if this test is the appropriate stance for India to determine what constitutes gambling. The dominant factor test is the interpretation provided by the SC of the term "mere skill" found in §12 (exemption clause) of the Public Gambling Act.[25]. The SC has allowed[26] and disallowed[27] betting on certain games through interpretation of this clause. The function of the exemption clause has been to make a clear distinction between games of skill and games of chance, in essence, determining gambling. It is determined through the employment of skill by the participants of a particular game. This provision allows states to undertake independent evaluation and set their own criteria to exempt a game from the application of gambling laws.

To determine the degree of skill and chance in any game, it is essential to first understand the interpretation of the words skill and chance. A game of skill is one in which nothing is left to chance and in which superior knowledge and attention or superior strength, ability and practice,

25 PGA, *supra* note 3, §12.
26 Lakshmanan, *supra* note 13, ¶ 29.
27 Satyanarayana, *supra* note 12, ¶ 12.

gain victory.[28] On the other hand, a game determined entirely or in part by draw of lots or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all or are thwarted by chance.[29] The SC has interpreted the word 'mere skill' extensively and liberally to expand the contours of the exemption clause.

A. The Common and Favourable Conception of 'Mere Skill'

The foundation of the commonly known preponderance test or the dominant factor test was laid *in State of Bombay v. R.M.D. Chamarbaugwala*[30] ("Chamarbaugwala II"). The apex court, while deliberating over the Bombay Prize Competition Tax Act, [31] made a reference to § 2(2) of the Act that dealt with the definition of 'prize competition'.[32] The definition excluded any game that did not substantially depend on exercise of skill. It was thus considered to be of a gambling nature.[33] Therefore any competition game wherein success did not depend to a substantial degree upon the exercise of skill was

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28 Rex v. Fortier, (1957) 13 Que 308 (K.B.).

29 *Ibid.*

30 Chamarbaugwala II, *supra* note 11.

31 Bombay Prize Competition Tax Act, Bom. XI of 1939 (1939).

32 *Ibid* § 2(2):
"Prize Competition " includes-
(a) crossword prize competition, missing words competition, picture prize competition, number prize competition, or any other competition, for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;
(b) any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; and
(c) any other competition success in which does not depend to a substantial degree upon the exercise of skill, but does not include a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay."

33 Coles v. Oldham Press Ltd. (1936) 1 Que 416 (K.B.).

considered gambling.[34] It is pertinent to note that despite being the first case to quantify the requisite degree of skill, there was no reference to the term 'mere skill'. The case ostensibly never intended to interpret the word in the context of the exemption clause but it was tagged along.

The test of preponderance was specifically applied for the first time in the case of *K. Satyanarayana.*[35] Although the Court determined the degree of skill in Rummy, it did so without expansively delving into question. It merely concluded that Rummy, unlike 'flush' or 'brag', is not a game based on pure chance. Although all card games have a certain element of chance, however those with subdued levels (of chance) would not qualify as gambling. It may be concluded that while the distribution of cards is based on chance, the gameplay and result is derived out of skill. Rummy thus requires a considerable amount of skill and is preponderantly a game of skill, thus laying down the preponderance test.[36] Therefore, such a game would not be considered as gambling. Strangely, the Court also considered extraneous determinants that don't affect gameplay such as profits made by a club from a game to categorize a game as gambling.[37] This case in isolation could be deemed insufficient in terms of its jurisprudential value.

The dominant factor test was solidified in the case of *Dr. K.R. Lakshmanan*. The case specifically considered the meaning of 'mere skill' in

34 Chamarbaugwala II, *supra* note 11, ¶ 17.
35 Satyanarayana, *supra* note 12, ¶ 12.
36 Satyanarayana, *supra* note 12, ¶ 12.
37 Satyanarayana, *supra* note 12, ¶ 12.

the backdrop of Madras City Police Act, 1888 and Madras Gaming Act, 1930.[38] It sought to determine whether horse riding is saved by the exemption clause. The Court undertook little analysis on its own while it placed heavy reliance on other sources to come to its conclusion. It endorsed the test of preponderance as derived from the *Chamarbaugwala* case and stated that games based on substantial degree of skill are not gambling. It concluded that horseracing is a sport primarily dependent on the special ability of the horse and the jockey acquired by training, therefore is one predominantly based on skill.[39] Therefore, the dominant factor test as per these cases merely held that there may be games of skill, chance and mixed games of skill and chance.[40] Within these three options, games where skill dominated over chance would not be considered gambling and could be played in India as games of 'mere skill'.

B. The Overshadowed and Ignored Game-changing Facets of the Law

The SC, however, added another dimension to the interpretation of 'mere skill' in the *M.J. Sivani*[41] case. While determining the fate of video games in the backdrop of the Mysore Police Act, 1963 (now known as the Karnataka Police Act, 1963),[42] the Court unambiguously stated that no game

38 Lakshmanan, *supra* note 13, ¶ 2.
39 Lakshmanan, *supra* note 13, ¶ 2.
40 Lakshmanan, *supra* note 13, ¶ 3; Satyanarayana, *supra* note 12, ¶ 15.
41 M.J. Sivani, *supra* note 15, ¶ 3.
42 Karnataka Police Act, *supra* note 31.

could be a game of skill alone.[43] It also expressed that when chance preponderated over a game, then it must not be designated as one of mere skill.[44] It may be inferred from the case that the Court believed that there could be only two categories under gaming; a game of mere chance[45] or a mixed game of skill and chance.[46] According to this interpretation, there was no scope for a game of mere skill, as chance would inevitably creep in. A mixed game of skill and chance was, therefore, merely resting under the garb of mere skill.

This interpretation was radical as it deviated from judgments such as *Lakshmanan*[47] where the SC had divided games into games of skill (mere skill), mixed games of skill and chance and games of mere chance. While the SC in the *M.J. Sivani* case had taken a novel approach in accounting for the element of luck and risk from strategizing that even games of pure skill (such as chess) possessed, it muddled the boundaries between what the legislatures and even future judicial decisions would continue to term as chance. Post the *M.J. Sivani* case, there began to exist two conceptions of chance, one that was an element of strategizing and stemmed as a result of skill, and the other which consisted of people staking their fortunes on an unknown and uncontrolled element such as the turn of cards. While the former, being a byproduct of skill, should not have been considered within the ambit of

43 M.J. Sivani, *supra* note 15, ¶ 11.
44 M.J. Sivani, *supra* note 15, ¶ 11.
45 M.J. Sivani, *supra note 15*, ¶ 9 (refers to Satyanarayana).
46 M.J. Sivani, *supra note 15*, ¶ 11.
47 Lakshmanan, *supra* note 13, ¶ 3.

chance, the *M.J. Sivani* case mistakenly clubbed it with the latter, fortune-based conception of chance that is used in gambling. This distinction between these two concepts can be observed with the examples of chess and betting on horse racing. Chess is a purely skill-based game, however, there are certain risks and unforeseen events that become a part of the gameplay due to the strategizing of the players. Although the *M.J. Sivani* case presumed this to be an element of chance in chess, it was in actuality the result of a set of purely skill-based events. Further, we may also take the example of betting on horse racing. The game involves a purely skill-based analysis of the method in which the betters analyze the strengths of the jockeys and the horses. However, there may also be element of risk from strategizing, as there is in the game of chess. These risks are unlike the uncertainty that presents itself in the turn of cards, where the element of chance is completely out of the control of the player.

Therefore, the test of preponderance since the *M.J. Sivani* case is unequivocally functioning on the premise that chance is an inseparable element from any game. In the quest for mere application of the test to games to determine their nature, the logical inconsistencies in the test have been left unquestioned. The result of this sudden shift in jurisprudence is that in overanalysing the elements in games of skill and games of chance, the SC has been unable to create a consistent approach for the state assemblies to adopt. While the effect of this confusion has been expanded upon in the subsequent section, recent examples of this conundrum are the Telangana Ordinances which prohibit mixed games of skill and chance and only permit

games of mere skill. Since all games possess an element of chance as per the *M.J. Sivani* case, the Ordinance cannot be practically implemented.

C. Difference Between Judicial Interpretation and State Legislations

Until recently, a principally uniform practice was followed due to a verbatim adoption of the exemption clause as provided under the Public Gambling Act, into state laws.[48] The states' laws were therefore largely in sync with the central law. However, with growing resentment towards gambling and its (believed) social consequences, certain states have created very stringent laws, directly conflicting with the rationale of the Supreme Court. The Supreme Court has stated that there is no game of skill alone[49] and a game of mere skill would mean preponderance of skill over chance, i.e. mixed game of skill and chance. In the backdrop of the aforesaid, Telangana and Karnataka laws on gambling consider even mixed game of skill and chance to be gambling.

From the perspective of a purely academic question of what constitutes a game of skill according to the test followed in India, sports and athletic games would also fall within the ambit of mixed game of skill and chance. If we were to apply the test of preponderance to any game under the sun, none of them would satisfy the test as being games of mere skill and

48 Sports Law and Policy Centre, *supra* note 17, at 5.
49 Lakshmanan, *supra* note 13, ¶ 3.

would accordingly fall within the ambit of gambling. This position could be deduced by only relying upon the analysis of the Court.

However, the SC has extensively relied on foreign sources to interpret the degree of skill or chance in such games.[50] It appears that there is a certain anomaly in the content cited in the judgments and what has been inferred out of those. In the same breath, the SC has said that games may be of chance, or of skill or of chance and skill combined, and that the element of chance cannot be eliminated from a game of skill.[51] This goes against the long list of precedents established by the SC.[52]

Although the *M.J. Sivani* case states that there will always remain an element of uncertainty in any game; in our opinion, it must not be interchangeably used with chance as it was done. The *Lakshmanan* test states that the expression 'mere skill' would mean preponderance of skill.[53] However, if we were to reconcile this meaning of preponderance of skill with the Telangana Ordinances and Karnataka Police Act, it would be more appropriate if the skill was dominating over the element of 'accident' and not 'chance' in the game. Since, games such as chess and betting on horse racing do not possess an element of chance, the term 'accident' could be used to define the element of uncertainty that exists in their gameplay. Then, in that case, the Telangana Ordinances could be practically implemented by

50 Lakshmanan, *supra* note 13, ¶ 7,10.
51 Lakshmanan, *supra* note 13, ¶ 3.
52 Lakshmanan, *supra* note 13, ¶ 3; Satyanarayana, *supra* note 12, ¶ 15.
53 Lakshmanan, *supra* note 13, ¶ 20.

accounting for this element of 'accident' and permit the playing of video games, chess and betting on horse racing. Therefore, it becomes imperative to understand the difference between 'accident' and chance in Indian jurisprudence.

D. Chance v. Accident

The *Lakshmanan* case has implicitly made a distinction between 'chance' and 'accident' by placing reliance upon foreign judgments. Through its reliance on foreign judgments, it could be demonstrated that a game could be one of mere skill, one of mere chance, or one of mixed game of skill and chance, wherein skill is the dominant factor and one wherein chance is the dominant factor.

Harless v. United States of America, as referred in *Lakshmanan*[54], states that there exists a wide difference between 'chance' and 'accident'.[55] While 'accident' is the intervention of some unforseeable circumstance that influences an expected result, chance is an uncalculated effect of mere luck. [56] A shot discharged at random strikes its object by chance; that which is turned aside from its well-directed aim by some unforeseen circumstances misses its

54 Lakshmanan, *supra* note 13, ¶ 27.
55 Harless v. United States of America, 329 F.2d 397 (1843).
56 *Ibid.*

mark by 'accident'.[57] The U.K. Court's interpretation as cited in the case went on to explain the point with an illustration:

> "*That the fleetest horse sometimes stumbles in the race course and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler, whose success depends upon the turn of the cards or the throwing of the dice, trusts his fortune to chance.*" [58]

If this case was to be scrutinized more carefully in the Indian context, the categorical bifurcation would be clear, leaving no room for absurdity or ambiguity and therefore only presenting scope for application of golden rule of interpretation. Hence, there are many games such as sports and athletic events, the results of which are entirely based upon skill, and certain degree of accident; and in those games chance is in no way resorted to therein.[59]

The current test of preponderance in the Indian context seems incomplete and irrational on another footing as well. The test requires the assessment and determination of whether chance or skill 'is the dominating factor in determining the result of the game'.[60] To be determined as a game of skill, skill must control the final result of the game and must not just be a part of the larger scheme.[61] The factor that influences the result of the game

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57 *Ibid*; Patamata Cultural and Recreational Society v. Commissioner of Police and Ors., (2005) (1) ALD 772.
58 Lakshmanan, *supra* note 13, ¶ 26.
59 Harless, *supra* note 52.
60 Sports Law and Policy Centre, *supra* note 17, at 6.
61 Commonwealth v. Plissner, 295 Mass 457 (1936).

is the dominant factor. Therefore, according to the Indian conception of the test that does not recognize an element of 'accident', despite skill playing a larger role in a game, if chance determines the result of the game then it would be considered a game of chance.

To put this in context, in a game of chess when the skills of two players are pitted against each other, result is procured through domination of one player's skill over the other player. According to the Indian conception, with each game involving an element of 'chance' and not 'accident', such loss of the player would be attributed to chance, as the result is uncertain, even though the game was largely governed by skill. However, if the element of 'chance' is to be replaced with 'accident', the result could be rationally attributed to an accidental move or a series of accidental moves by losing player which led to his loss. Implying that even though he lost due to incorrect moves, his exercise of skill is not subdued by chance. Correspondingly, the winning player's skill thwarted the losing player's skill, leading to an element of accidental uncertainty.

In any game, there is a possibility that some oversight or unexpected incident may affect the result and if these incidents are sufficient to make a game in which it may occur, one of chance, then there is no such thing as a game of skill.[62] If the test of character of any game is through the element

62 Engel v. State, 53 Ariz 458 (1939).

that determines the result of the game,[63] then according to the Indian conception there is no game of mere skill.

It might be concluded that two essential elements of the dominant factor test have not been considered by the Indian Courts. In the absence of consideration of the element of 'accident', the Courts are paving a path for higher degree of judicial interpretation while compromising upon the desired legislative clarity sought to exist. Additionally, due to non-consideration of element of 'accident', the uncertainty in the result of the game would be attributed to 'chance'. Upon complete adoption of the test of preponderance, if chance determines the result of the game, then a game can never be deemed one of 'mere skill'. Therefore, there can be no game according to the Indian conception of the test where skill would be the dominant factor. The only solution left is for laws which ban mixed games of skill and chance, to differentiate between the terms 'chance' and 'accident', such that they permit games of pure skill wherein chance does not play a part but accidents may occur.

III. POLICY ISSUES HAMPERING THE EFFECTIVE REGULATION OF BETTING AND GAMBLING IN INDIA

As briefly mentioned *supra*, there exists a clash over the interpretation of 'mere skill' and the resultant categorization thereof, between the SC and state laws. This can be avoided if there is a clearer delineation between the

63 Joker Club v. Hardin, 643 SE2d 626 (NC Ct. App 2007).

powers of the SC and state legislatures. While the SC has implicitly created two categories- mixed game of skill and chance and game of pure chance; the Telangana Ordinance has created three categories- game of mere skill, mixed game of skill and chance and game of pure chance. On the face of it, there appears to be direct incongruity. However, the state has the power under Article 162 of the Constitution[64] to legislate on all matters under the State List. An interpretation of mere skill provided by the SC cannot prevent the state from determining which games can be played within its jurisdiction. If it were to be viewed from a strictly legal perspective, there exists no clash. Otherwise, if the SC provides an additional layer of protection, such as the fundamental right of profession and trade to those wishing to host tournaments or parlors for games of 'mere skill' as defined by it, the State would then be unable to restrict the definition of mere skill in its legislature (explained in detail later in the Article).

Post-independence, Entry 34, List II of the Seventh Schedule empowered the state government to regulate gambling and betting in their own territory. Soon after, several states came up with their own laws while most adopted the central Public Gambling Act, 1867. While some states sought to take a view largely concurrent with the central policy, some adopted radical policies. Goa, Sikkim and Nagaland have a liberal policy and even promote betting and gambling for purposes such as tourism, but

64 INDIAN CONST.

through their laws; Assam[65], Odisha[66], Telangana[67] and Karnataka[68] have taken a very stringent view towards gambling. Effectively, it is to be kept in mind that the differential policies have different implications on the interpretation of mere skill.

The SC interpreted mere skill in the backdrop of Bombay Lotteries and Prize Competition Control and Tax Act, 1948 in the *Chamarbaugwala* case; Hyderabad Gambling Act, 1974 in *Satyanarayana* case; T.N. Gaming Act, 1930 and Madras City Police Act, 1888 in *Dr. K.R. Lakshmanan* case as well as the Mysore Police Act, 1963 in the *M.J. Sivani* case. None of them have similar features to the new Telangana law. While all of the aforementioned statutes, including the Public Gambling Act, 1867, merely deem mixed game of skill and chance to be gambling at most and exempt mere games of skill, the degree of specificity in terms of describing these terms is missing. The Telangana Ordinance, on the other hand provides for an explanation[69] attached with the exemption clause. Hence, the Supreme Court has interpreted mere skill in a different context wherein the statutes are unclear about the term. Such interpretation, in a pedantic sense, shall not be applicable to the Telangana Ordinance, thereby technically not allowing a clash.

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65 The Assam Game and Betting Act, Assam Act XVIII of 1970 (1970).
66 The Orissa (Prevention of) Gambling Act, No. 17 of 1955 (1955).
67 Telangana Amendment Ordinance, *supra* note 19.
68 Karnataka Police Act, No. 4 of 1964 (1964).
69 Telangana Amendment Ordinance, *supra* note 19, § 15 Explanation I, II & III.

However, if we were to deal with the substance, there exists a direct conflict between the interpretation of the SC and the Telangana Ordinance. The Explanation in the Telangana Ordinance can be deemed to be the state's interpretation of 'mere skill', vastly differing with the interpretation of the Supreme Court. Such variance presents two issues; the lack of existence of a clear policy of the country and a split in the regulatory powers governing betting and gambling.

A. Lack of a Clear Policy

In the true spirit of federalism, the Constitution places 'gambling and betting' in state list and permits the states to formulate their own policies. The vast powers allow states to regulate gambling and betting for varied purposes such as those in societal interest or generating revenue. While some of the states through their legislations are doing the bare minimum of demarcating a policy, they are not effectively regulating and modernizing the law.

First, India's position on gambling and betting is unsettled. United Kingdom, which enacted the Public Gambling Act, 1867 in India, has formulated the Gambling Act, 2005.[70] Through this legislation, it has updated, modernized and settled the position of law within its territory.

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70 S.S.Rana, *Clipping The Wings of Gaming: The Telangana State Gaming (Amendment) Ordinance, 2017*, MONDAQ, (Oct. 31, 2017), http://www.mondaq.com/india/x/641468/Gaming/Clipping+The+Wings+Of+ Gaming+The+Telangan a+State+Gaming+Amendment+Ordinance+2017.

However, India is federally still being governed by a century old legislation, failing to take into account the modern ways of gambling and betting, such as online gambling. Moreover, decentralization through permitting states to create their own legislations has further muddled the position of law. While going against the SC's decision and restricting specific games such as Rummy through notification or otherwise is acceptable as it doesn't amount to challenging a settled position of law, Telangana's act of giving a new meaning to 'mere skill' through the Explanation creates a parallel position of such law. Such differences create unpredictability and do not reasonably enable an entity to regulate its conduct. For instance, the Telangana Ordinance which suddenly outlawed Rummy by explicitly not calling it a game of skill caused certain Rummy websites to file a writ petition before the High Court.[71] While the matter was *sub judice*, Telangana passed the Amendment Bill that deemed even games of skill wherein an unknown result was involved to be wagering.[72] Such acts of states create an uncomfortable environment for businesses seeking to invest in the country. At least some degree of clarity could be retained by not disturbing a settled position of law, despite the imperfections that may exist in the dominant factor test.

Second, in the wake of a tumultuous debate over the legality of online gambling, betting and similar platforms, the centre and states have failed to satisfactorily establish a policy and act upon it. The archaic gambling laws of various states including the Public Gambling Act, neither preempts

71 *Ibid.*

72 Telangana Amendment Ordinance, *supra* note 19, § 2(2)(i)(d).

the emergence of online gambling websites nor has been amended to accommodate the changes. They still regulate gaming houses. On the state level, only Sikkim[73], Nagaland[74] and Telangana[75] have shown the foresight to govern online gambling. However, another question regarding the difference in degree of skill exercised in physical gambling and online gambling has arisen. Currently, the principle of functional equivalence applies to states that haven't established laws on online gambling. Through functional equivalence, the general legal frameworks existing offline is extended to online equivalent.[76]

Due to the application of this principle, the same problems harassing physical gambling extend to online gambling websites. Additionally, diversity in state laws makes it increasingly difficult for the country to establish a much-needed uniform basic policy across all the paradigms.

To remedy this situation, the 276th Law Commission Report suggested a delineation of power between the Centre and the State to ensure uniformity in legislation. It advised the Parliament to adopt a model law that would subsequently be adopted by the states.[77] However, since there have

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73 Sikkim Online Gaming (Regulation) Act (2008).

74 Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act (2015).

75 Telangana Amendment Ordinance, *supra* note 19.

76 9 BERT-JAAP KOOPS, *Should ICT Regulations be Technology-Neutral?, in* STARTING POINT FOR ICT REGULATION , DECONSTRUCTING PREVALENT POLICY ONE-LINERS, IT & LAW SERIES, 84 (Koops, Lips, Prins & Schellekens eds. 2006).

77 Law Commission of India Report No. 276, *Legal Framework: Gambling and Sports Betting including in Cricket in India* (2018), ¶ 9.8.2. [hereinafter Law Commission Report No. 276].

been attempts by states such as Telangana to initially deviate from the definition of games of chance under the central legislation (Public Gambling Act), it does not seem feasible that a model law would be sufficient to ensure uniformity. Alternatively, Articles 249[78] and 252[79] provide the Centre power to legislate on matters in List II of the Constitution. Since Article 249 refers to legislation made in national interest that can only be applicable for two years, it would be more feasible for the power to stem from Article 252. Article 252 allows the States to cede their powers under List II to the Centre, however, the legislation made by the Centre would only apply to the consenting states, with the remaining states having a choice to implement it as well.[80] Further, this new Gambling Act that the Centre would formulate must define the scope of the law, the role and responsibility of Central and State governments, a national structure and supervising authority if needed.[81] This supervising authority may be similar to that of the Gambling Commission of the United Kingdom[82] which provides licenses to gambling operators and ensures their compliance with rules and regulations. The creation of a Gambling Commission of India to regulate the aforesaid matters can occur as the Centre has the authority to create such a body under Article 263 (b) of the Constitution.[83] The Article stipulates that an inter-state council may be formed in the interest of a subject matter which is of national

78 INDIAN CONST.
79 *Ibid.*
80 *Ibid* ¶9.8.2.
81 *Ibid* at 127.
82 UK Gambling Act, *supra* note 63, § 20.
83 INDIAN CONST.

and state interest.[84] Therefore, creation of a centralized legislation under Article 252 as well as the establishment of the Gambling Commission of India would go a long way in removing the disparities that arise across the state legislations in determining which games can be permitted or prohibited.

B. Split of Regulatory Powers

While the previous section attempted to solve the conflict within state legislations, it did not deal with problems that arise when parliaments or legislative assemblies interpret the court's decisions on what constitutes gambling. The current model of regulation of gambling laws allows the states to determine their own fate. However, due to the lack of foresight by these states and only acting when the need arises, the judiciary is called in times of despair to provide certainty. Due to the lack of a specialized body such as the Gambling Commission in UK[85], the judiciary in India, through determination of degree of skill, permits certain games to be played. While the judiciary has adjudicated legal questions surrounding games such as Rummy[86], Bridge[87], horse riding[88] and video games[89], the status of a large number of games is still undetermined. Due to the non-determination of status of several games, they still function in the grey area of gambling, and hence there is no effective regulation of such games unless the Supreme Court determines their status.

84 *Ibid* ¶ 6.3.
85 UK Gambling Act, *supra* note 63, § 20.
86 Satyanarayana, *supra* note 12, ¶ 12.
87 Satyanarayana, *supra* note 12, ¶ 12.
88 Lakshmanan, *supra* note 13, ¶ 51.
89 M.J. Sivani, *supra* note 15, ¶ 20.

However, on the other hand, certain states such as Nagaland through notifications[90] or explicit mention in their statutes[91] have classified certain games as those of skill according to them. Certain states such as Odisha[92] have reserved the right to exempt any game from the application of the state law to it. Although such inclusion might still be subject to final judicial interpretation, in the absence of such interpretation it provides certainty and transparency in law. Such proactivity would not only ensure that the states have clearly spelled out their terms of regulation to ensure that the people regulate their conduct accordingly, but it would also reduce the burden of the judiciary. If effectively implemented, the provision could ensure greater freedom of states to regulate gambling and betting matters in their own territory.

Additionally, the current process of deeming a game as that of skill through judicial process, is inefficient as the respective High Court's adjudication is bound to be appealed. If the High Court is to determine the degree of skill in a particular game, the question is not one of law. It is not restricted to the statute in question. It may not be a preferable situation wherein two High Courts have a different idea of degree of skill in a game. Even if it were to happen, such difference would anyway be resolved before the SC, effectively nullifying the High Court's opinion. The opinion might, at

90 Government of Nagaland, Directorate of State Lotteries, Kohima, *License for Online Games of Skill: Kohima: License to Bet 365* (Dec. 14, 2016), https://www.khelo365.com/k365_license.pdf.

91 Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, Schedule (2015).

92 The Orissa (Prevention of) Gambling Act, *supra* note 8.

the most, come in as an aid to interpret the game. However, it would have very little significance in terms of finality. This could be evinced through the previous cases of *Chamarbaugwala, Satyanarayana, M.J. Sivani* and *Lakshmanan*, wherein all of them were finally settled by the SC. Even the validity of the Telangana Ordinance and the Dominance Games Pvt. Ltd. case, dealing with the aspect of skill in poker, which were recently decided by the Telangana and AP High Court and Gujarat High Court respectively, are speculated to be in the process of being appealed.

Considering that the element of skill in a game must ideally be interpreted uniformly for the country, it's preferable that the apex court determine it, notwithstanding the fact that preemption on part of the state legislature would solidify the division of power.

IV. PROTECTION OF GAMES OF SKILL SUCH AS RUMMY UNDER FUNDAMENTAL RIGHTS IN LIGHT OF THE TELANGANA LAWS

The question of whether betting on games with preponderance of skill is permitted or not, resurfaced with the *Dominance Games*[93] case before the Gujarat High Court, dealing with determination of degree of skill in the game of poker. It was contended on behalf of the petitioners that a fundamental right to carry on trade and business exists since poker must not be considered as betting.[94] While the Court explored the avenue of placing

93 Dominance Games Pvt. Ltd. v. State of Gujarat, C/SCA/6903/2017, ¶ 3 (2017).
94 *Ibid* ¶ 11.

reasonable restrictions upon fundamental rights,[95] it never got to address this contention as it declared poker to be gambling,[96] and therefore declared that the question of fundamental rights needn't be discussed. However, a long list of precedents has delved into the question of according protection under fundamental rights to betting and gambling activities.

A. Gambling and Betting as a Part of Fundamental Rights: Judicial Position

The foundation was laid down in the cases of *R.M.D Chamarbaugwala v. Union of India*[97] ("Chamarbaugwala I") and *R.M.D. Chamarbaugwala II.*[98] The Court in *Chamarbaugwala I* did not delve into the question of protection of gambling and betting activities under Article 19(1)(g)[99] as the Respondent had conceded the issue. It however held that gambling is *res extra commercium* and hence, cannot be accorded legal protection under Article 19(1)(g) and 301[100].[101] Interestingly, the doctrine of *res extra commercium* was used for the first time in Indian context in *Chamarbaugwala II* and upheld in

95 *Ibid* ¶ 70.
96 *Ibid* ¶ 75.
97 RMD Chamarbaugwala v. Union of India, (1957) AIR 628 [hereinafter Chamarbaugwala I].
98 Chamarbaugwala II, *supra* note 11.
99 INDIAN CONST.
100 *Ibid.*
101 Chamarbaugwala I, *supra* note 100.

Chamarbaugwala I,[102] and its assent was briefly threatened in *KK Narula v. Jammu & Kashmir.*[103]

The Court in *Chamarbaugwala II* held that gambling constitutes a thing outside of commerce, however it did not expressly adjudicate upon betting. By applying this doctrine, it rendered gambling as a constitutional outcast.[104] On the other hand, the Court stated that games involving substantial skill are business activities deserving protection under Art. 19(1)(g).[105]

Additionally, it is worth noting that a parallel debate has ensued upon the usage of *res extra commercium* by C.J. Das in *Chamarbaugwala II*. It has been contended that the doctrine of police powers was employed under the garb of *res extra commercium.*[106] Das C.J. in *Chamarbaugwala II* held gambling to not be protected on grounds that it was morally repugnant.[107] On the contrary, *res extra commercium* is a Roman law doctrine[108] that enumerates certain things or artifacts that cannot conceptually be owned and, hence cannot be an object of commerce.[109] Hence, the concept is not purported to apply on the

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102 Arvind Datar & Shivprasad Swaminathan, *Police Powers and the Constitution of India: The Inconspicuous Ascent of an Incongruous American Implant*, 28 EMORY INT. L.R. 63, 66 (2014) [hereinafter Police Powers and the Constitution of India].

