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UNDERSTANDING THE JUDICIAL INTERPRETATION OF PUBLIC PURPOSE UNDER THE LAND ACQUISITION LAWS IN INDIA: A CASE OF ROBBING THE POOR TO FEED THE RICH*

Abstract

More often than not, land acquisition involves balancing the needs of the individual with those of the community. The justification for the acquisition on the basis of eminent domain runs on the utilitarian logic of greater good. The jurisprudence evolving globally on this subject has given birth to different minimum thresholds that the need to acquire must meet before it can be classified as being for the greater public good. However, time and again, the judiciary and the executive have seemingly allowed acquisition where the greater public good is not unquestionably served, to say the least. This paper analyses the land acquisition laws in India and undertakes a comparative analysis of the laws in the United States of America and the United Kingdom to present a comprehensive picture of the legal landscape of land acquisition.

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INTRODUCTION

In India, instead of being recognised as a fundamental right, the right to property is recognised as a human right and a constitutional right.[1] This right, according to the law, can be curtailed, abridged or modified by the state only by exercising its legislative power. The Constitution of India provides for the acquisition and requisitioning of property by State Governments and the Central Government.[3] Such powers are based on the concept of eminent domain, which vests in the state the authority to compulsorily acquire land for what are deemed to be public purposes.

The eminent domain concept empowers a sovereign to reassert its dominion over any portion of the soil of the state including private property without its owner's consent provided that such an assertion is on account of public exigency and for public good,[4] The principle behind this power of eminent domain is that property should be freely

[1] The 44th Amendment of the Constitution of India, 1978 (It repealed Article 31 of the Constitution and transferred the right to property from the category of Fundamental Rights to an ordinary constitutional right by enacting article 300A.); *Jilubhai Nanabhai Khachar v State of Gujarat,* **AIR** 1995 SC 142.

[2] Article 300A of the Constitution of India, 1949; See also *State of Mysore v K Chandrasekhara Adiga,* **AIR** 1976 SC 853.

Schedule VII, Entry 42, List III of the Constitution of India, 1949.

[A] *Jilubhai Nanbhai Khachar v State of Gujarat,* (1995) Supp. 1 SCC 5%.; *Dwarkadas Shrinivas v Sholapur Spg. and Wvg. Company* , AIR 1954 SC 119; *Chiranjit Lai Chowdhuri v Union of India,* **AIR** 1951 SC 41.

available for everyone and developed whenever the sum of the value to **all individuals** who would use it exceeds its development cost.[5] In India, **the power of eminent** domain is exercised since the colonial era under **The Land Acquisition** Act, 1894 ["LAA"].

Over the years, the Indian judiciary has abused the expression "public **purpose"** by **upholding** a generic interpretation, including any purpose in **which even a** fraction of the community may be interested or by which it **may be benefited.[6] The** authors of this essay will critically analyse the **judicial interpretation of the** public purpose doctrine and argue that land **acquisition for a public purpose** rarely involves any equitable benefit for **those parting with their land.** Further, the authors will also analyse the **"public use" and** "compelling case in public interest" doctrines of the **United States and** the United Kingdom, respectively. Finally, the authors **will discuss** the definition of "public purpose" as proposed under the **Land Acquisition and** Rehabilitation and Resettlement Bill.

JUDICIAL INTERPRETATION OF PUBLIC PURPOSE

§3(f) of **the LAA** defines "public purpose" using an illustrative, **non-exhaustive list.** As **there** is no fixed statutory definition for public

[5] **Shavell, Steven,** Ch **11** in *'Economic Analysis of Property Laitf,* Discussion paper no **599,** (2002). John M. Olin Center for Law, Economics, and Business, Harvard **Law School. * *Babu Barkya** *Tbakur v The State of Bombay & Ors,* AIR 1960 SC 1203.

purpose, the government enjoys the sole and absolute discretion in deciding what constitutes public purpose.[7] Thus, the government has flexible powers to acquire land for the advancement and protection of interests of the community as a whole.[8]

Further, in addition to the executive having unbridled powers to determine what constitutes public purpose, the judiciary has been given a very limited power of interference with such decisions.[9] Indian courts can review the decisions of the government only when there is a colourable exercise of power, in other words, if the purpose for which land is acquired is not a public but a private purpose, or no purpose at all.[10] When such exercise is deemed to have occurred, the same is open to challenge at the instance of the aggrieved party.[11]

[1]*Daulat Singh Surma v First hand Acquisition Collector,* AIR 2007 SC 47. [%]*Motibhai Vitbalbbai Patel & Anr. v State of Gujarat & Anr.,* AIR 1961 Guj 93 (Public purpose is not a constant. The scope of an expression which conjugates general interest of the public must necessarily depend inter alia on social and economic needs and broad interpretation of the democratic ideal. The application of the rule must rest on the modem economic system of a welfare state having its own requirements and problems.); Usha Ramanathan, *Displacement and the Law,* (1996) Economic and Political Weekly, Vol. 31, No. 24, 1486.

[9] *Daulat Singh Surana v First Land Acquisition Collector,* AIR 2007 SC *41\Bajirao T. Kote (dead) by LRs. & Anr. v State of Maharashtra & Ors.*,(1995) 2 SCC 442. (The SC held that it is primarily for the State Government to decide whether there exists a public purpose or not, and it is not for courts to evaluate the evidence and come to its own conclusion whether or not there,is public purpose). ^*Arnold Rodricks and Anr v State Of Maharashtra and Ors.,* [1966] 3 SCR. 885. [1]*Smt. Somavanti and Ors. v The State of Punjab and Ors.,* AIR 1963 SC 151.

The courts, while exercising the aforementioned power, have played an active role in deciding the scope and ambit of "public purpose" under the LAA. In 1955, the Supreme Court of India (SC), in *State of Bihar v Maharajadhiraja Sir Kameshivar Singh of Darbhanga <& Others,*[i2] *6bserved* that the phrase "public purpose" has to be construed **according** to the spirit of the times in which the particular legislation is **enacted.** The SC held that anything in furtherance of the general interests of the community as opposed to the particular interest of the individual must **be** regarded as **a** public purpose.[13]

Furthermore, **a** seven judge bench of the SC in State of *Karnataka & Anr. v Shri Ranganatha Reddy & Anr.,*[H] fine-tuned the scope and **interpretation** of public purpose under the LAA and held that "if the purpose is **for** servicing the public, then everything desiderated for serving such **a** public purpose falls under the broad and expanding rubric of public purpose. The nexus between the taking of property and the **public purpose,** springs necessarily into existence if the former is capable of **answering** the latter. On the other hand, if the purpose is a private or non-public one, the mere fact that die hand that acquires or requires is

[n] *State of Bihar v Maharajadhiraja Sir Kameshwar Singh of Darbhanga <& Ors.,* [1952] 1 **SCR 889.**

»**Id.**

[u] ***StaU*** *of Karnataka &Anr. v Shri Ranganatha Reddy &Anr,* AIR 1977 SC 215.

government or a public corporation, does **not make the purpose** automatically a public purpose".[15]

Therefore, if the government **exercises its power outside the** ambit of the power conferred upon it **by the** LAA, **then the same can be** nullified by the courts.[16] **Thus, the courts have been vested with the** sacrosanct role of ensuring **that the power of acquisition is not abused by** the government.

Contrary to.the position **and powers enjoyed by the government,** landowners parting with their **land are left in a debilitated state. By** displaying an apathetic attitude, the **Judiciary has played a significant role** in executing the LAA. without a care **for the effects of land acquisition on** small and medium landholders, **and on agricultural labourers.[17] This is** mainly because the **courts are* inclined towards a pro-development** philosophy that channels the **resources only in the way of development,** which is interpreted solely as **large scale industrialization.[18] There is also** this false and **unsubstantiated presumption that with massive**

[15] Id.

[16] Id.

[17] Colin Gonsalves, *Judicial Failure on Land Acquisition for Corporations*, Vol. 65, No 32, 37, Economic & Political Weekly, (2010).

[18] Mihir Desai, *Land Acquisition Law and the Proposed Changes*, Vol XLVI Nos 26 & 27, 95, Economic & Political Weekly, (2011).

industrialisation, a large number of jobs will be created, whichwill absorb those who have lost their lands.[19]

With the balance in favour of industrialization, any checks for colourable exercise of power have been diluted by the courts with their unrestrained interpretation. The courts have now virtually held that as long as some manufacturing, service or business activity is carried out on the acquired property, it will be held to be acquired for public purpose because some employment is. being generated.[20] For. example, the SC held that an acquisition of land for setting up of a factory for the manufacture of chinaware and porcelain to be a pubHc purpose.[21] Therefore, any action against *malafide* or colourable exercise of powers has become redundant as every activity is linked directly or indirectly to public exigency and public interest.[22]

Judicial interpretation has also expanded the scope of acquisition by implementing deceptive "integrated complimentary schemes". For

[19] Id. ... , '

[20] *State ofKarnataka &Anr. v Sbri Ranganatha Reddy &Anr*$_y$ AIR 1977 SC 215. *njage Ram & Ors. v State ofHaryana & Ors.,* AIR 1971 SC 1033.

[22] This attitude of the courts to indirecdy link every purpose to be a public purpose is not seen in all cases. There have been certain instances where the courts have stepped in and prevented *malafide* exercise of powers. For example, in *Royal Orchid Hotels Limited & Anr. v G. Jqyarama Reddy & Ors.,* 2011 (9) ADJ 505, the State acquired land for a golf cum hotel resort claiming it to be a public purpose. The SC held that such acts amount to diversification of public purpose; and that public purpose cannot be over-stretched to legitimize a patendy illegal and fraudulent exercise undertaken.

example, in *State of Kamataka & Anr v All India Manufacturers?* the government while implementing a highway project, acquired land far away from the highway for the purpose of industrial development. The same was challenged as, owing to the distance, it could not have been required for the public purpose, in other words, construction of the highway. However, the SC upheld the acquisition, stating that me project was an integrated infrastructure development project and not merely a highway project.[24]

Further, in *Sooraram Pratap Reddy & Ors. v District Collector, Ranga Reddy Distt. & Ors.?* the SC upheld large acquisitions of land for an integrated project to develop a major business-cum-leisure tourism infrastructure centre for the state. The court held mat a holistic approach has to be adopted in such matters. It interpreted public purpose to include any public benefit and stated mat if the project, taken as a whole, is an attempt in the direction of bringing foreign exchange, generating employment opportunities and securing economic benefits to the state and the public at large, it will fall within the ambit of public purpose.[26]

[23] AIR 2006 SC 1846. [2]<
Id.
2* (2008) 9 SCC 552. "[26]
Id.

In *Nand Kishore Gupta & Ors. v State of U.P.,*[V] the government while constructing an expressway for public purpose, acquired an additional twenty five million square metres of land for the creation of zones for industry, residence and amusement parks around the expressway..An incongruous line of reasoning was adopted by the SC to uphold this unreasonable acquisition to be complimentary to the creation of the expressway. The SC held that die creation of the land parcels would give impetus to the industrial development of the state by creating more jobs, helping *the* economy and diereby helping the general public in an industrially backward area.[28] Thus, the SC held that for an integrated project, the acquisition and transfer of lands far away from the main public purpose project is justified.[29]

Additionally, under such integrated schemes, various acquisition proposals in different parts of the country have been found-to vary to the extent of 1000 percent more than what is needed.[30] For example, the Orissa Government acquired 350 acres of land for a sugar plant that only required thirty five acres.[31] Also, many state industrial development

" AIR 2010 SC 3654.
[28] Id.
[29] Id.
[30] Mohammed Asif, *Land Acquisition Act: Need for an AlternativeParadigm,Vol.* 34, No. 25 1564 Economic and Political Weekly (1999).
[31] Id.

bodies acquire land, set up an industrial estate and only then proceed to search for entrepreneurs interested to use the facilities.[32] The court has upheld such an act stating that acquisition generally precedes development and therefore, no justification for the amount of land needed is requiredi[33] Because of such acquisitions without any plan or need, prime agricultural land remains vacant for many years.

For instance, in *Aflatoon & On. » Lieutenant Governor of Delhi &* Ox,[34] land was sought to be acquired for development befote the Master Plan or the Zonal Plan was ready and the SC allowed the same.

Another duty entrusted to the courts was to ensure tfiat the provisions of me LAA are not misused by the State or the local authority with the intent of making a profit[35] For instance, a government can acquire land under the LAA for planned development and subsequently dispose of the same in whole or in part by lease, assignment or outright sale, with the object of securing further development as planned.[36]

[32] Id.
[33] AIR 1974 SC 2077.
[34] [1975)1 SCR 802.
[15] Id.
[%] §3(f)(iii) LAA reads "the provision of land for planned development from public funds in pursuance of "any scheme or poKcy of Government and subsequent disposal thereof in whole or in part by lease, assignment or outt^it sale with the object of securing further development as planned".

Hie phrase "object of securing further development" is" a very vague expression and has not been defined by the LAA. The expression "further development" has also not been defined.[37] Despite the ambiguity, the courts have not played an active role in preventing, the misuse of such omissions. This provision, whereby land can be acquired by a government and resold to private agencies has been abused as the courts have allowed such acquisitions even when then: is no plan for development in the first place. For example,, in *Bharat Singh v State of Haryana,*™ the land was acquired at a nominal price of rupees ten, twenty or fifty per square yard and resold at a high profit.

Thus, it is clear that the courts have heavily favoured industrialization at the cost of community ties, livelihood and housing if the same is for industrial development, even when profit-making private industries are involved. Essentially, the courts, through judicial interpretation, have watered down the provisions of the LAA-by reading the provisions incorporated for public purpose only through a narrow prism of industrial development

^*Kamshwar Prasad v State of Bihar*, 196? SCR SupL (3) 369.
[3]» AIR 1988 SC 2181.

THE JUDICIARY'S STANCE ON ACQUISITION OF LAND BY COMPANIES

Apart from the judicial construction of public purpose, the courts in India have also ruled on acquisition of land by companies. The LAA has substantive provisions for acquisition of land by companies.[39] Part VII of tiie LAA lays down the procedure to be adopted when land is sought to be acquired for companies. The LAA allows companies to acquire land for the erection of dwelling houses for workmen employed by the company or for the provision of amenities'.'directly connected therewith, or that such acquisition is needed for the construction of some work which is likely to prove useful to the public.[40] This provision of the LAA was not to be used for the acquisition of land for any company in which the public has merely an indirect interest.[41] For example, Part VII 'was not to be invoked for a spinning or weaving company or an iron foundry, as the public will not have any direct interest or benefit arising out of die same.[42]

[39] Part II and Part VII of the LAA (Part II relates to public purpose acquisition and Part VII relates to acquisition of land for private companies).
*§40 of the LAA.
[41]The second Select Committee Report, 1 Bombay Government Gazette Part VI, January 24,1894. ("Committee Report").
[42] Proceedings of the Council of the Governor General of India: Gazette of India Part VI, 12/03/1892, 28.

Despite such clarifications against indirect interests given in the Committee Report, the courts in India have allowed indirect and expansive interpretation of the powers. This has resulted in die exploitation of the poor. For example, in *Babu Barkya Thakur v The State of Bombay &* 0/x,[43] the acquisition of land by a company whose chief products included the production of steel bars and rods was deemed to be "likely to be useful to die public". The SC upheld the acquisition and indirectly held that such production constitutes public purpose as the products of the company are consumed directly in bulk for public utility projects like dams, hydroelectric projects, roads, railways, industrial plants and housing projects, both in the public and private sectors.

Further, akhough §40(l)(a) of the LAA states that companies can acquire land for erection of dwelling houses for workmen, die SG has allowed acquisition of land for welfare schemes for such workmen, including land for parks,'gardens, playgrounds, medical relief centre, etc.[44] Sadly, this approach of the Indian courts has legitimised baseless acquisitions for temporary housing facilities for workmen at the cost of permanent loss of livelihood and shelter of the landowners.

« AIR 1960 SC 1203.
"Id.

Furthermore, in addition to having allowed indirect expansion of Part VII of the LAA, the courts have also interpreted the provisions of the LAA in a manner wherein the requirements of Part VII can be circumvented by a company.[45]

Prior to the 1984 Amendment, the SC held that the provisions of Part VII can be circumvented when the cost of acquisition for a public purpose is borne, wholly or in part, out of public funds.[46] Further, die SC held that the word 'part' does not mean a substantial part but also includes nominal contributions. For example, in *Snit Somavanti & Ort; v The State 6f"Punjab & On.?*[1] it was held that even a nominal contribution of Rs.100 by the government would convert an acquisition by a company into a public purpose acquisition under Part II. Further, die SC, in *Manubhai Jehtalal Patel v State of Gujarat?** appallingly held that, a contribution of one rupee from the public exchequer would .also validate the acquisition by a company to. be a public,purpose acquisition,. . ,,.

[45] On a perusal of the procedure and manner of acquisition, the procedures for public purpose and for companies have been delineated^by die statute. Further, upon a general reading of the preamble and the provisions of §5A, §6 and §7, the LAA makes a clear distinction between acquisition of land needed for a public purpose and that for a company. Moreover, there is no express or implied provision in the LAA which allows for circumvention of the procedure laid down in Part VII by companies.

"Pandit jhandu Lal& On. v The State of Punjab &Anr., AIR 1961 SC 343,
"Smt. Somavanti & On. v The State If Punjab 6" On., AIR 1963 SC 151. «
AIR 1984 SC 120.

To prevent this circumvention by nominal contributions, the LAA was amended in 1984 and an exclusionary clause was introduced to the expression "public purpose" in §3(f) which clearly states that the expression "public purpose" does not include acquisition of land for-companies. Post this Amendment, a company could acquire land only for limited purposes as provided in Part VII of the LAA, contrary to the expansive scope it had earlier as per §3(f) of the LAA.

However, despite the legislature making this abundandy clear with the insertion of the 1984 Amendment, the SC has continued to ignore the same. For. instance, in *Pratibba Nema v Stale of MP,*[49] land was acquired under Part II of the LAA for the establishment of a diamond park consisting of cutting and polishing units. The SC upheld the acquisition by a private company and observed that "by contributing even a trifling sum, the character and pattern of acquisition could be changed by the Government. In the ultimate analysis, what is considered to be an acquisition for facilitating the setting up of an industry in private sector could get imbued with the character of public purpose acquisition, if only the Government comes forward to sanction the payment of a nominal sum towards the compensation".[50]

* (2M3) 10 SCC 626.
*1A

This disregard of the intent of the 1984 Amendment indicates how powerful the urge was among industrialists to grab the farmers' lands.[31] It also reflects the attitude of the courts in India who, at the cost of thousands of communities, iniquitously held that the industrialization of any area is in the public interest.[32]

In view of the above, it is submitted that, in India, the public purpose doctrine in the name of industrial growth and development has been expanded beyond its natural scope.

A COMPARATIVE ANALYSIS WITH THE AMERICAN AND BRITISH LAND ACQUISITION SYSTEMS

UNITED STATES OF AMERICA

The law of eminent domain in the United States of America is regulated by the Fifth,[33] and the Fourteenth Amendments to the

^*State qfKarnahtka <& Anr. v Shri Ranganatha Reddy &Anr*, AIR 1977 SC 215. ,
[S2]*Jage Ram v State ofHaiyana,* (1971) 1 SCC 671. [53] The Fifth Amendment reads "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be ' ^ compelled in any criminal case to be a witness against himself, nor be deprived pf life, liberty, or property, without due process of law; nor shall private ■ property be taken for public use, without just compensation".

Constitution.[54] The Fifth Amendment states that no person shall be deprived of his property without due process of law or that no property shall be taken for public use without just compensation. The Fourteenth Amendment provides that no State shall deprive any person of property without due process of law.

Notably, no specific provision for the power of eminent domain appears in the federal Constitution. However, it has been held by the US Supreme Court that the power of eminent domain is incidental to federal sovereignty and an "offspring of political necessity".[5'] Similar to the Indian concept of "public purpose", the Fifth Amendment requires that the "taking" of any property should meet the minimum threshold of "public use". The earliest interpretation of the public use test was that a taking was legal when it was for "the public good, the public necessity or the public utility".[56]

>*§1 of the Fourteenth Amendment reads "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

'^United States v Gettysburg Electric Railway Company, 160 U.S. 668 (1896); *Bauman v Ross,* 167 U.S. 548 (1897), as cited in John E. Nowak and Ronald D. Rotunda, *Constitutional Law* at 437 (West 5th ed 1995).

^John E. Nowak and Ronald D. Rotunda, "The 'Public Use' Limitation" in *Constitutional Law* at 464 (West 5th ed 1995).

However, this extremely broad approach was later discarded in the nineteenth century so that courts could exercise a greater degree of control over the use or abuse of eminent domain by private parties to whom power had been delegated by the government.[57] The various state courts developed and started following the "use by the public" test.[58] Under this test, the only point that the court considered when questioning the validity of a taking was whether the public had a right to use or enjoy the property taken. However, this test was not in existence for long and the courts returned to a broader interpretation of the public use doctrine.[59]

The leading modern case regarding the interpretation of public use was the decision in *Herman v Parker,*[w)] which involved the constitutionality of the District of Columbia Redevelopment Act, 1945. Under the Act, Congress declared it the policy of the United States to eliminate all substandard housing in the District of Columbia because these houses were "injurious to public health, safety, morals, and

[57]Id.
[58]Id.
[59]M/. *Vernon Woodbeny Cotton Duck Co. v Alabama Interstate Power Corporation,* 240 U.S. 30 (1916).
'•"348 U.S. 26 (1954).

welfare".[61] The property would be acquired by the government and then turned over to a private party for redevelopment.[62] The challenge was based on the ground that since private developers were gaining from the taking, it would not qualify as public use.

The Court rejected the claims of the appellant and held that "it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled".[63] The Court further held that once the legislature has declared a condemnation to be for public use, the role of the courts is an extremely narrow one.[64] This approach significandy widened the public use doctrine and it has made it very easy for the minimum threshold to be met. However, the Court did not delve into this aspect in detail, and merely observed that it was not up to the couns to reappraise the judgment of the legislature. As long as the taking is for health, safety and welfare of the citizens, the government may take away land, provided just compensation is paid.[61]

*[!] District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D. C. Code, 5§ 5-701-5-719 (1951).

^Id.

**bamm v Parker,* 348 U.S. 26 (1954) at 33.

**See note 56.

<**Bem*» i, ParJker,* 348 U.S. 26 (1954) at 33.

This decision was followed up by *Hawaii Housing Authority v Midkiff*, where it was held that any taking was legal as long as it was "rationally related to a conceivable public purpose"."

The next major decision would widen the field even further. *Kelo v City of New London,*[67] was a challenge against the condemnation of property, including homes, by the City of New London so that it may be used as part of a "comprehensive redevelopment plan". The city claimed that this development would create jobs and stimulate the economy, thereby creating more tax revenue.

The US Supreme Court ruled by a five-four margin in favour of New London and held that if a legislative body has found that an economic project will create new jobs, increase tax, and revitalise a depressed urban area, such a taking was within the ambit of the First and Fifth Amendments/'[8] The Court also rejected a literal interpretation of the public use test.[69] The Court observed that it would no longer merely

"467 U.S. 229 (1984).
[67]545 U.S. 469 (2005).
[68]See Justice Stevens' majority opinion in *Kelo*, 467 U.S. 229 (1984).
[69]Of particular note is the Court's use of the phraseology "public purpose" interchangeably with "public use", thereby widening even further the interpretation of the Takings clause. Justice Thomas referred to this in his dissenting judgment, writing "This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue,

check whether there has been a "use by the public" *per se* and would embrace a "broader and more natural interpretation".[7]" The court reiterated the "rationally related to a conceivable public purpose" criteria that was laid down in *Midkiff.*[n] Finally, the Court was of the opinion that in such matters, there was always "deference to legislative judgments in this field".[72]

The decision in *Kelo,'* has been vigorously criticised by some authors,[4] for widening the scope of takings under the First Amendment beyond the natural meaning of public use. The result is that even private homes may be condemned by the government and turned over to private parties for development if such development produces tax revenue. °

but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use"'. "" See note 68.

"■Hawaii Homing Authority v Midkiff 467 U.S. 229 (1984).

~[2]Id.

"Kelo v City of New London, 545 U.S. 469 (2005).

~[4].\. Bell and C. Parchomovsky, *The Uselessness of Public Use,* 106 Colum L Rev 1412 (2006); E. R. Claeys, *Don't Waste a Teaching Moment: Kelo, Urban Renewal, and Blight*, 15 Journal of Affordable Housing & Community Development Law 14 .2005).

"Perhaps the irony of the *Kelo* decision is that some states such as Arizona, California, Florida, Michigan, Minnesota, Mississippi, Nevada, New Hampshire and Wisconsin have passed laws to negate the decision and to restrict takings by the government to transfer property to private developers. For instance, United States of America, Minnesota Statute 117.025, 2012 goes so far as to say that "The public benefits of economic development, including an increase in tax

However, it can be argued that such wide powers to take property jre tempered to a small extent by the system of compensation. . For instance, the American system considers the "highest and best use" of the land, which is determined by the value of the property in light of its present arid potential uses that, can be anticipated by reasonable certainty.[76]

Additionally, the courts have also recognised the concept of "takings by regulation" wherein certain regulations by the government on property is considered as a taking.[77] A regulation is deemed to be a regulatory taking when the government imposes limitations on a property such that those limitations amount to use of the government's eminent domain powers even without divesting the owner of the tide.[78] Over the years, a wide range of things such as restrictions on mining,[79]permanent physical presence of cable lines on a residential building,[80] and eliminating

base, tax revenues, employment, or^eneral economic health, do not by themselves constitute a public use or public purpose".

[76] *Super-Power Co. v'Sommers,* 352 111. 610 (1933).

[77] *Euclid v Ambler Realty Co.,* 272 U.S. 365 (1926).

[78] Id.

[79] *Pennsylvania Coal v Mahon,* 260 U.S. 393 (1922). However, the later decision in *Keystone Bituminous Coal Association v DeBenedictis,* 480 U.S. 470 (1987), has reduced the legal strength of *Pennsylvania Coalby* holding that regulations that were imposed for the protection of public interest in health, the environment, and the fiscal integrity of the area did not constitute regulatory takings.

[80] *~Loretto v Teleprompter Manhattan CATV Corporation,* 458 U.S. 419 (1982).

or reducing the value of the land,[81] have been held to constitute takings by regulation.

UNITED KINGDOM

In the United Kingdom, the power of eminent domain is expressed, through Compulsory Purchase Orders ("CPO"].[82] These orders are issued by the appropriate government department as determined by the Parliament, and allow that department to acquire any private property. The legal regime surrounding CPOs is very complex, with a plethora of legislations that specify multiple rights and duties. There is no single legislation that oversees land acquisition in every case. Instead, municipal and other governmental bodies are given powers under the legislations that enable them to compulsorily acquire land.[83] When a particular government body decides to acquire property, it draws up a CPO under the seal after approval by the local council by

"Lucas v South Carolina Coastal Council, 505 U.S. 1003 (1992).

[82] United Kingdom, Office of the Deputy Prime Minister, 2006, Compulsory Purchase and Crichel Down Rules, ODPM Circular 06/2004.

^Valuation Office Agency, *The hand Compensation Manual,* online at http://www.voa.gov.uk/corporate /Publications/Manuals/LandCompensationManual/sectl /26f-lc-man-sl -pnl - 1 .html#P75_947 (visited January 30, 2013).

resolution. [4] This Order must also be approved by the appropriate Secretary of State or Minister.[85]

§226 of the Town and Country Planning Act, 1990, for instance, specifies the grounds under which a CPO can be made under it.[86] However, all compulsory purchases have to meet the minimum requirement of a "compelling case in the public interest" before it can be carried out.[87] The acquiring authority is also required to show that the purposes for which it is making a CPO sufficiently justifies interfering with the human rights of those with an interest in the land affected.[88]

The authority is further required to carry out the acquisition only after due regard is given to the provisions of Article 1 of the First

[84]Id. "Hd.

[H6] The section reads, "(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, (b) is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.
(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects (a) the promotion or improvement of the economic well-being of their area; (b) the promotion or improvement of the social well-being of their area; (c) the promotion or improvement of the environmental well-being of their area".

[S7]See note 80. "[8]ld.

Protocol to the European Convention on Human Rights and, in the case of a dwelling, Article 8 of the Convention.[89] Article 1 of the First Protocol states that every person is entitled to "the peaceful enjoyment of his possessions" and that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".[911] Article 8 of the Convention states that every person "has the right to respect for his private and family life, his home and his correspondence" and that "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[91]

Additionally, "if an acquiring authority does not have a clear idea of how it intends to use the land which it is proposing to acquire, and cannot show that all the necessary resources are likely to be available to

[OT]ld.

*" Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 1,* Paris, 20.III.1952.

[91]Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

achieve that end within a reasonable time-scale, it will be difficult to show conclusively that the compulsory acquisition of the land included in the order is justified in the public interest".[92] Land would only be taken compulsorily where there is clear evidence that the public benefit will outweigh the private loss.[93] Finally, the acquiring authority must be able to demonstrate that the land is required immediately in order to secure the purpose' for which it is to be acquired.[94]

There is very litde judicial explanation as to how the term "compelling case in public interest" is to be interpreted.[95] In most cases, the court seems to uphold the acquisition as long as there is a finding by the appropriate body that there is indeed a compelling case and that the other statutory requirements have been met.[9ı1] Further, there is no requirement that the authority must set out in a formulaic way as to whether there was a compelling case in public interest.[97] Recently, the courts have added a further requirement of the CPO being "reasonably

[92]Id.

'»Id.

**Id.

*'*The Alliance Spring Co Ltd <& Others v The First Secretary of State,* [2005] EWHC 18 (Admin); *Walker v Secretary of State for Communities and Local Government,* [2008] EWHC 62 (QB); *Bexley LBC v Secretary of State for the Environment, Transport and the Regions,* [2001] EWHC Admin 323; R. *(on the application of Hall) v First Secretary of State,* [2007] EWCA Civ 612.

[%]See note 93.

[91] *Bexley LBC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323.

necessary, but not obligatorily the least intrusive of [European] Convention rights".[91]*

Whereas the "compelling case" test is vague and undefined and leaves a broader scope for land acquisition, UK attempts to counter the effects of the same by having instituted a very mature and liberal system of compensation. In addition to the market value, disturbance claims such as removal costs, costs of acquiring and adapting relocation premises, arrangement fee if mortgages have to be transferred, temporary and permanent loss of profit and up to ten percent of the land value as intangible losses is paid to any person whose land is compulsorily acquired."

Both the United States and the United Kingdom follow a much broader definition for the terms "public use" and "compelling case" which is no worse than what is followed when interpreting "public purpose" in India. However, it is tempered to a great extent by the regulatory taking aspect in the US and the liberal compensation system of both the countries. The latter is an aspect, that can be imported from these foreign jurisdictions to mitigate the effects of the wide

"•R *(on the application of Clays Lane Housing Cooperative Ltd) v Housing Corp,* [2004] EWCA Civ 1658; *Smith v Secretary of State for Trade and Industry,* [2007] EWHC 1013 (Admin). "See note 83.

interpretation in India. This is especially pertinent considering the fact that India is a welfare state. The Land Acquisition, Rehabilitation and Resettlement Bill, 2011 seeks to redress some of these shortfalls by introducing comprehensive rehabilitation and resettlement procedures.

