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<h1>NLUJ LAW REVIEW</h1>

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<h1>NLUJ LAW REVIEW</h1>

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**SAVING PRIVATE REVIEW: REFLECTIONS ON THE LAW REVIEWS
OF TODAY**

ABHIPSIT MISHRA*

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I. INTRODUCTION

“Occasionally, very occasionally, a bit of heavy humor does get into print. But it must be the sort of humor that tends to produce, at best, a cracked smile rather than a guffaw. (...)The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny.”

- Fred Rodell, GOODBYE TO LAW REVIEWS, Virginia Law Review

“Whereas most periodicals are published primarily in order that they may be read, the law reviews are published in order that they may be written.”

Harold C. Havinghurst, LAW REVIEWS AND LEGAL EDUCATION, N.W.L. Rev.

The most prominent and widely circulated law review, the Harvard Law Review (HLR), has seen its readership decline drastically. From a total number of 10,895 subscribers in 1963-64, the subscriber base for 2010-11 stands at a mere 1,896.¹ If that be the case with the HLR, legal scholarship indeed faces an existential crisis. Too many people are asking too many questions. Some of them,² are ringing the death knell for what has allegedly become of these law reviews: *bulky bastions of esoteric legal erudition*. Others meanwhile are almost melancholically asking for a reinvention which would rejuvenate legal academia.³

The study of law, as the study of any profession poses a unique challenge. The *study* of the profession cannot be isolated from its *practice*. For example, while analysing the different schools of thought on the jurisprudence of ‘rights’ is important (academic), it is also important for people

¹ Walter Olsen, *Abolish the Law Reviews*, THE ATLANTIC (July 5, 2012), available at <http://www.theatlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/>; For a compilation of the total paid circulation for flagship law reviews at ‘many fine schools’, see Ross E. Davies, *The Increasingly Lengthy Long Run of the Law Reviews: Law Review Business 2012 – Circulation and Production*, 3(2) JOURNAL OF LAW (2 JOURNAL OF LEGAL METRICS) 245-271 (2013).

² Walter Olsen, *supra* note 1.

³ Nicholas Kristof, *Professors We Need You*, THE NEW YORK TIMES (February 15, 2014), available at http://www.nytimes.com/2014/02/16/opinion/sunday/kristof-professors-we-need-you.html?_r=0.

to dedicate themselves towards developing a rights theory to decriminalise or criminalise consensual homosexual acts for those who support and oppose it respectively (practical).

However, overemphasis on either is undesirable. While practice cannot develop in isolation from theory, stressing the study to the exclusion of practice can render any discipline devoid of much meaning.

The evidence of this paradox can be seen in how academic growth is contingent not on the years of professional practice, but on PhDs and periodic publications. That sort of an attitude screams out loud the irony of entrusting the training of lawyers to those who were only too eager to leave the practice of law behind.

The origin of law reviews can be traced to the 19th century when legal scholarship was more of a *professional* venture than an *academic* one.⁴ It used to serve a distinctly ‘relevant’ purpose in that it provided lawyers and judges a doctrinal analysis of a given subject area. For example, it would reconcile divergent lines of authority. On other occasions, it would bring to fore the evident contradiction over the same question of law by different courts. Sometimes, it would criticise a particular line of cases and provide an alternative approach that could be envisaged or even adopted at the appellate stage. Law reviews’ foundations therefore have been grounded in how it assisted the practice of law rather than *just* the study of law.

However, they encompass a different set of utilities today. They are being read by people who are trying to remain at par with the developments in their field of academic or professional interest. Others are reading it to find answers to their specific research questions. For the inclined few, it is a source of recreation. While for others, it may be a source of getting a fair idea of subject areas outside their own specialisation. Students are probably reading articles to figure out how to author one. To each her own; people are finding their own reason to pick up a law review.

However, the real question is, how many of us are really picking up a law review? We have at our disposal today, one of the most powerful tools that has thus far been deprived to every generation of the legal fraternity before ours: the World Wide Web.

Compare the ease of a term search (Google search, or a ‘Ctrl+F’ on a webpage or a document), to the process of finding out the relevant law review (through word of mouth, prior

⁴ Richard Posner J., *Against the Law Reviews*, LEGAL AFFAIRS (December, 2004), available at http://legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp.

citation, or sheer luck), and then within that issue, skimming through the table of contents or the index to find the relevant article, and then within that article, browsing to find the relevant portion which would satisfy the purpose for which we picked up the law review in the first place. But, this still merely questions the need to have printed law reviews. If law reviews are available online, we are still saved from the cumbersome process of finding what we are seeking. The larger question is, do we really need law reviews to begin with?

They have allegedly become too long, too obscure, too irrelevant, and just plain difficult to read. While this needs a concrete data point to be persuasive, the Indian judiciary is rarely, if ever, giving a chance to legal scholarship to persuade it. One also wonders if much of the Indian legal scholarship is persuasive.

Despite the above factors, which are going to be discussed subsequently, there has been an unprecedented proliferation of the journal culture. While this journal-population explosion does some good to the legal academia, the bad and the ugly of it (not just in India, but globally) is something that is slowly yet increasingly being noticed; raising doubts about the utility and viability of the law review.

Admittedly, this editorial hopes to provoke rather than persuade. It has its limitations in being credible due to the lack of empirical data available regarding the Indian legal academic writing and generally, the impact of legal scholarship on the Indian judiciary.

Nonetheless, I hope that it will provide a perspective on the circumstances that today's law reviews exist in. I hope that it will interest the current and future editorial boards into deliberating about the course that NLUJ Law Review should take. Is it time for NLUJ Law Review to become web-only? Is it time for us to become more flexible about our style? How do we get practitioners, students, academicians, advocates, judges and even members outside the legal fraternity to read what we publish?

A little soul searching is required. I only hope that this editorial initiates that.

II. THE CRITICISM

A. IRRELEVANCE

The need for law reviews to remain practically relevant is for more than just intuitive satisfaction; it has a certain philosophical basis too. Law has been seen as the only alternative to

force as a means of dispute resolution. Law displaced might. In doing that, it guaranteed to all individuals, rights which would never have been theirs to enjoy. If law loses that quintessence, we are headed towards the surrendering of every benefit that accrues to us through the rule of law. If we agree to that, let us test the law reviews of today at the anvil of how relevant they are.

1. THE POSSIBILITY OF RELEVANCE

The effects of such practical relevance have been seen often in the USA.⁵ As far back as in 1980, the Californian Supreme Court made use of a law review article to determine individual liability in a tort claim.⁶ The claim was filed on behalf of the women afflicted with cancer whose mothers had taken a synthetic estrogen during pregnancy. The Court despite finding favour with the plaintiffs, could not find any authority to determine the liability of individual manufacturers. A student note in the Fordham Law Review came to the rescue by proposing the theory of market share liability. That became Californian law for the times to come.

More recently, Ted Cruz, a junior senator from Texas and a Harvard alumnus raked up a controversy with his essay titled “Limits on the Treaty Power”.⁷ The essay ventured into the possible use of international treaties by a devious federal government to acquire a larger realm of jurisdiction for itself by chipping away at the states’ powers. While this essay did not affect a judicial decision (not yet!), it nevertheless hit at the heart of the American federal-constitutional structure.

It was contemporary enough to generate a whirlpool of discussions. It was relevant.

However, off late, that relevance seems to be fading. Arguers of the growing obscurity of law reviews have regularly quoted Chief Justice John C. Roberts Jr.’s remarks at the Fourth Circuit Judicial Conference held in 2011:

“Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth century Bulgaria, or

⁵ An analysis of how often Indian judges cite law reviews would probably make for an extremely interesting study. Concrete authorship on the same is severely lacking.

⁶ *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980) (Supreme Court of California); Gerald F. Uelman, *Wisdom and Worthlessness*, CALL A LAWYER (June, 2010), available at <http://www.callawyer.com/clstory.cfm?pubdt=201006&cid=909875&evid=1>.

⁷ Ted Cruz, *Limits on the Treaty Power*, 127 HARVARD LAW REVIEW F. 93 (2014), available at http://www.harvardlawreview.org/issues/127/january14/forum_1023.php.

*something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.*⁸

Nicholas Kristof adds that academicians too often engage in technical debates at the cost of real ones.⁹ As proof, Kristof points (in a direction other than law) to the obliviousness of political scientists to the possibility of the Arab Spring. According to him, the failure to predict the same was a natural corollary of the recent absence of policy prescriptions by political scientists.

2. MISPLACED FOCUS

An evergreen trend in legal writing has been to focus on cases dealt by the higher judiciary of a country. For example, law reviews will regularly carry pieces about an upcoming or a recently concluded case at a supreme court or a high court. Further, law reviews tend to concentrate more on the subject areas that these higher courts generally deal with such as constitutional law.

However, this emphasis is disproportionate to the subject areas dealt with and judgments delivered by the lower courts. The need to make doctrinal contributions is in fact more at the lower courts where there is a plethora of divergent authority and no academic support to streamline the same.

Nevertheless, the shower of arrows hurled at law reviews do not restrict themselves to the loss of this original purpose; that of being relevant to the practice of law. People are not just grieving the growing irrelevance of law reviews, they are also grieving what remains of it despite its irrelevance.

B. STYLE: TRY HARDER TO BE EASY

1. TURGID PROSE

One of the recent storm brewers in evaluating academia at large was Nicholas Kristof.¹⁰ He believes that the problem is due to a combination of multiple factors. According to him, academic disciplines have become more specialised and hence less accessible for the ordinary

⁸ John Roberts C.J., *A Conversation with Chief Justice Roberts*, Annual Fourth Circuit Court of Appeals Conference, C-Span (June 25, 2011) available at www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/.

⁹ Nicholas Kristof, *supra* note 3.

¹⁰ *Id.*

individual. Doctorate programmes encourage obscurity while disdain impact and audience.¹¹ To further aggravate the problem, the style of writing is akin to ‘turgid prose’.

However, there is a more diverse range of criticism when it comes to style; almost Miranda Priestly-esque.

2. LENGTH

A while back, in 2004, the Harvard Law Review invited feedback from approximately 800 professors through a survey. The results of the survey showed that an overwhelming number (about 86%) of the respondents felt that law review articles are too long.¹² This led to a declaration through a joint statement regarding articles length issued by 11 leading American law journals. It reflected the commitment of those journals to play an active role in moderating the length of law review articles.¹³ The survey’s respondents also advocated that the reduced length would have multiple advantages to the tune of enhancing the quality of the scholarship, simplifying the editorial process and making the articles more readable.¹⁴

However, truth be told, the optimum ‘length’ of an article is best not quantified. The keen and the inclined will not mind the length and should not be denied extensive analysis of a legal issue. Length is often the necessary evil for analysis. Assertions require few words; arguments, a little more. Accusations, anyone can make; proving them, only a select few.

Of course, if the length is without purpose or utility, it takes away from the appeal of the article. Consequently, it should deservedly be edited or refused publication.

¹¹ To back his allegations of the academia’s conscious effort to be obscure, Kristof points towards the Executive Council of International Studies Association’s proposal to ban its editors from blogging (seemingly because blogging prefers impact and reach to obscurity and pedantry). See Erik Voeten, *Another Ill-conceived Attempt at Regulating Academic Blogging*, WASHINGTON POST (January 28, 2014) available at <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/28/another-ill-conceived-attempt-at-regulating-academic-blogging/>.

¹² Law Review Usage Survey Results, HARVARD LAW REVIEW (July, 2005), available at http://www.harvardlawreview.org/law_review_usage_survey_results.pdf.

¹³ Joint Statement regarding Articles Length, HARVARD LAW REVIEW (February 9, 2005), available at http://www.harvardlawreview.org/PDF/articles_length_policy.pdf.

¹⁴ *Id.*

Equally problematic is the quantification of how much is too much. Today's reader base is so diverse that it is making defining the 'new normal' extremely tough.¹⁵ It is thus, that despite the joint statement, the length limitations of the Harvard Law Review state the following:

*"The Review strongly prefers articles under 25,000 words in length — the equivalent of 50 law review pages — including text and footnotes. The Review will not publish articles exceeding 30,000 words — the equivalent of 60 law review pages — except in extraordinary circumstances."*¹⁶

Hardly a moderate length, is it?

3. LOSING THE HUMAN TOUCH

Fred Rodell looked to be in sublime form when he decimated the content and style of a typical law review article.¹⁷ He argues that people read either to be convinced or entertained. In fact, according to him, even when people are reading to be convinced or informed, everybody likes a dash of humour. According to him, the typical law review article fails on both counts.

The failure on account of style and entertainment is exhibited best by certain puritanical prohibitions and prescriptions. For example, thou shalt not use pronouns of first person; as though, not using 'I' would somehow render anonymity to the article. Equally intriguing is the prohibition to use 'firstly' and instead use 'first' first and then use the '-ly' suffix subsequently (secondly, thirdly, etc.).

However, despite all of the above, what is more nauseating is the fixation with footnotes.

4. FOOTNOTE FETISH

Rodell aptly defines footnotes as the, "*pet peeve of everyone who has ever read a law review piece for any other reason than that he was too lazy to look up his own cases*". The obsession for footnoting the most trivial excerpts is born out of this unnatural urge to show that everything stated in the article is backed up by prior-existing authority and is hence, proved.

¹⁵ For how today's reader, her mind and attention span are being affected by technology, see Nicholas Carr, *Is Google Making Us Stupid?*, THE ATLANTIC (August, 2008), available at <http://www.theatlantic.com/magazine/archive/2008/07/is-google-making-us-stupid/306868/>.

¹⁶ Submissions, HARVARD LAW REVIEW, available at <http://www.harvardlawreview.org/submissions.php>.

¹⁷ Fred Rodell, *Goodbye to Law Reviews*, 23 VIRGINIA LAW REVIEW 38-45 (1936).

One can understand the need to cite data sources, or to develop a ‘reasonability’ rider to footnoting. In fact, footnotes serve an important function of not just verifying the information, crediting the original source but also leading keen readers to further reading or explanations.

However, you only need to glance through an average law review article to see the absolute frivolity of some of the referencing and cross-referencing. It almost seems like authors take pride in the number of footnotes as though they were runs scored by batsmen in a cricket test match. For example, Judge Richard Posner points to the stylistic revisions to the tune of providing parenthetical summaries of authorities, including entire books.¹⁸

With footnotes, what is problematic is the greed to have more of it. In fact, if allowed to become the obsession that they are developing into, citations can become cash equivalents for academic corruption. ‘Citation cartels’ have allegedly cropped up where an insular group of renowned scholars cite each other and leave out those who fail to conform to their viewpoint.¹⁹ Probably, these renowned scholars often are the powers that be in the academic circles as members of tenure committees or occupy other significant administrative positions. As usual, cartelisation is an extremely problematic phenomenon to prove. However, the scope for abuse is hardly a preposterous notion.

We are often cautioned to put our faith not in people, but processes. However, the disillusioned have found much to be desired even in that regard from law reviews.

C. PROCEDURAL PREDICAMENTS

Walter Olsen while crucifying the law reviews found three major procedural problems.²⁰ Firstly, the long lead time to publication; which means that an entire issue might get held up because of one author who is hindering the issue from going to print. Secondly, the lack of peer review and the consequent reliance on student editing. Thirdly, the lack of scope for post-publication improvements. Among these three however, critics have resoundingly echoed the concerns regarding student editing.

¹⁸ Richard Posner J., *supra* note 4. It is ironical that I insert a footnote here, but this delightfully crisp article is strongly recommended for further reading.

¹⁹ Phil Davis, *The Emergence of a Citation Cartel*, THE SCHOLARLY KITCHEN (April 10, 2012), *available at* <http://scholarlykitchen.sspnet.org/2012/04/10/emergence-of-a-citation-cartel/>.

²⁰ Walter Olsen, *supra* note 1.

1. ADOLESCENT EDITING

Adam Liptak joins the rhetoric by asking if we would want our medical scholarship to be edited by medical students.²¹ Liptak feels that the student editors are amateurs in both their knowledge of law and at editing prose. In fact, there is a good chance that they might have never studied the subject area which encompasses the article that they are going to edit.

Judge Posner's reservations too are hinged around the lack of peer-review.²² He believes that a peer-review affords a more informed feedback and revisions which contributes towards significantly improving an article. Further, the paucity of space in peer-reviewed journals incentivises brevity. The concern is more acute in contemporary articles because of their interdisciplinary nature which further impediments an already novice law undergraduate.

2. GOING THE WEB WAY

The problems regarding the long lead time and the lack of an opportunity to improve post-publication have also started irking an increasing number of authors and editors alike. There are growing voices in the academic community to completely do away with print versions of the law reviews. Going web-only has several advantages. First and foremost, instead of having to wait for the author who is delaying the issue, it allows publishers to upload the finalised articles as soon as they are ready.

Secondly, it saves tremendous amounts of paper, and consequent printer costs. We are witnessing a time when most educational institutions in India are battling a heavy opportunity cost for every rupee spent. The printer costs that the institution saves can be invested in student welfare such as sponsoring students in their extra-curricular activities, or inviting guest lecturers, etc.

Thirdly, being available on the internet means that you are there for everybody. The sheer reach from being online cannot be matched by any print version. The increased reach of the review contributes positively to the need for freer access to bridge the national and global academic disparity.

²¹ Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, THE NEW YORK TIMES (October 21, 2013), available at <http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html>.

²² Richard Posner J., *supra* note 4.

An ethical consultancy firm is probably better placed to pass a judgment on the social costs that will be saved, but the economics of doing away with the print versions are for everyone to see.

Moreover, Olsen suggests that technology affords possibilities of increasing visual appeal that can help in reviving the law reviews. The potential is in better information and understanding too. Ready hyperlinking gives the inclined reader an immediate access to further material to understand the article better. The use of ‘moving pictures’ or interactive charts can greatly enhance the reading experience.

It is no wonder then that academicians are being encouraged from all corners to engage with their readers more over the internet through blogs (such as The Volokh Conspiracy, Balkinization, Spicy IP, IndiaCorpLaw, or the recent rage Indconlawphil, etc.), professionally edited web outlets (such as The Atlantic, The New York Times, The Hindu etc.), and social media.

3. THE PRESTIGE

However, despite the mounting clamour for more engagement over the internet, law reviews and academicians are probably reluctant to do so because of a seemingly trivial reason: prestige. The understanding about this prestige, or the lack of it, is probably found in two aspects.

Historically, the law reviews have been in print. Moreover, law reviews’ reputation is almost always staked on its subscriber base. The latter is probably indicative of the merit of a law review in that it investigates whether the review is good enough for the fraternity to be willing to pay good money to read it. Or is it dispensable enough, with perfect or close enough substitutes available for free? Presumably, for the above, and reasons unknown, it is widely believed that printed is how reputed law reviews have been, and should always be.

Exclusivity is the other factor. The ease of uploading something over the internet makes it something anyone can do. Publishing print volumes on the other hand is not everyone’s cup of coffee. However, this is at best, a mirage now, if not an outright lie. One only needs to take a look at the number of reviews that are mushrooming in law schools across India. Moreover, there is a sea of non-law school reviews (such as the Taxmann, Madras Law Journal, etc.).

There really seems to be no stopping any institution to come up with an ever-increasing number of print journals because that apparently is an indicator of academic earnestness, or a matter of academic pride.

Is the party really that exclusive then?

III. LEONIDAS' ARMY

The believers are a faithful few; much like Leonidas' Spartan army. It is only too apparent that for most things, art, literature, cinema, writing, etc., much of what is produced is forgettable. Thus, since there is a sea of legal scholarship out there, it's easy to find articles that are irrelevant. The relevant ones are probably out there in lesser numbers, but nevertheless, by the grace of internet, equally accessible.

Moreover, academicians have been seen to make a constant effort to regularly engage with a larger group of people. The social media and blogging culture has not completely escaped the academic circles. Furthermore, shrinking finances at the disposal of graduate programmes and tenure committees is getting the professors to have to constantly show why their research areas are still 'relevant' and hence, worthy of funding.

Thus, much of the support for law reviews is grounded in the belief that most of the criticism is based on certain assertions and assumptions.

A. THE NATURE OF ACADEMIC WRITING

Many find no plausible reason as to why there is a 'mandatory' need for public recognition. Joshua Rothman chimes in and explains the difference between 'ordinary' writing and 'academic' writing.²³ According to him, the ambiguity has more to do with the audience. Contrary to ordinary writing, which is intended for a general audience, academic writing is intended for a very niche audience of hyper-knowledgeable, mutually acquainted specialists. That makes it probably among the most personal writing there is.²⁴

1. TARGET AUDIENCE

The most important audience for any academician is bound to be a close circle of people which would constitute mostly of their students, peers, tenure committees and editors. Courts, lawyers and other realms of law, which are often described as 'relevant' areas, are but a subset of the complete legal landscape.

²³ Joshua Rothman, *Why is Academic Writing so Academic?*, THE NEW YORKER (February 21, 2014), available at <http://www.newyorker.com/online/blogs/books/2014/02/why-is-academic-writing-so-academic.html>.

²⁴ Rothman chides by saying that "If journalists sound friendly, that's because they're writing for strangers".

Thus, if courts aren't to be the sole point of academic emphasis, citations in judgments cannot be the sole criteria for determining success. Really, a lack of citations, could be for many random reasons such as an accidental or a deliberate omission to cite.

2. RELEVANT FIELDS

The other major assumption is that certain fields are not worth researching in. Notwithstanding that there seems to be no rational basis for making that exception (and conveniently running the argument on isolated examples), works of history, jurisprudence, philosophy or literature have impacted several key American legislations such as those on health, privacy, gun control, service laws, labour laws, etc.²⁵

Moreover, there is obviously the possibility of stumbling across something which might be relevant (for example, finding concrete historical evidence of the social acceptance of homosexuality in India, which would effectively nullify the arguments on that count for criminalising consensual homosexual intercourse).

As a wise man once said, "How do you evaluate the risk of not doing something?"²⁶

B. VICTIMS OF CIRCUMSTANCES

1. TENURE COMMITTEES

Much of the malaise of the legal scholarship is attributable to the systems in which the academicians exist. The need to have periodic publications that will find favour with tenure committees for growth in the academic fraternity is not a closely guarded Illuminati secret. Law reviews have become the fulcrum for professors and students alike to leverage employment.

That sort of an incentive structure pollutes academic integrity. If professors are going to be guided by what will please tenure committees, it will be of no surprise if the quality of scholarship and its readability by the general public is adversely affected.

²⁵ For example, those calling for more stringent gun control laws often refer to the prevailing circumstances when the American Constitution's Second Amendment was enacted. The then-used musket, for example, was a much tougher weapon to wield than the extremely user-friendly Uzi. The growing trigger-happy incidents, mostly at the behest of young people, has launched this rhetoric into popular use.

²⁶ Mark Strong in *Zero Dark Thirty* while talking about the possibility of potentially letting the capture of Osama Bin Laden slip through their fingers by not conducting the Abbottabad strike which eventually led to Bin Laden's death; See Kathryn Bigelow, *ZERO DARK THIRTY* (2012).

2. PEER PROBLEMS: EDITORS V. RESPONDERS

While we are on circumstances, it is worthwhile to note how susceptible to flaws the peer review system is. For example, it is susceptible to a personal bias, where editing processes might be affected by the personal viewpoint of a peer. This personal bias could affect a student editor too. However, the perspectives will differ in that the student will only in exceptional circumstances take serious exception to the difference of opinion vis-à-vis the peer, who will probably be more assertive with her opinion, as she sees the author as her equal.

As discussed previously, the overemphasis on peer-review can also lead to academic cartelisation. Having an alternative in student-edited law reviews helps mitigate that possibility to a large extent.

However, the most pertinent issue here is the fact that peer-review is not really necessary ‘front-end’ i.e. prior to publication. The contribution from departmental colleagues or other peers can always happen ‘back-end’ i.e. after publication. As Matt Bodie points out, meaningful peer-review comes in the literature to follow.²⁷ Moreover, in a time when Social Science Research Network (which offers no review except the download count) is a researcher’s gold mine, the effectiveness of the peer review system really needs to be relooked for exaggeration.²⁸

IV. CONCLUSION

“Maybe one of these days the law reviews, or some of them, will have the nerve to shoot for higher stakes. (...) Maybe they will come to realize that the English language is most useful when it is used normally and naturally, and that the law is nothing more than a means to a social end and should never, for all the law schools and law firms in the world, be treated as an end in itself.”

- Fred Rodell, GOODBYE TO LAW REVIEWS, Virginia Law Review

Probably, the single most pressing dilemma facing law reviews is their *form*. Going web-only is an imperative that institutions and editorial boards will soon have to reconcile themselves with. The evidence for the saving of financial and social costs are irrefutable. Moreover, it

²⁷ Matt Bodie, *Et Tu, Adam? The Lazy Critiques of Law Reviews Continue* (October 21, 2013), PRAWFSBLAWG, available at <http://prawfsblawg.blogs.com/prawfsblawg/2013/10/et-tu-adam-the-lazy-critiques-of-law-reviews-continues.html>.

²⁸ *Id.*

resembles what iTunes did for the music industry by allowing users to purchase single songs instead of entire albums. Thus, even for a rigid reader like myself, who likes to read the hard copy, purchasing and/or taking printouts of just the article that I am going to read is always an available alternative.

Beyond that however, certain aspects of authorship are unavoidable. The *forum* of interaction for one, cannot be imposed on academicians. In any case, there is a growing practice of engaging more on the varied internet platforms. Moreover, scholarly writing in a law review and over the different internet platforms are not mutually exclusive. The same idea can be expressed differently, in both those forums, keeping in mind the audience that access them.

The *style* of writing is another area that cannot be enforced or generalised. Humour cannot be forced out of an author. Watertight requirements to make articles more appealing (for example, by necessitating the use of pictures, diagrams or interactive charts) will only slay the natural flow and the innovation of any author. Consequently, the *length* should be need-based i.e. proportionate to the analysis.

Similarly, there are certain facets of academic prose that are best not interfered with. For example, no subject area should be summarily dismissed as unimportant for want of relevance. So long as the choice of the *topic* and the *intended audience* are chosen freely by an author, without undue influence of external factors such as tenures or 'hot topics', the academic integrity and earnestness of the research and authorship deserves all our respect.

Not enough has been said about the benefits of having a board of student editors. By and large, what a student editor lacks in experience, she probably compensates for with her effort and enthusiasm. The answer to the *composition* conundrum of editorial boards perhaps lies in the healthy balance of faculty supervision and participative student editors.

However, law reviews are more than just academic publications. Owing to the unique involvement of student editors, it provides an interesting platform for established academicians to personally interact with a set of students. For all the flaws that student editing might suffer from, even in the worst case scenario, the interaction between the students and the authors provides an opportunity for the latter to exhibit what they do and how they do it. In fact, academicians should see this exchange as an avatar of teaching.

I hope that the current and future editorial boards of the NLUJ Law Review will remember the foundations of this flagship publication. It is not just to encourage legal scholarship in India, but to take it to a wider audience by relieving it of some of the obscurity it seems to have made its shadow. The editorial board, in pursuance of the same, has worked to put in processes that ensure that the aim is not lost sight of.

The current issue contains articles on a wide array of legal issues. Ajay Kr. Sharma exposes flaws in the current FDI policy of 2014. In a strongly worded piece, Joshita Jothi and Keshavdev Js discuss the paradigms of legislation to make rape a gender neutral crime. Subsequently, in another piece, the right against self-incrimination and its interplay with investigation processes finds in-depth discussion from Shivani Mittal. Moving over to international law, Astha Pandey discusses the responsibility to protect in light of a legal and ethical basis for humanitarian intervention. Harisankar K.S. responds to an article by Prabhash Ranjan published in the first issue of the NLUJ Law Review and deliberates whether a BIT claim can be made against India for the actions of the Indian judiciary. In an interesting analysis of child rights, the question of a complete ban versus a balancing of ground realities and normative objectives has been made by Nidhu Srivastava. Prakhar and Abhinav give an insightful review about Sudhir Naib's book on the Right to Information; a book one would do well to pick up if she intended to make herself well versed with probably one of the most revolutionary legislations of India.

I hope that through perseverance, the NLUJ Law Review will overcome its major challenges such as not being able to put in stone its processes, standardising its layout, suffering from a long lead time to publication and having to face hesitancy from reputed academicians to write for the journal. Further, I hope that all of us will put in a conscious thought into finding for ourselves what we can do to better the law reviews at our respective ends as authors, institutions, editors or even readers. Most of all however, I hope that you thoroughly enjoy this issue.

Harishankar K. S., *State Courts and State Responsibility: A Response to Prof. Prabhash Ranjan's "Can BIT claims be made against India for the actions of the Indian judiciary?"*, 2(1) NLUJ Law Review 16 (2013)

**STATE COURTS AND STATE RESPONSIBILITY: A RESPONSE TO
PROF. PRABHASH RANJAN'S "CAN BIT CLAIMS BE MADE
AGAINST INDIA FOR THE ACTIONS OF THE INDIAN
JUDICIARY?"**

HARISANKAR K S*

This piece is a response to an article that appeared in the first issue of NLUJ law review by Dr. Prabhash Ranjan in his paper entitled "Can BIT Claims Be Made against India for the Actions of the Indian Judiciary? The author attempts to analyse the crucial question of the role of national courts in complying with international norms in the backdrop of the Supreme Court of India's order cancelling the 2G spectrum licenses. This piece discusses the inherent asymmetry in Investment Treaty Arbitration, which grants investors rights but not obligations, while imposing upon the states obligations unaccompanied by rights; the need for balancing the competing interests taking into consideration state sovereignty which signify the ability of states to regulate for the benefit of public welfare. It is discussed that a potential review by a tribunal cannot merely decide on the basis of a single court decision, rather they must see whether a reasonable opportunity of getting their loss redressed, is foreclosed. Lastly, the author explores the question of arbitrability in cases of public corruption involved in the investments and concludes that the claims, if at all possible, would not be successful before an ITA tribunal.

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I. INTRODUCTION

An article that appeared in the first issue of NLUJ law review is the genesis of this piece. Dr. Prabhash Ranjan in his paper entitled “Can BIT Claims Be Made against India for the Actions of the Indian Judiciary?”¹ has argued that the actions of the Indian judiciary shall be attributed for state responsibility under international law and therefore, shall become a potential claim before an international arbitral tribunal. He develops this argument on the basis of a statement made by the Attorney General of India (AG) in the light of the Supreme Court order,² in which while cancelling the 2G spectrum licenses the Court held that, an “alleged loss which emanates out of orders passed by the court does not constitute a cause of action against the government”.³

This assertion of the AG and the response made by the author posits two dimensions of the problem. *First*, whether judicial actions can be attributed to the State and whether it can be subjected to a review by an international investment arbitral tribunal? *Second*, whether this claim would be successful before the tribunal? In this note, I discuss the first aspect of the problem; i.e., whether, a BIT claim can be brought against India for the actions of the Indian judiciary. I argue this in the affirmative. While largely agreeing with this point that national judiciary comes under the rubric of a ‘State’ under international law, in this paper, I would like to focus more on the second aspect, looking at the ‘reviewability’ of a national judicial action by an international arbitral tribunal and make a contrary opinion. To put it

¹ Prabash Ranjan, *Can BIT Claims Be Made against India for the Actions of the Indian Judiciary*, 1(1) NLUJ LAW REVIEW 87 (2013).

² Centre for Public Interest Litigation and others v. Union of India and others, AIR 2012 SC 3725 (Supreme Court of India).

³ Thomas K. Thomas, *Foreign players cannot invoke bilateral treaties: Attorney-General*, THE HINDU BUSINESS LINE (Aug. 13, 2012), available at http://www.thehindubusinessline.com/industryandeconomy/infotech/article3764819.ece?homepage=true&ref=wl_home.

differently, I am more interested in the subtler question, whether all investment-affecting actions of national courts would be arbitrable?

As a prelude, in its first part, the paper tries to bring some light on the first dimension by contemplating on the possible reasons on why the AG thought that the court orders are not attributable to the government. Here, the discussion is based on the relevance of state courts in international law. The second part of this note would deal with the asymmetric structure of Investor-State Arbitration and underlines the importance of dealing with ‘public interest’ matters. The third part addresses the nature of the Supreme Court’s decision in order to see whether it constitutes either a denial of justice or judicial expropriation. The final part looks at the question of arbitrability, taking into account the alleged illegality and corruption involved in the investments. It further argue that the claims, if at all possible, would not be successful before an ITA tribunal.

II. ROLE OF STATE COURTS IN THE INTERNATIONAL LEGAL ORDER

Although the following discussion majorly pertains to the international legal order, it is important to start from the domestic legal context in order to examine the logic of the AG’s arguments.

A. NATURE OF JUDICIARY AS ‘STATE’ UNDER THE CONSTITUTION

The general political science theory enlists the legislature, executive and judiciary as the three organs of a State. These three organs have to function within their own spheres demarcated under the Constitution as recognised by the principle of separation of powers. However, under Article 12 of the Constitution, the judiciary has not been explicitly included under the definition of ‘State’. Nevertheless, this definition is only an inclusive one and moreover limited to purposes of Part III of the constitution.⁴ Further, it is to be noted that judicial independence, a fundamental requirement for the effective functioning of a democracy, is well asserted by the Supreme Court of India as a part of the basic structure of our Constitution. In this light, a technical interpretation of the statement,⁵ of the AG makes some sense; a judicial order does not constitute a cause of action against the Government which represents the executive. Perhaps, his argument is tenable for a political scientist as the

⁴ Kalyani Ramnath, *Guarding the Guards: The Judiciary as State within the meaning of Article 12 of the Constitution*, 18(2) STUDENT BAR REVIEW (2006).

⁵ *Id.* (The AG had further said that claim of damages from the Indian government by these companies was based on a complete misunderstanding of the constitutional position prevailing in the country).

executive and judiciary are sub-ordinates of a generic concept of 'State'. Yet, for all practical purposes it is presumed that the Government means the State only.

B. DOMESTIC JUDICIAL ACTIONS UNDER INTERNATIONAL LAW

Domestic courts are often asked to apply and interpret international law in a variety of domestic proceedings. This application of international law by the domestic courts varies in different jurisdictions depending on whether a particular jurisdiction follows a 'monistic' or a 'dualistic' theory, which is germane to the domestic judicial function of a State court. However, here, the important question is whether the domestic courts play any international judicial function in the international plane. In other words, the question is whether the distinction between 'domestic' and 'international' judicial function is crucial in determining the State responsibility arising out of national judicial actions.

The core judicial function of any legal order (domestic or international) would be the resolution of disputes and the development of jurisprudence through the principle of *stare decisis*. If there is a violation of international law, who decides that the state court erred in its international judicial function? An immediate or first- instance judge would be the State itself; as the judicial organ of State. Moreover, by virtue of international law, the state courts will test the legality of the State measure.⁶ All the same, in the absence of any centralised international appellate body, the State Courts as the natural judges have to apply the international norms at their own risk⁷, and it may be challenged before an international tribunal. However, unlike a court sitting on appeal, an international tribunal does not enjoy any kind of supervisory powers. Their role is subsidiary as compared to the primary role assigned to domestic courts as enforcers of international law. This is evident in various spheres of international law.⁸ Similarly, the Principle of 'Margin of Appreciation' emphasises the secondary importance of international tribunals in relation to domestic courts.⁹

Perhaps, domestic courts are entrusted with the enforcement of international obligations due to its independency and apolitical role towards other organs of the State. But,

⁶ Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, Vol. 34 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW JOURNAL 133, 153 (2011). (He cites exhaustion of local remedies as a customary principle of international law).

⁷ Lord Bingham of Cornhill, *International Law in National Courts: Discussion*, in THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY: AN ANNIVERSARY SYMPOSIUM 1, 3 (James Crawford & Margaret Young eds., 2008), available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php; as cited in *id.*, at 162.

⁸ *Supra* note 7. (He cites examples like, Rome statute of the ICC, GATT, etc.)

⁹ Yual Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16(5) EUROPEAN JOURNAL OF INTERNATIONAL LAW 907 (2006).

a strong case of conflict of interests and apparent bias would be expected when State courts act as settlers of international law that involves their own state. It is to be admitted that the national courts would be subdued in the strict applications of international norms which are against the interests of the State.¹⁰

From the standpoint of international law, the judicial organs of a State must interpret and apply the international norms in its strict sense. Any less vigorous application of these norms to accommodate the governmental interests would call for international responsibility of the state.¹¹ It does not mean that the domestic courts must deviate from its primary duty of upholding the domestic norms in order to preserve its obligations. Therefore, the crucial point is whether the national court, while failing to comply with an international norm upholds domestic constitutional norms, especially when the domestic norms are ‘internationalised’¹² or form part of ‘international public policy’.

III. ASKEWNESS OF INVESTMENT TREATY ARBITRATION

Before the advent of investment treaty arbitration (ITA), settlement of investment disputes was through diplomatic protection at the discretion of the home state of the investor. In the new investor-state dispute resolution, the host state is always the respondent that tries to avoid state responsibility under international law. Hence, Bilateral Investment Treaties (BITs) are (in)famously asymmetric. They grant investors rights but not obligations, while imposing upon the states obligations unaccompanied by rights.¹³ The very objective of Investment Treaty Arbitration is to ensure that the states do not misuse their sovereign powers and harm foreign investment. In doing so, the system puts an extensive limitation on the host state’s sovereignty with respect to a wide range of matters which are traditionally reserved to a domestic jurisdiction.¹⁴ For instance, the customary principle of ‘exhaustion of

¹⁰ Eyed Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4(1) EUROPEAN JOURNAL OF INTERNATIONAL LAW 159 (1993).

¹¹ *Id.*

¹² *Supra* note 7.

¹³ Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States?*, 52(3) VIRGINIA JOURNAL OF INTERNATIONAL LAW 723 (2012).

¹⁴ Francesco Francioni, *Access to Justice, Denial of Justice and International Investment Law*, 20(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 729 (2009).

local remedies' have been compromised by the international adjudicators including the International Court of Justice in order to give more favourable treatment to investment.¹⁵

The competing interests of the two players in this setting, namely, the Investor and the Host State need to be more balanced in order to enhance the legitimacy of the investment treaty arbitration. National judiciary may, as an apolitical and independent body from other organs of the State, play a significant role in this balancing act by identifying the common interests. However, it is a fact that national courts tend to be sympathetic to their own governments. In this regard, it is also important to see whether the national (public) interests of the host state have been protected rather than just governmental (executive) interests. Thus, State responsibility is attributable to judicial actions if there exist coercion with the government machinery.