103 Krishna Kumar Narula etc v. The State of Jammu and Kashmir & Ors., (1967) AIR SC 1368.

104 Ugar Sugar Works Ltd. v. Delhi Administration and Others, (2001) (2) SCR 630, 1447.

105 Chamarbaugwala I, *supra* note 82, at 5.

106 Police Powers and the Constitution of India, *supra* note 85, at 93.

107 Chamarbaugwala I, *supra* note 82, ¶¶ 37, 44-46.

108 WILLIAM BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 310 (1st ed. 1918).

109 RUDOLF SOHM, THE INSTITUTES: A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 59 (3rd ed 1907).

grounds that an activity is morally repugnant,[110] and cannot strictly apply on the grounds enumerated under *Chamarbaugwala II*.

While in the *Lakshmanan* case it was contended that horse riding is a game of skill and taking the business of the petitioner would be hit by Article 19(1)(g),[111] the Court never delved into the question. It stated that the relevant Act violates Article 14 and hence it is not necessary to get into the question of violation of Article 19.[112]

The *M.J. Sivani* case did not reiterate the aforementioned cases.[113] It recognized that business or trade in video games is covered under Article 19(1)(g), however it is subject to reasonable restrictions.[114] While ascertaining the extent of reasonable restrictions, it maintained a high threshold, thereby permitting a greater number of restrictions to be considered as reasonable. The Court vouched for a balance between social control and right of an individual.[115] It went on to say that not only a pure game of chance but also a mixed game of skill and chance would be a game prohibited under the statute

110 Arvind Dater, *Privilege, Powers and Res Extra Commercium- Glaring Conceptual Errors*, 21 NAT'L L. SCH. IND. REV. 145, 134-36 (2009).
111 Lakshmanan, *supra* note 13, ¶ 44.
112 Lakshmanan, *supra* note 13, ¶ 47.
113 M.J. Sivani, *supra* note 15.
114 M.J. Sivani, *supra* note 15, ¶ 18.
115 M.J. Sivani, *supra* note 15, ¶ 18.

except by regulation.[116] Such restrictions in public interest would not be arbitrary or unbridled and therefore not violate Article 19(1)(g).[117]

Strangely in *Dominance Games*, the Gujarat High Court while taking a stance in favour of social control had declared poker to not be a game of skill,and as a result, not covered within fundamental rights. Thus, it revived the controversial position taken in *Chamarbaugwala II*.

Hence, the Court only accorded protection to mere games of skill under Article 19(1)(g); while the threshold of reasonable restriction under Article 19(6) has been set as very high. While in the past certain contentious position has been taken by borrowing foreign doctrines in the wrong context, the Court has eventually moved around it and taken a position in favour of greater social control. The Court must reconsider its approach on reasonable restrictions under Article 19(6). Restrictions must be seen as aiding the exercise of fundamental rights and hampering the freedom of inter-state trade and commerce.[118]

B. Gambling and Betting as a Part of Fundamental Rights: Legislative position

The laws on gambling across the country have uniformly prohibited games of chance and in most instances have provided an exemption to mere

116 M.J. Sivani, *supra* note 15, ¶ 19.
117 M.J. Sivani, *supra* note 15, ¶ 19.
118 Chamarbaugwala II, *supra* note 11, ¶ 28.

games of skill. However, the term 'mixed games of skill and chance' has recently been subjected to jurisprudential debate. As highlighted *supra*, there is no *de facto* distinction between mere game of skill and mixed games of skill and chance, unless chance preponderates in the latter. Hence, the statutes making such a distinction do not take a clear position in line of the SC's test of preponderance and resulting interpretation.

One such instance that caused widespread tumult was the formulation of the Ordinances of Telangana. Through the Telangana State Gaming (Amendment) Ordinance, 2017[119], the state legislature made changes to the Telangana State Gaming Act, 1974 that it adopted from Andhra Pradesh State Gaming Act, 1974. While amending § 15 i.e. the exemption clause, it added three explanations as given *supra*.[120] The set of explanations were unlike any other statute in the country. It did not only have consequences upon the academic question of what constitutes a game of skill but it also impacted the question of what kind of games are saved by Article 19(1)(g).

By outlawing mixed games of skill and chance, and expressly deeming Rummy to be a part of it, the law went against the settled interpretation of the SC. While the SC deemed it to be a game, mainly and preponderantly, of skill[121], Explanation III of the Ordinance states that Rummy is a mixed game

119 Telangana Amendment Ordinance, *supra* note 19.
120 Telangana Amendment Ordinance, *supra* note 19.
121 Satyanarayana, *supra* note 12, ¶ 12.

of skill and chance. The Telangana Ordinance would not be incorrect in logic and according to the conception proposed by the authors in this article, however it is directly conflicting and infringing upon a fundamental right of individuals.

In light of this, certain online Rummy websites filed a petition before the High Court challenging the Ordinance. While it would have made an interesting question of law, however, recently, the Telangana government passed the Telangana Gaming (Amendment) Act, 2017[122] in anticipation of an adverse decision by the High Court. While on one hand it repealed the exemption clause in its entirety, including the Explanations, on the other hand it included an unprecedented provision.

It amended the definition of wagering and betting to include "any act of risking money, or otherwise on the unknown result of an event including a game of skill".[123] Through this act, betting on each and every game except horse riding, irrespective of the degree of skill involved, shall constitute wagering and accordingly gaming. It is an accepted position of law that every game has certain degree of uncertainty, and although a participant is going to win the game, the exact identity of the participant remains unknown. According to the SC's conception, such uncertainty is chance (it has been argued that such uncertainty must be attributed to accident). Hence, regardless of any degree of skill exercised, the result would continue to

122 Telangana Gaming Amendment Bill, *supra* note 112.
123 Telangana Gaming (Amendment) Bill, *supra* note 112, § 2(2) Explanation (i)(d).

remain uncertain. The Telangana government effectively prohibited betting and wagering on all games, thereby rendering the question of skill or chance irrelevant.

This is an unprecedented situation. The SC has never dealt with such a question. While there has been a change in the language, but the impact remains the same. The position taken through adding Explanations to §15 were incompatible with the Supreme Court's interpretation and similarly, prohibiting betting on games of skill would also be incompatible with Supreme Court's interpretation in this context. Although the Supreme Court has created an implied difference between wholly uncertain and doubtful result[124] and a result that can be reasonably predicted, the Amendment Bill makes no such distinction. Even horse racing, allowed by the Amendment Bill, is uncertain in its result.[125] Hence, the Amendment Bill takes a more stringent position and continues to take an equally anti-gaming position and zero tolerance policy towards gambling as observed through the Amendment Bill's Statement of Objects and Reasons.[126]

The situation is perplexing. On one hand the State has the power to make laws on gambling and betting, and impose reasonable restrictions in pursuance of that, on the other it completely deprives an individual of the

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124 Lakshmanan, *supra* note 13, ¶3.

125 Harless, *supra* note 52.

126 Telangana Gaming (Amendment) Bill, Statement of Objects and Reasons states:
"The endeavour of the Government of Telangana has been to strictly implement the policy of Zero Tolerance against gambling which has serious impact on the financial status and well being of the common public".

right to even play or carry out business on a mere game of skill. Therefore, the question is subjective in nature, and could be reduced to one wherein social control is pitched against individual rights which can only be determined by the judiciary

V. CONCLUSION

Over the past couple of years, India has made significant progress in updating its legislations and making judicial decisions more consistent and predictable. In most sectors, the visible lack of enforcement overshadows adequacy of regulations. However, unlike other sectors, problems arise in the gambling and betting industry out of unwillingness to streamline its regulation. The legal system, in the context of the gambling and betting industry, does not function proactively but in a reactionary manner. The determination to regulate the industry seems largely dependent on societal concerns stemming from political concerns.

While judiciary must not be the authority of first instance when it comes to regulation of the industry, it is made so owing to the legislature's failure to create a law enabling people to regulate their conduct. Gambling and betting are often frowned upon and often meet with adverse reactions when individuals choose to exercise their freedom in light of no express prohibition. This is evinced in the *Dominance Games Pvt. Ltd.* case.

Burdened with heightened responsibility in this regard, the Court also failed to take a conclusive position in its latest string of cases. In *Dominance Games Pvt. Ltd.*, the judgment was laden with apparent absurdity in logic and

it was held that all games of skill, when played with stakes, would constitute gambling leading to consequent restrictions under law. Taking the judgment to its logical extreme, even if a game of chess were to be betted upon, it would constitute gambling. In this context, the element of skill in a game is rendered irrelevant in determining the nature of the game under law. The decision was appealed to a division bench almost a year ago however strangely it has failed to reach the Gujarat High Court Board until now.[127] The Bombay High Court, in the case concerning *Spartan Poker*, verbally observed poker to be a game of chance however simply referred to it as a game of change without any explicit reference in its order.[128] Meeting with a similar fate, a petition was filed before the Delhi High Court for quashing criminal charges on the grounds of poker being a game of skill under S. 13 of the Delhi Public Gambling Act which initially got deferred only to be withdrawn at a later date.[129] It is safe to conclude that the approach of various courts towards the determination of nature of poker is murky and it may appear that the courts and parties are playing it safe by avoiding conclusive determination due to the fear of a negative verdict.

From the foregoing, there appears to be a visible lack of foresight. For instance, the central and the state laws, barring not more than a handful,

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127 Jay Sayta, *Gujarat High Court matter adjourned now heard February 2019*, GLAWS (Dec. 22, 2018) https://glaws.in/2018/12/22/gujarat-hc-poker-matter-adjourned-now-heard-february-2019/

128 Jay Sayta, *After Dramatic Last Minute intervention by Salman Khan's lawyer, Bombay HC does not mention the word 'poker' in order*, GLAWS (Apr. 3, 2018), https://glaws.in/2018/04/03/dramatic-last-minute-intervention-salman-khans-lawyer-bombay-hc-not-mention-word-poker-order/.

129 Jay Sayta, *Delhi HC to hear poker petition on 1st November, Gujarat HC on 26th June,* GLAWS (May 2, 2018), https://glaws.in/2018/05/02/delhi-hc-hear-poker-petition-1st-november-gujarat-hc-26th-june/.

have not been updated and are still meant to govern the conventional 'common gambling houses'. Technological developments seem to be largely unaccounted for. There are no express provisions under the central law or cases concerning online gambling and betting except *Gaussian Network*[130] which was withdrawn even before it could reach the high court. There is an alarming lack of regulation or jurisprudence on online gambling and betting, despite its rapid growth in popularity. It continues to be regulated by an extraneous legislation never intended for it.

In a rudimentary sense, there is a need for modernization of laws. Moreover, there is scope for courts to efficiently deal with matters concerning gambling and betting on an immediate basis. *First*, as highlighted in this paper, the courts must reconcile the differences concerning interpretation of game of skill. In our opinion, the courts can significantly clarify their position by laying down a clear test applicable to gambling and betting. By introducing the element of 'accident' as argued above, the court may provide for greater judicial precision and certainty. Laying down a conclusive test also may have the effect of reducing the court's burden. It may avoid the existing status quo wherein courts, which may not be as well-equipped, are approached for determination of the degree of skill in each game individually. *Second,* the uniformity between state legislations can be maintained by the adoption of a model central law which the states may follow. The states may also, under Article 252 of the Constitution of India,

130 Gaussian Network Pvt Ltd v. Monica Lakhanpal, (2012) Suti no. 32/2012.

empower the center to legislate on matters regarding betting and gambling. Any laws created in this matter would then be applied to those states which had ceded their authority to the center. *Third*, there is a further need for determination of the contours of fundamental right of gambling and betting. The Telangana Ordinance goes against the settled positions of law laid down by the Supreme Court to deem rummy as a game of chance and therefore prohibited. While allowing states to regulate gambling and betting in their own territory must ideally ensure efficiency in regulation, on the other hand, it is currently leading to increasing ambiguity in the wake of apparent clashes in accordance of rights.

On a foundation level, the regulation of gambling and betting appears to be predominantly determined through the lenses of a social control perspective and other such determinants that are completely unrelated with the actual gameplay. Even if prohibition on gambling and betting were to be covered under reasonable restrictions, as a policy concern, it seems to tilt in favor of social control over preferring individual rights which may impact the pro-business position of the incumbent government.

Knowing that the country has been unable to prevent the underground gambling and betting industry from strengthening its roots, regulation in accordance with the recommendations made by the Law Commission of India in its Report seems to be in the country's and its people's interest.

SECTION 434(1) (A) OF COMPANIES ACT, 2013: A CONUNDRUM OF RETROSPECTIVE APPLICATION ON PENDING PETITIONS TRANSFERRED FROM THE COMPANY LAW BOARD TO THE NATIONAL COMPANY LAW TRIBUNAL

Ankit Sharma & Himanshu Pabreja[*]

ABSTRACT

The enactment of Companies Act, 2013 reflects a significant shift in the Indian State's mind-set towards lesser government approvals and augmenting corporate governance in companies. The transition from the Companies Act, 1956 to the Companies Act, 2013 ["2013 Act"] has been marked by consolidation of company-related enactments into a unified legislation, and the creation of specialised authorities (National Company Law Tribunal ["NCLT"] and National Company Law Appellate Tribunal ["NCLAT"]) for the adjudication of disputes arising thereunder. Consequently, petitions under the repealed enactments that were pending before the Company Law Board ["CLB"] and other superseded judicial authorities under the repealed enactment were transferred to the NCLT under Section 434 of the 2013 Act. However, Section 434(1)(a) of the 2013 Act, which stipulates the

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transfer of such proceedings from the CLB to the NCLT has created uncertainty around the application of substantive law on these pending petitions so transferred. The contradictory opinions recorded by different benches of the NCLT and the NCLAT on the question whether the transferred petitions will be governed by the Companies Act, 1956 or the Companies Act, 2013 may adduce several implications to the parties to these petitions. In light of this uncertainty, this paper will focus on the question of alteration of substantive law due to transfer of pending petitions from the CLB to the NCLT under Section 434(1)(a) of the Act. Through reference to divergent opinions of the NCLT and the NCLAT, this paper will analyse contesting contentions and ramifications of retrospective application of the 2013 Act on proceedings transferred under Section 434(1)(a).

I. INTRODUCTION

The enactment of the 2013 Act marked a watershed in Indian commercial law jurisprudence, consolidating the multiple legislations and the system of distinct adjudicatory bodies for different subject matters into one comprehensive structure.[1] It was introduced with multiple objectives, *viz.* to cater to the constantly evolving commercial environment, to minimise government approvals, strengthen shareholder's role in company affairs, and ensure better accountability and transparency on the part of the company

1 Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transparent to Autochthony*, NUS Law, Working Paper No. 2015/001 68 (2015), http://law.nus.edu.sg/wps/pdfs/001_2015_Umakanth_Varottil.pdf.

towards its members. One of the significant reforms introduced by the new legislation is the establishment of the NCLT and the NCLAT to adjudicate disputes arising under the 2013 Act and a few other legislations.

The constitution of the NCLT as a single adjudicatory authority under the 2013 Act necessitated the transfer of matters pending before various bodies under the erstwhile Companies Act, 1956[2] ["1956 Act"] to the newly created NCLT. To effectuate such transfer, Section 434 of the 2013 Act governs instance(s) of transfer of these pending proceedings to the NCLT. It states that:

> "*(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this Section referred to as the Company Law Board) constituted under sub-Section (1) of Section 10E of the Companies Act, 1956 (1 of 1956), immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act.*"[3] (Emphasis supplied)

Subsequently, a question of interpretation of the phrase 'disposal of these matters, proceedings or cases *in accordance with provisions of this Act*' arose before the NCLT and the NCLAT apropos the relevant substantive law applicable on these pending matters so transferred. In light of this phrase, the tribunals had to determine whether the transfer of these pending petitions

2 The Companies Act, 1956, No. 1, Acts of Parliament, 1956 (India). ['1956 Act']
3 The Companies Act, 2013; § 434(1)(a). ['2013 Act']

would effectuate the applicability of the 2013 Act only on procedural law or on substantive law as well. While examining the question, the NCLT and the NCLAT have taken contrary stances. The arguments revolve around a conjoint reading of Section 465[4] of the 2013 Act and Section 6 of the General Clauses Act[5] (both are provisions on "Repeal & Savings") on one side, and principles of statutory interpretation surrounding parliamentary intention and plain language on the other. Consequently, the divergent opinions noted by different benches of the NCLT and the NCLAT on this question have resulted in uncertainty over the correct legal stance. This has profound ramifications not only for the rights of persons concerned with these matters, but also in laying down an erroneous precedent for principles applicable to similar transfer issues under other legislations.

In light of this backdrop, it is imperative to examine the legal framework of the transfer stipulated in Section 434(1)(a) of the 2013 Act. Part I refers to different judgments of the NCLT and the NCLAT to highlight how their divergent opinions on the issue of applicable substantive law on pending transferred matters has created uncertainty over the correct legal stance. Part II analyses the sustainability of arguments raised in favour of applicability of the 2013 Act by the NCLAT. Part III argues for the application of the 1956 Act on the transferred petitions based on various principles of statutory interpretation. Part IV analyses the profound ramifications that the approach suggested by NCLAT might entail. The

4 *Ibid* at § 465.
5 General Clauses Act, 1897; § 6.

paper concludes with an opinion on the true application of substantive law on pending proceedings in contradiction to what has been observed by the NCLAT.

II. SECTION 434(1)(A): A JUDICIAL DILEMMA BETWEEN THE NCLT AND THE NCLAT

C. NCLT's Observations in Favour of the Applicability of 1956 Act

Different benches of the NCLT observed that a petition that has been filed under provisions of the 1956 Act should continue to be adjudicated under those provisions. They rejected the modification of substantive law applicable on the pending transferred petitions on the ground that these petitions were presented before the adjudicatory bodies under the repealed act and regardless of language of Section 434(1)(a), the 2013 Act does not provide for alteration in substantive law after the repeal of earlier enactment.[6]

In the matter of *M/s. Ingersoll-Rand International (India) Private Limited,*[7] a transfer petition was filed under Section 621A of the 1956 Act before the erstwhile CLB. However, the provisions of Section 441 of the 2013 Act came

6 M/s. Ashok Commercial Enterprises v. Parekh Aluminex Limited,2017 SCC OnLineBom 421; Matter of M/s. Ingersoll-Rand International (India) Private Limited, 2017 SCC OnLine NCLT 293; Suhas Chakma v. South Asian Human Rights Documentation Centre Pvt. Ltd. & Ors., 2016 SCC OnLine NCLT 93; Anil Kumar Poddar v. Prime Focus Ltd. & Ors., [2017] 200 CompCas 64; Ace Oilfield Supply Inc. & Ors. v. Tools International Services Pvt. Ltd. & Ors, T.C.P. No. 44/397-398/2015.

7 Matter of M/S. Ingersoll-Rand International (India) Private Limited, 2017 SCC OnLine NCLT 293.

into effect from 1st June 2016, i.e. the date on which this petition was transferred to the NCLT. But the NCLT refused to interpret Section 434(1)(a) as a provision to effect a change in substantive law applicable on this petition. A similar observation was made by the NCLT in *Suhas Chakma v. South Asian Human Rights Documentation Centre Pvt. Ltd,*[8] where it held that since the petition was presented before the CLB on September 10, 2015 under Sections 397-403 of the 1956 Act, Sections 241-242 of the 2013 Act could not be applied after its transfer to the NCLT under Section 434(1)(a) of the 2013 Act.

Further, in *Anil Kumar Poddar v. Prime Focus Ltd.*[9], the NCLT observed that the interpretation of Section 434(1)(a) should be done as per its object. Section 434 of the 2013 Act is merely to effectuate the transfer of pending petitions from the CLB to the NCLT, whereas, Repeal & Savings has been provided for under Section 465 of the 2013 Act. Therefore, Section 434 cannot be used to argue that a repealed act cannot be applied on pending dispute post transfer to the NCLT. Moreover, the 2013 Act does not rule out the general application of Section 6 of the General Clauses Act.[10] Thus a legal recognition of the abovementioned argument would be inconsistent with Section 6 of the General Clauses Act, which saves legal proceedings pending

8 Suhas Chakma v. South Asian Human Rights Documentation Centre Pvt. Ltd. & Ors., 2016 SCC OnLine NCLT 93.

9 Anil Kumar Poddar v. Prime Focus Ltd. & Ors., [2017] 200 CompCas 64.

10 2013 Act, *supra* note 4, § 465(3).

before the repeal of old enactment and provides for application of repealed enactment on the same.[11]

In yet another instance, the NCLT elaborated on the retrospective application of the provisions dealing with substantive laws.[12] The petition was filed before the CLB under Sections 397-398 of the 1956 Act. When it was argued that it should be dealt with under the 2013 Act post its transfer to the NCLT, the NCLT observed that it is a well-settled principle of interpretation that provisions dealing with substantive rights of parties cannot be retrospectively altered unless the statute expressly provides for it. Therefore, the 2013 Act must be presumed to be prospectively applied unless retrospective operation is provided by express words or necessary implication.

D. NCLAT's Observations in Favour of the 2013 Act

On the other hand, the NCLAT resorted to the plain language rule to determine whether the 1956 or the 2013 Act should apply on pending transferred matters. In the case of *BSE Ltd. v. Ricoh Company Ltd,*[13] the NCLAT observed that though it was dealing with a petition filed under repealed enactment before the CLB, statutory language expressly provides for its disposal as per the 2013 Act. A bare reading of Section 434(1)(a)

11 General Clauses, *supra* note 6, § 6(e).

12 Ace Oilfield Supply Inc. & Ors. v. Tools International Services Pvt. Ltd. & Ors, T.C.P. No. 44/397-398/2015.

13 BSE v. Ricoh, 2017 SCC OnLine NCLAT 12.

proves that the Parliament intended disposal of such transferred matters under provisions of the 2013 Act. A similar observation was also made in *Upper India Steel Manufacturing and Engineering Co. Ltd. v. Gurlal Singh Grewal.*[14]

Further, in *Re: Engineering & Construction India Private Limited,*[15] the NCLT observed that besides the aforementioned reason, petitions transferred to the NCLT should be disposed as per the 2013 Act, because the NCLT is a creature of the 2013 Act and, thus, its powers cannot transgress beyond its provisions. Accordingly, it observed that since the NCLT has been created by the 2013 Act, it has jurisdiction to determine matters only within provisions of the 2013 Act, and not the 1956 Act. Moreover, it observed that the 1956 Act stands repealed for these petitions post their transfer to the NCLT.[16]

The aforementioned judgments of different benches of the NCLT and the NCLAT highlight judicial disagreement on a significant question of the relevant substantive law applicable for transferred pending matters. This disagreement has left this complex question unsettled as despite the NCLAT's observations, different benches of the NCLT still continue to decide petitions on the basis of the 1956 Act rather than the 2013 Act. The next section analyses the arguments from both sides.

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14 Upper India Steel Manufacturing and Engineering Co. Ltd. & Ors. v. Gurlal Singh Grewal &Ors, 2017 SCC OnLine NCLAT 339.

15 Re: Engineering & Construction India Private Limited, Company Petition No. 766/2016 & Company Application (Main) No. 106/2016, Principal Bench, NCLT .

16 Re: R.S. Livemedia Private Limited and Ors., Company Petition No. 912/2016 & Company Application (Main) No. 117/2016, Principal Bench, NCLT.

III. 1956 ACT OR 2013 ACT: ANALYSIS OF THE NCLAT'S ARGUMENTS FOR RETROSPECTIVE APPLICATION OF THE 2013 ACT

The NCLAT provided two arguments in favour of retrospective operation of the 2013 Act on transferred petitions. *First*, that NCLT, though being a specie of the 2013 Act, can still adjudicate a petition beyond the scope of the 2013 Act. *Second*, that plain language cannot be resorted to for interpretation of an ambiguous provision. This section critically analyses both of these arguments. With respect to the first argument, the NCLAT's observation to the effect that the NCLT can only adjudicate within the contours of the 2013 Act, and that the 1956 Act stands repealed for these petitions, is misplaced due to following reasons:

A. Applications May Have Been Filed Before the NCLT under the 1956 Act when Corresponding Provisions of the 2013 Act were Not Notified.

The NCLT was constituted on June 1, 2016.[17] Previously, the CLB admitted all matters related to disputes on Companies Act. Accordingly, unless the CLB was formally dissolved and replaced with the NCLT, the disputes continued to be adjudicated before the CLB. Thereby, the

17 Ministry of Corporate Affairs, Constitution of NCLT & NCLAT, S.O. 1932(E) (June 1, 2016). ['S.O. 1932(E)']

constitution of the NCLT resulted in transfer of all disputes pending before the CLB to the NCLT.[18]

The 2013 Act empowered the Union Government to enforce different provisions of the 2013 Act on dates as it may appoint.[19] Consequently, while 98 sections of the Act were enforced on 12 September 2013,[20] the remaining subject matters continued to be dealt under the provisions of the 1956 Act. Accordingly, due to different dates of enforcement for different provisions, certain provisions of the 2013 Act were notified before the constitution of the NCLT and some were notified after. Though the 2013 Act has not formally repealed the 1956 Act as Section 465 has not yet been notified, provisions of the 1956 Act for which corresponding provisions in the 2013 Act have been notified stand repealed by implication.[21] Accordingly, matters with corresponding provisions in the 2013 Act that were not notified until or after the constitution of the NCLT continued to be governed by the 1956 Act. All disputes initiated after 1 June 2016 would be filed before the NCLT, but they were to be filed under provisions of the 1956 Act for matters whose corresponding provisions in the 2013 Act were not yet notified.[22]For instance, Section 48 of the 2013 Act which deals with variation of shareholder's rights was enforced with effect

18 2013 Act, *supra* note 4, § 434(1) (a).
19 *Ibid*, § 1(3).
20 *Companies Act*, *supra* note 2.
21 3 CR DATTA, COMPANY LAW, 3.2306-3.2307 (7th ed. 2016).
22 *Ibid.*

from 15 December 2016.[23] Accordingly, its corresponding provision, i.e. Sections 106 and 107 of the 1956 Act continued to be in operation till 15 December 2016.[24] Since the NCLT was constituted on 1 June 2016, it continued to admit and adjudicate variation of shareholder's rights cases under sections 106 and 107 of the 1956 Act after dissolution of the CLB. Moreover, since the 2013 Act does not provide authority to the NCLT to impose an interim stay on these proceedings till provision of the 2013 Act is notified, the NCLT would have had to adjudicate these petitions on basis of the 1956 Act, even though it is a specie of the 2013 Act.

B. Rule 64 of the NCLT Rules

Rule 64 provides that where an action that arose under provisions of the 1956 Act is pending before the CLB, it shall stand transferred to the NCLT on the date of its constitution. [25] Moreover, it provides that such matters shall be transferred to the NCLT as if the case had been originally filed therein on the date upon which it was actually filed before the CLB. Accordingly, Parliament created a legal fiction with the effect of designating the NCLT as the original place for filing of application. However, the law to be applied by the NCLT on such matters has been stated to be as was in force on the 'date upon which it was actually filed in the CLB'.[26] Accordingly,

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23 Ministry of Corporate Affairs, Notification of Certain Sections of Companies Act, 2013, S.O. 3677(E) (December 7, 2016). ['S.O. 3677(E)']

24 *See* State of Madhya Pradesh v. Kedia Leather and Liquor Ltd., AIR 2003 SC 3236.

25 The National Company Law Tribunal Rules, G.S.R. 716(E) Rule 64 (2016).

26 *Ibid.*

Rule 64 makes no provision for application of only the 2013 Act on transferred matters, and as such it cannot be argued that the NCLT cannot apply the 1956 Act in these matters.

C. Applications Filed Before the CLB under the 1956 Act Transferred to the NCLT May Not Have Corresponding Provision(s) in the 2013 Act

There are certain provisions in the 1956 act which have no corresponding provisions in the 2013 Act. Thus, if the argument that the NCLT can only adjudicate as per the 2013 Act is accepted, it would mean that such pending matters would have to be left undecided post transfer to the NCLT merely because they have no corresponding provision in the 2013 Act. Since nothing has been expressed in the 2013 Act to that effect, it can be stated that the NCLT would have to adjudicate these pending disputes under provisions of the 1956 Act. For instance, there are no corresponding provisions in the 2013 Act for sections 55A, 203, 269(7), (8), (9), (10), 388B, 408, 409, and 614 of the 1956 Act.[27] Consequently, for disputes arising thereunder cannot be left undecided post their transfer to the NCLT, and it would have to decide them as per the 1956 Act.