THE MEANING OF "PUBLIC PURPOSE" UNDER THE LAND ACQUISITION, REHABILITATION AND RESETTLEMENT BILL, 2011

GENERAL PROVISIONS

The new Land Acquisition, Rehabilitation and Resetdement Bill, as introduced in the Parliament, attempts to significantly alter the Indian land acquisition regime.'"[0] For the first time, the law provides mechanisms for rehabilitation and resettlement where land acquisition has taken place. The process for land acquisition also involves a Social Impact Assessment survey, a preliminary notification stating the purpose for acquisition, and compensation that should be mandatorily paid within a certain time.[101] Notably, the Bill also changes the definition of public purpose.

T°°The Land Acquisition, Rehabilitation and Resettlement Bill, Bill No. 77 of 2011.

""Id, Chapter II.

Under the Bill, public purpose is defined as including, but not necessarily limited to, (i) the provision of land for strategic purposes relating to naval, military, air force, and armed forces of the Union or any work vital to national security or defence of India or State police, safety of the people, (ii) the provision of land for railways, highways, ports, power and irrigation purposes for use by Government and public sector companies or corporations, (iii) the provision of land for project affected people, (iv) the provision of land for planned development or the improvement of village sites or any site in the urban area or provision of land for residential purposes for the weaker sections in rural and urban areas or the provision of land for Government administered educational, agricultural, health and research schemes or institutions, (v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by the government, any local authority or a corporation owned or controlled by the State, (vi) the provision of land in the public interest for, either (a) use by the government for purposes other than those specified above, where the benefits largely accrue to the general public; or (b) Public Private Partnership projects for the production of public goods or" the provision of public services, and finally for (vii) the provision of land in

the public interest for private companies for the production of goods for public or provision of public services.[102]

However, in the case of instances that fall under (vi) and (vii) above, the consent of at least 80% of the people affected by the proposed project should be obtained through a prior informed process to be prescribed by the appropriate government.[103]

Further, where a private company, after having purchased part of the land needed for a project for public purpose, seeks the intervention of the government to acquire the balance of the land, it will be bound by rehabilitation and resetdement provisions for the land already acquired through private negotiations and it will further have to comply with all provisions for the remaining area sought to be acquired as well.[104] The Bill permits no change from the purpose or related purpose for which the land was originally acquired,[105] and also does not permit any change in the ownership of the land without. specific permissions from the government.[106] Moreover, in cases where the rehabilitation and

[102]ld, Clause 3(za).
[1(13]ld, Clause 8(4). [104]Id,
Clause 2(1). ,[05]Id,
Clause .93.

resettlement package has not been complied with in full, no change in the use of the land is permitted at all.[107]

Additionally, when land of hundred acres or more of is proposed to be acquired, the government has a duty to constitute a committee to examine the same.[108] The committee is expected to guarantee that "there is a legitimate and *bona fide* public purpose for the proposed acquisition" **and** that "only the minimum area of land required for the project is proposed to be acquired".[109] The said committee is also to ensure "minimum displacement of people, minimum disturbance to the infrastructure, ecology and minimum adverse impact on the individual affected".[11]"

It is evident that the Bill has retained most of the old grounds for **the** acquisition such as national security and infrastructure projects. It has also added a provision for acquisition to facilitate projects involving Public Private Partnerships. Therefore, the new Bill envisages a greater amount of private participation in infrastructural development projects. Any acquisition for private parties must be solely for the "production of goods for public or provision of public services."

"Id, Clause 42(4).
^Id, Clause 8. «"Id.
■**"Id.**

FLAWS IN'THE **BILL**

The Bill is not without flaws. For one, it does not seek override any of the other specialised land acquisition laws administers by the different governmental agencies.[111] Hence, there is no clarity c whether these separate governmental bodies are bound to follow tl definition of public purpose under the Bill when acquiring land under tl other legislations.

Further, the eighty percent consent requirement is limited only cases where the land is acquired for private parties or for Public Priva Partnership Projects, and not when land is acquired directly by tl government. There has also been a concerted effort within tl Parliament on behalf of certain industrial concerns to reduce the consei requirement from eighty percent to sixty six percent, but such movi have so far been resisted.[112] Furthermore, there is no mechanism c guideline provided within the Bill to ensure that the consent of tl persons affected by the proposed project is free and without ar coercion.

[H1]F. A. S. Sharma, *Sops for the Poor and a Bonus for Industry,* Vol. XLVI No. 4 Economic and Political Weekly, 32.

[112]A. Dutta, *l^and Acquisition Bill: Consent clause back to 80%,* The Hindu Busine Line (November 19, 2012).

Anodier flaw is that the Bill does not provide any mechanism to check or prevent acquisition through companies that may be proxies of the actual acquirer. Not preventing such acquisitions would mean that the provisions of the Bill can be circumvented by one entity by purchasing small pieces of adjoining land while posing as separate buyers.

Equally problematic are the uses of the phrases "where the benefits largely accrue to the general public" and "production of public goods or the provision of public services" in clause 3(za)(vi). Just like under the LAA, the onus of the interpretation of these terms has been left completely in the hands of the judiciary and it is easy to see from cases that have already been discussed in this paper that this may not yield the intended results. It is possible that numerous courts in the country will give these phrases a wider import than what is intended by the Parliament. It is vital that the judiciary interprets this phrase in a limited way so as to not negate the positive aspects of the proposed law.

Although detailed definition clauses and other devices may help to restrict judicial creativity, it ultimately falls to the courts to exercise restraint in the matter. Considering the *Kelo* decision in the United States, it is also not entirely inconceivable that the Indian courts will allow the government's claim of the need to increase tax revenue being in public interest and therefore acquire land for that purpose. In any case, the use

of the phrase "benefits largely accrue to the public" and "production of public goods or the provision of public services" leaves us in the same hole as before with regard to the scope and ambit of public purpose. The importance of judicial restraint in not expanding the scope of the Act beyond what was intended by the Parliament cannot be stressed enough.

On the whole, the definition of public purpose has not been fundamentally altered by the Bill. It has undoubtedly widened the scope of public purpose under the land acquisition regime by explicitly allowing acquisition for private parties. However, important procedural safeguards such as the consent requirement, the Social Impact Assessment and the mandatory rehabilitation and resetdement package make it a significant improvement on the current system. It can only be hoped that the courts will ensure that the positives of the Bill are not diluted.

CONCLUSION

From the numerous cases that have been analyzed in this paper, it is clear that the Indian courts have traditionally allowed the government to give the phrase "public purpose" as wide an interpretation as possible, sometimes including strictly private and profit making activities within'the ambit of the same. Moreover, there has never been a conscious attempt on the part of the courts to limit the sphere of what constitutes public purpose and more often than not, any form of

industrialization, irrespective of the cost has been seen to be for public good.

Even in other jurisdictions such as the United States, the courts have given the broadest possible interpretation for the term "public use". In the United Kingdom, the courts are generally reluctant to interfere in land acquisitions as long as the appropriate authority has found that there is a compelling case for the CPO. However, these jurisdictions seek to temper such wide powers by having mature systems of compensation. **The** Indian land acquisition system has paid only minimal attention to compensating and rehabilitating the owners of compulsorily acquired **land.** The Land Acquisition, Rehabilitation and Resetdement Bill seeks to address this by bringing in a greater amount of democratic participation **as** well as by ensuring rehabilitation and resettlement for the ousted.

However, by using ambiguous phrases such as "benefits largely accrue to **the** public" and "production of public goods or the provision of public services", the legislature has once again presented a double-edged sword, **and** it falls to the judiciary to decide as to how it will be used. Thus, the **onus** is on the courts to make sure that these phrases are interpreted in a restrictive way so as to ensure that the positive aspects of the legislation **are** not negated.

PROBING POSTPONEMENT ORDERS: JUDICIARY'S LATEST ATTEMPT TO SQUARE THE CIRCLE IN THE MEDIA VERSUS THE FAIR TRIAL DEBATE*

Abstract

The relationship between the "a .< id the judiciary is a complex one, sometimes operating in unison, while at times being completely at loggerheads, vying against one another in terms of meeting public expectations. Trial by media has always earned the ire of the judiciary worldwide for being intrusive in the course of delivering justice. This paper canvasses the judicial measures that have been devised in USA, UK, EU and Canada to counter this vice. Treading on these footsteps, the Indian approach has also permitted issuance of prior restraint orders, pre-censorship orders and postponement orders in the recent landmark judgment of Sahara India Real Estate Corporation htd. v SEBI, which certainly merits an academic comment. Being. a fetter on the crucial fundamental right of freedom of speech and expression, the verdict has rekindled the constitutional debate between free speech and fair trial once again. This article makes an objective effort to examine the justifications put forth by tk judiciary while curtailing the media's freedom of expression rights and the right U

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know of the citizens. It winds up by opining that the current legal framewift on .urtailing media freedom is already replete with post facto measures like contempt prr,ceedings and it does not require to be further supplemented by ex-ante measures as 'vmced by the recent Sahara ruling.

INTRODUCTION

"Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press... it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits'".'

A cardinal feature of a democratic constitution is to ensure fairness in the administration of justice and conduct of a trial, while allowing no interference from any outside forces to operate in judicial proceedings. However, the public has as much interest in obtaining information of judicial proceedings as in ensuring a fair trial. The problem arises when the media at times by its reporting prior to the trial and during the trial impacts the justice delivery system, thereby prejudicing the rights of the litigants, the accused, and the witnesses in the proceedings. In popular parlance, this is referred to as a media trial which denotes carrying on a trial concurrently and simultaneously with a court trial.

This germinates a series of raging questions which can never be concretely answered- How far can the media go while debating the core issues involved in a case without usurping the jurisdiction of the court?

[1] *Romesh Thappar v State of Madras,* AIR 1950 SC 124, 129 (Patanjali Shastri J. majority), quoting *Near v Minnesota,* 283 U.S. 697, 718 (Hughes C.J.).

Most importantly, what are the long term outcomes of this development? In this backdrop, this vital exercise of contemporary relevance of delving into the ihexus between media and fair trial is another attempt at finding possible principle-based answers. It involves looking at how the courts in India and other jurisdictions worldwide have gone about addressing this complex issue arising from time to time in diversified forms.

In this article, the authors have primarily analysed the issue of *ex ante* restrictions that can be imposed on the media. Further, the modes of curtailment of freedom of media through prior restraint orders, pre-censorship, and the latest judicial practice of permitting issuance of postponement orders as witnessed in the Apex Court's most recent ruling in *Sahara India Real Estate Corporation Lid. v SEBI,*[2] is examined.

In the first part, the authors scrutinize the influence of the media on trials by enlisting recent instances of constructive and destructive role played by it in the justice delivery system. Subsequently, the authors indulge in a comparative analysis on the very subject of prior-restraint and postponement orders. The judicial approaches in jurisdictions of the USA, England, European Union and Canada are closely analysed while attempting to figure out the approach most suited to India. Thereafter, in

[2] (2012)10 SCC7U).

the subsequent section, the *Sahara India Real Estate?* decision is examined in great detail with the objective of addressing how far the constitutional bench has succeeded in achieving the goals it had set out to conquer and what questions are still left unanswered, if any. The paper finally winds up by furnishing pragmatic pointers as to where the appropriate line of control can be drawn amidst the swinging power balance between the two institutions.

TRIM. BY MEDIA - BOON OR A BANE?

The influence of the media over fair trial has in the recent years shown very fluctuating outcomes. Sometimes it has produced very positive results, aiding in the process of administration of justice whereas at times it has also caused great prejudice to the litigants.

A glaring instance of media's powerful influence on justice delivery has been patendy visible in the recent hanging of Afzal Guru on February 9, 2013, the prime accused in December 13 Parliament Attacks case which is also dubbed as 'India's 9/11' by India's political establishment and the corporate media.[4] Even though democracy which

[3] Id.

[4] Kranti Kumara and Keith Jones, *A legal lynching: Indian government executes Afiyil Guru*, online at http://www.wsws.org/en/articles/2013/02/12/afza-fl2.html (visited May 23, 2013). See also Shivam Vij, *Secret hanging a major setback: Human Rights Watch on the execution of Af^al Guru*, online at

is grounded in the opinion of majority seems to be satisfied, an iota of doubt as to the real culpability and justice is still ruminated by many and the question of real justice remains open. The intelligentsia around the world is of the view that this is justice moulded by the influence of media; and Afzal Guru is nothing short of victim of circumstances. A cursory glance over the course of events from the attacks to his execution is probably required for a better appreciation of the argument.

On December 13, 2001 five terrorists entered the Parliament complex and started indiscriminately firing which resulted in the death of nine people and injuries to over 15. The five terrorists were killed during the encounter. A car laden with explosives was also brought into the complex but it did not set off. On recovery of the mobile phones, SIM cards and paper slips bearing telephone numbers and certain other information from dead terrorists; ihe Delhi Police picked up Afzal Guru, S.A.R. Geelani (Lecturer at Delhi University), Afsan Guru and Shaukat Hassan Guru. Headlines like 'DU Lecturer was Terror Plan Hub',

http://kafila.org/2013/02/11 /secret-hanging-a-major-setback-human-rights-\vatch-on-the-execution-of-afzal-guru/ (visited May 23, 2013).

'Varsity Don Guided Fidayeen' and 'Don Lectured on Terror in Free Time' were to be seen during those days.[5]

Charging them for being the masterminds behind the Jaish-e-Mohammed terrorist attack, the TADA Act,[6] was enforced and confessions were extracted which were used as admissible evidences initially. Circumstantial evidences showed frequent telephonic contacts between few numbers most of which belonged to the four accused, exchange of phones (IMEI verification), recovery of laptops containing incriminating information, discovery of abodes and hideouts etc. In December 2002, the Trial Court, based on these circumstantial evidences, awarded death for Afzal, Shaukat and Geelani, and five-years imprisonment to Afsan Guru. The Delhi High Court commuted Geelani's death sentence but upheld Afzal and Shaukat's death sentence.[8] On appeal, the Supreme Court commuted Shaukat's death sentence but upheld Afzal's death sentence on grounds of hatching criminal

[5] Arundhati Roy, *A perfect day for democracy,* The Hindu (Feb 10, 2013), online at http://www.thehindu.com/opinion/lead/a-perfect-day-for-democracy/article4397705.ece (visited May 23, 2013).

[6] Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act No. 28 of 1987). The Act which was criticised on various counts by human rights organisations and political parties was permitted to lapse in May 1995. However, cases initiated while it was in force continue to hold legal validity.

[7] *Mohammed Af^al to be banged on October 20,* The Hindu (September 27, 2006), online at http://www.hindu.com/2006/09/27/stories/2006092711420100.htm (visited May 25, 2013).

[8] *Mohd. Afoalv State (NCT of Delhi),* 107 (2003) DLT 385.

conspiracy and waging war against Government and committing murder under section 302 of the IPC.

The SC reasoned that the target chosen was the Parliament, which is a symbol of India's sovereignty and the superior law making body comprising of people's representatives. Thus, an attack on the Parliament constituted a blow to India's democracy. Thus, this attack was termed as one of the rarest of rare cases and Afzal's death sentence was upheld.[9] The Supreme Court observed that:

"The incident having shaken the whole nation would be vindicated and its collective conscience would only be satisfied if capital punishment is awarded to the offender."[10]

The question which looms unanswered is the import of the abstract phase 'collective conscience of the nation' and who defines or limits it? In the opinion of the authors, if nothing else, the mass hysteria generated by the media played a cardinal role in moulding this conscience.

That apart, certain irregularities in Afzal's conviction are discernible- the police claimed that Geelani led to Afzal's arrest, but records showed that the message to arrest Afzal went out before Geelani

* *State (NCI' of Delhi) v Navjot Sandhu @ Afsan Guru,* AIR 2005 SC 3820.

'*IdatU18.

was picked up. Moreover, evidences collected from arrest spots were not sealed and tampering of the same was highly likely. Further, one witness claimed that one of the SIM cards was sold to Afzal on December 4th while the prosecution's own records showed that the SIM was operational from 6th November.[11] Afzal was also deprived of one of the basic rights viz. right to be defended by a competent lawyer in a criminal trial. He went unrepresented from his arrest to the extraction of his confession. His legal representation in the form of amicus curiae in which Afzal had no trust was thus a mere lip-service.'[2]

While major discrepancies like these and many more missed the media's attention, senior journalists at other instances misrepresented Afzal to be one of the attackers who attacked the Parliament. Afzal's portrayal as the main culprit continued as the government's moves to deploy troops to borders and talks of a possible nuclear war gained spotlight. This being the state of affairs, Afzal's death sentence continued to be upheld in a review petition in Supreme Court. A mercy petition was filed before the then President, Dr. A.P.J. Abdul Kalam in October, 2006

[1] Nirmalangshu Mukherji, *The Day Afcal Died*, online at http:/Aafila.org/2013/02/ll/the-day-afzal-died-nirmalangshu-mukherji (visited May 22, 2013).

[12] See note 5.

only to be indefinitely kept on hold'.[13]-In an unexpected turn of events, Pranab Mukherjee after having occupied office, dug up the dusty files with great priority and rejected his mercy petition. Critics claim this to be a highly calculated public demonstration to promote national and communal chauvinism, so as to satisfy the majority's desire (the same being moulded by media) and with a view to gain an edge in the forthcoming elections.[14]

Media as a positive force was experienced in the *Priyadarshini Mattoo case,*[n] where the accused Santosh Kumar Singh who is the son of an Inspector General, was acquitted by the trial court. Owing to the intense media pressure, the facts of the case were closely scrutinized by the High Court after being reopened in a highly accelerated trial; something unprecedented in the tangled Indian court system. This lead to a reversal of the trial court's verdict. The accused was sentenced to death by the High Court.

Similarly, the media owes its imperishable existence worldwide to this mixed bag of successes and failures. However, being cognizant of the impeding traits of the media, the courts in various jurisdictions have

•■'Id.

:4 See note 4.

[15] *Santosh Kumar Singh v State,* (2010) 9 SCC 747. See *Mann Sharma v NCT Delhi,* (2004) CriLJ 684 (Del).

evolved methods of curtailing them, which shall be embarked upon in the following section.

CURBING THE EXPANSIVE POWERS OF MEDIA- THE GLOBAL EXPERIENCE

USA OUTLOOK

The USA recognizes the principle of an unconditional freedom of speech through the First Amendment.[16] Thus, in the US, any interference with the media's freedom is *ipso facto* unlawful and prior restraints are completely banned. The media has been granted *carte blanche* freedom against any form of irresponsible or casual reporting of trials which infringe upon the actual proceeding of the court. The contempt of court laws are therefore considered redundant or incompatible to be applied to the media. Justice Brennan in *New York Times Co. vSullivan]* gave a classic account of the principle embodied in the First Amendment:

"Authoritative interpretations of the First Amendment guarantees have been consistently refused to recognise an exception for any test of truth — whether

[16] The First Amendment does not tolerate any kind of restraint and the freedom of the press is absolute. There is no provision like Article 19(2) of the Indian Constitution in the form of reasonable restrictions to the said right or provisions similar to Section 1 of the Charter Rights under the Canadian Constitution.
" 376 U.S. 254 (1964).

administered by judges, juries or administrative officials — and especially one that puts it burden of proving truth on the speaker[1]'.[18]

Further, in this context, Madison had aptly remarked that *"Some dtgrte oj abuse is inseparable from the proper use of everything; and in no instance is Ais truer than in that of press".*[19]

People of the State of California v Orienthal James Simpson?[0] also popularly called the O.J. Simpson Trial has been one of the most publicized and dramatized murder trials in American history. Simpson was a former American football star and a former actor tried on two counts of murder following the June 1994 deaths of his ex-wife Nicole Brown Simpson and her friend Ronald Lyle Goldman. The trial was more hyped owing to the racist dimensions to it. The media coverage reached such proportions that at times, it began to look more like a long-running TV soap opera than real life. An estimated 135 million people, almost half the population, watched the proceedings on TV or heard the verdict which was covered exhaustively by CNN, and all the major

'«Id.

[n] Elliot's Debates on the Federal Constitution (1876), |571. The First Amendment according to Learned Hand J. presupposes that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all".

[9] *People v OrenthaiJames Simpson,* No. BA097211 (Cal. Super. Ct. 1995).

networks and cable channels (during which time advertising slot reportedly were sold at five times the normal price). [1]

As the verdict of 'not guilty' was read out, reports say, mos whites reacted with dismay while many blacks cheered. Thus, in the enc the trial was transformed from a TV drama into a football game, wit' blacks and whites largely championing opposing sides. To the whites, 0 appeared as a brutal dominating black man who beat and killed his whit wife. To the blacks, it was more than merely supporting a fellow blac out of a feeling of solidarity.[22] Based on their own experience of bein black in the US, OJ was symbol of another black man victimized by criminal justice system heavily biased towards whites and designed main, to condemn black men.

One month after the arrest, before the trial had begun, whi evidence was being collected, 68 per cent of whites thought he w; probably guilty, while only 24 per cent of blacks did so. The proportioi did not change much after OJ was acquitted.[23]Presumably, the Jul which consists of normal citizens, was also influenced. One may nev

[21] Carol Upadhya, *Art and Life in America - The Trial of OJ. Simpson,* (Oct, 199 30(43) Economic and Political Weekly 2729, 1J2728.
[22] Id at 2728.
[23] Carl E. Enomoto, *Public Sympathy for 0. J. Simpson: The Roles of Race, A Gender, Income, and Education,* The American Journal of Economics and Sociolo Vol. 58, No. 1 (1999), HI45-161.

know for sure, but such a media hype can probably cause more hurt than good in criminal trials where the verdict is pronounced by a jury instead of a judge.

Similarly, the facts of the recent *Casey Anthony murder case*,[24] were hyper-inflated by the media who through their radical reporting, tried to fill up the gaps in circumstantial evidences and made it look as a complete chain where Casey Anthony had murdered her two year old daughter Caylee Anthony. She was portrayed as a troublesome and a reckless woman who was deep into drug abuse and did not deserve to be a mother.[25] However, ultimately, the jury declared her to be 'not guilty' and she was acquitted by the court since the criminal charges levelled against her could not be proved beyond reasonable doubt by the state.

However, the US courts have recendy evolved techniques in o*der to counter this absolute freedom accorded to the media. Such

* *StaU of Florida v Casey Marie Anthony*, Case No. 48-2008-CF-15606-O (Ninth Judicial Circuit in and for Orange County, Florida).

[B] Eric Deggans, *Did continuous negative media coverage of Casey Anthony actually help* Jw *get acquitted?*, online at http://www.tampabay.com/blogs/media/ eament/did-continuous-negative-media-coverage-casey-anthony-actually-help-brr-get-acquitted (visited May 23, 2012).

* *CMsey Anthony Not Guilty in Slaying of Daughter*, The New York Times (July 5, **2011),** online at http://www.nytimes.com/2011/07/06/us/06casey.html? p^cwanted=all&_r=0 (visited on May 21, 2013).

techniques include employing minor devices like changing the venue,[27] drastic measures such as ordering retrial and reversal of conviction appeal.[28] These devices employed by the court are popularly term 'neutralizing devices'. *Near v Minnesota*® is a prime instance of dilution the absolute rule against prior restraint.[30] Its necessity has b(recognized by the courts and thus the courts have been evolv neutralizing techniques. The approach of other constitutional courts different legal jurisdictions has been instrumental in bringing this sul alteration of their well-settled approach.[31]

UK PERSPECTIVE

The English Contempt of Courts Act, 1981 ("1981 Act") has b enacted after the judgment of European Court of Human Rij

[2]7 See *United States v McVeigh,* 918 F. Supp. 1467, 1471 (W.D. Okla. 199i 1(1470-74 where the trial was shifted from Oklahoma to Denver, Colorado *also Koon v United States* (94-1664), 518 U.S. 81 (1996) where the Rodney ! beating trial was shifted from Los Angeles to Simi Valley.

[28] See *Sheppard v Maxwell,* 384 U.S. 333, 351-52 (1966).

[29] 283 U.S. 697 (1931) (Hughes C.J.).

[30] The authors believe that such techniques have greatly compromised wit] absolute freedom of speech rights, which is a unique feature of US Constiti

[31] William Rehnquist C.J. observed, "Constitutional law is now so f grounded in so many countries, it is time that the US courts begin looki decisions of other constitutional courts to aid in their own deliberative pro< See William Rehnquist, *Constitutional Courts: Comparative Rfmarks in Germar, its Basic haw: Past, Present and Future,* Kirchhof & Donald P. Kommers (AufL, Baden-Baden Nomos, 1993).

(ECtHR) in *Sunday Times v United Kingdom.*[i2]*It* seeks to achieve a balance between fair trial rights and free media rights vide §4(2) of the 1981 Act.[33] It empowers the courts to postpone the publication of any report of the proceedings or any part of proceedings for such period as the court deems fit with the objective of avoiding substantial risk of prejudice, primarily to the litigants and the witnesses involved.

Thus, the litmus test for restricting the media's rights in the UK lies in the *identification of a substantial risk of prejudice,* which will ultimately depend on the facts and circumstances of each case. It is also pertinent to note that strict liability contempt has been incorporated by the courts in §2,[M] of the 1981 Act whose basis lies, again, in the publication of prejudicial material. Also, the definition of publication is very wide." The underlying rationale behind the exercise of discretionary power by

[J2](1979)2EHRR245.

[13] Contempt of Courts Act, 1981, §4(2) (states "Contemporary report of proceedings - In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose").

[M] Id at §2(2) (states "The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced).

[55] Id at §2(1) (states "Publication" includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public").

common law courts in issuance of **postponement order seems to be to** not only safeguard fair trial but also serve **the greater purpose of** protecting the media from getting punished for **contempt under strict** liability contempt law.[36]

EU STANCE

The continental approach **takes recourse to an *ab initio*** uncompromising approach towards **media.** The **underlying assumption is** that the media xoverage of pending trials **might not only prejudice** fairness and impartiality of proceedings, **but also affect individual or** societal interests.[37] The EU model is gready **concerned with safeguarding** the privacy, personal dignity, and **presumption of innocence and thus,** takes serious note of the media's capacity to **interfere and tamper with** such a presumption.[38]

Therefore, in certain countries like **Germany, the presumption of** innocence is employed as the normative **parameter while balancing the**

[36] Borrie & Lowe, *The Law of Contempt* (LexisNexis Butterworths, 4th Edition, 2010).

[37] Paul Lemmens, *The Relation Between the Charter of Fundamental Rights of the European Union and the European Conventional on Human Rights — Substantive Aspects*, 8 Maastricht J. Eur & Comp. L. 49,54 (2001).

[38] European Convention on Human Rights (ECHR), 1950, Art 6(2) (states "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law").

right to fair trial versus the freedom of speech.[39] There is a positive obligation on states to take action for protecting the presumption of innocence from interference by non-state actors. Hence, the EU approach prefers imposing certain narrowly focused prior restraints rather than providing for contempt proceedings. However, lately, the ECHR has been applying the principle of proportionality to prevent imposition of overreaching restrictions on the media.[40]

CANADIAN APPROACH

Prior to the genesis of the Canadian Charter of Rights and Freedoms, there was no express guarantee accorded to the freedom of press and therefore, the balance was tilted largely in favour of fair trial in most of the Canadian courts' decisions.[41] However, with the unveiling of the Charter rights, the courts were forced to reformulate the traditional *subjudice* rule.[42] The judgment of the Canadian Supreme Court in *Dagenais*

[w] Torstein Stein, *Free Speech in Germany,* in M.P. Singh (ed.), *Comparative ConstitutionalLawat* 464 (Eastern Book Company, 2011).

[40] Tor-Inge Harbo, *The Function of the Proportionality Principle in EU han>,* 16(2) European Law Journal 158,169 (2010).

[41] *Hill v The Queen,* [1977] 1 SCR 827. See also *Steiner v Toronto StarUd.,* [1956] OR 14.

[c] Canadian Charter of Rights and Freedoms, §1 (states "The *Canadian Charter of Rights and Freedoms guarantees* the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."),§2(b) (states "freedom of thought, belief, opinion and expression, including freedom of the press- and other media of communication.").

v Canadian Broadcasting Corporation?[1] voted in favour of curtailing the freedom of press through imposition of a publication ban only when a critical necessity arose so as to prevent serious risk to the proper administration of justice, and when reasonable alternative measures, like postponement of the trial or a change of venue, would not prevent the risk.

Thus, the necessity test calculates whether the salutary effects of a publication ban outweighs the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to free expression and the right of the accused to an open trial.[44] However, what sets the Canadian approach apart from the US or UK approach is that the Canadian approach requires a balance to be struck, which fully respects both the rights.[45] This harmonization has to be achieved on a case to case basis.

INDIAN APPROACH

The judicial genesis of prior restraint lies in *Brij Bhushan v State of Delhi?*' The Court was dealing with the constitutionality of a statutory provision, which authorized the provincial government or any authorized

[43] (1994) 3 SCR 835 (Can SC).
[44] Id at Tf839.
[45] Id at 1J877.
[46] AIR 1950 SC 129.

body to scrutinize all publications, which could pose threat to public safety or the maintenance of public order. The six-judge bench, speaking through Patanjali Shastri J., held the impugned provision as unconstitutional since the restrictions imposed by it did not come under the ambit of Article 19(2).[47] However, the Court stopped short of declaring that pre-censorship per se is unconstitutional. This acquiescence bythe Court has kept open the debate on constitutionality of pre-censorship orders till date.

A five-judge bench in *Vinnder v State of Punjab?** dealt with similar statutory provisions concerned widi the preservation of public order and communal harmony (instead of public safety as in *Brij Bhushan).* These impugned provisions were comparatively harsher, empowering authorities to even direcUy prohibit any publication capable of endangering public order or communal harmony. The Court, speaking through Das C.J., upheld pre-censorship imposed for a limited period of two months,[49] while another provision imposing pre-censorship without a time-limit was held to be unconstitutional.[50] Thus, from imposing a

[47] Id at 1126.
[48] AIR 1957 SC 896.
[49] See note 48 at 1J15.
[50] Id at 119.

blanket ban on pre-censorship orders, we find that the judiciary exhibited a more liberal attitude by permitting ad-interim pre-censorship orders

Subsequently, in *K.A. Abbas v Union of India?*[1] the constitutional bench, speaking through Hidyatullah C.J., allowed prior restraint on exhibition of motion pictures subject to government setting up a corrective machinery which censored the motion pictures in a reasonable time period. However, the misuse of powers of pre-censorship or prior restraint was frowned upon by the Court.[52]

The other landmark decision is that of *Reliance Petrochemicals Limited v Proprietors of Indian Express Newspapers Bombay Pvt. Ltd and Ors.*[S3]*A* national daily had published articles containing adverse remarks on the issue of debentures by Reliance which were *subjudice* in the Court. The Court granted an injunction against the said publication. Sabyasachi' Mukherjee J. formulated the test that preventive injunction against the press can be issued only if reasonable grounds for keeping the administration of justice unimpaired necessitated so.[54] The danger apprehended had to be real and imminent.[55] This approach of the Court was influenced by the test of clear and present danger propounded by

5i (1970) 2 SCC 780.
[52] See *Binod Rao v Minocher Rustom Masani,* 78 BomLR 125.
» (1988) 4 SCC 592.
s< Id at 134.
[55] Id.

Justice Holmes.[56] Moreover, the court treated the said doctrine as the test of ^*balance of convenience.*

The landmark judgment dealing with the debate on media versus fair trial is the nine-judge bench decision in *Naresh Sridhar Mirajkar v State of Maharashtra?*[1] wherein the Court was concerned with its power to conduct court proceedings in-camera. The majority, speaking through Gajendragadkar C.J., held that the right to open justice is not absolute and the Court has the inherent jurisdiction under Article 142 of the Constitution to hold a trial in-camera to meet the ends of justice when the adoption of such a course is called for.[58]It also stated that, *'what would meet the ends of justice will always depend on the facts of each case and the requirements of justice'.*[59]

It is in this backdrop that a comprehensive analysis of the recent pronouncement of the Supreme Court in *Sahara India* is made.