A. PUBLIC INTEREST

State sovereignty encompasses the ability of States to regulate activities within their jurisdiction for the benefit of public welfare.¹⁶ Moreover, it is an accepted principle of international law that a state is not liable for economic injury which is a consequence of *bona fide* regulation made within the accepted police power of states.¹⁷ Accordingly, the state can use its police powers to make regulatory measures as an expression of its sovereignty in pursuance of public policy making. However, ironically, the respondent State has an onus of pleading the 'public interest' before an international private tribunal, whose mandate is to see whether the State has violated the treaty obligations. Despite the efforts from the transparency movement in investment arbitration, the public interest involved in the investment disputes is not generally dealt by the investment tribunals.¹⁸ Here, an important question remains; in the absence of an assured mechanism of judicial review for the purpose of public interest, what is the alternative?

The natural choice for the state populace would be the judicial organ of the State for the enforcement of their rights. In addition, it is an established fact that national authorities

¹⁵ *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, 1989 ICJ Reports, 15, ¶¶61, 62 (International Court of Justice) as cited in *id.*, at 734.

¹⁶ Sandra L. Caruba, *Resolving International Investment Disputes in a Globalised World*, 13 NEW ZEALAND BUSINESS LAW QUARTERLY 128, 137 (2007).

¹⁷ Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 775 (2008); See also *Sedco Inc. v. Nat'l Iranian Oil Co.*, 9 Iran-U.S. Cl. Trib. Rep. 248, 275 (1985).

¹⁸ Ruth Teitelbaum, *A Look At The Public Interest In Investment Arbitration: Is It Unique? What Should We Do About It?*, 5(1) BERKELEY JOURNAL OF INTERNATIONAL LAW PUBLICIST 55 (2010).

have better knowledge of their society and its needs, and are therefore “better placed than [an] international [court] to appreciate what is in the public interest”.¹⁹ Traditionally, judicial review has been the main tool for examining the decisions of executive to ensure that the public officials act lawfully. Although the courts derive this power from the national constitution, this is enshrined in the international legal order as well. In a recent decision in the case of *Kadi*,²⁰ the European Court of Justice, by emphasising the rule of law upheld the significance of a right to effective judicial review by the national/regional courts.

In order to comply with its bilateral and multilateral treaties post liberalisation, the Indian legal system has adopted a progressive regime giving expanded protection to the property and investment of aliens.²¹ According to the existing constitutional regime, the right to property available to both the ‘citizens’ as well as ‘persons’ are subject to reasonable restrictions on the basis of ‘public interest’, and further provides that private property could be forcefully acquired by State only for ‘public purpose’.²² Customary international law also allows expropriation of foreign investment subject to certain conditions and it includes *inter alia* public purpose.²³

IV. ORDER OF THE SUPREME COURT- DENIAL OF JUSTICE OR JUDICIAL EXPROPRIATION?

The Supreme court of India, after an eventful year of serious allegations of corruption involving the then minister and corporate heads of the Indian telecom sector with respect to the granting of 2G spectrum licenses, on February 2, 2012 through its judgment in *Centre for Public Interest Litigation and others v. Union of India and others*,²⁴ cancelled 122 licenses issued by the Department of Telecommunications. The Court held that the allotment of licenses were arbitrary and illegal and noted that 2G spectrum is a natural resource and that

¹⁹ *James v. United Kingdom*, Judgement, 98 Eur. Ct. H.R. (ser. A) 9, 32 (1986) (European Court of Human Rights) as cited in *id.*, at 791.

²⁰ Joined Cases, *Kadi & Al Barakaat v. Council of the European Union and EC Commission*, Judgement, C-402/05 P & C-415/05 P, 3 C.M.L.R. 41 (2008)(European Court of Justice).

²¹ Rajesh Babu, *Constitutional Right to Property in Changing Times: The Indian Experience*, 6(2) VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 213 (2012).

²² *Id.*

²³ OECD, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, (Working Papers on International Investment, 2004/4, Organisation for Economic Co-operation and Development, 2004), available at <http://dx.doi.org/10.1787/780155872321>.

²⁴ *Centre for Public Interest Litigation and others v. Union of India and others*, AIR 2012 SC 3725 (Supreme Court of India).

“the State is the legal owner of the natural resources as a trustee of the people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including the doctrine of equality and larger public good”. Applying the doctrine of ‘public trust’, the court noted that the Government is obligated to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes.²⁵ According to customary international law, the ownership regime related to natural resources rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty over natural resources.²⁶

Further, the apex court opined that the ‘doctrine of equality’ that emerge from the concepts of justice and fairness guide the State in determining the actual mechanism of distribution of natural resources. The doctrine regulates the rights and obligations of the State vis-à-vis private parties seeking to acquire/use the resource and demands that the procedure adopted for distribution is just, non-arbitrary and transparent and that it does not discriminate between similarly placed private parties.²⁷ The order states the importance of judicial review and branch autonomy in the following words, “when it is clearly demonstrated before the Court that the policy framed by the State or its agency/instrumentality and/or its implementation is contrary to public interest or is violative of the constitutional principles, it is the duty of the Court to exercise its jurisdiction in larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond the recognised parameters”.

Here the main consideration would be the proper characterisation of the nature of the Court’s order, as to whether it amounts to judicial expropriation or denial of justice. *Saipem v. Bangladesh*,²⁸ case is a better example for this categorisation relating to judicial

²⁵ *Fomento Resorts and Hotels Limited v. Minguel Martins*, (2009) 3 SCC 571 at ¶54. (The court cited a scholarly work by Prof. Joseph Lax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention* (1970). The public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust).

²⁶ *Centre for Public Interest Litigation and others v. Union of India and others*, AIR 2012 SC 3725 (Supreme Court of India), ¶64; *International Court of Justice in the case opposing the Democratic Republic of Congo to Uganda. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, ¶244.

²⁷ *Centre for Public Interest Litigation and others v. Union of India and others*, AIR 2012 SC 3725 (Supreme Court of India), ¶69.

²⁸ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID CASE No. ARB/05/07, available at <http://arbitration.fr/resources/ICSID-ARB-05-7.pdf>.

actions becoming the reasons for investment treaty arbitration. In this case, an ICSID tribunal held the host state (Bangladesh) responsible for expropriation due to unnecessary interventions of its domestic courts in the arbitration proceedings instituted by the investor (an Italian corporation Saipem). The tribunal declined the argument of exhausting the local remedies as a prerequisite in all the cases where actions of the judiciary gave rise to the claim. Distinguishing the case from the characterisation of the claim as denial of justice as held in *Loewen v. USA*,²⁹ the arbitral tribunal treated it as a case of judicial expropriation.³⁰

Over the recent past, international investment disputes on ‘taking’ have largely taken the form of indirect expropriation replacing the cases on direct expropriation characterised by the nationalisation and termination of concession agreements of industries in the second half of the 20th century. Contemporary disputes on indirect expropriation are mostly applicable to the regulatory measures of the State aimed at protecting the natural resources and other welfare interests of the society. The question that arises is to what extent a government may affect the investors’ interests and the value of a property by regulation made for a legitimate public purpose, without effecting a “taking” and having to compensate for it.³¹

As Prof. Ian Brownlie states, “state measures, *prima facie* a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation”.³²

However, the existing investment arbitration jurisprudence does not seem to be helpful in ascertaining a precise theory of defining what constitutes a regulatory or indirect expropriation. Nevertheless the doctrine of ‘police powers’ of the state, a widely accepted principle of customary international law, permits the state to make regulatory measures in the public interest. Moreover, it provides that “A state is not responsible for loss of property or

²⁹ Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID CASE No. ARB(AF)/98/3, available at <http://www.state.gov/documents/organization/22094.pdf>.

³⁰ Mavluda Sattorova, *Denial of justice disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61(1), INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 223 (2012).

³¹ Centre for Public Interest Litigation and others v. Union of India and others, AIR 2012 SC 3725 (Supreme Court of India).

³² I. Brownlie, PUBLIC INTERNATIONAL LAW, 509 (6th edn., 2003).

for other economic disadvantage resulting from *bona fide* regulations or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory".³³

Moreover, as part of the normal judicial activities of the host state, the mere fact that an investor suffers a deprivation as a result of the court action will be insufficient to ground an expropriation claim. In these types of proceedings, some form of deprivation may well be a normal part of the proceedings.³⁴ Having seen that expropriation is possible for a public purpose, the next question is what if the Supreme Court's order has been categorised as a denial of justice?

As stated by Prof. Jan Paulsson, the content of denial of justice cannot be reduced to a set of predictable or objective criteria. Neither can denial of justice be easily categorized, since the 'patterns of behaviour said to comprise denial of justice are often kaleidoscopic'.³⁵ He argues that denial of justice is always a matter of procedure and reasons that international responsibility arises as a result of the failure of a national legal system to provide due process. According to Paulsson, the denial of justice should not be a form of international judicial review of the substance of a national court decision and therefore not require the compliance with the principle of exhaustion of local remedies.³⁶

If denial of justice results from the failure of a national legal *system* to provide justice, then it invariably calls for the State's obligation to create a system of justice that allows errors in the administration of justice to be corrected. A systematic approach would call for all the possible remedies available in that state including legislative and executive branches of the State. Hence the main obligation is to provide a remedial system of fair and effective means of justice, which means that the potential review by a tribunal cannot merely decide on the basis of a single court decision, rather they must see whether a reasonable opportunity of getting their loss redressed is foreclosed. Looking at the order of the Supreme Court, it is

³³ Sec. 712, Restatement of the Law Third, the Foreign Relations of the United States, American Law Institute, Vol. 1 (1987).

³⁴ A. Newcombe, and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009).

³⁵ Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, 132 (2005).

³⁶ *Id.*, at 68. (There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state's failure to provide a decent system of justice. They do not constitute international appellate review of national law).

clear that the requirement of ‘judicial finality’ rule,³⁷ has been complied with and more importantly, it also orders the executive branch to initiate fresh proceedings for grant of licence and allocation of spectrum by a transparent auction.

V. CORRUPTION DEFENCE AND NON-ARBITRABILITY

The defence of Corruption has been emerging as a tool for the respondent (host) states appearing before international investment tribunals. Traditionally, international commercial arbitral tribunals have declined jurisdiction in cases of contracts involving corruption, on account of the non-arbitrability of the dispute.³⁸ National courts have also used the doctrine of ‘unclean hands’ to deny jurisdiction for a disputant involved in public corruption.³⁹ In such cases, courts and arbitrators have held that corruption is contrary to international public policy and criminalisation of bribery and corruption make the subject matter incapable of settlement by arbitration.

Hub Power Company Limited (HUBCO) v. Pakistan WADPA & the Federation of Pakistan,⁴⁰ is an illustration to demonstrate the non-arbitrability of the disputes arising out of a contract obtained through corruption. Here the main dispute involved a private company incorporated in Pakistan and the national power and development authority of Pakistan (WADPA) in connection with a construction contract. The Supreme Court of Pakistan decided that where there was *prima facie* evidence that state contracts were obtained through fraud, it would violate public policy to allow the dispute to be resolved by an arbitral tribunal.

In effect, the corruption defence, as recognised by the investment tribunals, imposes an obligation on the private investors to stay away from any kind of corrupt practices in the course of making a BIT protected investment in the host state. In a recent investment dispute between Siemens AG and the Republic of Argentina, the ICSID tribunal awarded a

³⁷ Here, a comparison of the SC order with *Lowen v. USA* case would suggest that when the decision is made by the highest court of the country (as compared to a lower court decision in *Lowen*) the judicial finality requirement seems to be complied with.

³⁸ See J. G. Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110*, 10 ARBITRATION INTERNATIONAL 277, 282 (1994), as cited in *supra* note 14.

³⁹ *Adler v. Federal Republic of Nigeria*, 219 F.3d 869 (9th Cir. 2000). (The court defines the unclean hands doctrine as “clos[ing] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behaviour of the defendant.”).

⁴⁰ L. Barrington, *Arbitral & Judicial Decision: HUBCO v. WADPA: Pakistan top court rejects modern arbitration*, 11 AMERICAN REVIEW OF INTERNATIONAL ARBITRATION 385 (2000).

huge sum in favour of Siemens for Argentina's expropriatory measures against the investment covered under the German-Argentina BIT. But later, when the national anti-corruption agencies brought out the evidence against Siemens AG regarding their involvement in public corruption, the investor instead of getting the award enforced, preferred a settlement.⁴¹ However, it is important to note that, the ICSID tribunal had not dealt with the issue of corruption in the arbitral proceedings.

In the investor-state context, there is little guidance as to how the investment tribunals deal with the corruption defence. Nevertheless, it does not mean that the future tribunals are not bound by the defence of corruption.

The only available investment treaty award in which an ICSID tribunal considered the question of corrupt practices involving public officials and the private investor was *World Duty Free Co. Ltd. v. Republic of Kenya*.⁴² In the absence of an underlying BIT, the tribunal accepted its jurisdiction on the basis of an arbitration clause that formed part of the concession agreement between the parties. During the course of the proceedings, it was revealed that the claimant obtained the contract by bribing the then President of Kenya. Hence, the tribunal dismissed the case. Interestingly, the tribunal upheld the validity of the arbitration agreement which was included in the tainted main contract on the ground of doctrine of separability. However, it held that the matter is inadmissible on the ground of violation of international public policy.⁴³

Similarly, the tribunal noted that, under the applicable (national) laws, the claimant was "not legally entitled to maintain any of its pleaded claims" on the ground of *ex turpi non oritur action* (from a dishonorable cause an action does not arise).⁴⁴ Similarly, the principle of 'good faith' is a well-established legal principle, which cannot be ignored in international law. It has been stated by the Permanent Court of International Justice in 1934 that, "contracting parties are always assumed to be acting honestly and in good faith."⁴⁵

⁴¹ Francioni, *supra* note 14.

⁴² *World Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case no. ARB/00/7, available at <http://italaw.com/documents/WDFv.KenyaAward.pdf>.

⁴³ For the distinction between jurisdiction and admissibility, see Jan Paulsson, *Jurisdiction and Admissibility* in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE, AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER, 601 (Gerald Aksen et al. eds., 2005). Prof. Newcombe argues that, rejecting the claim on admissibility ground is a preferred approach.

⁴⁴ *Id.*, at 732.

⁴⁵ *Permanent Court of International Justice: Lighthouses Case between France and Greece* (1934), available at http://www.worldcourts.com/pcij/eng/decisions/1934.03.17_lighthouses.htm], as cited in D.E.

According to Professor Andrew Newcombe, this misconduct of an investor may take different forms (such as illegality and corruption) and may arise at different stages of the investment process.⁴⁶ Depending on the stage and nature of the misconduct the legal consequence of the claim submitted before the investment tribunal may vary.⁴⁷ In the absence of an appeal against ITA, it is desirable that the tribunal treat the claim involving public policy questions (like fraud, illegality and corruption) as inadmissible.

VI. CONCLUDING REMARKS

Investment treaty arbitrations challenging the actions of domestic courts have become a fascinating area of research in international law. Even when domestic courts function as ‘good institutions’ from a political science point of view, they may find their decisions reviewed by international tribunals empowered under BITs signed by other branches of the State.⁴⁸ After the *White Industries* award for the delays of national courts, judicial intervention in cases like *Antrix v. Devas*,⁴⁹ brought India into the limelight of investment treaty arbitration. The facts that separate the possible claims against India for the Supreme Court’s cancellation of telecom licenses from the above mentioned cases are majorly based on public interest and the involvement of corruption by public officials. Applying the defence of corruption and its violation of international public policy, to the possible investment arbitrations against India in the wake of the Supreme Court’s order, it can well be assumed that the chances of claims being successful is very weak.

A comparable situation comes from the courts of Moldova. In 2009, the national courts of Moldova held that the granting of license to Mr. Fanck Arif, a French investor, for

Vielleville, Esq. and B.S. Vasani, *Sovereignty Over Natural Resources Versus Rights Under Investment Contracts: Which One Prevails?*, 5(2) TRANSNATIONAL DISPUTE MANAGEMENT (2008).

⁴⁶ A. Newcombe, *Investor Misconduct: Jurisdiction, Admissibility or Merits?*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187 (Chester Brown & Kate Miles eds., 2011).

⁴⁷ *Id.*, at 191.

⁴⁸ Todd N Tucker, INVESTMENT AGREEMENTS VERSUS THE RULE OF LAW? *available at* <http://investmentpolicyhub.unctad.org/Views/Public/FeaturedDiscussionDetails.aspx?fdid=25>.

⁴⁹ The major investors in Devas have initiated separate arbitration proceedings against Antrix at the Permanent Court of Arbitration at The Hague. Three companies Columbia Capital/Devas (Mauritius) Ltd, Telecom Devas Mauritius Ltd and Devas Employees Mauritius Private Ltd which had invested in Devas through their Mauritius- based operations, are claiming damages citing a breach of a Bilateral Investment Protection and Promotion Agreement (BIPA) between India and Mauritius. *See* Nidhi Gupta, *Saving Face Or Upholding ‘Rule Of Law’: Reflections On Antrix Corp Ltd. V. Devas Multimedia P. Ltd. (Arbitration Petition No. 20 Of 2011, Decided On May 10, 2013)*, 2(2) INDIAN JOURNAL OF ARBITRATION LAW, 2013, *available at* <http://ijal.in/sites/default/files/Nidhi%20Gupta.pdf>.

the operation of duty-free shops at the airport was illegal. Equating the case in point with the allocation of 2G spectrum licenses by the Indian government, the executive branch of the Republic of Moldova did not follow the required competitive tender process, preventing other investors a fair participation in the bidding. Aggrieved by the order of the Moldovan court, the French national initiated an arbitration proceeding under the France-Moldova BIT. Although the ICSID tribunal in this case,⁵⁰ held against the State (on the ground of fair and equitable treatment), the order of the court was exalted. This case is indicative of the fact that obligating the State for every action of the judiciary would be difficult.

By this piece, I neither intend to join the legitimacy-critiques' bandwagon nor argue against the system of investment treaty arbitration. The only suggestion I wish to make is, due to the one sided advantage given to the investor (ironically by the host state itself in the form of a BIT) the host state should not always be forced to take a defensive stand. As a "Quantum of Solace"⁵¹ to the host state, the future tribunals must make the standard of review more lucid as against broad and vague treaty standards like the fair & equitable treatment.

⁵⁰ Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, *available at* <http://www.italaw.com/sites/default/files/case-documents/italaw1370.pdf>.

⁵¹ This is the title given by Prof. Andrew Newcombe (inspired from a James Bond movie) on his ongoing research project on investor misconduct in international investment law.

Ajay Kr. Sharma, *A Critique of the Indian FDI Law and Policy: Problems & Solutions*,
2(1) NLUJ Law Review 30 (2013)

A CRITIQUE OF THE INDIAN FDI LAW AND POLICY: PROBLEMS & SOLUTIONS

AJAY KR. SHARMA*

The Indian Foreign Direct Investment (FDI) policy coupled with the pertinent foreign exchange management laws makes the edifice of Indian FDI regime framework. The current FDI policy, 2014 which has been recently introduced has numerous flaws, predominantly due to poor drafting, which are exposed in this paper. By comparing the extant FDI policy with its two previous versions, it is postulated that the Indian government does not appear to be serious in correcting certain apparent flaws of the policy. The charge assumes greater seriousness due to the fact that the author's report to the Government, in response to a public invitation by the concerned department, on the FDI policy, 2012 pointing out many of these flaws, despite being duly received, is apparently overlooked while forming the previous and current FDI policy. Role and powers of a key recommendatory government body, under the 'government route', the Foreign Investment Promotion Board (FIPB) have also been analysed in this paper. Further, apart from the general policy aspects, some of the problems in the drafting of the 'sector specific conditions' chapter in the FDI Policy are also discussed. This paper further examines the competence of the Department of Industrial Policy and Promotion (DIPP) under the Commerce Ministry of the Central Government in regulating other forms of foreign investment apart

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from FDI; and also discusses certain other problems and redundancies which have crept into the exchange control laws contained in the pertinent regulations under the Foreign Exchange Management Act, 1999 (FEMA) causing pragmatic apprehensions of law and policy mismatch and conflicts. Feasible solutions to the avowed problems are also suggested.

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I. INTRODUCTION

Is the Indian Government serious about improving its Foreign Direct Investment (FDI) Policy?¹ If the comparison of the extant FDI policy with its predecessor forms the

¹ The extant Indian FDI Policy is contained in the Consolidated FDI Policy Circular of 2014 (Dep’t of Industrial Policy and Promotion (‘DIPP’), Min. of Commerce & Industry, Govt. of India, April 17, 2014), available at http://dipp.gov.in/English/Policies/FDI_Circular_2014.pdf (‘FDI Policy, 2014’). The Government of India had intended to issue the 2014 policy on March 31, 2014, see the DIPP Circular seeking comments from the stakeholders on the 2013 FDI Policy prior to issue of the 7th edition of the FDI Policy (2014), available at http://dipp.nic.in/English/policies/FDIPolicy_InvitingComments_01January2014.pdf; however, the 2014 Policy has come into effect (factually retrospectively) from April 17, 2014, see *infra* note 5, for a

basis of the response, it is likely to be negative. However, let me clarify here the contextual meaning of the term ‘improving’. Improvement can refer to two things. It can either mean a more liberalised FDI policy, both in terms of the general norms and the sectoral conditionalities;² or it can mean qualitative improvements in the FDI policy by removing drafting errors and inconsistencies. It is in this latter sense that the word ‘improvement’ is used in this paper. The former is usually discussed in policy making and policy debates, and is keenly focussed upon by the foreign investors. The latter, though concerning core issues, is usually ignored unless the investors subsequently discover problems during the course of making their foreign investment.³

Thus, it is this aspect, which is examined in the paper, along with critically analysing salient investment norms in the extant FDI Policy. From this perspective, this paper

detailed discussion. The previous FDI policy edition was contained in the Circular No. 1 of 2013 (Dep’t of Industrial Policy and Promotion (‘DIPP’), Min. of Commerce & Industry, Govt. of India, April 5, 2013), *available at* http://dipp.nic.in/English/Policies/FDI_Circular_01_2013.pdf (‘FDI Policy, 2013’). The 2012 FDI Policy contained was in the Circular No. 1 of 2012 (Dep’t of Industrial Policy and Promotion (‘DIPP’), Min. of Commerce & Industry, Govt. of India, April 10, 2012), http://dipp.nic.in/English/Policies/FDI_Circular_01_2012.pdf (‘FDI Policy, 2012’). Note that this FDI Policy was supposed to undergo change when the new superseding 2013 version was to be notified vide Circular no. 1 of 2013 on March 31, 2013, w.e.f. April 1, 2013. But there was delay of around 10 days, after which the ‘FDI Policy, 2013’ was uploaded on the DIPP website, *see infra* note 5, for a detailed discussion.

² *See, e.g.*, Deepshikha Sikarwar, *Ambitious reform: Plan to scrap FDI limits to rein in Current Account Deficit*, ECONOMIC TIMES 1 (Mumbai edn., March 11, 2013).

³ *See, e.g.*, Anindya Upadhyaya and Deepshikha Sikarwar, *It Would Be Full Stop for Air Asia Sans A Comma Finmin, DIPP take refuge in a strategically placed comma in Press Note 6 to clear Air Asia-Tata Venture*, ECONOMIC TIMES 1 (Mumbai edn., March 7, 2013) (discussing how the investor friendly interpretation of a comma in the sectoral FDI policy pertaining to the ‘air transport services’ saved the Air Asia-Tata venture. Actually this relates to the condition introduced in the FDI Policy through the DIPP Press Note 6 of 2012 permitting foreign airlines to invest conditionally in the capital of certain Indian companies. The relevant clause in contention read: “Foreign airlines are also, henceforth, allowed to invest, in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital.” The ‘comma’ after ‘Indian companies’ was interpreted by the FIPB to include the Indian companies which are not currently operating the services mentioned. Civil aviation ministry officials however opposed this interpretation arguing that it was contrary to a previous Cabinet decision. It is arguable that the FIPB decision may not be in consonance with the commonly understood rules of English Grammar particularly, on the use of ‘comma’ as a punctuation, as the qualification of the Indian companies enclosed within commas cannot be said to merely ‘optional’ part of the sentence, and has to be considered integral and essential to its overall meaning. Perhaps, it would have been better if the said commas were not used, though the meaning remains unchanged despite their (mis)use, *see* Comma in Oxford Dictionaries, *available at* <http://www.oxforddictionaries.com/words/comma>).

contends vehemently that the Indian Government does not appear to be serious about qualitatively improving its FDI Policy.

Evidence will be led to prove this claim. Apart from revealing problems in the policy, the FDI policy critique is also based on a report sent by the author to the DIPP, the concerned government department when the public opinion was sought to improve the FDI policy, 2012 while formulating the 2013 FDI policy.⁴ The current version of FDI Policy carries forward most of these problems from the precious two versions despite the pointed critical comments for improvements contained in the author's report. Thus, it appears that the author's report was not considered by the DIPP while formulating the FDI Policy, 2013 in spite of duly receiving the same. This is a serious charge, and casts aspersions on the governmental process of deliberations and drafting of the FDI policy, which compromises the whole exercise and consequentially the standard of the FDI policy.⁵

⁴ See Ajay Kr. Sharma, *Report containing Suggestions and Comments on Extant Consolidated FDI Policy (Government of India)*, (Working paper, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210875 ('Report').

⁵ It should be noted that the Government of India did constitute a committee headed by Arvind Mayaram, Secretary, Department of Economic Affairs, Ministry of Finance, Government of India to look into the FDI and Foreign Portfolio Investment (FPI) policy. The same has given its report and the newspaper reports suggest that it has made certain recommendations, *inter alia*, to redefine FDI to include any foreign investment of more than 10 per cent in a listed company; and making it optional for an investor to choose from FDI or FPI when making an investment in an Indian entity, see *All foreign investment in unlisted firms is FDI: Mayaram panel*, THE HINDU BUSINESS LINE (January 21, 2014), available at <http://www.thehindubusinessline.com/industry-and-economy/all-foreign-investment-in-unlisted-firms-is-fdi-mayaram-panel/article5602539.ece>. However, these reformative measures of the government do not mollify my charge. The Government had full one year to reform its FDI policy, after introduction of the 2012 FDI Policy in April 2012, before it sought to introduce the last edition on April 1, 2013. Not only did it fail to make many needed qualitative improvements during this period, as verifiable by comparison with the 2013 version, it missed the deadline by around 10 days. The FDI Policy, 2013, *supra* note 1, was expressly in effect from April 5, 2013 though the file containing it was uploaded on the DIPP website after April 5, 2013. In fact, the evidence to substantiate this submission is provided by the pdf file of Circular 1 of 2013 uploaded on the DIPP website. On opening the said file, the 'properties' of the file (Ctrl+D) clearly shows the date of its creation as April 15, 2013. Thus clearly, if it is created on April 15, 2013 it could not be uploaded on April 5, 2013. This also affirms the charge of laxity and tardiness on the concerned Indian governmental authorities. This charge would not have been defensible by the author if the Government would not have preannounced its intention of coming up with the new FDI Policy, 2013 on March 31, 2013 by issuing a public notice in January 2013 'inviting comments from stakeholders', available at http://www.dipp.gov.in/English/News/SeekingComments_FDIPolicy_04January2013.pdf; as there was no sunset clause in the FDI Policy, 2012. A similar notice was later on uploaded on the DIPP website inviting comments on the FDI Policy, 2013 before the current FDI Policy of 2014, see *supra* note 1. From his experience the author instead of sending comments to the Ministry preferred this time to write this research article. Similar charge of factual retrospective operation with respect to the FDI Policy, 2014 is made. The FDI Policy, 2014, *supra* note 1, was expressly in effect from April 17, 2014 though it

Some of the problems relating to different law and policy facets, identified by the author, which will be highlighted in this paper appertain to, inter alia, the FDI policy drafting and the deliberations stage; the FDI policy formulation both, general and sectoral; (in)consistency and (un)predictability in the FDI policy; and the foreign exchange control laws under the Foreign Exchange Management Act, 1999 (FEMA) administered by the Central Bank, Reserve Bank of India (RBI). Some valuable lessons could be drawn from the discourse by, inter alia, the regulators, transactional lawyers and potential investors in all countries.

For the sake of brevity, succinctly the following five claims and issues are listed, which will be orderly substantiated and discussed in this exploration in various parts viz., Parts 2 to 6 below: *First*, that the current Indian FDI Policy is improperly and callously drafted and needs substantial drafting improvements (Part-II);⁶ *second*, the role, procedure and powers of the Foreign Investment Promotion Board (FIPB), which is a critical and indispensable recommendation making body under the ‘government route’,⁷ as delineated in the FDI Policy currently need more clarity, transparency and elaboration for the sake of both, the potential investors as well as the FIPB itself, as apparent from its practice. (Part-III); *third*, that the FDI Policy formulation needs more deliberations on continuous basis with stakeholders including, law and policy experts comprising not only, corporate law firms and consultancies but also, academicians and researchers. The current policy deliberations are probably inclusive only in form and not in substance; and the suggestions and comments of stakeholders are probably overlooked while formulating FDI policy (Part IV). This claim is made on basis of author’s personal experience when he gave suggestions and comments for

was uploaded on the DIPP website after April 17, 2014. Again using the same methodology, on opening the said file, the ‘properties’ of this file shows the date of its creation as April 21, 2014. Thus as seen earlier, if it is created on April 21, 2014 it could not be uploaded on April 17, 2014. This retrospective operation due to delay in uploading could potentially be disastrous by unsettling any deal following the FDI Policy, 2013 which took place between the date on which the new policy comes into force and date of its being brought into the public domain, if it is inconsistent with the FDI Policy, 2014. Similar criticism can be made against the previous FDI policy.

⁶ See Report, *supra* note 4.

⁷ FDI Policy, 2014, *supra* note 1, at ¶2.1.17 defines “government route.” It reads: “Government route” means that investment in the capital of resident entities by non-resident entities can be made only with the prior approval of Government (FIPB), Department of Economic Affairs (DEA), Ministry of Finance or Department of Industrial Policy & Promotion, as the case may be). See identical definition in ¶2.1.16, FDI Policy, 2013 and FDI Policy, 2012, *supra* note 1.

formulating the FDI Policy, 2013;⁸ *fourth*, that we need to delve into the problems and redundancies which have crept into the FEMA framework, which may create the law and policy mismatch, with practical consequences (Part-V);⁹ and, *fifth*, that the competence of the DIPP to regulate other forms of foreign investments apart from the FDI needs to be questioned, apart from examining the merit in argument of creating separate policies, consistent with each other, for regulating each type of foreign investment (Part-VI).

One other salient feature of this paper is presentation of results of analysis of data collected during the empirical research done by the author through a survey conducted in this regard by eliciting opinions and views of several Indian Corporate Lawyers working with many prestigious Corporate Law Firms in India in this area.¹⁰ Although the survey concerned the FDI policy of 2012 the results are equally relevant for the current policy of 2014 and the previous FDI Policy, 2013, given their striking similarities in the pertinent aspects, which be highlighted while discussing the crucial aspects selected from the current policy an compared with these previous policies. The results from this survey on two crucial aspects will be presented in this paper viz., on the clarity in the extant FDI policy, and the FIPB's functioning. Thus, to further substantiate the claims in Parts 2 and 3, the results will be presented on analysis of data collected in response to the queries in the said survey.

In providing emphasis upon the international legal framework to promote and protect FDI we should neither ignore nor undermine the importance of the domestic law and policy pertaining to foreign investment.¹¹ The vagueness, opaqueness, ambiguities, and

⁸ Apart from this, currently the consultations are occasional. This may diminish the value and utility of the consultation process.

⁹ See FDI Policy, 2014, *supra* at 1, at ¶1.1.2, which states that: "In case of any conflict, the relevant FEMA Notification will prevail." Similar assertion was there in the FDI Policy, 2013 and FDI Policy, 2012, *see supra* note 1, at ¶1.1.2.

¹⁰ This online survey was designed using Google Drive facility, available through the author's Google Mail Account. Email requests were sent to various practising Indian corporate lawyers. The identity of the respondent lawyers and their firms is kept confidential, as agreed with the respondents. Looking at the number of respondents viz., 14, it may be argued that the sample is not representative. However, the author argues to the contrary. The respondents, at the time of responding, were employed at 7 renowned Indian Law Firms and 1 internationally renowned Professional Services Firm. Thus, it may be presumed that due to the nature and number of organisations involved in the survey the responses are fairly representative of the Indian Corporate Lawyers; and provides valuable insights (on file with author). This paper does not claim to be an empirical work; but the author's doctrinal analysis and claims will be supported by the opinions expressed in the said survey.

¹¹ This statement does not suggest that other forms of foreign investment like portfolio investment are unimportant or not protected by the international investment law. In fact, one of the central jurisdictional issues concerning jurisdiction *ratione materiae* concerns the scope of coverage of 'investment' in the

inconsistencies within the municipal norms; compounded with the pragmatic problems relating to the working, attitude and coordination between the concerned state agencies increases the risks and transaction costs for the foreign investors. Although the investor-state arbitration provides a mechanism for investment dispute resolution it is undeniable that a foreign investor intends to prevent legal disputes in both domestic and international forums, seeking a profitable commercial FDI venture.

Discussion on the above aspects allows introspection not only into some of the crucial imperatives pertaining to the Indian FDI Law and Policy, but may offer invaluable lessons to other countries particularly to the developing countries which are seeking to liberalise their capital account convertibility and invite foreign equity into their countries.

II. DRAFTING ERRORS AND OTHER PROBLEMS IN THE FDI POLICY

The corporate lawyers and other stake holders may get valuable interpretative insights on careful reading of the current FDI policy, which may help them to formulate newer perspectives on similar policy issues and problems. Various drafting problems in the existing FDI Policy are discussed below in this part.

A. PROBLEMS IN KEY DEFINITIONS

The problem begins with the most important term's definition viz., that of the 'FDI' (i.e., Foreign Direct Investment).¹² The definition takes us to other terms like, 'non-resident

relevant investment regime. Though, recent treaties particularly, Bilateral Investment Treaties (BITs) including, many Indian Bilateral Investment Promotion and Protection Agreements (BIPAs) expansively define the term 'investment', traditionally e.g., in the formative ICSID Jurisprudence the objective criteria adopted for the purposes of interpreting Art. 25 of the ICSID Convention confined itself to the 'direct investment'. See, e.g., *Salini v. Morocco* (Decision on Jurisdiction, July 23, 2001). Digressions and challenges to the *Salini's* 'criteria approach' have now arisen in some recent decisions like, *Biwater Gauff v. Tanzania* (Award, July 24, 2008) and *Malaysian Historical Salvors v. Malaysia* (Decision on Annulment, April 16, 2009). See Rudolf Dolzer, and Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, 60-76 (2nd edn., 2012) for a detailed discussion on this issue. The emphasis of this paper, however, is on the 'Foreign Direct Investment' (FDI) alone as restricted by the contours of the topic. FDI, as per the Indian norms, is defined in ¶2.1.11 of the FDI Policy, 2014, *supra* note 1.

¹² See FDI Policy, 2014, *supra* note 1, at ¶2.1.11 which defines 'FDI', as per the Indian norms, as "'FDI' means investment by non-resident entity/person resident outside India in the capital of an Indian company under Schedule 1 of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000." One minor drafting problem with this definition is the mere use of acronym 'FDI' rather than the full term 'Foreign Direct Investment'. Another issue worth consideration is supplying the URLs of the said FEMA notification viz., Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations 2000 and its amendment notifications on the RBI Website in the 'FDI' definitional clause. Though the efforts to supply the links to e-resources is commendable the effects on the clause, the implications, in case the URL changes are

entity’, ‘person resident outside India’, ‘capital’ and ‘Indian company’ whose definitions are then sought by the reader from the policy. A ‘non-resident entity’ is simply defined as a ‘person resident outside India’ as defined under Foreign Exchange Management Act, 1999 (FEMA).¹³ Whereas a ‘person resident outside India’ is separately defined, exactly as in the FEMA, as a person who is not resident in India.¹⁴ The definition of a ‘person resident in India’ is identical to the FEMA’s definition.¹⁵ There are certain inferences which flow from the policy definition of ‘FDI’. First, the use of the terms ‘non-resident entity’ along-with ‘person resident outside India’ seems unnecessary. Is ‘person resident outside India’ not sufficient? This superfluity could be avoided. It is worth observing, that ‘person resident outside India’ as defined in FEMA includes both natural and juridical persons within its ambit.¹⁶ Second, there is an anticipated anomalous situation which can arise in future, but which could have been obviated if just one term viz., ‘person resident outside India’ was used in the definition of ‘FDI’. This ‘situation’ can arise if the FEMA is amended resulting in

worth governmental deliberations. It is neither conventional nor advisable to put URLs in the policy definitions. I am sure that the stakeholders are resourceful enough to locate the relevant material online, without guidance in the FDI policy, particularly when the relevant site is not being managed and administered by the concerned Ministry and Department viz., the DIPP.

¹³ See FDI Policy, 2014, *supra* note 1, at ¶2.1.26, FDI Policy, 2013, *supra* note 1, at ¶2.1.24 and FDI Policy, 2012, *supra* note 1, ¶2.1.24 (all identical).

¹⁴ *Id.*, at ¶2.1.32 in the FDI Policy, 2014, and ¶2.1.30 in the 2013 and 2012 FDI Policies. The corresponding Foreign Exchange Management Act, 1999 (FEMA) definition is contained in its Section 2(w).

¹⁵ See FDI Policy, 2014, *supra* note 1, at ¶2.1.31, and FDI Policy, 2013, *supra* note 1, at ¶2.1.29; and FDI Policy, 2012, *supra* note 1, at ¶2.1.29 (all identical); *see also* identical Section 2(v), FEMA.