27 DATTA, *supra* note 22, at 3.2307.

D. Applications Filed Before the CLB under the 1956 Act Prior to 1 June 2016 and Transferred to the NCLT Without any Notified Corresponding Provision in the 2013 Act

In this case, the petition would have been filed before the CLB before the constitution of the NCLT. But since all provisions of the 2013 Act were not notified till the date of transfer of the pending petitions to the NCLT,[28] provisions of the 1956 Act still stood valid until corresponding provisions of the 2013 Act were notified.[29] Thus, the NCLT would have to continue to adjudicate these pending cases according to the 1956 Act until provisions of the 2013 Act were notified. For instance, while disputes were filed under sections 100-105 of the 1956 Act before the CLB, the constitution of the NCLT resulted in transfer of pending proceedings to the the NCLT. However, the NCLT would only have had to continue adjudicating these pending matters on basis of the 1956 Act, as the relevant corresponding provision i.e. section 66 was not notified until 15 December 2016.[30]

E. Statutory Language of Section 434(1)(c)

It is a basic principle of statutory interpretation that a provision of a statute can be interpreted through the interpretation of other provisions of

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28 PRACHI MANEKAR WAZALWAR, NATIONAL COMPANY LAW TRIBUNAL AND NATIONAL COMPANY LAW APPELLATE TRIBUNAL: LAW, PRACTICE, AND PROCEDURE 38 (3rd ed. 2017).

29 *See, Municipal Council, v. T.J. Joseph,* AIR 1963 SC 1561.

30 S.O. 3677(E), *supra* note 24.

the same statute, as far as possible, as a statute needs to be read as a whole.[31] Further, a clause by clause reading of a provision has been observed as a cardinal principle to interpret the scope and legislative intention of a specific provision within a statute.[32] This rule helps determine the intention of the legislature in framing the language of a statute and, thereby, interpret the meaning of a statute.[33]Applying this rule to Section 434 of the 2013 Act, it may be observed that section 434(1)(a) & 434(1)(c) form part of same provision and deal with issue of 'transfer of certain pending proceedings'[34] from one body to the NCLT. These two sub-clauses deal with pending matters to be transferred to the NCLT from different authorities. However, this doesn't justify that the NCLT's authority under both clauses differs to the extent that for cases transferred from a High Court or District Courts, it can adjudicate as per the 1956 Act; while for those transferred from the CLB, it cannot. Further, from the language of sub-clause (c) of section 434(1) authorising the NCLT to adjudicate certain cases on basis of the 1956 Act, it may be inferred that the Parliament never intended to bar the NCLT to adjudicate cases as per the 1956 Act in any circumstance. Thereby, there is scope for the NCLT to adjudicate as per the 1956 Act since it has not been explicitly barred.

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31 *Queen v. Eduljee Byramjee, Queen v. Eduljee Byramjee,* (1846) 3 MIA 468, (PC);State of Punjab v. Balbir Singh, AIR 1994 SC 1872.

32 Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd., AIR 1987 SC 1023.

33 *State of Uttar Pradesh v. Vijay AnandMaharaj,* AIR 1963 SC 946.

34 *See,* 2013 Act, *supra* note 4, Chapter Heading: § 434.

F. Plain Language Rule Cannot be Applied for the Interpretation of an Ambiguous Provision.

The golden rule of statutory interpretation is that when the words of a statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only one meaning, then the courts are bound to give effect to that meaning, irrespective of consequences.[35] Per contra, ambiguity means doubtfulness or uncertainty of meaning or intention.[36] If in a particular context, words convey varying meanings to different judges, they are ambiguous.[37] Consequently, an evidently ambiguous provision cannot be interpreted through the plain language rule until its real legislative intent is clarified by courts.

The phrase "*in accordance with the provisions of this act,*" as in section 434(1)(a) of the 2013 Act is *prima facie* ambiguous, as it is silent on whether the provisions of the 2013 Act should be applied only for procedural purposes or for the purpose of adjudication of rights and liabilities as well. Moreover, the disagreement between the NCLT and the NCLAT on this question further substantiates its ambiguous nature. Due to the existence of ambiguity, the plain language rule cannot be applied to the instant phrase.

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35 *Om Prakash Gupta v. Dig Vijendrapal Gupta,* AIR 1982 SC 1230; *Union of India v. Hansoli Devi,* AIR 2002 SC 3240; Thakur Amar Singhji v. State of Rajasthan, AIR 1955 SC 504; Croxford v. Universal Insurance Co. Ltd., (1963) AII ER 151; State of Jharkhand v. Govind Singh, AIR 2005 SC 294; Natha Devi v. Radha Devi Gupta, AIR 2005 SC 648; Gurudevdatt VKSS Maryaditt v. State of Maharashtra, AIR 2001 SC 1980.

36 BRYAN A. GARNER, BLACK'S LAW DICTIONARY 93(9th ed. 2009).

37 Kirkness v. John Hudson & Co. Ltd, [1955] AC 696.

Thus, the NCLAT's reasoning that the NCLT cannot adjudicate matters under 2013 Act is misplaced and requires reconsideration. The next part relies on basic principles of statutory interpretation to show how the reasoning of the NCLAT is misplaced.

IV. 1956 ACT OR 2013 ACT: ANALYSIS OF ARGUMENTS FOR APPLICATION OF THE 1956 ACT

Although the Parliament enacted Section 434(1)(a) of the 2013 Act only to effectuate the transfer of matters pending before the CLB to the NCLT, it has been interpreted to have an effect of altering the relevant substantive law on matters so transferred.[38] Rules of statutory interpretation may help in determining the relevant substantive law applicable to these matters.

A. Section 6 of the General Clauses Act 'Saves' Pending Matters

The repeal of an enactment is governed by Section 6 of the General Clauses Act, which states the consequences that follow,[39] unless the statute

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38 Upper India Steel Manufacturing and Engineering Co. Ltd. & Ors. v. Gurlal Singh Grewal & Ors, 2017 SCC OnLine NCLAT 339; BSE v. Ricoh, 2017 SCC OnLine NCLAT 12.

39 General Clauses, *supra* note 6:

"*Unless a different intention appears, the repeal shall not-*

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be

expresses a different intention. Additionally, even in cases where the repeal of an enactment is followed by a new legislation, Section 6 is applicable unless the new legislation manifests an intention incompatible with, in conflict with, or in contradiction to Section 6 through its 'savings' provision.[40] The principle behind Section 6 of the General Clauses Act is that all provisions of the repealed legislation would continue to be in force for purposes of enforcing the liability incurred when the Acts were in force and any investigation, legal proceeding, or remedy may be instituted, continued or enforced as if the Acts had not expired.[41] If the relevant section of the 2013 Act was in force when the transaction was effected, then any subsequent repeal of the statute would not affect the merits, rights, or liabilities of the parties as on the date of the transaction.[42] That means that a repeal will not affect any investigation, legal proceedings, or remedy in respect of any liability, penalty, or punishment so repealed or anything done thereunder.[43] Thus, the relevant question to determine if the provisions of the new Act would apply to an Act commenced under a repealed Act is not whether the

instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

40 Ramesh Chandra v. State, AIR 1994 Ori 187.

41 Amadalavalasa Co-operative Agricultural and Industrial Society Ltd. v. UOI, AIR 1976 SC 958.

42 Sundra Bai v. Manohar, AIR 1993 Bom. 262; SidheswarSahu v. Additional District Judge, Cuttack, (2003) 8 I.L.D. 240.

43 L. VenkateshNaik v. Assistant Collector, Special Customs Preventive Division, Kozikode, AIR 1992 Ker. 383.

new Act expressly keeps alive old rights and liabilities[44] but whether it manifests an intention to destroy them.[45]

Further, there is a presumption against a retrospective operation if, when so operated, it would prejudicially affect the legality of past transactions.[46] In regard to retrospective operation of a statute, the golden rule of construction is that it cannot be so construed as to have an effect of altering the law applicable to pending litigation at the time when the enactment was passed,[47] unless the new statute shows a clear intention[48] to vary such rights.[49]

Under the 2013 Act, Section 465 (not notified hitherto) has been incorporated by the Parliament as a 'Repeal & Savings' provision.[50] Though the section has not been enforced, it is relevant in detemining the intended scope of these provisions. Section 465(3) of the 2013 Act precisely states that specific provisions of Section 465(2) would not prejudice the general application of Section 6 of the General Clauses Act to the effect of repeal of the 1956 Act.[51] Thus, Section 465 allows general application of Section 6 of General Clauses Act to 'Repeal & Savings' under the 2013 Act. Hence, the

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44 Brihan Maharashtra Sugar Syndicate Ltd. v. JanardanRamchandra Kulkarni &Ors., AIR 1960 SC 794; T.S. Baliah v. T.S Rengachari, AIR 1969 SC 701.
45 State of Punjab v. Mohar Singh, [1955] 1 S.C.R. 893.
46 Krushna Chandra v. Commissioner of Endowments, AIR 1976 Ori 52.
47 Sankar Kumar Bhattar v. Tehsildar-cum-Revenue Officer, Basta, AIR 1976 Ori 103.
48 Income Tax Officer, Tuticorin v. TS Devinatha Nadar, AIR 1968 SC 623.
49 KatikaraChintamani Dora v. GuatreddiAnnamanaidu, AIR 1974 SC 1069.
50 2013 Act, *supra* note 4, § 465.
51 *Ibid,* §465(3).

repeal of the 1956 Act shall not affect any legal proceeding pending for acts or offences *ante* to the 2013 Act, which will continue to be governed by the 1956 Act,[52] as nothing to the contrary has been expressed in the 2013 Act. Moreover, as the 2013 Act does not make any express provision regarding retrospective operation of the 2013 Act, it cannot be presumed so herein.

Additionally, Section 434(1)(a) of the 2013 Act states the all the proceedings so transferred from the CLB to the NCLT shall be disposed of "*in accordance with the provisions of this act.*" The aforementioned phrase is fraught with uncertainty as it is not clear whether it refers to the applicability of the 2013 Act only for the procedural facet of the proceedings or the substantive portion as well. It is also a rule now firmly established[53] that the intention of the legislature must be found by reading the statute as a whole.[54] Hence, by construing section 434(1)(a) in light of section 465(3), it may be inferred that the phrase refers to the application of the 2013 Act only for procedural purposes and not for the substantive law applicable to the transferred proceedings.

B. Specific Provision Assumes Validity over a General Provision

Section 434(1)(a) of the 2013 Act provides for the transfer of cases from the CLB to the NCLT, and Section 465 is a provision solely dedicated

52 Anil Kumar Poddar v. Prime Focus Ltd. & Ors., [2017] 200 CompCas 64.

53 *Philips India Ltd. v. Labour Court,* (1985) 3 SCC 103*; Osmania University Teachers Association v. State of A.P.,* AIR 1987 SC 2034.

54 *Captain Subhash Kumar v. The Principal Officer, Mercantile Marine Deptt.,* AIR 1991 SC 1632.

to deal with the repeal of enactments and savings. Under the rules of statutory interpretation,[55] where there is a general provision which, if applied in its entirety, would neutralise a specific or special provision dealing with the same subject matter, the specific provision must be read as a proviso to the general provision, and the general provision, insofar as it is inconsistent with the specific provision, must be deemed not to apply[56]. Herein, Section 465 is specifically dealing with 'Repeal & Savings', whereas, Section 434 is only to effectuate the instance of transfer. Accordingly, a conjoint reference to Sections 434 and 465 manifest an intention that section 434 was never meant for retrospective application of substantive law under the 2013 Act on pending matters transferred from the CLB to the NCLT. Section 465(3) unequivocally states that the stipulations in sub-section (2) will not be held to prejudice the general application of Section 6 of the General Clauses Act, thereby implying that the provisions of the 2013 Act will not be applicable to proceedings pending under the 1956 Act, and the same shall be governed and disposed of in accordance with the provisions of the 1956 Act. Consequently, Section 465, being a specific provision incorporated into the 2013 Act as a 'savings' provision, would prevail over Section 434 that was only to facilitate the process of transfer.

55 Mangilal v. State of Rajasthan, 1997 AIHC 1892 (Raj).

56 Taylor v. Oldham Corpn., 4 Ch D 395; Goodwin v. Phillips, 7 CLR 1; Charity Commission, State of Maharastra, Bombay v. Shanti Devi Lalchand Trust, AOR 1990 Bom 189; Antaryami Patna v. State of Orissa, 1993 Cr Lj 1908.

C. Reference to the Heading of the Provision

It is a settled rule[57] of interpretation that the section heading can be relied upon to clear any doubt or ambiguity in the interpretation of the provision[58] and to discern the legislative intent[59]. The heading might be treated as preambles to the provisions following them[60] and may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath.[61] The title prefixed to Section 434 of the 2013 Act reads as, "*Transfer of certain pending proceedings.*" An apparent reference to its title demonstrates that the provision seeks to provide for only transfer of proceedings from forums that existed in the erstwhile 1956 Act to the NCLT as established by the 2013 Act, and doesn't intend to suggest the repeal of the 1956 Act or operation of the 2013 Act on transferred matters.

Having discussed how the various principles of statutory interpretation support the applicability of the 1956 Act, the next part highlights how application of the 2013 Act is prejudicial to the interests of the various stakeholders at different stages of proceedings.

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57 *Hammer Smith & City Ry. v. Brand,* (1869) LR 4 HLC 171; *Ingils v. Robertson,* (1898) AC 616 (HL)*; Toronto Corporation v. Toronto Ry.,* (1907) AC 315(PC)*; Martins v. Fowler,* (1926) AC 746 (PC)*; Qualter Hall & Co. Ltd. v. Board of Trade,* (1961) 3 All ER 389 (CA)*; Bhinka v. Charan Singh,* AIR 1959 SC 960; *Director of Public Prosecutions v. Schildkamp,* (1969) 3 All ER 1640 (HL).

58 *Toronto Corporation v. Toronto Ry. Co.,* (1907) AC 315 (PC), *referred to in Ralph George Cariton, Re,* (1945) 1 All ER 559.

59 *N.C. Dhondial v. Union of India,* AIR 2004 SC 1272.

60 *Martins v. Fowler,* (1926) AC 746.

61 *Raichurmatham Prabhakar & Anr. v. Rawatmal Dugar,* (2004) 4 SCC 766.

V. MISPLACED INTERPRETATION OF BASIC PRINCIPLES: RETROSPECTIVE OPERATION OF THE 2013 ACT IS PREJUDICIAL TO PARTIES

Accepting NCLAT's argument in favour of retrospective operation of the 2013 Act on pending transferred proceedings as a valid principle of law would have two implications. *First*, it would result in retrospective modification of substantive rights of parties concerned with disputes filed under the 1956 Act when the 2013 Act does not expressly provide for such consequences. *Second,* it would imply retrospective operation of a provision from date of transfer proceedings pending under it and not from date of its enforcement.

A. Modification of Substantive Rights Existing as per the 1956 Act in Disputes Filed Under the 1956 Act

The application of the 2013 Act on pending matters transferred from the CLB to the NCLT would be inconsistent with the principle of rights crystallised under the 1956 Act, under which disputes were initially filed before the CLB.[62] Every provision that takes away or impairs vested rights acquired under existing provisions, creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already incurred under an earlier provision must be presumed not to be applicable on

62 Ramvilas Bajaj vs Ashok Kumar, 2007 (4) ALT 348.

matters pending under the repealed provision.[63] Where a legislation does not clearly provide for application of new rights or obliteration of an already existing right from a substantive provision of a statute, its application on existing matters cannot be presumed.[64] Since there is no such expression in the 2013 Act, mere instance of transfer of pending matters from the CLB to the NCLT is not sufficient to apply new provisions altering the rights under which pending disputes were initially filed.

For instance, the language of the following provisions in the 2013 Act have been so altered *vis-à-vis* provisions of the 1956 Act that application of the 2013 Act on transferred matters would result in retrospective modification of rights of parties even when there is no such expression in the 2013 Act expressly providing for it.

1. Petition for Mismanagement

Under the 1956 Act, Section 397 provided for relief in cases of oppression wherein the affairs of a company that are prejudicial to public interest or oppressive to member(s) may be brought before the Tribunal (here, the NCLT & the NCLAT) on ground of oppression. Accordingly, the Tribunal could pass any order if it was of opinion that company's affairs were indeed prejudicial to public interest or oppressive to member(s) and that though these grounds were sufficient to wind up the company on just and

63 Amireddi Raja Gopala Rao v. Amireddi Sitharamamma, AIR 1965 SC 1970; *See,* General Clauses, *supra* note 6.

64 *Bourke v. Nutt,* (1894) 1 QB 725.

equitable grounds, yet such winding up would prejudice these member(s).[65] Similarly, Section 398 provided for application to the Tribunal for relief in cases of mismanagement. It provided a right to members to approach the Tribunal when affairs of the company are being conducted in a prejudicial manner to public interest or to interest of company, or that a material change in management or control of company would be likely to cause company's affairs to be conducted in a manner prejudicial to public interest or interest of the company.[66]

However, the 2013 Act consolidated these provisions under Sections 241 and 242 as 'Oppression and Mismanagement.' This consolidation modified the grounds for filing application under oppression or mismanagement. Section 241 seeks to cover aspects of both oppression as well as mismanagement whereby members of a company may approach the Tribunal with an application that affairs of the company 'have been' or 'are being' conducted in a manner prejudicial to public interest or the interest of the company, or prejudicial or oppressive to member(s) of the company.[67] Further, they may also approach the Tribunal where a material change in control or management of the company would be likely to result in the company's affairs being prejudicial to interests of members or a class of

65 1956 Act, *supra* note 3, § 397(1).
66 *Ibid,* § 398(1).
67 2013 Act, *supra* note 4, § 241(1)(a).

members, and the Tribunal has the power to pass orders to end such conduct.[68]

Accordingly, illustratively speaking, the following disputes filed under the 1956 Act would be affected by application of the 2013 Act subsequent to their transfer to the NCLT:

a) Powers of Tribunal to provide relief for 'preventing' mismanagement

Section 241(1)(b) was modified to obliterate the aspects of 'use of powers by the Tribunal for *prevention* of conduct of affairs of company causing mismanagement' as provided under Section 398. Section 398(1)(b) allowed the Tribunal to take actions in order to end or prevent 'matters complained of or apprehended' as mismanagement of the company. The removal of this phrase in the 2013 Act and retrospective operation of the 2013 Act on pending matters transferred from the CLB to the NCLT would prejudice the rights of applicants who approached the tribunal to invoke its powers of prevention of mismanagement in company affairs.

68 *Ibid*, § 241(1)(b).

b) Additional ground of 'winding up on just and equitable cause' to be proved by petitioner for claiming relief in mismanagement from NCLT

Under Section 242, obtaining relief of mismanagement requires the applicant to prove that affairs of a company are either prejudicial to the interests of public or members of the company, or oppressive to members. Additionally, it must be proved that these grounds are sufficient for 'winding up of the company on just and equitable grounds', and yet such winding up order would prejudice interests of these member(s).[69] Under the 1956 Act, the test of 'winding up on just and equitable grounds' had to be proved only for cases of oppression. Consequently, this modification resulting in an additional ground to be proved for relief of mismanagement would prejudice the rights of those who filed their petition before the enforcement of Section 242, due to its retrospective operation to their petition subsequent to its transfer from the CLB to the NCLT.[70]

c) Transfer of power to grant waiver to file petitions from Central Government to the NCLT under the 2013 Act

Additionally, under Section 399 of the 1956 Act, the Central Government had the authority to grant waiver to an applicant(s) who could

69 *Ibid,* § 242(1) (b).
70 *Ibid*, § 434(1) (a).

not satisfy the minimum eligibility criteria under section 399(1).[71] With the enforcement of Section 244, this authority has been provided to the NCLT. If it is accepted that pending petitions transferred from the CLB to the NCLT would only have to be decided as per the 2013 Act, the authority of the Central Government to grant a waiver under the 1956 Act becomes unclear since the 2013 Act does not provide for validity of waivers granted under the erstwhile legislation.

2. Disputes Related to Further Issue of Share Capital under Section 62 of the 2013 Act (Corresponding to Sections 81 & 94 of the 1956 Act):

Under the 1956 Act, Section 81 provided conditions required to be complied with by all non-private[72] companies for further issue of share capital at any time after two years from formation of the company, or one year from allotment of shares made by the company for the first time subsequent to its formation.[73] Where further issue of shares occurs in the aforementioned circumstances, a public company has to further issue shares to members existing as on the date of offer through a notice specifying the number of shares to be issued and the number of days for which the offer stands valid.[74] However, under the 2013 Act, Section 62 was modified it such that all companies, irrespective of the time when the further issue of shares is

71 1956 Act, *supra* note 3, § 399(4).
72 *Ibid*, § 81(3).
73 *Ibid,* § 81(1).
74 *Ibid,* § 81(1) (a) & (b).

undertaken by them, must comply with the conditions.[75] Herein, existing members, as on the date of offer, have been provided a pre-emptory right to subscribe to further shares before invitations for subscription are sent to non-members.

Consequently, illustratively speaking, the following disputes would be affected due to the retrospective operation of Section 62 on pending transferred matters that were before the CLB under section 81:

a) Interpretation regarding cut-off date under Section 81(1)

A petition may have been raised against a company for non-compliance with Section 81(1) pertaining to the cut-off dates mentioned therein. Accordingly, retrospective operation of Section 62 of the 2013 Act on such matters, which obliterates the impact of these cut-off dates, would prejudice the rights of a company that had rightly not complied with the procedure mentioned.

b) Issues of offer of subscription to further issue of share capital to persons other than those mentioned under section 81(1)

Moreover, Section 81 may also be invoked by certain members of a company with respect to the issue of further capital to persons other than

75 2013 Act, *supra* note 4, § 62.

existing members. These issues involve the interpretation and application of Section 81(1A)(b) which allows a company to offer the option to subscribe to further issue of shares to 'other persons' similar to the manner they are offered to existing members, even if a special resolution is not passed in a general meeting to that effect.[76] Consequently, retrospective application of Section 62 on this petition subsequent to its transfer to the NCLT would prejudice rights of the company as well as of those 'other' persons since the provision authorising the issue of further capital to the other persons under Section 81(1A)(b) has been removed from the 2013 Act.

3. Petition for Misstatements in Prospectus of a Company Incorporated Outside India under Sections 391 & 392 of the 2013 Act (Corresponding to Sections 607 of the 1956 Act)

The liability of a company incorporated outside India with respect to misstatement or fraudulent inducement in a prospectus issued by it for inviting Indian investors to subscribe to its securities was covered under Sections 603-608 of the 1956 Act.[77] Under the 2013 Act, Sections 391 and 392 cover such liability.[78] Earlier, Section 607 of the 1956 Act provided only for civil liability for misstatements in a prospectus by foreign companies. However, the 2013 Act incorporated a modification providing for the application of Sections 34 to 36 on foreign companies as if they were

76 1956 Act, *supra* note 3, § 81(1) (b).
77 *Ibid,* §§ 603-608.
78 2013 Act, *supra* note 4, §§ 391, 392.

incorporated in India,[79] with the effect of imposing criminal liability on foreign companies who have made misstatements in their prospectuses. Such modification with retrospective effect would impose an additional criminal liability[80] on companies whose cause of action arose prior to the enforcement of the new provision.[81] Such operation would be inconsistent with cardinal principle of legal jurisprudence that no criminal liability can be retrospectively imposed and prejudice the rights of companies against whom petitions were filed under Section 607 before they were transferred to the NCLT.[82]

4. Resolutions Requiring Special Notice

Under the 1956 Act, when certain members wished to introduce a resolution, they were required to give a notice of intention to move a resolution to the company not less than fourteen days before the meeting at which such resolution was to be moved.[83]Under the 2013 Act, on the other hand, such notice may be sent only by members holding not less than 1% of total voting power, or holding shares whose aggregate sum does not exceed five lakh rupees.[84] For instance, a petition might involve a dispute related to the removal of a director, initiated by a notice under the 1956 Act. However,

79 *Ibid,* § 391.

80 General Clauses, *supra* note 6.

81 INDIA CONST.art. 20, cl 1.

82 *Ibid;* Collector of Central Excise, Ahmedabad v. Orient Fabrics Pvt. Ltd., (2004) 1 SCC 597; JK Cotton Spinning & Weaving Mills Ltd. v. Union of India, 1988 SCC (Tax) 26; Collector of Customs, Bombay v. East Punjab Traders, (1998) 9 SCC 115.

83 1956 Act, *supra* note 3, § 190.

84 2013 Act, *supra* note 4, § 115.

retrospective application of the 2013 Act post its transfer to the NCLT would alter the eligibility of members to send a notice of their intention to move a resolution for removing a director of the company. Since the eligibility criterion of notice will be altered with a petition transfer, it would put the notice itself under a questionable character. This would not only prejudice the rights of members who sent that notice under Section 190 of the 2013 Act but also invalidate the removal of a director that might have been valid under the erstwhile 1956 Act.

5. Right of Transferor or Other Person to File an Appeal Against Refusal of Company to Register the Transfer of Shares.

Under the 1956 Act, section 111 provided for the right of a 'transferor, transferee, or other person who gave intimation of transmission of shares by operation of law' to file an appeal before the Tribunal against a company's refusal to register the transfer or transmission of shares, or for its failure to send notice of its decision to the persons concerned.[85] However, under the 2013 Act, only a transferee has been authorised to file an appeal only against the refusal by a company to register the transfer or transmission of shares.[86]

Accordingly, retrospective operation of the 2013 Act would obliterate the right of a 'transferor or the other person who gave intimation of the

85 1956 Act, *supra* note 3, § 111(2).
86 2013 Act, *supra* note 4, § 58(3).

transmission by operation of law'[87] to approach the Tribunal for refusal of a company to register the transfer of their shares or for sending them notices for its such decision within the period specified under the 2013 Act. Moreover, it would also prejudice right of a transferee to approach the Tribunal against failure of a company to send them notices regarding its decision not to register such transfer or transmission of shares. This would even render pending petitions infructuous.

6. Filing a Petition Against a Company for Failure to Comply with Section 190 of the 2013 Act.

Under the 1956 Act, Section 302 obliged 'every' company to disclose to members the nature of concern or interests of director of the company in contract or variation in contract of employment of manager of the company, if such interest or concern existed.[88] Accordingly, a member could approach the Tribunal in cases of non-compliance. However, under the 2013 Act, this provision has not only obliterated the nature of disclosure earlier required to be made by a company but also exempted private companies from complying.[89] Accordingly, a retrospective operation of the 2013 Act on petitions filed under Section 302 would make such proceedings redundant. These sections demonstrate that a retrospective operation of the 2013 Act on pending proceedings on mere instance of transfer from the CLB to the

87 1956 Act, *supra* note 3, § 111(2).
88 *Ibid,* § 302(1), (2).
89 2013 Act, *supra* note 4, § 190.

NCLT would be inconsistent with the well settled principle that rights existing as on the date of filing of petition can be modified only when a modified provision expressly provides for it. Since no such express provision exists in the 2013 Act, such alteration in substantive law would prejudice those rights of parties that existed at the instance of filing of a petition.

B. Enforcement of Modified Provisions for Transfer of Pending Petitions.

The NCLT's constitution under the 2013 Act sparked a debate on alteration of substantive laws applicable on pending petitions transferred from the CLB. While the NCLT's predecessor continued to adjudicate pending matters under the 1956 Act even after enforcement of corresponding provisions of the 2013 Act,[90] no such claim of retrospective operation of the 2013 Act was raised. The same was raised only after pending matters had to be transferred from the CLB to the NCLT under Section 434(1)(a) of the 2013 Act. This argument defies the ideal construct wherein the retrospectivity should operate from the date of enforcement of the provision under the 2013 Act, and not on the date of transfer of the proceedings pending under earlier provision. Consequently, a retrospective operation at such instance would be contrary to well-established principles of statutory interpretation. For instance, following provisions of the 2013 Act

90 Ministry of Corporate Affairs, Enforcement of certain provisions of Companies Act, 2013, S.O. 2754(E) (September 12, 2013). ['S.O. 2754(E)']; Enforcement of certain provisions of Companies Act, 2013, S.O. 902 (E) (March 26, 2014). ['March 26'].

were notified before the date of constitution of the NCLT but the CLB continued adjudication of pending matters under the 1956 Act:

1. Section 58

Section 58 of the 2013 Act was notified on 12 September 2013.[91] Accordingly, the CLB was authorised to continue adjudicating petitions that arose out of its erstwhile corresponding section 111 of the 1956 Act as well as accept fresh petitions under the newly enforced section 58 of the 2013 Act. The enforcement of corresponding provision of the 2013 Act did not affect continuance of petitions earlier filed under section 111 of the 1956 Act, because there was no provision for retrospective operation of the 2013 Act on a petition filed under section 111 of the 1956 Act. Consequently, it can be inferred that the instance of implied repeal of section 111 by enforcement of section 58 had no impact on pending proceedings. However, argument of retrospective operation of Section 58 of the 2013 Act came to be raised only after transfer of pending petitions from the CLB to the NCLT under section 434(1)(a).