THE DECISION IN *SAHARA INDIA*

The apex court's judgment in *Sahara India Real Estate Corporation v SEBI,*[60] has reignited the tug of war between freedom of the press vis-a-

* See *Abrams v United States,* 250 U.S. 660.
* **AIR** 1967 SCI.
"IdatfiO. »Idatf30.
«• *Sahara India Real Estate Corporation Ltd. v SEBI,* (2012)10 SCC 710.

vis fair trial, the nebulous contours of which have always been swaying from one side to the other. It is a bitter truth that uniformity cannot be sought and this debate will keep on springing up before the courts time and again, only to be sorted out with different approaches as was done in *Sahara India*,[M] wherein the issue of postponement of publication was, for the first time, agitated directly.

A show-cause notice was issued by the Supreme Court to SEBI necessitating them to direct Sahara to disclose the manner in which Sahara was intending to secure the liabilities incurred by them as part of its refunding process to the holders of Optionally Fully Convertible Bonds ["OFCD"]. Subsequently, an affidavit was filed by Sahara clearly oudining its strategy, which was termed insufficient by SEBI in securing the liabilities and protecting the OFCD holders. The Court asked both Sahara and SEBI to reach a consensus with respect to an acceptable security. Pursuant to this, Sahara addressed a personal letter, through an e-mail, to SEBI's counsel indicating the fair market value of the assets proposed to be offered as security. Notably, this was meant to be a stricdy confidential inter-party communication intended to arrive at a consensus before commencement of the next hearing.

[6]Ud.

However, a television news channel flashed the details of the said proposal, which was obviously not meant for circulation in the public domain. Moreover, the valuer who had done the valuation of the security was also named in the news.

Annoyed by the increasingly intrusive practice of the media,[62] the counsels of SEBI and Sahara joined forces to request the Court to issue directions with regard to reporting of matters which were *subjudice* in a court, including public disclosure of documents forming part of the court proceedings. A five-judge bench was formulated by the Chief Justice of India keeping in mind the larger questions, of public importance and the long-term ramifications that arose in this case viz. the right to negotiate in confidence. The Court in its quest to frame appropriate guidelines for media reporting was faced with the following questions:

a) Whether mandatory guidelines regarding restraints on media should be laid down by the Court or whether they should be self-regulatory in the context of regulating contempt of court vide Article 129 and Article 215?

[62] S.H. Kapadia, CJ observed at T[ll: "We are distressed to note that...such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice". Reference was also made to *State of Maharashtra v RafendraJ. Gandhi,* (1997) 8 SCC 386 - "A trial by press, electronic media or public agitation is the very antithesis of rule of law".

b) What is the position of postponement orders under Article 19(l)(a) and Article 21?

c) Whether postponement orders come within the ambit of reasonable restrictions under Article 19(2)?

The court speaking through S.H. Kapadia, CJ observed that they were bound by the judgment of the apex court in *Mirqjkar,*[63] and *Reliance Petrochemicals Ltd,*[64] wherein it had been held that the courts of record under Article 129 and Article 215 have inherent powers to prohibit publication of court proceedings or the evidence of the witness and such powers did not violate Article 19(l)(a).[65]

Further, the Court observed that unlike the US Constitution's First Amendment clause, in India, we have the test of reasonable restriction in Article 19(2).[66] It relied on *Ministry of Information and Broadcasting v Cricket Association of Bengal,*[61] and stated that the several grounds mentioned in Article 19(2) for imposition of restrictions are ultimately referable to societal interest and are conceived in the interest of ensuring that the freedom of speech and expression is exercised

[63] *Naresh Sridhar Mirajkar v State of Maharashtra,* AIR 1967 SC 1.
[64] *Reliance Petrochemicals Limited v Proprietors of Indian Express Newspapers Bombay Pvt. Ltd &Ors.,* (1988) 4 SCC 592.
« *Sahara India,* (2012)10 SCC 710 at 1)33.
[66] Id at 137.
[67] (1995) 2 SCC 161.

meaningfully by the citizens of this country.[68] It referred to *E.M Sankaran Namboodripad v* T. *Narayanan Nambiar*,[69]*s.nd* stated that where the law is silent (in the instant case, Contempt of Courts Act, 1971) the courts have a discretion, especially when interpreting in the light of Article 21. The Court also conceded that it was impractical to concretely define the scope and ambit of the term "offending publication" and apply it uniformly across all cases. Exercise of discretion on a case to case basis was held to be more prudent.

Invoking this very discretionary power was held to have assumed greater significance under Article 141 of the Constitution since it involved the crucial judicial exercise of interpretation of constitutional limitations on free speech under Article 19(l)(a), in the context of Article 21.[70] The need is more significant in the determination of open-textured expressions such as "law in relation to contempt of court" in Article 19(2), "equal protection of law", "freedom of speech and expression" and "administration of justice".[71]

In the backdrop of the exercise of this discretionary power, the dash of two rights of equal weight was identified by the apex court viz. the freedom of expression and die right to a fair trial. It was adjudged

» Id at K189. See *Sahara India,* (2012)10 SCC 710 at f37.
«• (1970) 2 SCC 325.
"» *Sahara India,* (2012)10 SCC 710 at f*5.
-•Id.

that the remedy lay in resorting to the use of a balancing technique sc that both the rights would be given equal space in the constitutiona scheme, which in this instant case was issue of a "postponement order".[72]

Postponement orders balance interests of equal amplitude in the context of the law of contempt. However, considering the indispensable role of the media, the Court explicitly noted, as a guideline, that a strong caveat existed for issuance of a postponement order i.e. the application of a test of necessity and proportionality in the presence of real and substantial risk of prejudice while conducting the trial.[73]

Referring to the US way of handling similar fact-circumstances, *the* evolution of 'neutralizing device' found detailed discussion. A neutralizing device is a discretionary measure evolved by the courts in some common law jurisdictions like the US which resorts to methods such as postponement of the trial, re-trials, change of venue and in appropriate cases, even granting acquittals in cases of excessive prejudicial media publicity with the larger objective of preventing justice ' from being perverted, prejudiced, obstructed or interfered with.[74]

It was opined that the Indian counterpart of neutralizing devices lay in weighing the viability of the above mentioned options and if they

[7]2Idatf34.
[73]Idatf42.
[74] Id at If 17.

were found to be inadequate, resort could be had to postponement Ofders.[75] For this, the alleged offending publication had to be thoroughly scrutinized in the light of tests of necessity and proportionality before the court could conclude whether the publication would result in real and mbstantial risk of prejudice to the litigants.[76] Further, it was observed dbat postponement orders serve the function of warning the media about possible contempt, the defiance of which would inevitably result in contempt proceedings.

Thus, postponement orders functioned not as a punitive measure *fa-se,* but rather a preventive measure favouring non-publication for a imited period.[77]

On the instant facts of the case, the court finally concluded that tfee right to negotiate and settle in confidence is of paramount ■nportance which the media had no right to encroach upon. However, it iropped short of enumerating categories of publication amounting to contempt, deliberately leaving it open for the future courts to decide it on a case by case basis.[78]

*11*d at 1143.
"»Id at 150.
"Id at 146.
"• Id at 1J53.

SCRUTINIZING THE COURT'S APPROACH: AN ANALYSIS

The crux of the judgment concentrated on balancing the freedom of the press with the need for a fair trial free from excessive publicity. Ultimately, the court resorted to a very neutral and diplomatic stance, by selecting" a balancing technique in which both the rights would co-exist together without interfering excessively with each other.

However, India being a country which has cherished the values of free democracy,[79] the Supreme Court has time and again zealously protected the freedom of the press under the protective umbrella of Article 19(1)(a) whenever restrictions have been imposed.[80] The media is considered to be the eyes and ears of the citizens, who have the right to know and the right to be informed; consequently, its sanctity cannot be undermined.[81] As regards resolving the conflict between rights under Article 19(1) (a) and Article 21, the apbc court has already held that freedoms under Article 19(l)(a) cannot be abridged to promote right to

[79] See *Maneka Gandhi v Union of India,* AIR 1978 SC 597 at 624 ("Democracy is based essentially on free debate and open discussion, for that is the only corrective of governmental action in a democratic setup. It enables people to - participate in the democratic process and intelligently exercise his right of making a choice".).

[80] See *Indian Express Newspapers Ltd. v Union of India,* (1985) 1 SCC 641; *In re Sham Lai,* (1978) 2 SCC 479; *Hamdard Dawakhana v Union of India,* AIR 1960 SC 554.

[81] See *S.P. Gupta v Union of India,* (1981) Supp SCC 87; *Ministry of Infromation and Broadcating v Cricket Association of Bengal,* (1995) 2 SCC 161; *S. Rangarajan v P. Usiivan Ram,* (1989) 2 SCC 574.

life under Article 21 unless they are reasonable restrictions falling within the ambit of Article 19(2).[82] The constitutional bench in *Sahara™* seems to have overlooked this clearly etched out position. Moreover, Article 21, rather than being in conflict with rights under Article 19, has been held wide enough to include freedom of speech and expression.[84]

The Constitution of India mandates that there is no way of curtailing the media's power of the fundamental right of freedom of expression under Article 19(l)(a) except by imposing reasonable restrictions under Article 19(2) through legislation or existing law in this regard. In this regard, reliance is placed by the authors upon *Romesh Thappar case*** where the State of Madras banned the petitioner's communism themed journal 'Cross Roads' after having' passed the Madras Maintenance of Public Order Act, 4949. The respondents cited the ground of "securing public safety and maintenance of public order" for imposing the ban on circulation. It was held that the reasonable

[c] *Saka/Papers v Union of India,* AIR 1962 SC 305; *Maneka Gandhi v Union of India,* (1978) 1 SCC 248; *Indian Express Newspapers Pvt. Ltd. v Union of India,* (1985) 1 SCC 641.

-[3] See note 2.

[M] *Francis Coralie Mullin v Union Territory of Delhi,* AIR 1981 SC 746 ("Right to life includes right to live with human dignity, possessing the basic necessities of life (...) facilities for reading, writing and expressing in diverse form"); *Maneka Gandhi v Union of India,* AIR 1978 SC 597 ("(...) 'personal liberty' includes variety of rights which consists of liberties of man and some of them have been (...) given additional protection under Article 19").

*[5] *Romesh Thapar v State of Madras,* AIR 1950 SC 124.

restrictions under Article 19(2) can be imposed only when grave circumstances like security of state is at stake,[86] and an attempt has been made to overthrow it. Thus, any prior restraint order which overlooks these aspects, fails to satisfy the test of reasonable restriction under Article 19(2), thereby being unconstitutional. The five-judge bench seems to have overlooked the test laid down by the six-judge bench in *Romesh Thappar* and diluted the test of reasonable restriction by equalizing prejudice between parties to the threat to the security of the state. Restrictions on fundamental rights, especially freedom rights in a free democracy, have to be interpreted strictly and a liberal interpretation is not desired.[87]

Further, in R. *Rajagopal v State ofTN,*[s&] a convicted criminal Auto Shankar alias Gauri Shankar had written an autobiography where-he set out the close nexus between himself and several IAS, IPS and other officers, some of whom were his partners in several crimes. He intended to publish the same in a Tamil weekly magazine, *Nakkheeran.* Through a communication dated 15-6-1994, the respondents imposed prior restraint orders and tried to prevent the publication on grounds of defamation. This was challenged by the petitioners to be violative of Article 19(l)(a).

[86] Idatfl2.
'."Id at I'll."'. [88]
(1994) 6 SCC 632.

indulges in laying down mandatory guidelines m t\us regard, separation of powers and functions has been held to be one of the t of the basic structure of our Constitution.[91] Thus, it is undesvral; consider it to be operating in a vacuum. As far as the role (judiciary is concerned, it can only interpret laws and fill up gaps existing legislation, but has no power to lay down new laws of g application which is the exclusive domain of the legislature.[93]Tht judiciary should limit itself to laying down normative guidelines and it for the legislature to be the torch bearer for constructing the framework within which postponement orders would operate judiciary [94] in the past had refrained from issuing guidelines or directio meet the situations relating to media in *Destruction of Public and I Properties v State o/AP,*[95] and the three-judge bench preferred leaving the appropriate authorities to take effective steps in this regard.

The Contempt of Court Act, as it stands now, is still silent about] restraint orders as a measure to prevent contempt. When a partii

field is not covered by legislation, the \\ididary cm supplemer

[91] *Keshavananda Bharati v State of Kerala,* AIR 1973 SC1461.

»3 *P. Ramachandra Rao v State o/Karnataka,* (2002) 4 SCC 578.

[94] See *State of Uttaranchal v Balwant Singh,* (2010) 3 SCC 402 (SC lai< normative guidelines as a matter of guidance to be followed by High Co

dealing -*with* onJ *Ai*~~—'—— *rr*™-*

existing provisions in the Contempt of Courts Act but not supplant it.[96] Moreover, the court cannot invoke its inherent jurisdiction under Article 142 as this power is to be sparingly used only to do complete justice to the parties by supplementing existing provisions. It operates in balancing the conflicting claims of the litigating parties by 'ironing out the creases' m the cause or matter before it.[97]These independent residuary powers, being curative in nature, cannot be used to build a new edifice where none existed earlier or by ignoring the statutory provisions already dealing with the subject; that would be indirectly doing what is otherwise the domain of the legislature.[98]

Incidentally, Chapter X of the 200th Law Commission Report,[99] recommends that the Parliament should amend the Contempt of Courts Act, to empower the courts to issue postponement orders. However, since the Parliament is yet to pass a law in this regard, the courts should patiendy wait instead of themselves laying down mandatory guidelines.

* *Kupa Ashok Hurra vAshok Hurra and Ann,* (2002) 4 SCC 388.

r *K. Veerswami v Union of India,* (1991) 3 SCC 655.

<* *Supreme Court Bar Association v Union of India,* (1998) 4 SCC 409. See *State ofWB i Committee for Protection of Democratic Rights,* (2010) 3 SCC 571.

** See Law Commission of India, *Report of the 200h Law Commission: Trial by Media Free Speech and Fair Trial under Criminal Procedure Code, 1973* (August 2006), online at http://lawcotnmissionofindia.nic.in/reports/rep200.pdf (visited June 27, 2013).

'■ In England this has already been incorporated vide Contempt of Courts Act, 54(2), (1981).

It is also pertinent to note that even though India is a common law country, its adjudication mechanism has abolished the jury system long ago. In the backdrop of a well-established adversarial system, the learned and well trained judges face no real possibility of getting swayed by discussions in the media. Therefore, it can be safely presumed that the judges stricdy stick to the admissible evidence laid down before them. Any presumption to the contrary is misconceived and challenges the wisdom of the judges.'[101] Further, in case there is an error on the part of any court, the aggrieved person has the option of appealing against the previous decision of the lower court in an appellate forum. Thus, in the authors' opinion, issuance of postponement orders amounts to resorting to over-apprehensive measures by the judiciary in a mature constitutional setup like India.

CONCLUSION

The *Sahara decision*™[2] permitting postponement orders in certain cases was largely based on the firm belief that they were bound by the nine-judge bench decision in *Mirajkar}*[0]* However, it is submitted that in

[101] See *S.P. Gupta v Union of India*, (1981) Supp SCC 87, *%21* ("Judges should be of stern stuff and tough fibre, unbending before power, economic pr political, and they must uphold the core principle of law which says, *Be you ever so high thai the law is above you").*

[102] *Sahara India Real Estate Corporation Ltd. v SEBI,* (2012)10 SCC 710.

103 *Naresh Sridhar Mirajkar v State of Maharashtra,* AIR 1967 SC i.

Mirajkar™ die main issue was whether courts were empowered to hold trial in camera by invoking their inherent jurisdiction for meeting the ends of justice; *the* answer being in the affirmative. It is setded law that under Article 141, what is binding is the ratio of the decision. It is the principle found out upon the reading of the judgment as a whole and by an analysis of the material facts of the case in light of the questions before the court.[105] The binding part of *Mirajkar*^ is only with respect to the permission to hold a trial in-camera in exceptional circumstances for meeting the ends of justice only and not the postponement of publications *per se.*

It is also well settied that the decision of the SC will be an authority only for the proposition that it lays down and not for what logically follows from it.[107] The nine-judge constitutional bench in *Mirajkar,*[m] had never intended to lay down restrictions on media. Thus,

'°* Id.

[105] *Indian Drugs and Pharmaceuticals Ltd. v Its Workmen,* (2007) 1 SCC 408. *U.P. State Brassware Corpn. Ltd. and Anr. v Udai Narain Pandey,* AIR 2006 SC 586. See also.Arthur L. Goodhart, *Determining the Ratio Decidendi of a case,* (40(2) Yale L J161, 182 (1930). ("The principle of a case is found by taking account of the facts treated by the judge as material and his decision as based on them").

[106] *Naresh Sridhar Mirajkar v State of Maharashtra,* AIR 1967 SC 1.

[107] *Contessa Knit Wear v Udyog Mandir Co-operative Housing Society,* AIR 1980 Bom 374, ^120 ("case is an authority for what it actually decides and not for what it implies or assumes"). See *zho, Quinn v Leatham,* (1901) AC 495.

[108] *Naresh Sridhar Mirajkar v State of Maharashtra,* AIR 1967 SC 1.

it is submitted that the Court has erred in construing *Mira/kar,[m]as* a binding precedent for *Sahara."[0]*

Article 141 empowers the apex court to only interpret the laws and not lay down new law of general application by stepping into the shoes of legislature.[111] Courts have always and should refrain from legislating as they retain the greater power of testing the validity of legislations and judicially reviewing the same on settled principles.[112] However, legislation by the courts will not be open to such tests and will be outside the scope and ambit of judicial review.[113] Therefore, it is humbly submitted that the apex court in *Sahara* has exceeded its jurisdiction under Article 141.

Further, as pointed earlier,[114] the apex court while invoking its inherent jurisdiction under Article 142, has no authority to lay down, guidelines on postponement orders by indulging in judicial activism. Exercise of the inherent jurisdiction envisages interpretation of the existing law to meet the ends of justice only and not come up with new

'w Id.

[110] *Sahara India Real Estate Corporation Ud. v SEBI,* (2012)10 SCC 710.

[111] *P. Ramachandra Rao v State ofKarnataka,* (2002) 4 SCC 578.

[112] Id at ^25.

[113] This is so because Judiciary does not qualify to be State. See generally *A.R Antulay v R.S. Nayak,* AIR 1988 SC 1531; *Naresh Mirajkar v State of Maharashtra,* AIR 1967 SCI.

[114] See *RupaAshok Hurra vAshok Hurra andAnr.,* (2002) 4 SCC 388.

laws. Moreover, the authors now turn to the question of the binding nature of the *Sahara judgment."** It is pertinent to note that the apex court has clearly held in *Ram Pravesh Singh v State o/Bihar,*[m] and in a catena of other decisions,[117] that "any direction given on special facts, in exercise of jurisdiction under Article 142, does not constitute a binding precedent". Thus, the law laid down in *Sahara,*[m] would not qualify to be a binding precedent for the purposes of Article 141.

Postponement orders have been held to be based on the balance of convenience test,[119] which seeks to alter the constitutional framework in order to conveniently accommodate an otherwise incompatible element and" make it conform to the Constitution. Such an alteration is the outcome of extreme judicial activism, which in this case involves altering the balance of Fundamental rights under Part III of the Constitution; At this point, it is noteworthy that altering the structure of Constitution by amendment is possible only under the aegis of the legislature by virtue of a Constitutional amendment power and procedure under Article 368. However, such powers not being plenary, the

[115] *Sahara India Real Estate Corporation Ltd. v SEBI,* (2012)10 SCC 710.
[1,6] (2006) 8 SCC 381.
[117] See *State of UP v Neeraj Awasthi & On.,* (2006) 1 SCC 667; *State of Kerala v Mahesh Kumar & Ors.,* (2009) 3 SCC 654.
[1,8] *Sahara India ReatEstate Corporation Ltd. v SEBI,* (2012)10 SCC 710.
[119] Id at K30.

legislature cannot touch the basic structure of the Constitution. Now, the judiciary in the name of harmonization by propounding a new doctrine . has less power to alter the constitutional framework, especially under Part III of the Constitution. Since the judiciary is the guardian of the Constitution itself, it is only empowered to interpret the Constitution under Article 141 and not legislate. Resorting to such practices entails violation of the basic structure by the judiciary itself, which is an abominable practice to say the least.

In order to stand tall and be regarded as the strongest pillar of democracy, the judiciary must have its concrete foundations firmly rooted within itself. The time is ripe for the apex court to repose confidence in the judicial mind and have faith in itself and its own judges. If the Supreme Court doesn't trust its own judges, then who will?

In India, there already exist *postfacto* restrictions that are imposed on the media. Restrictions imposed on account of contempt of court is one such ground. Moreover, under the Contempt of Courts Act, both civil contempt,[120] and criminal contempt,[121] are recognized. Criminal

[120] Contempt of Courts Act, §2(b)(1971), states that "Civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.

[121] §2(c), Contempt of Courts Act, 1971 states that, "Criminal contempt" means the publication (whether by v/ords, spoken or written, or by signs, or by visible

contempt recognizes restrictions on the ground of "prejudicing, interfering or obstructing with a judicial proceeding or prejudicing, interfering with the administration of justice" as valid grounds for contempt of court. The object of criminal control is aimed at preserving the sanctity of the judicial proceedings and the larger cause of administration of justice.

In light of the above, the authors believe that the appropriate line of control lies in not laying down any *ex ante* restrictions on publications by the media, as *post facto* criminal sanctions exist already. This view also finds concurrence in Blackstone's commentaries wherein he observes, "The liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right *to* lay down what sentiments he pleases before the public; to forfrid this, is to destroy the freedom of the press".[122] " . -

representation, or otherwise) of any matter or the doing of any other act whatsoever which

(i) Scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or

(ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceeding, or

(iii) Interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner. [122] Sir William Blackstone, 4 *Blackstone's Commentaries on Laws of England* at 151-52 (Hart Wilfred Prest ed 2009).

DEEMED SALES UNDER ARTICLE 366(29A)(D) OF THE ■ CONSTITUTION OF INDIA: CLARIFICATION OR CONFUSION?*

Abstract

The Vodafone controversy has still not found settled shores. The numerous amendments implemented with an intention to resolve the problem, function as continuing evidence of the fact that they only generate more problems than solutions. The amendment made to Article 366(29A)(d) of the Constitution of India in order to increase the tax base of sales tax has suffered a similar fate. The legislature, in promulgating this amendment specifically sought to override certain key decisions of the Supreme Court which had taken a strict interpretation of the Article and restricted the application of the Article in the case of certain sale-service transactions. However, the Supreme Court has once again taken an activist position in re-interpreting the Amendment itself and curtailing its applicability to provide relief to taxpayers from excessive taxes. By retaining the 'dominant intention' test and the 'effective control and possession' test to limit the applicability of sub-clause (d) of Article 3 66 (29A), the judiciary has arguably defied the intention of the legislature. The tug of war between the legislature and the judiciary in this respect therefore continues, and correspondingly, has only led to an increase in the taxpayers' woes.

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INTRODUCTION

"When a new source of taxation is found it never means, in practice, that the old source is abandoned. It merely means that the politicians have two ways of milking the taxpayer where they had one before." - Henry Louis Mencken

Taxation laws in India are famed for their complexity and difficulty in interpretation. Even more famed is the alacrity with which the Indian legislature indiscriminately amends tax laws every time the Supreme Court attempts to provide some semblance of certainty. Almost invariably, any interpretation of the Supreme Court seeking to rein in the ambit of a tax provision so as to protect the taxpayers from an exorbitant and disproportionate tax is met with immediate resistance from the legislature in the form of a prompt amendment which invalidates the judgment. In the recent past alone, there have been over thirty such amendments that have taken place in a span of two years, all in the name of "clarifications" or "interpretations", eventually amounting to nothing but a new levy.[1]

[1] Amendments such as : a) The addition of proviso to §9 of the Income Tax Act, 1961 which sought to overrule *Ishikawajima Harima Heavy Industries Co. v Director of Income Tax*, 288 ITR 408, making income accruing from services delivered by foreigners taxable, irrespective of whether such services were actually rendered in India or not. b) The retrospective amendment to §80P of the Income Tax Act, 1961 in order to circumvent the decision of *Kerala State*

The 2012 Vodafone case stands as a perfect example of one such amendment that created a storm in India's commercial and corporate world and made India, one of the world's most favoured investment destinations, subject to the intense scrutiny of the entire world.[2]

Entry 54 in List II of the Seventh Schedule of the Constitution of India, which permits the State to impose a tax on the 'sale or purchase of goods other than newspapers', is another unfortunate, albeit seasoned

Co-operative Marketing Federation Ltd. v CIT, [1998] 231 ITR 814 thus making profits derived by a co-operative society engaged in the marketing of agricultural produce of grown by people other than its members taxable. c) The amendment to §2(24) of the Income Tax Act, 1961 which expanded the meaning of the word 'income' to "include any special allowance or benefit, other than perquisite" resulting in the legislative overruling of *CIT v* R.R. *Bajoria* [1988] 169 ITR 162.

[2] See *Vodafone International Holdings BV v Union of India,* 2012 (6) SCC 757. The transfer of a Cayman Island company from Hutchison Telecommunications International Ltd. to Vodafone Group Pic. without any payment of tax in India was challenged by the Income Tax Department. The Tax Department contended that the transfer involved another indirect transfer of the controlling stake in Hutchison Essar Limited, an Indian Company since its shares were held by the Cayman Island Company. The Tax Department argued that this indirect transfer amounted to a 'transfer of capital assets' under §9 of the Income Tax Act. The amount in dispute was over $2.5 billion dollars;-the Court's judgment went in favour of Vodafone. To counteract this, amendments were made to the Act with retrospective effect, which in effect made Vodafone liable to pay the tax under Indian law.

Taxation policies being one of the most integral aspects of any international cross-border transaction, the modifications carried out by the Finance Act, 2012 to §9 of the Income Tax Act, not just in the context of a tax on the 'transfer of capital assets' outside India, but also on the question of 'royalty' and 'fees for technical services', has rendered each of these impositions wider in ambit than they earlier were and thus cast a cloud of suspicion on India's accessibility and openness to foreign commercial entities.

victim of the abovementioned problem. This provision assumes greater significance because the amendment made in this case was not just to any legislation, but to the Constitution itself. The 46th Amendment to Article 366 of the Constitution of India (henceforth "the Amendment") sought to provide a solution to the problem of interpreting the meaning of "sale of goods"; however, it eventually did nothing but deepened the conundrum. The Amendment created a legal fiction,[3] by introducing the concept of 'deemed sales' through clause 29-A, which in effect widened the ambit of sales tax that could be imposed by the State.[4] However, it can be safely said that this amendment sought to impose a new form of tax altogether, unlike the other amendments cited above which had retrospective effect since they were deemed to be only a clarification to the original section.[5] It is probably the underlying reason as. to why it was notified as a constitutional amendment and applied only prospectively:

> The Amendment to Article 366 was a corollary to certain kinds of

* 'Legal fiction' is defined as 'a fact which is assumed or created by courts or legislature' in *Black's Law Dictionary*, 804 (West 5th ed. 1979).

[4] *Rasbtriya Ispat Nigam Ltd. v Commercial Tax Officer, Company Circle,* (1990) 77 STC **182.**

[5] Clarificatory amendments to tax-levies are therefore in the nature of amendments which claim that the original section meant to include the form of **tax** mentioned in the amendment, but on account of their wrong interpretation they were assumed not to have done so. Therefore, the clarification is deemed only to reiterate what the original section said anyway and hence had retrospective application dating back to when the section actually came into effect.

transactions called "composite contracts" which involved both a sale of goods and the provision for a service taking place simultaneously, such as in the case of catering services. The objects and reasons of the Amendment are discussed in the next section which details how the Supreme Court sought to make certain composite contracts exempt from the application of the tax, but the legislature, through its amendments overrode these decisions. As a result of the Amendment, three distinct categories of "sale" were created which are presendy liable to tax:

1. An outright sale having no service component;
2. A deemed sale as per Article 366(29A); and
3. Composite contracts where sale of the goods, and not the provision of service, remains the dominant aspect of the transaction.

The authors have observed that despite the amendments and i plethora of decisions on this issue/' the classification of a transaction into one of these three heads is not as simple as it seems. The article will

[6] *State of Madras v Gannon Dunkerly,* AIR 1958 SC 560; *A.V. Meiyappan v Commissioner of Commercial Taxes, Madras,* (1967) XX STC *S;Bharat Sanchor Nigam Umited v Union of India,* (2006) 3 SCC 1; *Builders' Association of India and Ors. v Union of India,* (1989) 2 SCC 645; *Bbarti Airtel Ud. v The State ofKamataka, Finance Department,* (2007) 7 VST 505 (Kar); *Idea Mobile Communications Ltd. v CCE, Trivandrum,* 2006 (4) STR 132; *Rasbtriya Ispat Nigam iJd. v Commercial Tax Officer,* (2002) 3 SCC 314; *Laksbmi Audio Visual v State ofKamataka,* [2001] 124 STC 426; *Tata Consultancy Services r State ofAndbra Pradesh,* (2005) 1 SCC 308.

detail how depending on the dominant intention of the parties, the intention of the legislature and conceptual understanding of a sale and its components, a particular transaction can always be mistakenly assumed to be a composite contract. However the judiciary, despite its meanderings on this issue, has secretly sought to give relief to those affected by the incidence of multiple taxes.[7]

The scope of this article is limited to examining the merits and nuances of the judgments and the controversy surrounding sub-clause (d) of Article 366 (29-A). In Section I we note how the controversy began and identify the Supreme Court decisions which led to the legislature's various amendments to Section 366(29-A). Section II will detail the landmark judgment of *Gannon Dunkerlywhich* was the basis for the particular amendment with respect to sub-clause (b) of Article 366 (29-A). In Section III, we will provide a better understanding of why there is still confusion existing with respect to the concept of deemed sales by

" See Section V on 'Judicial Interpretation'. In various cases the Supreme Court **and** the High Courts have re-interpreted Article 366 (29A)(d) such that the dominant intention test and the effective possession and control test have linited the application of Article 366(29A)(d). ! **See** *Rainbow Colour Lab and Anr v State of UP and Ors,* (2000) 2 SCC 385; *Bharat Saachar Nigam Limited v Union of India,* (2006) 3 SCC 1; *State of Andhra Pradesh v BSNL Hyderabad,* 2012 [25] S.T.R. 321; *DP. Agarwala v Oil and Natural Gas Corporation Ltd. and Ors.,* 2010 (3) GLT 667; *Lakshmi Audio Visual v State of tjamataka,* [2001] 124 *STC426; Tata Consultancy Services v State of Andhra Pradesh,* |2005) 1 SCC 308.

explaining the.difference between indivisible and composite contracts and the difficulty in trying to categorize transactions according to this difference. Section IV will elaborate on the Amendment itself in greater detail while Section V will examine how the judiciary, despite the legislature's attempts to increase the tax base, has through various techniques sought to limit the Amendment's scope so as to protect taxpayers from excessive taxes. In the concluding segment, the authors opine that a literal interpretation of sub-clause (d) is not the right approach to adopt. Instead, it is the judicial interpretation that ought to be conformed with and the legislature should in fact fashion the judicial decisions into a binding statutory form.

HOW IT ALL STARTED

It is clear from the Statement of Objects and Reasons of the Amendment that its purpose Was to invalidate specific decisions of the Supreme Court on certain issues dealing with the determination of what constitutes a-sale under Entry 54 of the Schedule.[8] The table below enumerates these decisions:

[8] See http://india.gov.in/govt/documents/amendment/amend46.htm (visited March 3, 2012).