¹⁶Section 2(v), FEMA reads thus: “person resident in India” means—

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) a person who has gone out of India or who stays outside India, in either case—

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India” (*Emphasis Added*).

the change of the existing definition of ‘person resident in India’, and thus consequentially ‘person resident outside India’. If such an amendment leads to the inconsistency between the FEMA definition and the FDI policy, this may apparently lead to a conflict.¹⁷ It would be absurd to suggest that in such a case there will be two sets of definitions, the policy one governing the criteria for a ‘non resident entity’ and the FEMA one prescribing the criteria for a ‘person resident outside India’. The FDI policy seeks to be in consonance with the FEMA definitions, and thus, a solution to this anticipated ‘conflict’ apprehension is that the term ‘non resident entity’ in the definition of ‘FDI’ must be done away with, and in the definition of the ‘person resident outside India’ and merely refer to the pertinent FEMA definition clause to adopt the FEMA definition without delineating the whole definition in the FDI Policy. Corresponding changes may have to be carried out elsewhere in consonance with this omission. This would always keep the policy definition in sync with the FEMA, as amended from time to time. Alternatively, if the government without any good reason intends to retain the superfluous term ‘non resident entity’ then it can have a common definition, as previously suggested, for both ‘non resident entity’ and ‘person resident outside India’. These terms create problems elsewhere also. For example, in the definition of the “Government Route”,¹⁸ which is one of the entry routes for FDI which is available, the other one being the “automatic route”, the term “non-resident entities” is used, apart from another term “resident entities.”¹⁹ Furthermore, the extant FDI policy permits, subject to prescribed conditions, non-residents to make FDI in inter alia LLPs, capital of a partnership firm or a proprietorship concern or any association of persons in India;²⁰ thus confining the policy definition of FDI to investment in the capital of the Indian companies only renders the definition incomplete, and should be amended to incorporate the other target Indian entities in the FDI definition’s fold as well.

¹⁷ See *supra* note 9. Though, the FDI Policy expressly gives overriding precedence to the FEMA notification over the FDI Policy in case of a conflict, this arguably would have been the case even if the policy would have been silent on this issue.

¹⁸ See *supra* note 7, for the definition of the “Government route.”

¹⁹ See FDI Policy, 2014, *supra* note 1, at ¶2.1.36, FDI Policy, 2013, *supra* note 1, at ¶2.1.34 and FDI Policy, 2012, *supra* note 1, at ¶2.1.34, all of them state that ‘Resident Entity’ means ‘Person resident in India’ excluding an individual. For definition of ‘Person resident in India’ see *supra* notes 15 and 16. The problems which may arise due to this definition, if it becomes inconsistent with the FEMA definition have already been discussed above.

²⁰ See FDI Policy, 2014, *supra* note 1, at ¶3.2, FDI Policy, 2013, *supra* note 1, at ¶3.2 and FDI Policy, 2012, *supra* note 1, at ¶3.2 (all identical).

B. AN INSTANCE OF APPARENT NON-APPLICATION OF MIND

A pervasive problem with the current FDI policy is that it is replete with errors. This in an instance goes to the extent of an apparent non application of mind in drafting. This relates to an erroneous illustration which is supposed to highlight the manner in which the indirect foreign investment has to be calculated for a target Indian Company X which has investment through an Indian investing Company Y having in it foreign investment.²¹ In this illustration, Company Y is presumed to have a foreign investment less than 50% and so the illustration deduces, that Company X would not be taken as having any indirect foreign investment through Company Y.²² The purpose of this illustration is to highlight a preceding rule pertaining to downstream investment, that in calculation of indirect foreign investment in an Indian target company through another Indian investing company having foreign investment in it if the investing company is both owned and controlled, directly or indirectly but, ultimately by resident Indian citizens, you will ignore all indirect foreign investment in the target company.²³ The illustration only takes into account the ‘ownership’ of the investing Company Y completely ignoring the ‘control’ of Company Y. Presuming if the control of Company Y is with non-resident investors, then despite ownership of Company Y being with the residents the entire investment by Company Y into Company X has to be taken into account, rendering this policy illustration erroneous.

C. MORE PROBLEMS—USE OF CERTAIN UNDEFINED TERMS

We also find use of certain undefined terms, which are remnants from the previous FDI press notes and circulars, now superseded and abrogated, and which cannot be clearly understood on basis of the current FDI policy. The ‘ownership’ and ‘control’ aspects assume importance in the downstream investment issues, as seen from the preceding paragraph. On introduction of the FDI Policy, 2013, only the definitions of terms “‘controlled’ by resident Indian citizens”²⁴ and “‘owned’ by resident Indian citizens”²⁵ were available. The

²¹ See FDI Policy, 2014, *supra* note 1, at 34, FDI Policy, 2013, *supra* note 1, at 34 and FDI Policy, 2012, *supra* note 1, at 36.

²² This illustration (A) reads: “where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y.” (Emphasis supplied).

²³ See FDI Policy, 2014, *supra* note 1, at ¶4.1.3 (ii)(a), FDI Policy, 2013, *supra* note 1, at ¶4.1.3 (ii)(a) and FDI Policy, 2013, *supra* note 1, at ¶4.1.3 (ii)(a) (all identical).

²⁴ See *id.*, at ¶2.1.7 in both FDI Policy, 2012 and FDI Policy, 2013. Also, see the amended definition of ‘control’, amending ¶2.1.7, introduced through Press No. 4 of 2013 (Dep’t of Industrial Policy and Promotion (DIPP), Min. of Commerce & Industry, Govt. of India, August 22, 2013) which now defines the term as: “‘Control’ shall include the right to appoint a majority of the directors or to control the

corresponding definitions of “owned” by non-resident entities and “controlled” by non-resident entities were not there in the policy,²⁶ though they assume significance particularly for “downstream investment by an Indian company which is owned and/or controlled by non-resident entity/ies.”²⁷ The problem regarding “control” is apparently solved by introduction of the new definition which is neutral regarding the residence of the persons exercising ‘control’ and applies to both the residents and non-residents.²⁸ Similar change in the definition of ‘ownership’ is needed, and this lacuna persists in the FDI Policy, 2014.

Another salient example is the use of the expression ‘operating-cum-investing companies’ in Para. 4.1.3 (ii)(b) which is not defined in the extant policy anywhere, and thus it cannot be understood from the extant policy without referring to the relevant previous FDI policies, which cannot be referred to as they have been rescinded by the current policy.²⁹ Thus a Catch-22 situation exists. Inchoateness and gaps is a worrisome feature of the present policy.

D. VAGUENESS IN THE SECTORAL POLICY REGULATING VARIOUS TYPES OF INVESTMENTS

Another problematic issue needs to be pondered upon here. This relates to the FDI Sectoral policy tabulated in Chapter 6, containing the negative list. Expressions like “(FDI

management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting arrangements.” Also, the same has now been incorporated in the FDI Policy, 2014, *id.*, at ¶2.1.7.

²⁵ *Id.*, at ¶2.1.26 in both FDI Policy, 2012 and FDI Policy, 2013.

²⁶ These expressions were properly defined in some previous consolidated FDI policies, *see, e.g.*, DIPP Circular 2 of 2010, *available at* http://dipp.nic.in/English/Publications/Manuals/FDI_Circular_02of2010.pdf.

²⁷ *See* FDI Policy, 2014, FDI Policy, 2013 and FDI Policy, 2012, *supra* note 1, ¶3.10.4.

²⁸ However, there is an apparent law and policy conflict which may arise due a June 7, 2013 amendment in FEMA 20, *vide.* (R.B.I.) Notification No. FEMA.278/2013-RB, which introduced Regulation 14, which *inter alia*, contained the definitions of company ‘owned by resident Indian citizens’ and company ‘owned by non-residents’ to define ‘ownership’ and ‘control’, which are similar to the pre-press note 14 of 2013 definitions in the FDI Policy, 2013, *see supra* note 24.

²⁹ *See* FDI Policy, 2014, *supra* note 1, at ¶1.1.3 clearly states: “The present consolidation subsumes and supersedes all Press Notes/Press Releases/Clarifications/ Circulars issued by DIPP, which were in force as on April 16, 2014 and reflects the FDI Policy as on April 17, 2014.” Similar clauses, with different dates, were there in the FDI Policy, 2013, *see supra* note 1, at ¶1.1.3 and FDI Policy, 2012, *see supra* note 1, at ¶1.1.3. The significance of a repeal clause cannot be undermined as otherwise introduction of new norms may create inconsistencies and conflicts with the preceding norms, thereby creating interpretative confusion. However, the work of policy consolidation, with repeal of the preceding instruments, which is not an easy one, needs to be done with great caution, so as not to create interpretative problems, confusion and normative vacuum.

+FII/FPI”, “investment by NRIs/PIOs/FII/FPI” and “FDI and portfolio investment” are used in the column “% of FDI Cap/Equity.”³⁰The terms NRI, PIO and FII are all defined in the FDI Policy, however, the vagueness arises due to the fact that the FDI policy seeks to regulate not only FDI but also other categories of foreign investment classified under the FEMA framework and specifically provided for in the different schedules of FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, popularly called by practitioners as FEMA 20, by its notification number.³¹ Somebody who is familiar with these schedules might get somewhat confused with meaning and scope of these terms as mentioned in Chapter 6 of the FDI policy. For example, what is the difference between ‘portfolio investment’ and ‘investment by FII’? Schedule 2 of FEMA 20 provides for sale or purchase of shares and convertible debentures by FIIs under portfolio investment scheme. Whereas Schedule 3 provides for the investments under the same scheme but by NRIs, but the term ‘portfolio investment’ is mentioned distinctly in the policy apart from ‘FDI’ and ‘NRI’, as mentioned above. It is arguable that the intention to use the term ‘portfolio investment’ clearly shows the intent to include investments under Schedules 2, 2A and 3 of FEMA 20, as is inferable from the definition of the ‘portfolio investment scheme’ in the current FDI Policy.³² However, the use of the expression ‘portfolio investment’ at one place and “investment by NRIs/PIOs/FII/FPI” at another place shows inconsistency in usage of the terms despite the preceding argument. This may confuse a lay interpreter of the Indian FDI policy.

Clarity in the formulation of arguably the most important column, prescribing for “% of FDI Cap/Equity” is desirable; and is easily achievable by consistent use of the terms defined in the definition chapter of the FDI Policy. Another suggestion, nuanced, discussed and justified in part 6, is that in a FDI policy, only FDI sectoral caps should be given and

³⁰ See FDI Policy, 2014, *supra* note 1, e.g., in Entry 6.2.8, at 53, the expression used is FDI and investment by NRIs/PIOs/FII/FPI. In entries 6.2.17.5.1 and 6.2.17.6.1 we find the use of expression: “(FDI+FII/FPI).” Whereas, in entry 6.2.17.3.1 relating to ‘Banking-Public Sector’ we find use of the expression: “FDI and Portfolio Investment.” In FDI Policy, 2013 also we found use of similar expressions. For example, in Entry 6.2.8, at 53, the expression used are ‘FDI and investment by NRIs/PIOs/FII’ investments and portfolio investment. In entries 6.2.17.5.1. and 6.2.17.6.1 we find use of the terms “(FDI & FII)”; and in entry 6.2.17.3.1 we find the terms “FDI and Portfolio Investment” being used. Similar expressions were used elsewhere also.

³¹ Actually the Notification No. is GSR 406(E) [FEMA 20/2000-RB], dated May 3, 2000.

³² See FDI Policy, 2014, *supra* at 1, at ¶2.1.33. See also, FDI Policy, 2013 and FDI Policy, 2012, *supra* note 1, at ¶2.1.31 (which excluded reference to Schedule 2A of FEMA 20).

other forms of foreign investment should be regulated by different policies to avoid confusion and lend clarity.

E. VIEWS OF THE RESPONDENTS REGARDING CLARITY IN THE FDI POLICY

Here, the author presents and discusses the results of the survey conducted by him amongst Indian Corporate Lawyers. The survey results lend support to the views advanced by the author in this article. Two questions were asked to the avowed practising Corporate Lawyers. The first one pertained to the FDI policy (2012) in general, and the second one appertained to the Sectoral FDI Policy. Results on both of them are presented below:

“Q.1. In your legal practice how much clarity you find in the extant consolidated FDI Policy of Government of India as far as understanding and interpreting its general rules are concerned?”

The following are the five options provided for responding to this question, along-with the percentage of respondents opting for each response:³³

Response	Respondents choosing a Response (in %)
Extremely Clear	7.14
Clear	7.14
Slightly Vague	71.44
Vague	14.28
Extremely Vague	0

Thus, an overwhelming 86% of the respondents find some degree of vagueness in the extant FDI Policy, though none terms it extremely vague.

“Q.2: In your legal practice how much clarity you find in the extant consolidated FDI Policy of the Government of India as far as understanding and interpreting the sectoral specific norms are concerned?”

The same five options were provided for responding to this question. The replies of the respondents are presented below along-with the percentage of respondents opting for each response:³⁴

Response	Respondents choosing a Response (in %)
Extremely Clear	0
Clear	15.38

³³ The recorded responses of the survey are there on file with the author.

³⁴ All the respondents who answered to Q.1, except one, responded to Q.2 as well.

Slightly Vague	46.16
Vague	23.08
Extremely Vague	15.38

Thus, none of the respondents found the FDI Sectoral Policy extremely clear, and only 15.38% of the respondents found it to be clear. An overwhelming majority viz., 84.62% of the other respondents found the FDI Policy to have certain degree of vagueness including, 15.38% of them who found it to be ‘extremely vague’. Thus, though a large majority of the respondents found the FDI Policy to be vague, relatively the respondents found the sectoral policy to be vaguer than the FDI policy as a whole generally.

III. ON THE PROBLEMS REGARDING THE FOREIGN INVESTMENT PROMOTION BOARD (FIPB)

Foreign Investment Promotion Board (FIPB) is an indispensable regulatory body for inter alia the FDI proposals falling under the ‘government route’, as prescribed under the ‘sector specific conditions’ chapter, having the sectoral policy, contained in the consolidated FDI Policy Circular. However, there are a few issues regarding the role, powers, and procedure of the FIPB which are deliberated upon in this part.

A. FIPB’S UNCLEAR ROLE AND POWERS, AND OPAQUE PROCEDURE

Three concerns arise with regard to both the procedure and the role of the FIPB. There is marked opacity with regard to the procedure followed by the FIPB, which is a critical omission. A foreign investor by reading Chapter 5, pertaining to FIPB, in the current FDI policy will have no clue about the detailed procedure, relevant considerations and timeframe (if any) prescribed to be followed by FIPB in considering the proposals under the ‘government route’. Notably, in a previous Consolidated FDI Policy contained in Circular 2 of 2010, there was a paragraph which contained the detailed “guidelines for consideration of FDI proposals by FIPB.”³⁵ In the extant FDI Policy, the said paragraph is not there. The presence of such a paragraph gives advance notice to the foreign investor about explicit aspects to be considered by the FIPB within the prescribed time frame, and is excellent as far as consequential accrual of at least these advantages are concerned viz., increasing the transparency, increasing the accountability of FIPB, maintaining objectivity of the decision making process, and decreasing the transaction costs; apart from echoing well with the

³⁵ ¶4.7 of DIPP Circular 2 of 2010, *supra* note 26.

principles of natural justice. The conspicuous absence of the same also supports the argument which can be advanced to show the qualitative deterioration of the current policy compared to some of its predecessors. Only in the Sectoral FDI policy in Chapter 6, while reading policy relating to some sectors, does a reader come to know about the considerations which FIPB should follow or the time frame which is prescribed for the FIPB. For example, the time frame is explicitly prescribed for only the approvals relating to the Defence Sector.³⁶

The other preventable confounding situation arises about delineation of the role of FIPB in the policy, which is essentially a recommendatory body, with the ultimate decision vesting with the concerned Minister or, in some cases, the Cabinet Committee on Economic Affairs (CCEA).³⁷ At various places, it appears from the language used, that FIPB grants approvals, giving an incorrect impression to the foreign investor, and clearly inconsistent with its role as described in Chapter 5 of the policy.³⁸ In fact, the definition of the ‘government route’ in Para 2.1.16 needs to be suitably amended to reflect this factual position, so that an erroneous impression is not formed that FIPB or DIPP accords final approvals.³⁹

Finally an important issue regarding the competence and powers of FIPB needs to be addressed by answering a question. Can FIPB give recommendations in favour of proposals

³⁶ Thus, condition (xix), under the ¶6.2.6.2 of the FDI Policy, 2014, *supra* note 1, pertaining to the ‘Defence Industry subject to Industrial license under the Industries (Development & Regulation) Act, 1951’ reads: “Government decision on applications to FIPB for FDI in defence industry sector will be normally communicated within a time frame of 10 weeks from the date of acknowledgement.”

³⁷ See FDI Policy, 2014, *supra* note 1, at ¶3.6.1 and ¶5.2. See also, identical paragraphs in FDI Policy, 2013 and FDI Policy, 2012, *supra* note 1, at ¶3.6.1 and ¶5.2.

³⁸ See *id.*, e.g., the use of the expression ‘Government approval/FIPB approval’ in FDI Policy, 2014, ¶3.6.2 also creates confusion and needs to be improved upon by omitting ‘FIPB approval’ therein. Similar is the case with ¶3.4.5.2 B. (i) concerning ‘Transfer of shares from Resident to Non Resident’ is mentioned, where prior/requisite approval of FIPB is talked about. Similarly, in ¶3.5.6 in “share swap”, which assumes importance for being an FDI for non-cash consideration, approval of government conveyed through FIPB is mentioned. The wordings make this clause arguably equivocal. The role of FIPB thus needs to be expressly clarified in the FDI policy for each transaction/activity which involves consideration by FIPB.

³⁹ See *supra* note 7, where it is noticeable, that in the definition of ‘government route’ the presence of disjunction ‘or’ between FIPB and DIPP is present. This itself may be erroneous in certain cases. For example, for FDI in ‘single brand product retail trading’ currently under the ‘government route’, as per ¶6.2.16.3 of FDI Policy, 2014, *supra* note 1, the application for FIPB consideration is routed through the Secretariat for Industrial Assistance (SIA) in DIPP. After DIPP processing for determination with regard to the proposed investment satisfying the notified guidelines, FIPB considers it for Government Approval. Thus, both FIPB and DIPP consider the investment proposals. Furthermore, FIPB is invariably involved in the ‘government route’ apart from other Governmental authorities which may be prescribed as per the FDI policy.

if they fall under the ‘prohibited sectors’ or, if they breach the ‘% of FDI/equity cap’ prescribed for that sector/activity under the FDI policy? The intuitive answer would be no. However, that may not be a correct answer, though it will be supportable by the FDI policy.⁴⁰ In this regard, Para. 3 of Schedule 1 to FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 [or FEMA 20] is worth noticing, on the basis of which we come to the contrary conclusion.⁴¹ The clear overriding effect of Para. 3, Schedule 1 over the conflicting pertinent FDI policy provisions took a hit when an apparently conflicting provision was introduced in FEMA 20 in June, 2013 with retrospective effect from February 13, 2009.⁴² It is suggested, that the apparent repugnancy between clause (b) of the said Para. 3 and the subsequently introduced Reg.14(3)(iv)(C) can

⁴⁰ See FDI Policy, 2014, *supra* note 1, at ¶3.7.1 which states: “Investments can be made by non-residents in the capital of a resident entity only to the extent of the percentage of the total capital as specified in the FDI policy. The caps in various sector(s) are detailed in Chapter 6 of this Circular.”; and ¶3.8.1 which reads: “Investments by non-residents can be permitted in the capital of a resident entity in certain sectors/activity with entry conditions. Such conditions may include norms for minimum capitalization, lock-in period, etc. The entry conditions in various sectors/activities are detailed in Chapter 6 of this circular.”; and furthermore, ¶6.1 which lists the ‘Prohibited Sectors’ in which FDI is expressly prohibited. A very important FDI Policy provision in this regard, which is now incorporated in FEMA 20, *see infra* note 42, at ¶4.1.3 (v)(c) which is one of the “additional conditions” prescribed under the “Guidelines for calculation of total foreign investment i.e., direct and indirect foreign investment in an Indian company”; and which reads: “[i]n all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.”

⁴¹ Clauses (a) and (b) of ¶3 of Schedule I of FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 (‘FEMA 20’) read thus: “An Indian company intending to issue shares to a person resident outside India in accordance with these regulations directly against foreign inward remittance (or by debit to NRE account/FCNR account) or against consideration against other than inward remittance...shall obtain prior approval of the Foreign Investment Promotion Board (FIPB) of Government of India if the Indian company:

(a) is engaged or proposes to engage, in any activity given in Annex A to this Schedule; or

(b) proposes to issue shares to a person resident outside India beyond sectoral limits or the activity of the Indian company falls under the FIPB route, as stipulated in Annex B to this Schedule;” The heading of this paragraph is: “Issue of shares by a company requiring the Government approval.” (Emphasis supplied). The Annex A to Schedule I to FEMA 20 provides for the list of prohibited sectors.

⁴² This Notification No. FEMA 278/2013-RB, dated June 7, 2013 introduced Regulation 14 in FEMA 20 containing *inter alia* guidelines for calculation of total foreign investment, which is a sum total of direct and indirect foreign investment. Though the dominant purpose of this new regulation appears to be to deal with indirect foreign investment, and applies to other foreign investments under Schedules 2, 3, 6 and 8 to FEMA 20 apart from FDI under Schedule 1 the regulation incorporated a few other conditions from the current FDI policy. The problematic clause viz., Reg. 14(3) (iv)(C) introduced in FEMA 20 through this notification is identical to ¶4.1.3 (v)(c) of the FDI Policy, 2013, *supra* note 40. This restricts the breach of prescribed sectoral cap and is thus apparently inconsistent with ¶3(b) of Schedule 1 to FEMA 20, *see id.*

be resolved by arriving at the ‘combined meaning of the enactments’ with the result that the apparent rigidity (“would specifically be...”) in the general rule contained in Reg. 14(3)(iv)(C) is relaxed for the FDI, which is sought to be brought under Schedule 1 to FEMA 20 in excess of sectoral cap, provided there is compliance with the condition regarding seeking prior FIPB approval as prescribed under Para. 3.⁴³ This harmonizing interpretation is necessary to give effect to the said para.3 (b) and save it from being rendered otiose. Para. 3(a), the preceding clause, conditionally permitting FDI in prohibited sectors, nevertheless remained unaffected throughout. However, even before insertion of Regulation 14 of FEMA 20, the FIPB practice did not appear to follow the norm in Para. 3, and the evidence suggests that FIPB strictly followed the prevalent Sectoral FDI policy applicable. One of the useful FIPB document in public domain, furnishing this evidence, is the ‘FIPB Review’, available on its website.⁴⁴ By reading the ‘FIPB Review’ for the year 2010,⁴⁵ an impression is drawn that the FIPB strictly follows the prescribed sectoral caps, as per the FDI policy, and shoots down the proposals which breach the sectoral caps.⁴⁶ This FIPB practice raises larger questions. Does FIPB consider or adhere to the law prescribed in FEMA 20? Are representations made before the FIPB in such cases, attracting FIPB’s attention to such legal provisions? Even if such representations are made before the FIPB, does or will FIPB exercise discretion in such matters allowing the breach of FDI policy? These are imperatives

⁴³ Francis Bennion, *BENNION ON STATUTORY INTERPRETATION* 465 (5th edn., 2008) (‘Bennion’), an authority on Statutory Interpretation, provides in Sec. 160 entitled “Repugnancy within the Act”: “(1) [w]here, on the facts of the instant case, the literal meaning of the enactment under inquiry is inconsistent with the literal meaning of one or more other enactments in the same Act, the combined meaning of the enactments is to be arrived at; (2) [t]o the extent that this combined meaning is inconsistent with the literal meaning of the enactment under inquiry, a *strained meaning* of the enactment is required. This is without prejudice to the possibility that the interpretative criteria may require some other meaning to be treated as the legal meaning of the enactment.” This rule of statutory interpretation is equally applicable to construe the delegated legislation like FEMA 20; *see* Sec. 60 of Bennion, which states: “[a]llowing for the difference in juridical nature and provenance, delegated legislation is to be construed in the same way as an Act.” An alternative approach can lead to invocation of the legal maxim *generalia specialia derogant* (special provisions override general ones) to create an exception within Reg. 14(3) (iv)(C) for a case in which ¶3(b) of Schedule 1 to FEMA 20 is invoked.

⁴⁴ The website of the Dep’t of Economic Affairs, Min. of Finance, Govt. of India, Foreign Investment Promotion Board, *available at* <http://www.fipbindia.com>.

⁴⁵ Foreign Investment Promotion Board, *FIPB, 2010 Review* (2011), *available at* <http://www.fipbindia.com/FIPB%20REVIEW%202010.pdf>.

⁴⁶ *See, e.g., id.*, at ¶1.5, at 10, discussing the approval of proposal of the M/s EADS Deutschland GmbH & M/s Larsen & Toubro Limited to form a JV company in India in the Defence Sector which was earlier rejected in a FIPB meeting on the ‘ground that the proposal was not in conformity with the sectoral cap of 26 per cent in the defence sector.’

that need to be addressed by the FIPB, the foreign investors seeking to make FDI under the government route and their Indian legal advisers involved in these cross border deals.

B. OPINIONS REGARDING THE ROLE OF THE FIPB

Let us now revert to the author's survey of the corporate lawyers discussed above, and see the questions appertaining to the FIPB along with the responses elicited from the respondents. This should help to appreciate the FIPB practice better.

The respondents were asked two questions regarding the FIPB. They are represented as Question Nos. 3 and 4 below:

“Q.3.: As per your opinion, what is the degree of transparency in FIPB Approvals granted under the Government Route to the FDI proposals?”

The following are the four options provided for responding to this question, along with the percentage of respondents opting for each response:⁴⁷

Response	Respondents choosing a Response (in percentage)
Highly Transparent	8.33
Moderately Transparent	66.67
Opaque	25
Highly Opaque	0

Though none of the respondents to Q.3 termed the FIPB approval process, under the 'government route', as 'highly opaque', only 8.33% found it to be 'highly transparent'. Only one fourth of the respondents termed it 'opaque' though a large percentage of them viz., 66.67% found it to be only 'moderately transparent'. Thus, there is merit in the proposal to make the FIPB process more transparent, than it currently exists.

The next question is even more relevant for the Transactional Law Practice in India.

“Q.4.: As per your opinion, what is the degree of predictability in the FIPB Approvals granted under the Government Route to the FDI Proposals?”

The following are the four options provided for responding to this question, along with the percentage of respondents opting for each response:

Response	Respondents choosing a Response (in percentage)
Mostly Predictable	15.39
More Predictable than Unpredictable	46.15
Mostly Unpredictable	30.78
Not Predictable at all	7.68

⁴⁷ All the respondents who answered to Q.2, except one, responded to Q.3 as well.

Ensuring predictability should be an important objective of any regulatory body's working and decisions. This is equally true about the FIPB, which assumes great importance for the FDI proposals coming through the 'government route'. The greater the predictability, the lower would be the transaction costs for a FDI transaction under the government route. Though around 61% of the respondents seem to have more confidence in predicting the outcome of a FIPB recommendation with respect to a proposal falling under the 'government route', a sizable amount of responses indicate to the contrary. It is arguable, that increasing the transparency in the working of FIPB will increase the predictability in its decisions. One of the ways to do this can be to formulate, as part of the next FDI policy, a clear and elaborate set of guidelines which FIPB should follow while considering the proposals under the Government Route, with mechanisms to address grievances of the stakeholders in that investment proposal.

IV. TARDY AND INFREQUENT CONSULTATION PROCESS

This Part claims that the FDI policy, 2013 formulation was not inclusive in spirit at the consultative level. For example, on the basis of my 'Report containing comments and suggestions on the extant consolidated FDI Policy',⁴⁸ I was invited by the Director, DIPP to attend a DIPP meeting on February 15, 2013, to be presided by the concerned Jt. Secretary, at New Delhi. This was anticipated by me and my institution as an excellent and exciting opportunity to attend the confluence of legal practitioners, business consultants, industry representatives, and academics who will share their views with the Government representatives and amongst themselves, thereby enriching their knowledge and the FDI policy. The meeting was postponed later on to February 20, 2013. During my journey to New Delhi to attend this February 20 meeting, I came to know that the said meeting was regrettably yet again postponed to February 28, 2013. As if this was not enough, the said meeting was yet again postponed, third time, to March 7, 2013, as February 28 is the 'Budget Day'. Considering the fact that the FDI Policy is arguably the most important governmental policy of the Indian Government, and the next edition was then due to be released on March 31, 2013, it is arguable that three weeks was not a sufficient time to deliberate upon the same including, the merits of the views of the stakeholders who have advanced their opinions, and

⁴⁸ See Report, *supra* note 4.

to finally come up with the final draft of the policy, a solemn exercise requiring due deliberations, time and efforts by the Governmental functionaries.

As discussed earlier, it is even more disappointing to note that post FDI policy, 2013 no significant qualitative improvements were incorporated by the Government in the extant policy; and the author's above 'Report' despite containing specific criticisms of the 2012 edition of the FDI policy and suggestions for improvements was probably overlooked. This also raises a larger issue regarding the efficacy of the role which academics can play in drafting of a governmental policy in India. At the same time, the author acknowledges that, the Government of India has consulted the stakeholders on previous occasions by, *inter alia*, floating discussion papers to elicit views before formulating sectoral policy.⁴⁹ Thus, it is suggested that in formulation of FDI Policy various stakeholders including academic experts and researchers should be not only be formally consulted, but the process should be solemnly and timely carried out and made as inclusive as possible. Furthermore, these consultations should not take place just before the drafting of the upcoming edition of policy, but should be routine and continuous so that the qualitative improvements are suggested and incorporated from time to time. There should be adequate time available, after these rounds of consultations, to the concerned government officials to draft the final draft of the FDI Policy, which is accorded approval by the Government. It is suggested that before coming up with the final draft, a rough draft must be circulated, as has been done previously (to the general public), in order to seek opinion from external experts from academia and corporate legal practice, instead of all stakeholders from the general public. This will reduce drafting errors, vagueness and ambiguities even further.

V. FEMA FRAMEWORK—LAW AND POLICY MISMATCH — PROBLEMS AND SOLUTIONS

As discussed earlier, the exchange control laws created by FEMA, 1999 and various pertinent Regulations and Rules under it should be in consonance with the FDI Policy, or there is a risk of the policy coming in conflict with the law and getting overridden

⁴⁹ For example, most importantly, *see* the Discussion Paper on FDI in Multi-brand Retail Trading (DIPP, Min. of Commerce & Industry, Govt. of India, July 6, 2010), *available* at http://dipp.nic.in/English/Discuss_paper/DP_FDI_Multi-BrandRetailTrading_06July2010.pdf, and some 45 odd feedback(s) and views received in response to this Discussion Paper, on the DIPP website, *available* at http://dipp.nic.in/English/Discuss_paper/Feedback%20on%20FDI%20in%20Multi-Brand%20Retail%20Trading.htm.

consequentially.⁵⁰ Such instances are discussed above.⁵¹ FEMA 20 amendments, which legally effectuate the FDI policy, should follow the FDI Policy in a timely manner to maintain this law and policy consonance. The lag between the FEMA laws and the FDI policy which often exists, was usually ignored, and possibly the sectoral policy delineated in the FDI policy has been followed by the legal practitioners.⁵² However, this critical issue possibly caught much public attention when the Supreme Court of India in the matter of the public interest litigation challenging the FDI in multi-brand retail trading sector commented upon the issue, clearly stating that the relevant FEMA Regulation viz., FEMA 20 should permit the FDI in this sector or it will override the enabling FDI policy provision.⁵³ This situation was averted by timely amendments in the FEMA 20 in this regard, which were then tabled in the Parliament,⁵⁴ and approved.⁵⁵

⁵⁰ See *supra* note 9.

⁵¹ See *supra* note 28 and discussion in Part III.

⁵² In this regard the author is reminded of a conversation with a highly experienced Indian Corporate lawyer, who is currently a founding partner of a nascent Indian law firm. The view held by that lawyer was, that the more contemporary FDI policy is always looked at and preferred over the FEMA 20, which was not often updated, while tendering legal advice. It is not claimed that this view is endorsed by majority of Indian transactional lawyers, but it is arguable that many lawyers may share the same view. This approach though pragmatic is fraught with danger as discussed above.

⁵³ See the Supreme Court order, dated May 1, 2013, dismissing this writ petition (PIL) in *Manohar Lal Sharma v. Union of India*, W.P. (C) No. 417 of 2012, available at <http://courtnic.nic.in/supremecourt/temp/wc%2041712p.txt>. This order also mentions that, “[w]hen the matter came up for consideration on 15.10.2012, learned Attorney General submitted that the process for necessary amendments to Regulations 2000 by the Reserve Bank of India was on and that necessary amendments in Regulations 2000 would be made soon.” Notably, as observed there, the FEMA 20 amendments were duly carried out subsequently. See also, e.g., J. Venkatesan, *Supreme Court refuses to interfere with FDI*, THE HINDU (New Delhi edn., November 5, 2012), available at <http://www.thehindu.com/news/national/supreme-court-refuses-to-interfere-with-fdi/article4067657.ece>; *Govt issued 3 Fema amendments for multi-brand FDI, says Attorney General*, BUSINESS STANDARD (New Delhi edn., November 6, 2012), available at http://www.business-standard.com/article/economy-policy/govt-issued-3-fema-amendments-for-multi-brand-fdi-says-attorney-general-112110602001_1.html.

⁵⁴ See Sec. 48, FEMA in this regard, whose heading is “Rules and regulations to be laid before Parliament.” Further in context with the laying of multi-brand retail sector FEMA 20 amendments, see *FEMA changes for FDI in retail tabled*, BUSINESS TODAY (November 30, 2012) available at <http://businesstoday.intoday.in/story/fema-changes-for-fdi-in-retail-tabled/1/190273.html>; see also, *FEMA amendments on FDI in retail tabled in Rajya Sabha*, (December 13, 2012), available at <http://in.news.yahoo.com/fema-amendments-fdi-retail-tabled-rajya-sabha-085606671--finance.html>.

⁵⁵ See Vinay Kumar, and J. Balaji, *Manmohan wins FDI vote*, THE HINDU (New Delhi edn., December 5, 2012), available at <http://www.thehindu.com/news/national/manmohan-wins-fdi-vote/article4166365.ece>; *UPA government wins FDI vote in Rajya Sabha*, THE TIMES OF INDIA (December 7,

It is reasonable to assume that the RBI may find it difficult to keep on updating its FEMA regulations to keep track with the evolving FDI Policy of the Government. The mismatch may have drastic consequences on the policy implementation, and create difficult interpretative problems for the Courts who may then attempt to harmoniously interpret law and policy provisions. The correct solution does not seem to be for the RBI to be more vigilant in reducing the time lag between FDI policy measure and its amendment notification, which will then have to undergo Parliamentary approval every time.⁵⁶ One feasible solution can be to remove the entire FDI sectoral policy from the Schedule 1 (i.e., the FDI Scheme) of FEMA 20 and instead put a simple clause therein, stating that the entire FDI sectoral policy contained in the extant FDI policy (with its prohibitions, restrictions, conditions and permissions) will be read into the Schedule 1 of FEMA 20. This suggestion is applicable even to other FEM regulation(s) which regulate foreign investment particularly in different sectors and economic activities. In the Schedule 1 of FEMA 20 there has been a partially successful attempt to incorporate certain aspects of the extant FDI policy in FEMA 20.⁵⁷ Apart from the sectoral policy provisions, in other aspects whenever the Government makes changes in other areas, e.g., pertaining to securities and remittances, the RBI should come up with the simultaneous amendment notification. This will take care of the time lag problem.

The ensuing arguments substantiate the above submissions further and also highlight some other FEMA Regulations provisions which need to be amended suitably in light of the extant FDI policy and in accordance with the above suggestions. Though the consolidated FDI Policies have come consistently initially after every six months, with the exception of the extant policy, as the mandatory sunset clause was done away with in later editions, on the other hand the pertinent parts of Schedule 1 of FEMA 20 have been sporadically amended,

2012), available at http://articles.timesofindia.indiatimes.com/2012-12-07/india/35669688_1_fdi-in-retail-sector-n-k-singh-fdi-vote.

⁵⁶ See Sec. 48, FEMA, *supra* note 54.

⁵⁷ See Schedule 1, ¶2(1), Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, which reads: “Indian company, not engaged in any activity/sector mentioned in Annex A to this Schedule, may issue shares or convertible debentures to a person resident outside India, subject to the limits prescribed in Annexure B to this Schedule, in accordance with the Entry Routes specified therein and the provisions of Foreign Direct Investment Policy, as notified by the Ministry of Commerce & Industry, Government of India, from time to time...” (Emphasis supplied) This clause, which is not happily worded, due to the limited scope of its latter part does not fully resolve the law and policy conflict which may arise.

sometimes retrospectively.⁵⁸ One notable oversight comes to light when we come across a provision in the FEM (Permissible Capital Account Transactions) Regulations, 2000 [‘FEMA 1’], which is the pertinent general FEM regulations regulating the ‘capital account transactions’, which apparently conflicts with FEMA 20. The RBI seems to have overlooked to amend a prohibitive clause in these regulations viz., Regulation 4(b) which prohibits non-resident investment in inter alia ‘agricultural and plantation activities’.⁵⁹ There is a long list of agricultural activities and ‘tea plantation’, in which subject to prescribed conditions, FDI is currently allowed under FEMA 20.⁶⁰ Had this provision not begun with a savings clause the consequences could have been disastrous, as this FEMA 1 provision would not have conflicted directly with the Schedule 1 of FEMA 20, which is now in consonance with the extant FDI policy.

Still a couple of problematic issues arise, which need to be addressed: Reg. 4(b) (of FEMA 1) restriction applies to investments in not only companies but in partnerships, sole proprietorships and other entities e.g., LLPs also but, Schedule 1 of FEMA 20 merely deals

⁵⁸ See, e.g., Ashhok Saxena, *BHARAT’S FOREIGN EXCHANGE MANAGEMENT MANUAL* (9th edn., 2011), where we find in Schedule 1 of FEMA 20, that the Annexure A containing *inter alia* the list of prohibited sectors and Annexure B containing the ‘Sector-specific policy for foreign investment’, were both last amended (substituted) by Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Second Amendment) Regulations, 2008 [Notification No. FEMA 179/2008-RB, dated August 22, 2008]. The latest amendment to the Annexure A and Annexure B was carried out vide by Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Sixth Amendment) Regulations, 2012 w.r.e.f. September 20, 2012, for Annexure A and w.e.f. October 19, 2012 for Annexure B (‘Sector-specific policy for foreign investment’). This amendment came following the A.P. (DIR Series) Circular No. 137 (RBI, June 28, 2012). These retrospective amendments are ostensibly introduced to take care of some of the anomalies created by law and policy mismatch in the past due to the continuous changes effected in the FDI policy as discussed above.