2. Section 62

Similarly, since Section 62 was notified on 1 April 2014,[92] matters that were filed under the 1956 Act continued as they were even after the enforcement of corresponding provisions of the 2013 Act. Consequently,

91 S.O. 2754(E), *supra* note 131.
92 March 26, s*upra* note 131.

when Section 62 was not sought to be retrospectively applied on applications pending under Section 81 of the 1956 Act after its enforcement, it cannot be so argued merely on instance of their transfer from the CLB to the NCLT.

The similar argument for no retrospective operation on an instance of 'transfer' of pending petitions from the CLB to the NCLT may also be applied to Section 115 (corresponding to Section 190 of the 1956 Act),[93] Section 190 (corresponding to Section 302 of the 1956 Act),[94] and Section 391 (corresponding to Section 607 of the 1956 Act)[95]. Accordingly, it may be argued that the Parliament had no intention of ensuring adjudication of pending petitions filed under the 1956 Act as per the 2013 Act on their transfer from the CLB to the NCLT because of the fact that even implied repeal of the provisions of the 1956 Act did not affect pending proceedings. A retrospective operation of certain provisions impliedly repealing an earlier provision can be applied on pending proceedings from 'date of their enforcement'[96] and not from an instance of transfer of proceedings from one authority to other.

Hence, it can be inferred that accepting 'transfer-date' based retrospective operation of provisions of an Act would not only prejudice substantive rights of parties to petitions pending under repealed enactment but also set precedential standards inconsistent with well- settled principles

93 2013 Act, *supra* note 4, § 115 (notified on April 1, 2014).
94 *Ibid,* § 190.
95 *Ibid* § 391.
96 *Commissioner of Income Tax v. Venkateshwara Hatcheries,* AIR 1999 SC 1225.

of law regarding retrospective operation of statutory provisions after repeal of earlier enactments.

VI. CONCLUSION

The disagreement and lack of cohesion between the different benches of the NCLT and the NCLAT apropos to their stance on the applicable law for adjudicating proceedings transferred from the CLB to the NCLT is baffling. The NCLAT's reckoning that plain language rule should be applied to interpret section 434(1)(a) of the 2013 Act is without any merit as it defies the basic tenets of statutory interpretation, since the plain language rule ought not be applied in case of ambiguities. Additionally, the reasoning that NCLT is authorised to only adjudicate as per the 2013 Act is not legally sound.

If the NCLAT's position is adopted, it would result in far reaching ramifications on proceedings pending adjudication. There would be substantial modification of the rights of parties crystallised at the time of filing of the petition. Moreover, an acceptance of this position would create an unprecedented situation in relation to transfer of petitions wherein setting up a specific authority is observed as justification for retrospective alteration of applicable substantive law, unlike in other cases where the repeal of law marks such alteration.

Though it has been vehemently argued that the Parliament intended to apply the 1956 Act, there are factors indicating the alternative which are

highly persuasive and convincing. The basis for this persuasion stems from Section 465(3) of the 2013 Act which stipulates the general applicability of Section 6 of the General Clauses Act. Section 6 states that pending legal proceedings will not be affected by annulment of law under which the cause of action for such litigation arose. Thus, it implies the applicability of the 1956 Act on transferred proceedings in the immediate matrix. Further, the title of Section 434 of the 2013 Act suggests that the provision is aimed at only stipulating and facilitating the transfer of cases from various judicial forums to the NCLT, and doesn't intend to provide or deal with the operation of the 2013 Act in any way. Thereby, it implies that the provision intends to deal with only procedural aspects of transfer contrary to what has been observed by the NCLAT.

THE RATIONALISATION OF THIRD PARTY RIGHTS UNDER THE LAW OF UNDISCLOSED AGENCY

Paridhi Poddar[*]

ABSTRACT

Undisclosed agency relationships refer to situations in which the agent deals with third parties without professing the existence of his principal. The common law has vested third parties with the right to hold such an undisclosed principal liable under the contracts made by his agent. However, simultaneously, courts have also created 'exceptions' which have limited this right. The aim of this paper is to analyse four of these limitations on the rights of the third parties – the doctrine of election, discharge of the principal by settlement with the agent, limits on authority and ratification. The paper advocates that the balance between the rights of the third parties and that of the undisclosed principal needs to be corrected, keeping in mind that concealment and secrecy that the law of undisclosed agency endorses works primarily to the advantage of the principal and his agent, and not the third party. It undertakes a comparative analysis of the position of the law in the English common law and the United States to recommend the legislative changes that need to be introduced in the Indian law.

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I. INTRODUCTION

Undisclosed agents may be employed in commercial relations out of a sense of 'necessity' when the principal believes that contracting in their own name would be disadvantageous to their interest. For instance, the principal may choose to remain undisclosed when they are aware that the revelation of their identify would lead the third party to negotiate less favourable terms, such as money-consideration.[1] Or, the undisclosed principal may decide to contract through an agent if they believes that the third party may not be interested in entering into a contract with them.[2] While initial commentators perceived it as a dubious method of contracting without any social utility; today, commentators recognise the business efficiency arguments in favour of the use of undisclosed agents.[3] This is reflected in the fact that undisclosed agents are commonly employed in business transactions.[4]

Despite this, the use of undisclosed agents is discouraged for various reasons. One, the emergence of the undisclosed principal can not only jeopardise the economic advantage that the third party may have bargained for (in terms of the standing of the agent), it also compels the third party to deal with a new party.[5] Two, the use of undisclosed principals can injure the

1 Martin Schiff, *The Problem of the Undisclosed Principal and How It Affects Agent and Third Party*, 1984 DET. C. L. REV. 47, 48 (1984)
2 *Ibid.*
3 Arnold Rochvarg, *Ratification and Undisclosed Principals,* 34 MCGILL L. J. 286, 327-28 (1989)
4 *Ibid.*
5 Randy E. Barnet, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1987 (1987).

interests of efficiency and fairness in ordinary commercial dealings, particularly where policy is in favour of disclosure of material information.[6]

Recognising this, most common law countries[7] allow the undisclosed principal to be sued directly by the third party, in addition to holding the agent personally liable under the contract to the third party.[8] However, in order to maintain reciprocity and mutuality of obligations, the common law also allows the undisclosed principal to sue the third party directly, without relying on his agent.[9] Even when the common law recognises the right of the undisclosed principal to sue the third party, it has held that the third party cannot be made worse-off due to the appearance of the undisclosed principal. For this reason, the third party is entitled to enjoy the same rights and defences against the undisclosed principal as they would have enjoyed if they were sued by the agent.[10] Thus, the third party cannot be bound by obligations greater than that they undertook while contracting with the agent.[11]

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6 Mark A. Sargent & Arnold Rochvarg, *A Re-examination of the Agency Doctrine of Election*, 36 U. MIAMI L. REV. 411, 431 (1982).

7 *See* Wolfram Muller-Freienfel, *Comparative Aspects of Undisclosed Agency*, 18 MOD. L. REV. 33 (1955). The position is in stark contrast with that in civil law countries where an agent acting in his own name acquires rights and becomes bound to the third party only personally; whereas, the rights and obligations of the undisclosed principal operate only *vis-à-vis* the agent. Despite such a construction, even civil law countries have created limited exceptions which allow the undisclosed principal and the third party to proceed directly against each other.

8 *See* The Indian Contract Act, 1872, §§232, 233.

9 The Indian Contract Act, 1872, §231.

10 *See* The Indian Contract Act, 1872, §231; Miller v. Lea, 5 Md. 396 (1872) as cited in Ferson, *infra* note 12, 159.

11 Ferson, *infra* note 12, 150.

In addition, with a view to saving the third party from suffering prejudice due to the emergence of the undisclosed principal, courts have recognised various exceptions to the liability of the third party to the undisclosed principal.[12] For instance, courts have upheld the right of a third party to rescind the contract if the identity of the other party was material to it or when the third party could show that they would not have entered into the contract if they were aware of the existence of the undisclosed principal.[13] Similarly, the third party is allowed to escape liability to the undisclosed principal if the contract specifically excluded the existence of an undisclosed principal.[14] In addition, the undisclosed principal is not allowed to acquire rights under the contract when its terms contemplated provision of services of a personal nature.[15]

Despite these protections, in many common law countries, courts have placed limitations on the rights of the third parties dealing with undisclosed principals. *First*, despite recognising the rights of the third party to sue both the agent and their undisclosed principal, courts require the third party to make an election between the two. *Second*, courts have held that the right of the third party to proceed against the undisclosed principal comes to

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12 However, the law, in its present form, also imposes certain duties on the third party. If the circumstances at the time of the conclusion of the contract are such that they would create an apprehension in the mind of a reasonable person that the character of the other party is equivocal, the third party is bound to inquire to determine whether he is acting on behalf of a principal. *See* Miller v. Lea, 5 Md. 396 (1872) as cited in Merton L. Ferson, *Undisclosed Principals*, 22 U. CIN. L. REV. 131, 159 (1953). *See also* The Indian Contract Act, 1872, §§231, 232.

13 The Indian Contract Act, 1872, §231; Sargent & Rochvarg, *supra* note 6, 412.

14 Sargent & Rochvarg, *supra* note 6, 412.

15 Schiff, *supra* note 1, 73.

an end if the undisclosed principal settles the accounts with his agent. *Third*, courts have refused to hold that the undisclosed principal can be held liable to the third party for the acts of their agent outside the scope of their actual authority. *Fourth*, courts have refused to hold the undisclosed principal liable for the unauthorised acts of their agent under the doctrine of ratification. In this manner, courts have curtailed the reliefs available to third parties to a large extent.

Such a stance of the common law is, however, problematic. The secrecy that the law of undisclosed agency allows works primarily in the interest of the undisclosed principal and their agent. For this reason, the tenor of the law should be to protect the rights of the third party from being prejudiced or curtailed in favour of that of the undisclosed principal or their agent. The underlying rationale is that any risk arising from the use of undisclosed agents should fall on the principal who is best placed to manage and minimise the risk, as opposed to imposing the same on the third party who is neither aware of the existence of agency nor has the means to manage the risk. Unless the risk is correctly allocated and the inequities inherent in the misallocation of the risk undone, the principals would prefer to remain undisclosed in order to shield themselves from the liabilities which are otherwise borne by disclosed principals. Further, the third parties may be denied their rights and lose valid claims.

This paper aims to analyse whether the law of undisclosed agency protects the rights of the third parties vis-à-vis the undisclosed principal in light of its limitations. Part II provides a brief overview of theories behind

the rationalisation of the law of undisclosed agency, demonstrating how its rules are inconsistent with traditional theories of contract law. Parts III, IV, V and VI each deal with one of the four limitations discussed above, i.e. the doctrine of election, the rule of discharge by settlement, limits on authority, and ratification. Each section compares and contrasts the position of the Indian law with two legal traditions: the English law – because the Indian Contract Act, 1872 ('Contract Act') is based on it – and the American law – because it has sometimes been considered more proactive in incorporating changes into the law of contract via the Restatements, which seek to inform judges about the evolving principles of common law.[16] Each section considers arguments for and against the existing position of the law and then advocates for changes in the Indian position. The underlying rationale for the changes discussed in this section is that the current law of undisclosed agency must be tailored in order to better reposition the notions of equity and to safeguard the rights of the third parties engaged in such relationships. Part VII concludes that, while the current state of the law relating to the rule of election, discharge by settlement of accounts, and limitations on scope of authority must be amended to prevent undisclosed principles from escaping liability vis-à-vis third parties, the rule of ratification, being a technical and not a purposive device, would not be able to capture this goal.

16 *See generally* Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34(2) H.K.L.J. 339 (2004)

II. THEORETICAL INDETERMINACY IN THE LAW OF UNDISCLOSED AGENCY

The law of undisclosed agency, which allows the undisclosed principal to sue and be sued on contracts made between the agent (on their own behalf) and the third party, is an anomaly. This is because the common law has solemnly affirmed the principle of privity of contract, thereby preventing the enforcement of contracts by persons not parties to the contract.[17] Thus, Barnet concludes that none of the five traditional theories of contract – the will, reliance, efficiency, substantive fairness, and bargain theories – adequately explain the basis of the law of undisclosed agency.[18]

To address this, other scholars looked for justification for undisclosed agency law in alternative theories. Lewis argues that the true basis for the liability of undisclosed principals lies in the fact that they are the ones who *cause* the contract to be concluded and, in effect, induce the third party to enter into the contract.[19] Rochvarg relies on the benefit-burden theory to argue that the undisclosed principal should be held liable for the burden of the contract as he is the one who receives the *benefit* therefrom.[20] Misller-Freienfel explains the benefit-burden theory as the consideration theory of undisclosed agency – he argues that, despite contrary

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17 *See generally* Jesse W. Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226 (1887-88) Despite the principle of privity being affirmed by common law, it was subsequently diluted in English law by the Contract (Rights of Third Parties) Act, 1999.

18 Barnet, *supra* note 5, 1974.

19 William Draper Lewis, *The Liability of the Undisclosed Principal in Contract*, 9(2) COL. L. REV. 116, 133 (1909).

20 *See* Rochvarg, *supra* note 3, 298-99.

manifestations, since it is the principal who bears the detriment for moving the *consideration* to the third party, they should have the rights and the liabilities under the contract.[21] Moving beyond the confines of traditional contract law principles of consideration and detriment, Ames explains the relationship between the agent and the undisclosed principal as that of a trustee and a *cestui que* trust, i.e. the beneficiary of a trust. On this basis, he argues that the right of an undisclosed principal to sue the third party on the contract is anomalous.[22] He also argues that the right of the third party to sue the undisclosed principal is essentially an equitable enforcement of the agent's right to exoneration against his principal by the third party.[23] Despite the intuitive force of these theories, each suffers from limitations; on account of this, there is no single theory which enjoys overwhelming support in academic literature or case law, or which has been able to explain all the rules governing undisclosed agency relationships.[24] However, even without any convincing theoretical justification, the application of the rules of undisclosed agency remains unchallenged. This may be due to the principle of fairness that the rules relating to undisclosed agency seem to capture.[25] Given the tension behind the basis of undisclosed agency in contract law, some scholars have conceded that the law of undisclosed agency is essentially

21 Wolfram Muller-Freienfel, *The Undisclosed Principal*, 16 MOD. L. REV. 299 (1953).
22 James B. Ames, *Undisclosed Principal-His Rights and Liabilities*, 18 YALE L.J. 443 (1909).
23 *Ibid.*
24 Grover R. Heyler, *Undisclosed Principal's Rights and Liabilities: A Test of Election of Remedies*, 39 CAL. L. REV. 409, 412 (1951).
25 Michael L. Richmond, *Scraping Some Moss from the Old Oaken Doctrine: Election between Undisclosed Principals and Agents and Discovery of Their Net Worth*, 66 MARQ. L. REV. 745, 750 (1983).

an outcome of equity, aided by the fiction of identity of the principal and the agent, and the doctrine of mutuality of contractual obligations.[26]

III. DOCTRINE OF ELECTION

The doctrine of election states that when two or more inconsistent remedies exist and a party pursues one of these remedies, they are precluded from pursuing any other.[27] In the context of undisclosed agencies, the doctrine requires the third party to proceed either against the principal or the agent. While the rule of election is considered to be a procedural issue, it is inextricably linked to the substantive conceptualisation of the relationship among the three parties involved in undisclosed agency relationships. Part III.A presents the position of the English, United States ('US') and Indian laws on this issue, and Part III.B analyses arguments for and against the doctrine to recommend the position the Indian law should take.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

The English law places a strict burden on the third party under the doctrine of election - the third party only has a single claim under the contract and thus, the liability of the agent and the undisclosed principal is

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26 Ferson, *supra* note 12, 133.

27 Maurice H. Merrill, *Election between Agent and Undisclosed Principal: Shall We Follow the Restatement*, 12 NEB. L. BULL. 100, 119 (1933); Chicago Tit. & Tr. Co. v. De Lasaux, 168 N. E. 640, 642 (1929).

alternative.[28] According to the single claim approach, as soon as a judgment is procured by the third party against the agent, their claim against the principal merges with the judgment procured against the agent.[29] For this reason, the third party is barred from proceeding against the undisclosed principal even when they were not aware of the principal's existence at the time of obtaining the judgment against the agent.[30]

Thus, under the English law, *first*, the bar on the right of the third party against the undisclosed principal operates even when they were not aware of the existence of the undisclosed principal, and *second*, the bar starts only once the judgment has been procured and not merely from the commencement of proceedings against one of the parties. For these two reasons, this rule is seen as an offshoot of the doctrine of merger as opposed to the doctrine of election – this is because the doctrine of election presupposes that the party making the election should have knowledge of the alternate claims, and, further, can label any conduct and not merely procurement of judgment as amounting to election.[31]

2. Position of Law in the United States

The American position acknowledges that the third party enjoys two different claims against the principal and the agent, but holds that these

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28 SIR FREDRICK POLLOCK & SIR DINSHAW FARDUNJI MULLA, POLLOCK & MULLA: THE INDIAN CONTRACT AND SPECIFIC RELIEFS ACT, VOL. II 1808 (Nilima Bhadbhade ed., 14th ed., 2012)

29 Ferson, *supra* note 12, 145; Merrill, *supra* note 27, 118.

30 Ferson, *supra* note 12, 146. *See* Kendall v. Hamilton, 4 App. Cas. 504 (1879).

31 Karl Stecher, *The Doctrine of Election as Applied to Undisclosed Principal and Agent*, 7 MISS. L. J. 466, 471 (1935).

claims are enforceable in the alternate as they arise from a single contract.[32] Thus, the American position says that a third party who pursues an agent is not precluded from holding a principal who has remained undisclosed up to that time.[33] However, once the agency is disclosed and knowledge of the existence of the principal is received by the third person, they are obligated to choose either of the parties.

In this regard, the American courts have taken different stances on when a third party shall make an election between the agent and the principal. Some courts have placed a very onerous burden on the third party to make an election at the earliest possible opportunity – thereby exacerbating the inequities of the doctrine.[34] Other courts, however, have taken a fairer approach by holding that while the third party would be allowed to sue both, they would be required to make the election sometime prior to the pronouncement of the judgment.[35] Another set of courts have further diluted the rigours of the doctrine by adopting a flexible interpretation, construing most forms of conduct of third parties as not amounting to election.[36] Some courts have held that election cannot be imputed on the third party unless the same is demanded by the defendant agent and principal, thereby allowing the right to election to be waived on account of the failure of the agent and the principal to specifically demand

32 Merrill, *supra* note 27, 118.
33 *Ibid*, 107.
34 Richmond, *supra* note 26, 765.
35 *Ibid*, 766.
36 Stecher, *supra* note 31, 472.

the same.[37] This is unlike the English position where obtaining a judgment against either of the parties is said to constitute a definite election.[38] Still others, while acknowledging that the second claim raised by the third party would have been barred by the doctrine of election, have nonetheless permitted the same on equitable grounds.[39] Despite this trend demonstrating that most courts are not convinced of the fundamental soundness of the doctrine in the context of undisclosed agency, the rule of election of remedies continues to be a tool in the hands of the undisclosed principal and their agent to invalidate claims raised by the third party.[40]

3. Position of Law in India

The position of Indian law with respect to election is laid down in §233 read with §230 of the Contract Act. §233 provides that, in cases in which the agent is personally liable, as in the case of undisclosed agency,[41] "a person dealing with him may hold either him or his principal, or both of them liable".[42] The language of the section initially created confusion as to whether

37 Klinger v. Modesto Fruit Co., 107 Cal. App. 97 (1930) as cited in Sargent & Rochvarg, *supra* note 6, 428. *See also* Fleming v. Dolfin, 4 Pac. (2d) 776 (1931); Craig v. Buckley, 21 Pac. (2d) 430 (1933) as cited in Merrill, *supra* note 27, 107.

38 Curtis v. Williamson, L.R. 10 Q.B.D. 57

39 Evans, Coleman & Evans Ltd. v. Pistorino, 245 Mass. 94, 139 N.E. 848 (1923) as cited in Heyler, *supra* note 24, 413.

40 In other to further remedy the inequities of the doctrine of election, various states in the US have brought in legislative amendments providing that procuring of a judgment against either the agent or the undisclosed principal shall not be deemed to be an election of remedies until the same remains unsatisfied. *See* Heyler, *supra* note 24, 420.

41 *See,* The Indian Contract Act, 1872, §230.

42 The right of the third party under §233 is subject to §234 which formulates a rule of estoppel preventing the third party from suing the principal when he induces him to believe that only the agent would be held liable, and vice-versa.

it aimed at effecting a departure from the English position – wherein the liability of the principal and the agent is alternative – to favour joint liability. Despite the language of the section seemingly suggesting otherwise, the drafting history of the provision shows that the drafters had only intended to reproduce the English law.[43]

Despite the intention of the drafters, the section was interpreted differently by different High Courts. The Madras and the Calcutta High Courts opined that the provision allowed the third party to sue either the principal or the agent, or sue both of them alternatively, but did not allow them to be sued together as jointly liable for the amount in question.[44] The Courts reached this conclusion on the ground that the liabilities of the agent and the undisclosed principal are not joint, but mutually exclusive.[45]

However, the Bombay High Court held that a third party can either sue one of the two, or sue them jointly – however, if the third party chooses to obtain a judgment against either the principal or the agent, they cannot subsequently file another suit against the other.[46] The Court reasoned that the right of the third party to sue is based in 'one cause of action' and that it was in the interest of public policy that litigation with respect to the 'same cause of action' must come to an end. Despite making this observation, the

43 POLLOCK & MULLA, *supra* note 28, 1808.

44 Pootheri Illath Kuttikrishnan Nair v. Kallil Appa Nair, A.I.R. 1926 Mad. 1213; Nicholas Schinas v. Nemazie, A.I.R. 1952 Cal. 859 as cited in POLLOCK & MULLA, *supra* note 28, 1808. *See also* Kutti Krishna Nair v. Appa Nair, 49 Mad. 900 as cited in LAW COMMISSION OF INDIA, THIRTEENTH REPORT ON CONTRACT ACT, 1872, ¶176 (September 26, 1958).

45 *Ibid.*

46 Raja Bahadur Shivlal Motilal v. Birdichand Jivraj, (1917) 40 Ind. Cas. 194.

Court held that obtaining a judgment against the agent would not bar a subsequent suit against the principal in cases when the judgement against the agent was obtained before the disclosure of the agency. This conclusion, however, is at odds with the Court's earlier observation that a bar on the subsequent suit is imposed on account of it emanating from the 'same cause of action.' Despite te internal inconsistency in the decision of the Bombay High Court, its position was later endorsed by both the Madras[47] and the Calcutta High Courts,[48] as well as by the Law Commission of India in its 1958 Report on the Indian Contract Act.[49] In my opinion, the judgment of the Bombay High Court is sound as it is in line with the plain reading of the language of the provision.

B. Analysing the Rule of Election in Undisclosed Agency

1. Justifications for the Rule of Election

There are three major justifications for the application of the rule of election in cases of undisclosed agency.

First, the doctrine of election brings the law of undisclosed agency in consonance with the theory of the identity of the principal and the agent, according to which only one obligation is created when the agent makes a

47 Shamsddin v. Shaw Wallace & Co., A.I.R. 1939 Mad. 520.
48 Pasupati Gorai v. Brindaban Khan, (1951) I.L.R. 1 Cal. 82.
49 LAW COMMISSION OF INDIA, *supra* note 44, ¶176.

contract with the third party.[50] Even though the law of undisclosed agency allows the third party the choice to sue the principal or the agent, there is still only one contract and hence, the liabilities are alternative. Without the doctrine of election, allowing the third party to sue the agent and the principal subsequently would be tantamount to allowing them to assert that there were two contracts – one with the agent and the other with the principal.[51]

Second, the rule of election prevents the third party from enjoying an "undeserved windfall" on account of the emergence of the undisclosed principal.[52] This is because the third party may contract with the agent relying on his standing, but is nonetheless given the option to choose between the two – this right, however, should not be extended to create a situation in which the third party can pursue any party on a whim.

Third, the doctrine of election may be justified due to expediency. Without the requirement of an early election, there may be uncertainty regarding whether the third part would choose the agent or the principal in their claim. This could lead to business inconvenience.[53]

2. Criticisms of the Rule of Election

The criticisms of the rule of election relate to four main arguments.

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50 Ferson, *supra* note 12, 143.
51 Merrill, *supra* note 27, 120.
52 Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 126.
53 *Election of Remedies by Party Dealing with Agent of Undisclosed Principal*, 39(2) YALE L. J. 265 (1929).

First, in an undisclosed agency relationship, there are two separate obligations: *one*, of the agent, emanating from the law on the basis of the binding nature of the contract they have entered into; and *two*, of the undisclosed principal, emanating not from any contract per se, but from the principles of the law of agency which are grounded in equity.[54] In other words, while the agent's liabilities are based in their status as a party to the contract, the undisclosed principal's liabilities are based in their jural status under agency law.[55] The doctrine of election, as understood in the common law, is inapplicable in such a scenario as there are two separate, non-contradictory obligations, emanating from the peculiar circumstances of undisclosed agency relationships.

Second, the emergence of the principal and the consequent liability imposed on them by law is not a windfall for the third party. The third party contracts with the agent relying on their standing, but is inevitably prejudiced due to the emergence of the principal, as it may imply that the agent is not as credible as they claimed.[56] Thus, the application of the rule of election defeats the fundamental objective of the law of undisclosed agency – which is to provide the third party with the economic advantage they bargained for.[57] This is so because the rules of election allow the third party to choose to litigate the matter against the agent on whose credit he relied in the first

54 Warren A. Seavey, *The Rationale of Agency*, 29(8) YALE L. J. 859 (1920); Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 122; *Election between Undisclosed Principal and Agent*, 24(3) INDIANA L. J. 446 (1949).

55 Sargent & Rochvarg, *supra* note 6, 419.

56 Heyler, *supra* note 24, 412.

57 Merrill, *supra* note 27, 126.

place, as opposed to compelling him to litigate against the undisclosed principal against his choice.

Third, the business expediency argument in favour of election is unacceptable as the undisclosed principal and their agent themselves decide to enter into contracts by maintaining secrecy. Any burden of inconvenience flowing from secrecy should thus be borne by the principal and their agent, as opposed to the third party.

Fourth, the rule of election on the ground places an additional burden on the third party to determine who of the two is more solvent and more likely to remain solvent until the judgment is satisfied.[58] However, the third party may not have the information necessary to make this determination. This is because, in most jurisdictions, rules of procedure do not allow discovery of the net worth of the defendant before the pronouncement of the judgment in most cases.[59] This may result in an erroneous selection by the third party and a total loss of a valid claim.[60] For instance, the third party may choose to sue the principal, on the presumption that they have better financial standing, and lose out due to an inability to prove the agency relationship.[61]

58 Heyler, *supra* note 24, 415.
59 Richmond, *supra* note 26, 74.
60 Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 124.
61 Heyler, *supra* note 24, 415.

C. Recommended Position

To address the concerns affecting the application of election, some argue that the doctrine of election should not be applied. Instead, they advocate for a shift from the rule of discharge by election to a rule of discharge by satisfaction. According to this rule, *first*, the third party should be permitted to join both the principal and the agent as defendants, with the judgment standing against both until it is satisfied by either of the parties.[62] *Second*, the third party should also be allowed to sue the other party subsequently if the agent or the principal against whom the judgment was first obtained is unable to satisfy the same.[63] This position seeks to minimize the inequities arising from the application of the rule of election and safeguard the rights of the third party.

While the first prong of the rule of satisfaction has already been incorporated under §233 of the Contract Act, legislative amendment or creative judicial interpretation is needed to read in the second right under §233. Here, it is important to note that the language of §233, which reads that the third party may hold "both of them liable," does not prevent the third party from filing a subsequent suit when the first one has remained

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62 Stecher, *supra* note 31, 475; Ferson, *supra* note 12, 147; Richmond, *supra* note 26, 783.

63 This rule of satisfaction has been incorporated under Article 13, Paragraph 2 of the 1983 Convention on Agency in the International Sale of Goods,[63] which provides that the third party may exercise his rights against the principal in a situation when the agent fails to fulfil his obligations under the contract. Given the broad manner in which Paragraph 2 is worded, arguably, failure by an agent to satisfy a judgment obtained against him would not deprive a third party to proceed against the principal. *See generally* J. S. McLennan, *Undisclosed Principals - The Troubles Continue: An International Solution*, 10 S. AFR. MERCANTILE L. J. 239, 243 (1998).

unsatisfied.[64] In light of the arguments presented against the rule of election, it is submitted that the Indian law should correct its position on the issue to allow subsequent suits against the undisclosed principal or their agent, as the case may be, if the original judgment remains unsatisfied.

IV. SETTLEMENT OF ACCOUNTS

The second rule under which courts have limited the rights of third parties vis-à-vis undisclosed principals is the rule of discharge by settlement of accounts. This rule prevents the third party from proceeding against the principal if the principal has settled their accounts with the agent before the disclosure of agency.[65] Part IV.A provides an overview of the position of the law with respect to this rule in different jurisdictions, whereas Part IV.B analyses arguments for and against the same.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

The rule relating to settlement of accounts originated from a dictum of Lord Tenterden in the case of *Thompson* v. *Davenport* (*'Thompson'*), in which he laid down that the right of the third party to recover from the undisclosed principal is subject to the qualification that "*the state of the account between the*

64 However, the right of the third party to sue the undisclosed principal subsequently can be barred in those cases when the principal has paid the agent in reliance of the conduct of the third party, such that it would be inequitable to hold him liable again. This consequence flows directly from the language of §234 of the Contract Act and is further discussed in Part IV.