Case	**Amendment**
New India Sugar Mills v Commissioner of Sales Tax, Bihar,[9] wherein it was held that since an element of volitional sale by the seller is not present in case of the transfer of controlled commodities under a Control Order, there was no sale.	Section 366(29A)(a)
State of Madras v Gannon Dunkerly,[w] in which works contracts were held.not liable to sales tax since the dominant intention was to effect a service only.	Section 366(29A)(b)
K.L. Johar and Company, v Deputy Commercial Tax Officer, held that there was no sale by the dealer to a person who wanted to purchase the vehicle at the time of the hire purchase agreement since the dominant intention was to effect a service only.	Section 366(29A)(c)
A.V. Meiyappan v Commissioner of Commercial Taxes, Madras}[1] wherein it was held that a lease of a negative	Section

[9] AIR 1963 SC 1207.

[10] AIR 1958 SC 560; it is the pre-amendment locus classicus on the issue of what amounts to a sale- i) parties competent to contract, ii) mutual assent and iii) transfer of property in goods from one of the parties to the contract to the other party thereto iv) for a price.

"AIR 1965 SCI 082. [12]

(1967) XX STC 115.

print of a picture would not be a sale.	366(29A)(d)
Commercial Tax Officer v Young Mens Indian Association"* in which it was held that that there was no transaction of sale involved in the supply of refreshments and preparations by the club to its members and no sales tax could be levied thereon since the dominant intention was to effect a service only.	Section 366(29A)(e)
Associated Hotels of India v R.N.Kapoor,[H] wherein it was held that there is no sale involved in the supply of food or drink by a hotelier since the dominant intention was to effect a service only to a person lodged in the hotel.	Section 366(29A)(f)

To counteract the effect of these judicial pronouncements and confirm the. wider connotation meant to be given to legislative entries,[15] the forty-sixth amendment to the Constitution of India was promulgated in 1976, which expanded the tax base of Entry 54 by introducing the

" *AIR 1970 SC 1212.*

[14] AIR 1972 SC 1131. " *E/etHote/s and Investments IJmited v Union of India,* ***AIR*** *1990 SC 1664.*

concept of "deemed sales".[16]

The Amendment essentially sought to prevent tax avoidance by including under Article 366(29A) (hereinafter referred to as "the Article") those transactions which were "in substance" sales.'Thus, it meant to tax those transactions which would otherwise be technically considered a sale even though the parties had not intended it to be a sale, such as the transfer of a SIM card. By initiating this change, the legislature wanted to negate the requirement of the intention of the parties to effect a sale (which the Supreme Court had in *Gannon Dunkerly* determined was essential for a sale), as also the requirement of an actual transfer of the title in the property. The earlier mandatory requirement of mutual consensus of the parties to conclude a sale has now been categorically vitiated by *Oil and Natural Gas Commission v State of Bihar*™ and *Vishnu Agencies v Commercial Tax Officer*™ which have held that "where there are any statutory compulsions, the statute itself should be treated as supplying the consensus and furnishing the modality of the consensus". The question that remains to be answered is which kind of sale transactions can now take place without such an intention.

■» *Builders'Association of India v State ofKarnataka,* 1990 79 STC 442 (Kar).
See note 8 and accompanying text. * AIR 1976 SC 2478.
*AIR1978SC449.

After the Amendment, even *"where one or more of the essential ingredients of a sale as defined in the Sale of Goods Act, 1930 are absent* ',[20] the transaction would still be *deemed* to be a sale. As expected, the confusion that arose from such a determination led to a flurry of cases being filed in the courts. Since the taxability was no longer dependent on the intention to effect a sale nor on the actual definition of a sale as determined by the Transfer of Property Act, people now began to question where exactly to draw the line for the purposes of taxing a so-called deemed sales transaction. Therefore, cases like *BSNL* and *Tata Consultancy Services* emerged where clarifications were sought with respect to the existence of *Gannon Dunkerljs* dominant intention test and *Rashtriya Ispat Nigam's* control and possession test.

Although almost all the sub-clauses of clause 29-A have now suffered judicial interpretations and clarifications, the primary controversy that arises with respect to interpretation is arguably in relation to sub-clause (d), with respect to the determination of what elements of a sale can be dispensed with for the purposes of effecting a deemed sale through transfer of a right to use; and which of them should necessarily continue to be a part of such transaction.

[2U] *Marat Sanchar Nigam Umited v Union of India,* (2006) 3 SCC 1, *["The BSNL Case"].*

THE CASE OF GANNON DUNKERLY

State of Madras v Gannon Dunkerly? was the landmark case which was sought to be invalidated by the 46,h amendment to the Constitution. The Supreme Court in this case had held that the Madras General Sales Tax (Amendment) Act, 1947 was ultra vires to the extent that it l-attempted to levy sales tax on materials used by the respondents in the execution of their works contracts, which included the elements of both a sale and a service. The Court held that works contracts, such construction contracts, are indivisible and cannot be separated into services and sales, and since the primary intention of the parties was only to render and accept a service and the parties' dominant intention was not to execute the sale of the goods (such as bricks) involved in the transaction, the same was not liable for sales tax.[22] The sale of the goods remained merely incidental or subordinate to the main intention of the parties to render services.

Therefore, unless the transaction in truth represents two distinct and separate contracts, one for sale of goods and one for the provision of services, and is clearly discernible as such through the intention of the parties, the State would not have the power to separate the agreement to

[21] AIR 1958 SC 560.
[22] Id.

sell from the agreement to render service, and impose tax on the sale.[23] This marked the birth of the 'dominant nature' test which was premised fundamentally on the intention of the parties to the contract to effect a sale.

INDIVISIBLE AND COMPOSITE CONTRACTS

A more detailed discussion of indivisible and composite contracts becomes necessary in order to appreciate the intricacies and complexities implicit in Article 366(29A). There are five distinct transactions under this head:

(i) Contract for service simplicitor;

(ii) Contract for sale simplicitor;

(iii) Composite contract which is divisible due to an intention of the parties to effect two separate contracts, one each for sale and service; (iv) Composite contracts which are indivisible due to a dominant intention to effect either a sale or a service only; and (v) Composite contracts which are divisible through a legal fiction by way of the deeming statutory provision.

[23] *The BSNL Case*, (cited in note 20).

While there is no issue with transactions (i) and (ii) .where the contract is only for a sale or for a service, the dominant nature test determines whether a contract falls under transaction (iii) or (iv). In the absence of a 'dominant intention' of the parties to effect a 'sale' of the goods involved in the contract, the contract would fall under (iv) i.e. it was rendered an indivisible service transaction even though it had a sal? component. The transaction not being liable for sales tax, it would lead to a huge loss of revenue for the Government since contracts of this nature exist aplenty. Hence, three options were suggested to the legislature by the 61st Report of the Law Commission to overcome the 'dominant intention' test:

a) amending State List Entry 54;

b) adding a fresh Entry in the State List; or

c) inserting in Article 366 a wide definition of "sale" so as to include works contracts.

The amendment to Article 366(29A) was chosen as the best option by the legislature to give effect to their intention,[24] by way of which certain indivisible contracts were statutorily *deemed* to be divisible into a contract of sale of goods and a contract of service *vide* a legal

[24] See note 8 and accompanying text; *Imagic Creative (P) lJd. v CCT,* (2008) 2 SCC 614.

fiction.[25] These are thus contracts which would earlier have fallen under (iv), but now subscribed to (v).,

ARTICLE 366(29a)(d)

Unlike hire-purchase contracts, works contracts or catering contracts, a contract involving the 'transfer of right to use goods' is not generally understood as a form of sale-service composite contract. If this had been the case, one could clearly have inferred that the specific intention behind devising sub-clause (d) of the Article was to overcome the element of 'dominant nature' even in such a transaction. The main intention behind formulating this sub-clause was however not to overcome the dominant intention test, but to render contracts having the transfer of a 'right to use' and not the 'tide' per se, as a sale.

Nevertheless, going by a *sui generis* interpretation of the entire Amendment, it seems that what the whole Article essentially attempts to target is the otherwise service-dominant indivisible contract, which the Government wishes to tax as sales. This seems to suggest that even the contracts involving the 'transfer of right to use goods' which are in the form of indivisible service-dominated composite contracts are meant to be taxed. There is nothing in the Amendment to suggest that the sub-

[25] *Builders' Association of India and Ors. v Union of India,* (1989) 2 SCC 645; *Gannon Dunkerley v State ofKajasthait,* (1993) 1 SCC 364.

clause intended to make dominant nature applicable even now to such transactions.

However, the problem arises in that there is nothing to suggest anything to the contrary either. It is also evident from the Object and Reasons of the Amendment that sub-clause (d) was enacted to overrule the principle in *A.V. Meiyappanv GCT Madras^vAiich* dealt with the taxation of a transaction involving the lease of a negative print, and has nothing to do With the dominant intention test.

It is now the settled position after *BSNL v Union of India}*[1] (hereinafter "BSNL") that the introduction of transactions of the nature of (v), would not entirely eradicate the existence of (iv). *BSNL* held that *Gannon Dunkerly case* continues to survive post-amendment in two respects:

1. It neither "altered the definition of the word 'sale' nor did the meaning of the constituent elements of a sale, such as "goods" charfge; and
2. Those composite contracts which do not fall under the ambit of Article 366 (29A) will still be subject to the dominant nature

[26] *A.V. Meiyappan v Commissioner ofCommercial Taxes, Madras (1967)* XXSTC 115.
* *The BSNL Case,* (cited in note 20).

test.[2]"

Composite transactions of the nature where the two components involved are not a 'service' and a 'sale', but a service and a *'deemed sale'* (i.e. a transfer of a right to use) exists. The Supreme Court in *BSNL* implicitly held that they are not disintegrable under statutory compulsion and therefore must fall under (iii) and (iv). Therefore, it seems that there exists a possibility that unless there is a dominant intention of the parties to separate *the service and the 'deemed sale' (the transfer of right to use goods),* it would be rendered an indivisible contract in spite of its composite elements.[29] The scope of such a possibility is what the authors seek to examine in this paper.

JUDICIAL INTERPRETATIONS

The extremely wide ambit, which may be inferred from the words of sub-clause (d) led to a number of cases where States have demanded the application of a sales tax on transactions where the transfer of a right to use goods is an inconsequential aspect of the entire transaction." A

[M]Id.

[29] *The BSNL Case*, (cited in note 20).

[30] X^e cases include amongst others *Commissioner, VAT, Trade and Taxes Department v International Travel House Ltd.*, (2009) 25 VST 653 (Delhi); *Bharti Airtel Ltd. v The State of Karnataka, Finance Department,* (2007) 7 VST 505 (Kar); *Bharti Airtel and Bharat Sanchar Nigam Ltd. v The State of Karnataka, Finance*

majority of the cases dealt with the nature of a transaction by which mobile phone and telephone connections are enjoyed and whether the same is a sale or a service or both. In one instance, the act of lending machinery (on a hire basis) solely for the purpose of executing a works contract was attempted to be taxed as a sale. In another instance, the tax authorities contended that the rendering of consultancy services in the nature of computer branding, job fair and placement supports amounts to a transfer of a right to use. In such cases, the State usually contends that die *intention to effect a transfer of the right to use* is no longer necessary after the Amendment and the otherwise indivisible contract becomes by legal fiction a composite one, including the two aspects of a 'transfer of the right to use goods' and a 'service'.[31]

An interpretation like this would however mean that any transaction where a good is transferred simply for use, irrespective of how inconspicuous it would be in the transaction, would amount to a sale. It would not be difficult to imagine that almost any service rendered would involve goods in one way or the other, such as the transfer of paper (documents) in a lawyer's service or transfer of a prescription in a

Department and Ors., (2011) 44 VST 486 (Kar); *State of Uttar Pradesh and Anr. vUnion of India,* AIR 2003 SC 1147; *BSNL v Union of India,* (cited in note 20).

[31] *P. Aganvala v Oil and Natural Gas Corporation Ud. and Ors,* 2010 (3) GLT 667. It was contended that the otherwise indivisible contract becomes composite on account of the deeming provision under clause (d). ■

doctor's one. The extent of abuse and inconvenience that such a Vide' worded clause would have caused is tremendous.

THE DOMINANT INTENTION TEST

It was thus, up to the judiciary to limit the scope of the tax and prevent an abuse of the sub-clause. *Rainbow Co/our Lab and Anr v State of UP and Ors,*[n] sought to do so in a bold manner by holding that it is only a labour contract that can be split under the Amendment, but the transfer of property in goods still requires the dominant intention of the parties. But *Associated Cement Companies Lid. v Commissioner of Customs?* 'and *BSNL* over-ruled this case, noting that such an interpretation ran expressly contrary to the Amendment.

BSNL: THE LANDMARK CASE

BSNL however found a more creative way of interpreting sub-clause (d) of the Article so as to limit its ambit without expressly going against the legislative intent. The issue that arose in this case was the nature of the transaction in case of provision of mobile phone services. It was argued by the Union that the "electromagnetic waves" used in transmission are the transferable 'goods' for use in this transaction. Therefore, the entire transaction which involved provision of services,

[32] (2000) 2 SCC 385. »
(2001) 4 SCC 593.

including the SIM and recharge coupons which are bought in order to make this transfer possible, could be made subject to sales tax under Article 366(29A)(d). The elaborate judgment of the SC laid down several general principles with regard to Article 366(29A) that have become the *locus classicus* for subsequent judgments. For the purpose of this paper, the specific holding of the court that becomes important is:

> *"Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale."*

The Court also held that no other service has been permitted to be so split(hospital or legal services for instance).[34]

It seems therefore, that the majority chose to leave the transactions falling under sub-clause (d) of the Article still open to the dominant nature test, even if they are composite transactions. The Court also left open, the question as to whether purchase of a SIM card amounted to a transfer of right to use open to the intention of the parties, thus implicitly acknowledging that only if the intention to

[34] *The BSNL Case*, (cited in note 20).

'transfer the right to use' is dominant over the intention to provi services, the transfer could be taxed as a sale under Article 366(29A)(d),

However, in another part of the judgment, the Court wr referring to the Amendment as a whole emphasized that it is oi transactions that fall entirely outside the scope of Article 366(29A) whi are no longer subject to the 'dominant intention' test. This runs contr; to the previous inference and raises a doubt whether they actually me: that even transactions under sub-clause (d) of the Article, no longer n< to fulfil the 'dominant intention' test.

[35] The issue regarding the taxability of SIM cards was made subject to anot round of litigation after the BSNL judgment in *Idea Mobile Communications Lt CCE, Trivandrum,* 2006 (4) STR 132, *BPL Mobile Communication Ltd. v Ci Mumbai,* 2007 (7) STR 440, *CCE&C Cochin v Idea Mobile Communications* I 2009-(020) STT 0019 (Ker.) etc., as both sales and service tax was being lev on the sale SIM. The quandary was finally put to rest in 2011 by the Supre Court in *Idea Mobile Communication v C.C.E&C, Cochin,* 2011-VIL-17-! wherein the Supreme Court after relying on the *BSNL judgment*held that S cards are not sold independent from services provided by the providers. Th the dominant intention of the transaction is to provide services and not to the SIM cards as they on their own do not have any value. The value of the S card is a part and parcel of the activation charges and the value of the tax is n calculated on the total amount paid to the operators from the customers service tax only, and there is no element of sale in the transaction. The And Pradesh High Court in *State ofAndhra Pradesh v BSNL;* cited in note 33, qualil the abovementioned proposition by holding that if' the goods are sold supplied to the subscribers by the service providers then there is a transfer the right to use these goods. It further held that in most cases the goods actually' procured by subscribers from suppliers, other than the sen providers. Thus the charges, which the subscriber is called upon to pay by service,,provider, would be considered a telecommunication service and can be in the" nature of a sale.

The concurring judgment of Justice Lakshmanan in *BSNL*, however, was crystal clear and beyond a doubt. Lakshmanan J. explicitly stated that the exemption from dominant intention is applicable only to works, catering and hire-purchase transactions and not to sub-clause (d), where the legal fiction operates only for the purposes of effecting a sale in the absence of a 'transfer of tide' in the goods and not to overcome the dominant intention test.

POST-BSNL

A judgment of the Andhra Pradesh High Court in 2012,[37] ["AP HC"] interpreted the aspect of BSNL regarding 'dominant intention' in great detail. It referred to *Builders Association of India v Union of India,*[38] which stated that:

When the law creates a legal fiction, such fiction should be carried to its logical end. If the power to tax a sale, in an ordinary sense, is subject to certain conditions and restrictions imposed by the Constitution, the power to tax a transaction Which is deemed to be a sale under Article 366(29A) of the Constitution should also be subject to the same restrictions and conditions.

[36] *The BSNL, Case,* (Lakshmanan J. concurring).
[37] *State of Andhra Pradesh v BSNL, Hyderabad* 2012 [25] S.T.R. 321.
[38] See note 25 and accompanying text.

The case read the 'dominant intention' test into sub-clause (d) of the Article by determining what it means when the clause says "transfer of right to use goods for consideration". Article 366(29A) (d) intended to tax a transaction in which a consideration was paid in *return for the transfer of right to use certain 'goods'*. BSNL had ruled that [w]hat are *"goods"* in a sales transaction remains, primarily, a matter of contract and intention. The Court would have to arrive at the conclusion as to what the parties had ~ intended, when they entered into a particular transaction of sale, as being the subject-matter of sale or purchase.

A 'sale' is complete only when one party agrees to pay consideration for the same 'good' that the other party intends to provide in return. A 'sale' represents a 'transfer of title' which is equivalent to 'deemed sale' here, which represents the 'transfer of right to use' and this change from 'title' to 'use' is the extent to which the legal Action under sub-clause (d) operates. It does not however, change other aspects or requirements of a sale, such as the *consensus ad idem* of the parties on the *subject matter which is being transferred* in the transaction. Therefore, akin to how a sale requires *consensus ad idem* on the subject matter whose *'title'* is transferred, even for the purposes of a deemed sale, one would have to determine what exactly the *subject matter* that was being transferred for Wwas.

The AP HC judgement concluded that if the parties to the agreement intended to pay the consideration for the transfer of the 'SIM', it means that the SIM is the subject matter of the 'transfer of right to use', and SIM being a "good" under the Sale of Goods Act, this would constitute a deemed sale. However, if the consideration was actually intended to be paid not for the SIM, but for the activation services that comes through a SIM, it could not be said to be a 'transfer of the right' to use goods since the activation services cannot constitute "goods" as per the legal definition of goods under the Sale of Goods Act, and thus this would constitute a deemed sale under the Amendment. Notably, the meaning of the term 'good' has not changed after the 46* Amendment.[39] Therefore, it is ultimately *what the parties intended to transfer for consideration* that would determine die nature of the transaction i.e. if there is indeed a "deemed sale" under the particular sub-clause. Effectively, this translates to the 'dominant intention' test, since it is ultimately the overarching intention of the parties to effect the 'deemed sale' that governs the contract.

Additionally, the Madras High Court judgment *inState of Tamil Nadu vEssar Shipping Limited andAnr.^has* expressly interpreted the Apex

[39] *The BSNL Case,* (cited in note 20).

[40] *The State of Tamil Nadu v Essar Shipping Limited No. 7* and *Essar Shipping Ports & Logistics Limited v The Commercial Tax Officer (FAC) Kuralagam Annexe*

Court decision to assert that the dominant intention test continues to apply to cases falling within the ambit of sub-clause (d) of the Article. The BSNL decision has been followed religiously in subsequent cases which have applied the clause only where a Service component^ is traceable as the dominant aspect in a transaction.[41]

However, a 2012 Bombay High Court judgement in the *Maharashtra Chamber of Housing Industry and Ors. v State of Maharashtra and Ors.,*[42] has expressed that " *ft]'he judgment in BSNL is authority for the principle that after the enactment of the Forty Sixth Amendment, the sale element of those contracts which are governed by any of the six sub-clauses of Clause (29A.) of Article 366 is made severable and that it is by a fiction of law isolated and subjected to sales tax by the State Governments under Entry 54 of List IF'.*

The judgment emphasizes that the sale element of *any* of the six sub-clauses is made severable by default through the Amendment. Although the abovementioned decision might not be considered an authority for this statement, since the main issue and the ratio in the case

Chennai, Tax Case (Revision) Nos. 184, 1563, 1589. and 1590 of 2006 and W.A. No. 1140 of 2010, *['Essar Shaping Case"]*.

41 *D.P. Agarwala v Oil and Natural Gas Corporation Ltd. and* Orr.,2010 (3) GLT 667; See also The Delhi High Court in *Commissioner, VAT, Trade and Taxes Department,* [2009] 25 VST 653; *HLS Asia Limited v The State ofTripura,* 2011 (3) GLT 512; *Ahuja Goods Agency, Commissioner, Trade Taxes, Uttar Pradesh v JamnaPrasodJaisml,* (2008) 13 VST 403 (All); R.P. *Kakoty v ONGC,* (2009) 22 VST 136.

42 2012 (114) Bom.L.R. 2152.

was only based on an interpretation involving a works contract, the decision is not the only judgment relaying on such an interpretation.

Therefore, the question whether sales tax can be imposed on those composite transactions which fall within the ambit of sub-clause (d) of the Article but do not have a "transfer of right to use goods" as a separately discernible dominant component of the transaction, still continues to remain is slightly unclear.

EFFECTIVE POSSESSION AND CONTROL TEST

There is yet another aspect on which the concept of 'transfer of right to use goods' can be tested. It has been determined that whether the parties had an intention to effect the transfer of the right to use goods as a dominant part of the transaction is essentially to be divined from the facts of each case and the terms of the contract.[43] One of the ways to determine such intention, as discussed above, is to determine what subject matter the consideration is paid for. One other fundamental test that has been used to determine the presence of the intention is the 'transfer of effective control and possession of the goods for use' test.

[43] *North East Gases Pvt. Ltd. v State of Assam,* [2004] 134 STC 249.

JUDICIAL UNDERSTANDING OF 'EFFECTIVE: POSSESSION AND **CONTROL'**

In *BSNL,* the Supreme Court examined two precedents: *State of Andhra Pradesh and Anr. v Rastriyalspat Nigam Ltd.** and *Agarwal Brothers v State ofHaryana and Anr.*[45] The distinction that war drawn between therri became the basis for the argument involving the necessity of dominant intention. While there was a transfer of goods for use in both the cases, the machinery transferred in the *Rastriyalspat Nigam* case was not under the complete control of the contractor, who could make use of it only for a particular purpose only, and not as freely as he wanted. In *Agrawed Brothers* on the other hand, the shuttering material that was transferred was completely within the control of the transferee and could be used by him as and how he wished. *BSNL* found that this denoted the 'dominant intention' of the parties to effect a 'transfer of the right to use' goods.

It is clear from subsequent cases that have heavily relied on BJ7VL,,[46]that transfer of effective control and delivery of possession has become the fundamental test to ascertain if there has been an intention

[44] (2003) 3 SCC 214.

[45] (1999) 9 SCC 182.

[46] See *Alpha Clays v State of Kerala,* 135 STC 107 (Ker,); *Rashtriya Ispat Nigam Ltd. v Commercial Tax Officer,* (2002) 3 SCC 314; *Krushna Chandra Behera v State oj Orissa,* [1991] 83 STC 325 (Ori); *Bank of India v Commercial Tax Officer, Central Section, Calcutta,* [1987] 67 STC 199 *(CsA);State Bank of India v State of Andhra Pradesh,* [1988] 70 STC 215 (AP).

to transfer the right to use. *State of Tamil Nadu and Essar Shipping Limited and Anr.,*[47] *has* held that *"in. order to attract charge under the transfer of the right to use any goods for any purpose as a deemed sale, what is emphasised is the intention to 'transfer the right to use goods' which, in turn, imply transfer of effective control for use"*. A mere delivery of possession without transferring effective control is insufficient to render it a transfer of the right to use.

In *Lakshmi Audio Visual?** it was held that in cases of hiring of audio, visual and multimedia equipment, if the transferor merely delivers the equipment to the customer on hire and leaves it to the customer to transport the equipment, install and operate them in any manner he wants, it will be a transfer of the possession and effective control but if he takes the equipment to the site of the programme, installs them, operates them and then dismantles them and brings them back after the period of hiring, it would not amount to a transfer of the right to use.

THE AMENDMENT TO THE FINANCE ACT, 1994

The position has been solidified by virtue of an amendment made to the Finance Act, 1994 in 2008.[49]Section 65(105)(zzzze) was added to Section 65(105) of Chapter V of Finance Act and was defined "taxable services" to include:

[47] *Essar Shipping Case*, (cited in note 40).
[48] *Lakshmi Audio Visual v State ofKarnataka*, [2001] 124 STC 426.
[49] Finance Act No 2 of 2009.

"..supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and . effective control of such machinery, equipment and appliances."

Information technology and software, among others, was included within the purview of a taxable service. In response to a challenge to this amendment as regards such software, in which it was argued that this amendment was beyond legislative competence since it would lead to an overlap between a sales tax under 366(29-A)(d) and service tax, it was held in *Tata Consultancy Services v State of Andhra Pradesh?*[0] and *Infotech Software Dealers Association v Union of India,*[51]*\hzt* only if there is an intention to effect the deemed sale through transfer of effective possession and control will the transaction become a sale under Article 33 (29A) (d). Since the new amendment relegated service tax only to transactions which did not exhibit such a dominant intention, it was upheld. Had *every* transaction involving a 'transfer of right to use goods' necessarily always been a sale, the contention that the amendment was beyond legislative competence would have succeeded.[52]

[50] (2005) 1 SCC 308.
[5'] (2010) 236 CTR (Mad) 58.
[52] Id.

Therefore, the dependency on the intention of the parties' alone was what rendered the argument moot and saved the constitutionality of the amendment. This judgment conclusively establishes that the determination of whether there has been a transfer qf right to use is a matter of the facts of each case and the parties' intention. To put it succinctly, if a composite transaction involves the intention to transfer the right to use a good and satisfies the effective control/possession test, it will be subject to sales tax only. If the test is not satisfied, dien service tax will be levied.

Thus, by applying the dominant nature test to sub-clause (d), not only is the breadth of the provision reduced, but a complicated levy of a combination of sales and service tax on their respective counterparts in the transactions is also avoided. If the tests were not made applicable, then the "transfer of right to use" of equipment for instance, would be taxable as a sale while the residuary part of_ the transaction, which may include installation and delivery charges would be taxable under service tax. Unfortunately, hire-purchase and leasing transactions as well as works contracts, which are taxable under clauses

(b) and (c) suffer from this problem of hybrid taxation,[53] thus causing much trouble to real-estate developers and property-owners.

IS LITERAL INTERPRETATION THE WRONG WAY?

The conventional method of interpreting any tax provision is to construe it stricdy.[54] Lord Cairns in *Charles James Partington v Attorney General?*[5] held that the principle of all fiscal legislation is this —*"if a person sought to be taxed comes under the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be".* It is respectfully submitted that the literal interpretation of sub-clause (d) of the Article would result in an extremely absurd situation where every transaction involving goods exchanging hands would be subjected to sales tax. Since it is an established principle that a strict interpretation that leads to an absurd

[53] See *K. Rabeja Development Corporation v State ofKamataka,* (2005) SCC 5 162, which held that real-estate developers must pay sales tax and §65(105)(zzzza) of the Finance Act, 1994 which imposes service tax on works contracts; See also *Association of Leasing & Financial Services v Union of India,* (2011) 2 SCC 352 which upholds §65(12) and §65(105)(zm) of the Finance Act, 1994 that subject leases and hire-purchase transactions to service tax.

[54] Vepa P. Sarathi, *Interpretation of Statutes,* ^375 (5th ed. 2010); Rowlatt J. in *Cape Brandy Syndicate v IRC,* [1921] 1 KB 64 approved in *CTT v Ajax Products Ltd.,* [1965] 55 ITR 741 (SQ; *Smt. TarulataShyam v CIT,* [1971] 108 1TR 345 (SQ: *"There is no scope for importing into the statute words which are not there. Such importation would be, not to construe, but to amend the statute. Even if there be a casus omissus, the defect can be remedied only by Legislation and not by judicial interpretation".*

[55] (1869) 4 HL 100. See also *CLTvT.V. Sundaramlyyengar,* [1975] 101 ITR 764 (SQ.

consequence cannot be taken, such 'an interpretation cannot be accepted.[56]

One must keep in mind that the general object of the Amendment was to reduce the scope of avoidance of tax.[57] However, the manner in which sub-clause (d) of the Article has been worded would mean that the legislature intended every transaction involving the slightest hint of a transfer of the right to use goods to be subject to sales tax. It is clear from the preceding analysis that the Supreme Court does not subscribe to such an interpretation and it does not seem very hard to fathom why. The enormous impact of such a reading, which would render one of the cardinal elements of a sale- the intention of the parties to the transaction-meaningless, especially in a situation where any good that is handed over "t>y one person to another almost always results in the right to use being transferred to the other, requires thorough examination.

The purpose of creating the legal fiction of 'deemed sales' was to tax those transactions that are similar to sales.[58] As the objects and reasons of the Amendment indicates, what the legislature intended was to

[56] *The Commissioner of Income Tax, Bangalore vJ.H. Gotla,* AIR 1985 SC 1698 relied upon in *Commissioner of Income Tax v M/S Alom Extinctions Limited,* (2010) 1 SCC 489 arid *The Commissioner 'of Income Tax v Saumya Finance And Leasing Co. (P),* (2008) 215 CTRBom 359.

[57] See note 8 and accompanying text.

[58] Id.

overrule decisions like *A.V. Meiyappan v CCTMadras.^Thz* legislature did not as such indicate any other purpose for which sub-clause (d) required to be introduced and it would be difficult to infer that they specifically wanted sub-clause (d) to apply across the board like its literal interpretation purports.

The consequence of such an amendment must be worked out only to its logical extent with due regard to the purpose for which the legal fiction has been created.[60] Stretching the consequences beyond what logically flows from the section amounts to an illegitimate extension of the purpose of the legal fiction.[61] Therefore, it is settled law that a legal fiction is' to be limited to the purpose for which it is created and should not be extended beyond that legitimate field.[62] In a provision of such a nature it would be inappropriate to have a clause so wide that it overlaps and covers even those transactions which have little or no resemblance to the concept of a sale. Such a clause would suffer from the vice of excessive breadth and cannot but be struck down as it subjects a taxpayer to absurdly excessive hardship.

[59] *A. V. Meiyappan v CCT, Madras,* (cited in note 26).
[60] *P, Prabhakaran v P. Jqyarajan,* AIR 2005 SC 688.
[61] *Maruti Udyog Ltd. v Ram LaiandOrs.,* AIR 2005 SC 851.
^*Bengal Immunity Co. Ltd. v State of Bihar,* AIR 1955 SG 661; *Garden Silk Mills Ltd v Union ofIndia,* AIR 2000 SC 33.

Furthermore, though the cardinal rule of interpretation is that words should be read in their ordinary and grammatical meaning, in the case of constitutional enactment like 366(29A) conferring legislative power, a liberal interpretation should be given to the words.[63] As the Constitution is a mechanism through which laws are to be made, the same principles that one applies to ordinary law cannot be applied here.[64] A constitutional provision can never be static; it is dynamic and eternally evolving, where latent capabilities must be developed by courts in case of novel situations;[65] as was done by introducing concepts of effective control and intention within sub-clause (d) of Article 366 (29-A).