⁵⁹ Clause (b) of Reg. 4, entitled “Prohibition” reads: “*Save as otherwise provided in the Act, rules or regulations made thereunder,—*

no person resident outside India shall make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not which is engaged or proposes to engage—

- (i) in the business of chit fund, or
- (ii) as Nidhi Company, or
- (iii) in agricultural or plantation activities, or
- (iv) in real estate business, or construction of farm houses, or
- (v) in trading in Transferable Development Rights (TDRs).

Explanation.—For the purpose of this regulation, “real estate business” shall not include development of townships, construction of residential/commercial premises, roads or bridges.”

⁶⁰ See FDI Policy, 2014, *supra* note 1, ¶¶6.2.1-6.2.2 and Schedule 1, Annex B, Sl. Nos. 1 and 2, FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.

with target Indian companies. Thus, despite FDI currently allowed in partnerships, sole proprietorships and LLPs, Reg. 4(b), conflicting with the FDI policy, does not permit the same in these entities operating in ‘agricultural and plantation activities’. Reg. 4(b) also prohibits all forms of non-resident investment and not only FDI under Schedule I of FEMA 20. The best course available would be to omit Reg. 4(b) altogether.

VI. DIPP’S FDI POLICY—REGULATING DIFFERENT TYPES OF FOREIGN INVESTMENT—THE COMPETENCE/COMPLEXITY ISSUE

A larger issue which needs to be addressed is also regarding the competence of the DIPP to prescribe for the investment limits for other types of foreign investments other than FDI.⁶¹ Although DIPP’s competence in this respect is also questioned in this part, even if it is argued that it is within the competence of DIPP to prescribe such limits, the question can be raised regarding its appropriateness.

First, DIPP may well reconsider its policy to continue regulating through FDI policy other forms of foreign investment except FDI, re-examining its competence under Entry II.21 under the heading ‘DIPP, Ministry of Commerce and Industry’ of Schedule 2 of Government of India (Allocation of Business) Rules, 1961 which empower DIPP to make FDI Policy.⁶² The distinction between this entry and another two entries in the said schedule viz., entry I.1(a) and entry I.4 under ‘Department of Economic Affairs (DEA), Ministry of Finance’ which relate to administration of FEMA and “foreign and non-resident investment excluding functions entrusted to the Ministry of Overseas Indian Affairs and Direct Foreign and Non-Resident Indian Investment in Industrial and Service projects” needs to be maintained. The ‘% of FDI Cap/Equity’ prescribed for various sectors under Chapter 6 of the FDI policy which sometimes relate to different categories of foreign investment, classified as per various schedules of Notification No. FEMA 20, other than FDI may impinge upon the said entries within the competence of DEA.

Second, as far as the issue of appropriateness is concerned, DIPP needs to examine whether it is apposite for it to prescribe policy for other types of foreign investment apart from FDI in the FDI Policy which, as has been reiterated above, by policy definition, is an investment under Schedule 1 of FEMA 20, as distinct from investments other schedules of

⁶¹ This part also draws from the author’s Report, *supra* note 4.

⁶² The relevant entry reads thus, “Direct foreign and non-resident investment in industrial and service projects excluding functions entrusted to the Ministry of Overseas Indian Affairs.”

FEMA 20. Apart from the above reasons, as claimed earlier, there may be merit in prescribing different policies regulating different types of foreign investment, rather than to do it through the FDI Policy for the sake of simplicity in interpreting particularly the sectoral policy.⁶³

VII. CONCLUSION

In conclusion, we can appreciate in hindsight how the FDI Law and Policy critique in Parts II to VI above on various key problematic issues helps in formulating an objective opinion and interpretative insights on the provisions discussed in this article. The corresponding suggestions also need to be examined to carry out law and policy reforms in both FDI policy and the FEMA framework. The author's views on the current Indian FDI policy, as reflected in this article, on basis of his doctrinal research appear to be largely supported by the views of the respondent Corporate Lawyers, as portrayed in the author's survey's data analysis and results as presented above. Since, as shown above, the author's criticisms against the FDI Policy, 2012 are equally applicable to the FDI Policy, 2013, the results of the above survey should also apply to the current FDI policy. FDI policy should be drafted more comprehensively and clearly, avoiding errors and vagueness which have crept into the present one; and the FDI policy should regulate the investments under Schedule 1 of FEMA 20 only. This would also require to bring in appropriate changes in the present FDI policy in the portions pertaining to calculating total foreign investment, 'direct' as well as 'indirect' (or 'downstream investment').⁶⁴

⁶³See Part II:D.

⁶⁴ See FDI Policy, 2014, *supra* note 1, at ¶3.10 and ¶4.1. FDI Policy, 2014, *supra* note 1, at ¶4.1.2 reads: "For the purpose of computation of indirect Foreign investment, Foreign Investment in Indian company shall include all types of foreign investments i.e. FDI; investment by FIIs (holding as on March 31); NRIs; ADRs; GDRs; Foreign Currency Convertible Bonds (FCCB); fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures regardless of whether the said investments have been made *under Schedule 1, 2, 2A, 3 and 6 of FEM (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000.*" (Emphasis supplied). This inclusion of other types of foreign investments under the FDI policy for calculation purposes is currently essential in view of the nature of the '% FDI cap/equity' limits imposed under the prevailing sectoral policy, as discussed above. Para. 3.10.2 defines 'downstream investment' as:

"For the purpose of this chapter,

(i) 'Downstream investment' means indirect foreign investment, by one Indian company, into another Indian company, by way of subscription or acquisition, in terms of ¶4.1. Para. 4.1.3 provides the guidelines for calculation of indirect foreign investment, with conditions specified in ¶4.1.3(v)." (Emphasis supplied). It should be noted at the onset, that this definition of 'downstream investment' is

The suggestions advanced in Part V may be useful to the RBI to reform its FEM Regulations to make them ever consistent with the FDI policy, obviating the danger of falling out of sync with the FDI policy. These solutions may be of utility for the Indian government also, which may find itself in an awkward and difficult situation before the Parliament for obtaining sanction for each amendment to FEMA 20 due to laying requirements in Section 48 of FEMA. The kind of difficulties the last central government faced before the both houses of Parliament during the Dec. 2012 proceedings on FEMA 20 amendments allowing FDI in multi brand retail trading sector are well known.

The importance of prudence in drafting of law and policy cannot be undermined, and there cannot be any common-sense presumptions about interpretation of terms based on common knowledge, and each term used in the FDI policy, subject to the context, should be clearly defined and consistently used; and should not be left to be understood on basis of external sources. FDI policy drafting should be given no less importance than drafting of a legislative bill, and thus should be drafted as prudently as the latter. This would be beneficial both, for the administration and regulation of FDI by the agencies concerned; and for the foreign investors upon whom the Government of India intends to create a favourable impression. Hopefully, the later FDI policies will incorporate the qualitative improvements suggested in this paper, making it to be a small but noticeable effort in this direction.

applicable for Chapter 3 only, as mentioned in the definition itself. This is inexplicable, as the term 'downstream investment' is used elsewhere, viz., in Chapter 4 which concerns, *inter alia*, calculation of "indirect investment." The terms 'downstream investment' and 'indirect foreign investment' for the FDI Policy purpose seem to be practically interchangeable; and thus to prevent any resultant confusion from unnecessary jargon only 'indirect investment' may be used in both Chapters 3 and 4.

Joshita Jothi and Keshavdev J.S., *Rethinking Rape: Should The Law Still Confine To The Paradigm?*, 2(1) NLUJ Law Review 56 (2014)

RETHINKING RAPE: SHOULD THE LAW STILL CONFINE TO THE PARADIGM?

JOSHITA JOTHI, KESHAVDEV JS*

From the available statistics, it has come to light that in about 10% of rape and sexual assault cases that occur, the victims are men. In such cases, the perpetrator could be a man, woman or a transgender. However, this is not recognised by the law as it exists today, even after the Criminal Law (Amendment) Act, 2013. It typecasts men in the role of the offender and women in the role of the victim. The Justice Verma Committee, which was formed pursuant to the brutal gang rape of a 23-year-old student in Delhi, in its recommendations, has suggested that rape and sexual assault laws should be made gender neutral. However, ignoring these recommendations and bowing down to the pressure from activists, the Government passed the Act without these much-needed reforms. In this paper, we attempt to bring to light the immediate necessity for a change in these laws. By analysing the international scenario and the reasons for this phenomenon, we seek to show that the reasons that are usually put forward by feminists and activists do not hold ground anymore. Women can and do rape men and this must be given legal recognition, as it would serve as a precursor to societal recognition. The Indian perspective that this would make women even more vulnerable cannot be accepted as well, as safeguards can be put in place to deter the misuse of such laws. Equality, being a fundamental principle embodied in the Constitution, must be given effect to, in order to ensure justice to all.

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I. INTRODUCTION

*“I was thrown face down onto the floor....He punched me twice in the head and said:
“shut up queer -- you get what you deserve”.... [and then he raped me]....I wanted to
die.”¹*

¹ Stephanie Allen, *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, *NEW VISIONS OF CRIME VICTIMS*, 38 (Carolyn Hoyle, Richard Young, Richard P Young eds.), (Portland, Oregon: Hart Publishing, 2002), available at http://books.google.co.in/books?id=tYWmgPIG9noC&pg=PA23&lpq=PA23&dq=Male+Victims+of+Rape:+Responses+to+a+Perceived+Threat+to+Masculinity&source=bl&ots=zppVNku8Zg&sig=kO5C0d3q3yrv7Pz7rZBmUa2J3Qk&hl=en&sa=X&ei=rQX_UeGEMM2FrQf3IIG4BA&ved=0CC0Q6AEw

This was the rant of a male victim of rape, as quoted by Stephanie Allen. Yet, male rape is, to this day, considered a societal taboo and a psychological abhorrence. It remains a social stigma, stifled by preconceived notions of men as symbols of power and dominance. It is indeed a concern that how many more of these victims must fall prey to crimes of such a nature until the patriarchal society that we live in takes cognizance of such events. One may say, in opposition, that the concept of feminism as it exists today is in favour of this discrimination, which is gender specificity in rape law. However, a more realistic approach to this problem is, indeed, proving to be necessary.

This can only be described as a narrow and disappointing way of thinking. It is appalling that the discussion on the issue of rape outside the male-on-female paradigm is negligible. Gender neutrality in sexual assault law has come to be accepted in a few jurisdictions over time; yet, the awareness of the same is minuscule. Not only is India not an exception to this general rule, the situation here is even worse. Even in light of the recommendations of the Justice Verma Committee and many protests regarding the same, the Criminal Law Amendment Act 2013 still enforces a gender specific approach to the offences of rape and sexual assault.

II. BACKGROUND

The Criminal Law (Amendment) Act, 2013 was passed by the Lok Sabha on 19th March, 2013 and by the Rajya Sabha on 21st March, 2013. It received the assent of the President on 2nd April, 2013 and was deemed to have come into force on the 3rd of February, 2013.² The Act coming into force has dashed the hopes of millions of Indians of who had fervently desired truly progressive and comprehensive laws on sexual offences. Though the Act has implemented several much-needed measures, it has ignored several more.

The brutal gang-rape of a 23 year old Physiotherapy student,³ was the catalyst that resulted in the passing of the Criminal Law (Amendment) Act, 2013. There was public outcry after the incident as thousands took to the streets, protesting against the apathy of the

AA#v=onepage&q=Male%20Victims%20of%20Rape%3A%20Responses%20to%20a%20Perceived%20Threat%20to%20Masculinity&f=false (Last visted on July 18, 2013).

² Sandeep Joshi, *Stringent anti-rape laws get President's nod*, THE HINDU, (April 3, 2013).

³ Harmeet Shah Singh, *India gang-rape victim in Singapore for treatment; new protests hit New Delhi*, CNN, (January 3, 2013), available at <http://edition.cnn.com/2012/12/27/world/asia/india-rape-protests/index.html> (Last visited on July 23, 2013).

state structures towards sexual crimes, and demanding that changes be brought about in the existing laws.⁴

In response to this gang rape, a Committee was set up on December 24th 2012, under the chairmanship of Justice (Retired) J.S.Verma, former Chief Justice of India. The purpose of this Committee was to review the laws dealing with sexual assault against women. The other two members of the Committee were Justice (Retired) Leila Seth and former Solicitor General Gopal Subramaniam. It received over 70,000 responses from the general public within a fortnight and came up with its report in a month's time.⁵ The Committee came up with several recommendations. However, only those that are relevant to the topic at hand have been analysed.

In the Chapter dealing with Conclusions and Recommendations, the Committee has categorically stated that, "Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same."⁶ Furthermore, it was also stated that unless the recommendations given by them were implemented urgently, it would result in the entire exercise being futile. The Committee has clearly acknowledged the existence and prevalence of male, homosexual, transgender and transsexual rape and the need for reforms in this area. However, the Parliament chose to ignore this suggestion and did not provide for the same in the Criminal Law (Amendment) Act, 2013.⁷

In the light of the above facts, it becomes clear that this issue is one of imminent importance and that it needs to be thoroughly analysed. In order to fully comprehend the various aspects involved, it becomes pertinent to delve into the global scenario.

⁴ Maithili Pradhan, *Featured Comment: Gang Rape in India Must Catalyze a Comprehensive and Sustained Effort to Combat Violence Against Women*, available at <http://www.lawschool.cornell.edu/womenandjustice/Comment-Gang-Rape-in-India.cfm> (Last visited on July 27, 2013).

⁵ T. K. Rajalakshmi, *An Action Plan*, FRONTLINE, (February 9-22, 2013) available at <http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl3003/stories/20130222300303000.htm> (Last visited on July 28, 2013).

⁶ Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW, 416, (2013) available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>.

⁷ T. K. Rajalakshmi, *Piecemeal Approach*, FRONTLINE, (March 8, 2013), available at <http://www.frontline.in/social-issues/general-issues/piecemeal-approach/article4431434.ece> (Last visited on July 28, 2013).

III. INTERNATIONAL SCENARIO

For the purpose of our study, the definition of sexual aggression as “behaviour with the intention of making another person engage in sexual activity despite his or her unwillingness to do so”⁸ has been adopted. As the sexual assault of males is a poorly understood phenomenon, the prevalent belief is that a ‘real’ man cannot be raped. Therefore, if an instance of male sexual abuse is reported, a fear of being labelled a “homosexual” has been generated. Consequently, it happens to be a vastly underreported phenomenon.⁹ Data collected from the government statistical reports of the United Kingdom and the United States have been relied upon to examine the prevalence of sexual assault on men, and also, have been used to touch upon the aspects of lesbian partner violence and female sex offenders. Data collected by organisations such as the RAINN (Rape, Abuse and Incest National Network) and also, various academic initiatives, have been used to supplement the submission that as opposed to the general notion, unwanted sexual contact among males, irrespective of the sexual orientation of the victim, can cause lasting psychological trauma.

A. SOUTH AFRICA

A population-based research using a sample of adult men in South Africa revealed that 9.6% of men reported male-on-male sexual violence victimization and 3.0% of them reported rape perpetration; 3.3% had been raped by another man, and 1.2% of them were perpetrators of male-on-male rape. It was also found that homosexual men were over nine times more likely to have been raped and are four times more likely to report the crime as opposed to heterosexual males.¹⁰

⁸ Barbara Krahè, Renate Scheinberger and Steffen Bieneck, *Men's Reports of Non-Consensual Sexual Interactions with Women: Prevalence and Impact*, 32(2) *ARCHIVES OF SEXUAL BEHAVIOUR* 165, available at <http://www.psych.uni-potsdam.de/social/projects/files/nonconsensual-sex-interact.pdf> (Last visited on July 15, 2013).

⁹ RJ Hillman, D Tomlinson, A McMillan, PD French and JRW Harris, *Sexual Assault on men: A series*, 66 *GENITOURIN MED* 247 (2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1194522/pdf/genitmed00046-0019.pdf> (Last visited July 15, 2013).

¹⁰ KL Dunkle, R Jewkes, *Consensual male-male sexual activity and male-male sexual violence: prevalence and associations with HIV infection from a population-based household survey in South Africa*, 10(6) *PLoS MED*, (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708702/> (Last visited on July 15, 2013).

B. UNITED KINGDOM

The Ministry of Justice, Home Office, and the Office for National Statistics of the United Kingdom recently revealed in its report that 0.4% of all males in England & Wales had been a victim of at least an attempted sexual offence.¹¹ This roughly rounds up to a figure of 72,000 males. These experiences of sexual abuse include the entire spectrum of sexual offences, ranging from rape and sexual assault to indecent exposure and unwanted touching. Among these, 12,000 related to offences such as rape or sexual assault by penetration.¹² The study also analysed the prevalence of subjection to sexual assault since the age of sixteen. This showed that 2.7% males had been a victim of at least an attempted sexual offence. Roughly 20% of these males were victims of rape or assault by penetration.¹³ The report further indicates that between the years of 2005-2011, there was an aggregate of 1141 cases per year recorded by the Police.¹⁴

C. UNITED STATES OF AMERICA

The situation in the United States is no better. 2.78 million males in the United States are victims of sexual assault or rape.¹⁵ In 2003, 1 out of every 33 men had experienced at least an attempted sexual abuse.¹⁶ Approximately 25,000 males in the United States were subjected to an aggravated form of sexual abuse or rape in the year 2009.¹⁷ A rate of 4% of homosexuals experiencing forced sex within their intimate relationships was reported by MSM in a study undertaken in the US.¹⁸

¹¹ Ministry of Justice, Home Office and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales*, 11 (January 10, 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214970/sexual-offending-overview-jan-2013.pdf (Last visited on July 15, 2013).

¹² *Id.*

¹³ *Id.*, at 18

¹⁴ *Id.*, at 21

¹⁵ National Institute of Justice & Centers for Disease Control & Prevention, *Prevalence, Incidence and Consequences of Violence Against Women Survey* (1998), available at <http://rainn.org/get-information/statistics/sexual-assault-victims> (Last visited on July 16, 2013).

¹⁶ U.S. Department of Justice, *National Crime Victimization Survey*, 7 (September 2004), available at <http://www.bjs.gov/content/pub/pdf/cv03.pdf> (Last visited on July 16, 2013).

¹⁷ *Id.*, at 5

¹⁸ R Stephenson, C Khosropour, et al., *Reporting of Intimate Partner Violence among Men Who Have Sex with Men in an Online Survey*, 11(3) *WESTERN JOURNAL OF EMERGENCY MEDICINE* 242, (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2941360/> (Last visited on July 15, 2013).

D. QUESTIONS APLENTY

The array of questions that obviously follows is: What constitutes male rape? How are males victimised? Is it homosexual men or heterosexual women? Can there be female sex offenders? If so, can a heterosexual male be sexually abused by a female? Can male rape or sexual assault be considered equivalent to similar acts of sexual aggression on females?

Male victimisation was recognised by Susan Brownmiller, in her ground-breaking study of female rape, wherein she said: “While the penis may remain the rapist’s favourite weapon, his prime instrument of vengeance, his triumphant display of power, it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the “natural” thing. And as men may invade women through their orifices, so, too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral sex or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self?”¹⁹

In a study of male rape victims, Stephanie Allen explains: “(...) both men and women describe how sexual victimisation undermines their sense of autonomy. For men, this acts as a direct challenge to the control they exert in the social and sexual arena, and therefore to their identity as men.”²⁰ Men are considered to be people who are able to defend themselves from sexual attacks, and those who are attacked fear that their claim that the sexual contact was forced would not be believed.²¹

In *People v. Yates*,²² the reason for the underreporting of male rape was discussed. It was said that “heterosexual male victims may feel that their sexual orientation is called into question and homosexual male victims fear that their sexual preference may be revealed.” As with most other sexual crimes, since there is a stigma attached to male same-sex rape,²³ men rarely report the crime and are rarely involved in subsequent prosecution efforts. However, this does not undermine the prevalence of male rape and its need to be recognised globally.

¹⁹Susan Brownmiller, *Against Our will: Men, Women and Rape*, quoted in *infra* n.34, 491

²⁰ Allen, *supra* note 1, at 36.

²¹ Center for Sex Offender Management, *Female Sex Offenders* 3 (March 2007), available at http://www.csom.org/pubs/female_sex_offenders_brief.pdf (Last visited on July 21, 2013).

²² 637 N.Y.S.2d 625 (1995).

²³ Elizabeth Kramer, 73 *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, *NEW YORK UNIVERSITY LAW REVIEW* 295 (1994), available at <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-73-1-Kramer.pdf> (Last visited on July 26, 2013).

E. THE ZIMBABWEAN SITUATION

To further this submission, we would like to address a certain issue in Zimbabwe, where, in 2011, there was a nationwide syndicate of women raping men.²⁴ The motive of these women was to use the semen of these men for health-related rituals. Reports suggest that a handful of hitch-hikers were drugged, threatened with knives, and even live snakes and were forced into sex before being dumped on the roadside.²⁵ As the Zimbabwean law does not recognize rape on males, those accused had to be charged on seventeen counts of indecent assault. However, the point that is to be noted here is that none of these counts amounted to rape. This substantiates the argument that the offence of rape on males needs to be recognised globally.

IV. NATURE OF THE OFFENCE

There exists a general notion that the offence of rape is committed so as to gratify carnal needs. However, many studies on the behavioural characteristics of rapists suggest otherwise. Holmstrom and Burgess, for example, reported that although rape always included power, anger, and sexuality, sexuality was never the dominant theme. The conclusion was that rape was used as a weapon to express anger or power.²⁶ Sexual humiliation may also be the motive of a rapist.²⁷ Of course, there is the aspect of sadistic sexual satisfaction inherent in almost every rape case; but in most cases, it is not the primary object.

A. IRRELEVANCE OF ORIENTATION

Homosexual rape need not necessarily be the apt terminology for male same-sex rape. Groth and Burgess observed that only two of the sixteen men who confessed to sexually assaulting other men confined their consensual sexual activities to men, and only

²⁴ Vickers Steve, *Zimbabwe Women accused of raping men for 'rituals'*, BBC NEWS (November 28, 2011), available at <http://www.bbc.co.uk/news/world-africa-15876968> (Last accessed on July 21, 2013).

²⁵ Sara C Nelson, *Zimbabwe 'Sperm Hunters' Acquitted Of Raping 17 Men*, THE HUFFINGTON POST (May 8, 2013), available at http://www.huffingtonpost.co.uk/2012/05/08/zimbabwe-sperm-hunters-acquitted-of-raping-17-men_n_1499056.html (Last visted on July 22, 2013).

²⁶ Marita P. McCabe and Michele Wauchope, *Behavioural Characteristics of Rapists*, 11(3) JOURNAL OF SEXUAL AGGRESSION 235 (2005), available at http://www.hawaii.edu/hivandaids/Behavioural_Characteristics_of_Rapists.pdf (Last visted on July 22, 2013).

²⁷*Id.*

two of six victims admitted to being homosexual or bisexual.²⁸ Therefore, it follows that neither the victims nor the perpetrators need necessarily be homosexual or bisexual. Sexual orientation is often an irrelevant consideration in this respect.

B. GENDER STEREOTYPES

At the macro level, sexual offences have long been seen as a male-only crime. This is, in part, because of pervasive gender-role stereotypes about women as nurturing, caretaking, individuals, who are incapable of such a crime.²⁹ However, the major reason for the under-awareness of female-perpetrated sexual offences may be said to be the sheer volume and imbalance of sexual offences involving males as the offenders.³⁰

Feminists Jeanne Gregory and Sue Lees, while recognising male victimisation in rape, say that both male and female rape can be seen as forms of promoting hegemonic heterosexuality.³¹ This, by implication, means that they recognised the existence of female rapists. The idea of male victimisation does not overthrow the notion of the dominant patriarchal character of the society; it cannot be seen as a move to further weaken the female sex, but should be seen as an anomaly, which, if not recognised, overrides the reality of sexual assault and rape outside the male-on-female paradigm. Rapes should be seen more as a display of power and domination rather than an act of sexual gratification.

The claim that a male cannot be raped by a female was rejected by the Court of Appeals of New York in the case of *People v. Liberta*,³² wherein the Court rejected the argument *in toto*. It said that the claim was ‘simply wrong’. In effect, the Court opined that even though forcible sexual assaults by females upon males are undoubtedly less common and vastly imbalanced with respect to forcible sexual assaults by males upon females, this numerical disparity cannot by itself make the gender discrimination justified. Women may well be responsible for a far lower number of all serious crimes than are men, but such disparity would not make it permissible for the state to punish only men who commit, for example, robbery.³³ However, this decision rested on the assumption that as rape involved penetration, penetration (however slight) could be achieved without arousal. In other words,

²⁸ Kramer, *supra* note 23, at 294.

²⁹ Center for Sex Offender Management, *supra* note 21

³⁰ *Ibid.*

³¹ Jeanne Gregory and Sue Lees, *Policing Sexual Assault* 131 (London: Psychology Press, 1999), available at http://books.google.co.in/books/about/Policing_Sexual_Assault.html?id=0I8K5x8oOJkC&redir_esc=y

³² 474 N.E.2d 567, 577 (N.Y. 1984).

³³ Philip Rumney, *In Defence of Gender Neutrality within Rape*, 6(1) *Seattle Journal for Social Justice* 526, (2007), available at <http://eprints.uwe.ac.uk/14750/1/RumneySJSJ.pdf> (Last visited on July 27, 2013).

if there happened to be an erection, it was so decided that it would amount to consent on the part of the male and it wouldn't be considered as rape.

C. IMPLIED CONSENT

This brings us to the bigger question that if the male 'victim' were to experience a penile erection and ejaculate during the act of 'rape', can it be considered as rape? Won't it imply that the male 'victim' experienced an orgasm, and that he actually enjoyed the act?

These questions are answered in the negative. Ejaculation or penile erection is only a physical response of the body and this does not amount to consent. Sarrel and Masters, in their study of eleven males sexually assaulted by females said that, "Men or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations has been overwhelmingly negative – embarrassment, humiliation, anxiety, fear, anger, or even terror."³⁴ These physical responses may be confused by the victim as indications of pleasure or unrecognised consent.³⁵

Furthermore, getting the victim to ejaculate is a tactic which most sex offenders use. In the case of male offenders, if the victim ejaculates, the victim himself may be bewildered by his physiological reaction to the act of rape, and, therefore, fail to report the act in fear that his sexuality may become suspect.³⁶ This, in turn, in trial testimony, may destroy the credibility of the victim's statement.³⁷ In the case of female sex offenders, the motivation for ejaculation might seem like a symbol of complete domination over the male body.

With respect to the physical consequences, those men who have been sexually assaulted since the age of sixteen, report poorer physical health statuses than men who have not been abused.³⁸ Research indicates that the sexual assault on men tends to be more violent and is often accompanied by more and greater corollary injuries than those committed on women.³⁹ In *People v. Yates*,⁴⁰ the existence of the 'male Rape Trauma Syndrome' was recognised. The Court said that, "A review of literature describing the effect

³⁴ *Id.* at 516.

³⁵ *Id.* at 517.

³⁶ *Ibid*

³⁷ *Ibid.*

³⁸ Richard Tewksbary, *Effects of Sexual Assaults on Men: Physical, Mental, and Sexual Consequences*, 6(1) *INTERNATIONAL JOURNAL OF MEN'S HEALTH* 26, available at <http://www.prearesourcecenter.org/sites/default/files/library/effectsofsexualassaultsonmen-physicalmentalandsexualconsequences.pdf> (Last visited on July 27, 2013).

³⁹ *Ibid.*

⁴⁰ N.Y.S. 2d 625 (N.Y. Sup. Ct, 1995)

of sexual assault on men reveals that male victims, both heterosexual and homosexual, exhibit a well-defined trauma syndrome parallel to that found in female victims of rape (. . .) Nothing in the peculiar reactions of male victims of sexual assault places them outside the medical definition of post-traumatic stress disorder [as recognized in cases involving female victims] or diminishes the validity of the conclusion that a syndrome of male sexual victimization is accepted in the scientific community.”

D. LESBIAN PARTNER VIOLENCE

Misconceptions about the “ability” of women to sexually victimise might suggest a narrow view that female sex offending is committed solely against the male sex.⁴¹ However, this is far from the truth. Research suggests that while there are cases of sexual offences on males committed by females, the cases of female-perpetrated male rape are rare. Usually, when female rape occurs, it is more likely to occur on the same sex.⁴² This brings us to the issue of lesbian partner violence, and female-on-female rape.

The myth is that a woman cannot really rape or sexually assault another woman. However, this is false. There exists a popular misconception that rape or sexual assault requires penile penetration, whether oral or vaginal. However, sexual assault between women can include:

- Forced vaginal/anal penetration with digits or objects;
- Forced oral sex; and
- Forced sexual touching.⁴³

The study conducted by Claire M. Renzetti suggested that 30% of the lesbians in the sample had been victims of sexual assault by their abusive partners.⁴⁴ Furthermore, literature on the impact of sexual assault between lesbians suggests that there are very pronounced similarities between the reactions of those women sexually assaulted by male dates or acquaintances and those sexually assaulted by lesbian partners or other females.⁴⁵

Recognition of same-sex violence and male rape is not an imputation to the general notions of the society; rather, it would only be the acknowledgement of a prevalent

⁴¹ Center for Sex Offender Management, *supra*, note 21 at 3

⁴² *Id.* at 7.

⁴³ Pandora’s Project, *Domestic Abuse in Lesbian Relationships*, available at <http://www.pandys.org/articles/lesbiandomesticviolence.html> (Last visted on July 17, 2013).

⁴⁴ *Id.* at 1.

⁴⁵ Lori Girshick, *Woman to Woman Sexual Violence: Does she call it rape?*, available at http://test31.biocom.arizona.edu/agency_updates/2004/06-Wingspan.pdf (Last visted on July 17, 2013).

underreported public secret. The next section gives a brief overview of a few jurisdictions which have adopted gender neutral rape-laws.

V. GENDER NEUTRALITY ACROSS VARIOUS JURISDICTIONS

Patricia Novotny refers to the definition of rape as “the carnal knowledge of a woman against her will”⁴⁶ as the ‘classic definition’ of rape.⁴⁷ However, in light of the vast revision of rape laws in the past few decades, the truth of this statement is in question.

A. THE AMERICAN SITUATION

Many jurisdictions have now adopted gender-neutral laws in rape, at least to the extent where they recognise the premise that men can also be victimised. It must be noted here that these gender-neutral laws are not uniform in nature.⁴⁸ For instance, Indiana has a very unusual gender neutral rape-law which only recognises rape among heterosexuals.⁴⁹ Ireland, Canada, all the Australian States, and most states of the United States of America have adopted gender neutrality in rape law. In fact, in the United States of America, all States except for Georgia, Maryland, Mississippi, North Carolina and Alabama have adopted gender neutral rape statutes. Interestingly, the Model Penal Code of the United States of America,⁵⁰ sticks to the ‘traditional’⁵¹ definition of rape.

Susan Estrich justifies the gender specific definition of the United States of America by suggesting that although males may experience the physical act of rape much the same way as women, in the case of males, there happens to be no risk of unwanted pregnancy.⁵² However, this argument stands refuted for pre-pubertal, menopausal, sterilized, and infertile women as well as women who practice contraception are also protected under gender neutral

⁴⁶ Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1(3) *SEATTLE JOURNAL FOR SOCIAL JUSTICE* 743 (2012), available at <http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/62/> (Last visited on July 17, 2013).

⁴⁷ *Id.*

⁴⁸ Rumney, *supra* note 33.

⁴⁹ IND. CODE S. 35-42-4-1, available at <http://www.in.gov/legislative/ic/2010/title35/ar42/ch4.html> (Last visited on July 17, 2013).

⁵⁰The American Law Institute, *Model Penal Code*, (1962), available at <http://www.utexas.edu/law/journals/tlr/sources/Issue%2087.3/Heinzerling/fn%2054%20-%20Model%20Penal%20Code.pdf> (Last visited on July 30, 2013).

⁵¹ *Id.* at 133

⁵² Rumney, *supra* note 33, at 486.

rape laws. Therefore, the risk of unwanted pregnancy cannot be an overriding consideration.⁵³

Also, as Jocelyne Scott noted, “It is not convincing to argue that a woman would necessarily be more damaged –physically or mentally– by penetration of vagina over penetration of anus, beyond the fact of loss of virginity in some cases, or the possible occurrence of pregnancy. Nor is it seemingly relevant in terms of damage that penetration is effected by penis or by artificial means. Further, although probably there are less men than women who are attacked by way of sexual advances leading to penetration, this does not appear to be a valid reason for assuming that penetration of a male anus is necessarily of less consequence to the criminal law than the classic rape situation.”⁵⁴

B. THE ENGLISH WAY

Some jurisdictions have accepted a definition of rape that is completely gender neutral in the sense that they recognise the possibility of males being victims of rape and also, females as potential perpetrators. On the other hand, many jurisdictions still consider rape as a male-only crime. England and Wales is one such example. Though the English law, by virtue of the 1994 amendment, recognises male rape as a crime, it fails to include females as potential principal offenders. However, before the Amendment of 1994, women could be convicted as accessories to a rape for which a man is the principal offender.⁵⁵

An important consideration is what would constitute male rape. Section 142 of the Criminal Justice and Public Order Act, 1994, which introduced male rape to English law by amending the Sexual Offences Act, 1956, states, “It is an offence for a man to rape a woman or another man”. For the purposes of rape, sexual intercourse included penetration of the anus or vagina. However, by way of the new Sexual Offences Act, 2003, it has been expanded to include penile penetration of the mouth.⁵⁶ However, the Act differentiates between the offences of rape and that of ‘sexual assault by penetration’. Females who force

⁵³*Id.* at 483

⁵⁴ *Id.* at 484.

⁵⁵ *Lord Baltimore’s Case*, 4 Burr 2179 (1768); *R. v. Ram and Ram Cox* (1893) 17 CC 609.

⁵⁶ The Home Office Review of Sexual Offences noted the argument of Cathy Halloran that the experiences of people who were victims of an oral sex assault “as degrading and traumatic and horrific as penetration of the vagina or of the anus.” Distinguishing it from rape would be downgraded the seriousness of this assault. House of Commons Home Affairs Committee, *Sexual Offences Bill: Fifth Report of Session 2002-2003* 7, (July 10, 2003), available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/639/639.pdf> (Last visited on July 30, 2013).

other men or women to engage in penetrative sex acts may also be convicted of the latter offence, which, incidentally, also carries a maximum punishment of life imprisonment similar to the offence of rape.

C. MISSING RATIONALE FOR DISTINCTION

The obvious question that arises is one regarding the rationale for labelling similar offences as different ones. Of course, there exists a need to differentiate between penile penetration and penetration by other objects. However, the subject of argument is when penile penetration of the anus or the mouth, is achieved by a woman raping a man, what is the rationale for discriminating based on the sex of the offender?

As Jocelyne Scott noted: “A principle of criminal law is, surely, that all persons should be protected equally from harm of like degree (...) The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor.”⁵⁷

D. THE CONSEQUENCES OF IGNORANCE

The importance of appropriate labelling of offences should not be underestimated. The lack of societal recognition of male rape and institutional neglect of the problem are only augmented by labelling an act which is similar to rape under a different head. As acknowledged by the Republic of Ireland Law Commission,⁵⁸ “(...) appropriate labelling of offences contributes to the victim’s sense of being vindicated and protected by the State and that any description which seems to understate the gravity of an offence or put it in a lesser category will be resented by the victim.” This would automatically imply that legal recognition of male rape or female same-sex rape for that matter, will only improve the chances of victims seeking legal or psychological redress, and will also strike down the societal notion that a ‘real’ man cannot be raped at all, let alone by a woman.

The lack of acknowledgement of male rape victims may even affect their ability to realise their own victimisation.⁵⁹ In fact, an account of a victim has been provided by Stephanie Allen in *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, to substantiate this argument. A person who had been anally penetrated with a toilet brush

⁵⁷ *Supra* note 54.

⁵⁸ The Law Reform Commission, *Rape and Allied Offences* (LRC 24-1988, Dublin, 1988), available at http://www.lawreform.ie/_fileupload/Reports/rRape.pdf (Last visited on July 30, 2013).

⁵⁹ Allen, *supra* note 1, at 24.

initially felt that what he had encountered was an act of physical violence, as opposed to one of sexual assault. In his own words, “(...) I tried to convince myself that it was more violent than sexual, but, really, deep down, I knew it was more than that. Because, you know, I’ve been in plenty of fights and I’d never felt like that before. There was no getting away from it...”⁶⁰

Gender neutrality in rape law –though adopted in many nations– still is rejected as needless in many others. The issue of male rape or lesbian violence remains a hushed-up secret between victims and perpetrators. The situation in India offers a glaring example.

VI. POSITION IN INDIA

In India, neither sexual assault nor rape are identified as offences that can be committed against men. In fact, the definition is so narrow that only a man can commit these offences against a woman. From a plain reading of the Report of the Committee on Amendments to Criminal law, a few observations can be inferred.

The fundamental right of every person to life with human dignity,⁶¹ and equality,⁶² are to be made available to every citizen, including men. However, as pointed out earlier, this has not been implemented, as the Government has chosen to ignore the suggestions of the Justice Verma Committee in this regard.⁶³ The Committee in its report had categorically stated that, if the human right of freedom means anything, then India cannot deny its citizens the right to be different. Thus, the right to sexual orientation is a human right guaranteed by the fundamental principles of equality.⁶⁴ The Committee clearly endorsed the rights of homosexuals and transgenders, to not be excluded from the purview of the protection against offences such as sexual harassment and sexual assault.

India is a party to several international covenants on the rights of individuals, such as The Universal Declaration of Human Rights, 1948, The International Covenant on Civil and Political Rights, 1966 and The International Covenant on Economic, Social and Cultural Rights, 1966, all of which reaffirm the inalienable right of every person to equality and human dignity.⁶⁵ However, India has wilfully chosen to disregard its obligations under these

⁶⁰ *Id.*, at 31.

⁶¹ Article 21, Constitution of India, 1950

⁶² Article 14, Constitution of India, 1950.

⁶³ Rajalakshmi, *supra* note 7.

⁶⁴ Verma, Seth and Subramaniam, *supra* note 6, at 57.

⁶⁵ Preamble, Universal Declaration of Human Rights, 1948.