65 Floyd R. Mechem, *The Liability of an Undisclosed Principal*, 23 HAR. L. REV. 513, 520 (1910).

principal and the agent [should] not [have been] altered to the prejudice of the principal".[66] This observation indicates that the principal shall be discharged if they pay the agent, in good faith, having reason to believe that the third party would settle the accounts with the agent. However, the judicial position in England on this issue was not settled for a long time, with different courts taking varying stances.

In *Heald* v. *Kenworthy* ('*Heald*'),[67] the rule of discharge by settlement of *Thompson* was rejected. Lord Parke observed that an undisclosed principal would not be discharged from thir obligation to pay the third party by merely making the payment to their agent, regardless of whether the third party is aware of their existence. This is because, despite making the payment to their agent, the undisclosed principal is under an obligation to ensure that the agent makes the payment to the third party. However, the case created scope for barring the rights of third parties. It laid down that the rights of the third party to claim from the principal would be barred in situations when, by their conduct, the third party leads the principal to believe that the agent and the third party have come to a settlement and, thus, induces the principal to make the payment to his agent.

However, the position of law changed once again in *Armstrong* v. *Stokes* ('*Armstrong*').[68] Reviving the *Thompson* rule, the court in *Armstrong* held that payment by the principal to the agent, made *before* the disclosure of the

66 Thompson v. Davenport, 9 B. & C. 78 (Exch. 1829).
67 Heald v. Kenworthy, (1855) 10 Exch. 739.
68 Armstrong v. Stokes, (1872) L.R. 7 Q.B.D. 598.

agency, is sufficient to discharge the principal. Due to these conflicting judgments, the issue was once again raised in *Irvine & Co.* v. *Watson & Sons* ('Irvine'),[69] which held that the rule laid down in *Heald* reflected the correct position of the law. Thus, in its present form, the English law places a bar on the right of the third party to sue the principal based on this rule only in cases where "it was reasonable [for the principal] to infer [from the conduct of the third party] that the agent has already settled with such third party, or that the latter looks exclusively to the agent for payment".[70]

2. Position of Law in the United States

In the US, *Fradley* v. *Hyland* ('Fradley'), was the first case to consider the rule of discharge by settlement.[71] Adopting the rule laid down in *Armstrong* over that laid down in *Heald*, the court in *Fradley* held that the principal would be exonerated from their liability if they make the payment to the agent *prior* to the disclosure of agency, even when they have not been misled in any manner by the third party. The Second Restatement of the Law of Agency sought to correct the position. The Restatement stated that good-faith payment by an undisclosed principal to their agent will not absolve the undisclosed principal from their liability to the third party, unless the third party has indicated by their conduct that the agent has settled the account,[72] thereby bringing the law in conformity with the English position .[73]

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69 Irvine & Co. v Watson & Sons, (1880) 5 Q. B. D. 414.
70 Stecher, *supra* note 31, 466-67.
71 Fradley v. Hyland, 37 F. 49 (1888).
72 Restatement (Second) of the Law of Agency, §208, reads:

3. Position of Law in India

The provisions of the Contract Act are silent on whether any settlement between the undisclosed principal and their agent can exonerate the principal from liability towards the third party, and the issue has not been litigated in the undisclosed agency context.[74] However, given that the Contract Act does not codify the entire law of agency[75] and since Indian contract law draws heavily from English law,[76] it is safe to conclude that if such an issue is raised before an Indian court, it may follow the position taken in *Irvine*. This conclusion is bolstered by the fact that §234 of the Contract Act says that if a third party contracting with the agent induces the principal to act on the belief that only the agent would be held liable or vice-versa, he cannot later hold the principal or the agent, respectively, liable.

B. Analysing the Rule of Discharge by Settlement

The courts which have endorsed the rule of discharge by settlement have done so in the interest of equity, reasoning that it would be inequitable

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"*An undisclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent, unless he does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account.*"

73 *See e.g.* A. Gay Jenson Farms Co. v. Cargill Incorporated, 309 N.W. 2d 285 (1981).

74 The effect of payment by a disclosed principal to his agent vis-à-vis the third party has, however, been discussed in many cases. *See generally* Kamal Singh Dugar v. Corporated Engineeers, A.I.R. 1963 Cal. 464 (the case held that payment by a disclosed principal to his agent would not relieve him of liability under the contract, unless the third party has authorised the agent to receive payment on his behalf or, by conduct, induced the principal to believe that the payment to the agent would exonerate him).

75 The Indian Contract Act, 1872, Preamble.

76 NILIMA BHADBHADE, CONTRACT LAW IN INDIA 27 (2010).

to require an undisclosed principal, who already paid their agent, to once again make the payment to the third party. However, there are several flaws in this line of reasoning.

First, the application of the rule, as laid down in *Thompson* and subsequently narrowed down in *Armstrong*, suggests that the third party does not have a right of their own against the undisclosed principal.[77] If the third party had an independent right of recourse against the principal, such a right cannot be taken away by a transaction between the principal and the agent inter-se.[78] This would be tantamount to saying that the law of undisclosed agency is simply an 'assignment' of the agent's rights against the principal in favour of the third party at the time of disclosure.[79] However, this is not the case given that the rules of equity recognise the independent right of the third party to proceed against the undisclosed principal. Since an undisclosed principal is aware of these equitable rights of the third party – flowing from the presumption of knowledge of the law – they cannot defeat the same by simply making the payment to their agent.[80]

Second, *Irvine* curtailed the scope of the rule to limit its application to only those cases in which the principal is induced to make the payment to their agent on account of the conduct of the third party. This approach is justified from one perspective – the right of the third party to sue the

77 Muller-Freienfel, *supra* note 21, 313-14 (1953).
78 *Ibid.*
79 *Ibid.*
80 P. F. P. Higgins, *The Equity of the Undisclosed Principal*, 28 MOD. L. REV. 167, 177 (1965).

undisclosed principal is grounded in equity and, hence, the third party cannot claim such a right when their own conduct has been inequitable.[81] However, the court in *Irvine* ultimately held that the narrow version of the rule would apply, irrespective of the knowledge of the third party regarding the existence of the principal. The rule, thus, assumes that the third party may induce the principal, probably through his conduct, into believing that they were exclusively looking at the agent for payment, even before the third party is made aware of the existence of the principal.[82] This is naturally problematic – while a third party dealing with a partially disclosed principal may be said to have acted in a manner so as to create reliance in the mind of the principal, even without being aware of their exact identity;[83] a third party dealing with an agent professing to act as the principal themselves cannot be said to have misled the actual undisclosed principal, of whose existence he was completely unaware. In other words, the ratio in *Irvine* goes against the very concept of inducement, where knowledge is presumed, and hence is fundamentally inconsistent.

Third, even when the application of the rule is limited to inducement by the third party *after* they become aware of the existence of the undisclosed principal, the question of what amounts to 'misleading conduct' to justify the application of this rule remains. The threshold of misleading conduct is lower than that of election, as long as the principal can show that they have

81 *Ibid*, 177.
82 *See* Mechem, *supra* note 65, 513.
83 *Ibid*, 530.

changed their position in reasonable reliance of the conduct of the third party.[84] However, this may lead to unforeseen consequences. For instance, there may be a situation where the third party commences a suit against the agent (as principal) and later becomes aware of the existence of the undisclosed principal, and yet fails to withdraw the suit to sue the principal. Such a failure on part of the third party to withdraw the suit may lead the principal to believe that he intends only to sue the agent, on account of which the principal may proceed to make the payment to the agent to settle the accounts. However, the third party may subsequently choose to litigate against the principal, even after he has made the payment to the agent. Since the issue has not been litigated much,[85] the question of whether this would amount to misleading conduct is unclear. Nonetheless, from the few cases decided on the issue, it may be inferred that courts tend to apply the rule strictly to prevent the principal from having to make the payment again. For instance, courts have held that both the failure of the third party to insist on payment (from the principal) within the time period stipulated under the contract[86] and a mistaken issue of receipt of payment by the third party to the agent[87] to be conduct sufficient to discharge the principal if they proceed to make the payment to the agent in reliance thereon.

Fourth, any rule requiring the principal to pay the third party, even when they have settled the accounts with the agent, would not necessarily

84 Mechem, *supra* note 65, 528.
85 *Ibid*, 529.
86 Kymer v. Suwercropp, 1 Camp. 110.
87 Wyatt v. Marquess of Hertford, 3 East 147.

result in inequitable consequences.[88] This is because the principal can recover the loss from their agent by bringing an action for breach of fiduciary duties.[89] In any case, even when the sum paid is not recoverable from the agent, the risk of the ultimate loss should fall on the principal who employed the undisclosed agent as opposed to on the third party.[90] Such an allocation of risk is justified since the principal chose to deal in a secretive fashion and is in a position to ensure that payment is made to the third party. Thus, if the principal pays their agent while failing to ascertain whether their agent made the payment to third party, they should be held liable for the same.

C. Recommended Position

If a case involving settlement of accounts comes before an Indian court, instead of following the common law interpretation, it is submitted that §234 of the Contract Act should operate, as it is the sole section in the Act which purports to apply to such a situation. Given the objections to the rule of discharge by settlement, the application of the rule in the Indian context, as provided under §234 of the Contract Act, should be limited to only those cases where the third party has, by their conduct, induced or misled the undisclosed principal to make the payment to the agent *after* the disclosure of the agency relationship. This is because it is only when the third party is aware of the existence of the undisclosed principal that they may create an inducement or reliance in the mind of the undisclosed principal.

88 Warren A. Seavey, *Undisclosed Principal; Unsettled Problems*, 1 HOWARD L.J. 79, 84 (1955).
89 Richmond, *supra* note 26, 747; *see* The Indian Contract Act, 1872, §211.
90 Richmond, *supra* note 26, 747.

Before the disclosure of agency, any act of the third party suggesting that they exclusively look at the agent (professing to be the principal) or rely solely on their standing for payment cannot create a reliance in the mind of the actual principal.

V. SCOPE OF AUTHORITY

The general rule that an agent can render their principal liable for acts done in contravention of their instructions but within the scope of their apparent authority[91] does not apply in the case of undisclosed principals. Intuitively, such a position of the law has a logical appeal – a third party who deals with an agent in the capacity of a principal (and is unaware of the existence of the principal) cannot later argue that the principal must be held liable because there was an appearance of authority in their agent.[92] However, this rule may unjustifiably limit the rights of the third parties dealing with undisclosed principals. V.A discusses the position of the law on this issue in different jurisdictions, and V.B analyses the rule to suggest the position Indian courts ought to adopt.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

The English position is that the doctrine of apparent authority cannot be applied to hold the undisclosed principal liable. Thus, the

91 *See,* The Indian Contract Act, 1872, §237.

92 Martin Schiff, *The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract*, 88 COM. L.J. 229, 232 (1983).

undisclosed principal cannot be made liable to the third party for those acts of their agent which were outside the scope of their actual authority.[93]

Despite this general rule, in certain cases, courts have taken a different approach and imposed liability on the undisclosed principal. In *Watteau* v. *Fenwick* ('*Watteau*'),[94] the principal, Fenwick, appointed an agent, Humble, to manage his beer business. Humble's name was painted on the door and the license of the business was also taken out in his name, but he did not have any "authority to buy any goods for the business except bottled ales and mineral waters." Nonetheless, Humble bought Bovril and cigars from *Watteau*, who after discovering the existence of the undisclosed principal, proceeded to sue him to recover the price of the goods. Given that the court could not directly infer apparent authority in this matter, it held that:

> "*Once it has been established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies – that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority.*"

Thus, the case laid down that, in the case of an undisclosed principal, the agent would be deemed to have the usual authority given to an agent of

93 *See e.g.* Miles v McIlwraith, (1883) 8 App. Cas. 120.
94 Watteau v. Fenwick, 1 Q.B.D. 346; *see also* Edmunds v. Bushell 4 Jones, (1865) L.R. 1 Q.B.D. 97.

that character, thereby fastening liability to the principal for the consequent acts. The court held that the application of such a rule was justified, even when there could not be any 'holding-out' of authority in undisclosed agency scenarios, as otherwise secret limitations placed on the authority of undisclosed agents would be invoked to defeat the claims of the third parties against the principals.

This case, however, has not received much acceptance in subsequent judicial decisions, though it has never been explicitly overruled.[95] It has also been criticised in academic literature[96] – scholars reason that despite referring to the concept of 'usual authority', the case in fact held the principal liable because he 'held-out' to the world that his agent had the authority of the owner of the business.[97] Other scholars, instead of rejecting the decision altogether, seek to limit its applicability to cases in which an undisclosed principal creates an 'apparent ownership' of the business in the agent, as opposed to all cases of 'apparent authority' – since in the cases dealing with the former, the third party can be said to have given the credit not only to

95 *See e.g.* Jerome v. Bentley, (1952) 2 All E.R. 114; Rhodian River Shipping Co. SA v. Halla, (1984) 1 Lloyd's Rep. 373.

96 Erich C. Stern, *A Problem in the Law of Agency*, 4 MARQ. L. REV. 6 (1919); J. L. Montrose, *Liability of Principal for Acts Exceeding Actual and Apparent Authority*, 17 CANADIAN B. REV. 693, 695 (1939); J. A. Hornby, *The Usual Authority of an Agent*, 1961 CAMB. L.J. 239, 246 (1961); Michael Conant, *Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 678 (1968).

97 J. G. Collier, *Authority of an Agent – Watteau v. Fenwick Revisited*, 44(3) CAMB. L. J. (1985); Goodhart & Hamson, *Undisclosed Principals in Contract*, 4 CAMB. L. J. 310 (1932).

the agent (as principal) but to the firm he apparently owns (which, in fact, belonged to the principal).[98]

However, some scholars justify the decision in *Watteau*, arguing that the case does not necessarily hinge on apparent authority by emphasising the fact that usual authority is analytically separate from ostensible authority.[99] Some others still support the decision on considerations of equity and fairness. They argue that the rule in *Watteau* ensures that unscrupulous principals are not able to escape their liabilities by hiring insolvent, undisclosed agents to contract for them and assert secret limitations on their authority; thereby bringing parity between the liabilities of the disclosed and undisclosed principals.[100]

2. Position of Law in the United States

While the rule laid down in *Watteau* has been criticised in England, it has been adopted by the Second Restatement of the Law of Agency in the US. The Restatement states that a general agent for an undisclosed principal would render the principal liable for all the acts done on their account, if they

98 POLLOCK & MULLA, *supra* note 28, 1639; Stern, *supra* note 96, 11.

99 Richard T. H. Stone, *Usual and Ostensible Authority - One Concept or Two?*, J.B.L. 325 (1993) (The author argues that usual authority depends upon the nature of a particular job, whereas apparent authority depends upon some holding-out or representation of the agent's authority. In one way, all cases of usual authority can be said to be cases of apparent authority wherein the principal can be said to have made a representation to the world by hiring an agent of a given character for an act – but such an approach would place unnecessary strain on the concept of representation and thus it is better if such cases are analysed from the perspective of what the job and the act entailed.).

100 Higgins, *supra* note 80, 167; Kevin M. Rogers, *A Case Harshly Treated? Watteau v. Fenwick Re-Evaluated*, 2(2) HERTFORDSHIRE L. J. 26, 29 (2004).

are "*usual or necessary in such transactions, although forbidden by the principal […].*"[101] The Restatement specifically adopts the rule laid down in *Watteau*, stating that an "undisclosed principal who entrusts an agent with the management of thier business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal."[102] The Restatement, however, states that the inherent powers rule cannot be applied in cases when an undisclosed principal hires a special, rather than a general agent.[103]

By virtue of these sections, an undisclosed principal may be liable due to the inherent powers of a general agent, even when the agent breaches their authority, as long as the agent's acts were usual or necessary.[104] However, in order to address the objections to the rule, the Restatement clarifies that the "*inherent agency power is derived […] solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent.*"[105] Thus, the concept of inherent agency is used in cases where the third party has reasonably relied on the agent's authority, even when there are no

101 Restatement (Second) of the Law of Agency, §194. *See also* Butler v. Mapes, 76 U.S. (P Wall.) 766 (1970).

102 Restatement (Second) of the Law of Agency, §195.

103 Schiff1, *supra* note 92, 233 (1983). Restatement (Second) of the Law of Agency, §161, defines a general agent as one who is appointed "to conduct a series of transactions over a period of time" and who could be properly regarded as "part of the principal's organization in much the same way as a servant is normally part of the master's business enterprise".

104 Schiff1, *supra* note 92, 232 (1983).

105 Restatement (Second) of the Law of Agency, §8A.

manifestations or representations made by the principal, as in the case of apparent agency.

3. Position of Law in India

Under the Contract Act, a disclosed principal is bound not only by those acts of the agent which are within the scope of their actual and apparent authority,[106] but also by those acts of the agent which are necessary to do the authorised acts or which are usually done in the course of dealing in the business to which the acts relate.[107] The rationale for reading in usual authority is that, partly, it is presumed to be intended by the principal and partly, it is presumed that the third party may attribute such authority to the agent with whom he deals – it is thus not based on any sort of representation by the principal.[108] However, the Indian cases have not delved into whether the usual authority doctrine would also cover cases of undisclosed agency relationships. However, some argue that the decision in *Watteau* may not be followed in the Indian context – both due to the criticism it has received in English law and because of its incorrect reasoning.[109]

106 The Indian Contract Act, 1872, §237.
107 The Indian Contract Act, 1872, §188.
108 POLLOCK & MULLA, *supra* note 28, 1639.
109 POLLOCK & MULLA, *supra* note 28, 1639.

B. Analysing Inherent Powers Rule & Recommended Position

The rule limiting the liability of an undisclosed principal to only authorised acts has been criticised on the ground that such a rule implies that an undisclosed principal would receive more favourable treatment than that accorded to those principals who choose to deal with third parties without any concealment.[110] For this reason, it is submitted that the result reached by the application of the inherent powers doctrine under American law is just. If a principal chooses to remain concealed while conferring wide-ranging powers on their general agent, the principal should be made liable for the acts of the agent which are usually done for effecting such transactions.[111]

However, some scholars object to such a broad conception of the scope of an agent's authority in the case of undisclosed agency. They assert that unlike disclosed principals, the undisclosed principal is not in a position to acquaint third parties with the limitations placed on the agent's authority. This is because it would inevitably require the principal to disclose their status to the third party and they would cease to enjoy the benefit of undisclosed agency.[112] While undisclosed principals may not be able to inform the third party of the limits placed on the agent's authority to save themselves from such liability; if a risk arises from the failure to make the third party aware of the limits on their authority, the same should be borne by the principal as opposed to the third party. In this manner, the rule would correct the balance of rights between the undisclosed principals and the third

110 Stecher, *supra* note 31, 469.
111 Seavey, *supra* note 88, 88 (1955).
112 Stern, *supra* note 96, 9.

parties. It would ensure that undisclosed principals are not able to defeat the claims of the third parties by placing secret limitations on the authority of their agents.[113] Thus, amendments on the lines of the American law should also be brought into the Contract Act.

VI. RATIFICATION

Inter-alia, ratification can be done when a contract was entered into and executed on behalf of the person who wishes to ratify.[114] Based on this, following the English case of *Keighley Maxsted & Co.* v. *Durant* ('*Keighley*')[115], the courts have held that ratification cannot be allowed in cases when an agent merely intends to bind the principal, but does nothing to profess or represent that intention, which is clearly the case in an undisclosed agency.[116] This not only prevents an undisclosed principal from authorising an unauthorised act of their agent, but also prevents the third party from holding the undisclosed principal liable under such a contract.

A. Position of Law in Different Jurisdictions

There is no divergence in the position of the English, the American and the Indian law on the issue of ratification the undisclosed principals. The law laid down in *Keighley* is followed in all three jurisdictions.[117]

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113 Higgins, *supra* note 80, 177-178.

114 *See* The Indian Contract Act, 1872, §196.

115 Keighley Maxsted & Co. v. Durant, (1900) Q. B.D. 630.

116 Keighley Maxsted & Co. v. Durant, (1900) Q. B.D. 630; Morgan v. Georgia Paving & Construction Co., 40 Ga. App. 335, 149 S. E. 426 (1929).

117 Edwin C. Goddard, *Ratification by an Undisclosed Principal*, 2 MICH. L. REV. 25, 39 (1903).

Despite this, some courts in the US have held an undisclosed principal may ratify in cases where the agent 'intended' to act as an agent, even when he did not 'profess' that intention, as whenever an agent so intended, they can be said to be acting on behalf of their principal.[118] However, this line of reasoning has been rejected by the English court in *Keighley*. It has also not received much acceptance before the US courts – one reason being the evidentiary uncertainty associated with ascertaining the intentions of the agent which are not professed.[119] Hence, ratification is not available to the third party to hold the undisclosed principal liable for the unauthorised acts of the agent.[120]

However, the Second Restatement of the Law of Agency, concerned about the inequitable results such a bar on ratification may cause in cases where the principal accepts benefits under an unauthorised contract, incorporates a provision to offer some relief to a third party. The Restatement states that, "[…] although there is no ratification, a person on whose account another acts or purports to act […] may become subject to liability for the value of the benefits received as a result of the original transaction."[121] Such a relief, grounded in unjust enrichment, is also available under English and Indian law.

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118 *Ibid*, 39.

119 *Ibid.*

120 *See generally* Timothy J. Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64(1) GEORGETOWN L. J. 1 (1975).

121 Restatement (Second) of the Law of Agency, §104.

B. Analysing the Rule of Ratification & Recommended Position

The doctrine of ratification has not been able to accommodate undisclosed agency relationships, as the courts have always resorted to a rigid and strict application of the rules under this doctrine.[122]

However, Goddard, who favours ratification by the undisclosed principal, argues that there is a need to reconsider the position on ratification by keeping in mind commercial convenience and reason. He reasons that, ratification should be allowed to preserve business relations between parties as much as possible.[123] Goddard also states that by allowing ratification by the undisclosed principal in cases when the agent 'intended' to act for the principal, the courts would uphold the real intention of the agent as it existed at the time of the contract formation. He believes that mere evidentiary uncertainty is not enough to deny substantive rights to parties.[124] Goddard further asserts that if the law, in its current form, allows the undisclosed principal to be sued by the third party and further holds the principal liable beyond the scope of the actual authority given by him to his agent, it is only 'fair' to also allow him to ratify such contracts to 'correct' the balance of rights.[125] On the other hand, Rochvarg favours ratification with a view to protect the rights of the third party. He asserts that courts need to appreciate

122 Goddard, *supra* note 117, 40. *See* Bolton Partners v. Lambert, (1889) 41 Ch. D. 295; Brook v. Hook, L. R. 6 Ex. 89, 31 Am.
123 Goddard, *supra* note 117, 40-44.
124 *Ibid*, 44.
125 *Ibid*, 33.

that the denial of ratification often prejudices the rights of the third party by negating the liability of the undisclosed principal.[126]

Despite the arguments presented by these scholars, and despite the appeal of the argument that allowing ratification may protect third party rights, it is submitted that it is not necessary to change the position of India law as it exists currently. This is primarily due to the technicalities underlining the doctrine of ratification; particularly, the requirement that the act must be done 'on behalf of another.' Further, ratification has never been understood in a 'purposive' fashion. The doctrine of ratification emphasises on professing one's intention to act on behalf of another to prevent strangers from becoming parties to the contract. Additionally, ascertaining what the agent actually intended is a complex question. Nonetheless, statutory amendments may be incorporated to allow the undisclosed principal to adopt the contract with a retroactive effect, as long as the third party re-affirms the same after the disclosure of the agency – but such a right cannot be squared away with the doctrine of ratification as it is understood in the common law.

VII. CONCLUSION

The status-quo allows undisclosed principals to escape liability based on rules of election, discharge by settlement of accounts, limitations on scope of authority and ratification. This is unfair and inequitable, as it places the risk of undisclosed dealings onto third parties as opposed to the principals

126 Rochvarg, *supra* note 3, 292.

and agents who choose to engage in such dealings. The policy suggestions put forth in this article are not intended to squash undisclosed agency agreements altogether. They aim to vest third parties with rights which reflect the true cost of contracting without disclosure with the principal and their agent.[127] This correction in the rights of the parties would ensure that the risk of dealing with incomplete information is borne by the principal and agent who have chosen to take the risk. Unless the issues discussed in this article are addressed, the device of undisclosed agency may be employed by principals with the objective of shielding themselves from liability otherwise borne by disclosed principals, thereby injuring the rights of the third parties in the process.

127 Sargent & Rochvarg, *supra* note 6, 432.

A PRINCIPLED ENQUIRY INTO THE WAIVER OF ANNULMENT PROCEEDINGS

Harshad[*]

ABSTRACT

Whether parties to an arbitration agreement should be permitted to waive their right to annul an arbitral award is a question gaining increasing prominence in India. And to answer it in a holistic manner is a challenging exercise. On the face of it, this question appears to position the principle of party autonomy at loggerheads with the policy interests of a State, which it may endeavour to protect by retaining a minimum amount of judicial supervision over arbitral proceeding. However, a closer look reveals that a potential annulment of arbitral awards poses further hurdles, which are often overlooked in a zeal to make arbitration a more attractive proposition for potential litigants. As such, there is a need to address this issue from both positivist and normative perspectives. To put it differently, in addition to studying the (non-)mandatory nature of annulment proceedings in different jurisdictions, one must further ascertain the precise role of annulment proceedings in the overall arbitral process, and the consequences to follow if it is waived. That is precisely what the paper endeavours to do by analysing the parties' supposed autonomy to

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waive their right to annul an arbitral award, and tracing the relationship between annulment proceedings and the doctrine of arbitrability as well as the negative effect of compétence-compétence.

I. INTRODUCTION

In 2016, the Supreme Court of India rendered its judgment in *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.,* [1] ('Centrotrade') providing some clarity on the permissibility of appellate arbitration in India. The Court noted that the possibility of annulment under Section 34 of the Indian Arbitration & Conciliation Act 1996 ('Indian Arbitration Act'), and that an award is final and binding, "does not exclude the autonomy of the parties to an arbitral award to mutually agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal."[2]

In doing so, the Supreme Court delved into the conceptual domain of post-award remedies, in particular the annulment mechanism prescribed under Section 34 of the Indian Arbitration Act, and the parties' ability to tinker with it. It was likely the first instance when India's apex Court had prominently raised this question, which in the past has troubled many courts outside the country. And while the Supreme Court in *Centrotrade* did not specifically concern itself with the waiver of annulment proceedings *per se*, limiting itself to some incidental observations, it is now only a matter of time

1 *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278.
2 *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶27.

before this issue knocks the Court's doors. This is precisely why it becomes imperative to conduct a principled enquiry into the waiver of annulment proceedings today. "[I]t is the best work of the legal academy to discuss ideas a thousand days, or even longer, before their time has come."[3]

The question as to whether parties to an arbitration agreement should be permitted to waive their right to annul an arbitral award can be addressed from various perspectives. One may perceive it as determining the contours of party autonomy, which symbolises parties' freedom to exercise control over their arbitration.[4] Alternatively, one may look at it as an enquiry into the mandatory nature of the annulment mechanism under a plethora of national laws.[5] But while both approaches lead to relevant conclusions, they remain inadequate; for there still remains the need to address this issue from a normative perspective. One must still ascertain the role of annulment proceedings in the overall arbitral process, and the consequences to follow if it is waived.

The parties' expectation from an arbitration proceeding is that it culminates in a valid and enforceable award. In this regard, the annulment mechanism assumes importance since it provides the first instance of judicial oversight over an arbitral award. It is the sole avenue for a competent national court to either affirm or deny the validity of the arbitral award, and

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3 Charles L. Black Jr., 'The Supreme Court, 1966 Term – Foreword: "State Action", Equal Protection and California's Proposition 14', (1967) 81 Harvard Law Review 69, 106.

4 Gary Born, *International Commercial Arbitration* (2014) 1609.

5 See *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC); *Noble China Inc. v. Lei*, 1998 CanLII 14708 (Ontario).

lend further legitimacy to an otherwise private dispute resolution process. Admittedly, unless precluded under Article V of the New York Convention[6], an arbitral award must be recognized and enforced by a Contracting State,[7] without any leave for enforcement from the country of origin.[8] However, where an arbitral award is set aside by a competent court, it will *usually* be regarded unenforceable not only by such court, but also by national courts elsewhere.[9] Therefore, an agreement to exclude the possibility of reviewing an award at the annulment stage may adversely impact the legitimacy of the arbitration process as a whole.[10] It allows a person to perceive arbitration as a dispute resolution mechanism, which under the guise of efficiency and autonomy, seeks increasing insulation from even minimal judicial oversight. And perception is critical. To borrow words from Aldous Huxley – "there are things known and there are things unknown, and in between are the doors of perception."