The Law Ministry's letter,[66] clarifying the 2008 amendment to the Finance Act also demonstrates implicit acceptance of the stand taken by the courts. Justifying how the transfer of the right to use in Article 366(29-A)(d) differs from the transfer of right.to use in Section 65(105) of the Finance Act, it stipulates that the *transfer of right to use involves transfer of both-possession and control of the goods to the user of the goods, which is not the case*

[63] *Navin Chandra » Commissioner of Income Tax,* 1955 1 SCR 829; *United Provinces v Atiqa Begam,MR* 1941 FC 16; *Western India Theatres Ltd. v Cantonment Board,* AIR 1959 SC582; *Elel Hotels & Investments Ud. v Union of India,* (1989) 3 SCC 698.

[64] *IndiaCedent'v State of Tamil Nadu,* (1990) 1 SCC 12.

[65] *Special Reference No 1 of 2002 by President,* (2002) 8 SCC 237.

« M.F. (D.R.) Letter D.OJF, No, 33.4/1 /2008-TRU, dated 29-2-2008, online at" http://www.taxindiaonline.com/RC2/inside2,php3?filenarne=bnews_detail.php3&newsid=11782 (visited March 12, 2012). '

in a 'service' under the Finance Act. Itfurther clarifies that whether there is a transfer of right is a question of facts and is to be decided based on the terms of the contract and other material facts.

Hence, in spite of the fact that a bare reading of the Article and the *sui generis* interpretation of the general object behind its introduction implies that overcoming the dominant intention test was the primary intention of the legislature,[67] the Court felt duty-bound to protect taxpayers by limiting the utterly expansive nature of sub-clause (d) of the Article and necessitating the existence of one element of sale- the intention of the parties of effect the transfer.

The stand taken by the Supreme Court is best justified by this Shakespearean adage: "

We must hot make a scarecrow of the law,

Setting it up to fear the birds^fprey,

And let it keep one shape, till custom make it

Their perch and not their terror. (Measure for Measure 2:1)

[67] *bengal Immunity Company Limited v State oj"Bihar,* AIR 1955 SC 661 approved Crawford in Statutory Construction stating: "Hence, the court should, when it seeks the legislative intent, construe all the constituent parts of the statute together and seek to ascertain the legislative intention from the whole Act$_v$ *considering every provision thereof in the light of the general purpose and object of the Act itself* 'and endeavouring to make every part effective, harmonize and sensible".

CONCLUSION

Once again, the Supreme Court has played the role of a sentinel on the *qui vive* by preventing the misinterpretation of sub-clause (d) of the Article through a liberal interpretation of the same through concepts like 'effective control and possession' and 'intention of the parties'. A significant amount of judicial meandering and deliberation that was incurred in arriving at these concepts meant that they are still not crystal clear, but the courts have, at the very least, provided a window of hope for further judgments to reinterpret the Article in a way which would avoid absurdity.

However, it is a pity that the law was only cleverly circumvented and creatively interpreted, but not changed; this may lead to wastage of time and expenses in future litigations. Due to the rather diplomatic stand taken by the Supreme Court to avoid going loggerheads with the legislature, a lot of effort has been, and would even in the future be wasted in litigation, simply because of a badly drafted clause which could very easily have been differently worded or repealed. It is no wonder then that even India's most eminent lawyer Mr. Nani Palkhivala opined:

'We Indians endure foolish laws and maddening amendments which benefit none except the legal and accountancy provisions, and instinctively prefer to circumvent the law than to fight for its repeal.'"

The disproportionate pecuniary burden that taxpayers endure because of the convoluted taxing legislations in India has made taxing provisions remain the subject matter of much litigation. The interplay between sales and service tax moreover has suffered countless challenges from taxpayers. The extent to which a provision like sub-clause (d) of the Article, which makes transfer of goods without transfer of title equivalent to a sale, can be misused is unimaginable. While the Supreme Court has managed to salvage the situation for the time being, it is a well-known that judicially evolved principles are dynamic and always susceptible to continuous modification and reversal.

It is the submission of the authors that a more concrete solution routed through the legislature therefore becomes necessary to prevent indiscriminate abuse of such burdensome taxing provisions. Perhaps a clarification in the form of an amendment to Article 366(29A) could expressly consider the connection between the 'dominant intention' test and the Article and settle the questions that have arisen regarding the

Kanga & Palkhivala, *The haw and Practice of Income Tax,* fvii (2nd ed., 2004).

continuance of the test and its applicability to the various clauses of the Article.

SUPREME COURT: EXPOUNDING PHILOSOPHY OF THE CONSTITUTION OF INDIA*

Abstract

This paper discusses the Supreme Court of India's evolution of the "expounding philosophy of the Constitution of India that evolves the nature of transformative jurisprudence" in India and its dimensions through the judicial process. Social, economic, cultural and political forces have significantly inspired the 'conservative reformation' of constitutional justice. The Supreme Court's decisions over the last six decades indicate that we have entered an arena characterised by the development of the basic structure doctrine, public interest litigation, sustainable development, sustainabUity of the various ecosystems, State as the public trustee of environmental protection, instrumentality and agency, reasonable, just and fair procedural justice, post-decisional hearing, human dignity, etc. Aa no bhadhrakratvqyantoovisvata (Rig-Veda) is the fountainhead of Indianprudentiajuris. This paper highUghtr the-get&sis, philosophy, contours and dimensions of the evolution of "expounding the transformative jurisprudence" reflected in and deducible from tht judgments of the Supreme Court. In the backdrop of the above, a modest endeavor ha.

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been made to analyse the judges' philosophy, as reflected in and deduced from their judgments.

INTRODUCTION

The Supreme Court's contributions to the development of the *corpus juris* of India are not without purpose or thought. We have been cautious enough to not intrude into any idea that may get subdued in the labyrinth of other contrived materials; we have been conscientious too, to indm' anv noble and notable ideas forming the core of our philosophy enjoined in the judgments that may not be lost sight of. Writing such a critique about judges has not been an easy task; it has been a rather challenging one.

The judgments selected for analysis reflect the intellectual activism of judges that show enlivened as well as evinced judicial craftsmanship. The judicial craftsmanship demonstrates a thorough understanding of the needs of the present times and thus gives shape to the evolving Indian jurisprudence. The demonstrated restraint is of paramount importance since "self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."[1]

The trinity of *Kesavatmnda Bbaratbi,*[2] *Maneka GatidhiJ'and S.R. Bon/ma/** has laid the foundation of a new constitutionalism and

[1] See *Morey v Doud,* 354 US 457 (1957) (Frankfurter, J. dissenting).
[2] *Kesavananda Bbarati v State of Kerala,* (1973) 4 SCC 225.
[3] *Maneka Gandbi v Union of India,* (1978) 1 SCC 248.
*S.K Bommai v Union of India, (1994) 3 SCC 1.

administrative process. It gives a deep insight demonstrating that the superior courts not only interpret the text of the Constitution but also expound the constitutional law that binds the posterity, i.e. the future generations. It highlights the genesis of the Constitution of India, born out of one of the saddest experiences of colonial anarchy, its present experiences working with the avowed democracy, and its future foundations.[5]

Kesavananda, the genesis of the basic structure diesis, has given *de novo* perceptions to the establishment of the rule of law as well as the constituent power of the Parliament of India encapsulated in Article 368 of the Constitution of India, that it does not enjoy infinite powers to evaporate the soup and sauce of the Indian Constitution's basic structure, which is its brooding omnipresent soul. The basic structure thesis is not the Outcome of any law-logic combine; it is rather, a law-experience analogy.

Maneka has given birth to tht principle of 'mutually reciprocative' as well as 'mutually inclusive' relationship between Ardcles 14, 19, 21 and 22, both in context and content. It also evolved the Indian perceptions of due process presented in the phrase "reasonable, just and lair". Moreover, it invented a novel approach to natural justice with the

[s] See *Ashok Kumar Thak.nr v Union oj India,* (2008) 6 SCC 1.

application of the expression "post-decisional hearing"; an unparalleled contribution to the evolution of administrative processes around the globe.

S.K Bommai puts a cap on the government's extra constitutional power that it had misused under Article 356 a number of times earlier.[6] 'The life of law has not been logic; it has been experience',[7] is the message conveyed in the triumvirate of cases unequivocally. It gives insights into the evolution of *de novo* judicial process, which portrays a new roadmap of shift from regressive to progressive contours of constitutional law in India.[8] It seems to be a progressive movement from, the archaic genesis of law,[9] to the realistic expounding of 'sociological

[6] See, for example, *State ofRajasthan v Union of India,* (1977) 2 SCC 592.
[7] See Oliver Wendell Holmes, Jr., *The Common Lamx* 5 (Belknap, 1967); Holmes, *The Path of Law,* 10 Harv L Rev at 157 (1897); Holmes, *Natural Law,* 32 Harv L Rev at 40 (1918).
[8] *A.K. Gopalan v State of Madras,* AIR 1950 SC 27; this was the first test case of right to life and personal liberty of a detained citizen of India under the preventive detention law and the Supreme Court was regressive in its interpretation of the expression "procedure established by law"; *ADM Jabaipur vShivkant Shukla,* (1976) 2 SCC 521, was another example of the regressive approach of the Supreme Court. Since the criticism of the judicial behavior of the Supreme Court of India during the emergency, imas been seen to become more progressive.
[9] See *Austin's* Analytical Positivism; *Bentham's* thesis as the genesis of Austin's Analytical Law and Command Theory; *C.K, Allen's* Imperative Theory of Law; *Kelserfs* Pure Theory of Law developed on the touchstone of Norms and Grundnorm of Austria's socio-economic-political background with least relevance to Indian context overdy and coverdy; *H. L A. Hart's* Concept of

jurisprudence', 'sociology of law', 'social engineering' and 'experiential jurisprudence'.[10]

The progressive contours are a boon for transformative jurisprudence in India that has indeed strengthened the dimensions of new jurisprudential thoughts of 'affirmative action',[11] 'human dignity',[12] 'legal aid',[13] 'under trials',[14] 'backlog/pendency of cases',[15] 'delay and speedy disposal of cases',[16] 'natural justice and post-decisional hearing',[17] "women empowerment',[18] 'child empowerment and child education',[19]

Law espoused in the backdrop of *Austin* and British Jurisprudential Thought; etc.

[10] See Dean Roscoe Pound, *Jurisprudence,* Holmes, *The Path Of Law With The Perceptions Of. Realistic Approaches To haw,* Cardo2o, *The Nature of Judicial Process,* etc.

[1] See Constitution of India, Art 15, §(3), §(4), §(5); Constitution of India, Art 16 §(4), §(4A), §(4B), §(5); see *Indra Sawhney v Union of India,* (1992) Supp. 3 SCC 217; *Ashok Kumar Thakur v Union of India,* (2008) 6 SCC 1.

[12] See Preamble to the Constitution of India, India Const Art 21; *Maneka Gandhi v Union of India,* (1978) 1 SCC 248; *I.R. Coelho v State ofT.N.,* (2007) 2 SCC 1; *Bandhua Mukti Morcha v Union of India,* (1991) 4 SCC *\II\BodhisattavaGautam vSubhra,* (1996) 1SCC 490.

[13] See Constitution of India Art 39-A, Art 21; *Khatri (II) v State of Bihar,* (1981) 1 SCC 627.

[14] See *KadraPahadiya v State of Bihar,* (1983) 2 SCC *\04;Kartar Singh v State of Punjab,* (1994) 3 SCC 569; *Raj Deo Sharma II v State of Bihar,* (1999) 7 SCC 604.

[15] *HussainaraKbatoon (IV) v Home Secretary, State of Bihar,* (1980) 1 SCC 98; (1986) 4 SCC 481.

«Id.

[17] *Maneka Gandhi v Union of India,* (1978) 1 SCC 248.

[18] *Visbaka v State ofRajasthan,* AIR 1997 SC 3011.

[19] *Unni Krishnan v State ofA.P,* (1993) 1 SCC *645-Jtfohini Jain v State ofKarnataka,* (1992) 3 SCC 666.

environmental law by inventing the concept of State as Public Trustee,[20] 'sustainability',[21] 'protection of underserved and underprivileged sections of the society',[22] 'aboriginals',[23] etc. It has propelled the boundaries of the constitutional governance of our country in new directions.[24]

Sukbdev Singh v Bhagat Ram[25] *R.D. Shetty v International Airport Authority of India*[26] *Ajay Hasia v Khalid' Mujib*[27]and *Pradeep Kumar Biswas v Indian Institute of Chemical Biology*[28]* provided new dimensions to the constitutional concept of 'other authorities' within the constitutional language of 'State'. The judicial tests of 'instrumentality and agency' broaden the scope of 'other authorities' and 'State' to be mutually symbolic as well as to exist in mutual harmony and not be mutually antagonizing.

[2"] *NIC. Mehta v Kamal Nath,* (1997) 1 SCC 388; *P. Ramachandra Rao v State of Karnataka,* (2002) 4 SCC 578.
[21] *M.C Mehta v Union of India,* (1987) 1 SCC 395.
[22] See note 11.
[23] Id.
[24] See *Vodafone International Holdings v Union of India,* 2012 (1) SCALE 530.
[25] *Sukbdev Singh i>BbagatRam,(\975)* 1 SCC 421.
[26] R.D. *Shetty v InternationalAirport Authority of India,* (1979) 3 SCC 489.
[27] *Ajay Hasia v KfjalidMujib,{\W\)* 1 SCC 722.
[28] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology,* (2002) 5 SCC 111.

THE EXPOUNDING PHILOSOPHY: FLASHING THE FLAMING SWORD OF INSPIRATION

Judicial process through judicial craftsmanship, judicial innovation, judicial creativity, and judicial governance, unequivocally narrates that legislations are temporary or seasonal; the Constitution however, is a permanent legal document which binds the posterity.

In the enlightened words of Justice Vivian Bose in 1954, one of the first judges of the Supreme Court of India, constitutional provisions in the context of justice mean "flashing the flaming sword of its inspiration". The phrase "flashing the flaming sword of its inspiration", contemplated by Justice Vivian Bose, is in relation to Article 142 of the Constitution of India that empowers the Supreme Court of India to pass such decrees or make such orders as is necessary for doing complete justice in any case or cause or matter pending before it. This axiom is the genesis of public interest litigation evolved as early asl954 when the concept of PIL or SAL or PAL was unheard of. It holds "judge-made law as one of the existing realities of life".[29]

[20] See Benjamin N. Cardozo, *The Nature of the Judicial Process* at 2 (Yale University Press, 1921); Holmes, *The Path ofLawnt* 10 (cited in note 7): "What the judge says in reality, there is nothing pretentious about it, is the law in the real sense"; See Constitution of India, Art 142.

This philosophy is a method along the line of logical progression or the rule of analogy or the method of philosophy; along the line of historical development or the method of evolution; along the line of the customs of the community or the method of tradition; along the lines of justice, morals, and social welfare, the mores of the day or the method of sociology.[30] This is an intellectual passion for *tkgantiajuris}*[x] This philosophy can never be disseminated or explained in brevity or precision. This philosophy is inspired by a class of questions, which in the end result culminates in the philosophy forming the growth and development of the judicial process,[32] namely, what is it that a judge does when he decides a case? To what sources of information does the judge appeal for guidance? In what proportions does the judge permit them to contribute to the result? In what proportions ought such sources to contribute? If a precedent is applicable, when does the judge refuse to follow it? If no precedent is applicable, how does the judge reach a rule that will make a precedent for the future? If the judge is seeking logical consistency, the symmetry of the legal structure, how far shall the judge seek it? At what point shall the quest be halted by some discrepant

[30] See Cardoso, *The Nature of the Judical Process* (cited in note 29).
[3]Ud.

custom? By some consideration of social welfare? By the judge's own standard, or the common standard of justice and morals?

These inquisitives explain the philosophy of *ex praecedentibus et consequentibus optima fit interpretation,* i.e., precedent, stare decisis, and ratio decidendi: the best interpretation is made by following the things preceding them. It is one of the living forces of the everyday working of our law or any system of law that follows this legal phrase.[33] The philosophy of the judges of the Supreme Court in this process is reflected in their judgments, which have their roots in the constant striving of the mind for a larger and more inclusive unity of consistency, certainty, uniformity of plan and structure, in which differences are reconciled, and abnormalities vanish.[34] The things deduced from the judgments are with reasons and consequence of today that will make the right and wrong of tomorrow.[35]

Thus, the things deduced from a judgment have a generative power that begets its own image and has a "directive force for future cases".[36] It is this principle of philosophy of judicial process, i.e., of

"Id.
34 Id.
«ld.
[36] See Josef Redlich, *The Common haw and the Case Method in American University Law Schools* at 37 (1914), in Cardozo, *The Nature of the Judicial Process* (cited in note 29).

logical development on the basis of reasoning and experience,[3]' from which new principles or norms may spring to shape or reshape the living forces of the judicial process. Munroe Smith explains the philosophy of this process: *"In their effort to give to the social sense of justice, they articulate expression in rules and in principles; the method of the law finding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule, which seems applicable, yields a result which is felt to be unjust, the ride is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice,'it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined'.*

It is debatable whether it is a process of analogy or logic or reasoning or experience or philosophy. However, it certainly is a process of induction and deduction that develops jurisprudential perceptions of the thought process. Be that as it may, it is a process of evolution and

[37] See Cardozo, *The Nature of the Judicial Process* (cited in note 29); Holmes, *The Common Law* (cited in note 7); "The life of the law has not been logic; it has been experience.".

[38] See Munroe Smith, *Jurisprudence*, at 21 (Columbia 1909); see also Pollock, *Essays in Jurisprudence and Ethics* at 246 (Macmillan and co. 1882).

growth,'which is shaped by the principle of consistency with the past or by that of consistency with some pre-established norm.[39] A page of history of justice, the vision of times past, is the needs of successive generations that may be explained in the words of Justice Marshall: "We must never forget that it is a Constitution we are expounding".[40]

The philosophy is not merely of symmetry and logic in the development of legal rules, but of practical, experiential and functional adaptation towards the attainment of just results.

SUPREME COURT COLLEGIUM AND JURISTOCRACY

Judicial integrity, judicial independence, judicial transparency, and judicial accountability are hallmarks for judging the judges and the judiciary. These are the contours of any judicial process. The Supreme Court's courage and conviction is reflected in the incidents of the transfer of High Court judges, which remind us that the 'higher courts are right because they are superior, not superior because they are right'.[41]

The Supreme Court should be seen as the key to maintaining judicial ethics, judicial independence, judicial integrity and judicial

[39] See James Bryce, 2 *Studies in History and Jurisprudence* at 609 (Clarendon 1901); Holmes, *The Common Law* (cited in note 7).

« *McCulloch v Maryland,* 17 4 Wheat 316,407 (U.S. 1819).

[41] Frank M. Cofin, *Views from the Bench,* at 27 (Chatham House, 1987); see also K.L. Bhatia, *Trial Court Management,* at 13 (Deep & Deep Publication, 1st Ed., 2006). ■ > ■

accountability. It acts as an Ombudsman to save the higher judiciary from the infamy of corrupt practices. Judicial scanning, scrutiny and corrections are prescriptions and proscriptions of judicial parameters of exemplary good behavior. It concludes that an upright judge has more regard to justice than to men: *Yogyaovicarkapurushmanpekshaivnyayamanusarti.* These are nevertheless imperative to maintaining "judicial honesty", within judicial bounds of dignity and propriety, so that the robed brethren do not break the code of correct conduct or rob the rule of law.[42] Judicial power must be free from "guilty shades of weaknesses" inasmuch as "power corrupts and absolute power corrupts absolutely". Justice Felix Frankfurt, a great Judge of the American Supreme Court, once observed:

> *"Judges as persons, or courts as institutions, are entitled to no great immunity from criticism than are other persons or institutions. Just because the holders of judicial offices are identified with the interests of justice, they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the Bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, judges must be kept mindful of their*

[42] Justice V.R. Krishna Iyer, *The Judiciary, Power and Accountability*, Lawyers Update (July 2009).

limitations and of their ultimate public responsibilities by a vigorous stream of criticism expressed with candor, however blunt."

A judge is perceived to be a person of integrity and principles. Judicial ethics and code of conduct are a statement of values of judicial life and the legal profession. "Canons of Judicial Ethics", delivered in Delhi in 2005, succinctly, with admirable lucidity, hands down the essence of ethical values for judicial officers as a prerequisite for dispensation of justice by an independent and impartial judiciary.[43] This reflects they/w *morumjus receptum* approach of the judges, i.e., judge as a guardian of morality of law.

Justice R.C. Lahoti's philosophical musings are encapsulated in the following words of the "Canons of Judicial Ethics": *"In light of the developments across the regions resulting in the drafting and adoption of the Bangalore Principles to promote greater judicial accountability, and thereby secure judicial integrity for the protection of judicial independence, the jury is out there watching, talking about and listening to the ethical conduct of their judges. (...) There are two key issues that must be addressed with regard to judicial ethics, vi%, (1) the identification of a standard to which members of the judiciary must be held; and (2) a*

[43] Param Cumaraswamy, *The Bangalore Principles of Judicial Conduct,* Asia Pacific Judicial Reform Conference Singapore, 1 (January 2009).

mechanism, formal or informal, to ensure that these standards are adhered to" .** The judicial values of independence, impartiality, integrity, propriety, equality, competence and diligence, are not mere pious platitudes, but are also effective tools to prepare better judges, who do not fear public scrutiny of their performance and conduct.[45]

INTEGRATING HUMAN VALUES AND PROFESSIONAL ETHICS

Besides legal ethics and conduct, a call for effective monitoring tools to save the legal profession from professional misconduct has been made. In *D.P. Chadha v Triyugi Narain Mishra^xhz* Supreme Court highlighted the reasons to save the legal profession from professional misconduct, affirming what Justice Krishna Iyer .opined in *The Bar Council of Maharashtra v Dabholkar?*[1]*; "The vital role of a lawyer depends on his probity and professional conduct. The central function of the legal profession is to promote the administration of justice. (...) The Bar cannot behave with doubtful Scruples, Canons of conduct cannot be crystallised into rigid rules, but ought to be felt by. the collective*

[44] Id.
[45] Id.
[46] *D.P. Chadha v Triyug Narain Mishra,* (2001) 2 SCC 221.
[47] *The Bar Council of Maharashtra v Dabholkar,* (1976) 2 SCC 291; see also the observations of Justice Crampton in *Queen v O'Connell,* 7 Irish Law Reports, 313 (1844): "The advocate is a representative but not a delegate, He gives to his clients the benefit of his learning, his talents and his judgment; but through all he never forgets what he owes to himself and to others".

conscience of the practitioners as a whole. (....) For the practice of law with expanding activist horisgns, professional ethics cannot be contained in a Bar Council rule or in the books. Mutual confidence in the discharge of duties, along with a correlation V *between the Bench and the Bar, smoothen the movement of the chariot of justice. As a responsible officer of the court, a counsel has an overall obligation to assist the courts in a just and proper manner: Zeal and enthusiasm are traits of success in a profession, but over-sgalousness and misguided enthusiasm have noplace jn the personality of a professional'.*

- Cleansing the higher judiciary and making it corruption free has been a major challenge. One judge has unequivocally expressed ^that the "judiciary is not corrupt but for aberrations", hinting at .the growing corruption widiin the judiciary.[48]

JUDICIARY V PARLIAMENT: JUDICIAL REMONSTRATION

Judicial integrity and judicial independence are constitutionally avowed mandates. Judicial pronouncements reflect the society's changing oudook within the permissible limits of constitutional compatibility. Political interference and politically unwarranted criticism of the judiciary work as a stumbling block and an unjust stranglehold on the integrity and

[48]Ju5ti"cc,,R.C. *Lahoti; Law Day Inaugural Speech, ot^nized by the Suptexnt* Court Bar . " Association, ^online . ■ V - at ' www.*upremecourtcasesx6rn/index2.^hp?op^n=com...l...i (visited on September 27,2009). " 7 i

independence of the judiciary. The Supreme Court of India had rightly remonstrated the Parliament for its unwarranted criticism of the Court's order ending caste-based quotas in privately run -professional and technical educational institutions. After all, the Supreme Court of India did that what ought to have been done by honest political elites in the Parliament. The populist sloganeering has permeated the "go-getting gimmicks", and has contributed to the slipping standards of education. The Court has formulated guidelines for the administration and admission policies o£- professional and technical private educational institutes, after debates and deliberations spanning decades.[49]

DELAYS AND ARREARS IN THE COURTS

Delay and clogging the courts with arrears are the two major problems that the Indian judiciary faces. Unclogging the courts of the menace of the huge pendency of cases mounted with further arrears has been a subject close to the heart of the Supreme Court. It is no exaggeration to submit that the Indian judicial process suffers from interstices of odd standards of legal archaisms.

[49] *P. A. Inamdar v State of Maharashtra", km.* 2005 SC 3226; *TMA Pai Foundation v State of Kamataka,* (2002) 8 SCC 481; *Islamic Academy of Education v State of Kamataka,* (2003) 6 SCC 697; *Ashok Kumar Thaktirv Union of India,* (2008) 6SCC 1.

The Supreme Court's observation in this regards is quite alarming: *"As a young over-enthusiastic district judge, having developed a mania for disposal of cases, apiece of sane advice was given to me by an elderly senior counsel. (...) Affectionately, he told me, "My dear young judge! Take it easy. During my 50 years of practice, I have seen many judges being finished, but I have never seen the Court work being finished'.* Henry G. Miller, President, NY State Bar Association, once said that *"The legal system is rf/en a mystery, and we, its priests, preside over rituals bajfling to everyday citizen/'.*

The phenomena of docket explosion and ever-mounting arrears in courts are broadly attributable to a few causes: (i) the faith of people in the justice delivery system despite the delay involved; (ii) working with, what is in the opinion of the Law Commission of India, 1/10' of the manpower requirement; (iii) lack of finances and consequent failure of the essential infrastructure; and (iv) lack of research, innovation and modernization in the field of court management. It has been,noted that the influx of cases cannot and should not be deliberately stopped. However, the speed of outflow can and should certainly be improved.

Even though the judiciary has no control over the allocation of resources and cannot create additional courts, appoint adequate court **staff,** or augment court infrastructure, there is a misguided perception

* Bhatia, *Trial Court Management* at 190 (cited in note 41).

that the judiciary is solely responsible for the mounting arrears of court cases.[51] Not only does the executive refuse to appoint more judges, but the government also drags its feet where giving the judiciary the requisite economic support is concerned.[52] The end result is that the Indian justice system is choked by the executive and legislative branches of the government.[53]

To dispel this specious impression, one must be made aware of the fact that the Indian judiciary has been carrying a phenomenal burden which perhaps no other judiciary in the world has had to shoulder.[54] The population explosion is partly responsible for the rise in the number of

[51] See Bhatia, *Trial Court Management* at 9 (cited in note 41).

[52] *Chapter 7: The Judiciary*, Vol. 1, Report of National Commission to Review the Working of the Constitution of India (2002); the poor financial allocations made by the executive were the root cause of the problem. The Five Year plans and the Finance Commission have made no separate provisions for funds for the judiciary for several decades. In September 2004, the then Chief Justice of India R.C. Lahoti pointed out at the joint conference of the chief justices of the high courts and the chief ministers of the States that during the Eighth Plan (1992-1997), the Centre spent Rs. 110 crores on improving infrastructure such as constructing courtrooms, etc. During the Ninth Plan (1997-2002), the Centre released Rs.385 crores for fulfilling priority demands of the judiciary and this was 0.07 percent of the Centre's plan expenditure of Rs. 541,207 crores. During the Tenth Plan (2002-2007), the allocation was Rs. 700 crores, which was 0.078 percent of the total plan ouday of Rs._893,183 crores. The inadequacies in plan allocation were conditioned upon the State governments making matching allocations. Further, the governments have been reluctant to grant complete financial autonomy to the higher judiciary.

[53] Colin Gonsalves, *Heavy Odds, Meagre Resources*, online at http://www.indiatogether.org/2008/jul/hrt-odds.htm (visited on July 16, 2008).

[54] *D.P. Chadha v TriyugiNarain Mishra*, (2001) 2 SCC 221.

litigations.[55] In a more complex and friction-prone society, dispute resolution and conciliation systems are bereft of efficacy.[56] However, courts cannot afford to turn a blind eye to the rank injustice merely because they are overburdened; doing so would cause serious harm to the credibility of the justice delivery institution.[57]

Be that as it may, the mounting pendency of cases is alarming. To remedy the problem, the Government of India conceived a policy of establishing Fast Track Courts for speedy justice. The poliey was conceived with an equitable intent. However, the Fast Track Courts suffer from 'snail-paced' infirmities of judicial process which render them meaningless.[58]

The problems of delay in the disposal of cases and the backlog of cases, are problems of injustice emanating from voluminous amounts of litigation. To overcome it, there has been a constant search for some

[55] Id.

[56] Id.

[57] Benjamin N. Cardozo, *The Nature of the Judicial Process* at 113 (Yale University Press, 1st Ed., 1921).

[58] See the opinion of CJI justice A.S. Anand, Justice R.C. Lahoti and Justice DoraiswamyRaju, while hearing the status of under trials in various states, regretting that the fast track courts, despite their crucial nature, was not brought to the notice of CJI before the government made an announcement in that regard. The Judges observed that the funds released to the state governments to set up fast track courts should have been placed at the disposal of the Chief Justices of th& High Courts, for proper, utilization.

alternative strategies to resolve disputes.[59] Our judges have **a passion for** Alternative Dispute Resolution methods to **clear** this **backlog and cleanse** the courts of the problem of delay. **Alternative Dispute Resolution** provides procedural flexibility, an alternative **to** the **adversarial process,** saves valuable time and money, and avoids **the** stress, **strains and pangs** of a conventional trial. The Supreme Court **of India, with its sound and** balanced judicial approach, marked by genuine sensitivity **to the** sufferings of the indigent and the exploited, observes:

'The philosophy of Alternative Dispute Resolution ***systems*** *is* ***well-stated by*** *Abraham Lincoln: 'discourage litigation; persuade* ***your neighbours to compromise*** *whenever you can. Point out to them how the* ***normal winner is often a loser in fees,*** *expense, cost and time'. Litigation does not always lead to a satisfactory* ***result.*** *It is expensive in terms of time and money. A case won* ***or*** *lost* ***in a court of law does not*** *change the mindset of the litigants who continue to* ***be adversaries and go on fighting in*** *appeals after appeals. Alternate Dispute Resolution systems* ***enable the change in the*** *mental approach of the parties."*[60]

[59] §89, Code of Civil Procedure, 1908; this section has aimed at reducing the delays in court litigation and casting an obligation upon the courts to try Alternate Dispute Resolution methods before cases are taken up for trial. The constitutional validity of this Section has been upheld in *Salem Advocate Bar Association, Tamil Nadu v Union of India,* AIR 2003 SC 189.

[60] Chief Justice R.C. Lahoti's address, *Conference of the Chief Ministers of States and the Chief justices of the High Courts, New Delhi,* (September 18, 2004); **see** also

It has further been observed that^ *"Human ingenuity in law has given birth to various alternative dispute resolution systems in departure from the traditional, time-tested and well-established system and procedure of courts. Mediation and conciliation, although not new to our country, the recent statutory recognition, has given them a shot in the arm. (...) The role of a conciliator is more interventionist than that of a mediator. Mediation may result in the-resolution of a dispute whereas conciliation emphasises more on the dissolution of a dispute"*** Both die processes seem to be a better investment of time and money than conventional litigation.

Public Interest Litigation (PIL) is an innovative product of the judicial process. The origin, growth and development of PILsis owed to the jurisprudence evolving around the access to justice. Access to justice is a progressive movement related to those marginalized, underprivileged, disadvantaged and deprived sections of the Indian society, for whom the doors of justice are far away. Such neglected sections of the society ordinarily suffer from ignorance of knowledge as well as the lack of financial resources.