Covenants, and has continued to turn a blind eye to the woeful cries of the affected minorities.

Under Chapter Fourteen, where the Committee has discussed the role of education and perception, it has brought to light the various gender stereotypes that are hammered into Indian children at a very young and impressionable age.⁶⁶ These stereotypes play a major role in moulding the ideas of men and women in India. As this attitude can be traced as one of the reasons for the increasing incidents of rape of women, it can also be said to be the reason why Indian society is so reluctant to acknowledge the occurrences of male rape. The very notion of the masculinity and the strength of a man is threatened when he admits to having been raped. This serves as one of the major reasons most male rapes go unreported.

Furthermore, the Committee, in the preface to its report, has also acknowledged that the required changes in the law can be brought about only by a change in the social mind-set and cannot be achieved simply by legal norms. This argument is augmented by the stiff resistance that was put up by feminists and activists alike in condemning these reforms, and insisting that the rape and sexual assault laws remain biased.⁶⁷ The main contention put forward by these groups is that if the rape and sexual assault laws were made gender neutral, this would result in complaints of rape by women being met by counter-claims to build pressure on them to withdraw their complaints. They argued that this would increase the vulnerability of women.⁶⁸

It must be understood that gender neutral laws would not necessarily work to the disadvantage of women and the loopholes, if any, must be suitably dealt with. Holding on to archaic laws in an attempt to avoid these changes would result in gross injustice to those who are currently beyond the purview of the laws. Thus, it is of utmost importance to amend the existing laws and insert the words 'person' in the place of 'man' and 'woman' in order to ensure justice to all.

The most glaring example of the plight of male rape survivors is that of Vinodhan, a young man from Chennai. In the media frenzy that followed the brutal rape of the 23-year-old in Delhi, Vinodhan was moved to write about his traumatic gang rape incident at the age

⁶⁶ Verma, Seth and Subramaniam, *supra* note 6, at 383.

⁶⁷ TNN, *Activists join chorus against gender neutral rape laws*, THE TIMES OF INDIA, (March 9, 2013), available at http://articles.timesofindia.indiatimes.com/2013-03-09/india/37580560_1_gender-human-rights-groups-women-activists (Last visited on August 1, 2013).

⁶⁸ *Ibid.*

of 18.⁶⁹ Many male rape survivors like Vinodhan have silently suffered for many years with no recourse to the law and nowhere to turn to for psychological relief. Several other victims have also come out with their stories such as Krishnan, who was raped in Kerala and was too ashamed to come out in the open.⁷⁰ It is time these victims were given access to justice and a platform to vent their grievances.

There have been cases,⁷¹ wherein the squeezing of testicles has been held to be an offence coming under the head of 'grievous hurt' under Section 320 of the Indian Penal Code. The courts have not examined this offence under sexual assault, nor have they explored the possibility of doing so. This is a clear illustration of the huge disparity in analysing rape and sexual assault committed against men as opposed to those committed against women. There is a pressing need to legislate on this aspect, with the judiciary and the general public lending a helping hand in the implementation of the same.

VII. CONCLUSION

A. PRINCIPLE NEED TO PROTECT

The existing pervasive gender-role stereotypes suggest a notion that males, and the idea of masculinity that they embody, cannot fall victim to an offence of rape or sexual assault. The veracity of this statement has now had reason to be doubted. The instances of male rape, as enunciated above, give a clear idea regarding its prevalence. However, questions regarding societal recognition and awareness of the same need to be advanced. As already noted, correct labelling of a crime gives the victim a sense of vindication which might encourage him to seek legal or psychological redress.⁷²

Gender neutrality has vastly been regarded as a coercive mechanism whereby scholars shift the attention from female victims of rape. However, it must be noted that the object of gender neutrality in sexual assault and rape law is very different and has a reasonable, independent standing. A change towards gender neutral laws brings forth the notion that the laws are not analysed in gender specific terms, but rather, gives emphasis to the act, irrespective of the gender of the perpetrator or the victim.

⁶⁹ Priya M. Menon, *Lacking support, male rape victims remain silent*, THE TIMES OF INDIA, (February 6, 2013).

⁷⁰ *Ibid.*

⁷¹ *State Of Karnataka v. Shivalingaiab Alias Handigidda*, AIR 1988 SC 115.

⁷² Rumney, *supra* note 33, at 485.

As has been observed previously in this article, the prevalence of such acts has increased considerably and the legislature cannot afford to turn a blind eye to the same. Criminal conduct should be appropriately labelled and legislation regarding the same should be sensitive to the experiences of the victim. Merely because there is a vast disparity between the number of rape and sexual assault cases against women as opposed to men and an even bigger disparity between the number of rape or sexual assault cases perpetrated by men as opposed to women, this by itself cannot be reason enough to ignore the problem and treat it as an exception or a mere anomaly. It is a principle of criminal law that the state will protect those individuals who are not able to protect themselves. It is indeed a discrimination that the gender of the victim is a precondition to such protection.

B. CONSTITUTIONAL MANDATE

This brings us to the issue of the right to equality as envisaged under the Indian Constitution and sexual assault. Article 14 guarantees to every person, equality before the law and the equal protection of laws.⁷³ The expression ‘equal protection under the laws’ has now come to be read as an obligation on the state to bring about the necessary social changes, so that everyone may enjoy equal protection of the laws.⁷⁴ This should be in consonance with the existing needs of society, and ensuring legal redress for instances of same-sex and male rape or sexual assault is the first step in bringing about social changes relevant to address such issues.

C. THE WAY FORWARD

It is said that the first step to the solution of any problem is in identifying it. This means that although the issue of sexual assault or rape outside the male-on-female paradigm has been largely overlooked by legislators till date, it is imperative that the flaws of the existing system come to the fore and be recognised. If rape outside the ‘typical’ definition,⁷⁵ must come to be recognised and acknowledged in society, it is crucial that the reporting of such crimes increases substantially. However, with the law remaining as it is, with its gender specific approach, which offers no hope for legal or psychological redress, and attracts social stigma, why would persons subjected to this crime want to report it?

⁷³ *Supra* note 62.

⁷⁴ V.N. Shukla, *CONSTITUTION OF INDIA*, 46 (Mahendra Pal Singh ed.), (Lucknow: Eastern Book Company Publishing, 2008).

⁷⁵ *Definition of “Rape”*, Oxford Dictionary U.S.A, available at http://oxforddictionaries.com/definition/american_english/rape (Last visited on August 1. 2013).

The answer to the problem that this question poses can only be the legal recognition of such offences. Gender specificity in sexual assault law can no longer be said to serve any purpose. The prevalence of rape outside the set paradigm has no reason to be doubted. It is only the development and application of a gender neutral law that will be effective in improving the reporting of such crimes. The definition of rape must be reconsidered, sexual assault must be classified in accordance with various degrees of harm caused by each, and each must be defined in a comprehensive manner.

Gender neutrality in sexual assault and rape law has long been an issue that legislators have been reluctant to address. However, the pressing need for its acceptance in the law cannot be ignored any longer. The Justice Verma Committee's recommendations indicate the same. Ultimately, it all boils down to a moralistic argument that every person deserves to have their rights protected, and that all persons subjected to the crimes of rape or sexual assault, irrespective of their gender, should have recourse to the law in order to achieve their well-deserved vindication. Only time will tell whether this will be achieved.

THE RIGHT AGAINST SELF-INCRIMINATION AND STATE OF BOMBAY V. KATHI KALU OGHAD: A CRITIQUE

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This paper follows the important stages of the evolution of case law on the right against self-incrimination as enshrined in Article 20(3) of the Indian constitution. Weaknesses of case law are highlighted as initially established in M.P. Sharma v. Satish Chandra in terms of its interpretation of self-incriminating evidence. The primary weakness brought out is the liberal interpretation of the constitutional provision which muzzled the process of investigation as envisaged in the Indian Evidence Act. This is followed by a discussion of the landmark case, Kathi Kalu Oghad v. State of Bombay which removed major anomalies in the existing case law and restored the balance between the investigation process and the right against self-incrimination. Further, case law is reviewed for whether the law on self-incrimination as it stands today is explicitly equipped to address issues arising out of technology driven social change such as the role of social media as a source of personal testimony.

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I. INTRODUCTION

*“Nemo debet prodere se ipsum.”*¹

The right against self-incrimination finds its earliest embodiment in the medieval law of the Roman church in the Latin maxim ‘*Nemon tenetur seipsum accusare*’ which means that ‘No man is obliged to accuse himself. The right gradually evolved in common law through protests against the inquisitorial and manifestly unjust methods of interrogation of accused persons, back in the middle ages in England.’²

The provision is one of the fundamental canons of common law criminal jurisprudence which has been incorporated in the Constitution of the United States under the Fifth Amendment³ which reads that ‘No person...shall be compelled in any criminal case, to be a witness against himself,’ and thereafter in the Indian Constitution.⁴ The Indian Constitution provides for protection to an accused against self-incrimination under compulsion through Article 20(3) – ‘No person accused of an offence shall be compelled to be a witness against himself.’⁵ Its first appearance has been considered a landmark event in the history of common law.⁶ In 1978, under the 44th Amendment,⁷ the Article 20 of the Constitution of India was granted a non-derogable status i.e. the state has no legal basis, even in a state of emergency, to refuse to honour this right. This is a testimony to the importance it has been accorded in our Constitution.

From the very first years of our Constitution, a certain ambiguity on the question of what evidence was accorded protection, and apparent conflicts between Article 20(3) and provisions of the Indian Evidence Act, 1872 have prevailed.⁸ This resulted in judgements with apparent imbalance between the right against self-incrimination in Article 20(3) and the necessity to facilitate collection of evidence by investigating trial agencies. These judgements were referred to the Apex Court, which clubbed them and referred them to an eleven-judge

¹ Translated from Latin maxim “No man is bound to betray himself”.

² 180th Report of the Law Commission of India, Article 20(3) the Constitution of India and the Right to Silence, 3, (2002).

³ Fifth Amendment, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1789.

⁴ M.P. Jain, INDIAN CONSTITUTIONAL LAW, 1064-1065 (5th edn, 2008).

⁵ Article 20(3), THE CONSTITUTION OF INDIA, 1950.

⁶ John H. Langbein, *The Historical Origins of the Privilege against Self-Incrimination at Common Law*, Vol. 92(5), MICHIGAN LAW REVIEW 1047, (1994).

⁷ Sec. 40, The Constitution (Forty-fourth Amendment) Act, 1978.

⁸ *State of Uttar Pradesh v. Deomen Upadhyaya*, AIR 1960 SC 1125(Supreme Court of India).

bench. The resultant judgement is the landmark judgment of *State of Bombay v. Kathi Kalu Oghad*⁹ which has made a defining contribution to the case law on the matter as it stands today.

*M.P. Sharma v. Satish Chandra*¹⁰ was the last significant ruling on the interpretation of Part III of the Constitution soon after independence. Following *M.P. Sharma*, several cases were referred to the Apex Court. Questions addressed were essentially of interpretation of what constitutes ‘to be a witness against himself’ with respect to the circumstances defining compulsion. Among the several cases bunched together, the leading case was of that of *Oghad*.

A murder accused was identified by the Trial Court and convicted based upon handwriting samples taken at three different times, under police custody. The convict appealed to the High Court which held that the evidence of specimen handwriting was tantamount to compulsion, as it was obtained under police custody, thereby making the evidence inadmissible. Holding that the identity of the respondent was not established beyond a reasonable doubt under other available evidence, the accused was acquitted. The State of Bombay then appealed to the Apex Court which led to the judgement under review.

The two issues contended were that of the admissibility of handwriting specimens as evidence in the light of Article 20(3) and whether compulsion was imputed in the taking of such specimens in police custody. The Apex Court held that handwriting exemplars, fingerprints, thumbprints, palm prints, footprints or signatures were considered to be outside the scope of Article 20(3). It was also held that the giving of a statement by an accused in police custody gave the Court no reason to believe that coercion had been used in the procurement of the same.¹¹

This paper reviews the case law on Art. 20(3) as established by the Supreme Court in the landmark judgement of *Oghad*. The judgement has been reviewed for its impact on the development of case law on the subject, particularly on the issues of how the nature of evidence protected under Article 20(3) was altered, the strengths and vulnerabilities of the judgement and its perceived robustness in addressing the emerging issue of the technological phenomenon of social media as a rich source of personal information of an accused.

⁹ *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808 (Supreme Court of India). [“*Oghad*”]

¹⁰ *M.P. Sharma v. Satish Chandra*, AIR 1954 SC 300 (Supreme Court of India). [“*M.P Sharma*”]

¹¹ *Oghad*, AIR 1961 SC 1808.

II. THE PILLARS OF ARTICLE 20(3)

“*The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power.*”¹²

The right against self-incrimination was afforded by the courts in consonance with the principles of an adversarial system of jurisprudence. The mid-18th and mid-19th centuries’ criminal trials saw the origins of this privilege and other tools to the accused such as the ‘beyond-reasonable-doubt’ and ‘burden of proof on the prosecution’ doctrines which equipped him with political liberties that could be used to defend himself in trial against the State, in a way minimizing the relative disadvantage which the individual defendants would face, as compared to the vast trial resources of the State.¹³ The rationale underlying the judicial provision against testimonial compulsion was well recognized long before our Constitution came into existence. The cornerstone of the protection against self-incrimination is best stated by the Court in *Saunders v. United Kingdom*.¹⁴ This case explained that the right lies for the protection of the accused by the improper compulsion of the authorities, thereby contributing to the avoidance of the miscarriages of justice.¹⁵ According to the author, ethics and reliability are the two pillars of the right against self-incrimination. The ethical rationale for voluntariness addresses the need to protect the accused from brutalization and torture by investigation agencies; the rationale is that if involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements, often through methods involving coercion, threats, inducement or deception.¹⁶ Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined.¹⁷ This situation is considered as a violation of basic human rights of life and limb. Hence, the right against self-incrimination serves as a vital

¹² Wigmore, EVIDENCE, 2264 (2nd edn, 1923) as cited in Fred Inbau, *Self-Incrimination: what can a Accused Person be compelled to do?*, 28(2) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 261, 264 (1937).

¹³ Gautam Swarup, *Narco Analysis and Article 20(3) of the Constitution of India: Blending the Much Awaited*, (2009), available at: http://works.bepress.com/gautam_swarup/2 (Last visited on October 12, 2013).

¹⁴ *Saunders v. United Kingdom*, (1997) 23 EHRR 313.

¹⁵ *Saunders v. United Kingdom*, (1997) 23 EHRR 313 as cited in Mike Redmayne, *Rethinking the Privilege against Self-Incrimination*, 27(2) OXFORD JOURNAL OF LEGAL STUDIES 209, 212 (2007).

¹⁶ Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to remain silent*, 94(8) MICHIGAN LAW REVIEW 2625, 2627 (1995).

¹⁷ *Smt. Selvi v. State of Karnataka*, 2010 7 SCC 263 (Supreme Court of India).[“Selvi?”]

safeguard against torture and other ‘third-degree methods’ that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important or investigators will be more inclined to extract information through such compulsion routinely rather than through the more difficult path of collecting independent evidence.¹⁸ In the view of this researcher, another concern behind the right against self- incrimination seems to be protecting a wholly or partially innocent person from making a false statement under stress and thereby needlessly reinforcing the needle of suspicion upon him or her. Similarly for the guilty, the protection affords a shield from aggravating his or her offense by misrepresentation or concealment of evidence. The accused is also shielded from reading of motives into what evidence he or she might give.

There were several contrary views among the makers of the Constitution, but it was widely accepted by those who devoted serious thought to it, that the easy path of procuring evidence, oral or documentary, by compulsion from an accused would do more harm than good to the administration of justice; it was felt that existence of this path would tend to discourage investigators or prosecution to indulge in a diligent search for reliable independent evidence and also dissuade them to exercise care while sifting through available evidence for the ascertainment of truth.¹⁹ If law permitted evidence to be obtained by coercion, investigators would never take up the onus of partaking in laborious investigation and prolonged examination of other associated persons, material and documents. It has been rightly said that the absence of the privilege against self-incrimination would incentivize those in charge of the enforcement of the law ‘to sit comfortable in the shade rubbing red pepper into the devil’s eye rather than go about in the sun hunting up evidence.’²⁰

The privilege also serves the goal of reliability.²¹ When a person suspected or accused of a crime is compelled to testify on his/ her own behalf through methods involving coercion, threats or inducements during the investigative stage, there is a higher likelihood of

¹⁸ *Sehvi*, 2010 7 SCC 263.

¹⁹ *Oghad*, AIR 1961 SC 1808 ¶ 34.

²⁰ James F. Stephen, HISTORY OF CRIMINAL LAW, Vol. 1, 442, (1883) as cited in *Oghad*, AIR 1961 SC 1808.

²¹ *Michigan v. Tucker*, 417 US 433 (1974) as cited in Akhil Reed Amar and Renee B Lettow, *Fifth Amendment First Principles: the Self-Incrimination Clause*, 93(5) MICHIGAN LAW REVIEW 857, 895 (1995).

such testimony being false or distorted out of sheer despair, anxiety and fear.²² Their mental status may serve as an impetus to offer evidence in order to avoid the unpleasantness of the current situation and complications that follow. Thus, involuntary statements from the accused may amount to false testimony which is likely to mislead the judge and the prosecutor, thereby impeding and vitiating the process of trial, and potentially leading to a miscarriage of justice with erroneous and unjust convictions. Even during the investigative stage, false statements are likely to cause delays and obstructions in the investigative efforts. Therefore, the privilege ensures that investigation agencies do not take the easy path of 'involuntary confessions' to supplant the diligent route of meaningful investigations and that the reliability of the testimony presented for trial is of a high order.

III. OGHAD: REDEFINING THE SCOPE OF EVIDENCE PROTECTED

The case law on Article 20(3) has been through an interesting journey: from a very broad interpretation in *M.P. Sharma* leading to contradictory conclusions to a much chiselled interpretation in *Oghad*. This chapter will trace how *Oghad* impacted the prevalent case law on Article 20(3), how it brought clarity and reduced anomalies in its subsequent administration, and, at the same time, how it may also have narrowed the scope of Article 20(3) vis-à-vis the general intention of the makers of the constitution rendering it incapable in meeting the perceived legislative intention.

Oghad was a landmark judgment of eleven judges, one of the largest benches in the history of Indian judiciary. It made a very significant contribution in evolving the case law on Article 20(3) by its interpretation of the right against self-incrimination by redefining what constituted 'being a witness against himself' taking *M.P. Sharma* as precedent. The constitutionality of a search or seizure of documents from a person against whom an FIR had been lodged with the police was questioned in *M.P. Sharma*; this case, taking a broad view of Article 20(3) held that the protection applied primarily to 'testimonial compulsion'.²³ It therefore extrapolated protection from oral evidence as applicable till then, to written statements as well, so as not to 'limit Article 20(3) and rob it of its substantial purpose or to miss the substance for the sound'.²⁴ Justice Jagannadhadas held that 'to be a witness' was

²² Stephen J. Schulhofer, *Some Kind Words for the Privilege against Self-Incrimination*, 26(1) VALPARAISO UNIVERSITY LAW REVIEW 311, 318 (1991).

²³ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

²⁴ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

equivalent to furnishing evidence which not only constituted oral testimony but also non-verbal forms of conduct such as production of documents or of a thing or in other modes.²⁵

The judgment in *M.P. Sharma*, however, failed to settle the scope of Article 20(3) especially with respect to the scope of 'non-verbal' evidence to which the protection was extended. As a result, the cases that followed *M.P. Sharma* and preceded *Oghad* had a sharp difference of judicial opinion.²⁶ In a case,²⁷ it was held, that an involuntary handwriting sample amounted to compelling to be a witness violating Article 20(3), prima facie rendering Section 73 of the Indian Evidence Act void. On the other hand, it was held in another case,²⁸ that taking of handwriting specimen or thumb impression under a court order did not violate Article 20(3). The propositions laid down in *M.P. Sharma* were considered to be too widely stated and *Oghad* made an attempt to re-interpret the same with more clarity.²⁹ It essentially examined the compatibility between Article 20(3), Section 73 of the Indian Evidence Act, and Sections 5 and 6 of the Identification of Prisoner's Act, as the case law on Article 20(3) prevalent since *M.P. Sharma* was seen to nullify the other statutes, creating a judicial gridlock. The liberality in that case may have gone beyond the original intent and purpose of Article 20(3).

While upholding *M.P. Sharma* on inclusion of written testimony, in addition to oral for protection, the instant case made an important departure from the former. The judgment in the instant case approached the matter by first examining the definition of the expression 'to be a witness' in Article 20(3). It sought to establish a distinction between testimonial and physical evidence, and held that the act of providing testimonial evidence alone constitutes 'to be a witness'. Justice B.P. Sinha opined that the phrase 'to be a witness' must be restricted to mean 'imparting knowledge in respect of relevant facts by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation on matters relevant to the subject under inquiry.'³⁰ Self-incrimination was declared as the conveying of information that was based upon the personal knowledge of a person giving that information. It was ruled that 'personal testimony' was to depend upon volition. An accused

²⁵ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

²⁶ H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 2, 1063-1064 (4thedn, 1996).

²⁷ *Farid Ahmed v. State*, AIR 1960 Cal 32 (Calcutta High Court).

²⁸ *Re: Sheik Mohd. Hussain*, AIR 1957 Mad 47 (Madras High Court).

²⁹ *Oghad*, AIR 1961 SC 1808.

³⁰ *Oghad*, AIR 1961 SC 1808 ¶ 12.

had the choice of making the statement or refusing to make the same.³¹ So, by limiting the scope of evidence qualifying the definition of ‘to be a witness’, *Oghad* brought much clarity on the interpretation of Article 20(3).

The judgment perceived a witness to be one who gave oral or written statements which by themselves had a tendency to incriminate the accused. All other kinds of physical, biometric, forensic and material evidence were not considered a ‘personal testimony’ and did not invoke the right against self-incrimination. Their purpose was seen as only to lend reliability to other evidence, and efforts to conceal their true nature would not change their ‘intrinsic character’. Consequently, handwriting samples, fingerprints, thumb-prints, palm-prints, footprints or signatures, were declared as material evidence, not incriminating the accused and falling outside the scope of Article 20(3), thereby subjecting them to compulsion in the due process of law.³² The position that a ‘witness’ must communicate facts with his personal knowledge echoes throughout the opinion on the controlling precedent *M.P. Sharma*. By establishing this benchmark for the distinction between testimonial and material/physical evidence, the judgment amended the interpretation given by its precedent.

Oghad was an extremely noteworthy judgment as it helped resolve conflicts among judgments with its interpretation. The court could now direct an accused to produce or give his handwriting exemplar, under Section 73,³³ without invoking Article 20(3).³⁴ Several subsequent cases were facilitated by the case law thus established by *Oghad* which helped resolve apparent conflict among different statutes and interpretations. A case in point is *Smt. Selvi v. State of Karnataka*³⁵ which involved the use of advanced scientific methods for collection of evidence for criminal investigations. It heavily drew upon *Oghad*, adding another new dimension to its interpretation. In *Selvi*, the constitutionality of narco-analysis, lie-detector test and analysis of brain waves (Brain Electrical Activated Profiling (BEAP) test) was questioned. The three judge bench ruled that the compulsory administration of such tests should be banned as forcible intrusion into the mind of the accused not only violated Article 20(3) but also intruded on the privacy and liberty of an individual, thus violating Article 21 of the Indian Constitution.³⁶ *Oghad* seems to have foreseen such a situation when

³¹ *Oghad*, AIR 1961 SC 1808 ¶ 11.

³² *Oghad*, AIR 1961 SC 1808 ¶ 11,12.

³³ Section 73, Indian Evidence Act, 1872.

³⁴ *State of Delhi v. Pali Ram*, AIR 1979 SC 14 (Supreme Court of India).

³⁵ *Selvi*, 2010 7 SCC 263.

³⁶ *Selvi*, 2010 7 SCC 263.

Justice Sinha stated that if the mind of the subject had been conditioned such that a confession was involuntary, it would be considered coercion, and hence in violation of Article 20(3).³⁷ At the same time it is perceived by the author that *Oghad*, in its re-interpretation, may not have sufficiently addressed all situations thrown up by technology driven social change.

While *Oghad* rightly disallowed protection to material evidence which in itself did not incriminate the accused in itself such as fingerprints, handwriting samples etc., it actively excluded a large space of evidence, much of what could potentially be self-incriminatory and could have been considered to be worthy of protection under the original spirit of Article 20(3). This is perceived by the author as its principle vulnerability especially in view of the changing nature of self-incriminatory evidence in the face of technological advancement.

Another vulnerable area is the ruling that a statement by an accused would not be considered as having been extracted under compulsion just for the fact that it was made under police custody, unless additional circumstances suggested to the contrary.³⁸

A. VULNERABILITY IN DILUTION OF PROTECTION TO DOCUMENTARY EVIDENCE

In *M.P. Sharma*, Justice Jagannadhadas had said that, 'the right against self-incrimination would extend to any compelled production of evidentiary documents which are 'reasonably' likely to support a prosecution against the accused.'³⁹ *Oghad* diluted this protection considerably by distinguishing 'production of document' from the phrase 'to be a witness'.⁴⁰ It implied that production of any document except those which formed a written testimony originating from personal knowledge was not protected against compulsion under Article 20(3) even if it threw light on the matter at hand and by implication incriminated the accused. Among other things, it took recourse to Section 139 of the Indian Evidence Act which provides that 'a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.' The impact of this position in the author's view tends to restrict the legislative intention behind Article 20(3) considerably.

First is the question of several documents which, while not having their origin in personal knowledge, might still incriminate the accused. Another question that remains

³⁷ *Oghad*, AIR 1961 SC 1808 ¶ 15.

³⁸ *Oghad*, AIR 1961 SC 1808 ¶ 15.

³⁹ *M.P. Sharma*, AIR 1954 SC 300 ¶ 12.

⁴⁰ Seervai, *supra* note 26, at 27.

unanswered is the issue of the same person subsequently becoming either a witness or an accused. The latter has been extensively dealt with in *Nandini Satpathy v. P.L. Dani*.⁴¹ The issue of how the authorities would decipher whether a document is based on the personal knowledge of the accused is yet another question. The answer to this typical question is simple. The authorities will firstly call upon the accused with the documents, after which they will decide whether the document is incriminating, strictly according to the majority ruling. This has created a situation where both the heads and the tails are in the hand of authorities.

In this matter, the minority judgment appears to have taken a view closer to the perceived legislative intent behind Article 20(3). It took a wider definition of what constituted 'to be a witness' wherein it construed the expression to mean the 'furnishing of evidence'.⁴² The majority's suggestion that to be a witness must be limited to an oral or written statement of an accused person imparting personal knowledge of relevant facts, was considered to be a rather narrow elucidation. It was also proposed that the usage of 'to be a witness' as suggested by the majority would result in procurement of a large number of documents which may be of greater evidentiary value when contrasted with oral statements.⁴³ Concurring with *M.P. Sharma*, it said that- '... "to be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes.'⁴⁴

To this may be added several others modes of information as evidence wherein, even though the actual process of producing the information may not be the same as that of making an oral or written statement, the consequences are similar i.e. self-incrimination. This includes a letter written by a co-conspirator to the accused with reference to the conspiracy and a plan of the burgled house.⁴⁵ Such incriminating documents could also include records of travel and expense.

Strength of jurisprudence is best judged by how well it accommodates technology driven social change, represented, in the present case, by social media such as email-accounts, social networking sites and blogs, to name a few. Given the restricted meaning assigned to 'to be a witness' in *Oghad*, it is perceived by the author that it is not sufficiently robust to address issues arising out of technology driven social change such as the increasing role of

⁴¹ *Nandini Satpathy v. P.L. Dani*, 1978 2 SCC 424 (Supreme Court of India).

⁴² *Oghad*, AIR 1961 SC 1808 ¶ 24.

⁴³ *Oghad*, AIR 1961 SC 1808 ¶ 23.

⁴⁴ *M.P. Sharma*, AIR 1954 SC 300 ¶ 11.

⁴⁵ *Oghad*, AIR 1961 SC 1808 ¶ 27.

social media as an alter ego and its implications on the right against self-incrimination. This issue has been examined at some length in Part IV.

B. VULNERABILITY IN ACCEPTANCE OF EVIDENCE IN POLICE CUSTODY

Unlike in *M.P. Sharma*, the instant case has laid the law that there is no presumption that custodial statements have been extracted through compulsion. It says that:⁴⁶

“The mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement.”

A provision was, however, made for the accused person to show that while in police custody he was subjected to treatment that would lend itself to the inference of compulsion.⁴⁷ This provision is seen as not entirely mindful of the socio-political realities prevailing in India where the police and other investigating agencies have no independence from the executive. There is apparently no safeguard from a police state, and with the onus of proving compulsion on the accused person, *Oghad* may have taken a step back from the established case law till then. It is also seen to fly in the face of the historical and ethical rationale behind the right against self-incrimination which was to safeguard a citizen against the state's might. A comparison with the law in the United States of America on the subject is relevant.

After *Miranda v. Arizona*,⁴⁸ a safeguard was introduced in the US, creating a blanket prohibition on the admissibility of confessions without a knowing and voluntary waiver of the right against self-incrimination. A compulsory administration of a warning about a person's right to silence during custodial interrogations as well as obtaining a voluntary waiver of the prescribed rights, has become a pervasive feature in the U.S. criminal justice system.⁴⁹ The absence of such a warning and voluntary waiver leads to the presumption of compulsion with regard to the custodial statements, thereby rendering them inadmissible as evidence. This is in stark contrast with the position in India where there is no presumption of compulsion in respect of custodial statement except when proved by the accused.

⁴⁶ *Oghad*, AIR 1961 SC 1808 ¶ 15.

⁴⁷ *Oghad*, AIR 1961 SC 1808 ¶ 15.

⁴⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966). [“*Miranda*”]

⁴⁹ *Miranda*, 384 U.S. 436 (1966).

IV. THE CHANGING FACE OF SELF-INCRIMINATORY EVIDENCE: OGHAD AND SOCIAL MEDIA

This Part shall cover *Oghad* in the light of techno-sociological phenomena. The author shall juxtapose the majority and the minority judgments in *Oghad* to explain their positions while addressing the emerging issue of the role played by social media as a rich source of personal testimony by an accused.

Social media are web-based and mobile technologies that turn communication into an interactive dialogue in a variety of online fora, allowing the creation and exchange of user-generated content.⁵⁰ Social networking websites are the next generation in communications technology, providing a platform for multi-faceted communication between participating users. Social networking sites and email accounts form an integral part of the way the world communicates today. Facebook posts, comments, and photographs are a potentially rich source of evidence in criminal cases, as they offer a window into a suspect's thoughts that is rare outside of the pages of a diary.⁵¹

Facebook has said that it had 46 million monthly active users in India at the end of 2011, up by 132% from a year earlier.⁵² This number is expected to rise exponentially as access to the Internet rises in the country. In the past few years (in the West), Facebook has emerged as a fertile source of incriminating information from boastful or careless defendants who find in Facebook a great way to project their outlaw persona to the world.⁵³ An online account on a social networking website is a tempting source of evidence and it can provide prosecutors with a treasure trove of incriminating evidence.⁵⁴ In the Geetika Sharma murder case, the victim's brother said that the victim's Facebook account has been deactivated and alleged that the prime accused was behind it.⁵⁵ The day is not too far when Facebook will

⁵⁰ Andreas Kaplan and Michael Haenlein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53(1) BUSINESS HORIZONS 53, 59 (2010).

⁵¹ Caren Myers Morrison, *Passwords, Profiles and the Privilege against Self-Incrimination: Facebook and the Fifth Amendment*, 26 (Legal Studies Paper No. 2012-05), Georgia State University of Law, (2012).

⁵² Amol Sharma, *Facebook, Google to Stand Trial in India*, THE WALL STREET JOURNAL (March 13, 2012), available at <http://online.wsj.com/article/SB10001424052702304537904577277263704300998.html> (Last visited on October 14, 2013).

⁵³ Morrison, *supra* note 51, at 2.

⁵⁴ *Id.*, at 1.

⁵⁵ *Kanda had enough time to destroy evidence: Geetika's brother*, DECCAN HERALD (Aug. 18, 2012), available at: <http://www.deccanherald.com/content/272452/geetika-case-former-haryana-minister.html> (Last visited on Oct. 15, 2013).

become a significant source of testimony in law in India too. This chapter is only covers the situation where the law enforcement officials, in the absence of a 'friend' of an accused or sufficient information to subpoena the company directly, cannot have access to the online profile of the accused without the cooperation of the accused himself.

An investigating agency does not look at a controversy in isolation. The agency not only seeks to establish the facts of the case but also any information related to the accused in any fashion whatsoever. The advent of social media has led to the creation of a pool of personal information which for the accused can become self-incriminatory, if revealed. A Facebook user, through the means of his 'wall' and profile, tries to create his own world. He makes regular, entries just as in a journal or diary, along with images, video cum audio links and links to other web-pages. Over a period of time, the user's profile begins to reflect his thinking patterns, lifestyle choices, interests, places frequented, philosophical, religious and cultural leanings, network of friends and personality traits.

An example can help clarify the relation between the privilege against self-incrimination and Facebook evidence. An accused X could have been the last person to have been sighted on the murder site. If X's Facebook page reveals that he was in fact present at the murder site or close to the murder site, at the time of murder, this information could incriminate him. It is here where the nature of information available on Facebook becomes a bone of contention. When faced with something other than a declarative oral or written statement, the U.S. Supreme Court has defined a compelled act as 'testimonial,' if it 'explicitly or implicitly relates a factual assertion or discloses information.'⁵⁶ The Supreme Court has accepted 'physical or real evidence'⁵⁷ as long as it does not 'disclose the contents of his own mind'.⁵⁸

The author believes that the substantive information available on the Facebook page of an accused is akin to a snapshot of his mind. Allowing access to it is analogous to 'disclosing the contents of one's mind'.⁵⁹ By making inferences through social media accounts, investigators are able to derive knowledge through the mind of the accused, which otherwise is not available to the former. An individual who is compelled to give law enforcement access to her Facebook page is forced to engage in cognition for the benefit of

⁵⁶ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

⁵⁷ Schmerber v. California, 384 U.S. (1966) as cited in Morrison, *supra* note 51, at 11.

⁵⁸ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

⁵⁹ Doe v. United States, 487 U.S. 201 (1988) as cited in Morrison, *supra* note 51, at 11.

the state and to turn over the results of that mental process.⁶⁰ In addition, the accused does implicitly relate the factual assertions, 'I do have a Facebook page' and 'Here is how to access that Facebook page'; these admissions play a major role in the light of the controversies regarding the authenticity of Facebook profiles.⁶¹ One of the arguments behind the privilege against self-incrimination centers upon the supposed cruelty of subjecting the accused to the 'trilemma of perjury, self-accusation or contempt'.⁶² A subpoena to give access to Facebook content places the accused in such a 'cruel trilemma' as the accused is placed in a position of disclosing the access to the content on his Facebook page, denying that he has a Facebook page, or refusing to answer.⁶³

According to the author, if *Oghad* were to address the interaction between information available on social media accounts and what constitutes 'testimony', content such as that available on Facebook would be dislodged from the protection of Article 20(3) in the assessment of the narrow judgment given by the majority judgment. Under the majority judgment, it can be easily argued that social media accounts of an accused do not enjoy protection under Article 20(3). It is based on the majority view that 'The giving of personal testimony must depend upon his volition.'⁶⁴ Facebook content will be read as neither oral nor written testimony as it cannot be placed under the volitional deposition of the accused to speak or write. It was also held that, 'The accused can make any statement ... an accused may have documentary evidence in his possession which may throw some light on the controversy ... if it is a document which is not his statement conveying his personal knowledge relating to the charge against him ... which may throw light on any of the points in controversy, he may be called upon by the court to produce that document...'⁶⁵ Any document that meets the aforementioned criterion can be asked to be produced before the Court. Facebook content shall fall under the production of such a document that does not impart personal knowledge in respect of relevant facts.

The majority faction in *Oghad* also held that 'In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within

⁶⁰ Ronald J. Allen and M. Kristin Mace, *The Self-Incrimination Clause explained and its future predicted*, 94(1) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 243, 267-68, 272 (2004).

⁶¹ Morrison, *supra* note 51, at 4.

⁶² Amar and Lettow, *supra* note 21, at 311.

⁶³ Morrison, *supra* note 51, at 13.

⁶⁴ *Oghad*, AIR 1961 SC 1808 ¶ 11.

⁶⁵ *Oghad*, AIR 1961 SC 1808 ¶ 10.

the prohibition of the constitutional provision, it must be of such a character that by itself, it should have the tendency of incriminating the accused, if not of actually doing so.⁶⁶ The web presence of accused can be ruled out of the scope of Article 20(3) as by itself, such information does have the tendency to incriminate the accused.

However, as seen according to the minority judgment, complete protection would be accorded to the web presence of an accused. The minority understood ‘to be a witness’ as ‘to furnish evidence’, when it stated that ‘There can be no doubt that the ordinary user of English words, the word “witness” is always associated with the evidence, so that to say that to be a witness is to furnish evidence is really to keep to the natural meaning of the words’.⁶⁷ The minority delved into the purpose of evidence to establish that ‘to be evidence, the oral statement or a statement contained in a document, shall have the tendency to prove a fact—whether it is a fact in issue or a relevant fact.’⁶⁸ By understanding the expression ‘to be a witness’ in its natural sense, the minority helped establish how documents, though not transmitting the accused’s personal knowledge could, in fact, have a tendency to make probable the existence of a fact in issue or a relevant fact, thereby furnishing evidence against himself.

Section 11 of the Indian Evidence Act embodies the facts which otherwise irrelevant become relevant. It states:

“Facts not otherwise relevant are relevant:

1. *if they are inconsistent with any fact in issue or relevant fact;*
2. *if, by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.”*

As stated earlier, X’s Facebook page may reveal that he was present at the murder site at the time of murder. The fact that he was at the murder site, at the time of murder, makes it highly probable he could have, in fact, committed the crime. Thus, this irrelevant fact becomes a relevant one as it has by itself made the existence of a fact in issue highly probable. Therefore, by allowing the trial agency access to one’s Facebook page, the accused is in fact furnishing evidence against himself.