But this discussion is not about legitimacy of the arbitral process, which is merely one facet of the question at hand. While the annulment

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6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Art V. ('New York Convention')

7 New York Convention, Art III.

8 Albert Jan van den Berg, 'The New York Convention of 1958: An Overview', available at: http://www.arbitration-icca.org.

9 New York Convention, Art V(1)(e); Nigel Blackaby and Constantine Partasides (eds.), *Redfern and Hunter on International Arbitration* (5th ed. 2009) 526.

10 Michelle Grando, 'Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop', Kluwer Arbitration Blog (19 September 2017) ("It has been argued that the arbitral process is too autonomous from domestic law and domestic court oversight…"); see generally Stephan W. Schill, 'Conceptions of Legitimacy of International Arbitration' in David D Caron, Stephan W Schill, Abby Cohen Smutny and Epaminontas E Triantafilou (eds.), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015) 106.

mechanism has direct implications on both validity and enforceability of an arbitral award, it also shares an intricate, even if indirect, relationship with other avenues of the arbitration. The possibility of exercising judicial oversight over an award at the stage of annulment is conceptually critical in order to answer certain essential questions which do not relate to the arbitral award at all. Specifically, these include issues surrounding the scope of the arbitrability doctrine and the negative effect of *compétence-compétence*. In principle, the mere existence of an annulment mechanism constitutes the backbone of these principles. Thus, whether the parties are permitted to waive their right to annul an award, and minimise judicial oversight at this stage, must also be addressed by reference to its impact on these other avenues of arbitration. That is precisely what the paper endeavours to do.

Part 2 begins with an account of the position of law in several jurisdictions, including India, with respect to the parties' autonomy to waive their right to annul an arbitral award. Thereafter, Part 3 proceeds to discuss the relationship between an annulment proceeding and the doctrine of arbitrability, and its impact on the negative effect of *compétence-compétence*. Part 4 concludes.

II. PARTY AUTONOMY AND WAIVER OF ANNULMENT PROCEEDINGS

Issues surrounding the waiver of annulment proceedings entail an enquiry into the principle of party autonomy, and the extent to which it is recognised by individual national laws. While many institutional rules

expressly waive the parties' right to seek annulment of a resultant arbitral award, the fate of such waiver is left to the applicable national law.

For instance, Article 35(6) of the International Chamber of Commerce's Arbitration Rules of 2017 ('ICC Rules') stipulates that "[e]very award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and *shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"[11]

The London Court of International Arbitration (LCIA) Arbitration Rules 2014, in Article 26.8 also state that "[e]very award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and *the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.*"[12]

In the Indian context, Article 30.12 of the Mumbai Centre for International Arbitration's Rules 2016 ('MCIA Rules') prescribes that "[s]ubject to Rules 14 and 31, by agreeing to arbitration under these Rules, the parties undertake to carry out the Award immediately and without delay, and *they also irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may be validly made* and the

11 ICC Arbitration Rules 2017, Art 35(6). (Emphasis added.)
12 LCIA Arbitration Rules 2014, Art 26.8. (Emphasis added.)

parties further agree that an Award shall be final and binding on the parties from the date it is made."[13]

Accordingly, whether the parties to an arbitration agreement can waive their right to annul an arbitral award must be answered by reference to a variety of national laws. This in turn compels one to trace the statutory origins of party autonomy across jurisdictions, in addition to verifying its acceptance in international arbitration jurisprudence.

For countries that have either adopted or otherwise mimicked the UNCITRAL Model Law on International Commercial Arbitration[14] ('Model Law'), the principle of party autonomy can be traced to Article 19 of the Model Law. Article 19(1) prescribes that "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed *by the arbitral tribunal* in conducting the proceedings."[15] Article 19(2) then clarifies that it is only failing such agreement that "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."[16] The Model Law contains similar provisions for designating the place of arbitration[17] and the language(s) to be used in the arbitral proceedings.[18]

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13 MCIA Rules 2016, Art 30.12. (Emphasis added.)

14 Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (11 Dec. 1985). ('UNCITRAL Model Law')

15 UNCITRAL Model Law, Art 19(1). (emphasis added)

16 UNCITRAL Model Law, Art 19(2).

17 UNCITRAL Model Law, Art 20.

18 UNCITRAL Model Law, Art 22.

A bare reading of Article 19(1) of the Model Law leads to two inferences. *First*, the parties' autonomy resulting from this provision is expressly confined to dictating the procedure for conduct of arbitral proceedings "by the arbitral tribunal". It does not appear to extend to the procedures to be followed by national courts in incidental court proceedings occurring prior to commencement of arbitration,[19] parallel to arbitral proceedings,[20] or subsequent to the publication of the award.[21] This is consistent with the fact that while an arbitral tribunal may be considered a creation of the parties' agreement,[22] no such assertion can be made in relation to national courts. *Second*, in any event, the parties' exercise of their autonomy under Article 19 is "subject to the provisions of" the Model Law, which will prevail in case of a conflict. This implies that unless the Model Law states otherwise,[23] its provisions are given an overriding effect over the parties' agreement to the contrary pursuant to Article 19(1). In such circumstance, can the parties' autonomy to tailor their arbitration extend to include a potential waiver of annulment proceedings? The answers invariably vary.

Article 19(1) of the Model Law is not the solitary source of the principle of party autonomy. For instance, Section 19(2) of the Indian

19 For instance, see UNCITRAL Model Law, Arts 9, 11.
20 For instance, see UNCITRAL Model Law, Arts 9, 27.
21 For instance, see UNCITRAL Model Law, art 34.
22 See Piero Bernardini, 'The Role of the International Arbitrator' (2004) 20(2) AI 113; Geoffrey Hartwell, 'Arbitration and Sovereign Power' (2000) 17(2) Journal of International Arbitration.
23 For instance, see UNCITRAL Model Law, art 24(1), art 25.

Arbitration Act[24] corresponds to Article 19(1) of the Model Law. Nonetheless, it is consistent to source the principle of party autonomy to provisions in the Indian Contract Act 1872 as well. Specifically, Section 28(a) of the said Act renders void any agreements, which restrict a party "absolutely from enforcing his [or her] rights under or in respect of any contract by usual legal proceedings in the ordinary tribunals."[25] But the arbitration framework in India, which permits the contracting parties to oust the jurisdiction of national courts in favour of arbitral tribunals, still thrives due to the statutory exceptions to this provision. These exceptions provide that Section 28(a) shall neither render illegal "a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration"[26] nor "affect any provision of any law in force for the time being as to references to arbitration."[27] One may construe this provision as recognising a broader and sturdier principle of party autonomy, which permeates beyond the conduct of proceedings by an arbitral tribunal. Such understanding would be consistent with the Supreme Court's description of party autonomy as a "guiding spirit"[28] and "backbone"[29] of arbitration.

24 Arbitration & Conciliation Act 1996 (India), s 19(2).
25 Indian Contract Act 1872, Section 28(a).
26 Indian Contract Act 1872, Section 28(a), Exception 1.
27 Indian Contract Act 1872, Section 28(a), Exception 2.
28 *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126, ¶5.
29 *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶36.

Likewise, irrespective of its statutory origins, party autonomy in arbitration is recognised as a central tenet of the European tradition,[30] and rallies unquestioned support in the international arbitration community notwithstanding the extent of its statutory recognition.[31]

But the arbitration laws of several European States also differ from the Model Law, which makes comparisons with Model Law jurisdictions inappropriate. This absence of harmonisation paves the way for different jurisdictions to treat the principle of party autonomy differently, to arrive at seemingly contradictory conclusions with regard to waiver of annulment proceedings. In this process, courts also consider if the relevant statutory provisions for annulment of an arbitral award or refusing its recognition and enforcement are mandatory in nature, and thus, non-derogable. In a nutshell, the judicial response to the question regarding parties' autonomy to waive the annulment mechanism can oscillate from one extreme to the other.

On the one hand, several jurisdictions emphasise on the importance of party autonomy to allow contracting parties to waive their right to seek annulment of an arbitral award, or oppose its recognition or enforcement.

For instance, Article 192(1) of the Swiss Federal Statute on Private International Law provides that "[i]f none of the parties have their domicile,

30 H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance' (2010) 3 ERCL 1, 4.

31 See for instance, H Heiss, 'Party autonomy', in F Ferrari and S Leible (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (Sellier de Gruyter 2009). ("Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations.")

their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)."[32] On the same lines, Article 1522 of the reformed Code of Civil Procedure in France, which only concerns international arbitration, stipulates that "[b]y way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside."[33] In both these jurisdictions, it appears that party autonomy visibly trumps the annulment mechanism provided for by the relevant statutes.

The position in Canada appears to be similar. In *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*,[34] the Supreme Court of British Columbia was asked to determine whether parties could waive their right to oppose recognition or enforcement of an award as enshrined in Section 36 of the International Commercial Arbitration Act of British Columbia. The parties had included the following provision in their contract, the validity of which was in question:

> "The parties intend that any award entered by the arbitrators in this case be final and binding, subject to enforcement either in Canada and/or the United States. In this regard, *both parties hereby expressly waive any entitlement they have or may have to rely upon the*

32 Federal Statute on Private International Law (Switzerland), art 192(1).
33 Code of Civil Procedure, Book IV, Title II (France), Art 1522.
34 *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC).

> *provisions of Section 36 of the International Commercial Arbitration Act of British Columbia (SBC 1986 c.14) and any similar provision in any comparable legislation in any other jurisdiction*, to seek to avoid recognition or enforcement of an arbitration award made pursuant to this Agreement."[35]

Acknowledging the importance of party autonomy in international arbitration, the Court held that "[i]t would not be appropriate for a court to go beyond the clear meaning of the words in an arbitration agreement and interpret them in such a way as to render the clause meaningless [...] the only possible conclusion is that the parties waived their right to oppose enforcement of the award [...] and the respondent's grounds for opposing enforcement cannot be supported as they clearly fall under that waiver."[36]

In 1998, the Ontario Court in *Noble China Inc. v Lei (Ontario)*[37] then extended this dictum to annulment proceedings. The Court noted that since the parties had waived their right to bring an application to set aside an award, "the court should give effect to this [as the] parties make their own agreements, so long as they do not derogate from [the Model Law's] mandatory provisions."[38] Crucially for other Model Law jurisdictions, the Court held that such waiver was "consistent with the philosophy and

35 *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC), ¶10.
36 *Food Services of America, Inc. v. Pan Pacific Specialties Ltd.*, 1997 CanLII 3604 (BC SC), ¶15-16.
37 *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
38 *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).

structure of the Model Law".[39] In its considered opinion, Article 34 was "not a mandatory provision of the Model Law. Parties may therefore agree to exclude any rights they may otherwise have to apply to set aside an award under this article."[40]

On the other hand, the position in the United States of America is blatantly different as far as the grounds for annulment in Section 10 and Section 11 of the Federal Arbitration Act ('FAA') are concerned. Notably, in *Hall Street Associates LLC v Mattel, Inc.*,[41] the Supreme Court of the United States of America ('SCOTUS') had to determine if the disputing parties could supplement these grounds by means of a contract. While the precise question before the court did not relate to waiver of the annulment mechanism *per se*, the SCOTUS' observations regarding the mandatory nature of this procedure are unquestionably relevant.

Expressly rejecting the parties' contractual expansion of statutory grounds for annulment, the SCOTUS, by way of a majority opinion, took a relatively narrow view of the principle of party autonomy. It observed that although the FAA undoubtedly permitted parties to tailor many features of their arbitration by contract, one cannot infer a general policy of treating arbitration agreements as enforceable without ascertaining whether the FAA has any textual features which stand at odds with the parties' contract. With respect to Sections 10 and 11 of the FAA, the SCOTUS answered this

39 *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
40 *Noble China Inc. v Lei*, 1998 CanLII 14708 (Ontario).
41 *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008).

question in the affirmative, holding that the statutory "text compels a reading of [Sections] 10 and 11 categories as exclusive."[42] It went on to reason that since "a general term included in the text [of the FAA] is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error."[43] It poetically observed that "in light of the historical context and the broader purpose of the FAA, [Sections] 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' "valid, irrevocable and enforceable" agreements to arbitrate their disputes subject to judicial review for errors of law."[44]

The SCOTUS' findings seem to resonate with the position under the UK Arbitration Act 1996, which expressly classifies the grounds enumerated in Section 67 for challenging any award of the arbitral tribunal as to its substantive jurisdiction,[45] or those stated in Section 68 relating to a serious irregularity[46], as being mandatory in nature.[47]

While Indian courts are yet to provide a similarly conclusive determination of the issue, there have been some relevant indicators in the past. Specifically, in *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India,*

42 *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Opinion of the Court.
43 *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Opinion of the Court.
44 *Hall Street Associates LLC v Mattel, Inc.*, 552 US 576 (2008), Dissenting Opinion of Justice Stevens and Justice Kennedy.
45 Arbitration Act 1996 (UK), Section 67.
46 Arbitration Act 1996 (UK), Section 68.
47 See Arbitration Act 1996 (UK), Section 4(1) and Schedule 1.

Ministry of Defence,[48] the High Court of Andhra Pradesh was tasked with determining whether two Indian parties could execute an arbitration agreement that excluded the applicability of the Indian Arbitration Act, and provided for an alternative mechanism for the annulment or setting aside of the arbitral award. The relevant clause provided as under:

> *"In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party for Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in-charge of the Department of Public Enterprises.* The Arbitration and Conciliation Act, 1996 shall not be applicable to arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the disputes provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry or Law & Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the parties finally and

48 *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492.

> conclusively. *The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.*"[49]

The High Court tested the validity of the above clause against the limitations imposed on the parties' autonomy to contract under the Indian Contract Act 1872. It held that the highlighted portion of the arbitration clause was contrary to law. Specifically, "providing for non-applicability of the [Indian] Arbitration and Conciliation Act, 1996 [was] void, under the provisions of Section 23 of the Indian Contract Act."[50] The High Court, thus, declared this portion providing for non-applicability of the Indian Arbitration Act "illegal and invalid", but severed it so as to preserve the remaining arbitration agreement.[51]

More recently, the Supreme Court of India in *Centrotrade* also opined on the relationship between the principle of party autonomy and the annulment mechanism in Section 34 of the Indian Arbitration Act. On the one hand, the Court observed that "[t]he intention of Section 34 […] is to avoid subjecting a party to an arbitration agreement to challenges to an award in multiple forums [...] not to throttle the autonomy of the parties or preclude them from adopting any other acceptable method of redressal such as an appellate arbitration."[52] On the other hand, the Court also clarified that while Section 34 does not disentitle the parties to mutually agree that their

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49 *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492, ¶1. (Emphasis added.)

50 *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence,* 2013 (6) ALD 492, ¶6.

51 *Hyderabad Precision Mfg. Co. Pvt. Ltd. v Government of India, Ministry of Defence*, 2013 (6) ALD 492, ¶11.

52 *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶28.

arbitral award might be reconsidered by another arbitrator by way of an appeal in a final and binding manner, this would only be "subject to a challenge provided for by the [Indian Arbitration Act]."[53]

In this light, the answer to the question whether the parties can waive their right to annul an award will necessarily depend on the jurisdiction where it is asked. This inherent contingency precludes one from answering this question definitively. In other words, in the absence of reference to a specific jurisdiction, it is futile to wonder whether the parties to an arbitration agreement *can* waive their right to set aside or annul an arbitral award. But whether they should be permitted to do so is an entirely different manner, involving a consideration of several aspects that travel beyond party autonomy and possible mandatory nature of annulment provisions in varied national laws. This remains the focus of enquiry in the subsequent parts.

III. THE IMPLICATIONS OF WAIVER OF ANNULMENT PROCEEDINGS

A. The Threshold of Arbitrability

The waiver of the right to annul an arbitral award has significant bearing on the burgeoning categories of disputes now deemed arbitrable. The doctrine of arbitrability entails a general enquiry into which types of disputes are capable of settlement by arbitration, and which are not.[54] Over the past

53 *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2017) 2 SCC 278, ¶27.

54 Karim Abou Youssef, 'The Death of Inarbitrability', *in* Loukas A. Mistelis and Stavros L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives* (2009) 47.

few decades, a gradual decline in judicial hostility towards arbitration has caused significant expansion of the domain of arbitration. In the United States of America, for instance, matters of anti-trust law[55] and consumer rights,[56] initially suspected to be inarbitrable, are now referred to arbitration routinely. The same can also be said about Switzerland,[57] which has greatly contributed to its popularity as a preferred seat for arbitration of international disputes.

However, much like romanticised tales of unexpected joy, the relaxation of the arbitrability doctrine can be sourced to a pivotal moment. In this context, many rightly point towards the barter that took place in *Mitsubishi* in 1985. In *Mitsubishi v Soler Chrysler-Plymouth,*[58] the petitioner, a Japanese automobile manufacturer, was a joint venture between Chrysler International, a Swiss corporation, and another Japanese corporation. It sought to distribute its automobiles outside the United States through Chrysler's dealers. For this, the Petitioner and Chrysler executed an agreement with the Respondent, a Puerto Rico corporation, which in turn also provided for arbitration by the Japan Commercial Arbitration Association. Upon occurrence of a dispute, the Petitioner approached the Federal District Court to compel arbitration. But the Respondent objected, and filed counterclaims based on the Sherman Anti-Trust Act. The dispute eventually reached the SCOTUS, which was asked to determine the

55 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* 473 U.S. 614. ('*Mitsubishi*')
56 *Scherk v. Alberto-Culver*, 417 U.S. 506.
57 Federal Statute on Private International Law (Switzerland), Art 177(1).
58 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc.* 473 U.S. 614.

arbitrability of anti-trust disputes in relation to an international commercial transaction. In a stark departure from the existing case-law,[59] the SCOTUS concluded that anti-trust disputes were arbitrable. However, it only did so on the basic premise that notwithstanding the parties' choice of law, as far as claims arising from the application of American anti-trust law were concerned; the arbitral tribunal was "bound to decide that dispute in accord with the national law giving rise to the claim."[60] The SCOTUS explicitly warned that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, [then it] would have little hesitation in condemning the agreement as against public policy."[61]

Admittedly, the SCOTUS foresaw that United States courts "will have the opportunity *at the award-enforcement stage* to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[62] This particular rationale also extends to annulment or set-aside proceedings; especially in today's globalised era where it is common for award-holders to pursue enforcement against the award-debtor's assets situated outside its home jurisdiction.[63] It is equally trite that the extent of any public policy enquiry available at the enforcement stage is far narrower than the one

59 *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821.
60 *Mitsubishi*, 637.
61 *Mitsubishi*, Footnote 19.
62 *Mitsubishi*, 638.
63 For instance, refer to the attempts at enforcement of the arbitral award in *Yukos Universal Limited v. The Russian Federation*, PCA Case No. AA 227 in USA, UK, France, Germany, Belgium and India.

permissible at the stage of annulment.[64] Hence, the two avenues of judicial protection do not offer equivalent protection of any legitimate policy interests that a State may have.

Simply put, the SCOTUS had paved the way to relax the arbitrability constraint on a dual-condition that (1) the arbitral tribunal shall apply the relevant mandatory rules; and importantly (2) its competent national courts will have reasonable opportunity to ensure that its legitimate public policy considerations are protected. However, if the parties are permitted to waive the annulment mechanism by mutual agreement, then the second condition stands nullified. For instance, A and B, two corporations incorporated in the US, can agree to resolve their disputes in a New York-seated arbitration, but potentially waive any recourse to set aside the award. In such circumstance, if A secures an award against B and B has assets outside the USA, then the US courts will have no opportunity to ensure the preservation of its public policy considerations. Admittedly, this concern attains greater significance in arbitrations involving parties of the same nationality, as opposed to international arbitrations involving parties from different nationalities where the parties commonly seat their arbitration in a neutral foreign jurisdiction.

The above illustration demonstrates that permitting contracting parties to waive their right to annul an award strikes at the foundation of the edifice on which the arbitrability restraint was first relaxed in 1985. Several

64 *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 SCC 433; *WSG (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd*, Civil Appeal No. 895/2014.

legal systems also subsequently enlarged the categories of disputes that can be submitted to arbitration on an identical expectation that their national courts will have reasonable opportunity to review the resultant arbitral award, even if only on limited grounds. In the contemporary paradigm where award-debtors need not seek any enforcement in the country of origin, the annulment mechanism becomes the lone basis to meet this expectation.[65]

Consequently, any a contractual waiver of this opportunity puts in question the barter that took place in *Mitsubishi*, and makes arbitration a fertile mechanism to evade judicial oversight. In such scenario, an over-emphasis on party autonomy has previously "allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their natural forum."[66] This not only affects the credibility of international arbitration, but may eventually constrain certain national courts to re-tighten the screws of arbitrability and limit the domain of arbitration. As such, the quest to preserve the growing domain of arbitration warrants that parties ought not to waive their right to set aside or annul an arbitral award.

B. The Negative Effect of Competence-Competence

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65 This expectation can also be defeated by designating a foreign seat of arbitration; conferring the jurisdiction to set aside an award on a foreign court. However, whether such autonomy exists is disputed in several jurisdictions, including India. For instance, see *Addhar Mercantile Pvt Ltd v. Shree Jagdamba Agrico Exports Pvt. Ltd*, Arbitration Application No. 197 of 2014 (Bom); *Sasan Power Ltd v. North American Coal Corporation India Pvt Ltd*, First Appeal No. 310/2015 (MP).

66 H M Watt, 'Party Autonomy in international contracts: from the makings of a myth to the requirements of global governance', (2010) 3 ERCL 1, 20. See also Mohammad Reza Baniassadi, 'Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?', (1992) 10(1) Berkley Journal of Int'l Law 59.

Apart from the doctrine of arbitrability, the annulment mechanism, or waiver thereof, also bears proximity to the cardinal principle of *compétence-compétence*. It is accepted that an arbitral tribunal "may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[67] This is the positive effect of *compétence-compétence*.[68] However, many jurisdictions, particularly France, also recognise its negative effect, which proffers that an arbitral tribunal should decide questions surrounding its jurisdiction at the first instance, subject to a possible judicial review of its decision at the stage of annulment.[69]

Although the principle of *compétence-compétence* has gained significant acceptance in the international community, the jurisdictional battle between national courts and arbitral tribunals as to which forum should take precedence in determining questions of arbitral jurisdiction continues to be open.[70] Despite the increasing recognition of the negative effect of the principle, many legal systems remain undecided. In fact, some have previously rejected its application altogether.[71] Even the academic criticism of its policy origins and pragmatic utility is cogent and continuous. Notably, Stavrous Brekoulakis strongly argues "against the adoption of the negative effect of compétence-compétence."[72]

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67 UNCITRAL Model Law, Art 16(1).

68 Gary Born, *International Commercial Arbitration* (2010) 853.

69 Jean-Fracois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2007) 387.

70 Stavrous Brekoulakis, 'The Negative Effect of Compétence-compétence: The Verdict has to be Negative', QMUL School of Law, Legal Studies Research Paper No. 22/2009, 12. ('Brekoulakis')

71 *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618.

72 Brekoulakis, 18.

Brekoulakis' argument, and that advanced by hesitant jurisdictions, largely emanates from a discomfort in allowing tribunals to have exclusive priority in assessing their own jurisdiction. For instance, Brekoulakis insists that in order "to take this legal fiction [of *compétence-compétence*] a step further, and confer exclusive jurisdiction on a forum whose validity is at stake, defies not only logic but also any principle of legitimacy."[73] He instead suggests that "allowing for concurrent jurisdiction of arbitral tribunals and national courts over the validity of the arbitration agreement, strikes the right balance."[74] However, the Supreme Court of India was not so accommodating. In *SBP & Co. v. Patel Engineering Ltd. & another.*, a judgment under the pre-amendment incarnation of the Indian Arbitration Act, the Supreme Court not only held that the Chief Justice of India had the right to decide certain jurisdictional issues prior to appointing arbitrators[75], but also that it can do so on the basis of a full and final review.[76] In both instances, the negative effect of *compétence-compétence* was shunted to oblivion.

In such circumstances, the sole avenue for buttressing the feasibility of the negative effect of *compétence-compétence* is the competent national courts' opportunity to conduct a judicial review at the stage of annulment. After all, the negative effect of *compétence-compétence* merely goes on to establish "a presumption of chronological priority for the tribunal [as against the national

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73 Brekoulakis, 13.

74 Brekoulakis, 14.

75 *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, ¶46(iv). See *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*, (2009) 1 SCC 267.

76 *SBP & Co. v. Patel Engineering Ltd. & Anr.*, (2005) 8 SCC 618, ¶38.

courts] with respect to resolving jurisdiction questions".[77] It does not necessitate any exclusivity in favour of arbitral tribunals. Any determination by an arbitral tribunal with respect to its own jurisdiction remains amenable for review by the competent national courts during annulment, which constitutes a much-needed safety net for preserving the rule of law.[78] This renders the possibility of providing chronological preference to arbitral tribunals only a matter of procedural efficiency and prevention of dilatory tactics by a recalcitrant party.[79]

But even this possibility to argue in favour of the negative effect of *compétence-compétence* is premised on an understanding that the national courts' jurisdiction to annul an award remains uncompromised. It cannot be made subordinate to the agreement of the parties. If the parties are permitted to waive their right to annul an award, it removes the proverbial safety net of judicial oversight. As stated above, the possibility to oppose the enforcement of an arbitral award, that too when it may be in a foreign jurisdiction, does not proffer equivalent protection. In such scenario, the waiver of annulment proceedings creates a justifiable basis to question the theoretical basis of the negative effect of *compétence-compétence*, and generally obstructs its pervasiveness. As such, the need, or at least preference, to promote the principle of *compétence-compétence* in its complete manifestation outweighs the

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77 Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard and Goldman on International Commercial Arbitration* (1999) 401.

78 UNCITRAL Model Law, Art 34.

79 William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 13, International Arbitration 2006: Back to Basics?* (2008) 81.

supposed benefits of allowing parties to waive their right to annul an arbitral award. If this were not so, a pressing response to Brekoulakis' otherwise coherent rejection of the negative effect of *compétence-compétence* is likely to disappear.

IV. CONCLUSION

To borrow words from Albert Jan van den Berg, "as long as arbitration has existed as an alternative to litigation in court, the award has been subject to some form of judicial review."[80] A cumulative consideration of the aforementioned parameters elucidates that the tide of time is yet to provide legitimate reasons to alter this paradigm. And while there is no definitive answer as to whether the contracting parties *can* waive their right to set aside or annul an arbitral award, a normative enquiry provides more certain conclusions. In the author's view, it is more appropriate for states to not permit parties to waive their right to annul their award.

[80] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?', (2014) ICSID Review 262, 264.

CAN USER RIGHTS UNDER SECTION 52 OF THE INDIAN COPYRIGHT ACT BE CONTRACTUALLY WAIVED?

Anupriya Dhonchak[*]

ABSTRACT

The note comments on the enforceability of contracts restricting user rights under the Indian Copyright Act, 1957. This topic has not received adequate attention due to our still emerging fair use doctrine and lack of litigation in this regard. This paper gleans the Indian position by analysis of constitutional principles, public policy and case law regarding unfairness in adhesion contracts (where terms and conditions are set by one of the parties, and the other party/parties has little or no ability to negotiate more favourable terms on account of being in a "take it or leave it" position). The note discusses the enforceability of contractual waivers of user rights by delving into the purposes of free speech, copyright and the exceptions to it. It analyses the chilling effects of enforceability of such waivers on free speech in causing a doctrinal creep in the already nascent fair use doctrine in India. It argues that the Indian Copyright Act, 1957 and the cases concerning fair use so far have laid down that the exceptions under Section 52 are not mere excuses for infringement but

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user rights whose full exercise is a public policy goal. Based on case law on waiver of statutory benefits in India and comparative legal positions in the European Union, U.K., the U.S and Canada, the note concludes that user rights under copyright law are statutory rights based on public interest that cannot be contractually waived off like fundamental rights themselves.

I. INTRODUCTION

Copyright schemes usually endeavour to internally balance the interest of the author in remuneration for her creative effort with that of the public in increasing access to and availability of the author's intellectual and artistic creation by imposing an artificially created market on all participants.[1] Within the realm of this legal monopoly, contracts can help in the achievement of copyright aims through licensing of protected materials, allowing authors to make economic profits through private negotiation of prices.[2] Contractual rights are generally believed to be unaffected by provisions of copyright law.[3] However, this note will argue that S.52 of the Indian Copyright Act, 1957 ("the Act") renders the contractual waiver of user rights, usually through standard form contracts, unenforceable as it contravenes the legislative intent of the Section, the right to free speech

1 Ramona Paetzold, 'Contracts Enlarging A Copyright Owner's Rights: A Framework For Determining Unenforceability' [1989] NLR 817.