It is a movement of *pro bono publicomdactiopopularis.* It is a movement of public injury litigation and a progressive shift from personal or private injury litigation. Unfortunately, PIL has come to be

similar Conference of December 4*. 1993, vide *Why ADR?*, online at http://icadr.nic.in/WhyADR.php (visited August 28,2009). [61] Cited in note 50.

nicknamed personal, popularity and publicity interest litigation. Notably, it should not be considered a pill for every ill.

The Indian Judiciary with its judicially restrained behavior does not permit PILs to run amok. *Ee: Death of 25 Mental Asylum Patients (Erwaay-Saarthak Public Interest Litigation)* in 2001,[62] is a case of *actiopopularis* relating to the treatment of mentally challenged patients housed in thatched sheds of the mental asylum at Erwadi in the Ramanathampuram District of Tamil Nadu, who were reported to have been charred to death.

The State as well as the Union of India started taking some initiative in the matter only after serious concern was expressed by the Supreme Court. The mental asylum homes were ill-equipped, ill-managed and devoid of any guidelines laid down under the Mental Health Act, 1987; The inmates were forced to live in fetters/chains. The Supreme Court observed that the inmates have an equal right to life and personal liberty under Article 21 of the Constitution of India as any other person. The Supreme Court unequivocally laid down the following guidelines to be followed by mental asylums homes:

[62] Before a Bench of CJI, Justice R.C. Lahoti, Justice P. Venkatarama Reddy, Petition No. 334/2001, 562/2001.

a. In future, such homes should obtain a licence under the Mental Health Act, 1987 before being started. All such existing homes should obtain a licence.

b. There will be a Monitoring Committee in each district headed by

- the District Collector. This Committee will include the Joint Director (Health), a trained psychiatrist and other medical personnel. Periodical inspections will be carried out by the Committee to ensure that these centers are maintained as per the guidelines. '.' c. In respect of inmates who are found to be not mentally ill but abandoned by their families, an old age pension under the category of destitute persons will be sanctioned to them, and such persons will be admitted in old age homes.

UNDERTRIALS WITHOUT TRIALS

In a horrific tale of delayed justice, a person was languishing in jail for fifty years without trial for allegedly 'causing grievous hurt'. This is a crime under Section 326 of the Indian Penal Code and carries a maximum punishment of imprisonment up to ten years. It is not only shocking due to the delay alone but also because the police failed to show any evidence to support the keeping of the accused for over half a century. The Supreme Court of India considered the letter of a lawyer

addressed to it for the release of an under-trial in Assam under its epistolary jurisdiction. The 77 year old under-trial was released from a state-run mental institution with Rs.3 lakhs compensation 54 years after he was picked up for allegedly 'causing grievous hurt'.

This incident among others, shows the apathy of the snail-paced Indian legal system. It shows that liberty with such fetters is meaningless. Notably, *pro bono publicoox.* the *actiopopu/arisapptoach* is an effective tool to promoting liberty without fetters.

JUDICIARY AND NATIONAL INTEREST

For justices of the higher judiciary, national interests are paramount. On several occasions, national interest is promoted through the judicial process. The Supreme Court has opined that although a judgment cannot be a solution to all the problems, for governmental lawlessness, the judiciary is the only repository of the confidence of the people.

In October 2004, the Court upheld a law passed in Haryana, prohibiting a person who had more than two children from contesting panchayat elections in the state. Moreover, it rejected the arguments based on the right to privacy and religion. Besides, it did not allow the political considerations to eclipse judicial independence and

unequivocally held that population control was needed *in* national interest.[63] .

Similarly, a solution in the cases of female foeticide and sex determination does not lie in enforcing the law but in educating the people.[64] It quashed the Illegal Migrants (Determination by Tribunals) Act on migrants in Assam in national interest through a judicial process to cleanse the turbulence of the sensitive issue of Bangladeshi migrants in the state of Assam.[65]The above show the mists of political haplessness that cloud free judicial independence.

JUDICIARY AND GENDER JUSTICE

The Supreme Court of India's deep concern about the human rights of women, women empowerment, and gender justice is unequivocal. Its philosophical perception is that a humane mind is imperative to promote gender .justice in an institutionalized way.*[6] Women empowerment is achieved if a woman is treated as an individual, a living human being entitled to the same dignity and status as her male

[63] *Zilt Singh v State of Haryana,* (2004) 8 SCC 1; *Sunil Kumar Raita v State of Haryana,* (2003) 2 SCC *628; Javedv State of Haryana,* (2003) 8 SCC 369.
[64] Id.
[65] *Sarbananda Sanowalv Union of India,* (2005) 5 SCC 665.
[66] See Speech of Justice R.C. Lahoti, at the All India Meeting of Chief Justices of High Courts on Women's Empowerment vis-a-vis Legislation and Judicial Decisions, Organized by The National Commission for Women, Conference Hall, Parliament House Annexe, New Delhi, 11th December, 2004.

counterparts.[67] The Constitution of India is a quantum leap with respect to women's rights and it treats women as a class and provides for affirmative action in their favour while prohibiting discrimination against them.[68]

It has been observed that: *'Women have faced social and economic handicaps for centuries. Despite the rights granted by the Constitution and the special legislations enacted, the reality is that there is widespread non-implementation of the legislations, structural inequalities and power imbalances within the society. Law is a means_of bringing silent changes in substantive laws and procedures, which have relevance to women's rights. However, the courts can go beyond the limitations of written law and have often done so. All law is not justice and all justice is not law. Justice is a combination of various factors, namely, good legislation and its implementation. Law in action is more important than law itself. The collective qualitative philosophy of justice should be that personal predilections and inhibitions should have no role to play. Bad interpretation can defeat the best intentions of good law.*

Landmark decisions of the judiciary in the last two decades have shown sensitivity towards gender justice. Our natural obligation to renou derogatory to the dignity of women has been elevated to the status of Duty by Article 51-A.

[68]Id.

In spite of all these developments, the truth remains that widespread violations of women's rights continue to persist. The forces of globalisation and extremism and the unwillingness of other segments of humanity continue to pose a threat to women's human rights. Structural inequalities and power imbalances facilitate such violations. Urge for easy money, greed, facilitating a life full of comforts, luxury, has in recent few years made women more susceptible to exploitation and violence.

Laws have taken silent and slow steps in the direction of political participation of women preventing gender biases and removing lacunas in procedural laws and laws relating to evidence. Law cannot change a society overnight; but it can certainly ensure that the disadvantaged are not given a raw deal. The courts can certainty go beyond the mere legality of insulating women against injustice suffered by biological and sociological factors.

*The role of the judiciary in the vindication of gender justice has had to be creative and gender friendly. However, the issue of gender justice should not become a war between two sexes. Both should complement each other rather than suspect each other. Changes in perceptions are needed for greater social awareness** ™

The following principles as 'court-room tips' are to be kept in mind by the judges to achieve the goal of gender justice:

[69] Id.

Be informed about the[x] historical and cultural background in which women have lived over the ages and understand their feelings to have regard to their needs as a class.

Strike a balance in the approach while dealing with any issue related to gender, or where a woman is a victim, in such a way, that all are treated as equals.

Treat women with dignity and inspire confidence in them by your conduct, behavior and ideology whenever they come to you as seekers of jusdce.

Do not allow diem to be harassed and certainly do not do anything yourselves which may amount to harassment of a woman.

Make efforts to render a woman victim quick, speedy, cheaper and effective justice.

Women are to be treated with courtesy and dignity while appearing in courts. Any comment, gesture or other action on the part of any one in or around the courtroom which would be detrimental to the confidence of women is to be curbed with a heavy hand.

Any gender bias is to be carefully guarded against in the courtroom and this protection should be extended to any female

present or appearing in the court either as a member of the staff or as*a party or a witness or a member of the legal profession. A clear message that any behavior unbecoming of the dignity of a woman shall not be tolerated by the court should be sent out.

8. Court proceedings involving women must begin on time and proceed with in an orderly manner so that they are concluded as expeditiously as possible by avoiding the need for repeated appearances of women in the court.
9. The examination and cross-examination of women witnesses must be conducted by the court itself, or under the direct supervision of the presiding judge.
10. The female members of the Bar may be encouraged in the profession, by giving assignments as Court Commissioners for inspections and recording statements of witnesses.
11. Preference may be given to female lawyers in the matter of assigning legal aid work or amicus curiae briefs so that they have more effective appearances in courts.
12. Crimes against women ought to be dealt with on a priority basis so as to dispose them off finally at an early date.[70]

CONCLUSION

This paper has sought to answer questions such as: What is it that expounds the Constitution? What rules of interpretation are followed in expounding the Constitution? What are those evinced principles of constitutional law of India, which are immutable in expounding the Constitution? What are those principles, which evolve the conceptual framework of fundamental rights, directive principles of state policy and fundamental duties?

The Supreme Court of India's expounding philosophy relating to the judicial process seems to be the philosophy of the seamless web of judgeship and judge that has extremely hard parameters, which are symptomatic of functional excellence. This is the 'basic feature' of the judicial process, which works on faith, confidence and acceptability of the people by developing the inner strength of morality and ethics in those who work with it.

In the backdrop of the above, a modest attempt has been made to analyze the genesis, philosophy and contours of the experiential-transformative jurisprudence ingrained in the judgments which contribute to the systematic, methodological, and scientific evolution of interpreting the Constitution of India with multifaceted dimensions.

IRISH ABORTION LAWS: A CRY FOR CHANGE*

Abstract Abortion and the laws related to it have always been surrounded by debates, drawing arguments in support and against them from various religious beliefs, ethics and morals. These debates have raised very significant, yet complex legal questions such as whether a foetus is a living being does it have the right of being carried in the womb till it is ready to be born, whether its right to life supersedes that of its mother and whether the mother has the right to decide when to give birth, among many others. Countries all over the world have different criterion for alloiving or banning abortion. One of the several countries having almost chaotic abortion laws is Ireland, which has in spite of various judgments of national and supranational courts, failed to update and modify its laws and allow abortion even in cases of rape or incest. This article embarks on an analysis of Irish abortion laws from past to present through various landmark judgments. In the existing era of awareness of individual rights and State obligations, the rights of the unborn child and the mother need to be balanced. Constant efforts need to be made to prevent religious beliefs from superseding the rationality of law in today's heterogeneous society. Following this very principle, this Article highlights the ambiguous position of the Irish abortion laws and the need to modify the same.

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INTRODUCTION

In the past six months abortion in Ireland has garneftd a lot of attention. The death of an Indian woman due to the country following strict anti-abortion laws caught the attention of the media, the citizens and the international community. However, it is not for the first time that the Republic of Ireland has faced global ire due to its abortion laws. This article sets out on a journey to understand the Irish position on abortion laws, the ambiguity which still exists and the need to clarify the same in the modern times. It also analyzes similar confusions and conflicts which exist in various other countries, not only in Europe but worldwide.

Since it gained independence from Britain,[1] the Republic of Ireland has effectuated certain polices of the Catholic Church — a result of ninety percent of its population being Catholic.[2] This influence reflects in Ireland's policy on abortion, which some prefer to term as 'pro-life'. However, in the past decade, the supporters of this Irish policy on abortion have substantially decreased and the demand for change has

[1] The Anglo-Irish Treaty, approved by the Irish Legislature, created the Irish Free State for the partitioned Island in 1921, Government of Ireland Act (1920). Ireland remained part of the British Commonwealth until 1949.

[2] Christine P. James, *Cead Mile Failte? Ireland Welcomes Divorce: The 1995 Irish Divorce Referendum And The Family (Divorce) Act Of 1996*, 8 Duke J. Comp. & Int'l L. 175 (1997).

been made time and again. There have been several decisions by the Supreme Court of Ireland and ambiguous legislations by the Irish Parliament, but no concrete solution has been provided for this issue.

IRISH ABORTION LAWS TILL DATE

Abortion has been illegal under the common law of Ireland since the mid-19th Century.[3] Sections 58 and 59 of the Offences against the Person Act of 1861 made it unlawful for any woman, or any other person to procure an abortion; and for a woman, or any other person to supply any instrument to procure an abortion. A liberal approach was seen in the 1939 English decision of *Rex v Bourne?* which held that a physician who had performed an abortion was not liable under the 1861 Act, where the abortion was necessary to keep the woman from becoming a physical or mental wreck.[5]

The issue of abortion laws in Ireland was again raised when most of the European countries and United States allowed for abortion and England passed the Abortion Act in 1967. However, the Irish Parliament in 1979 passed the Health Family Planning Act, reaffirming its stand on abortion as mentioned in Offences against the Person Act. The

[3] IESC C-l 59/90, *Society for the Protection of Unborn Children IrelandLtd. v Grogan,* [1991] E.C.R. 4685.
[4] *Rex v Bourne,* [1938] 3A11 ER 615 (CCA).
[5] Even though Irish Courts don't take precedence from English Courts but their Drafting and Legislations are almost similar to the English legislations.

legislations brought a change in the approach of the courts of law in Ireland with regard to the issue of abortion. They started protecting human rights on the grounds that certain fundamental rights are superior and antecedent to man-made law. In *Ryan v Attorney General?* the court held that the right of bodily integrity was a personal right tacitly contemplated by Article 40.3.1. But in 1974, through *Mcgee v Attorney General?* the court reinforced the position and precedence of Natural Law,[8] holding that there is no right to import contraceptives not legally available in Ireland,[9] but it did recognize the right of marital privacy as a personal right under the Constitution.

Then in 1981, pro-life activists started campaigning for a constitutional amendment which culminated into the Eighth Amendment, codified as article 40.3.3.[10] This was followed by a series of matters which contributed in shaping the abortion laws of Ireland.

[6]IESC Case No. 913 of 1962, *Ryan vA.G.* [1965] 2941.R.
[7] IESC Case No. 2314 of 1971, *McGee vA.G. <& Anor* [1974] 284 I.R.
[8] Id at 317.
[9] Republic Of Ireland, Criminal Law Amendment Act, No.6 (1935) §17, *"It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Ireland for sale, any contraceptive".*
[10] Constitution of Republic of Ireland, Art 40.3.3., *"The State acknowledges the right to life of the unborn and, with due regard to the equal life of the mother, guarantees in its laws respect, and, as far as practicable, by its laws to defend and vindicate that righf.*

THE FIRST INFORMATION CASE: *SPUC V OPEN DOO*^

After the passing of the Eighth Amendment, the pro-life activists wanted to put a stop to women going abroad for abortions and hence family planning clinics advertising abortion services mainly in Britain were targeted.[12] In 1985, one such group called Society for the Protection of Unborn Children (SPUC) brought suit against Open Door Counselling Ltd. and Dublin Well Woman Centre Ltd., alleging that their activists were guilty of violating the Eighth Amendment.

The High Court upheld this contention, holding that this action violated the Eighth Amendment, as the activity engaged was in destruction of the Fundamental Right of the unborn child,[13] and the Supreme Court followed suit, resulting in permanent injunctions against such clinics. In an appeal to the European Commission on Human Rights ["ECHR"], it was contended that such an injunction was against Articles 8, 10 and 14 of the ECHR. The commission decided the case solely on the basis of the claim to freedom of expression. The question was whether interference was 'prescribed by law', as required by Article 10; and the commission concluded that the clinics could not have

[1] IESC Application no. 14234/88; 14235/88, *SPUC v Open Door* [1988] 593 I.R. *['The First Information Case"]*.

[12] See Lynn Marie Morgan and Meredith W. Michaels, *Fetal Subjects and Feminist Positions,* 181 (University of Pennsylvania Press, 1999).

[13] *"The First Information Case",* I.R. (IESC 1988) at 614.

foreseen that the Irish law prohibited their actions,[14] as a restraint is legal if it is "adequately accessible and reasonably foreseeable".

The case went to the European Court of Human Rights ["ECtHR"], which upheld Commission's decision but found the injunction violative of Article 10 for different reasons, holding that the diffusion of information was "broad and disproportionate,"[16] in relation to its purpose of protecting morals.[17] Finally, the injunction was found to be violative of Article 10.[18]However, the issue of the existence of right to abortion was avoided by the court.

[14] *Sunday Times v United Kingdom* [1979] 2 Eur. H.R. Rep. 245.

[15] Id.

[1(5] *Open Door and Dublin Well Woman v Ireland* (14234/88) [1992] ECHR68.

[17] The Court awarded damages of IR£25,000 to Dublin Well Woman, and costs and expenses to both corporate applicants.

[18] Article 10 — Freedom of expression:

"/. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality ofthejudiciary."

THE SECOND INFORMATION CASE: *SPUC V GROGAU P*

This case dealt with the controversy started by the Eighth Amendment. SPUC sued three student organizations that published the details of abortion clinics in Great Britain, contending that it violated fight to life of the unborn and requested an injunction.[20] However, it was not granted. The student groups argued that their activities were protected under Articles 59 and 60 of the Treaty establishing the European Economic Commission ["EEC Treaty"], guaranteeing right to travel between member states to receive services. After the Supreme Court reversed a High Court judgment that the plaintiff had no standing to bring the suit, the plaintiff returned to the High Court for further action, which again did not grant injunction and further, referred the case to the European Court of Justice ["ECJ"].

The Court held that,[21] *"where the right sought to be protected is that of a life, no putative right may exist in EC law as a corollary to the right to travel to procure services"* making sure that the decision of ECJ did not affect the

[19] IESC C-159/90, *Society for the Protection of Unborn Children Ireland Ltd. v Grogan,* [1991] E.C.R.4685. *["The Second'Information Case"].*

2° Id.

[21] *SPUC (Ireland) Ud.v Grogan[\9<)X* ECR1-4685.

Irish stand on this issue.[22] This case raised important issues regarding community law and public policy.[23] On basis of this order, the High Court granted a permanent injunction.[24]

THE X CASE[25]

This was perhaps the most controversial case ever heard in the Irish Supreme Court, changing the landscape of abortion forcing the court to decide upon the relation between Abortion and Article 40.3.3 of the Constitution of Ireland. The case saw a fourteen year old girl conceive as a result of repeatedly being raped by the father of a friend. Before the High Court, it was argued by X that the right to life of the unborn is subordinate to the right to life of the mother. But the court awarded a permanent injunction holding that as per Article 40.3.3., killing of an unborn child is repugnant to Irish law. Further reasoning was given on the basis of the public policy,[26] and community law superseding the right to travel provided to the EU citizens. On the possibility of X committing suicide, if forced to carry the pregnancy to term, the court

[22] The Court further stated, *"In the last analysis only this Court can decide finally what are the effects of the interaction of the 8th Amendment of the Constitution and the 3rd Amendment of the Constitution"*.
[23] EEC TREATY Art 56 (now Art 46).
[24] Sabina Zenkich, *X Marks the Spot While Casey Strikes Out: Two Controversial Abortion Decisions,* 23 Golden Gate U. L. Rev 1001,147 (1993).
[25]IESC 1992No. *S46P,A.G.* *X[1992] 1 I.R. 1 *['TheXCase"]*.
[26] Court relied on: ECJ Case 30/77, R. *vBouchereau,* [1977] E.C.R. 1999.

applied a balancing test i.e., in case the'order was not granted, the suicide being committed was only probable but if the order was granted, the death of the unborn child was assured.

However, the Supreme Court quashed the High Court order by a four-is-to-one majority holding that the pregnancy represented a "real and substantial risk" to the mother's life and such a termination can be allowed under Article 40.3.3 of the Constitution for it is nearly impossible to prevent suicide.[27]

What this meant for the layman was that an Irish woman could get an abortion outside of Ireland if the threat amounted to substantial risk to her life but the court failed to define the circumstances which would amount to substantial risk, resulting in ambiguity. The question of allowing abortion within Ireland itself in case of substantial risk to the life of the mother was also left unanswered.

Thereafter, several consequences followed. First, there was the Maastricht Treaty, which was going through a referendum to promote development as a whole in the EU. The government had added Protocol 17 which would not affect Irish policies after ratification of the treaty. A referendum in 1992 was also introduced which gave rise to the

[27] Chief Justice Finlay stated, *"It is almost impossible to prevent self destruction in a jounggirl in the situation in which this defendant is if she were to decide to carry out her threat of suicide."* in *"The X Case"* 1 I.R. at 21.

Thirteenth Amendment and the Fourteenth Amendment. While the former allowed people to go abroad for abortion, the latter imposed certain ambiguous conditions on the same which gave the judiciary the power to decide the circumstances thenceforth.

In March 1995, a bill to pass The Abortion Information Act,[28] providing freedom of information for services legally available in other states, was passed. The Court unanimously ruled that it did not violate any Constitutional provisions. In doing so, the court upheld that amendments violating natural law are not entirely barred and reaffirmed the decision in the *X case.*[29] However, no proper reasoning was given for this departure from the natural law. Many believe that it was an attempt to bring the Irish laws in consonance with the norms of EU and to reduce the increasing pressure by the EU to change the abortion laws.

THE C CASE[30]

This particular case showcases the change in the ideology of the Irish citizens. In the fall of 1997, a thirteen year old girl, impregnated by

[28] Republic Of Ireland, Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, No. 5 (1995) (tr.) ["Regulation of Information Act"]. The Act makes it legal to distribute information on abortion services abroad as long as the information does not promote abortion.

[29] *"The X Case"* \ I.R. 1 (IESC 1992).

30 *A. &B. v E. Health Bd., Judge Mary Fahy& C. & the Attorney Gen. (C Case),* 1 I.L.R.M. 460, [IEHC 1998].

rape was placed into temporary care with the Health Board. She wanted to travel to England to get an abortion. The Healtfi Board was standing as *in loco parentis,* and asked for permission of the High Court for the abortion, which was granted. However, when the parents of the girl objected, the appeal was dismissed and the abortion was allowed.[31] This case showed that there was no fixed criterion to show and prove real and substantial risk on the part of the mother-to-be.

The *C Case* caused the government to commission the "Green Paper on Abortion" in 1999 to clear the ambiguity surrounding the ahprtion laws and the right to travel. A constitutional amendment (Twenty-Fifth) and a referendum was announced for the same, granting constitutional safeguards to the medical practitioners who terminated a pregnancy in order to protect the life of a mother,[32] and made it clear that the exception of risk of suicide would be no longer a valid reason to seek an abortion. The referendum which came in 2002 and which was indirectly vague about the usage of the morning-after pill,[33] was rejected

[31] In obiter dicta, the Justice stated that the abortion would be legal if performed in Ireland, so C was allowed to travel for the purposes of obtaining something legal in Ireland.

[32] Republic Of Ireland, Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001.

[33] See Carol Coulter, *Legislation Proposed by Government Has Four Main Aims,* Feb. 18, 2002, Irish Times, online at http://www.irishtimes.com/news/legislation-

by a narrow margin of 10,000 votes,[34] implying that the people were not ready for a change in the age old catholic principles. This narrow margin causing defeat could have been present due to the confusion with regard to the Church's statement which initially condoned the morning after pill in the referendum,[35] but later rejected the same; a discrepancy that the media did not fail to highlight.[36]

A,B&CVIRELAND[37]

This case dealt with Article 8 of ECHR, where three women approached the European Court of Human Rights ["ECtHR"] contending that the Irish authorities had failed to provide an accessible and effective procedure to establish if a woman qualifies for an abortion or not. The court held that the Irish laws were in contradiction of the provisions of ECHR. A detailed analysis of the same is provided in the following section.

proposed-by-government-has-four-main-aims-1.1050768, (visited June 21, 2013).

[34] RTE News Abortion amendment narrowly defeated 2002 7th March, online at http://www.rte.ie/news/2002/0307/abortion.html (visited June 21, 2013).

[35] Carol Coulter, *Legislation Proposed by Government Has Four Main Aims*, (cited in note 35)

[36] Declan Fahy, *Political Parties 'Confuse' Voters*, Irish Times2002 February 25 p 6, online at http://www.irishtimes.com/news/political-parties-confuse-voters-1.1051620], (visited June 21, 2013)

* *A,B&Cv Ireland*, Application no. 25579/05, 53 EHRR 13, (ECtHR 2010) *["Tt>eA,B&CCase"]*

EUROPE'S APPROACH TOWARDS ABORTION

Ireland being a member of both, EC and EU, is bound by the decisions of the ECtHR as well as those of the ECJ and is also bound by the provisions of the European Convention on Human Rights and the European Union Charter of Fundamental Rights ["Charter"].

However, it was held in the *X case,*[3]* that while Ireland is bound by the laws of the EC, deviation can be allowed in exceptional cases where the State's Public policy, public health or public security is at risk. At the same time, this does not mean that the State will always be allowed to flout EC laws to fulfil obligations imposed upon it domestically as is in the case of the Irish Constitution to protect the life of the unborn child, for the supremacy of EU laws over national laws was clearly established by the ECJ in the case of *Flaminio Costa vENEL.*[39]

The European Convention on Human Rights provides for, the Right to Life under Article 2 and the Right to Respect for Private and Family Life (Article 8), while the Charter provides for Human Dignity (Article 1), Right to Life (Article 2) and the Right to the Integrity of the Person (Article 3).[40]

» *"The X Case"*, 1 I.R. (IE&C 1992).
*» *Flaminio Costa vENEL*, Case 6/64,1 [1964] ECR 585, (ECJ 1964).
[40] Charter of the Fundamental Rights of the European Union:

Article 1 of the Charter explicitly states that 'human dignity is inviolable'. The courts have expounded upon the meaning and scope of these provisions through various cases; most famously in *A, B <& C v Ireland?* where three women approached the ECtHR in 2005 after unintentionally conceiving and facing harassment due to the anti abortion laws in Ireland. The main contentions of the applicants was that their human rights under various provisions of European Convention on Human Rights like Right to Life under Article 2, Prohibition of Torture under Article 3, Right to Respect for Family and Private Life under Article 8 and Prohibition of Discrimination under Article 14 had been violated.

It was held unanimously by the court that the then existing Irish laws on abortion were violative of Article 8 of the ECHR and needed to be amended and modified and it directed that abortion for saving the life of the mother must be made legal, and available to the people.

The ECJ has also given similar decisions in the matters of *Society for Protection of Unborn Children v Grogan?*[1] where it expounded upon the meaning and scope of Articles 59 and 60 of the European Economic

Article 2-(1) Everyone has the right to life.

(2) No one shall be condemned to the death penalty, or executed. Article 3-(1) Everyone has the right to respect for his or her physical and mental integrity.

41 *"TheA, B&CCase"* (ECtHR2010).

42 *"The Second Information Case"* (IESC 1991).

Convention ["EEC"] Treaty, which is also binding on Ireland, holding that while Article 60 defines services, Article 59 prohibits member States from imposing restrictions on EC Citizens who wish to provide services in the EC. It obsencd that 'services' would include medical service of abortion also.

Further, in *Luisi and Carbone v Ministerodel Tesoro,*[Ai] the ECJ observed that the right to travel extends and applies to any person who - wishes to cross a border and has the means to pay for some sort of -service.[44] These judgments show that a majority of the members of the European Union ["EU"] supports abortion when the mother's life is in danger and is in favour of letting a woman exercise her right to decide when and under what circumstances, she wishes to give birth.

The Maastricht Treaty, which lead to the creation of the EU and established the three pillars of EU in the form of European Community ["EC"], Common Foreign and Security Policy ["CFSP"] and the Justice and Home Affairs ["JHA"], contains a solemn declaration in its Protocol . Seventeen wherein it does not aim at limiting the freedom to travel between member states or to impose restriction on collecting

[43] Case C-286/62 & 26/83 *Luisi and Carbone v Ministerodel Tesoro,* 3 C.M.L.R 52, [1985] E.C.R. 377 (ECJ 1985).

[44] Sabina Zenkich, *X Marks, the Spot While Casey Strikes Out: Two Controversial Abortion Decisions,* (cited in note 24).

information of services available in other EU countries. This means that the Irish laws cannot be applied or interpreted in a manner which takes away or restricts the right of women to travel or collect information about abortion in other member countries of the EU.

While Europe has many countries with anti-abortion laws similar to that of Ireland; its supranational bodies and regional mechanisms for protection of human rights along with the laws of other member nations which allows abortion, have upheld the right to life of the mother and have clarified that in spite of cultural and ethnical differences, a majority are in favour of allowing abortion, giving women the right to decide when to procreate and the right to protect their lives if the foetus endangers the same.

CONFLICT IN OTHER COUNTRIES

The issue of abortion has always been shrouded with controversies and debates on the grounds of ethics, morality, religion and in the modern times, human rights. Thus, governments all over the world have been struggling since long to arrive at a feasible and acceptable solution.

In Chile, abortion was legalized in 1967 by the Chilean Health Code in cases where the mother's life was in danger. However, it was reversed by the then President Augusto Pinochet and abortion has, since

then, been illegal in all cases. In El Salvador, abortion is illegal in ill cases including danger to life of the mother or any other medical necessity. The same holds true for Nicaragua where earlier, abortion was allowed if at least three doctors suggested the same.

While on one hand, some countries ban abortion, others have no laws to regulate the same. In 1988, the Supreme Court of Canada ruled that the then existing abortion rules were unconstitutional. This resulted in abortion being legalized for all or any cause, in the absence of any law to regulate it.

In Western Europe, Ireland stands out as the black sheep among countries like Greece, Great Britain, Germany, Spain, Sweden, where an abortion is legal for social and economic reasons, to save the life of the mother within different time spans of conceiving. A majority of European countries allow abortion on request.[45] But Poland and a few others join Ireland in their chaotic and ambiguous approach towards abortion laws.

Poland has recently made efforts to eliminate all exceptions to abortion, including medical emergency, and ban it entirely. The ECtHR has held that Poland does not have a coherent legal framework to

[45] Europe's abortioh rules, BBC News 2007 February 12, online at http://news.bbc.co.Uk/2/hi/europe/6235557.stm (visited June 21, 2013).

regulate abortion practices.[46] It is noted that the exceptions wherein the service can be utilized, it is being misused such as terminating the pregnancy even where the foetus does not suffer from a life threatening disease. At the same time, where anti abortion sentiments are very strong, abortion is not* allowed under any condition except for when the pregnancy is a result of rape, it is a risk, to the health of the mother or the foetus is severely deformed. The result is that a high number of illegal abortions and increasing pressure on the Polish government exists to liberalize its approach towards abortion.

The United States of America has also faced the dilemma of legalizing abortion and its consequences in the society and on the rights of individuals. In 1973, the decision in *Roe v Wade,*[1] gave women the right to terminate their pregnancies but also gave rise to the attempts by the government to regulate the same. The decision divided the nine months of the pregnancy into trimesters and specified those in which the state had the interest to protect the life of the mother and could allow abortion to attain the same. In *Webster v Reproductive Health Services?** the court upheld the validity of the government regulation, which prohibited

[46] ECHR Case No. 2011/15 R *v Poland,* [2011] Reports of Judgments and Decisions, (ECtHR2011).
[47] USSC No. 70-18 *Roe v Wade,* 41Q U.S 113 (US Supreme Court -'USSC hereinafter 1973).
[48] USSC No. 88-605 *Webster v Reproductive Health Sues,* 492 U.S 490 (USSC 1989).

public health workers from performing abortions until the mother's life was in danger. This case showed the Court's willingness to allow the States to impose restrictions on abortion laws.

The *Casey case?'* became another landmark decision with respect to abortion laws. It allowed state interventions for virtually, the entire term of the pregnancy and liberalized the standards to determine the need for an abortion. Its consequences involved the patient being given more information about the procedure and aiming to dissuade her from opting for the procedure. It also required minors to obtain the permission from both the parents before undergoing an abortion except in case of danger to the life of the mother.