The minority is closer to the spirit and intent of Article 20(3) as it comprehensively explains that the dangers that abound in the absence of the privilege against self-

⁶⁶ *Oghad*, AIR 1961 SC 1808 ¶ 12.

⁶⁷ *Oghad*, AIR 1961 SC 1808 ¶ 25.

⁶⁸ *Oghad*, AIR 1961 SC 1808 ¶ 28.

incrimination exist 'whether the evidence which the accused is compelled to furnish is in the form of oral or written statements about his own knowledge or in the shape of documents or things which though not transmitting his knowledge of the accused person directly helps the court to come to a conclusion against him.'⁶⁹ The minority states that the production of such documents or things does amount to 'being a witness' as the giving of the same amounts to furnishing evidence and hence, the person producing of the same is being a witness. The advent of social media and web presence is thrown into sharp relief by the depth of the minority judgment due to the intricate and intimate personal information available which acts as rich source of testimony and can incriminate a person falsely. Thus, giving access to one 'social media accounts does amount to 'being a witness'.

Facebook content, under the minority judgement, will make Article 20(3) spring into action as Facebook content is of the nature of a document that may not provide personal knowledge with respect to the facts in question but help make probable a fact in issue or a relevant fact, thereby furnishing evidence against the accused and making him a 'witness'. A subpoena to access the Facebook page of the accused necessarily means compulsion.⁷⁰ As all three ingredients of Article 20(3) co-exist, protection of Article 20(3) can be claimed. In the author's opinion, Facebook content closes gaps between other kinds of evidence. Information on social media accounts 'furnish a new link in the chain of evidence'⁷¹ and help the investigators discover fresh facts or materials that could be relevant to the on-going investigation.⁷²

The author's position is that the minority undoubtedly protects the substantive information available on social media accounts. The majority judgment has circumscribed the scope of Article 20(3) whereas the minority has taken a deeper view behind the jurisprudence underlying Article 20(3). The principles upheld by the minority decision which go into great detail are sound. It is a far-reaching judgment as it caters for new developments like social media and techno-sociological developments and perhaps even more developments in the future. The majority seems to have taken a minimalistic stance where the accused has been accorded adequate protection, yet the emphasis has been laid on ensuring that the investigation process is not unduly hampered. The minority, on the

⁶⁹ *Oghad*, AIR 1961 SC 1808 ¶ 30.

⁷⁰ *Morrison*, *supra* note 51, at 11.

⁷¹ *Selvi*, 2010 7 SCC 263.

⁷² *Selvi*, 2010 7 SCC 263.

contrary, zealously protects the spirit of Article 20(3) by analyzing the doctrine in much more profundity. It is well-recognized fact social media sites are a storehouse of personal information and inclinations. One's entire personality is etched across the pages of social networking sites. In their efforts to vet applicants, some companies and government agencies are going beyond merely glancing at a person's social networking profiles and instead asking to log in as the user to have a look around.⁷³ This speaks volumes about the notion prevalent amongst employers that one's social media accounts are a storehouse of sensitive and personal information which can be used to assess candidature.

Facebook is a tantalizing prize for prosecutors. It gives an insight, even if it is only in the form of the highly stylized, self-dramatizing Facebook persona, into the psyche of the defendant.⁷⁴ The substantive content available on social networking sites is a rich source of testimony that easily fits the purpose of Article 20(3) as meant by the makers of the constitution, which was not envisioned by the majority in *Oghad*. The minority, however recognized this principle in its true sense and hence, is better suited to deal with the changing nature of self-incriminatory evidence with changes in technology.

V. CONCLUSION

Oghad had a far reaching impact in evolving the case law on the right against self-incrimination as enshrined in Article 20(3) of the Indian constitution. It was made amidst a state of ambiguity in the existing case law laid down by *M.P. Sharma*. In the prevailing state, judgements under Article 20(3) tended to take a broad view of the evidence that was protected. As a result, physical evidence like handwriting samples, finger prints, foot prints, thumbprints and palm prints were also deemed protected. This unduly tilted the balance against the process of investigation. A second issue was whether custodial statements given by the accused imputed compulsion, plainly by the fact that they had been given under police custody. *Oghad* had a seminal impact on the evolution of the relevant case law. Much of it was positive, but in the view of the author, it did have a negative bearing as well.

The positive impact was in the laying down of the line between evidence that was protected under Article 20(3) and that which was not. It kept purely forensic evidence, which

⁷³ Manuel Valdes, *Job seekers getting asked for Facebook passwords*, ASSOCIATED PRESS (Mar 20, 2012), available at <http://finance.yahoo.com/news/job-seekers-getting-asked-facebook-080920368.html> (Last visited on Oct.15, 2013).

⁷⁴ Morrison, *supra* note 51, at 25.

is not in itself incriminatory, beyond the pale of protection. Only oral or written testimonial based on personal knowledge and communicated through a positive act of volition was accorded protection from compulsion. This settled the ambiguity visited upon in past cases. Its stress on 'act of volition' also helped developed case law in *Selvi* on evidence collection methods based on narco-analysis, polygraph tests and BEAP tests. In the view of the author, a significant negative impact lay in the holding that statements provided by an accused under police custody would not be considered as given under compulsion and therefore be admissible unless compulsion is proven by the accused. This has grave potential of abuse by the state machinery, something that Article 20(3) purports to provide a safeguard against. However, the primary negative consequence follows from the redefinition of the scope of the phrase 'to be a witness' in Article 20(3) so as to include only oral and written testimony based on the accused's personal knowledge. This is perceived to narrow the scope of the Article by excluding a range of evidence which meets the criteria of self-incrimination. Forensic and biometric evidence have been excluded from the scope of Article 20(3) as they are not intrinsically incriminatory. Certain documentary evidence also matches the aforementioned criterion but the author believes that rightly excluding such evidence unequivocally may be a case of throwing the baby out with the bathwater.

A sweeping impact of the restrictive definition of 'to be a witness' in *Oghad* is that the case law on self-incrimination as it stands today is not explicitly equipped to address issues arising out of technology driven social change such as the role of social media as a source of personal testimony. A case in point is Section 69 of the Information Technology Act, 2000, which allows the government to force a person to decrypt information, and is prima facie violative of Article 20(3) when applied to an accused.⁷⁵ The narrow definition of 'testimonial' in *Oghad*, however, renders the constitutional provision ill equipped to realise its ends. In conclusion, the author finds it apt to quote Justice Jagannadhadas in *M.P. Sharma*, "...it is a recognized doctrine that when appropriate a constitutional provision has to be liberally construed so as to advance the intendment thereof and to prevent its circumvention."⁷⁶

⁷⁵ Pranesh Prakash, *Practice what you preach*, INDIAN EXPRESS (Apr 26, 2012), available at <http://www.indianexpress.com/news/practise-what-you-preach/941491/> (Last visited on Oct.15, 2013).

⁷⁶ *M.P. Sharma*, AIR 1954 SC 300 ¶ 10.

**TO BAN OR BALANCE: CHILDREN AS 'HANDS' AND
POPULAR CINEMA**

NIDHU SHRIVASTAVA*

Aiming to trace the commonly accepted views on child labour in the country, this paper chooses popular cinema as data set for studying society's perception, utilising the educative power of popular Hindi cinema. The central question to be addressed is whether the problem of child labour in the country can be solved by imposing a blanket ban on the practice or just by balancing the interest of children with that of societal ground realities and regulating the same. In light of popular perceptions, the paper evaluates the relevant provisions of The Child Labour (Prohibition and Regulation) Act, 1986, and The Child and Adolescent Labour (Prohibition and Regulation) Amendment Bill, 2012, to see if a complete ban on the practice of child labour is justified or not, using the Theory of Multiple Equilibria. The researcher, however, wishes to leave the question of a possible alternative policy framework open and hence the same is not covered by this paper.

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1. INTRODUCTION

India is considered to be one of the most regulated economies of the world, with power concentrated in the hands of a few.¹ Owing to the multipart social, political and economic environment, India suffers from an inequity in wealth and welfare distribution and effects thereof have become an accepted norm. Even though the country has secured an impressive growth, the society is still experiencing high levels of poverty and unemployment,² because of this uneven distribution. As a result, an overwhelming majority of children in India have to work for them and their families to subsist.³ The issue of child labour involves a question of survival, and thus requires the formulation of a multi-facet policy which India lacks today.

The principal objective of this study is to contribute towards an analytical basis for answering the policy question of whether and to what extent a partial ban on child labour through the Child Labour (Prohibition and Regulation) Act, 1986⁴ is helpful in diminution of the practice. The study attempts to answer this by considering whether the primary theoretical basis on which the 1986 Act has been formulated is correct and also by determining, if given a choice between a blanket ban and a partial ban on child labour, which would be more suitable in India in the

¹ See *India is most over-regulated country in the world: Survey*, THE ECONOMICS TIMES (January 27, 2011), available at http://articles.economictimes.indiatimes.com/2011-01-27/news/28432561_1_survey-economic-risk-consultancy-bandwidth (The Political and Economic Risk Consultancy Ltd., Hong Kong conducted a survey in 2011 wherein India was ranked number 'over-regulated' economy in the world).

² THE CENTRAL INTELLIGENCE AGENCY WORLD FACT BOOK, (2012) [India has been ranked 72 in the CIA Poverty Index, with a poverty rate of 29.8%; and 93 in the CIA Unemployment Index, with an unemployment rate of 9.8% for the year 2012].

³ Aishwarya Padmanabhan, *India's Child Labour Policies: Its Implementation within the ILO Framework with emphasis on Conventions 138 and 182 and the Multilateral Framework with emphasis on the Social Clause of the WTO*, (2010), available at <http://www.inter-disciplinary.net/wp-content/uploads/2010/06/Padmanabhan-paper.pdf>.

⁴ The Child Labour (Prohibition and Regulation) Act, 1986

context of The Child and Adolescent Labour (Prohibition and Regulation) Amendment Bill, 2012.⁵

The researcher delves into these questions, taking the help of Kaushik Basu's Theory of Multiple Equilibria⁶ to analyse the relevant policy decisions from an economic angle.

A. HYPOTHESIS PROPOSED AND ASSUMPTIONS MADE

The paper proposes a general hypothesis that considering the socio-economic environment in India, a blanket ban on the practice of child labour is unrealistic. However, a stricter regulation as compared to the 1986 Act is welcome.

Before analysing the issue, the paper makes three assumptions: first, child labour is a menace and it is desirable to take steps to eliminate it; second, there are various reasons for child labour like poverty, unemployment, lack of social security etc.; and third, that the policies made by the legislators are implemented completely. Hence, discussion on policy is in isolation to the issue of implementation.

B. CHOICE OF DATA SET

Since Bollywood cinema is considered to be the most powerful means to make and break stereotypes, the paper uses the edifying potential of Indian cinema to formulate the factual basis for the study. Both patent and latent issues involved in a film hold importance and can affect the thought process of the viewers. The author has chosen four feature films - 'Salaam Bombay', 'I Am Kalaam', 'Stanley ka Dabba' and 'Slumdog Millionaire', as the major data set for the purpose. However, relevant instances from other cinematographic work as a part of the data set have also been referred to.

The rationale for zeroing in on these four films is that all these films have very strong central lead characters and their commercial nature attracts a large viewership. Also, these films bring out the issues involved in child labour in a sensitive and novel manner.

⁵ The Child and Adolescent Labour (Prohibition and Regulation) Amendment Bill (introduced in Rajya Sabha on December 4, 2012).

⁶ Kaushik Basu and Pham Hoang Van, *The Economics of Child Labor*, 88(3) THE AMERICAN ECONOMIC REVIEW 412-427, (1998).

While *Salaam Bombay*⁷ (1988) portrays the seedy, dark underbelly of the city of Bombay in a realistic manner and presents a stark picture of the lives of the city's street children from the perspective of the protagonist, Krishna (Shafiq Syed), *I am Kalaam*⁸ (2011) takes one through the story of Chhotu/Kalaam (Harsh Mayar) and how he was destined, after being hit by famine, to work in a dhaba run by Bhaati (Gulshan Grover). Krishna works at a tea stall in Bombay located in the neighbourhood of a brothel whereas Chhotu keeps his zeal to learn alive after getting inspired by Dr. A. P. J. Abdul Kalaam Azad.

Amole Gupte's *Stanley ka Dabba* (2011) showcases the struggle for self-respect of a child, Stanley (Partho Gupte), while he works in a family establishment. It tracks his journey with the greedy Hindi teacher (Amole Gupte) who hawks on students' tiffin boxes, an unimaginative science teacher (Divya Jagdale) who puts an end to use of innovation by students and a loving English teacher (Divya Dutta).⁹ Danny Boyle's *Slumdog Millionaire* (2008) presents the life of young Jamal Malik (Dev Patel), hailing from the slums of Juhu, in a rags to riches story.¹⁰ The paper also borrows from relevant instances of other Bollywood feature films as well (*Break ke Baad* (2010), *Traffic Signal* (2007), *Boot Polish* (1954), *Deewar* (1975), *Chillar*

⁷ Mirabi Films, *SALAAM BOMBAY*, 1988. *Salaam Bombay* is a story of day-to-day life happenings of the characters and their fight for survival. The film touches upon the issues of inadequate Government infrastructure to rehabilitate the street children and insensitivity of law enforcement agencies, when both Krishna and Manju are caught and put into child care centres. The film presents a depressing picture of loss of innocence of childhood, living in the environs of prostitutes and finding friends in drug-peddlers.

⁸ Smile Foundation, *I AM KALAAM*, 2010. The story navigates through the life of *Kalaam*, from the time he starts working at the *dhaba* to the time when he decides to bear the cost of his own education and starts calling himself '*Kalaam*'. He finds a friend in royalty, *Kunwar Ranvijay* (Hussan Saad), to whom he teaches Hindi and learns English from. The film portrays rampant problems of poverty and illiteracy with ease. It also presents a strong metaphor to Dr. Kalaam, with a ray of hope for change.

⁹ Fox STAR Studios, *STANLEY KA DABBA*, 2011.

¹⁰ Fox Searchlight Pictures, *SLUMDOG MILLIONAIRE*, 2008. The movie shows how at the age of eight years, *Jamal* (Ayush Mahesh Khedekar) was forced to beg after being trapped by Maman (Ankur Vikal). He flees with his brother, *Salim* (Azharuddin Mohammed Ismail), and they are compelled to keep shifting jobs, from being shoe thieves to waiters. While *Salim* chooses the life of a gangster after growing up, *Jamal* becomes an assistant in a call centre. He appears on a reality TV show '*Who wants to be a Millionaire?*' and wins it. The film portrays the struggle of life of a slum boy to survive.

Party (2011) and few other short films) to support the arguments made and to get a better hold of the common perceptions on the subject of child labour.

Since, the data set of popular cinema which the author has chosen deals majorly with children working in different sectors, be it a roadside dhaba, a traffic signal, a tea stall, or independently as shoe shiners, the paper will use the term 'child labour' to refer to any child working, whether for money or not. This paper tries to deal with the two separate categories of 'child labour' and 'child work' as a whole, as one of the major aims of the work is to evaluate the viability of the option of withdrawing all children from the market.

II. IF I HAVE ENOUGH MONEY TO EAT, I AM GOOD

A. THE COMMON ACCEPTANCE OF CHILD LABOUR

One example to demonstrate the educating potential of cinema is the case of *Mahesh Bhatt v. Union of India*,¹¹ in which the unwarranted depiction of smoking in Bollywood films was disallowed after a WHO Report was published in 2003¹² arguing that smoking on screen is a form of glamorisation which further encourages the youth to pick up the unhealthy habit. On this rationale, the Delhi High Court cautioned film makers against unwarranted use of smoking on screen.

Even though child labour is a detested concept in a utopian world, the common man finds it tolerable and acceptable in reality, which can be traced throughout popular cinema. Bollywood's portrayal of child labour shows the apathy faced by child labour and raises important issues which go unnoticed.

Salaam Bombay, directorial venture of Mira Nair, navigates through the life of the protagonist, Krishna, a 12 year old boy who does a variety of menial works in Mumbai. With child labour and the struggle for survival as background issues, the film presents a grim picture of the life of the street children of Bombay, working merely for Rs. 5/day as chaiwalas or cleaners of chicken sheds or waiters at weddings or singing on streets. But the harrowing truth that the film softly tries to put forward is that child labour has become a societal more; it is an accepted way of life and hence people don't try to change it. Child labour is not seen as a crisis at all. Similar is the

¹¹ *Mahesh Bhatt v. Union of India*, 156 (2009) DLT 725 (High Court of Delhi).

¹² WHO, *'Bollywood': Victim or ally?*, available at: <http://www.who.int/tobacco/media/en/bollywood-exesum.pdf>.

stand of Nila Madhab Panda, the director of *I am Kalaam*, where the presence of the protagonist (Chhotu/Kalaam) working at a small dhaba in Rajasthan does not bother the visitors at all, even when they cannot miss his keen and optimistic attitude to learn and grow. This indicates how the people at large do not find the concept of child labour incongruous.¹³

Bollywood cinema has been showing this reality through different films in different genres. It is also interesting to note that these characters have gained a lot of popularity through the ages. Modern cinema also brings out cases where cosmopolitan youngsters approve the idea of a boy working at a traffic signal in *Break Ke Baad*; or how a progressive residential society in Mumbai shoulders a child named 'Fatka' washing their cars for money in *Chillar Party*. *Traffic Signal*, by Madhur Bhandarkar, takes no different view on the issue; it presents a megastore where both children and adults work as salesmen. The elites of the society, who passes through the signals, prefer ignoring the existence of the children selling variety of items there.

This popular societal approach of accepting child labour and its invisibility as a part of routine life may be supplemented by a study conducted by Hanumantha Rao and M. Madhusudhana Rao. The study shows that in India, the practice of child labour is highly desirable. Employers argue that they employ children to provide livelihood or to supplement their family income.¹⁴ Also, the children themselves are inclined to work in many cases as they know that they have to do a similar kind of work their entire life. Most of the employers also prefer this kind of labour because it is easily available and involves low maintenance cost.¹⁵

Desirability of child labour is also demonstrated on the part of the State and courts as they give a tacit consent to the practice over time. An instance of this can be found when the State of Karnataka preferred an amendment to the Minimum Wages

¹³ K. Hanumantha Rao and M. Madhusudhana Rao, *Employers' View of Child Labour*, 34(1) INDIAN JOURNAL OF INDUSTRIAL RELATIONS 15, (1998). (In a study conducted, only 44 out of 125 employers found child labour to be undesirable. Employers give various reasons why children should work. Employers suggested that children have low ego, and high discipline; can be controlled and coaxed and do demeaning jobs. Children are usually paid low wages for equal amount of work, and they are highly active, can be easily removed and are not entitled for retirement benefits).

¹⁴ *Id.*, at 18.

¹⁵ *Id.* [The study targeted 125 employers from 5 different unorganised sectors in Vishakhapatnam].

Act to lay down the remuneration due to a child domestic help rather than taking steps to discourage it. A similar desirability was witnessed when in the Child Labour Case,¹⁶ Kania J. and Ranganathan J. propounded the Nimble Finger Theory.¹⁷

B. GAME OF EQUILIBRIUM

Explaining this insensitivity towards child labour, Kaushik Basu argues that since child labour for us is a matter of ‘acquired morality,’ derived from what we do or used to do, we find it acceptable.¹⁸ The extent of acceptance though, may differ because the conception and perimeter of morality changes from society to society. As a solution, Basu suggests breaking this customary practise of child labour by bringing in a policy that bans child labour in toto. This may renovate acquired morality into a customary practice, wherein even if the policy is revoked subsequently, children would not be sent to work, because of the inherent immorality involved.¹⁹

Basu argues that for this renovation, an inclusive ban on child labour is required. Child labour takes birth out of a vicious cycle of poverty. It is usually a question of survival for poor families, adding to the pool of workers available in the market, hence shrinking the wage rates. And when these children grow up, they also prefer to send their children to work and not school²⁰, creating an educational impasse which adds onto the vicious cycle.²¹ For employers who pay low wages and derive more work, investing in new technology is disincentivized,²² creating a

¹⁶ M.C. Mehta v. State of Tamil Nadu, AIR 1991 SC 417 (Supreme Court of India). [Child Labour case I]

¹⁷ [The Government has fixed Rs. 150 per month for washing utensils and Rs. 1,600 per month for washing utensils, clothes, housekeeping and taking care of children. However, the notification does not hold good today because of the 2006 amendment of the 1986 Act. The court in Child Labour Case I, AIR 1991 SC 417, ¶ 7 gave a tacit consent to the idea of child labour, propounding the Nimble Finger Theory, stating “*We take note of the fact that the tender hands of the young workers are more suited to sorting out the manufactured product and process it for the purposes of packing*”]; See Bachpan Bachao v. Union of India, WP (Crl.) No. 82 of 2009 December 24, 2010 (A.K. Sikri and Ajit Bharihoke, JJ.) (High Court of Delhi).

¹⁸ Basu and Van, *supra* note 6.

¹⁹ *Id.*, at 422.

²⁰ Bellettini Giorgio, *et. al.*, *Child Labour and Resistance to Change*, 72(287) *ECONOMICA* 397, (2005).

²¹ Basu and Van, *supra* note 6, at 413.

²² International Labour Organization, *The End Of Child Labour: Within Reach*, (2006), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf>.

situation of technical impasse.²³ This situation is considered as equilibrium in the society, as it is catering to their immediate needs.²⁴

In this backdrop, it is interesting that Mira Nair's representation of street children, poverty, and prostitution cannot be limited only to Bombay, but can be extended to any place in the world. However, in the Indian context, the film is detached from reality as usually parents do not abandon their children but consider them as an asset to the family as their labour contributes to the total income of the family²⁵; as is shown in *I am Kalaam*. In India, the issue of survival becomes a big reason for the propagation of the practice of child labour. *Deewar* shows a young boy working for feeding and looking after his younger sister; a similar picture is shown in *Judwaa* where the need is to feed an infant girl.

Why this boy works in a factory? You see, it is a question of survival. Factories give quick returns. Parents should not be forced to send their children to school when we are not able to provide them employment. Children are economic assets to the poor.²⁶

But, in any society, an equilibrium that is achieved by making children toil is not desirable. To change this, Basu proposes a policy to withdraw all the children from the market so as to create a labour deficit. This deficit, will lead to a hike in labour prices for adults.²⁷ Assuming that adult labour is can be substituted for child labour²⁸, the wages of adult labour would rise, increasing the family income in total.²⁹ Also, less supply puts labourers in the driving seat resulting in better negotiations and lesser exploitation.

This position can be explained by taking a very simple example, where a family (father, mother and two children) requires fifty units of money for its monthly

²³ Bellettini, *supra* note 21, at 407.

²⁴ Basu and Van, *supra* note 6, at 417-419.

²⁵ Martha Nussbaum, *Education for Profit, Education for Freedom*, THE HEBREW UNIVERSITY OF JERUSALEM (December 16, 2007), available at http://auroraforum.stanford.edu/files/essays/Nussbaum_Educ_for_Profit_Freedom.pdf.

²⁶ *Id.*, at 2.

²⁷ Basu also argues, "*Since economically well-off families do not send their children to work, a gross rise in the nation's prosperity may lead to decline in instances of child labour, even in absence on any law banning child labour.*"

²⁸ Basu and Van, *supra* note 6, at 416 (Basu refers to this phenomenon as the *Substitution Axiom*).

²⁹ *Id.* (Basu refers to this phenomenon as the *Luxury Axiom*).

expenditure on basic necessities. In a society where child labour is partially allowed, a part of the market would be occupied by the children, assuming that from the prohibited industries, all the children are effectively withdrawn. If all the adults and children are able to find some kind of employment, all of them contribute to the family income. Say, both the adults of the family earn thirty units monthly collectively and children twenty units, fulfilling the need of required family expenditure of fifty units. Here the desirability of employers to employ children, as mentioned earlier instead of adults, also plays a very important role. According to the Theory of Multiple Equilibria, this is also an equilibrium point, as family requirements are being met. Even in case of a street/orphan child, if his monthly expenditure is 50 units (say), he has to earn it himself, hence, reaching at point of equilibrium as well, where his demand is meeting supply.

<i>Wages A/C</i>	<i>Child</i>	<i>Child</i>	<i>Total Expenditure</i>
<i>Adult/ State</i>	30, 20	0, 50	50
<i>Adult/ State</i>	50, 0	40, 10	50

Further presuming that the Government comes with a stricter policy on child labour and withdraws all the children from the market, then, assuming a 100% implementation, the market labour force, which earlier consisted of both adults and children, will now consist only of adults. This will create a space for more adults to be accommodated in place of withdrawn children, resulting in rise in the price for labour due to an increase in demand caused by lack of labour available in the market at a particular point of time and space. Due to these market forces, the contribution of children would be zero and that of adults will get hiked to fifty, fulfilling the need of total expenditure and cutting the need for children to work. In case of street children, the place of adults is taken over by the State, who, with the increase in revenue with

increase in wages and employment, would provide the child with expenditure for basic needs.

If such a policy of ban on child labour is coupled with education and social security provisions, especially in developing countries which are not ready for direct measure of child labour, the delivered results could be surprising.³⁰ The best out of all is to ensure compulsory education for all, which will keep in check the hours, nature and conditions of work.³¹ Once the ban is imposed and education is made compulsory with quality improvements, the demand for education will rise and supply of child labour to market will automatically fall. In this setting, where family income is rising and parents are sending their children to schools, those who don't will face a social disapproval, bringing a new equilibrium where children go to school and adults work. Hence the equilibrium is shifted from children working when wages of the adults are low to children not working when wages of adults increase.³² Sociologically, the second equilibrium point is most desirable as globally efforts are being made to bring down the number of child labourers.

Despite the common acceptance of the phenomenon of child labour in the society, the practise is not desirable from an international perspective. Global efforts are being made to curb the menace of child abuse, and a number of organisations, both governmental and non-governmental, are at work. Shifting the equilibrium of the society by managing a higher wages for the adult labour and withdrawing children from the market, may, to some extent, contribute in reducing child labour in the society.

³⁰ International Labour Organization, *supra* note 23, at 19, 21, 65, 86-87.

³¹ Kiran Bhatta, *Child Labour: Breaking the Vicious Cycle*, 31(7) ECONOMIC AND POLITICAL WEEKLY 385, (1996). (*Historical comparisons with Sri Lanka, Vietnam, Tanzania, Uganda, Zaire, Burma, Kenya, and China' show that even in developing countries the principle of compulsory education, whether sponsored by the state or a religious or social group, can be successfully adopted, with corresponding decreases in child labour*).

³² Basu and Van, *supra* note 6, at 413.

III. BANNING OR BALANCING?

A. WELL BEGUN IS HALF DONE?: DILEMMAS OF CHILD LABOUR

(PROHIBITION AND REGULATION) ACT, 1986

Presently, the Child Labour (Prohibition and Regulation) Act, 1986, prohibits employment of any child below fourteen years of age in a hazardous industry.³³

However, the Act also creates exemptions to this general clause. Any workshop carried on by the owner with the aid of his family or any training school run or established or supported financially by the Government, are out of the purview of the general clause under Section 3 of the Act. The issue here is that workshops which are otherwise considered as hazardous and where the employment of children is prohibited, if qualify this exemption, fall outside the scope of the Act.³⁴ If an employer's children are working beside him, it is enough to take the business outside the purview of the Act.³⁵ Article 24 of the Indian Constitution however seems to be conflicting with this provision of the Act, as it prohibits any kind of hazardous employment of children below the age of fourteen years, without any exception.

The Act creates a milieu of partial ban by its application only to minority of children labouring in the country. Partial prohibition of child labour is argued to make protection of children even more difficult. If on paper, children are not working presumably in a particular establishment; in law little can be done to improve it excluding a set of child labours from trade unions, employment benefits and regulation of conditions like hours of work and levels of wages.³⁶ In most developing

³³ See Sec. 3, Child Labour (Prohibition and Regulation) Act, 1986.

³⁴ Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21(2) ARIZONA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 683, (2004). (*In Varanasi, there are two hundred government-run carpet weaving training centres. These centres can employ child labourers, but private businesses or even private training centres are prohibited from doing so.*)

³⁵ Sec. 3, Child Labour (Prohibition and Regulation) Act, 1986: *Prohibition of employment of children in certain occupations and processes*: No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on: Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

³⁶ Umesh Sahoo, *Child Labour and Legislation*, 25(46) ECONOMIC AND POLITICAL WEEKLY 2530 (November 17, 1990).

countries, the minimum legal working age is fourteen years and any child below that age does not get the legal status of worker.³⁷ Thus, such a law seems to be reinforcing protecting the vulnerability of child. However, the laws today have neither been able to eliminate child labour nor have they been able to provide the status to children of workers which has contributed to their exploitation. Evidence of the negative effects of such a stipulation can easily be traced from Karandighi Beedi Binding Factory, where child labourers were working in the disguise of family worker, who could neither be detected nor rehabilitated.³⁸ Even the courts have recognised the fact that small scale industries, household works and agriculture are the sectors which give birth to undetectable child labour.³⁹

Even as per Basu's argument the idea of a partial ban in many ways works to the disadvantage of the subjects of the Act. The protagonist, Stanley, in the film Stanley ka Dabba is an orphan who works at a family-run hotel. But he cannot be benefitted under the Act as he is not a formal subject of the Act. Children working in family occupations or households or agriculture are also left uncovered. The rehabilitation and welfare programmes are targeted for only those children withdrawn from the industries notified under the Act.

Consequently, the effect of a partial ban is to prioritise a set of child labourers over others who also require policy and programmatic support from the Government. This does not measure up to a logical solution to the problem. A partial ban actually makes the situation worse as the children who could have worked in the regular organised sector are forced to turn to secretly working in inhumane conditions.⁴⁰ This legislative stand shows that child labour today in some forms is acceptable to us and has not become a customary aversion yet.⁴¹ Another issue of

³⁷ Augendra Bhukuth, *Defining Child Labour: A Controversial Debate*, 18(3) DEVELOPMENT IN PRACTICE 392, (2008).

³⁸ Chandan Roy and Jiten Barman, *Child Labour & Inclusive Education in Backward Districts of India*, 4(4) INTERNATIONAL JOURNAL OF EDUCATION 311, (2012).

³⁹ See *Mangalore Ganesh Beedi Works v. Union of India*, AIR 1974 SC 1832, ¶ 7 (Supreme Court of India).

⁴⁰ The report of the Second National Commission on Labour, 2002, available at: <http://labour.nic.in>. (The Second National Labour Commission Report suggested widening the definition of child labour to solve the problem; to *All out of school children must be treated as child labourers or as those who have the potential to become child labourers...*)

⁴¹ This is evident by the stands of legislations and policies on child labour. For example, as already mentioned the Second Labour Law Commission Report provides for a wider definition of child

concern is that since the wages of children are very less in most cases,⁴² their employment does not cater to total expenditure need of the family and further, the resulting abundance of labour in the market leads to depression of the wages of adults.

**B. ILLUSIONARY YET SPOT ON: THE CHILD AND ADOLESCENT LABOUR
(PROHIBITION AND REGULATION) AMENDMENT BILL, 2012**

As an alternative, the Child Labour (Prohibition and Regulation) Amendment Bill, 2012, aims at a blanket ban on employment of children below fourteen years of age in any hazardous/non-hazardous industries.⁴³ The Bill aims at banning child⁴⁴ labour (below fourteen years) completely and regulating adolescent labour (below eighteen years).⁴⁵ It is not contested that this Bill covers a wider ambit of child labour than the 1986 Act, but even this cannot be considered as a law effecting a complete ban on child labour as it allows children to work in family occupations, home-based work, training workshops and forest gathering, allowing undetectable labour to flourish. The Bill thus excludes a certain set of children from the purview of the Act, not adhering to a 100 per cent ban policy which could allow scope for misuse.

But in a developing country like India, the Bill finds assent from the ILO Minimum Age Convention, 1973,⁴⁶ one of the fundamental documents on child labour, which allows developing countries to enact a child labour prohibition Act banning child labour below the age of compulsory schooling⁴⁷ and excludes family

labour, and not prohibiting the same; Sec. 3 of the Minimum Wages Act, 1948 states that the wages of children and adults may differ, hence, allowing the payment of a lower wage to a child labour for the same work as that of the adult].

⁴²United Nations Children Fund, *Children Pay High Price for Cheap Labour, Child Rights*, THE PROGRESS OF NATIONS, available at <http://www.unicef.org/pon95/chil0016.html>.

⁴³ The long title of the Bill reads “*An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes and the matters connected therewith or incidental thereto.*”

⁴⁴ Cl. 2(ii) of the Bill defines ‘child’ as “*A person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009, whichever is more*”; A person from 6 to 14 years of age is the subject matter of RTE Act under Section 2.

⁴⁶ Convention Concerning Minimum Age for Admission to Employment, Minimum Age Convention, No. 138 (Adopted on June 26, 1973).

⁴⁷ See Art. 2(3) and Art. 2(4) of the Convention (The age of compulsory schooling in India is upto 14 years).

and small-scale holdings producing for local consumption and irregularly employing hired workers.⁴⁸ Also, even international organisations tolerate the idea of light work⁴⁹ by children, to the extent that it does not compromise their physical and mental health; especially in the case of developing countries that are finding it untenable to completely ban child labour.

This stand of the Bill addresses the inbuilt limitations of Basu's theory. First, he only talks of children living in a family and working to supplement family income and not street or orphan children who work for their own survival. Second, his theory presupposes that all parents do not want to send their children to work when given a choice, but they are forced to do it due to poverty and unemployment. He does not take into consideration the socio-economic forces that compel parents to utilize their children as economic assets in order to survive. The societal norms which accept child labour as a customary practise have also been ignored. Third, he considers poverty as the major contributor to the practice of child labour, when there are contrary examples and studies available.⁵⁰

It is not denied that there is a strong and direct connection between poverty and child labour, but poverty is not the only reason. Films like *I Am Kalaam*, where the protagonist Kalaam was left at a dhaba for him to earn and send money to family after being hit by famine, provides other reasons for child labour. A similar case has been made out in *Traffic Signal*, where a tsunami hit Tamil Nadu boy migrates to Mumbai and works as a rag picker. *Stanley ka Dabba* very strongly contends that vulnerability of child to enter into labour practices also increases in case of death of both or one parent(s). *Boot Polish* (1954) portrays death of parents and abusive foster parents as reasons for child labour. It is indeed true that socio-economic conditions like poverty, unemployment and illiteracy contribute to child labour in a major way.⁵¹ At the same time, issues of cultural stereotypes draw a distinction...between children as 'hands' and children as 'minds,' that is between the child who must be taught to

⁴⁸ See Art. 5(3) of the Convention.

⁴⁹ Art. 7, of the Convention defines 'light work' as *work that should, (a) not be harmful to a child's health and development and, (b) not prejudice attendance at school and participation in vocational training or the capacity to benefit from the instruction received.*

⁵⁰ See Jens Christopher Andvig, *Family-Controlled Child Labor in Sub-Saharan Africa A Survey of Research*, No. 0122, Social Protection Discussion Paper Series, October, 2001, available at: <http://web.worldbank.org/archive/website01048/WEB/IMAGES/0122.PDF>.

⁵¹ Padmanabhan, *supra* note 3, at 1.

‘work’ and the child who must be taught to ‘learn.’⁵² Poorly trained and overworked labour inspectors who are prone to bribery, bad government infrastructure, and natural disasters⁵³ increase the gravity of the menace by huge margin.

If the policy is worked out with other quality measures for education and social security, it might be able to shift the equilibrium of the society. A partial ban cannot create a labour deficit in the market, but with a multi-faceted policy (the Bill with Right to Free and Compulsory Education Act, 2010 and National Child Labour Policy collectively) a noticeable decrease in child labour and subsequent increase in school enrolments may be witnessed.

IV. EXPANDING GOVERNMENT, CONTRACTING LIVES

The notion of “Development as Freedom” by Amartya Sen⁵⁴ suggests that every policy should aim at removal of major sources of un-freedom such as poverty, tyranny, poor economic opportunities, social deprivation, neglect of public facilities, and once these are assured, the social development is in the hands of people themselves.⁵⁵ But in the Indian context, where there already exists a link between labourers and labour rights and policies for poverty alleviation, right to education and employment guarantee are in place, issues of implementation are daunting. June 12,⁵⁶ a satirical short film, shows the irony of government policies on child labour, where a child is employed to stick posters on walls. He dreams of becoming an important person like the people he sees in the posters of films. But the last poster he sticks (supporting the World Day against Child Labour, June 12) looks drab to him as it has no pictures.

As has been already discussed, many factors contribute to child labour. In cases where children have to work due to reasons other than poverty, even if these children are withdrawn from the market, the State has to perform the function of parents and provide for their basic necessities. The duties of the State in such cases are defined by the doctrine of ‘*parens patriae*’ which marks out the protective role of

⁵² Agarwal, *supra* note 35, at 687.

⁵³ International Labour Organization, *supra* note 23, at 26.

⁵⁴ Amartya Sen, DEVELOPMENT AS FREEDOM 1999.

⁵⁵ Agarwal, *supra* note 35, at 671.

⁵⁶ Ice4mad Films, JUNE 12, 2012.

governments towards the vulnerable groups of the society.⁵⁷ While it is accepted that there are ample schemes, statutes, and programmes on paper which equip the government to rehabilitate or withdraw child, the issue here is that of implementation.

Take, for example, the 'Scheme for Working Children in Need of Care' and Protection for children working as domestic helps, at roadside dhabas and in mechanic shops, which provides for bridging education and vocational training, medicine, food and recreation/sports equipments for the children. Similarly, the 'Integrated Programme for Street Children' supports non-government organizations in running drop-in shelters and providing food, clothing, shelter, non-formal education, recreation, counselling, guidance and referral services to children. The other components of the scheme include enrolment in schools, vocational training, occupational placement, mobilizing preventive health services and reducing incidents of drug and substance abuse, HIV/AIDS etc. It also provided for shelter homes and other provisions for restoration to parents. 'The Integrated Child Development Scheme' (ICDS), launched in 1975, provides an integrated programme for the full-fledged development of children, targeting the children of the age group of 6-11 years, especially of poor families, providing a whole package which ranged from early childhood care to elementary education. The Integrated Child Protection Scheme aims at children in need of care and in conflict or contact of law and provides various kinds of support, including emergency outreach services, shelter, foster-care, special homes, website for missing children and innovative interventions, and provides for setting up of State and District Child Protection Units. However, to what extent these schemes actually support the needy, is a question of debate.