2 Goldstein, 'Pre-empted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright' [1977] UCLALR 113.

3 Brown, 'UnifTcatio. A Cheerful Requiem for Common Law Copyright' [1977] UCLALR 1070.

(Article 19(1)(a), Indian Constitution) and thereby public policy as per S.23 of the Indian Contract Act, 1872.[4]

In the 1970s, Prof. Nimmer had aptly foreseen that courts will need to "*delineate the respective claims of copyright and freedom of speech.*"[5] As per the U.S. Supreme Court (SC), the right to free speech furthers creation of a free marketplace of ideas,[6] enhances political participation, stabilises society by channelling potentially disruptive energy into meaningful public discourse[7] and allows citizens to make informed decisions within democratic processes.[8] As per Justice Brandeis, free speech is an end in itself,[9] as restrictions to speech or information impede us from developing our faculties to their fullest potential.[10]

Similarly, S.52 of the Indian Copyright Act provides the users of copyright with certain rights not amounting to infringement. The legislative intent behind this section is to facilitate cultural activity, business transactions, improve education, make law more accessible and permit

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4 What consideration and objects are lawful, and what not. — The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is saIbid to be unlawful. Every agreement of which the object or consideration is unlawful is void

5 Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?' [1970] UCLALR 1180.

6 *Red Lion Broadcasting Co. v. FCC* [1969] 395 US 367 [390].

7 *Whitney v. California* [1927] 274 US 357 [375] (Brandeis J).

8 Meiklejohn, 'The First Amendment Is an Absolute' [1961] SUP CT REV 245.

9 *Supra* Note 8.

10 Emerson, 'Toward a General Theory of the First Amendment' [1966] YLJ 877.

persons with disabilities to access copyrighted content.[11] It seeks to offset the monopoly of a copyright holder against public interest by increasing accessibility in a manner that does not conflict substantially with the holder's moral rights or commercial profit.[12] Part of the purpose of the fair dealing provisions[13] and exceptions under S.52 of the Act is to realise the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India, which as per case law includes the community right of accessing information,[14] the individual right of being informed,[15] as well as the social good of an engaged public.[16] Barriers to the exercise of this right are not confined to direct and affirmative state action such as outright censorship. They include resource inequalities impeding free speech upheld by State regulation of property rights through laws such as copyright law in the immediate case.[17] Thus, S.52 must be interpreted and enforced in harmony with constitutional principles to avoid the impediments to a full exercise of the freedom guaranteed under Art.19(1)(a) of the Constitution of India. This

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11 Lok Sabha Debates, 22 May 2012, available at: https://www.youtube.com/watch?v=qCLB0Gz675I&feature=related, last accessed 25 September 2018.

12 Arpad Bogsch, "WIPO - Guide to the Berne Convention" [1978] ¶ 9.6 to 9.13.

13 Fair dealing is an exception to copyright infringement laid out in the copyright statutes of common law jurisdictions such as Great Britain, Canada, Australia and New Zealand.

14 *Tata Press Ltd. v Mahanagar Telephone Nigam Ltd.* [1995] 5 SCC 139; *Sect, Ministry of Information and Broadcasting v. Cricket Association Bengal* [1995] 2 SCC 161.

15 *Union of India v. Association for Democratic Reforms* [2002] 5 SCC 294; *PUCL v. UoI* [2003] 4 SCC 399; Indian Express v. UoI [1985] 1 SCC 641.

16 Justice Iyer, *Law, Freedom and Change* (East West Press Pvt. Ltd., New Delhi, 1975) 68; *Sakal Papers Pvt. Limited v UoI* [1962] 3 SCR 842.

17 Gautam Bhatia, 'Copyright and Free Speech – I' (Indconlawphil, 7 Oct 2013), available at: https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-against-oup-et-al-in-the-delhi-university-photocopying-lawsuit/, last accessed 20 January 2018.

will keep the Act from intolerable rigidity, internally balance user as well as owner rights and preclude the violation of public policy, especially as the Indian Copyright Act was enacted in 1957 prior to the extensive development of Art.19(1)(a) jurisprudence.[18]

For enforcing a contractual waiver of user rights, it is to be determined *firstly*, that the contract is not unconscionable due to contravention of Section 23 (violation of public policy) or Section 28 (restraint on legal proceedings) of the Indian Contract Act or Article 19 of the Constitution of India, and *secondly*, that the waiver of the rights is *voluntary* and does not demonstrate a stark inequality in bargaining power through its standard form. Part I of this essay discusses how fair use reconciles and negotiates between the aims of copyright and free speech whenever they are seemingly in conflict with each other. It also discusses the Indian standard of fair dealing as per statutory and case law. Part II argues that Indian courts have read Section 52 as a provision conferring user rights and interpreted the same liberally. Part III analyses the ramifications of such reading upon the enforceability of contractual waiver of rights premised on public policy such as user rights. Part IV concludes in light of recent landmark decisions that user rights cannot be contractually waived as such contracts would be unenforceable for contravention of public policy.

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18 Gautam Bhatia, 'Copyright and Free Speech – I' (Indconlawphil, 7 Oct 2013), available at: https://indconlawphil.wordpress.com/2013/10/07/copyright-and-free-speech-i-constitutional-arguments-against-oup-et-al-in-the-delhi-university-photocopying-lawsuit/, last accessed 20 January 2018.

II. FAIR USE: MEDIATING BETWEEN COPYRIGHT AND FREE SPEECH

This part helps analyse the purpose of fair use within the Indian copyright regime which thereby allows us to define its scope and subsequently determine the enforceability of its waiver in India. The rationale for fair use is the same as that of free speech for it allows free dissemination of information, criticism, comment, research, etc.[19] Justice Ginsburg famously referred to fair use as a free speech safeguard.[20] Justice Endlaw, referring to a journal article[21] also brought into perspective the similarity of the purpose of both free speech and copyright law by reasoning that the latter "*is designed to stimulate activity and progress in the arts for the intellectual enrichment of the public"* and *"intended to increase and not impede the harvest of knowledge, motivate the creative activity of authors and inventors in order to benefit the public."*[22] Thus, reward for the author's creativity is recognised as the means to general public welfare.[23] Once we acknowledge the sameness of aims of both copyright and free speech, we can resolve conflicts by ascertaining on a case-to-case basis which of the two serves the ultimate purpose of public interest.

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19 *Meeropol v. Nizer* 505 F.2d 232 (2d Cir. 1974).

20 University of Michigan Library, 'Five things you should know about 'fair use'' (20 February 2017), available at: https://record.umich.edu/articles/five-things-you-should-know-about-fair-use, last accessed 20 January 2018.

21 Basheer, Khettry, Nandy, Mitra, 'Exhausting Copyrights and Promoting Access to Education: An Empirical Take' [2012] JIPR 335.

22 *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services* ("*Rameshwari Photocopy*" case) 233 [2016] DLT 279.

23 *Twentieth Century Music v. Aiken* [1975] 422 US 151.

The single Judge Bench of the Delhi High Court in the case of *ICC Development (International) Ltd & Anr* v. *New Delhi Television Ltd.*[24] had observed that it is both impossible and inadvisable to exactly define the ambit of fair dealing, reaffirming the Division Bench's observations in the case of *ESPN Star Sports v Global Broadcast News Ltd. & Ors.*[25] The Court held that a determination of fair dealing with the work would occur based on particular facts on a case-to-case basis, for instance*, "the length of use, context in and the purpose for which the work is used and the intention behind such use, whether it is by way of a bonafide reporting of the current news and its review or it is aimed at commercial exploitation of the work so as to gain unfair advantage for the broadcaster"* and no straitjacket formula could be laid down in that regard.[26]

Contrary to the initial single Judge decision, J. Nandrajog on the Division Bench in the landmark *Rameshwari Photocopy case*[27] clarified that the "*fair dealing*" standard was expressly prescribed only in S.52(1)(a).[28] Fair use tests as developed in jurisdictions abroad (especially the U.S.A) apply to S.52(1)(a) as per the Division Bench of the Delhi High Court in *D.B. India TV Independent News Service Pvt. Ltd. & Ors. v. Yashraj Films Pvt. Ltd.*[29] As per J. Nandrajog in the *Rameshwari Photocopy* case, these tests cannot be imported

24 *ICC Development (International) Ltd & Anr* v. *New Delhi Television Ltd.* 193 [2012] DLT 279 [17].
25 *ESPN Star Sports v. Global Broadcast News Ltd. & Ors.* [2008] 2 CTMR 494 (Delhi) (DB).
26 *ICC Development (International) Ltd & Anr* v. *New Delhi Television Ltd.* 193 [2012] DLT 279 [17].
27 *The Chancellor, Masters & Scholars of the University of Oxford & Ors. v. Rameshwari Photocopy Services* 233 [2016] DLT 279.
28 S.52 of the Copyright Act.
29 *D.B. India TV Independent News Service Pvt. Ltd. & Ors. v. Yashraj Films Pvt. Ltd.* 192 [2012] DLT 502.

into the other sub-sections of S.52(1), including S.52(1)(i).[30] The sub-sections under S.52 contain exceptions to copyright applicable to different categories of purposes. The scope of fairness under these sub-sections is to be determined as per the purposes defined therein and not the general factors used in the U.S. and other jurisdictions.[31] It is based on a balancing test as the application of the respective provisions require courts to consider each case uniquely. The interests of the rights-holder are to be weighed against the legislative intent and social purpose of the right. The rights conferred have to fall within the ambit of the exception and exercised to the extent *justified* by the purpose that they have been excepted for.[32]

Further, Indian courts have held the purpose of usage to be determinative of fairness even when commercial use is involved. Commercial use in itself does not invalidate the general fair dealing exceptions under Section 52. The Delhi High Court in the case of *Super Cassettes Industries Limited* v. *Hamar Television Network Pvt. Ltd. & Anr.*[33] held that the exceptions under Section 52(1)(a)(ii) or Section 52(1)(b)(ii) were inapplicable to the unauthorized usage of copyrighted work by the media companies. The decision, however, did not turn on commercial exploitation but the purpose of usage. As the infringing material was not found to be used for criticism or review, it did not fall within the said exceptions. The Court noted that

30 S.52(1) of the Copyright Act.

31 *Rameshwari Photocopy* case, ¶ 31-35.

32 *Rameshwari Photocopy* case, ¶ 33.

33 *Super Cassettes Industries Limited* v. *Hamar Television Network Pvt. Ltd. & Anr.* CS(OS) No. 1889/2009, decided on May 24, 2010.

commercial use simplicitor wouldn't make the use unfair if *"a defendant can rely upon the gateways carved in Section 52 or 39"*[34] and *"demonstrate that the copyrighted work is used for purposes indicated therein.*" Similar observations regarding commercial exploitation *ipso facto* not rendering the usage of a work unfair were made by the Delhi High Court quite expressly, in *ICC Development (International) Ltd & Anr* v. *New Delhi Television Ltd.*[35]

This shows that where expressly stated, as in S.52(1)(a), the fair dealing standard will import global tests. However, this is not to say that fairness will not be read into sub-sections other than S.52(1)(a) where it is not expressly prescribed. Here, the court will determine the fairness of use based on the purpose of usage and the degree of its justification by the said purpose. This is because the aim of these subsections is not just to serve as exceptions to copyright but user rights meant to further public policy goals.

III. COPYRIGHT AS USER'S RIGHT IN INDIA

This section analyses case law interpreting Section 52 to argue that it has been read as a user right in India. User rights refer to valid permission for usage of copyrighted material without the right holder's authorization, conferred through exceptions to protection, limitations, definitions, protection against enforcement and in automatic remuneration schemes (statutory licenses or liability rules) mentioned within copyright statutes as

34 S. 39 of the Copyright Act.

35 *ICC Development (International) Ltd & Anr* v. *New Delhi Television Ltd.* CS (OS) No. 2416/2012, decided on September 18, 2012.

well as diverse areas of law i.e. constitutional rights, consumer protection, competition etc.[36]

The English fair dealing test laid down by Lord Denning in *Hubbard vs. Vosper*[37] was adopted and significantly expanded by the Canadian Supreme Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*[38] wherein Chief Justice Beverley McLachlin specified a fair dealing test based on six factors i.e. purpose, character, amount of and alternatives to the dealing, nature of the work and the impact of such dealing on it, as per Denning's judgment.[39] Copyright as user's right was most pronouncedly recognised and liberally interpreted by the Supreme Court of Canada in *CCH Canadian.*[40] The reasoning of *CCH Canadian* qua 'originality' has already been adopted by the Indian Supreme Court in the case of *Eastern BC vs D.B. Modak.*[41] I argue that Indian jurisprudence has recognised S.52 exceptions to infringement of copyright as user rights by holding that wherever applicable they would not serve as excuses/defences for infringement but rather as user rights whose exercise would not constitute infringement in the first place as is evident from the holding in the *Rameshwari Photocopy* case.

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36 Washington College of Law, 'Copyright User Rights Survey', available at: http://infojustice.org/survey, last accessed 2 January 2018.

37 *Hubbard v. Vosper* [1972] 2 Q.B. 84.

38 *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339; Vaver, David (2011). *Intellectual Property Law: Copyright, Patents, Trade-Marks* (2nd ed.). Toronto: Irwin Law ISBN 978-1-55221-209-7.

39 *Supra* Note 32.

40 *Supra* Note 32.

41 *Eastern BC vs D.B. Modak* [2008] 1 SCC 1 [37].

Some jurists regard the distinction between considering the exceptions either as user rights or defences to infringement purely academic.[42] However, it is material to note that dignifying the said exceptions with user rights status traces their origin to fundamental rights and public policy derived thereof, making their waiver contractually unenforceable and opening the possibility of enjoining copyright holders with an affirmative obligation to ensure that their copyrights are not at loggerheads with the exercise of user rights.[43] In the *Rameshwar Photocopy* case, even though J. Endlaw held that Section 52(1)(a) was inapplicable to the University's action, it was stated that photocopying of the impugned material by students for private or personal use would indeed constitute fair dealing and not copyright infringement, especially when reproduction of copyrighted work by both i.e. the students and the University has the same effect. This was done by laying emphasis on S.16 of the Act[44] and giving the rights of the owner a restrictive interpretation by holding that copyright was converted from a natural/common law right to a statutory right by the enactment of the statute and its exercise necessarily required statutory conditions to be satisfied.[45] In contrast, the user right, for instance, "in course of instruction" in S.52(1)(i), was interpreted extensively and reliance was placed on the German Federal SC in *Re. the Supply of Photocopies of Newspaper Articles by Public Library*[46] to support the conclusion that "*the freedom to operate and the reproduction rights of*

42 *Continental Casualty Co. v Beardsley* 151 F Supp 28, 31-32 (SDNY 1957).
43 Pascale Chapdelaine, *Copyright User Rights* (OUP 2017) 48.
44 Section 16 of the Copyright Act.
45 *Rameshwari Photocopy* case.
46 *Re. the Supply of Photocopies of Newspaper Articles by Public Library* [2000] ECC 237.

authors were restricted in favour of freedom of information."[47] J. Endlaw held that absent any limitation on the exercise of Section 52 exceptions by the legislature, the Court would not inquire into whether they "unreasonably prejudice the legitimate interest of the author" or are not justified for their respective purposes[48] as the legislature is presumed to have determined otherwise before enacting S.52. Such an understanding of Section 52 as guaranteeing user rights whose exercise is indispensable to furthering public policy allows us to determine the enforceability (or lack thereof) of a contractual waiver of such rights. This is analysed in the following section via an enquiry into the enforceability of contractual waivers of comparable rights.

IV. CONTRACTUAL WAIVER: AGAINST PUBLIC POLICY

In the case of *Gherulal Parekh,*[49] the Supreme Court of India relied on common law precedent to argue that "public policy" was synonymous with "the public good", the ambit of which was subsequently expanded vastly in the case of *Brojo Nath Ganguly.*[50] This was the first case where the Supreme Court determined the (un)enforceability of a contract on the basis of distributive justice, unreasonableness, unconscionability, and unequal bargaining power between contracting parties in adhesion contracts. It held unreasonable contractual clauses to be unenforceable irrespective of their

47 *Supra* Note 20,.
48 WIPO, Berne Convention (1971), Art.9 & 10.
49 *Gherulal Parakh v. Mahadeodas Maiya* AIR 1959 SC 781.
50 *Central Inland Water Transport Corporation v Brojo Nath Ganguly* AIR 1986 SC 1571.

being consented to. The 199th Law Commission of India Report particularly highlighted concerns of unfairness in standard form contracts[51] despite the existence of special legislations such as the Consumer Protection Act, 1986 protecting consumers from unfairness in such contracts.

Further, post ratification of the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), fair dealing can be said to be a part of public policy in India.[52] The Indian Supreme Court in the case of *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited*[53] held that a waiver of a benefit under statute is permissible only where public policy or interest are not subverted.[54] It was held in the case of *Basheshar Nath v. Income Tax Commissioner,* that certain rights are part of the Constitution as a matter of public policy and the doctrine of waiver cannot apply to such rights.[55] The Supreme Court further affirmed this reasoning in *Murlidhar Aggarwal and Anr v. State of Uttar Pradesh*[56] by disallowing a tenant's contractual waiver of the protection against eviction conferred upon him by Section 3 of the U.P (Temporary) Control of Rent and Eviction Act, 1947 as the safeguard was a statutory right granted as a matter of public policy and not a mere individual benefit. Further, the

51 199th report of the Law Commission of India, "Unfair (Procedural & Substantive) Terms in Contract", 199 (2006).
52 Matthan & Narendran, 'Fair Dealing of Computer Programs in India' [2011] IJLT 94.
53 *Centrotrade Minerals and Metal. Inc. v. Hindustan Copper Limited* (2006) 11 SCC 245.
54 Bhatia, *Supra* Note 22.
55 *Basheshar Nath v. Income Tax Commissioner* AIR 1959 SC 149.
56 *Murlidhar Aggarwal and Anr v. State of Uttar Pradesh* 1975 1 SCR 575.

Supreme Court in *Lachoo Mal vs. Radhey Shyam*[57] and *Krishna Bahadur vs. M/S Purna Theatre & Ors.*, has held that "*A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein.*"[58] Though Indian courts have not dealt with the issue of enforcing a contractual waiver of user rights under the Copyright Act directly, the Delhi High Court in *Tekla Corporation & Anr* v. *Survo Ghosh & Anr.*[59] held that fair use of a protected work as allowed by Section 52 or any other provision of the Copyright Act could not be curtailed contractually as such a contract would violate public policy and hence be unenforceable. Justice Endlaw observed in the case that the copyright holder is *"not entitled in law to impose any restrictions curtailing the fair use thereof"* and that *"the legal action even if any taken by holder of copyright against any other person for violating the conditions illegally imposed by the holder of copyright, would thus fail"*. Further, the Income Tax Appellate Tribunal (Mumbai) held in the case of *Capgemeni Business Services (I)* v. *Assessee (2016)*[60] that if a license agreement had a condition that restricted fair use of software otherwise available under the Copyright Act, it is unenforceable. Thus, as aforementioned because fair use is a part of public policy in India[61], contractual waiver of user rights is against public policy and thereby unenforceable. In so far as free speech would conflict with a contractual waiver of user rights, the latter would be

57 *Lachoo Mal vs. Radhey Shyam* AIR 1971 SC 2213, ¶6.
58 *Krishna Bahadur vs. M/S Purna Theatre & Ors* Appeal (civil) 7251 of 2001.
59 *Tekla Corporation & Anr* v. *Survo Ghosh & Anr.* AIR 2014 Del 184.
60 *Capgemeni Business Services (I)* v. *Assessee (2016)* 2016 (3) TMI 280.
61 Matthan & Narendran, *Supra* Note 14.

unenforceable for the former, by its very nature is predicated on public policy and interest.

Determination of fair use on a case to case basis leads to uncertainty and curtails users from fair dealing when in doubt because of risk averse lawyering. It contributes to a clearance and permissions culture. Contractual waivers lead to many negative externalities including chilling effects on free speech and fair dealing. This results in narrowing the scope of user rights as more and more people waive them away, or pay for their exercise.[62] It makes their use without permission or payment progressively less routine until it is not considered "fair use" at all due to a creep in the doctrine of fair use itself.[63] When these rights are waived off through standard form contracts, the one sided terms apply to anyone who wants to access the work making them akin to "private legislation",[64] bestowing exclusive rights on the owner wherein the material can only be accessed if one agrees to limit fair dealing or contract out of her fair use rights. In the U.S. even when express statutory prohibitions are absent, courts hold contractual provisions to be unenforceable per se (via pre-emption) due to contradiction of strong policies inherent in the statute,[65] especially when those policies are said to be determinative of public policy. The more pivotal an exception is to preclude copyright law from violating public policy, the more central it will be to the

62 James Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law' [2007] 116 YLJ 885.

63 Sara K. Stadler, 'Incentive and Expectation in Copyright' [2007] 58 HLJ 433.

64 Julie Cohen, Lochner 'In Cyberspace: The New Economic Orthodoxy of "Rights Management' [1998] MLR 462.

65 E. Famsworth, *Contracts* (4th edn, Wolters Kluwer 1982).

purpose of the Act, increasing the likelihood of the statute itself pre-empting its waiver contractually. However, pre-emption is mandatory only in cases where a narrow objective or purpose is frustrated due to contractual restriction of fair use. It is not essential where there arises a tension with the broad aims of the Act, in which case the rule of reason standard determines enforceability up to the court's discretion.[66] This discretion is to be guided by the likelihood of furtherance of public policy by refusal to enforce the contract.[67] Under the rule of reason standard, contractual provisions violative of statutory policy may be considered enforceable subject to reasonability.[68] Contractual waiver of fair use rights is thus pre-empted by various public policy considerations that may be internal or external to the Copyright statute.

In the U.S., any contractual infringement of fair use rights that deprives users of freedom of speech and expression as per the 1st Amendment is said to be pre-empted and such contractual provisions are held to be unenforceable per se.[69] In the European Parliament's Reda report[70], the members emphasised the need for prevention of contractual waiver of user rights for the exercise of statutory limitations and exceptions

66 Restatement (Second) Of Contracts § 178 (1981).

67 *Ibid.*

68 E. Farnsworth, *Supra* Note 10, § 5.5; Restatement (second) of Contracts § 178 (1981).

69 *Cf.* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression,* 67 [1989] CALIF. L. REV. 283, 287-89.

70 Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society - A8-0209/2015 Europarl.europa.eu, available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2015-0209&language=EN, last accessed January 13, 2018 (¶ 61).

under Copyright laws to be effective, and to facilitate access to content. This report on the implementation of Directive 2001/29/EC (the "Infosoc Directive") also drives home the point that sans rules protecting users from contractual/technological supersession[71] of their rights contained in the current exceptions and limitations within copyright laws, right-holders and intermediaries will tread roughshod over these exceptions and thereby minimise the scope of their intended benefit for the public. Only some European Union members have domestic legislations that expressly regulate the contractual manipulation of copyright exceptions.[72] For instance, as per Polish copyright law, private use is an exception to infringement. Copyright protection does not allow authors to restrict buyers from borrowing or copying products for private use in the interest of consumer welfare.[73]

The Copyright Act in India, much like the Infosoc Directive and most other national copyright legislations does not pre-empt the mutilation and modification of such exceptions via contract. In most cases, the stronger party with greater, and sometimes all the bargaining power (in adhesion contracts) is the rights-holder enjoying a monopoly over granting permission for the usage of copyrighted work, leaving to the consumer a Hobson's choice and denying her access to the copyrighted work unless she agrees to

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71 TPM (Technological Protection Measures) and DRM (Digital Rights Management) provisions impose restrictions on user rights similar to adhesion contracts but a discussion on them is beyond the scope of this note.

72 Article 29 (4B) of British Copyright, Designs and Patents Act.; Article 2 (10) of Irish Copyright and Related Rights Act; Copyright and Related Rights Act, 2000; Article XI.193 of Belgian Code of Economic Law; Article 75 (5) of Portuguese Copyright and Related Rights Code.

73 UOKiK - About us - About us - News - Reliable consumer information Uokik.gov.pl, https://uokik.gov.pl/news.php?news_id=1021, last accessed January 20, 2018.

abide by the conditions laid down via separate agreements or licenses with rights-holders, akin to Henry Ford's famous exposition, "*A customer can have a car painted any colour that he wants so long as it is black*".[74]

Contract provisions in adhesion contracts try to expand the scope of rights-holders' rights by limiting the dissemination/use of the protected materials and are unenforceable in most jurisdictions if reasonably unexpected by the non-drafting party or against public policy due to unconscionability or undue oppression.[75]

V. CONCLUSION

To determine the enforceability of a contract, it is important to firstly expose the goals, purposes and policies inherently a part of copyright statutes.[76] Where the objective of a certain provision of the Act is amply clear, conflicting contracts can be said to be unenforceable per se by virtue of pre-emption, or as mandated expressly within statutory provisions themselves.[77]

In India, S.52 of the Copyright Act accommodates constitutional freedoms within statutory exceptions. It does not confer upon individuals a private right that can be waived off but a statutory right based on public

74 'On the Need to Protect Copyright Exceptions from Contractual Interference' - International Communia Association, available at: https://www.communia-association.org/2015/07/30/on-the-need-to-protect-copyright-exceptions-from-contractual-interference/, last visited Jan 2, 2018.
75 *Cubic Corp. v. Marty*, 1 U.S.P.Q.2d (BNA) 1709, 1712-13 (1986).
76 *Supra* Note 1, 824.
77 *Ibid*, 824.

interest and policy whose legislative purpose is to protect fundamental rights. It cannot be waived off, just like fundamental rights themselves,[78] and enforcing such a waiver would defeat the purpose of S.52.

Finally, we are still developing our IPR regime. The benchmark set via the *Rameshwari photocopy case*[79] promises to favour public policy. It is indeed a landmark segue into restraining subsequent corporates and copyright holders from exploiting the populace by overriding S.52 user rights through standard form contracts.

78 Heath & Liu, 'Copyright Law and the Information Society in Asia' (Hart, 2006); *Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.* 1985 SCC (3) 545.

79 *Rameshwari Photocopy* case.

CARPENTER V. UNITED STATES: STATE SURVEILLANCE AND CITIZEN PRIVACY

Nehaa Chaudhari and Smitha Krishna Prasad[*]

ABSTRACT

The technological possibility of tracking a mobile phone's location with increasing accuracy coupled with the ubiquity of phones make it possible to track the location of a mobile phone user with considerable accuracy. This increases the potential for intrusive surveillance. This comment analyses the constitutional safeguards against the tracking of such data by the State. First*, it reviews the case* Timothy Ivory Carpenter v. United States, *a United States ("US") judgment on the power of the State vis-à-vis the citizen's right to privacy.* Second*, it compares the principles evolved in the US with Indian jurisprudence.* Lastly*, the comment observes that, despite certain problematic principles from US jurisprudence being eschewed by the Indian Supreme Court, there continues to exist concerns regarding the overreach of State power through Indian statutory provisions and other loopholes that haven't yet been scrutinized from the perspective of the right to privacy.*

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I. INTRODUCTION

The United States has 396 million mobile phone service accounts, against a population of 326 million.[1] In India, a country of about 1.3 billion people, the number of mobile phone subscribers stands at over 1 billion.[2] More than half of these will be smartphone users by the end of 2018.[3] Billions of people around the world use mobile phones for a "*wide and growing variety of functions,*"[4] and "*compulsively carry cell phones with them all the time*".[5]

Similar to other disruptive technologies, the mobile phone's design, functionality, technical architecture, and inalienability in modern life has us evaluating how it changes, among others, the relationship between the citizen and the state.[6] In the digital age, citizens and states are constantly renegotiating the terms of their social contract - particularly how citizens'

1 Roberts . J., *Timothy Ivory Carpenter, Petitioner v. United States*, 22 June 2018, 585 U.S. ___ (2018).

2 *More than 5.5 billion mobile users by 2022, India to lead*, HINDUSTAN TIMES (2017), https://www.hindustantimes.com/world-news/more-than-5-5-billion-mobile-users-by-2022-india-to-lead/story-KqCGSfgALYQ4RsMHg7praN.html (last visited Jul 23, 2018).

3 *India set to have 530 million smartphone users in 2018: Study*, THE INDIAN EXPRESS (2017), https://indianexpress.com/article/technology/india-set-to-have-530-million-smartphone-users-in-2018-study-4893159/ (last visited Jul 23, 2018).

4 *Carpenter*, Roberts. J., *supra* note 1, at 1.

5 *Ibid* at 13.

6 For a discussion on changing relationships of power as a result of disruptive technologies, see, generally, Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, DAEDALUS, THE JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES, http://benkler.org/Degrees_of_Freedom_Dimensions_of_Power_Final.pdf (last visited Jul 23, 2018).

civil rights and liberties stack up against states' police powers - with courts being the final arbiter.[7]

Timothy Ivory Carpenter v. United States[8] ("*Carpenter*") is the most recent instance of the Supreme Court of the United States ("SCOTUS") measuring the state's exercise of police powers (search and seizure) against a citizen's right to privacy. The court was called to determine[9] if the state, when it accessed the petitioner's historical cell phone records "*that provide a comprehensive chronicle of the user's past movements*," conducted a "*search*" for the purposes of the Fourth Amendment.[10] In a 5-4 split decision, SCOTUS held that government access of mobile phone records in this case was indeed a Fourth Amendment search,[11] bound by its confines, which include the safeguard of certain expectations of a person's privacy.