Following such decisions, the USA saw a trend of the courts, allowing abortion on one hand but also upholding the state's attempts to regulate or restrict the same in cases such as *Stenberg v Carhart,* ' where partial-birth abortion (a technique of abortion) in Nebraska was banned; and in *Gon^akt^ v Carhart?* and *Gon^ale^ v Planned Parenthood Federation of America?*[1] in 2007 where the court upheld the federal law known as the

[49] USSC No. 91-902 *Planned Parenthood of Southeastern Pa. v Casey,* U.S. 833, (USSC 1992).
so USSCNo. 91-902 *Stenberg v Carhart,* 530 U.S 914 (USSC 2000).
[51] USSCNo. 05-380 *Gonzales v Carhart,* 550 U.S .124 (USSC 2007).
[52] *Gonzalez v Planned Parenthood Federation of-America,* Writ No. 05-1382, (USSC 2005).

PartiaUBirth Abortion Act which banned abortion, using a specific technique, a deviation from a previous High Court judgment which required any anti-abortion law to include protecting the life of the mother as an exception.[53] At present, although the law allows abortion, it is very strict when it comes to the procedure of partial birth. The debate on validating the same tp protect the life of the mother continues.

Recently, RwaAda, a small country in Eastern Africa updated its abortion laws. The previous laws allowed abortion in cases of medical emergency and had been in force since 1977. The revised Penal Code of Rwanda legalizes abortion when the pregnancy is a result of rape, forced marriage, intercourse between very close relatives and threat to the life of the mother-to-be under Article 165.

It is seen that when the law attempts to protect the rights of women and modify-the laws in light of modernized society, liberalized views and increased awareness with respect to human rights, it faces criticism from various sections of the society who on religious, cultural and ethical grounds refuse to accept abortion.

In India, abortion laws underwent liberalization after the Medical Termination of Pregnancy Act was enforced in 1971 which allows abortion to preserve the physical, mental health of the mother or her life,

53 USSC No. 70-18 *Ro^v Wade* [1973] U.S. 410 113.

in cases where it is a result of incest or rape, in cases of foetal impairment, for economic and social reasons or on contraceptive failure on part of either husband or wife. The aforesaid Act allows abortion under broader grounds than those available under the Penal Code. The government has emphasized that medical termination of pregnancy must not be understood as a method of birili control. The Courts too have had a pro-life approach. While abortion laws in the country are very liberal and have thus helped to protect the right to life and privacy of many women, it has also given rise to sex-selective abortion in a distinctly patriarchal Indian society. This in turn has caused havoc in the sex ratio.

CONFLICT WITH THE RIGHTS OF THE UNBORN

The UNFPO defines reproductive rights as follows:

"Reproductive rights rest on the recognition of the basic rights of all the couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.' [4]

[54] Adopted at the International Conference on Population and Development (ICPD) in Cairo in September 1994 in the form of United Nations Programme of Action at |7.12.

The EU covers various policy issues through its law making bodies. Family matters, including the rights of the child, are covered by the European Economic and Social Committee. This instrumentality of the EU has played a very significant role in protecting the rights of the child through Article 2 of Protocol No.l (Right to education) and with respect to birth, education and adoption.[55] It has, however, not covered the conflicting rights of the mother which includes the right to not give birth. According to a survey conducted by the IIPF in May 2012, eleven member nations of EU do not have the facility of medical abortion. Some of these include Albania, Bulgaria, Ireland, Poland, and Hungary among many others.[56] . .

The international communa has been very active since the late twentieth century in its attempts to protect the rights of the child, including those of the unborn child.[57] However, the feminist movements have brought to light the rights of the mother also which empower her to

[55] European Conventiohon Adoption of Children (Revised), (2011); Council of Europe Convention on Protection of Children Against Sexual Exploitation and Sexual Abuse," (2010).

[56] See IPPF:'International Planned Parenthood Federation, European Network, *Abortion legislation in- Europe, (Updated in May 2012),* online at http://www.ippfen.org/NR/rdonlyres/ED17CA78-43A8-4A49-ABE7-64A836C0413E/0/Abortionlegislation_May2012corr.pdf.

[57] The Preamble to Declaration of the rights of the Child, (1959) states that the child needs special protection before and after its birth; Article 6 of Convention on the Rights of the Child, (1990) provides that State Parties recognize that every child has the inherent right to life.

^decide when her body is to be used for the purpose of procreation. The effect of these movements can be seen in the form of the choice to obtain legal abortion and entrenchment of sex equality in the Canadian Charter of Rights in 1982,[58] and the concept of voluntary motherhood encouraging participation of women in making decisions regarding conceiving and giving birth, which have today emerged as an essential element of Reproductive Rights.[59]

The right to life is, in such a scenario, to be balanced between the mother and the child. In cases where the impregnation has been the result of a rape or non-consensual intercourse or where, either the unborn child or the mother, suffer from a fatal disease like AIDS or some genetic condition, the right to life of the mother needs to be weighed with that of the child. Support to this approach was seen in a Behaviour and Attitude Poll conducted in January 2013 which showed that almost 60% of people were in favour of abortion being allowed in cases of rape, AIDS or foetal abnormality.[60] A similar approach was

[58] See Margrit Eichler and Marie Lavigne, *Women's Movement*, online at http://www.thecanadianencyclopedia.com/articles/womens-movernent.

[59] See *UNFPA Reproductive Health*, online at http://www.unfpa.org/rh/rights.htm#rights

[60] See Ian McShane, *Behaviour and Attitutdes January 2013 Opinion Poll*, Sunday Times, online at http://www.banda.ie/assets/files/pdf/J.4369%20Sunday%20Times%20Jan%202013%20Report.pdf.

adopted by the United States Supreme Court when it held in *Roe v Wade*,[6]* that the State's duty of protecting life of the mother and the child have to be balanced.

UDHR has played a significant role in popularizing the use of 'human dignity' in the context of various human rights.[62] Human dignity has been acknowledged by the preambles to the United Nations Charter, ICCPR, in the constitutions of various countries all over the world such as India, Costa Rica, Italy, etc., in regional mechanisms like the American Declaration of the Rights and Duties of Man and Customary International Law which demonstrate *Opinio Juris*,[6]* and State Practice. The Statute of the International Court of Justice describes customary international law as a general practice accepted as law,[64] and reflects the intention of the States to be bound by this branch of international law.

[61] USSC No. 70-18 *Roe v Wade*, [1973] U.S. 410 113.
[62] See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights* EJIL (2008), Vol. 19 No. 4 The European Journal of International Law 655 - 724, online at http://www.ejil.Org/pdfs/19/4/1658.pdf.
[63] Legality of the Threat or use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 1J226 (Shahabuddeen dissenting); South West Africa Case i.e. *Ethiopia v South Africa*, I.C.J. Reports 1961,1|6 (Dissenting opinion).
[64] ICJ Statute, *Article 38(1)(b):- "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: b. international custom, as evidence of a general practice accepted as law"*.

Hence, States are obligated to conform to customary international human rights.[65]

In cases where the pregnancy is a result of a rape or where the mother-to-be is herself a child, she must be given the choice to decide and determine if her body is physically and mentally prepared to meet the demands of a pregnancy. The right to life is not just mere survival but includes health, dignity and other means necessary to lead a life with respect. Forcing a woman to give birth to a child she does not want or who will not survive till term, clearly violates the right to privacy, dignity of the woman and the right to life of not only the mother, but also the child. Where the woman is not fit or healthy enough to carry a pregnancy or where the impregnation has been done against her will, she should be given the right to live.

While the critics of abortion laws contend that the unborn child too has a right of life which cannot be taken away and that abortion is synonymous to killing or murder, imposing an absolute ban on abortion in all cases too, is not judicious. The U.N.'s special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez, in his annual report to the Human Rights Council questioned

[65] See Customary International Humanitarian Law: Q&A ICRC 15th August 2005, online at http://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a5.

the policy of an absolute ban on abortion observing that such laws violate the prohibition of torture.[66]

In the case of Ireland, Article 40(3) (3) provides an unborn child with a right to life equal to that of the mother.[67] However, the provision clarifies that such equality of right will not be applicable to travel from one state to another or have any implication on availing services in other states which are lawful there but unlawful in Ireland. This means that travelling outside Ireland to another State where abortion is legal will not result in violation of Article 40(3) (3).

But the right to travel abroad to procuring abortion is subject to the condition of real and substantial risk to the life of the mother. This criterion is highly subjective and can be difficult to prove by a patient in the absence of any guidelines being issued for the same. However, judgments of supranational bodies which are more or less binding on member nations in the EC and EU have made it clear that the right to

[66] See Juan E. Mendez, United Nations General Assembly, *Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22nd Session, online at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

[67] Art. 40.3.3 of the Constitution of Ireland - *"The State shall acknowledge the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".*

abortion for at least protecting the right of the mother, needs to be protected.[68]

The right to bodily integrity,[69] which is one of the unremunerated rights in the Irish Constitution, discovered by the Courts of Law, also prevents the State from doing anything which may cause harm to a person's life or health. The conflict between the rights of the mother and the foetus can be solved by determining the rights of the unborn. Accordingly, the unborn can be given full rights (and be treated as a person separate from the mother), no rights (on the grounds that it has no moral existence till the, time of its birth) or rights with" advancing gestation (wherein the unborn will become entided to more ajnd more rights as it advances in the stages of gestation).[70] However, the ultimate choice has to be made by the State in light of national and international human rights.

[6S] *The X Case, The C Case, ECUR (Application no. 57375/08) P and S v Poland* [2012] Annonced'arrets 30.10.12.

[69] See *, IHRC A Summary Of Your RIGHTS,* online at http://www.ihrc.ie/training/guide/section6/, Irish Human Rights Commissionr

[70] See Linda Tran, *Legal Rights and the Maternal-Fetal Conflict,* The Science Creative Quarterly 2005, May 23rd, online at http://www.scq.ubc.ca/legal-rights-and-the-maternal-fetal-conflict/.

RECENT DEVELOPMENTS

The year 2012 saw the death of a thirty one year old Indian citizen, Savita Halappanavar, who was working as a dentist, in the University Hospital Galway in Ireland, after suffering from a miscarriage for days but being denied the service of an abortion till the time the foetus had a heartbeat.[71] By the time she qualified for medical procedures, substantial damage had been suffered by her internal organs resulting in her death from organ failure and septicaemia. This case drew outrage within the country,[72] internationally in the form of protests, candle light vigils, extensive coverage by the media which mounted pressure on Ireland once again to review and modify its abortion laws.

Under this severe social and political pressure to introduce a legislation in accordance with the *X Case*, the government issued statements that an improved legislation would soon be enforced to legalize abortion in Ireland.[73]Contradictory stances were seen as the

[71] See Hasan Suroor, *Indian woman dies after being refused abortion*, The Hindu 2012 November 15, online at http://www.thehindu.com/news/international/indian-woman-dies-after-being-refusedabortion/article4097428.ece.

[72] See Una Mullally, *Savita story resonates around the world*, Irish Times 2012 November 17, online at

http://www.irishtimes.eom/newspaper/ireland/2012/l 117/1224326702387.html. ;

[73] See Bruno Waterfield, *Ireland to legalise abortion*, The Telegraph 2012 December 18, online at

Indian Government,[74] Amnesty International,[75] and the United Nations supported the need to modify abortion laws on one hand and Pope Benedict declared his support to the advocates of pro-life or the anti-abortion laws.[76]

It is possible that the proposed legalisation, if enacted, will not be any different than the constitutional amendments that were enacted after the *X Case* i.e. ambiguous and keeping the power with the Irish Government or the judiciary to decide the circumstances under which an abortion may be permitted.

A growing number of Irish citizens have changed their perceptions about abortion (as shown by major surveys),[77] and the

http://www.telegraph.co.uk/news/worldnews/europe/ireland/9753313/Irelan d-to-legalise-abortion,html.

[74] See Times Of India, *Salman Khurshid closely following developments in SavitaHalappanavar death case,* 2012 November 18, online at http://timesofindia.indiatimes.cpm/india/Salman-Khurshid-closely-following-developments-in-Savita-Halappanavar-death-case/articleshow/17270798.cms.

[75] See Times of India, *Irish govt must clarify on abortion issue: Amnesty,* 2012 November 17, online at http://artides.timesofindia.indiatimes.com/2012-ll-17/uk/35171872_l_human-rights-indian-dentist-irish-supreme-court.

[76] See Patrick Counihan, *Pope Benedict slams Ireland's attempts to introduce abortion,* Irish , Central 2013... ' January 8, online at http://www.irishcentral.com/news/Pope-Benedict-slams-Irelands-attempts-to-introduce-abortion-185999302.html.

[77] See Sorcha Pollak, *Ireland's Abortion Debate Heats Up,* 2012 November 12 Time World, online at

country opened its first abortion centre amidst protests. Despite all of this, for now, the government is not ready to depart from its Catholic principles.

The proposed legislation is set to be presented this year itself amidst international pressure by various members of the EU as well as different institutions calling for a change in the Irish policy.

CONCLUSION

It has been two years since the *A, B & C judgment* was given and the ECHR directed Ireland to modify its laws with regard to abortion. However, it has taken the death of a foreign national to wake the government up to the issue. The Irish government has been slow in taking action to implement this decision of the ECHR even though it is binding on all member nations. In spite of widespread disapproval of the attitude of the government towards abortion laws, no major steps have been taken towards the same. While promises have been made under pressure from the international community and citizens of Ireland themselves, actual progress remains to be seen.

Pending a final decision and legislation from the government-many more women have undergone abortion illegally or have bee:

http://world.time.com/2012/11/12/irelands-abortion-debate-heats-up/.

forced to carry a pregnancy to its, term m spite of danger to their lives. As a result, many women have lost their right over their own body and their right to life. They have been forced to travel to England or Scodand for abortions in order to protect their own lives. While judicial precedents > xist in the form of judgments of Irish courts as well as the European [1] ourt of Human Rights, no formal legislation has been passed to crystallize the ratio of these decisions. The result has been utter confusion about the actual legal position, increasing complexity of the rights of the mother viz-a-viz those of the child.

The duty of the government to make the required changes should not increase due to international pressure but due to inherent need for the same to be made. According to a poll conducted recently, eight out of ten Irish citizens wanted the abortion laws to be changed.[78] Being a democracy,'the laws of the nation must reflect the will of the people. Thus, change is needed not only to conform to the changed notions of women's rights and dignity of human rights, but also to reaffirm the faith of the people in their government.

[78] See Mark Simpson, *Poll: Most Irish want new abortion legislation*, 2012 December 1 BBC News Europe, online at http://www.bbc.co.uk/news/world-europe-20568283.

THE PRACTICE OF OIL POLLUTION LIABILITY: A COMPARATIVE STUDY OF INDIA AND USA*

Abstract

Oil pollution may result in loss of life, personal injury and other impairments of health, loss or damage to property, and short term or long term damage to the marine environment. Major issues include fixing liability for damage caused, and ascertaining the proportionate level of compensation for the same. The legal regime addressing the issues of oil pollution liability and compensation are primarily governed by the Merchant Shipping Act, 1958 (MSA) and its Amendment Acts of 2002 and 2003 in India, and the Oil Pollution 'Act, 1990 (OPA) in United States of America (USA). The MSA and OPA are founded on the principle of strict liability for ship-owners and create a system of compulsory liability insurance. Claims for compensation for oil pollution damage maj be brought against the owner of the tanker, which caused the damage, or directly against the owner's P&I insurer. This paper gives an overview of the Indian and American legal framework for oil pollution liability and provides an insight in to the potential strengths and weaknesses of the same. The central argument made through the paper is that despite the straightforward

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claims procedure under the Indian law, claimants are less likely to obtain adequate compensation in the event of a catastrophic oil spill, in comparison to the OPA which guarantees that there are adequate funds available to provide sufficient compensation for successful claimants.

INTRODUCTION

The International Convention on Civil Liability for Oil Pollution Damage, 1969 and its 1976 and 1992 Protocols (1992 CLC), place strict liability on tanker owners for damage to the coastline or related interests of any state caused by pollution of the sea by oil. As a supplementary instrument to this convention, the International Convention on the Establishment of Fund for Compensation for Oil Pollution Damage, 1971 and its 1976 and 1992 Protocols (1992 Fund Convention) have been adopted.[1] These provide additional compensation to victims of oil pollution damage over and above the remedies available under the 1992 CLC.

India has ratified these two conventions, along with the 1976 and 1992 Protocols to these two Conventions. The 1992 CLC and Fund Conventions were brought into Indian Law by The Merchant Shipping Act, 1958 (MSA) as amended in 2002 and 2003.[2] Part XB of the MSA deals with the civil liability for oil pollution damage and Part XC with-International Oil Pollution Compensation Fund (IOCF). However,

[1] The original texts- of these conventions are available at International Oil Pollution Compensation Fund. Online at http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf (visited June 18,2013).

[2] The original text of the Act is available at Directorate General of Shipping, "Merchant shipping Rules and Acts." Online at http://www.dgshipping.com (visitedjune!8,2013).

United States of America (USA) has not ratified these conventions, and in 1990 it introduced the Oil Pollution Act, 1990 (OPA) .[3]

• The objective of this paper is to provide an outline of the oil pollution liability provisions of the Indian and American legal framework and to compare their potential strengths and weaknesses. The second part of the paper provides an overview of the provisions of the MSA in India, and the third part deals with the provisions of the OPA in USA. Part four compares the relevant provisions and argues that in spite of the straightforward claims procedure under Indian law; claimants are less likely to obtain adequate compensation in the event of catastrophic oil spill, in comparison to OPA which guarantees that there are adequate funds available to provide sufficient compensation for claimants. However, the fund under OPA is USA specific; whereas the fund under MSA is based on IOPC funds which operate in a large number of jurisdictions with different legal systems.

LIABILITY PROVISIONS OF MSA

Under §3521 of the MSA, in cases of pollution by oil, a strict liability is imposed on all ship-owners, irrespective of their nationality or flag. The liability is geographically limited to any damage caused in the

-[1] Oil Pollution Act, 1990, Pub. L. No. 101-380,104 Stat. 484 (1990), online at http://epw.senate.gov/opa90.pdf (visited June 18,2013).

area of India by contamination resulting from the discharge or escape of 'oil'[4] from the ship. It includes the costs of 'preventive measures'.[5] It also covers damage caused in the territory, territorial sea and in the Exclusive Economic Zone ["EEZ"] of India in consequences of such preventive measures.

ELEMENTS OF LIABILITY

POLLUTION DAMAGE

The MSA ascertains the liability of the owner of a ship for pollution damage caused by oil escaping from the ship as a result of an incident, on the territory of a party (including its territorial sea), and covers preventive measures to minimize such damage.

The MSA provides compensation only for "pollution damage" which is defined as:[7]

[4] Merchant Shipping Act, 1958 (MSA), §352H (b) reads: "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as a cargo or in the bunkers of such a ship".

[5] Id at §352H (e) (states: "Preventive measures" means any reasonable measures taken by any person after the incident to prevent or minimize pollution damage).

[6] Id at §352H (a) (states "Incident" is defined as any occurrence, or series of occurrences having the same origin, which causes pollution damage).

[7] Id at §352H(d).

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided , that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(b) the costs of preventive[1] "measures and further loss or damage caused by preventive measures.

. Both accidental and intentional discharges are covered in this definition. Actual escape or discharge is an essential condition and the definition, thus, does not cover a case of grave and imminent threat of pollution damage. The MSA does not provide compensation for damage to the environment, except for the costs incurred in restoring the damaged environment, such as clean-up costs or other measures of restoration. No compensation is payable for damages which cannot be repaired, calculated or measured and are, therefore, irreparable.

The MSA applies to personal damage to property, if acausal connection to the oil discharge can be proved. Persons whose property has not been damaged may suffer economic loss as a result of oil pollution. For instance, if a certain area of the sea is heavily polluted,

fishing may be altogether impossible in that area for a certain period of time, which may cause economic loss to a great number of fishermen for whom there is no possibility of fishing elsewhere. Also, hotel owners may lose income due to the fact that the tourists may not come to the area because the beaches have become polluted.

COMPENSATION

To receive compensation for damage to the marine environment by oil, the MSA has introduced provisions in line with 1992 CLC and Fund Convention. A Fund, in other words, the International Oil Pollution Compensation Fund (IOPCF) established by the 1992 Fund .Convention, as amended from time to time,[8] is available to any claimant who has suffered pollution damage if the claimant is unable to obtain full and adequate compensation for the damage under the terms of the 1992 CLC on any of the following specific grounds of Fund Convention:

- Where no liability arose under the CLC;
- Where the ship-owner was incapable of meeting CLC obligations or where his insurance covers and/or financial security were themselves inadequate;

[8] Id at §352 (c).
[9] Jd-at §352W.

Where the value of the damage caused exceeded the vessel owner's liability under the CLC.[10]

The MSA provides that parties wishing to raise actions to enforce their claims must do so within three years of the claim arising, and not later than six years after the occurrence of the spill, or threat of spill. Once compensations are paid for damage by the Fund or the Public Authority of India, they acquire the right of subrogation of all the rights against the owner or his guarantor.[12]

Smaller claims can be settled unilaterally by the Fund Director, but the Fund's Executive Committee must decide larger claims. Provisional hardship payments can be made, and the Fund's Claims Manual states that it seeks to pay out compensation as quickly as possible.[13] In the event of a major incident that may very often result in huge claims, initially, the claim may far exceed the total amount available under the conventions. In such" a situation the IOPC Funds can only make provisional payments of amounts corresponding to a certain

[10] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, (1992 Fund Convention), Article 4(1). " MSA, § 352Y. i[2] Id at §352Z.

[13] See Mans Jacobsson, *The Internationa/ Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Compensation 1 :tmd,* Colin de la Rue (ed.), Liability for Damage to the Marine Environment, Lloyd's of London, London (1993) at 51-52.

percentage of the proven damage. This is necessary in order to ensure that the total amount eventually paid in respect of the incident does not exceed the amount available under the MSA, so that all claimants are given equal treatment. This can obviously cause financial hardship to claimants who will have to wait for a long time before they get full compensation; particularly small businesses and individuals who form part of such collective claims.

PERSONS ENTITLED TO LIABILITY

Under the MSA, only the owner is liable. "Owner" includes the person registered as the owner of the ship, and includes the operator who for the time being is in charge of the ship and the master of the ship; or in the absence of registration, the person owning the ship; or in the case of a tanker owned by a foreign state, the person registered in that state as the operator of the ship.[14] Under §3521(6) of the MSA, no claim for pollution damage shall be made against any of the following persons:

(a) The servants or agents of the owner or the members of the crew;

(b) The pilot or any other person who, without being a member of the crew, renders services for the ship;

« MSA, §352H(c).

(c) Any charterer (howsoever described, including a bare-boat charterer), manager or operator of the ship;

(d) Any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;

(e) Any person taking preventive measures;

(f) All servants or agents of persons mentioned in clauses (c), (d) and (e).

These exempted persons are of the kind who might be expected to be •' involved with the vessel when an incident involving an oil spill, or any threat or danger arises. However, the exempted persons are held liable, where such person causes damage wilfully or recklessly.

DEFENCES TO LIABILITY

Despite strict liability being applicable, a few defences are available to the ship-owner:[15]

(a) An act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

» Id at §3521, K2.

(b) When the damage was wholly caused by an act or omission done with intent to cause such damage by any other person; or

(c) When the damage was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in exercise of its functions in that behalf.

In respect of (b) and (c), the word *'wholly'* is particularly important. If the ship-owner can only prove that the damage fell partly within the events listed, he would be unable to claim the exemption. Liability was also excluded in respect of any warship or any ship for the time being used by the government of any country for purposes other than commercial purposes.[16]

Where an oil spill occurred from two or more ships, the owners of all such shipTshould be joindy and severally liable for all such damage, which is not reasonably separable.[17] If a plaintiff himself had contributed to the loss or damage in anyway, the owner shall be exonerated, wholly or partially, from liability.[18]

»> Id at §352Q. "Id
at §3521,14. [1(i] Id
at §3521, «p.

LIMITATION OF LIABILITY

The owner may -limit his liability in respect of any,oil pollution damage, in respect of any one or more incidents, as "may be prescribed, by the Central Government.[19] The MSA permits the Central Government to make rules prescribing the limits of liability of an owner in respect of one or more incident of pollution damage, having regard to the provisions of the 1992 CLC.[20] Consequendy, the provisions of the 1992 CLC provides for the limits of liability under the MSA.[21]

The limits are not for situations where the discharge or escape occurred with the willful or reckless act of the owner.[22]Any owner desiring to avail the benefit of a limitation of his liability has to apply to the High Court for establishment of a limitation fund. Such a fund may be constituted either by depositing the sum with the High Court or by

i[9]Idat§352J,Hl.

[20] Id at §352R.

[21] CLC, Article V' [as' amended by Article 6 of the 1992 Protocol. The compensation limits under 1992 Protocol were amended in 2000 and set out as follows:

- For a ship not exceeding 5,000 gross tonnage, liability is limited to 4.51 million SDR (US$6.0 million);
- For.a ship 5,000 to 140,000 gross tonnage: liability is limited to 4.51 million SDR (US$6.0 million)plus 631 SDR(US$898) for each additional gross tonne over 5,000;
- For a ship over 140,000 gross tonnage: liability is limited to 89.77 million SDR (US$128 million)].

[22] MSA, §352J, 112. ;

providing a bank guarantee or such other security which is acceptable to the High Court.[23]

FINANCIAL RESPONSIBILITY

The provisions of the MSA require the responsible party to provide evidence of compulsory insurance or other financial guarantees sufficient to meet the liability. All ships carrying 2,000 tons or more oil in bulk as cargo are required to maintain a certificate confirming a liability insurance,[24] covering their 1992 CLC liabilities.[25]Any certificate issued outside India by a competent authority shall be accepted at any port or place in India.[26] Without such a certificate, the ship will not be permitted to enter or leave any Indian port or place in the territorial sea of India.[27]

Any claim for damage to the marine environment may be brought directly against the insurer or other persons providing financial security for the owner's liability for pollution damage. The financial requirements that tanker owners should produce evidence of capability to

[23]Idat§352K,Hl. -■-'■..
[24] Id at §352N, ^1 (states "The insurance or other financial security should be equivalent to (a) one hundred and thirty-three Special Dtawing Rights for each ton of the ship's tonnage; or (b) fourteen million Special Drawing Rights whichever is the lower").
[2]5Idat§352N(3).
[26]Idat§3520. ■ ■ .
[27]Idat§352P.

meet their liabilities can be provided by the P&I Clubs in the form of appropriate certificates as required by the MSA.

JURISDICTION

Any action for a claim against the fund for compensation must be brought before the High Court. The.fund has the right to intervene as a party in any legal proceeding instituted in the High Court Against the owner or its guarantor.[28]

The MSA based on the 1992 CLC and Fund Conventions specifically provide for the international recognition of the jurisdiction of the courts of states parties to the conventions, where when damage has been suffered based on incurrence of costs and damages, a right of direct action against the ship-owner's insurance companies exists.[29] Thus, the MSA gives the High Courts jurisdiction over all the tankers registered in a State Party to 1992 CLC and Fund Conventions arid ensures that potential claimants have a means of compensation.

[28] Id'at §352X.

[29] Civil liability Convention for Oil Pollution Damage, 1969, (CLC) Article IX as amended by Article 8 of 1992 Protocol provides that claims for compensation-may be brought before the courts of any Contracting State within the jurisdiction of which damage has been suffered. Where the action has been brought only before a court competent under Article !X of CLC, that court has exclusive competence over any action against the Fund under Articles 4 or 5 of the 1992 Fund Convention in respect of the same damage.

LIABILITY PROVISIONS OF OPA[30]

The OP A provides that the "responsible party"[31] for a vessel of" "facility"[32] from which "oil"[33] is discharged, or "which poses a substantial

[30] For a comment on OPA, see John E. Noyes, *The US Oil Pollution Act of1990,1* International Journal of Estuarine and Coastal Law 43-55(1992); George J. Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990,2*\ Envd. L. 237-50(1991); Antonio J. Rodriguez and Paul AC. Jaffe, *The Oil Pollution Act of 1990,*15 Tulane Journal of Maritime Law 1-28(1990).

[31] United States of America, Oil Pollution Act, 1990 (OPA), §1001(32)"responsible party" means the following:
(A) Vessels: In the case of a'vessel, any person owning, operating, or demise chartering the vessel.
(B) Onshore Facilities: In tin c:i<V of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner-transfers possession and right to use the property to another person by lease, assignment, or permit.
(Q Offshore Facilities: In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.
(D) Deepwater Ports.—In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.
(E) Pipelines: In the case of a pipeline, any person -owning or operating the pipeline.
(F) Abandonment: In the case of an abandoned vessel, onshore facility, < deepwater port, pipeline, or offshore facility, the persons who would have been responsible s parties immediately prior to the abandonment of the vessel or facility.

[32] Id at§1001(9): "facility" means any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following

threat of a 'discharge',[34] tj§_ liable for: (1) certain specified damages resulting from the discharged oil; and

(2) "removal costs"[35] incurred in a manner consistent with the National Contingency Plan (NCP).[36]

Upon actual discharge of oil from the vessel or a reasonably serious threat of an escape of oil, the owners and operators of a vessel are liable for removal costs and damages from such discharge. The oil need not necessarily be cargo; it could be fuel also. The vessel discharging the oil may be of any type.[37]

purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes.

[33] Id at §1001(23) defines "oil" as oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of §101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act.

[34] Id at §1001(7) defines "discharge" as any emission (other than natural see page), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping.

[35] Id at §1001(31) defines "removal costs" to include not only costs incurred after an oil discharge has occurred, but also the costs to prevent^ minimize, or mitigate oil pollution from an incident that poses a substantial threat of an oil discharge.

[36] Id at §1002(a).

[37] Christopher Hill, *Maritime Law* at 444 (Lloyd's of London 5* ed 1998).

ELEMENTS OF LIABILITY

DAMAGES

The 'damages' stands for damages specified in §1002(b) of the OPA, and includes the cost of assessing these damages.[38] §1006 of the OPA stipulates that the responsible party is liable for damages for injury to "natural resources".[39] In addition, the responsible party is liable for injury to real or personal property (including economic losses resulting from that injury), loss of sustainable use of natural resources,[40] loss of revenues (including federal, state or local taxes) on the use of natural resources and real or personal property, loss of profits and impairment of earning capacity resulting from such pollution, and the costs of providing additional public services during or after removal activities.[4,]It is evident from its broad coverage of damages that the OPA is more adequately

[38] OPA, §1001(5).

[39] Id at §1001(20). "Natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.

[40] Id at §1006(d)(l).The measure of damages payable for lost or damaged natural resources shall be the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources as well as the diminution in value of those natural resources pending restoration, plus the cost of assessing those damages.

[41] Id at 51002(b)(2).

designed to resolve the numerous legal conflicts stemming from an oil spill.