Another problem here is that of defining the beneficiaries under various policies.⁵⁸ The ambiguous definition of subjects often results in a lack of co-

⁵⁷ Brian L. Cutler, *Encyclopaedia Of Law And Psychology*, 536 (2008) (People who cannot provide for their own security and subsistence and who lack social guarantees for both are weak and helpless, against any individual and institution in a position to deprive them of anything else they value by means of threatening their security and subsistence. By this definition of vulnerability, children are obviously weak and helpless and are dependent on their families).

⁵⁸ Indian Policy Makers seem to have been struggling with the definition of the subjects of the huge number of child care and protection policies the country has, since the very inception. The *Immoral Traffic (Prevention) Act, 1956*, defines 'Child' as a person who has not completed the age of eighteen years (Section 2(aa)). *The Women's And Children's Institutions (Licensing) Act, 1956*, takes a

ordination and convergence of child care programmes or services. For example, the United Nations Convention on Rights of the Child (UNCRC) defines a child as “every human being below the age of eighteen years.”⁵⁹ But the local laws of different countries differ largely on this count.⁶⁰ The anti-child labour policies also contradict on the definition of ‘child labour’, adding to the uncertainty.⁶¹

From the perspective of the State, *Salaam Bombay* shows the strained and overcrowded conditions of State Child Care Centres which are always under-budgeted, underpaid and under-staffed. The dismal conditions of State institutions do not allow them to function as an alternative to life on the streets for these children. This brings to our notice the flaws of the State in relation to the children. Also, the State is not concerned about regulating the employers to check labour law violations, exploitation of child-labour and to rehabilitate them. *Salaam Bombay* also shows the authoritative interference of the State in family lives, for the worse. In a sequence, the police pick up Manju (Rekha’s daughter) and Krishna and keep them in Child Care Centres. But the condition in which both the children have to live is not much different from their lives on the street. The detention centres are shown to be full of bullies. They also lack adequate infrastructure, care, and willingness to rehabilitate these children. The shabby maintenance of the Centres affects the emotional side of Manju which changes her carefree personality and allows Krishna to escape easily.

The present legal system promotes the practice of child labour by specifying certain works for which children below fourteen years of age can be employed, as has

similar stand (Section 2(a)). *The Young Persons (Harmful Publications) Act, 1956*, applies to person under the age of twenty years (Section 2(c)). Whereas the *Children’s Act, 1960*, defines ‘Child’ as a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years (Section 2(e)). Interpreting differently, the *Child Labour (Prohibition and Regulation) Act, 1986* defines ‘Child’ as a person who has not completed his fourteenth year of age (Section 2(ii)).

⁵⁹ Art. 1, United Nations Convention on the Rights of the Child 1577 UNTS 3 (Adopted on November 20, 1989).

⁶⁰ See The African Child Policy Forum, Definition of The Child: The International/Regional Legal Framework, available at: http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_1_en.pdf; Usang Maria Assim, *Harmonising the definition of Child*, OSISA, July 30, 2012, available at: <http://www.osisa.org/general/blog/hamonising-definition-child>

⁶¹ As per ILO standards, every economically active child earning wages can be considered as child labour, if under the age of 14 years for non-hazardous and 18 years for hazardous industries.

been argued by some.⁶² And the non-implementation of the rest of the provisions makes the situation even worse.⁶³ To exemplify, in Rajasthan, child labour is high in the unorganised sector, where children are made to work for at least ten-sixteen hours a day, which is far more than the prescribed time limit of six hours a day.⁶⁴ Even though the 2006 amendment to the Child Labour Act extended the ban on employment of children below the age of fourteen years as domestic help in dhabas and hospitality sectors, popular cinema kept showcasing the most common form of child labour as working full-time at dhabas or tea stalls. *I am Kalaam* (2011), *Stanley ka Dabba* (2011) and *Slumdog Millionaire* (2008) are some of the films which have easily portrayed many children working on roadside motels without any efforts from the government's side to withdraw them. In case of such unorganised sectors, the biggest problem is that even if children are rescued, the government infrastructure is not adept enough to provide them with even the basic necessities of life, because of which children keep shifting their jobs and become undetectable in most of the cases.

Nothing has been done so far to address the reasons for child labour, to end it from the very root. All the programmes either aim at rehabilitation or provision of food and shelter, which all go in wane. *Traffic Signal* shows the plight of a tsunami hit boy of Tamil Nadu who shifts to Bombay and works as a rag picker. He uses all his money to call up the Tsunami Relief Fund of Tamil Nadu in search of his parents who went missing after the Tsunami, but never gets any satisfactory reply. The Relief Fund Officer later reveals that his parents have already died, but have been put in the list of missing. Therefore, the compensation as was fixed by the Government would not be given to the child. Even in *Slumdog Millionaire* Jamal and Salim lose their mother and home in Bombay riots, and were left with nowhere to go, hence, forced to take up various jobs to survive.

⁶² Deepak Kalra, *Weak Laws allow Child Labour in Organization*, Rajasthan State Commission for Protection of Child Rights (SCPCR), Jaipur (July 25, 2012), available at <http://www.thehindu.com/todays-paper/tp-national/article3680478..>

⁶³ Statistics show the failure of Indian Labour Regulation Machinery to provide for the needed. Based on the 2001 census, 252,000 children are engaged in beedi manufacturing and 208,833 in the construction sector. An estimated 185,595 children are employed as domestic help and in dhabas (small roadside eateries); 49,893 children work in auto-repair workshops.

⁶⁴ *Child labour consistently increasing in unorganised sector*, THE HINDU (July 25, 2012), available at <http://www.thehindu.com/todays-paper/tp-national/article3680478..>

It is not only a matter of reel, but in real life also. NGOs have to come forward to get court orders from the courts to withdraw children detained in circuses or as domestic servants. In *Bachpan Bachao Aandolan v. Union of India*,⁶⁵ Bachpan Bachao Aandolan (an NGO) filed a writ petition under Article 32 of the Indian Constitution seeking issue of the writ of mandamus in the wake of forceful detention of children in circuses in inhumane conditions.⁶⁶ The NGO argued that the fundamental and human rights of the children were being violated. Eventually, the Supreme Court, realising the seriousness of the situation, issued directions for the Government to conduct frequent raids in circuses and issued a notification making employment of children in circuses illegal.⁶⁷

In the *Child Labour Case II*⁶⁸, a writ petition was filed by Shri M.C. Mehta, seeking court orders for violation of fundamental rights of 2,941 child labourers employed in factories of Sivasaki, manufacturing matches and fireworks.⁶⁹ Further a suo moto cognizance was taken by the court in the wake of an accident in one of the Sivakasi cracker factories.⁷⁰ The court recognized poverty as a cause for child labour⁷¹ and gave its tacit approval to child labour.⁷² It tried to ensure social security measures for child labourers so as to give them an opportunity to discontinue working. The court suggested the State ought to make provisions for alternative employment for the parents of the child, and in case it is not available, a sum of Rs. 25,000 must be paid for each child, every month.⁷³ Labour inspectors were given the duty to ensure that the children withdrawn from the work are sent to school.⁷⁴ The work hours were fixed at not exceeding six hours a day and a minimum two hours of education was made compulsory for children working in non-hazardous industries at the cost of the employers.⁷⁵

⁶⁵ *Bachpan Bachao Aandolan v. Union of India*, AIR 2011 SC 3361 (Supreme Court of India).

⁶⁶ *Bachpan Bachao Aandolan*, AIR 2011 SC 3361, ¶ 1.

⁶⁷ *Bachpan Bachao Aandolan*, AIR 2011 SC 3361, ¶ 68.

⁶⁸ *Child Labour Case II*, AIR 1997 SC 699.

⁶⁹ *Child Labour Case II*, AIR 1997 SC 699, ¶ 2.

⁷⁰ *Child Labour Case II*, AIR 1997 SC 699, ¶ 4.

⁷¹ *Child Labour Case II*, AIR 1997 SC 699, ¶¶ 13, 27, 25.

⁷² *Child Labour Case II*, AIR 1997 SC 699, ¶ 31.

⁷³ *Child Labour Case II*, AIR 1997 SC 699, ¶ 31. (The employment given or payment made would cease to be operative if the child would not be sent by the parent/guardian for education).

⁷⁴ *Child Labour Case II*, AIR 1997 SC 699, ¶ 31.

⁷⁵ *Child Labour Case II*, AIR 1997 SC 699, ¶ 31.

However, the directions of the Supreme Court suffered from non-implementation and in 2009 the Delhi High Court in *Court on Its Own Motion v. Government of Delhi, NCT*,⁷⁶ had to issue directions to the Delhi Government to formulate an action plan on the lines of the directions of the Supreme Court in 1997, for the protection of working children.

V. CONCLUSION

India, as a country with the largest number of child labourers has reached a point where an appropriate law to tackle the menace is most desirable. Wide-spread poverty, unemployment, corruption and lack of social security are to be blamed for increase in child labour over the years. Even though the Constitution of the country, under Article 24 prohibits child labour, the same has been honoured more in breach than in observance.

Popular cinema in India, since the very beginning, has been depicting child labour as an accepted practice in the society, which has not witnessed any movement of change. The perception of the society towards the problem has not changed much, and though the policies of the government have, the change has been nevertheless to no one's benefit. The picture of child labour as presented by Indian cinema hits at the root causes and coincides with the idea of necessity more than an evil. Without addressing the root causes of child labour, India cannot bring in a total ban on the practice of child labour. And even if India does, it cannot be enforced as it would directly affect the question of survival for millions of poor people.

A partial ban, as is in place today, raises doubts as to its usefulness and highly suffers from inbuilt deficiencies, and of course, lack of implementation. The result is that children today not only toil in prohibited hazardous industries in great numbers, but also do not get any benefit of labour regulation policies. On a perusal of the 1986 Act, even courts have expressed views that under the Act, only child workers employed in scheduled occupations and processes can be liberated and children employed above the age of fourteen years cannot be rescued.⁷⁷ Also, since the Act only prohibits employment of children in certain scheduled occupations and

⁷⁶ *Court on Its Own Motion v. Government of Delhi, NCT*, WP(C) No. 9767 of 2009, July 15, 2009, (C.J. and Manmohan J.) (High Court of Delhi).

⁷⁷ *Court on Its Own Motion*, WP(C) No. 9767 of 2009, ¶20.

processes, child workers employed in non-hazardous jobs cannot be rescued.⁷⁸ Hence the Act leaves out a large population of child labour from the benefits therein. Even the children, who fall within the purview of the Act, are not bothered to be withdrawn and rehabilitated, Indian cinema contends.

India, being a developing country is considered to be unprepared for direct stringent measures to tackle child labour. Thus the 2012 Bill also leaves scope for working of children, but in a restricted manner work in family occupation, home-based work, training workshops or forest gathering. The Bill does seem to be a better alternative over the 1986 Act, but it is not the niche we should aim at. One common feature in the policies, among the countries with considerable high literacy rates is that they all have made any form of child labour illegal and punishable under law, be it working in factories or as helpers or even working or helping with parents. They have made it mandatory for parents to send their children to school.

At this juncture, what India should aim at is a comprehensive and coherent approach to child labour, which should first address the causes of child labour by providing for poverty reduction, provision of quality education, and social protection measures; followed by a complete ban on child labour and complete implementation of the 'Right to Free and Compulsory Education Act, 2010' to allow everyone equal chance to participate. The intimidating issues of implementation have to be addressed at the earliest to allow current system to work, so that the effects thereof can be assessed and future course of action can be decided.

⁷⁸ Court on Its Own Motion, WP(C) No. 9767 of 2009, ¶ 19.

Astha Pandey, *The Responsibility to Protect (“R2P”) in International Law: Protection of Human Rights or Destruction of State Sovereignty?*, 2(1) NLUJ Law Review 115 (2013)

THE RESPONSIBILITY TO PROTECT (“R2P”) IN INTERNATIONAL LAW: PROTECTION OF HUMAN RIGHTS OR DESTRUCTION OF STATE SOVEREIGNTY?

ASTHA PANDEY*

The last decade has been characterized by a fervent debate over the role of the United Nations when it comes to dealing with and responding to large scale human rights violations. The recurrent legal, political and philosophical discussions pertaining to the inherent tension between state sovereignty and intervention have yielded inconclusive results. Against this background, the ‘Responsibility to Protect’ has emerged as a relatively new principle that aims at the protection of the world’s most vulnerable populations from abominable international crimes, namely, genocide, war crimes, ethnic cleansing and crimes against humanity. The central idea underlying the concept of R2P is primarily twofold: one, that sovereign states have a responsibility to protect their own citizens from avoidable catastrophes and two, when they are unable or unwilling to do so, this responsibility falls upon the shoulders of the international community. The primary objection raised by international law scholars regarding the practical implementation of R2P has been with respect to its incongruity with the concept of state sovereignty. In this Article, the author contends that by providing a legal and ethical basis for humanitarian intervention, the R2P, rather than conflicting with, complements the principle of state sovereignty where a state fails to live up to its responsibility.

The author focuses on fortifying this stance by arguing in favour of the employment of an extensive approach, as opposed to a restrictive approach in the interpretation of the

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customary prohibition on the use of force and seeks to establish that such interpretation serves to sever the Gordian knot of tension between intervention and sovereignty.

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I. INTRODUCTION

“ . . .if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”¹

The question regarding the legality and legitimacy of humanitarian intervention gained prominence in the aftermath of the Cold War era and the overhauling of the UN collective security system. The failure of the UN to restore order in Somalia between 1992-1993, to prevent genocide in Rwanda in 1994, to avert the widespread massacre of thousands of civilians seeking shelter in UN “safe areas” in Srebrenica in 1995,² and the unauthorized bombing in Kosovo by NATO in 1999 to eliminate ethnic cleansing and mass atrocities augmented the intense debates surrounding the issue concerning the methods to deal with heinous international crimes.³ These events had a major impact on the conceptualization,

¹ United Nations Secretary-General Kofi Annan in the General Assembly in 1999 and 2000; THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at viii, *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

² THE REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at 17, *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

³ Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 THE YALE JOURNAL OF INTERNATIONAL LAW, at 470 (2010).

analysis and characterization of the problem of intervention with respect to which, during the latter half of the twentieth century, the international community was acutely divided.⁴ On the one hand, proponents were of the opinion that humanitarian intervention often serves as the only effective means of addressing massive human rights violations and on the other, opponents regarded it as merely a political rhetoric, employed by great powers in order to pursue their imperialist self-interests through coercive measures.⁵

Questions regarding the recourse to be taken by the international community in situations of large scale human rights violations where the state in question claims immunity on the grounds of the deep-rooted principles of state sovereignty in international law and the permissibility for states to take military action against another in pursuance of protecting its citizens have been the focal point of international debates for a long time.⁶ It is in this context that Kofi Annan called for “a robust international legal order” to regulate “an emerging global civilization,”⁷ and the R2P concept gained recognition by transitioning the discourse beyond the contentious notion of “humanitarian intervention” to a “responsibility to protect”,⁸ thereby focusing on reconciling the conflict between sovereignty and human rights by implanting the notion of human rights within the concept of sovereignty.⁹

A. THE RESPONSIBILITY TO PROTECT: THE CONFLICT BETWEEN STATE

SOVEREIGNTY AND HUMANITARIAN INTERVENTION

The concept of R2P manifests an intellectual breakthrough and a paradigmatic shift in international politics in that it has played a predominant role in fostering the imperative need to recognize the importance of addressing genocide and mass killings taking place across the globe.¹⁰ The three primary documents responsible for attracting deepened scholarly debate and conceptualization of the idea of R2P are the Report of the International Commission on

⁴ *Supra* note 3, at 18.

⁵ *Supra* note 4, at 470.

⁶ Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WISCONSIN INTERNATIONAL LAW JOURNAL, at 703 (2006).

⁷ Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* 13 (New York: United Nations, 2000) as cited in Yamagata Hideo, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 RITSUMEIKAN INTERNATIONAL AFFAIRS, at 23 (2009).

⁸ [Hereinafter ‘the R2P’].

⁹ *Supra* note 4, at 470-471.

¹⁰ Vijay Mehta, *The UN Doctrine on the Responsibility to Protect*, at 2 (March 9, 2009), available at <http://www.action-for-un-renewal.org.uk/speeches/The%20UN%20Doctrine%20on%20Responsibility%20to%20Protect.pdf>.

Intervention and State Sovereignty of 2001,¹¹ the Report of the High Level Panel of 2004¹² and the UN World Summit Outcome Document of 2005.¹³ The notion of R2P varies with respect to the ambit, prerequisites as well as the means of this responsibility in all the three aforementioned documents.¹⁴ Since the World Summit, most policy discussions on humanitarian crises have been infiltrated by the R2P framework and the language employed by it.¹⁵

In 2009, the UN Secretary General produced a report setting forth a three-pillared strategy for the implementation of R2P.¹⁶ Pillar one deals with the responsibility of the state to protect its citizens, which also entails the prevention of such crimes and violations, including their incitement; the duty of the international community to assist states in complying with their responsibilities of protection and prevention is addressed by pillar two; and lastly, pillar three addresses the international community's responsibility to respond, through peaceful means, in a timely and decisive manner, and in the event of failure of such response, resort to forceful means in accordance with international law.¹⁷

Thus, the R2P concept encompasses two broad propositions. The first proposition is that states have a responsibility to protect their populations from large-scale human rights violations, in particular, genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁸ This notion is well-established and deeply rooted in the principles of international law.¹⁹ The second proposition is that it is not only a right, but also a collective responsibility of the

¹¹ [Hereinafter "the ICISS Report"].

¹² [Hereinafter "the Panel Report"].

¹³ [Hereinafter "the Summit Document"].

¹⁴ Nadja Kunadt, *The Responsibility to Protect as a General Principle of International Law*, at 189 (2010), available at <http://biblio.juridicas.unam.mx/estrev/pdf/derint/cont/11/art/art7.pdf>.

¹⁵ Sheri P. Rosenberg, *The Responsibility to Protect: A Framework for Prevention*, at 444 (2009), available at [http://responsibilitytoprotect.org/The%20Responsibility%20to%20Protect%20A%20Framework%20For%20Prevention%20\(Rosenberg\).pdf](http://responsibilitytoprotect.org/The%20Responsibility%20to%20Protect%20A%20Framework%20For%20Prevention%20(Rosenberg).pdf).

¹⁶ INTERNATIONAL HUMANITARIAN LAW AND THE RESPONSIBILITY TO PROTECT: A HANDBOOK, at 11-12 (2011), available at www.redcross.org.au/files/IHL__R2P_responsibility-to-protect.pdf.

¹⁷ *Supra* note 15, at 445.

¹⁸ This list of crimes was first delineated in the 2005 World Summit Outcome, and most state officials and commentators have since emphasized that the '*Responsibility to Protect*' concept is restricted to these crimes; ICISS, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (Ottawa: IDRC, 2001); and UN GA, WORLD SUMMIT OUTCOME, A/60/1, 24 October 2005, at paras 138-139 as cited in Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUMAN RIGHTS LAW REVIEW, at 2 (2012).

¹⁹ *Id.* at 3.

international community to assist host states in fulfilling their responsibility to protect their populations, when they are unable or unwilling to do so.²⁰ Therefore, the novelty of the R2P concept lies in its attempt to alter the contours of the understanding of sovereignty by emphasizing that sovereignty implies a dual responsibility: internally, to protect the dignity and basic human rights of citizens within the state; and externally, to respect the sovereignty of other states.²¹ As regards the external responsibility, when a state is unable or unwilling to fulfil its sovereign responsibility, it becomes the responsibility of the international community to act in its place,²² that is, “the principle of non-intervention yields to the international responsibility to protect.”²³ The primary concern raised by international law scholars with respect to this external responsibility is that it undermines the notion of sovereignty by legitimizing humanitarian intervention and positing the extraterritorial protection of populations as not merely a right but a positive obligation to be borne by all the states.²⁴

In the next Part, the author seeks to address this concern by contending that the inherent incongruity between state sovereignty and humanitarian intervention can be resolved by interpreting the customary international law norm of the prohibition on the use of force in light of an extensive approach.

II. THE EXTENSIVE APPROACH: A PRIMER

In the beginning of the twentieth century, international law, as constructed, was almost free from any value judgment.²⁵ The value of non-use of force was considered paramount and no moral or political values could justify the use of force.²⁶ Therefore, it was natural that prohibition of unilateral use of force, rightly described as “the cornerstone of the Charter-system,”²⁷ was the only possible contender under Article 2(4) of the UN Charter, since none

²⁰ Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUMAN RIGHTS LAW REVIEW, at 3-4 (2012).

²¹ *Supra* note 3, at 24.

²² *Supra* note 4, at 473.

²³ *Supra* note 3, at xi.

²⁴ *Supra* note 20, at 4.

²⁵ Yamagata Hideo, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 RITSUMEIKAN I INTERNATIONAL AFFAIRS, at 45 (2009).

²⁶ *Id* at 46.

²⁷ JAMES L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 414 (6th ed. 1963); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 732 (7th ed. 2008) as cited in Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 THE YALE JOURNAL OF INTERNATIONAL LAW, at 492 (2010).

of the other principles of international law, including human rights, could justify the use of force by individual states.²⁸ Despite several attempts by states and scholars to restrict the scope of the principle, the principle has endured and retained its position in international law since its inception.²⁹ However, in response to the globalization of the international community, the framework of international law has undergone significant changes.³⁰ The most highly esteemed value of non-use of force is being replaced by emerging international interests, especially in light of the fact that there is a growing consensus that states should not only be concerned with their domestic affairs and businesses, but also with global threats.³¹

The interpretation of customary rules and treaty texts has played a predominant role in the development and evolution of the international legal order. The evolution of the prohibition on the use of force, which is both a treaty-based rule as well as a rule of customary law, has been the centre of numerous scholarly debates, especially in recent years.³² These debates highlight two extreme positions on the interpretation of the legal rule. On one side, there is the extensive approach which endorses a very flexible method of interpretation and includes within its ambit exceptions such as “preventive self-defence”, the “implicit authorization” of the Security Council and the right of “humanitarian intervention.”³³ On the other side is the restrictive approach which favours a very strict interpretation, thereby not accommodating any of the aforementioned exceptions within its scope.³⁴

III. THE EXTENSIVE APPROACH: REDEFINING THE CONTOURS OF THE CUSTOMARY PROHIBITION ON THE USE OF FORCE

*“In the end, each use of force must find legitimacy in the facts and circumstances that the States believe made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it.”*³⁵

²⁸ *Supra* note 25, at 45.

²⁹ *Supra* note 4, at 492.

³⁰ *Supra* note 25, at 45.

³¹ *Ibid.*

³² Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 803 (2006).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Taft IV and Buchwald, *Preemption, Iraq and International Law*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW, at 557 (2003) as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 805 (2006).

The extensive approach characterizes custom as a means of adapting international law to the exigencies of international life.³⁶ The essence of the approach lies in its attempt to move beyond the formalistic method of treaty interpretation in order to examine them in accordance with the factual circumstances pertinent to each case.³⁷ A humanitarian intervention's conformity with international law can only be tested in light of the facts and circumstances of the particular case.³⁸ This flexible conception of custom which allows the extensive approach to justify humanitarian interventions can best be understood in the following words:

*"Artificial rules cannot bear the burden of the real world pressures that underlie use-of-force issues. Today, moreover, the need to enforce rules to advance human rights and to limit the power of tyrants and terrorists is greater than ever. To deprive the international community of a reasoned basis for using force threatens Charter interests and values, rather than supporting and advancing them."*³⁹

Therefore, the extensive approach is of utmost significance in that its conceptualization of custom not only makes it possible to establish a clear link between the legal rule and the facts of a particular case, but also makes room for non-legal considerations such as political and moral values which are indispensable to the process of interpretation,⁴⁰ especially when it comes to evaluating the legality of military interventions.

The interpretation of the UN Charter necessarily involves taking into account of political considerations since it is a convention that is primarily constitutional in character.⁴¹ Through a process that is essentially political in nature, the understanding of the presumptively static norms contained in the UN Charter, such as Article 2(4); which prohibits "the threat or use of force against the territorial integrity or political independence of any state", and Article 51; which recognises an "inherent right of individual or collective self-defence if an armed

³⁶ Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 805 (2006).

³⁷ Sofaer, *On the Necessity of Pre-emption*, 14 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 212-213 (2003) as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 805 (2006).

³⁸ *Ibid.*

³⁹ Sofaer, *On the Necessity of Pre-emption*, 14 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 225 (2003) as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 812 (2006).

⁴⁰ *Ibid.*

⁴¹ *Supra* note 32, at 807.

attack occurs", has been seen to be continuously evolving, since ultimately these norms are applied to practical situations and circumstances.⁴² This is especially true in light of the fact that the Security Council has not condemned certain humanitarian interventions provided that the circumstances are comparable to those of the precedents invoked.⁴³ The fact that the Security Council endorsed the NATO Agreement in Resolution 1203 with a tempered reproach, that it still had primary authority as far as international peace and its preservation is concerned, is glaring testimony of its assent to humanitarian intervention in the Kosovo crisis of 1997.⁴⁴ To restrict the operation of Article 51 of the UN Charter, which provides for individual or collective self-defence to the occurrence of an "armed attack," would result in greatly undermining the natural, customary right to legitimate self-defence, which Article 51 never intended to do in the first place.⁴⁵ Instead, a better mechanism would be to factor in precedents wherein certain preventive or pre-emptive measures involving the use of force were accepted by the international community, rather than arbitrarily outlawing all forms of "pre-emptive self-defence" under the garb of Article 51.⁴⁶ The extensive approach enables the interpretation of Article 51 of the UN Charter in a manner that takes into account the realities and practicalities of life by providing adequate means of adapting international law and conferring a general status upon custom.⁴⁷ Furthermore, it enables the linking of abstract legal concepts to the particular factual situation, which is imperative in forming judgment as regards humanitarian intervention, due to the peculiarities of the circumstances in each given case.

The R2P concept comprising the responsibilities to prevent catastrophic situations, to react immediately when they occur and to rebuild in the aftermath of disastrous occurrences

⁴² Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in Holzgrefe and Keohane (eds), at 205 as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 807 (2006).

⁴³ Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW (1999), at 830-832, Franck, *What Happens Now? The United Nations After Iraq*, 97 (2003) 607, AMERICAN JOURNAL OF INTERNATIONAL LAW at 615 as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 807 (2006).

⁴⁴ Stefan Troebst, *Conflict in Kosovo: Failure or Prevention?*, ECMI WORKING PAPER No. 1, available at http://www.ecmi.de/uploads/tx_lfpubdb/working_paper_1.pdf.

⁴⁵ J.L. Holzgrefe and R.O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003), at 53; Buchanan, *Reforming the International Law of Humanitarian Intervention*, in Holzgrefe and Keohane (eds) at 134 as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 806 (2006).

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

may be seen as an attempt to redefine the principle of humanitarian intervention in a way that seeks to curtail the motives of the intervening powers.⁴⁸ It is the author’s contention that in light of the change in the understanding of sovereignty as envisaged by the dual responsibility under the R2P concept, R2P does not debilitate either of the two principles, that is, prohibition of the use of force and non-intervention.⁴⁹ This assertion is further fortified by the fact that neither the ICISS Report nor the Summit Document suggests any dilution of these principles.⁵⁰ The notion of respecting the sovereignty of other states is enmeshed within the concept of the R2P in that the R2P concept, as envisaged by the ICISS Report, stipulates intervention only as a last resort when states fail to comply with their obligation to protect their populations in times of grave human rights violations. Moreover, the propriety of such intervention is tested against the threshold of the “just war doctrine” which requires compliance with the following criteria: just cause, right intention, last resort, proportionality, reasonable prospects for success and right authority.⁵¹ Since both the ban on the use of force as well as R2P are ultimately aimed

⁴⁸ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa, 2001; Report of the UN High Level Panel on Threats, Challenges and Change, A/59/565, 2004, at paras. 201–3; UN Secretary-General, *In Larger Freedom*, A/59/2005, paras. 16–22; World Summit Outcome, General Assembly resolution 60/1, 2005, paras. 138–139, and C. Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW, 2007, at 99 as cited in Malcolm N. Shaw, INTERNATIONAL LAW 1158 (6th ed. 2008).

⁴⁹ *Supra* note 4, at 493.

⁵⁰ *Ibid.*

⁵¹ The Just Cause threshold stipulates that military intervention for the purposes of human protection is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to individuals, or imminently likely to occur. It must satisfy the following two criteria:

- i. Large-scale loss of life-actual or apprehended, with or without genocidal intent, which is the result of deliberate state action, state neglect, inability to act or a failed situation; and
- ii. Large-scale ethnic cleansing- actual or apprehended, carried out by killing, forced expulsion, acts of terror or rape.
 1. Right Intention- Regardless of the motives that intervening states may have, the primary objective underlying the intervention must be to halt or avert human suffering.
 2. Last Resort- Military intervention can only be justified on the exhaustion of every non-military option for the prevention or peaceful resolution of the catastrophe, with reasonable grounds for believing that lesser measures would not have succeeded.
 3. Proportionality- The scale duration and intensity should be the minimum necessary to ensure the objective of human protection.
 4. Reasonable Prospects- The consequences of the military action should not be worse than the causes of inaction and there must be reasonable prospects of succeeding at halting or averting the human suffering.
 5. Right Authority- The UN Security Council has been conferred with the primary responsibility to authorize military intervention for the purposes of human protection.

at protecting fundamental human rights,⁵² the question of a discord between the two or R2P being in violation of the prohibition of the use of force norm does not arise.

The recent occurrences in Libya and Syria have brought to the forefront the question of the viability of armed humanitarian intervention or in other words, the R2P. The conclusion that the Libyan R2P operation succeeded is evidenced by the fact of military victory on the ground itself, despite the objections raised to it and the abstention of Security Council members from the vote on Resolution 1973. It can safely be said that the Libyan intervention advanced the cause of the R2P doctrine.⁵³ The criticisms levelled against it, especially as regards the manner of its implementation, and the fact that the intervention was disproportionate and went well beyond what the UN Charter permits, can be addressed by the application of the extensive approach to the interpretation of humanitarian intervention as it factors in the substantive realities of humanitarian catastrophes. On the other hand, the Security Council's passivity with respect to Syria has raised considerable concerns over R2P's future prospects. This is not to say that humanitarian interventions will no longer occur. Instead, it is likely that the doctrine will be applied relatively more selectively, taking into account the circumstances and exigencies of the particular situation,⁵⁴ which is in accordance with the extensive approach.

In the face of gross human rights violations, it becomes morally and legally imperative that the notion of sovereignty, which has for centuries been perceived as an immutable feature of international relations, gives way to the notion of protection of human rights, thereby ensuring the triumph of justice over the rigidities of the law.⁵⁵

Supra note 3, at xii, as cited in Luke Glanville, *The Responsibility to Protect Beyond Borders*, 12 HUMAN RIGHTS LAW REVIEW, at 10 (2012).

⁵² Thakur, R., *The Responsibility to Protect*, in Thakur, R., (ed.) *The United Nations Peace and Security: From Collective Security to the Responsibility to Protect*, Cambridge University Press, (2006), at 254, as cited in Nadja Kunadt, *The Responsibility to Protect as a General Principle of International Law*, at 204 (2010), available at <http://biblio.juridicas.unam.mx/estrev/pdf/derint/cont/11/art/art7.pdf>.

⁵³ Spencer Zifcak, *The Responsibility to Protect after Libya and Syria*, MELBOURNE JOURNAL OF INTERNATIONAL LAW, Vol. 13, p. 9.

⁵⁴ *Supra* note 53, at 33.

⁵⁵ Jim Whitman, *Violation of Article 2(4): When is it Right to Intervene?*, RATIONALIST ASSOCIATION, THE JOURNAL OF HUMANITARIAN ASSISTANCE, available at <http://rationalist.org.uk/articles/441/violation-of-article-24>.

IV. CONCLUSION

It is clear from the above discussion that the R2P concept, since its inception, has shaped international discourse pertaining to the prevention and containment of the most heinous crimes.⁵⁶ A *tour d'horizon* of the development of the concept, however, brings to light the inconsistencies in the understandings of the idea.⁵⁷ There is no doubt that R2P as a concept has found astounding resonance among state representatives, international and regional organizations as well as non-state actors,⁵⁸ and it has established its status as a remarkable moral and political concept in international politics and scholarship.⁵⁹ However, the opponents of R2P contend that though the primary documents concerning R2P lay down the criteria for legitimacy of intervention, they are silent as regards its lawfulness or legality,⁶⁰ which is why this relatively new concept can be categorized as merely *de lege ferenda*, as it has not yet acquired the status of *lex lata*.⁶¹ The extensive approach entails moving away from the formalistic method of interpretation and favouring a policy-oriented perspective⁶² which justifies humanitarian intervention in a manner that brings together legality and legitimacy, and bridges the gap between *lex lata* and *lex ferenda*.⁶³

⁵⁶ Carsten Stahn, *Responsibility To Protect: Political Rhetoric or Emerging Legal Norm*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 99, at 118 (2007) as cited in Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 THE YALE JOURNAL OF INTERNATIONAL LAW, at 480 (2010).

⁵⁷ The details of the concept as developed in the 2004 High Panel Report are significantly different from the 2001 ICISS Report. Moreover, the 2005 World Summit Document reflects an even narrower consensus. The UN Secretary General Ban Ki-moon's attempt to install a special representative on the responsibility to protect in the Fifth Committee of the General Assembly was greatly criticized and is a manifestation of the fact that though the concept is widely accepted, the single implications associated with it are not., as cited in Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 THE YALE JOURNAL OF INTERNATIONAL LAW, at 480 (2010).

⁵⁸ *Ibid.*

⁵⁹ *Supra* note 4, at 516.

⁶⁰ *Supra* note 25 at 44.

⁶¹ Geliijn Molier, *Supra* note 32, at 62, See also, Edward Newman, "Humanitarian Intervention: Legality and Legitimacy," 6:4 INTERNATIONAL JOURNAL OF HUMAN RIGHTS, at 102, 119 (2002) as cited in Yamagata Hideo, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 RITSUMEIKAN INTERNATIONAL AFFAIRS, at 45 (2009).

⁶² *Supra* note 32, at 809.

⁶³ Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AMERICAN JOURNAL OF INTERNATIONAL LAW(2003) 576, at 584 as cited in Olivier Corten, *The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate*, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, at 806 (2006).

Despite the fact that the R2P concept does not solve every problem or answer every question regarding the propriety of forcible interventions, it does provide a valid justification for the same, particularly in times when critical human goals are at stake. Moreover, it has played a crucial role in offering important conceptual insights into the relationship between sovereignty, responsibility and intervention by acknowledging that permitting certain unilateral actions becomes inevitable in cases where collective security mechanisms have failed to function.

It is imperative that the international community embraces the moral as well as legal calling of R2P within the system of collective security in order to address the sufferings of the millions of people during times of catastrophes.⁶⁴ Otherwise, R2P will be blamed for justifying “neo-imperialist interventions.”⁶⁵ Notwithstanding that the international responses to crises occurring across the globe may have been inadequate and disconcerting, justifying much of the rampant criticism, this should not deter scholars from acknowledging the gradual but undeniable emergence of an international endorsement of the responsibility to protect populations from the world’s most atrocious crimes.⁶⁶ The concrete international law norm of prohibition on the use of force will hopefully undergo a significant change in light of the growing recognition and acceptance of the R2P concept.⁶⁷ In the long run, the R2P concept and the employment of the extensive approach will serve as a valuable tool in assisting the prevention and containment of genocide and other grave human rights violations⁶⁸ as well as subverting the following long-held belief: “*No century has had better norms and worse realities.*”⁶⁹

⁶⁴ *Supra* note 14, at 219.

⁶⁵ Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine – But What of Implementation?* 19 HARVARD HUMAN RIGHTS JOURNAL, at 297 (2006); Upadhyaya also explains the anxiety of the Third World that “human security and humanitarian intervention are often branded as western sponsored enterprises promoting western values and are used to legitimize intervention against the poor and weak states.”; Priyanka Upadhyaya, *Human Security, Humanitarian Intervention, and the Third World Concerns*, 33 DENVER JOURNAL OF INTERNATIONAL LAW & POLICY, at 71, 86 (2004). See also, V. S. Mani, *Humanitarian Intervention Today*, 313 RECUEIL DES COURS, at 297-298 (2005) as cited in Yamagata Hideo, *Responsibility to Protect Democracy as a Robust International Legal Order*, 7 RITSUMEIKAN INTERNATIONAL AFFAIRS, at 47 (2009).

⁶⁶ Wax W. Matthews, *Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur*, 31 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW, at 152 (2008).

⁶⁷ *Supra* note 4, at 491.

⁶⁸ *Supra* note 4, at 516.

⁶⁹ Reiff, D., *A Bed for the Night, Humanitarianism in Crisis*, New York SIMON & SCHUSTER, (2002), at 70 as cited in Nadja Kunadt, *The Responsibility to Protect as a General Principle of International Law*, at 219 (2010), available at <http://biblio.juridicas.unam.mx/estrev/pdf/derint/cont/11/art/art7.pdf>.

BOOK REVIEW OF “THE RIGHT TO INFORMATION IN INDIA” BY SUDHIR NAIB

ABHINAV KUMAR, PRAKHAR BHARDWAJ*

This is a book review of The Right to Information in India by Sudhir Naib which is a valuable addition to the existing literature on the Right to Information. Its crisp, concise and reader-friendly format vindicates its description as a short introduction and establishes its value as a ready referencer on the Right to Information. After giving a short overview of the book, the authors put forth two primary critiques; first, regarding the author’s insufficient analysis of the legal content of ‘public authority’ – a term that has decisive importance in the scheme of the Act; and secondly, that the author’s critique of the Supreme Court order in Namit Sharma is flawed in principle. This review treats the criticisms of the book as a point of departure to probe deeper into critical questions that the right to information faces today.

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I. INTRODUCTION

"The fight for the right to information is the fight for survival of democracy in India. The stakes are too high for us to ever give up. So we will never give up."

-Arvind Kejriwal

It is not often that a legislation holds a central place in a democracy, gets endorsed by the Prime Minister of the country,¹ or becomes the favourite tool of the civil society. It is perhaps this characteristic of the Right to Information ("RTI") that ensures that it will never disappear from public memory. The machinery under the Act has produced some remarkable orders giving citizens access to information related to CBSE Board papers,² accounts of political parties,³ and records of many public works programs which would have otherwise remained inaccessible to the public eye.