In the remainder of this article, we discuss Chief Justice Roberts' majority opinion in *Carpenter,* and its underlying rationale. We compare the law according to *Carpenter* with the Indian position, laid out particularly in *Puttaswamy v. Union of India*[12] ("*Puttaswamy*") and *District Registrar & Collector, Hyderabad v. Canara Bank*[13] ("*Canara Bank*"). We conclude that India does not recognise a broad exception to the right to privacy equivalent to the US'

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7 *See, generally*, *Puttaswamy v. Union of India*, (2017) 10 SCC 1 (hereafter referred to as *Puttaswamy*) for a detailed overview of disruptive technologies challenging citizen-state relations, and the role that the Indian Supreme Court has played as arbiter, over the years.

8 *Carpenter*, Roberts. J., *supra* note 1.

9 *Ibid* at 1.

10 U.S. CONST. amend. IV.

11 *Carpenter,* Roberts. J., *supra* note 1, at 11.

12 *Puttaswamy*, *supra* note 7.

13 *Distt. Registrar and Collector, Hyderabad and Ors. v. Canara Bank and Ors.*, AIR 2005 SC 186.

'*third-party doctrine*'. However, the absence of adequate safeguards in Indian laws that provide for government access to personal data of individuals could allow for collection of data on a scale similar to *Carpenter*.

II. *CARPENTER*: PRIVACY CLAIMS IN HISTORICAL CELL-SITE RECORDS

Timothy Ivory Carpenter, the petitioner ("Timothy"), was convicted and sentenced for armed robbery by the court of the first instance, a decision which the Court of Appeals for the Sixth Circuit ("Court of Appeals") upheld. SCOTUS agreed to review the decision, and granted Timothy's petition for a writ of certiorari.[14]

C. Historical Cell-site Records

At Timothy's trial, the police relied on his historical cell-site location information ("CSLI") to demonstrate that he had been at the place of the robbery while it was taking place. CSLI is a "*time-stamped record*" that a phone generates "*each time [it] connects to a cell-site*".[15] A cell-site consists of a set of radio antennae, and is most often located in mobile phone towers, and sometimes in other places such as building roofs.[16] A mobile phone typically generates multiple cell-site records a minute.[17] It scans the area around, even when not in use (unless it is switched off, or its connection to the mobile

14 *Carpenter,* Roberts. J., *supra* note 1, at 4.
15 *Ibid* at 2.
16 *Ibid* at 2.
17 *Ibid* at 2.

network has been disabled), as it tries to connect to the closest cell-site and find the best available signal.[18]

The closest cell-site might be closer than you think it is, and coming ever closer. Mobile network companies, in a bid to ensure better connectivity, are setting up more and more towers and cell-sites. A larger number of cell-sites means that each cell-site has to cover a smaller area.[19] This in turn means that CSLI records are able to pinpoint a mobile phone's location more and more accurately. When coupled with the fact that most cell-phone users are at most only a few feet apart from their cell-phones at all times, CSLI records do not just accurately pinpoint a cell-phone's physical location, but also the user's location.

D. Fourth Amendment Claims and the SCOTUS Ruling

In Timothy's case, the police relied on CSLI records to place Timothy's cell-phone, and as a result, Timothy, at the scene of the crime. The state documented his movements over 127 days, and obtained 12,898 location points.[20] Timothy argued that this constituted a "*search*" for the purposes of the Fourth Amendment.[21] He argued that for a search to be constitutional under the Fourth Amendment, the state was required to obtain

18 *Ibid* at 1.
19 *Ibid* at 2.
20 *Carpenter*, Roberts. J., *supra* note 1, at 3.
21 *Ibid.*

a warrant backed by probable cause, which it had failed to do in this case;[22] accordingly, this information ought to be suppressed.

Neither the court of the first instance,[23] nor the Court of Appeals agreed with Timothy's argument. The latter opined that Timothy had no "*reasonable expectation of privacy*"[24] in his historical CSLI since he had voluntarily shared that information with his mobile phone network providers.

Having admitted Timothy's appeal, SCOTUS was now required to determine whether or not the state's procurement of Timothy's CSLI violated his Fourth Amendment rights. It had to examine whether the state's action amounted to an unreasonable search or seizure, with a related question being what constitutes a reasonable search or seizure. SCOTUS was required to determine whether Timothy had privacy claims in his CSLI, or, like the Court of Appeals had held, he had no reasonable expectation of privacy.

SCOTUS upheld Timothy's privacy claims, and found that in procuring his historical CSLI, the state had conducted an unreasonable "*search*" for the purposes of the Fourth Amendment.[25] Citing *Katz v. United States*[26] ("*Katz*"), SCOTUS opined that the Fourth Amendment protected "*certain expectations of privacy*" which society was prepared to recognize as

22 *Ibid.*
23 *Ibid.*
24 *Ibid* at 4.
25 *Carpenter,* Roberts. J., *supra* note 1, at 11.
26 *Katz v. United States* 389 U.S. 347 (1967). Hereafter referred to as *Katz.*

reasonable, and not just property.[27] As a result, any state action which intruded upon such an expectation of privacy had to be based on a warrant backed by probable cause.[28] Chief Justice Roberts, writing for the majority, was of the view that while the standard that needed to be met for a search to be acceptable under the Fourth Amendment was one of reasonableness; in almost all cases, a search not pursuant to a warrant backed by probable cause, was likely to be unreasonable.[29] In this case, the state obtained Timothy's information pursuant to a court order obtained under the Stored Communications Act, 1986[30] and not a warrant backed by probable cause. The standard required to be met under this legislation to get a court order is lower than the requirements for a warrant under the Fourth Amendment.[31] As such, the state's action - a warrantless and, therefore, unreasonable search - violated Timothy's Fourth Amendment rights.[32] SCOTUS also noted, however, that although the state could only access CSLI after obtaining a warrant as a general rule, a warrantless search may be permitted in certain special circumstances.[33]

E. Privacy Principles in Carpenter

When SCOTUS found that the state violated Timothy's Fourth Amendment Rights, it recognised that the amendment protected not just a

27 *Carpenter,* Roberts. J., *supra* note 1, at 5.
28 SCOTUS discusses *Smith v. Maryland*, *infra* note 45 in *Carpenter*, *supra* note 1, at 2.
29 *Carpenter*, Roberts. J., *supra* note 1, at 18.
30 18 U.S.C. Chapter 121.
31 *Carpenter,* Roberts. J., *supra* note 1 at 18.
32 *Ibid* at 3.
33 *Ibid* at 4.

person's property, but also an expectation of privacy that society was willing to recognize as reasonable. Chief Justice Roberts categorized the issue at hand - privacy interests in a person's physical location data that was maintained by a third party[34] - as bringing together two distinct lines of issues and cases in U.S. privacy jurisprudence. The first of these is about "*a person's expectation of privacy in his physical location and movements*"[35] and the second is about the '*third-party doctrine*' and "*whether there is a 'legitimate expectation of privacy' in information [that a person] voluntarily turns over to third parties*".[36]

The judgment in *Carpenter* follows from SCOTUS' landmark 2012 decision on locational privacy in *Jones v. United States*[37] ("*Jones*"). In *Jones*, the issue was whether the state had violated the respondent's privacy by remotely monitoring his vehicle's movements for 28 days, via a GPS tracking device that they had installed on it.[38] In *Carpenter*, Chief Justice Roberts observes[39] that although the decision in *Jones* was based on "*physical trespass of the vehicle*" by the state, five SCOTUS Justices shared the view that the case raised privacy concerns on at least two fronts - by law enforcement "*surreptitiously activating a stolen vehicle detection system*" and by tracking the GPS location of the respondent's mobile phone.

34 *Ibid* at 7.
35 *Ibid* at 7.
36 *Ibid* at 9.
37 *Jones v. United States*, 565 U. S. 400 (2012).
38 *Carpenter*, Roberts. J., *supra* note 1, at 8.
39 *Ibid.*

SCOTUS' observations on GPS tracking in *Jones* are particularly important for *Carpenter*. In fact, the majority in *Carpenter* views the threat to privacy from government access of historical CSLI to be far greater than the threat to privacy from GPS surveillance in *Jones*.[40] This is because of three reasons. First, in the words of Chief Justice Roberts, "*[w]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user*".[41] Second, because the information is historical as well as records are continuously logged, by accessing historical cell-site records the state can effectively "*travel back in time*"[42] and recreate in some detail a person's movements and location history. Third, because all mobile phones continuously generate CSLI, the state's ability to track such information *"runs against everyone*" and the only ones who can "*escape this tireless and absolute surveillance*" are the few people who do not have a mobile phone.[43] Chief Justice Roberts also notes that while deciding cases involving state surveillance with implications for the Fourth Amendment, the court's approach needs to be future-proof and technology neutral.[44]

SCOTUS' holding in *Jones* notwithstanding, the question of privacy claims in historical cell-site records is complicated as a result of a second line

40 *Ibid* at 13.
41 *Ibid* at 13.
42 *Ibid* at 13.
43 *Ibid* at 14.
44 *Ibid* at 6, 14 and 15. SCOTUS refers to *Kyllo v. United States*, 533 U. S. 27, 34 (2001).

of cases about the '*third-party doctrine*'. The most important of these are *Smith v. Maryland*[45] ("*Smith*") and *United States v. Miller*[46] ("*Miller*").

Simply put, under the '*third-party doctrine*', a person has a "*reduced expectation of privacy*"[47] in information that she voluntarily discloses to a third party.[48] As a result of *Miller*, the position in U.S. law is that this reduced expectation of privacy will apply regardless of the fact that the person may have disclosed it for a limited purpose.[49] In *Miller*, the state had subpoenaed many of the respondent's bank records including monthly statements, deposit slips and cancelled cheques[50] as it was investigating him for evading his taxes.[51] SCOTUS did not uphold the respondent's Fourth Amendment claim. It held that the documents subpoenaed were not confidential but were "*business records of the banks*"[52] and that when he disclosed this information to the bank, the respondent had assumed the risk that the bank would disclose that information to the state.[53] Similarly, in *Smith*, SCOTUS found that the petitioner having voluntarily communicated to the phone company telephone numbers that he had dialled, had "*assumed the risk*"[54] that the company would share its records with the state.[55]

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45 *Smith v. Maryland*, 442 U. S. 735 (1979).
46 *United States v. Miller*, 425 U. S. 435 (1976).
47 *Carpenter*, Roberts. J., *supra* note 1, at 3.
48 *Smith*, *supra* note 45; *Miller*, *supra* note 46, and *Ibid* at 3.
49 SCOTUS cites *Miller* in *Carpenter*, Roberts. J., *supra* note 1, at 9.
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 *Ibid* at 10.
54 *Ibid.*
55 *Ibid.*

The majority in *Carpenter* declined[56] to uphold the state's argument that its collection of Timothy's historical cell site information was governed by the '*third-party doctrine*'. It differentiated between CSLI and the "*limited types of personal information*" that was in question in *Smith* and *Miller* - telephone numbers and bank records, respectively.[57] SCOTUS also opined that the third-party doctrine could not "*mechanically*" be applied to CSLI, given "*the lack of comparable limitations on the revealing nature of CSLI*".[58] It also found no element of voluntariness in subscribers sharing mobile phone location information with their telecom service providers:[59] as mentioned earlier in the paper, mobile phones are constantly generating cell-site records as long as they are not switched off/their mobile network connectivity is not disabled; and mobile phones have become an indispensable part of our lives today.[60]

Bringing together the law on locational privacy developed in *Jones* and other cases, and the law on the '*third-party doctrine',* in *Carpenter,* SCOTUS held "*an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI*".[61] However, it did not explicitly overrule the *third-party doctrine*.

56 *Ibid* at 11.
57 *Ibid.*
58 Carpenter, Roberts. J., *supra* note 1, at 3.
59 *Ibid.*
60 *Ibid* at 11.
61 *Ibid.*

III. INDIAN LAW IN THE CONTEXT OF *CARPENTER*'S PRINCIPLES

The Indian Constitution does not have a provision similar to the Fourth Amendment. Article 20(3) of the Indian Constitution only contains a protection against self-incrimination: "*No person accused of any offence shall be compelled to be a witness against himself*". In *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi*[62] ("*M. P. Sharma*") the Supreme Court held that in the absence of a provision similar to that of the Fourth Amendment to the US Constitution, the right to privacy cannot be read into the provisions of Article 20(3) of the Indian Constitution.

This case has, however, been partially overruled by the Indian Supreme Court ("Supreme Court") in *Puttaswamy*.[63] In this landmark judgment, the Supreme Court upheld and confirmed that the right to privacy is a fundamental right under the Indian Constitution. Although the Indian Constitution does not explicitly recognise such a right, the Supreme Court in *Puttaswamy* found that "*[t]he right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution*". In this vein, the Court also overruled *M. P. Sharma* to the extent that it held that the right to privacy is not protected by the Constitution.

The *Puttaswamy* judgment is a milestone in Indian privacy jurisprudence. A 9-judge bench of the Supreme Court upheld the right to

62 *M. P. Sharma v. Satish Chandra, District Magistrate, Delhi,* (1954) SCR 1077.
63 *Puttaswamy, supra* note 7.

privacy as a fundamental right. The primary opinion in this judgment, authored by Justice Chandrachud, and signed by 3 other judges, also recommended that the State ensure that the regulatory framework in the country support the exercise of this right, and specifically the right to data privacy.

However, to understand the position of Indian jurisprudence in the context of the facts and principles discussed in Carpenter, we look at two previous judgments of the Supreme Court: *People's Union for Civil Liberties v. Union of India*[64] ("*PUCL*") and *Canara Bank*, and corresponding legal provisions. The first deals with the interception and monitoring of telephone communications, and the second with search and seizure of records held by third parties. Both of these judgments have been discussed in detail and upheld in *Puttaswamy*.[65]

A. Interception of Communications and the PUCL Judgment

The Indian state's powers to conduct surveillance, and search or seize documents and records are governed by multiple statutory frameworks. The Telegraph Act, 1885 ("Telegraph Act") is among the more comprehensive of these statutes. The provisions of the Telegraph Act and rules issued under this law govern the State's powers to intercept telephone communications.

64 *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301. Hereafter referred to as *PUCL*.
65 *Puttaswamy*, *supra* note 7.

Section 5(2) of the Telegraph Act provides that the government may intercept telephone communications, among other things, in the event of any public emergency, or in the interest of public safety. Such action can only be undertaken if the government is satisfied that interception of such communication is necessary in the "*interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence*". Reasons for directing such interception must be recorded in writing.

In *PUCL*,[66] this section was challenged as unconstitutional before the Supreme Court. The Supreme Court upheld the section, but also provided guidelines on the circumstances and manner in which telephone communications may be intercepted under Section 5(2) of the Telegraph Act. It directed that:[67]

1. Telephone-tapping orders under Section 5(2) of the Telegraph Act can only be issued by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. This power can be delegated to officers in the Home Department, who are at least of the rank of Joint Secretary in case of emergencies. Copies of each order should be sent to the Review Committee (see below), within a week.

66 *PUCL*, *supra* note 64.
67 *Ibid.*

2. The order should direct interception of the communications described in the order, and may also direct the disclosure of such intercepted materials to specific persons.

3. The order should be issued only after considering whether the information to be obtained by such interception cannot be reasonably acquired by other means, and should direct limited interception of communications between specific address(es) and persons / premises.

4. Any order for interception will be valid for 2 months, unless renewed. The total period for which one order can operate is 6 months.

5. The authority issuing the order should maintain records of the intercepted communications, the extent to which the material is disclosed, the number of persons and their identity to whom any of the material is disclosed, the extent to which the material is copied and the number of copies made of any of the material.

6. The use of the intercepted material should be limited to a necessary minimum, and any copies of intercepted material must be destroyed as soon as retention is no longer necessary.

7. A Review Committee will be set up at both Central and State levels.

a. The review committee must investigate whether each order passed under Section 5(2) was relevant, and passed in accordance with the terms of Section 5(2) within 2 months of the order.

b. If the committee finds that an order was passed in violation of Section 5(2), the order will be set aside, and intercepted material must be destroyed.

The Supreme Court did not however impose procedural requirements, i.e. there is no requirement for a search warrant or prior judicial scrutiny to intercept / obtain intercepted material.[68]

The guidelines provided by the Supreme Court were modified slightly, and codified by way of Rule 419-A of the Indian Telegraph Rules, 1951. In addition to the provisions and rules under the Telegraph Act, we also see that the Information Technology Act, 2000 ("IT Act") touches upon interception and monitoring of content.

Section 69 of the IT Act provides the central and state governments with the power to intercept, monitor or decrypt any information[69] generated,

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68 Chaitanya Ramachandran, *PUCL v. Union of India revisited: Why India's surveillance law must be redesigned for the digital age*, NUJS Law Review, 7 NUJS L. Rev.105 (2014), http://nujslawreview.org/2016/12/04/pucl-v-union-of-india-revisited-why-indias-surveillance-law-must-be-revised-for-the-digital-age/ (last visited Jul 23, 2018); Chinmayi Arun, *Paper-Thin Safeguards and Mass Surveillance in India*, 26 NLSI REV. 105 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2615958 (last visited Jul 23, 2018).

transmitted, received or stored in any computer resource.[70] The government may order interception, monitoring or decryption of information where necessary in the interests of the "*sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence*". This list of reasons is largely similar to that under Section 5(2) of the Telegraph Act, with the notable additions being the defence of India, and investigation of any offence.

The other notable difference between the provisions of the Telegraph Act and the IT Act, is that orders for interception, monitoring or decryption, under the IT Act, can be issued at any time subject to the list of acceptable reasons for such order discussed above. However, the Telegraph Act requires additional circumstances involving public emergency, or public safety to be present before such orders are issued.

Section 69B of the IT Act also empowers the government to authorise the monitoring and collection of traffic data or information generated, transmitted, received or stored in any computer resource. Such monitoring and / or collection maybe undertaken to enhance cyber security and for identification, analysis and prevention of intrusion or spread of

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69 Section 2(1)(v) - Definition of Information: "includes 12 [data, message, text], images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche."

70 Section 2(1)(k) - Computer resource is defined to include a 'computer, computer system, computer network, data, computer data base or software', most of which are defined terms under the IT Act.

computer contaminant in the country. Both, Sections 69 and 69B, as well as the rules[71] issued under these sections, provide procedural guidelines that need to be followed with regard to orders issued under these sections.

B. The Search and Seizure of Records and the Canara Bank Judgment

In *Canara Bank,*[72] the Supreme Court examined the validity of laws that permitted inspection and seizure of documents held by a third party public institution. Stamp laws in India typically require a duty to be paid on the execution of certain documents. The authorities under the local stamp law in the state of Andhra Pradesh were empowered to inspect documents held by public institutions, to examine whether the appropriate duty had been paid. In this case, the question was whether this power could be used to inspect and seize agreements / documents provided by individuals to public sector banks (to which the bank was not necessarily party); for instance, for the purpose of securing a loan.

In its judgment in *Canara Bank*, the Supreme Court discussed the right to privacy *vis-a-vis* search and seizure laws, the debate around the *third-party doctrine* in the US, and similar debates in other countries. It upheld the

71 Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules, 2009 and Information Technology (Procedure and Safeguards for Monitoring and Collecting Traffic Data or Information) Rules, 2009.

72 *Canara Bank*, *supra* note 13.

decision of the Andhra Pradesh High Court, which found that the provision in question was unconstitutional on the following grounds:

1. the provision was inconsistent with the other provisions of the State's stamp laws;

2. the provision was violative of the principles of natural justice;

3. the provision was arbitrary and unreasonable and hence violative of Article 14 of the Constitution; and

4. the provision was arbitrary, and unreasonable, and could be considered an excessive delegation of statutory powers, since it did not provide any guidelines for the exercise of power by authorized persons.

Below we look into the primary legislative provisions that govern search and seizure powers, and the Court' discussion on privacy in its judgment in *Canara Bank*.

C. Legal Provisions on Search and Seizure

The primary legislation dealing with search and seizure of documents in India is the Code of Criminal Procedure, 1973 ("CrPC"). The relevant provisions dealing with such powers, as discussed by the Supreme Court in *Canara Bank*, are described below.

Section 93 of the CrPC allows a court to issue a search warrant in specific circumstances, for instance where the court has issued a summons / requisitioned a document and believes that such an order will not be followed, or an inquiry / trial will be served by a general search or inspection. The court may specify the place (or part of the place) that needs to be searched or inspected under such a warrant.

Section 92 of the CrPC also allows District Magistrates and Courts to require a postal / telegraph authority to deliver any document, parcel or things within their custody, that the District Magistrate or Court deems necessary for any investigation, inquiry, trial or other proceeding.

Section 165 of the CrPC allows a police officer authorised to investigate an offence, to search a place within their jurisdictional limits, if the officer believes that "*anything necessary for the purposes of an investigation ... may be found in any place with the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay*". The officer may conduct such a search or authorise a subordinate to conduct the search after recording reasons for their belief, and specifying to the extent possible the thing that they are searching for, in writing.

The Court also noted that other laws such as the Income Tax Act, 1961 also contain provisions regarding the search and seizure of documents[73].

D. Privacy Jurisprudence in Canara Bank

Looking into international human rights law, US and other foreign jurisprudence, as well as precedents set by the Indian Supreme Court, the Court in *Canara Bank* traced the evolution of the right to privacy - beginning as a right to property, and eventually being recognised as a right in relation to a person.

For this purpose, the Court referred to SCOTUS judgments in *Warden v. Heyden*,[74] where it was "*recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property*". The Court also referred to *Katz*,[75] which reiterated that the Fourth Amendment protects people and not places.

Tracing the evolution of the right in India, the Supreme Court referred to its early cases, specifically to *Kharak Singh v. State of UP*,[76] noting that the right to privacy was held to be part of the right to life under Article 21 in this case. The Court also referred to *Govind v. State of MP*[77] ("*Govind*")

73 Section 132 and 133 of the Income Tax Act, 1961.
74 *Warden v. Heyden* (1967) 387 US 294 (304).
75 *Katz*, *supra* note 26.
76 *Kharak Singh v. State of UP*, 1964 (1) SCR 332.
77 *Govind v. State of M.P.*, [1975] 2 SCC 148.

which found that the right to privacy has been implied in Article 19(1)(a) and (d) and Article 21 of the Constitution.

Moving to the facts in question in *Canara Bank*, the Court noted that that in a situation where a bank holds documents of its customers, there is an element of confidentiality in the relationship between the bank and the customer. Here, the Court questioned the right of the State to inspect or seize such documents without any prior reliable information supporting the inspection.

In this context the Court specifically referred to the '*third-party doctrine*', and the principle of '*assumption of risk*' as laid out by SCOTUS in *Miller*. The Court noted however, that the decision in *Miller* was criticised by jurists, on the basis that this third-party doctrine was "*based on the old concept of treating the right of privacy as one attached to property whereas the Court had, in Katz accepted that the privacy right protected 'individuals and not places*".[78]

The Court also noted that the Right to Financial Privacy Act, 1978[79], was enacted post *Miller*. This law "*provided several safeguards to secure privacy, namely requiring reasonable cause and also enabling the customer to challenge the summons or warrant in a Court of law before it could be executed.*"

Reiterating that in *Govind*, and later cases, the Supreme Court has held that the right to privacy deals with persons and not places. The Court stated

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78 *Canara Bank*, *supra* note 13.

79 *Ibid. See also,* Right to Financial Privacy Act, 12 U.S.C. §§ 3401-342.

that "*we cannot accept the line of Miller in which the Court proceeded on the basis that the right to privacy is referable to the right of 'property' theory*". The Court found that the search of documents in the given circumstances could not be valid unless there was some probable or reasonable cause.

This judgment of a 2-judge bench in *Canara Bank* has been discussed in detail, and upheld (among several other judgments), by the 9-judge bench of the Supreme Court in *Puttaswamy*.[80] Discussing *Canara Bank*, the Court in *Puttaswamy* found that the decision in *Canara Bank* has important consequences for recognising informational privacy for the following reasons:[81]

> "*The significance of the judgment in Canara Bank lies first in its reaffirmation of the right to privacy as emanating from the liberties guaranteed by Article 19 and from the protection of life and personal liberty under Article 21 … Thirdly, the right to privacy is construed as a right which attaches to the person. The significance of this is that the right to privacy is not lost as a result of confidential documents or information being parted with by the customer to the custody of the bank ... Fourthly, the Court emphasised the need to read procedural safeguards to ensure that the power of search and seizure of the nature contemplated by Section 73 is not exercised arbitrarily. Fifthly, access to bank records to the Collector does not permit a delegation of those powers by the*

80 *Puttaswamy*, *supra* note 7.
81 *Puttaswamy*, Chandrachud. J., *supra* note 7, at para 65.

> *Collector to a private individual ... Sixthly, information provided by an individual to a third party (in that case a bank) carries with it a reasonable expectation that it will be utilised only for the purpose for which it is provided … Seventhly, while legitimate aims of the state, such as the protection of the revenue may intervene to permit a disclosure to the state, the state must take care to ensure that the information is not accessed by a private entity*".

IV. CONCLUDING OBSERVATIONS

The Indian Supreme Court's judgment in *Canara Bank* clearly states that the right to privacy under Indian law applies in relation to a person, and not in relation to property or a place. This position has been reiterated by the Court in *Puttaswamy*.[82]

The *Canara Bank* judgment is also clear that a US style third-party doctrine doesn't apply in India.[83] However, the right to privacy vis-a-vis the state's power to search, inspect or seize documents and collect information still needs to be examined on a case to case basis. In *Canara Bank*, the court addresses the need for procedural safeguards to the state's powers of search and seizure, both in its discussion of the criticisms of *Miller* and the *third-party doctrine*, as well as in the specific context of the impugned law in the case.

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82 *Ibid* at para 168.

83 *Canara Bank*, *supra* note 12.

Some of the older provisions permitting search and seizure of documents under the CrPC have been tested in court, and the scope and limitations of these provisions have been discussed in detail.[84] However, the various provisions and rules that do permit interception of communications and collection of information under the Telegraph Act and the IT Act have been criticized for their lack of adequate safeguards.[85] In the absence of proper safeguards, a *Carpenter* like scenario where the state is empowered to collect large amounts of information is entirely possible under existing laws in India.

At the time of writing this paper, we await the recommendations of the Committee of Experts set up to provide recommendations on a legal framework for data protection in India[86] ("Committee"). In November 2017, this Committee published a white paper outlining the various issues that the Committee found important to incorporate into the law, and solicited public comments on these issues.[87] This white paper notes that a comprehensive data protection law should be applicable to the collection and processing of data by both private actors and the State.[88] It then goes on to provide that

84 *Ibid.*

85 *Supra* note 68. See also Sunil Abraham, Elonnai Hickok; Government access to private-sector data in India, *International Data Privacy Law*, 2 (4), 302–315, (November 1, 2012), https://doi.org/10.1093/idpl/ips028 (last visited Jul 23, 2018).

86 Ministry of Electronics and Information Technology, *Office Memorandum No. 3(6)/2017-CLES*, http://meity.gov.in/writereaddata/files/MeitY_constitution_Expert_Committee_31.07.2017.pdf (last visited Jul 23, 2018).

87 Ministry of Electronics and Information Technology, *White Paper of the Committee of Experts on a Data Protection Framework for India,* (2017), http://meity.gov.in/white-paper-data-protection-framework-india-public-comments-invited (last visited Jul 23, 2018).

88 *Ibid* at 31.

exceptions should be made under this law, for the purpose of law enforcement and national security.[89] However, there is almost no discussion on the nature of the exception or the safeguards that should be put in place in this context.

Any conversation on the protection of personal information of individuals, should necessarily include the protection of such information against arbitrary collection and processing of data by the State - whether for law enforcement purposes or otherwise. Given the Committee's view that there is need for a comprehensive data protection law that applies horizontally across sectors,[90] it would be useful for this Committee to discuss collection and processing of data by the State in all contexts.

It could be argued that issues such as surveillance, law enforcement and national security are outside the purview of the Committee's mandate. However, we note that the Committee has not shied away from discussing these issues in the context of data localisation and cross border transfer of data - situations where the interests of the State may be affected.[91]

With 396 million mobile phone service accounts in the US,[92] SCOTUS has taken cognizance of the impact that phone-based location tracking could have on one's privacy, in an age where tracking a mobile

89 *Ibid* at 57.
90 *Ibid* at 31.
91 *Ibid* at 69.
92 *Carpenter*, Roberts. J., s*upra* note 1.

phone could lead to "*near perfect surveillance*."[93] India on the other hand has over a billion mobile phone accounts,[94] several surveillance regimes comparable to those in the US,[95] and limited (if any) safeguards protecting the rights of its citizens. If the fundamental right to privacy, as discussed in *Puttaswamy* is to be upheld in a meaningful manner, it is imperative that adequate safeguards that stand the tests of constitutionality are built into the way in which the State interacts with citizens' personal information.

[93] *Ibid* at 13.

[94] *Supra* note 2.

[95] Privacy International and Centre for Internet and Society, *State of Privacy in India (January 2018)*, https://privacyinternational.org/state-privacy/1002/state-privacy-india (last visited Jul 23, 2018).