COMPENSATION

The OPA merges the funds established until that time under federal law into The Oil Spill Liability Trust Fund (OSLTF).[42] The fund is available to pay for removal costs and certain other expenses, claims and damages. Once payments are made, the fund subrogates to the rights of the claimants or of a state who received them and is entitled to recover from the responsible party.[43] Generally, a claim must be presented to the responsible party or a guarantor before being presented to the fund.[44] The claim may be presented to the fund in some specific cases.[45]

The OSLTF has two main components, namely an Emergency fund[46] and a Principal fund.[47]The efficacy of a fund with a high capping

[42] This Fund was originally established pursuant to Internal Revenue Code of 1986,26 USC §§4611, 9509.
[43] OPA, 51012(f).
[44]Idat§1013(a).
[45] Id at §1013(1) talks about these specific cases as: where the President has advertised or otherwise notified claimants; by the governor of a state for removal costs incurred by that state; by a US claimant where a facility located in the territorial sea, or over the continental shelf of a foreign country, spills or substantially threatens to spill oil resulting in costs or damages within US jurisdiction.
[46] It is available for Federal On-Scene Coordinators (FOSCs) to respond to discharges and for federal trustees to initiate natural resource damage assessments. The Emergency Fund is a recurring $50 million available to the

clearly shows itself in a situation where an individual controlling a one-ship company, possibly without limitation of liability and after the unlikely piercing of the corporate veil of diat legal person, is unable to meet claims.[48]

PERSONS ENTITLED TO LIABILITY

Under the OP A, owners, operators or demise charterers of a vessel, owners or operators of pipe line, licensees of deepwater port licensed under the Deepwater Port Act of 1974, and.certain persons connected with other onshore or offshore facilities are the responsible parties on whom liability may be fixed.[49]

Unlike the MSA, under the OPA it is not only the ship-owner who is rendered stricdy liable for oil pollution damage but also the operator of such vessel. The use of the term 'operator' is very significant in that it covers a whole spectrum of potential defendants, including a pilot, a ship management company and a mortgagee in possession.

President annually. See: *The Oil Spill Liability Trust Fund* (United States Coast Guard: National Pollution Fund Centre Feb 2012), online at http://www.uscg.mi1/npfc/About_NPFC/osltf.asp#osltf_structure (visited November 2012).

[47] Id. This is the remaining balance, used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of the OPA and support research and development.

[48] Gotthard Gauci, *Oil Pollution at Sea: Civil Liabilityand Compensation forDamage* at 24-25 (Wiley 1st ed 1997).

[49] OPA, §1001(32).

Cargo-owners are not exposed to liability by virtue of the OPA.AU the responsible parties are jointly, severally and strictly responsible.

DEFENCES TO LIABILITY

The ship-owner is allowed to escape the strict liability imposed by the OPA, if he can prove that the discharge was caused solely by an act of God.an act of war, an act or omission of a third party other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with a contractual relationship with the responsible party, or any combination of these three acts.[50]However, these provisions are restricted by the OPA where the responsible party does not report the discharge, or fails to cooperate with or abide by the orders of the officials concerned with removal. activities.[51]The responsible party is not liable to the claimant to the extent that the discharge is caused by the gross negligence or wilful misconduct of the claimant.[52]

[50] Id at §1003(a).
[51] Id at §1003(c): Subsection (a) does not apply with respect to a responsible party who fails or refuses— (1) to report the incident as required by law if the responsible party knows or has reason to know of the incident; (2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or (3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of §311 of the Federal Water Pollution Control Act (33 USC 1321) as amended by this Act, or the Intervention on the High Seas Act (33 USC 1471 et seq).
[52] Id at §1003(b).

LIMITATION OF LIABILITY

For tankers exceeding three thousand gross tonnes, the liability limit is US$1,200 per gross tonne or US$10 million whichever is greater, whereas tankers of three thousand tonnes or less the limit is fixed at US$1,200 per gross tonne and US$2 million, whichever is less. For dry cargo vessels, the ceiling is either US$600 per gross tonne or US$500,000, whichever is greater.[53] It is obvious that the OPA provides for higher limits of liability than the MSA.[54] Further, the right to limit liability provided in the OPA might have little significance when a victim of pollution has a right to claim unlimited damages in terms of the law of an individual state.[55] Furthermore, under the OPA, responsible parties can also be subject to unlimited liability under a variety of circumstances.[56] .

[53] Id at § 1004(a).

[54] See note 21.

[55] OPA, § 1004(c) (3). One of the most onerous provisions from tanker owner's point of view, or of his liability insurer (P&I Clubs), is that the OPA allows individual states to enact their own domestic legislation even on terms more onerous and imposing greater liability on responsible parties than the Federal law itself, even permitting them to provide for unlimited liability.

[56] Id at § 1004(c), which states:

(1) Acts of Responsible Party: Subsection (a) does not apply if the incident was proximately caused by—

(A) gross negligence or wilful misconduct of, or (B) the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

However, all increased liability limits and preventive measures only apply to those ship-owners subject to USA jurisdiction. As a result, a foreign ship-owner can escape liability under the OP A. Being an entirely domestic system for dealing with oil pollution liability, the OPA encounters problems concerning accidents with foreign tankers. A probable claimant faces the problem of obtaining jurisdiction over the foreign tanker owner, as many do not have attachable property or agents in the US. On the other hand, if the ship-owner agrees to jurisdiction or

(2) Failure or Refusal of Responsible Party: Subsection (a) does not apply if the responsible party fails or refuses—
(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;
(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or
(Q without sufficient cause, to comply with an order issued under subsection (c) or (e) of §311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq).
(3) OCS Facility or Vessel: Notwithstanding the limitations established under subsection (a) and the defences of §1003, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.
(4) Certain Tank Vessels: Subsection (a)(1) shall not apply to—
(A) a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in §2 of the Edible Oil Regulatory Reform Act; and
(B) a tank vessel that is designated in its certificate of inspection as an oil spill response vessel (as that term is defined in §2101 of tide 46, United States Code) and that is used solely for removal.

is assessed to pay his maximum liability, there would be problems in enforcing judgments in foreign courts.

Thus, a significant drawback to the OPA is its failure to provide uniform system which would allow recovery against foreign shipowners.[57] Nevertheless the MSA through the CLC and Fund Convention establishes jurisdiction over all the tankers registered in a State party to international regime and ensures that potential claimants have a means of compensation.

FINANCIAL RESPONSIBILITY

The OPA calls for the responsible party to provide evidence of financial responsibility adequate enough to meet the appropriate maximum liability in respect of vessels.[58]Offshore facilities are required to maintain evidence of financial responsibility of $150 million. Vessels and deepwater ports must provide evidence of financial responsibility up to the maximum applicable liability amount. Claims for removal costs and damages may be direcdy asserted against the guarantor providing evidence of financial responsibility.[59] It is also mandatory for the responsible party for any vessel over 300 gross tonnes to ascertain

[57] Stephen T. Smith, *An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil liability for Oil Pollution Damage,\4 Houston Journal of International* Lw 114(1991).
[58] OPA, §1016.
[59]Idat§1016(c)(l)and(2).

evidence of financial capability to convene the maximum amount of his liability under the limitation provisions of the OPA calculated in terms of the largest vessel which the party owns or operates.[40] If the responsible party fails to provide the necessary certificate, his vessels may be denied entry into the US ports,[61] or may even be detained or seized or forfeited.[62]

The OPA provides for a right of direct action against the guarantor for claims for removal costs and damages.[63]Any guarantor who provides the required evidence of financial responsibility is entitled to the same defences and limitation rights as the responsible party himself for whom he stopd guarantee. An absolute defence for such a guarantor is that the incident, which resulted in the loss, was caused by the wilful misconduct of that responsible party.

[60] Noi^setf-propelled vessels that dp not carry oil as cargo or fuel are exempted. Idat§1016(a).
[61] Id at §1016(b)(2).
[62]Idat§1016(b)(3).
[63]Idat§1013(a).

JURISDICTION

The OPA grants the USA district courts the federal question jurisdiction with regard to all controversies arising under the Act.[64] Even state courts have the jurisdiction to consider claims under the OPA.[65]

A COMPARISON OF MSA AND OPA

Both the MSA and the OPA include some common characteristics like defining the activities and substances involved i.e. oil, damage to persons, property and environment; establishing a standard of strict liability; creating an obligation to procure insurance cover; and declaring the competent court to deal with the claims.

When comparing the specific provisions of the OPA and the MSA based on CLC and Fund Conventions, it is clear that the former is more effective in resolving the numerous legal conflicts stemming from an oil spill. The advantages of the OPA over the MSA are broad coverage of damages, substantial compensation to victims in cases of catastrophic spills, claims procedure in such catastrophic spills, provisions of unlimited liability and strict observance of safety rules.

The OPA is more adequately designed by broad coverage of damages including removal costs, damage to natural resources, real or

[64] Id at §1017(b). «Id
at §1017(c).

personal property, subsistence use of natural resources, revenues (including federal, state or local taxes), profits and earning capacity and the costs of providing public service during or after removal activities.[66] Such a wide coverage of damages is not seen in the MSA,

The MSA enables only those individual claimants who have suffered pure economic loss as a result of damage to natural resource to establish liability and claim compensation. Under the OP A, claimants are able to establish liability not only for any resulting loss of profits, but also for impairment of earning capacity arising out of damage to the environment.[67]

In case the ship-owner is able to limit his liability, the amount of money available to compensate for loss arising out of the spill under the provisions of the MSA is considerably less than the one billion dollars available under the OSLTF of USA.^The total amount of compensation payable for any one incident under the MSA will be limited to a

<*Idat§1002(b).

[67] For example, employees of companies, which have sustained a downturn in orders through natural resource, damage, and whose livelihood has thereby suffered, *prima facie* have the option of raising a claim for impairment of earning capacity.

[68] OP A, §9001 (a) amends the Internal Revenue Act of 1986 to consolidate funds established under omer statutes and to increase permitted levels of expenditures. Penalties and funds established under several laws are consolidated, and the OSLTF borrowing limit is increased from $500 million to $1 billion.

combined total (payable under the 1992 CLC and Fund Conventions) US $289 million.[69] Although the sums available under the MSA are sufficient, it would seem that claimants might be disadvantaged as compared to the OPA when there is a catastrophic oil spill.

In the event of a catastrophic spill, those who have suffered loss must first communicate a claim under the MSA. The claim can be made direcdy against the ship-owner's insurer. It is important to note that the MSA has no mechanism of the sort provided for in the OPA, which encourages responsible parties and their insurers to setde as early as possible by using the 90-day time limit.[70] The MSA provides that parties wishing to raise actions to enforce their claims must do so within three years of the claim arising, and not later than six years after the occurrence of the spill, or threat of spill.[71] There is no special accelerated procedure for claims, and those without the necessary resources may require qualifying for civil legal aid. The process can be long and arduous, with

[69] Mansjacobsson, *The International Compensation Regime and the Activities of International Oil PoUution Compensation Funds*, International Seminar on Tanker Safety, Pollution Prevention and Spill Preparedness, ^J3 (8 December 2005), online at http://www.itopf.com/_assets/documents/jacobsson05.pdf (visited 21 January 2013).

[70] If a claim has been presented to the responsible party or guarantor and that party denies liability or fails to pay within a 90-day period, the claimant may elect to present his claim to the Fund. OPA, §1013(c).

[71] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Article 6.

no guarantee that there will be sufficient funds to compensate all the claimants.

The OPA imposes strict liability, and it is more likely for a ship-owner to lose the right to limit his liability under this statute rather than under the MSA. Section 1004(a) of the OPA grants limitation of liability which is substantially higher than the limits of liability under the MSA. Furthermore, the OPA allows numerous possibilities for unlimited liability under a variety of circumstances including gross negligence or wilful misconduct; or the violation of an appreciable federal safety, construction or operating regulation; refusing to report the incident, provide cooperation or comply with existing law; the President with the ability and discretion to adjust liability limits if deemed necessary.'[72]

One of the most onerous provisions, from the tanker owner's point of view, or of his liability insurer (P&I Clubs), is that the OPA allows individual states to enact their own domestic legislation even on terms more onerous and imposing greater liability on responsible parties than the Federal law itself even permitting them to provide for unlimited liability.[73]Moreover, States may impose additional liability (including

[7]2 OPA, §1004(c). JJ
Id at §1004(c)(3).

unlimited liability), funding mechanisms, requirements for removal actions, and fines and penalties for responsible parties.

The increased liability limits under the OPA only apply to those ship-owners subject to USA jurisdiction. It is an entirely domestic system which is not in perfect sync with the international community. A comparison between the IOPC Funds of the international regime and the OPA must take into account the fact that while the OSLTF works within one nation and one legal system, the IOPC Funds operate in a large number of jurisdictions with different legal systems.

The OPA provides for federal safety, construction and operating regulations. It requires that all new vessels constructed for the carriage of oil shall be equipped with a double hull when operating in USA waters or the USA exclusive economic zone.[74] With regard to the existing vessels, the double hull requirement is phased in over a period of years, starting in 1995, depending upon the age and size of the tanker.[75] The strict observance of these safety rules will not only help to prevent unnecessary

[7]* Id at §4115. >.

[75] The vessels which currently have double bottoms or double sides may continue operating in U.S waters until 2015. The year 2015 is also the date by which vessels unloading oil at a deepwater pott or offloading in lightering operations more than 60 miles from the coast must have double hull construction; Id at §4115(a).

spills, but its effectiveness will further encourage the oil industry to stand by it.

The comparison between the MSA and the OPA reveals that the former stands weak in an important aspect i.e. providing adequate compensation to victims in case of a catastrophic oil spill. Therefore, the MSA needs to be modified in a way that it takes care of the inadequate compensation without creating a domestic system like the USA. In pursuance of that, India should ratify the 2003 Protocol to the 1992 Fund Convention. By implication, the total amount of compensation payable for any one incident would be increased to US$1,067 million including the amount of compensation (US$289 million) paid under the 1992 CLC and Fund Conventions.[76]

Currendy, the 1992 CLC Convention has been ratified by 130 countries covering 97.19% of the world tonnage and the 1992 Fund Convention has been ratified by 111 countries covering the 91.22% of world tonnage, and the 2003 Fund Protocol has been ratified by 29 countries.[77] In a few years, as the 2003 Protocol gets ratified by more

[76] See note 69, Tf9.

[77] International Maritime Organization (IMO), *Summary of Status of Conventions*, online at http://www.imo.org/About/Conventions/StatusOfConventionsyPages/Default.aspx (visited May 21, 2013)

countries, the IOPC Funds under the 2003 Protocol would operate in a large number of jurisdictions.

Meanwhile, India can institute its own Oil Pollution Fund under the MSA which would pay the compensation in case of a catastrophic oil spill. As India is currently a party to the 1992 CLC and the Fund Convention, the IOPC Fund could be used to pay the compensation in cases which are within its scope. However, if the total assessment of the legitimate claims exceeds the 1992 Fund limit, the Oil Pollution Fund can be used to pay the excess claims.

USE OF **MSA AND OPA**

The most recent oil spill incident which attracted serious attention in the USA was the "Deepwater Horizon oil spill" in the Mexico Gulf in April 2010. It caused the death of eleven oil rig workers and damaged the water, fish and wildlife, and habitats across the Gulf.[78]In this disaster, claims under the OPA could have been filed for economic loss such as property damage, loss of profit, and loss of wages; medical claims for injuries caused by oil spill or clean-up operations related to this incident.[79] In addition the OPA permits certain federal agencies, states and Indian tribes, collectively known as the Natural

[78] Federation of American Scientists, http://www.fas.org/sgp/crs/misc/R41396.pdf (visited June 19,2013).
[79] OPA, §1002(b).

Resource Trustees to assess the impact of the Deepwater Horizon oil spill on natural resources like marine mammals, sea turtles, fish, birds and deep water habitat etc.[80]

Hundreds of lawsuits related to these claims under the OPA have been and continue to be filed in courts across the USA.[81] To address mese cases individually would have been difficult and unbalanced if different courts came to different conclusions. Consequendy, the Judicial Panel on Multidistrict Litigation could have consolidated the cases into a Multi District Litigation ["MDL"] such that common questions of fact could be addressed all at once.[82]

However, the "responsible party"[83] and the plaintiffs settled most of the economic and medical claims. Through this settlement, the

-[80]Idat§1006(b).

[81] Emily Gosden, *Mexico sues BP over Gulfdisaster as oil giant faces 2200 new law suits in less than two months,* The Telegraph, 22 May 2013, online at http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/1002727 l/Mexico-sues-BP-over-Gulf-disaster-as-oil-giant-faces-2200-new-lawsuits-in-less-than-two-months.html (visited June 48, 2013).

[82] Environmental Law Institute, *Legal Claims and Litigation,* online at http://eli-ocean.org/gulf/understanding-litigation/ (visited May 22, 2013).

[83] The US governmentidentified BP, who leased die rig, as a responsible party, but it is possible that others, including Transocean, Halliburton or Cameron International could face liability under OPA. See: *Factual Background and Legal Framework Governing Gulf Oil Spill Claims,* Alliance for Justice, online at http://www.afjrorg/resources-and-publication's/films-and-programs/crude_justice/crude-justice-factual-background-and-legal-overview.pdf (visited June 19, 2013).

responsible party compensated the injured people as well as those whose businesses were affected.[84] As of 30 April 2013, the responsible party had paid $9,169,530,459 for the individual and business claims made under the OPA.[85] In connection with the damage to natural resources under the OPA Natural Resource Damage Assessment ["NRDA"] regulations, in some instances the responsible party, British Petroleum ["BP"] has been working cooperatively with the trustees to collect pre-assessment data and to conduct NRDA activities.[86]

The biggest maritime disaster in India occurred on 7 August 2010 when a collision between MSC Chitra and MV Khalijia-III occurred five nautical miles off the Mumbai coast. Due to this collision, 879 tonnes of oil and 31 containers of pesticide spilled into the sea causing damage of approximately Rs 514 crore (or $351 million).[87] The owners of MSC

[84] On December 21, 2012, the court approved the agreement between BP and the Plaintiffs' Steering Committee that settled most of the economic loss claims related to the disaster. Then on January 11, 2013, the court approved the agreement between the two parties that setded most of the related medical claims.

[85] British Petroleum, *Claims Information,* online at http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/claims-information.html (visited June 19, 2013).

[86] NOAA, *NRDA Work Plans and Data,* online at http://www.gulfspillrestoration.noaa.gov/oil-spill/gulf-spill-data/ (visited May 22,2013). - «

[87] Maharashtra Pollution Control Board, *Environmental Impact Assessment (EIA) Study on Pollution Due to Oil Spill and Other Hazardous Substances, (Interim Progress*

Chitra, which collided with another cargo ship resulting in an oil slick off the Mumbai coast, have been asked to pay full compensation for the collision. Under Section 356J of the MSA,[88] port authorities have sent notices to the vessel owner, the Mediterranean Shipping Company, asking them to pay full compensation as they have been identified as the polluters. The owner of MSC Chitra was also made responsible under the MSA, and ordered to clean up the oil slick that had spread across the surface of the Arabian Sea.

CONCLUSION

It is imperative that the environmental damage and economic losses suffered due to oil spills must be adequately compensated. It is concluded that the Merchant Shipping Act fails to effectively achieve that goal. Although it provides for a comparatively straightforward claims procedure, claimants are less likely to obtain adequate compensation in the event of catastrophic oil spills.

The OP A ensures mat there are sufficient funds available to provide adequate compensation for claimants, including those claiming relatively wide categories of pure economic loss. It also provides for the

Report). Online at http://mpcb.gov.in/images/pdf/OilSpillinterimrepott-NEERI.pdf (visited June 18, 2013).

[88] §356J authorizes the central government to give notice to owner etc. of pollution ship.

environmental damage and clean-up costs. The OPA allows for potentially unlimited liability against a vessel owner under the laws of the individual states, and creates exposure to a formidable range of penalties.

On the other hand, the unlimited liability limits only apply to those ship-owners subject to US jurisdiction. Moreover, the fund under OPA is US specific whereas the fund under MSA is based on IOPC funds which operate in a large number of jurisdictions with different legal systems.

In conclusion, the OPA seems to be a more effective oil pollution •legislation, which imposes considerably higher limits of liability on a vessel owner than the MSA and guarantees adequate compensation.

SEEKING SIMILARITY IN SOUTH ASIA*

COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA (S. KMnani, V. Raghavan and A. Thiruvengadam, eds., Oxford University Press: New Delhi, 2013)

INTRODUCTION

Yon can translate a word by a word, but behind the word is an idea, the thing, which the word denotes, and this idea you cannot translate if it does not exist among the people in whose language you are translating.'

These words of Bankim Chandra Chatterji, which have great relevance to the concept of comparative constitutional law, have been rightly quoted in the book Comparative Constitutionalism in South Asia.^he book does not define comparative constitutionalism. However, an examination of the literature on the issue indicates that comparative constitutionalism refers to comparison of the constitutions of various jurisdictions for developing a link in the understanding of constitutionalism as a whole. The book delves into the

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rationale behind comparative constitutional law. The objective of the book is to "Search for a common foundation beneath the cultures of South Asia".[3]The book attempts to fill a void in the representation of South Asian constitutions and constitutionalism in international discourse, and the authors hope that this would inspire others to make similar contributions to South Asian constitutional law and help revive and redefine the field.[4] The collection of essays deals with a wide array of issues regarding the different approaches to comparative constitutional law and problems facing it.

SUMMARY

Professor Upendra Baxi, in his masterly treatment of the subject in Chapter one, examines the perplexities of South Asian constitutionalism.[5]Professor Baxi argues that one of the the cornerstones of South Asian constitutionalism like the notion of constitution as governance machine has turned out to be tombstones. While offering critical views on strains of constitutional scholarship that focuses on

[3]S Khilani, V Raghavan and A Thiruvengadam, *Reviving South Asian Comparative Constitutionalism,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

[4]Idat22.

[5]Upendra Baxi, *Modelling "optimal" Constituional Design,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

"Optimal Constitutional design", he recognises that such studies bear the potential for a more empirically based and comparatively informed public discussion.

Chapter two, which is an essay by Sujith Choudhry, attempts to answer questions pertaining to the role of comparative material in the interpretation of aconstitution.[6]The author examines the Court's use of comparative constitutional law in *Na^ Foundation v Union of India,* [hereinafter, "Naz Judgement"] and asserts that the Court used a dialogical approach while comparing constitutional material.[8]With regard to the analysis of the Naz judgment, Mr Choudhry elaborates that despite the extensive application of comparative material, the Court offers little in the way of explanations for such an interpretative move.[9]The thrust of Mr Choudhry's argument is that the judgment has re-emphasized the unique Indian constitutional identity while comparing constitutional material by adopting the dialogical model. He concludes that the question of comparative constitutional experience is vet to play out in the Indian

[6]Cited in note 2 at 45.
ma^Foundation v Union oflndia,(2009) 160 DLT 277.
[8]Cited in note 2 at 46.
[9]Idat51.

context, while preserving the correctness of Naz Foundation is another major question that still remains unanswered.'[0]

Chapter three is an essay by Mara Malgadi on the issue of the constitutional development in Nepal." Ms. Malgadi surveys the constitutions uevelopment in Nepal in light of the interaction between indigenous law and transplanted law.lihe essay seeks to answer questions with regard to reasons for the demise of the 1990 Constitution and the democratic politics in the early 2007. The essay begins by tracing the constitutional developments in Nepal since its conception as a political entity in 1769. The author also notes the French influence in the development of the legal system during the regime of Jang Bahadur Kunwar. The author points out that the failure of the 1990 Constitution was owing to the exclusionary approach of its promulgation, where many smaller parties were not included in the commission. This was starker where women, ethno-linguistic and religious minorities found no direct representation. [13]The author concludes that the grave failure of the 1990

]"Id at 85.

"Mara Malgadi, *Constitutional Developments in a Himalayan Kingdom — The Experience of Nepal,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

[12]Idat86.

"Id at 99.

Constitution was the reason for the political instability in 2007 and thus consensus is the key for political stability.

Chapter four examines the relationship between Buddhism, the new Constitution, and the avowed secular nature of the contemporary Bhutanese state. [14]Richard W. Whilecross traces the development of the related law since 1616. This was the beginning of the dual system, where the civic officials had both religious and secular functions without a clear distinction. Further, he analyses the first written constitution published in 2005. He discusses the transformed version of the dual system and notes that despite specific removal of Buddhism as the State religion, the constitution could not in reality separate politics and religion.[15]

Chapter five is an attempt to determine the appropriate constitutional scheme in a pluralistic society. Deepika Udagama seeks to touch upon three aspects to understand the nature of the constitutional - scheme in Sri-Lanka. First, she deals with the jurisprudence of the Supreme Court of Sri-Lanka on the provisions relating to religion in the Independence Constitution. The second aspect covered is the influence of international human rights obligation on jurisprudence in Sri-Lanka.

[u]Richard W Whilecross, > *Constitutional Separating Religion and Polititcs - Buddhism and the Bhutanese Constitution, in* S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013). [15]Id at 138.

Lastly, the author traces die development of Sri-Lankan jurisprudence in light of the comparative South Asian experience. [16]She analyses the treatment of the various religions in the South Asian constitutions. Furthermore, Ms.Udagama analyses three cases in Sri-Lanka and notes that the court assumes that the propagation of Christianity will necessarily "impair the very existence of Buddhism". The author concludes that references to comparative materials have been selective, and that has hampered progressive development of law.[17]

In chapter six, there is an analysis of the nature of constitutional borrowings in South Asia.[18] The authors Jacobson and Shankar examine the impact of comparative constitutional law in their study of the Thirteenth Amendment case in Sri-Lanka.[19] The Supreme Court upheld the constitutional validity of an amendment that provided for the dual demands of equal language rights and greater autonomy by the Tamil minority.[20] The Apex court referred to the Indian precedents on striking down constitutional amendments. Further, the court held that

[16]Deepika Udagama, *The Democratic State and religious Pluralism,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

[17]Idatl77.

[18]Jacobson and Shankar .*Constitutional Borrowings in South Asiajn* S.Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

[19]Idatl96.

[20]«Id.

constitutional changes cannot be regarded as "entrenching the basic features of the constitution". The authors went to the extent of calling it opportunistic and unparalleled cross-border borrowing to preserve the unitary and Buddhist nature of Sri-Lanka.[21]

Chapter 7 is an interesting comparative analysis of the relationship between law making, religion and politics in India and Pakistan.^Matthew J Nelson observes that India under Prime Minister Jawaharlal Nehru and Pakistan under generals Ayub Khan and Zia-ul-Haq pursued major "substantive" religious-cum-legal reforms.[23] The essay focuses on inheritance laws, and emphasises the importance of political analysis while conducting comparative constitutional studies.

Chapter 8 undertakes an examination of the conversion laws in India and Pakistan. John H. Manfield starts by providing possible explanations for the judgment in *Sarla Muetga/,*[24]*sxich* as the concern to protect Hinduism from inroads of Christianity and Islam, a desire to protect women, and to make conversions that are not bona fide more

[2]'Id.
[22]Matthew J Nelson, *Inheritance unbound,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).
[23]Idat244.
™*Sarla Mudgalv Union of India* (1995) 3 SCC 635.

difficult.[23] The author emphasises on the seriousness of the legal consequences of a motivated conversion from one religion to another. He then analyses the line of the anti-Sarla Mudgal cases in India and Pakistan. Based on this analysis he observes that the trend in Pakistan unlike in India is in the direction of Islamization.[26]The chapter concludes that religious minorities in Pakistan are substantially worse off than religious minorities in India in terms of freedom to practice as well as propagate their beliefs.[27]

In chapter 9, T. John O'Dowd explores human rights issues.[28] He compares the freedom of speech and expression as understood in the subcontinent and the United States. He concludes by initiating a conversation on reasonable restrictions between sub-continental legal systems and the European Court of Human Rights and the Canadian courts. Chapter 10 focuses on the role of the judiciary in Bangladesh. The author, Ridwanul Hoque asserts that Bangladeshi judicial activism has

[25]Id at 249.
[26]Id at 264.
[27] Id at 266.
[28]T. John O'Dowd, *Pilates Paramount Duty*, in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).

increasingly become robust, particularly in the post-Emergency period [2007-2008].[29]

Arun Thiruvengadam performs a detailed survey of the role of the judiciary and Public Interest Litigations (PILs) in pluralistic societies in chapter ll.[30] Mr Thiruvengadam argues that the transformation of the judiciary, from being a reviled institution within India to one of the most revered, owes much to the phenomenon of PILs. The descriptive argument of the essay demonstrated the dramatic transformation in the nature and content of PILs in India. The normative argument emphasised that the main drivers of social change in South Asia ought to be judges.

CONTRIBUTION TO THE SCHOLARSHIP ON THE ISSUE

An examination of the literature on the issue reveals that comparative South-Asian constitutional Law has been a relatively unexplored area in the region's jurisprudence.[31] The editors highlight three main reasons for the failure- heavy reliance on colonial

[29]Ridwanul Haq, *Constitutionalism and the Judiciary in Bangladesh,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in 'South Asia* (Oxford University Press: New Delhi, 2013).
[3n]A Thiruvengadam, *Remsting the Role of the Judiciary in Plural Societies,* in S. Khilnani, V. Raghavan and A. Thiruvengadam, eds., *Comparative Constitutionalism in South Asia* (Oxford University Press: New Delhi, 2013).
[3l]Cited in note 2 at 2.

legal/political tradition, shortage of funds and resources, and perceived lack of incentive in surveying regional developments.[32] Hence, this book, which is a result of two workshops, on South Asian Constitutionalism, is an outstanding contribution to the field of comparative constitutional studies.[33]

The book makes several contributions to academic literature and the on-going debate about various issues of South Asian constitutionalism. Three main contributions can b& identified. First, the book analyses the role of the judiciary in developing South Asian constitutionalism and further highlighting the need for greater participation from the executive, legislature, and academicians. Secondly, the book examines the various approaches for South-Asian comparative constitutional law-particularist, universal, and dialogic approach. It emphasises the positives of a dialogic approach through examples of judicial pronouncements. The book holds that the Naz judgment could be analysed from the universal and dialogic approach and prefers the latter. Mr. Choudhry in Chapter two has highlighted how a dialogical approach would help create a separate identity of the constitution along

[32] Idat3. .,;.-.

[33] The first workshop was held in November, 2006 at the School of Oriental and African Studies [SOAS] in London. The Second workshop was at Faculty of Law, National university of Singapore [NUS], June 2009; See note 2.

with constitutional borrowings. Thirdly, it sets out and reflects upon the relationship between religion, politics, cultural underpinnings and the constitutional framework.

UNEXPLORED ISSUES

Though a wide array of issues have been covered in the book, the following two aspects could have been explored in greater detail. First, there is a need for greater political analysis along with comparative constitutionalism. Constitutionalism is more likely to emerge from a fertile political culture.[34] The book in Chapter 7, tries exploring the relationship between politics, law-making, and religion. However, an inclusion of the perspectives of political analysts would have provided a more holistic touch to the book. Secondly, the discipline "Law and Development", which deals with the potential of law as an instrument of social change in developing countries, could have been further explored. A chapter on how comparative constitutionalism can aid law and development in South Asia with reference to fledgling societies like Burma would have done justice to the topic.

^Daniel P. Franklin, Michael J. Baun, *Political Culture and Constitutionalism: A comparative approach* ME Sharpe, (2005)7

CONCLUSION

Amartya Sen in his article, "Universal Truths: Human Rights and the Westernizing Illusion",[35] denies the existence of so-called Asian-values in the Ancient times. However, the question that emerges is whether effective comparative constitutionalism in South Asia can create an Asian symbol to find the common foundation beneath the cultures of South Asia, which the book seeks to achieve. The book emphasises that an effective approach towards comparative constitutionalism is the key for such a result. The book would prove to be a framework and inspiration for future research on this area. Furthermore, the book has left certain questions open for further discussion and research. A greater involvement of political analysts and social thinkers towards South Asian Comparative constitutionalism would provide for a more holistic perspective to the same. Thus, despite the myriads of political and cultural differences, identifying South-Asian values and a South-Asian symbol would be possible through sustained and systematic studies in this field.

[35]Amartya Sen, *Universal Truths: Human Rights and the Westerning Illusion*, 20 Harv L Rev 40-43(Summer, 1998).