Its pride of place within the civil society has also had a veritable impact on legal academia, as is evidenced by the numerous volumes of concise, readable and non-exhaustive commentaries available on the subject today. The educative value of such writing is immense, and it goes a long way in aiding the people in the exercise of their rights. *The Right to Information in India* by Sudhir Naib,⁴ is one such attempt to bring the RTI Act closer to the people. Its crisp, concise and reader-friendly format vindicates its description as a short introduction, and establishes its value as a handy guide on the Right to Information.

¹ *Prime Minister Manmohan Singh's Independence Day Speech*, THE HINDU (August 15, 2013), available at <http://www.thehindu.com/news/resources/prime-minister-manmohan-singhs-independence-day-speech/article5025006.ece> ("Through the RTI Act, the common man now gets more information than ever before about the work of the government. This legislation is being used on a large scale at all levels. The Act frequently brings to light irregularities and corruption and opens the door for improvements.")

² *CBSE v. Aditya Bandopadhyaya*, (2011) 8 SCC 497 (Supreme Court of India).

³ *Subhash Chandra Agarwal v. Indian National Congress and Ors.*, File No. CIC/SM/C/2011/001386. (Central Information Commission).

⁴ Sudhir Naib, *THE RIGHT TO INFORMATION IN INDIA* (2013).

The present article aims to provide a holistic review of the book. In Part II, we shall provide an overview of the book, and its contribution to the ever-expanding body of literature on the Right to Information. We have attempted to examine the layout and logical flow of the book, followed by an in-depth analysis of its value *vis-à-vis* existing literature.

In Part III, we shall present our critique. The book has been critiqued on two principle grounds. First, that despite it being the lynchpin of the RTI Act, the term ‘public authority’, lacks proper analysis. In our attempt to fill this gap, we have provided the required analysis in terms of the RTI Act, Article 12 of the Constitution and relevant case law.

The second critique is closely tied to the recent judgment of *Namit Sharma v. Union of India*,⁵ wherein the Apex Court directed that since Information Commissions have the trappings of a court, they must have a judicial member. The author has criticized the judgment as a case of judicial activism, and has made a case for maintaining status quo, under which information officers are essentially administrative personnel.⁶ We have critiqued the author’s stand as flawed in principle. Thereafter, we have highlighted both, the problems with the status quo and the need for judicially trained information officers.

The article culminates with a conclusion, summing up our analysis of the book.

II. OVERVIEW AND CONTRIBUTIONS

Against the backdrop of the recently vociferous demands for transparency and accountability in governance, the RTI and allied topics are indeed emerging areas of study and debate. Any attempt to spread awareness in respect of the same is not only welcome, but also crucial in order to contribute to the progress of the debate in a principled and informed manner. The importance of the author’s contribution to the field may particularly be acknowledged in terms of the layout and content of the book.

A. CHAPTERISATION

The book is divided into 7 chapters. The first, titled ‘Freedom of Information: A Global Perspective’,⁷ provides a background by analysing information regimes throughout the world. Thereafter, the author traces the evolution of the right in the chapter titled

⁵ *Namit Sharma v. Union of India*, (2013) 1 SCC 45 (Supreme Court of India) [“*Namit Sharma*”].

⁶ *Naib*, *supra* note 4, at 216 (“The Union Government has filed a review petition before the Supreme Court. It is hoped that the Union of India will argue the case better in review than it did in the original petition and the Court will address the issues arising out of the earlier judgment as pendency of cases remains a big problem”).

⁷ *Id.*, at 1.

‘Towards the Right to Information in India’.⁸ Subsequently, the statute itself is analysed in ‘Right to Information Act 2005’.⁹ In the following two chapters, ‘Rights of Information Seekers’,¹⁰ and ‘Duties of Information Suppliers’,¹¹ the author has examined the scheme of rights and duties under the Act in considerable detail. The restrictions upon the right to information have been discussed in the penultimate chapter, titled ‘Information Exempted from Disclosure’.¹² In the final chapter, ‘Recommendations to Improve Implementation of Right to Information’,¹³ the author has expressed his views on the pitfalls in the implementation of the Act and made suggestions in respect of removing the same.

B. SUMMARY

At the outset, the book provides a global perspective on the freedom of information.¹⁴ To begin the book with a comparative analysis, without an engaging discussion about the Act itself is a puzzling beginning to a book with an otherwise logical and endearing flow. However, the author is successful in restoring the sense of familiarity to the topic in his next chapter, which traces the evolution of the right to information in India.¹⁵ After establishing the right as implicit in the scheme of Part III of the Constitution, he has embarked upon a description of the mass movement and civil society roots of the right, and traced the legislative process that has culminated in the passage of the RTI Act as we know it today. This is followed by a detailed overview of the provisions of the Act and its implementation.¹⁶ Thereafter, the author has presented a unique analysis of the Act in terms of the rights of information seekers and the corresponding duties of information providers. The practical and educative value of this part of the book is immense. First, it establishes the different aspects of the right in terms of the information that can be sought, the process for making a request for information and the appeal mechanism. Secondly, it examines the scope and obligations of ‘public authority’ under the Act and the duties and responsibilities of public information officers.

⁸ *Id.*, at 32.

⁹ *Id.*, at 60.

¹⁰ *Id.*, at 89.

¹¹ *Id.*, at 107.

¹² *Id.*, at 146.

¹³ *Id.*, at 198.

¹⁴ *Id.*, at 1.

¹⁵ *Id.*, at 32 (“Towards the Right to Information in India”).

¹⁶ *Id.*, at 60 (“The Right to Information Act, 2005”).

It is a well-established principle of law that no right is absolute in nature and the exercise of each right is subject to reasonable restrictions. The right to information is no exception and its exercise is subject to section 8 of the Act, which enumerates the classes of information that are exempt from disclosure. In the penultimate chapter,¹⁷ the author has dealt with section 8 in considerable detail. Each exemption has been dealt with individually, and supplemented with case law analysis wherever possible.

The RTI Act has come a long way since its inception as the basis of transparency and accountability in the scheme of Indian governance. While the provisions are all in place, there is a long way to go in terms of perfecting its implementation. In the final chapter,¹⁸ the author has identified a number of loopholes in this context. Moreover, he has made recommendations in respect of a number of aspects that require appropriate consideration, *inter alia* the disclosure of the file noting,¹⁹ the scope of ‘public authority’,²⁰ raising awareness about the RTI mechanism,²¹ training of information officers,²² and the need to protect RTI applicants and whistle-blowers.²³

C. CONTRIBUTION TO EXISTING LITERATURE

The academic literature on the RTI is presently flooded with short introductions. Indeed, writing an introduction seems to be a perfect compromise between regurgitating bare provisions and actually analysing their content. Notable among these short works is the introduction written by SP Sathe,²⁴ though it is riddled with its own methodological shortcomings.²⁵ Nonetheless, Sathe’s work far surpasses the mediocrity that is prevalent in rest of the available literature in the subject.²⁶ A useful contribution to literature is also made

¹⁷ *Id.*, at 146 (“Information Exempted from Disclosure”).

¹⁸ *Id.*, at 198 (“Recommendations to Improve the Implementation of Right to Information”).

¹⁹ *Id.*, at 200.

²⁰ *Id.*, at 202.

²¹ *Id.*, at 210.

²² *Id.*

²³ *Id.*, at 211.

²⁴ See generally S. P. Sathe, RIGHT TO INFORMATION (2006).

²⁵ Sathe’s work was released almost simultaneously with the enactment of the RTI Act. Hence, it is largely prospective in its outlook, in that, it tries to pre-empt the problems that might be faced in its future implementation. This becomes amply clear from the author’s own description of his work. *Id.*, at 1 (“This monograph deals with the law that is going to be enforced. This book is an attempt to focus on the Act, the judicial decisions on the right and the administrative problems that might be faced while implementing it.”).

²⁶ See N. K. Jain, RIGHT TO INFORMATION: CONCEPT, LAW AND PRACTICE, 16-51 (2007), where from pages 16-51 plainly lists out provisions from foreign legislations; See also, N. N. Mathur, EXHAUSTIVE

by Jaipurkar and Satpate's casebook,²⁷ which serves as a great ready-reference for anyone engaged in RTI litigation.

It is in this context that the relative merit of Naib's work is to be evaluated. This book serves as a valuable lodestar to any academic or practitioner who seeks to navigate the field of the right to information. Its crisp layout, coupled with its accessible language and tabular charts give a conceptual clarity that few other commentaries can deliver. The book makes at least three distinct contributions to literature.

First, it is written in simple language, thereby ensuring that the reader grasps the exact import of the key provisions of the Act. *Secondly*, the comprehensive nature of the chapter on exemptions makes it informative, thereby enabling a thorough understanding of the Act. *Thirdly*, the author also attempts to engage in a social impact assessment of the RTI Act, in a way that is both rare and valuable in its outlook.

D. IMPACT

Information is essentially the oxygen of democracy, and as such, the RTI Act is a major step towards making Indian democracy more transparent and accountable. However, in order to be effective, this legislation demands a populace which is well versed with its rights and knows how to exercise them.

The author has been successful in providing a concise yet comprehensive overview of the Act, its exposition and its practical functioning. It is thus that the educative value of his book is immense. The said value operates on a number of levels. The book has the potential to empower information-seekers i.e. a citizenry often accused of ignorance and indifference. Further, it can easily serve the purpose of educating the basic cadre of information-providers (Public Information Officers) as to the effective discharge of their duties. Lastly, the book also stands to benefit academics, scholars and students wishing to get a firm grasp of the subject in a short period of time. Thus, the book vindicates its purpose of providing a useful introduction to the right to information in India.

The author has made an honest attempt to wrest the RTI Act from the incomprehensible realm of legal jargon and to explain it in layman's terms. Such an attempt is crucial in order to educate the common man as to the value and potential of the Act as an effective tool to make Indian democracy more transparent and accountable. The clear and

COMMENTARY ON THE RIGHT TO INFORMATION (2005), where the author spends 71 pages on general principles of statutory interpretation as commentary to the preamble of the Act.

²⁷ Divya Jyoti Jaipurkar and Jayshree Satpate, LEADING CASES ON RIGHT TO INFORMATION (2009).

lucid manner in which the Act has been presented is commendable. A clear testament to the same is the author’s superb use of figures,²⁸ and tables,²⁹ to break down the entire RTI machinery into a few straightforward and easily comprehensible steps. Simple tools such as a tabular analysis can go a long way in supplementing governmental efforts to create awareness as to people’s rights and the relative ease with which they can be exercised.

Section 8 of the Act states the exemptions from the right to information, and in order to facilitate an effective understanding of the Act, the reader must be made aware of the limits within which the right operates. In this context, another aspect of the book that must be appreciated is the comprehensive analysis of the exceptions to the right to information. The author has explained, in some detail, the nature of the information exempted from disclosure under the Act,³⁰ supplemented with case law analysis wherever possible.

No piece of legislation is perfect, and each suffers from its own set of loopholes. The hallmark of a good legislative analysis is the ability to identify these loopholes and offer a principled critique and corresponding suggestions. The author discharges this requirement in the concluding chapter of his book, wherein he highlights the important shortcomings of the Act, and makes recommendations on improving its implementation. In highlighting important issues such as the scope of information to be disclosed, the scope of ‘public authority’ and the need to widen the same, the need for digitization of information and for continuous proactive disclosure, the training of officials and the protection of RTI applicants and whistle-blowers, the author is asking all the right questions to the authorities responsible for implementing the Act.

Lastly, the author is able to draw freely from non-legal sources to demonstrate the ground realities of the operation of the law. He begins by tracing the evolution of the movement from the founding of the *Mazdoor Kisan Shakti Sangathan*,³¹ to its reformulation by the Parliamentary Standing Committee;³² thus providing an insight into its legislative history. In the section titled ‘How the RTI Act has Helped: Success Stories’,³³ the author has summarized studies by Ivy League researchers and prominent organizations such as the

²⁸ Naib, *supra* note 4, at 106 (“Application and Appeal Process Through RTI”); Naib, *Id.*, at 134 (“Procedure for Disposal of Request by PIO”); Naib, *Id.*, at 144 (“Involvement of Third Party”).

²⁹ *Id.*, at 138 (“Time Limit for Disposal of Applications”); Naib, *Id.*, at 143 (“Time Period for Supply of Information when Third Party is Involved”).

³⁰ *Id.*, at 146 (“Information Exempted from Disclosure”).

³¹ *Id.*, at 41-45.

³² *Id.*, at 51.

³³ *Id.*, at 70.

Centre for Media Studies to showcase the workings of the Act. In doing so, the author collates important information that would have otherwise gone unnoticed. There is a dire need for such studies, especially in the context of the formulation of rights under Article 21 by the Supreme Court,³⁴ with reckless disregard for the actual hazards related to the implementation and realization of rights.

III. CRITIQUE

The above part has outlined the value that this book has added to the academic literature on RTI. Although nothing contained in this section would take away from that fact, there is still plenty that the author could have improved. The two major critiques that have been dealt with below best showcase his tendency to deal with complex questions of law with blanket statements. Apart from the primary critiques, there are also reservations as to the method employed by the author in some parts.

The excessive attention that has been devoted to the ‘Global Perspective’ on the RTI,³⁵ needs some serious examination. It is difficult to understand the underlying purpose behind delving into global information regimes without prior reference to the Indian scheme of things. Moreover, providing a highly detailed analysis of the information laws of Europe,³⁶ the Americas,³⁷ Asia Pacific,³⁸ the Middle East and Africa,³⁹ and a comparative analysis,⁴⁰ right at the outset of the book would cause a sense of bewilderment in the layman unfamiliar with the ‘information jargon’.

This is not to say that foreign legal material is irrelevant. However, before citing any such legislation or judgment, some analysis on the lines of historical association of the countries, cognate legal systems and analogous nature of constitutional institutions involved must be undertaken.⁴¹ While it is not expected that a short introduction would delve in the

³⁴See Durga Das Basu, *SHORTER CONSTITUTION OF INDIA*, 377-383 (2011), where the author talks about the many socio-economic rights read into Article 21 including the right to freedom from malnutrition, reasonable residence, decent environment etc.

³⁵Naib, *supra* note 4, at 1-32.

³⁶*Id.*, at 3.

³⁷*Id.*, at 10.

³⁸*Id.*, at 14.

³⁹*Id.*, at 16.

⁴⁰*Id.*, at 17.

⁴¹Gautam Swarup, *Why Indian Judges would Rather be Originalist: Debunking Practices of Comparative Constitutional Law*, 5(1) *INDIAN JOURNAL OF CONSTITUTIONAL LAW*, 55-76.

depths of comparative analysis, perhaps the legislative survey could have restricted itself to prominent jurisdictions that India has some history of borrowing from.

A second tendency of the author that considerably takes away from the narrative is the lack of conclusions drawn at the end of each section. This is specifically important in areas that have seen rapid change of law with court orders being overturned by superior courts. A prime example of the same is the sub-section on the ‘disclosure of answer sheets’.⁴² Right after mentioning the Supreme Court order on the issue,⁴³ the author has highlighted the order of the CIC where it ‘took a different stand’.⁴⁴ Such a statement of the law is enough to confuse any reader who is not well versed with the doctrine of *stare decisis*. A brief concluding remark would have, hence, gone a long way in clarifying the current position of law, and making the information contained in the book a lot more accurate.

The section below will deal with two major substantive points of law that require more analysis. These are the questions relating to the legal content of ‘public authority’ – a term that has decisive importance in the scheme of the Act, and the author’s critique of the Supreme Court order in *Namit Sharma*.⁴⁵ The following section will treat the criticisms of the book as a point of departure to probe deeper into critical questions that the right to information faces today.

A. INSUFFICIENT ANALYSIS ON THE DEFINITION OF ‘PUBLIC AUTHORITY’

Section 2(h) of the Right to Information Act, 2005 defines ‘public authority’ for the purpose of the Act. The term has been defined in four parts. The first three parts comprise of authorities or bodies or institutions of self-government constituted by or under the Constitution, by any other law made by the Parliament or the states. However, it is the fourth part of the definition that has received the maximum judicial scrutiny. Consequently, it has been creatively interpreted in a number of contexts.⁴⁶

The definition of ‘public authority’ is the lynchpin of the RTI Act.⁴⁷ As one of the central terms in the Act, it directly affects the obligations of the respondents in most cases

⁴² Naib, *supra* note 4, at 169- 172.

⁴³ *CBSE v. Aditya Bandopadhyaya*, (2011) 8 SCC 497 (Supreme Court of India).

⁴⁴ *Manoj Kumar Pathak v. CBSE*, Decision No. CIC/OK/A/2008/00832/SG/0677 Appeal No. CIC/OK/A/2008/00832/ (Central Information Commission).

⁴⁵ *Namit Sharma*, *supra* note 5.

⁴⁶ See *infra* notes 55-57.

⁴⁷ The phrase ‘public authority’ occurs in several critical sections in the Act. Sec. 2(j) defines the “right to information” as information held by or under the control of a ‘public authority’. Sec. 4 lays down the obligations regarding pro-active disclosure of information by public authorities. Similarly, Sec. 5 lays

and has a definitive impact on the coverage of the Act. Definitions have a notorious stature in the hall of fame of judicially active statutory interpretation, as the margin of error in the interpretation of the definitions is even smaller. This is so because the *ratio decidendi* would then apply to each and every case that falls within that Act. For example, the interpretation of ‘consultation’ in Art. 124(2),⁴⁸ would only have ramifications on the appointment of Judges to the Supreme Court. However, an interpretation of ‘industry’,⁴⁹ under Section 2(j) of the Industrial Disputes Act, 1947 would have an impact, on every case that comes under the given statute.

It is this fundamental problem that we also see unfurl in the arena of RTI litigation. Compared to its nucleic importance under the Act, the author provides insufficient analysis of the term and the many implications that surround its interpretation. In Chapter 5, titled ‘Duties of Information Suppliers’, the author firstly deals with precedents related to the meaning of the term ‘authority’, ‘body’ and ‘institution of self-government’. Thereafter, he has provided a collection of important decisions with regard to the scope of the term ‘public authority’.⁵⁰ Instead of treating the section one clause at a time, ‘authority’, ‘body’ and ‘institution of self-government’ are used as euphemisms, which ambiguously covers the scope of each clause. As a consequence, there is a lack of clarity as to some of the most fundamental principles of law laid down by the CICs and the High Courts over the course of many precedents.⁵¹

There are at least two issues that remain unaddressed after reading the abovementioned chapter. *First*, what are the implications of Section 2(h)(d) and what are the exact touchstones to judge whether a given body falls within the definition? *Secondly*, what is the relation between bodies under Article 12 of the Constitution and ‘public authorities’ under Section 2(h) of the Act? We will consider these questions one by one.

down that each public authority shall designate a Central Public Information Officer and Sec. 6 prescribes the “request for obtaining information” along the same lines.

⁴⁸ See *Sankalchand Himatlal Sheth v. Union of India*, (1977) 40 SCC (Supreme Court of India), *S.P. Gupta v. President of India*, (1981) Supp SCC 87 (Supreme Court of India), *Supreme Court Advocates on Record v. Union of India*, (1993) 4 SCC 441 (Supreme Court of India).

⁴⁹ Readers would be familiar with the judicial uncertainty that surrounds the meaning of ‘industry’ after *Bangalore Water Supply & Sewage Board v. Rajappa*, AIR1978 SC 548 (Supreme Court of India); See E. M. Rao, *INDUSTRIAL JURISPRUDENCE: A CRITICAL COMMENTARY*, 696-705 (2008).

⁵⁰ Naib, *supra* note 4, at 107-16.

⁵¹ *Infra* notes 55-57.

1. INTERPRETATION OF ‘PUBLIC AUTHORITIES’ UNDER SECTION 2(H)(D)

Section 2(h)(d) states that ‘public authority’ means any authority, body or institution of self-government established or constituted by the notification issued or order made by the appropriate Government, and includes any body owned, controlled or substantially financed; or a Non-Governmental Organization (“NGO”) substantially financed, directly or indirectly by funds provided by the appropriate government.

A plain reading of this provision will bring forth many issues. First, are authorities not established or constituted by notification to be included within the ambit of the term ‘public authority’? Secondly, what is the scope of ‘indirect funding’ by the government?

With regards to the interpretational issues that surround this section, the author merely mentions that “clause (ii) has been interpreted to include private non-governmental bodies that are substantially financed.”⁵² This explanation is plainly insufficient, specifically after considering the volume of judicial dicta dedicated to this section.

The CIC’s orders over a long period of time have essentially used three main factors in judging whether an NGO is a ‘public authority’: the nature of function and whether the same qualifies to be a ‘public function’,⁵³ the funding given by the Government and whether the same amounts to ‘substantial funding’,⁵⁴ and lastly, the nature of the organization itself.⁵⁵ However, these three factors have not proved enough to guide reasoned decisions on the scope of the term. Indeed, most judgments of the CIC amount to a pragmatic calculation of ‘public interest’ which lies in the favour of the citizen with a thread-bare analysis on the three factors outlined above.

⁵² *Id.*, at 112.

⁵³ *See* DAV College Trust and Management Society v. Director of Public Instruction, AIR 2008 P&H 117 (Punjab and Haryana High Court), where the Court held that a 45% grant-in-aid did not constitute substantial funding, but the college was a ‘public authority’ under the Act because it performed a ‘public function’.

⁵⁴ *See* Lt. Col Anil Heble v. Airport Authority of India, CIC/OK/C/2006/00125 (Central Information Commission), where the Court held that 26 % funding of the DIAL amounted to substantial funding. Also *see* Indian Olympic Association v. V Malik and Anr, (2010) ILR 4 Delhi 1 (High Court of Delhi), wherein it was held that substantial funding was not equivalent to majority funding.

⁵⁵ *See* Shri Roshan Lal v. Delhi Transco Ltd, CIC/WB/2006/01061 (Central Information Commission), where the CIC held that Power Distribution Companies which were created on a public-private partnership were ‘public authorities’ because of financing by the state. Also *see* Diamond Jubilee Higher Secondary School v. Union of India, (2007) 3 MLJ 77 (High Court of Judicature at Madras), where the Court rejected the contention that a substantially financed English speaking School would be a ‘public authority’ despite its purely private nature.

For instance, in *MP Verghese*,⁵⁶ the Court held that a private-aided University was controlled by the government since it had to abide by the Kerala University Act, 1974. Therefore, rather than meaning influence over decision making processes, ‘control’ has been interpreted to be synonymous with statutory compliance. By the same token, an industry which complies with all the environmental regulations should be considered a ‘public authority’. Such a conclusion would be patently absurd. It is thus perhaps that it has been held that a mere notification under the Co-operative Societies Act, does not render a body a ‘public authority’.⁵⁷

These doctrinal tensions best displayed themselves when the CIC recently found itself in the midst of a politically charged litigation where the petitioner had requested for receipts, payments and manifesto promises of all national parties.⁵⁸ The Commission finally based its opinion on the fact that land given at concessional rates and exemption from taxation amounted to substantial funding, performance of a public duty and constitutional/legal provisions vesting political parties with rights and liabilities.⁵⁹ Of these, the last element is the most dubious – while substantial funding has a clear textual basis, and the public function test derives itself from the fact that an authority must be ‘public’ to be a ‘public authority’, it is tough to fathom where this third consideration draws its basis from. It would have been an altogether different scenario had the statutes or constitution established political parties, but they merely give recognition. Therefore, the latest order only complicates matters. The questions regarding the relation within these three elements and whether they are disjunctive or conjunctive are yet to be answered.

2. ‘STATE’ UNDER ARTICLE 12 VIS-À-VIS ‘PUBLIC AUTHORITY’

On a plain reading of Section 2, the first sub-heading prescribes that bodies established or authorized by or under the Constitution are ‘public authorities’. One might wonder then as to the exact scope for any ambiguity to arise as a result of which there might arise a need to interpret this Section. Indeed, it is a settled proposition of law that the definition of the term ‘public authority’ is wider than the scope of the term ‘state’ as defined in Article 12 of the Constitution. This definition is wide and covers even those organizations

⁵⁶ *MP Verghese v. Mahatma Gandhi University*, AIR 2007 Ker 230 (High Court of Kerala).

⁵⁷ *Bidar District Central Co-op bank Ltd. v. Karnataka Information Commission*, ILR 2008 KAR 3830 (High Court of Karnataka).

⁵⁸ *Subhash Chandra Agarwal v. Indian National Congress and Ors.*, File No. CIC/SM/C/2011/001386 (Central Information Commission).

⁵⁹ *Id.*, at ¶ 62.

that do not enjoy a constitutional monopoly.⁶⁰ This is further evidenced by the fact a lot of bodies that were declared to be ‘public authorities’ were in fact not adjudged to be ‘state’ under Article 12. Indeed, while the Board of Control for Cricket in India was held not to be state,⁶¹ the Indian Olympic Association, with similar facts and circumstances was adjudged to be a ‘public authority’ by the Delhi HC.⁶² Similarly, many schools and colleges have also been held to be covered under the Act,⁶³ because the school was performing a public function and received substantial grants-in-aid from the Government.⁶⁴

The interpretation of the first sub-part may, however, seem problematic when a specific contingency is considered. For example, an organization may be adjudged ‘state’ under Article 12 but is nonetheless unfit to be called a ‘public authority’ under Section 2(h)(d)(ii). Such a unique instance was provided by an order by the Delhi High Court earlier this year, which held that the private news television channel *Aaj Tak* was amenable to writ jurisdiction.⁶⁵ Further it awarded five lakh rupees to the petitioner, a rape victim, for violations of her right to privacy and confidentiality as the respondent news channel had revealed her name.⁶⁶

From the principles stated in the previous sub-part, it becomes clear that a private news channel would have never qualified as a ‘public authority’ under Section 2(h)(d). It has no constitutional or statutory status, it does not enjoy substantial grants-in-aid and it performs a function that is almost exclusively performed by private empires today. This possibility leads to many perplexing questions. Are all bodies that are amenable to writ jurisdiction ‘public authorities’ under Section 2(h)(a)? While the literal interpretation of the statute may point towards an obvious affirmative answer, the above case clearly displays an anomaly.

⁶⁰ *Supra* note 27.

⁶¹ *Zee Telefilms v. Union of India*, (2005) 4 SCC 694 (Supreme Court of India).

⁶² *Indian Olympic Association v. V Malik and Ors.*, (2010) ILR 4 Delhi 1 (High Court of Delhi).

⁶³ *Supra* note 56.

⁶⁴ *Id.*

⁶⁵ *ABC v. Police Commissioner*, W.P. (C.) No. 12730/2005 and C.M. Nos. 9505/2005, 13315/2005 & 12222/2007 (High Court of Delhi). For a justification of the rationale of the decision, see Vishnu S. Warrior, *Redefining the Definition of “State” under Article 12 of the Constitution*, 1(2) CONSTITUTIONAL AND ADMINISTRATIVE LAW QUARTERLY, 39-46 (2013) for a view that criticizes the judgment; see Prashant Reddy, *The Fourth Estate as the State? A Troubling Precedent by the Supreme Court*, (February 15, 2013), LAW AND OTHER THINGS, available at <http://lawandotherthings.blogspot.in/2013/02/the-fourth-estate-as-state-troubling.html>.

⁶⁶ *Id.*

When Section 2(h) is supposed to be wider than state under Article 12, how can a body under Article 12 not be a ‘public authority’ under Section 2(h)? Further, if it is a body, are private news agencies to have Central Public Information Officers? Lastly, does that affect their right to freedom of speech and expression?⁶⁷ Would an RTI application to reveal confidential sources of information be acceptable? The above discussion points towards the need to look at the RTI movement from different vantage points. One only realizes such tensions once the RTI Act is seen through a constitutional lens. Therefore, in omitting to mention the general relationship between Article 12 and Section 2(h)(d), the author misses out a key relationship in understanding the right to information. However, as we have seen in this section, understanding that one is broader than the other is not necessarily the dead-end to the road of inquiry.

B. AUTHOR’S CRITIQUE OF *NAMIT SHARMA* FLAWED IN PRINCIPLE

In the epilogue to the book, the author discusses the ramifications of the Supreme Court’s judgment in *Namit Sharma v. Union of India*,⁶⁸ in some detail. His stand on the judgment becomes clear by his characterization of the directives of the Supreme Court as a case of judicial activism,⁶⁹ and his apparent desire for a different outcome in the review petition that has been filed by the Union of India and at the time of writing, is pending before the Apex Court.⁷⁰

1. THE ANOMALY

Before giving a brief summary of the judgment, it is important to understand the textual anomaly that underlies this writ petition. Sections 12 and 15 of the Act deal with the composition of the Central and State Information Commissions respectively. Section 12(5) states that the CIC and ICs shall be persons of eminence in public life with wide knowledge and experience in certain stated fields, such as law, science and technology, social service, management, journalism, mass media or administration and governance.

⁶⁷ If a restriction has a direct impact on a corporation’s ability to send and receive information, the same is understood to be violative of the right to freedom of speech and expression. *See* generally *Bennett Coleman v. Union of India*, AIR 1973 SC 106 (Supreme Court of India); *Express Newspapers v. Union of India*, AIR 1958 SC 578 (Supreme Court of India); *Sakal Newspapers v. Union of India*, AIR 1962 SC 305 (Supreme Court of India).

⁶⁸ *Namit Sharma*, *supra* note 5.

⁶⁹ *Naib*, *supra* note 4, at 215.

⁷⁰ *Id.*, at 216, (“The Union Government has filed a review petition before the Supreme Court. It is hoped that the Union of India will argue the case better in review than it did in the original petition and the Court will address the issues arising out of the earlier judgment as pendency of cases remains a big problem”).

The imprecise nature of this provision is supplanted by the utterly puzzling language of Section 12(6), which disqualifies from the posts mentioned under Section 12(5) any MP, MLA, or holder of any other office of profit or person connected with any political party, or carrying on any business or pursuing any profession. From the text of Section 12(6), it appears that the disqualifications contained therein operate before the appointment is made. That being the case, they debar virtually everyone from holding the offices of CIC and ICs. Thereby, if the two provisions are read in succession, the latter defeats the former. The same language is reproduced in Section 15.

This contradiction was addressed by the Apex Court in the matter of *Namit Sharma v. Union of India*,⁷¹ a public interest litigation which challenged the constitutionality of the impugned provisions, on the principal grounds that the eligibility criteria for appointment to a quasi-judicial office under Sections 12(5) and 15(5) were extremely vague and inconsistent with the judicial bent of mind required to successfully perform an adjudicatory function.

However, the Court was inclined to favour the constitutionality of the statute, and thereby upheld the same.⁷² Yet, in a detailed order, it stated that appointment of legally qualified, judicially trained and experienced persons would ensure a more effective and just dispute resolution mechanism under the RTI Act. Consequently, the Court directed that Information Commissions were to operate in benches of two, with each Bench having a ‘judicial member’ with proficiency and experience in the law, appointed in consultation with the relevant Chief Justice, and an ‘expert member’ in consonance with the stated fields in Sections 12(5) and 15(5). The vires of Sections 12(6) and 15(6) were upheld by reading into the provisions that the said disqualifications would be operative only post-appointment, so that CICs and ICs would not concurrently hold any other office.

2. JUDICIAL ACTIVISM AND THE SEPARATION OF POWERS

The author has successfully pointed out the practical difficulties with the implementation of the impugned directives, *inter alia* pendency of appeals while such unique benches are constituted, and the same have been partially (albeit grudgingly) recognized by the Supreme Court *vide* its partial stay order dated 16th April 2013.⁷³

⁷¹ *Namit Sharma*, *supra* note 5.

⁷² Per Swatanter Kumar, J, *Namit Sharma*, *supra* note 5, at ¶ 58.

⁷³ *Union of India v. Namit Sharma*, 2013 (5) SCALE 736 (Supreme Court of India). In this review petition, the Court, through A. K. Patnaik and Arjan Kumar Sikri, JJ., stated that it was not inclined to stay the operation of the entire judgment in *Namit Sharma v. Union of India*. However, it directed that the operation of two prior orders *viz.* constitution of Information Commissions as special benches of two

Yet, it is argued here that his case for judicial activism is unconvincing at best. The primary flaw is that it is deduced on the strength of practical difficulties rather than in principle and suffers from a lack of analysis. Thereby, we purport to show that when analysed in principle, directives of the Apex Court are sound and will ensure a more meaningful implementation of the Act: a conclusion diametrically opposite to that reached by the author.

In order to support or oppose the case for judicial intervention in the issue at hand, it becomes imperative to delve into the very doctrine of separation of powers between the three organs of government⁷⁴. In its classical sense, the doctrine advocates a complete delineation of the respective functions of legislation, implementation and adjudication, which are not meant to overlap in any circumstance whatsoever. However, in contemporary times, this approach has attracted criticism for being dogmatic and practically unworkable, as no government can run on a strict separation of powers.⁷⁵ Therefore, it is not a case of impassable barriers and unalterable frontiers but of mutual restraint in the exercise of powers by the 3 organs of the State.⁷⁶ Hence, the doctrine may be more appropriately christened *division*, rather than the separation, of powers, and this leads to the irresistible conclusion that the lines of demarcation between the three organs and their functions have become more porous than ever.

However, the classical doctrine yet holds merit in the modern world. The underlying logic is that of polarity so that the centralization of authority is dispersed in order to avoid absolutism.⁷⁷ Some interaction is considered inevitable; yet, it is possible for the essential distinction between the three functions of legislation, policy-making and implementation,

with one judicial and one 'expert' member, and the appointment of the judicial members in consultation with the judiciary, would be stayed during the pendency of the review petition.

⁷⁴ This is so because any critique on judicial activism rests on a criticism that the judiciary is overstepping its boundaries in making binding regulations or entering into the making of a policy decision, which is the exclusive realm of the legislature and executive respectively. For a typical critique of judicial activism, See T. R. Andhyarujina, *Disturbing Trends in Judicial Activism*, THE HINDU (August 6, 2012) available at <http://www.thehindu.com/opinion/lead/disturbing-trends-in-judicial-activism/article3731471.ece>, where the author comments "Unless the parameters of PIL are strictly formulated by the Supreme Court and strictly observed, PIL which is so necessary in India, is in danger of becoming diffuse, unprincipled, encroaching into the functions of other branches of government and ineffective by its indiscriminate use." Also see generally S. P. Sathe, *JUDICIAL ACTIVISM: TRANSGRESSING BORDERS AND ENFORCING LIMITS* (2002).

⁷⁵ IP Massey, *ADMINISTRATIVE LAW*, (2008) at 43.

⁷⁶ Massey, *Id.*, at 45.

⁷⁷ *Id.*

and adjudication, to co-exist with the said interaction between the organs themselves. In particular, the freedom of information, demands that a distinction be maintained between the tasks of administration and that of adjudication. This ensures that neither cadre of personnel undertakes to perform the tasks that must, by their very nature, vest in the other.

3. ROLE OF INFORMATION COMMISSIONS

In order to put this statement in proper context, one question is of supreme importance: what is the true nature of the dispute resolution mechanism under the RTI Act? The essential query is whether decisions made by Information Commissions come closer to administrative decisions or judicial determination based on the rule of law. This determination requires a close scrutiny of the role of the Information Commissions.

It is essentially clear that an Information Commission is required to decide a *lis*, wherein information is required by one person and its furnishing is contested by the other.⁷⁸ In the course of such determination, matters of serious consequences are adjudicated upon. It may be a simple query for information but can have far reaching consequences upon the right of a third party or an individual with regard to whom such information is sought.⁷⁹ Therefore, the Commission may be called upon to resolve the tussle between the right to information under Article 19(1)(a) and the right to privacy under Article 21 or to determine whether the information sought falls under any of the exemptions enumerated in Section 8 of the Act.

The Information Commissioners are obliged under the Act to approach each matter seriously and with caution, and to take cognizance of the consequences of disclosure or secrecy upon the rights of others.⁸⁰ Since orders passed by the Commission may have civil as well as penal consequences, it is expected to act in consonance with the principles of natural justice as well as those applicable to service law jurisprudence.⁸¹ Such an approach clearly demands adjudication upon intricate issues of legal essence and effect, which in their turn must insist upon application of mind and the passing of reasoned orders.⁸² The Information

⁷⁸ Namit Sharma, *supra* note 5, at ¶ 59.

⁷⁹ *Id.*, at ¶ 72. Section 11 of the Act provides that when an Information Officer intends to disclose information that relates to or has been supplied by a third party intending to keep it confidential, such third party is statutorily entitled to written notice of such intention and shall be allowed to make a written or oral submission as to whether the information should be disclosed. The Information Officer is bound to take the submission into consideration while deciding about the disclosure of the information.

⁸⁰ *Id.*

⁸¹ Namit Sharma, *supra* note 5, at ¶ 76.

⁸² *Id.*, at ¶ 60.

Commissioners are therefore essentially required to adjudicate upon a *lis* in accordance with the law, and such a function cannot be termed as an administrative function *simpliciter*.⁸³ The exercise of the powers mentioned above and the decision-making process not only gives the color of judicial and/or quasi-judicial functioning to these authorities but also vests the Commissions with the essential trappings of a civil Court.⁸⁴

Moreover, the various provisions of this Act are clear indicators of the unquestionable proposition of law that the Commission is a judicial tribunal and not a ministerial tribunal. It is an important cog in and is part of the court attached system of the administration of justice, unlike a ministerial tribunal which is more influenced, controlled and performs functions akin to the machinery of administration.⁸⁵ This complex function of maintaining the precarious balance between conflicting interests in law may be performed more efficiently by a legally trained mind.⁸⁶ The legislative scheme of the Act clearly envisions the passing of a reasoned order.⁸⁷ Therefore, the conclusion that the functions performed by Information Commissions are based on the process of judicial determination is inevitable. Hence, providing Information Commissioners with judicial training and experience will go a long way in enhancing the success of the RTI in India.

4. VINDICATING NAMIT SHARMA

It is in this respect that it is argued that adjudication of a judicial nature ought to be left to those with the requisite training to discharge the same, and not sacrificed at the altar of administrative indifference as it is under the present regime. The directives made by the Supreme Court in *Namit Sharma* stand vindicated by a principled reasoning, though its practical implementation poses a genuine quandary for the authorities. One can hope that the same will be resolved, and a new cadre of judicially enlightened Information Commissions will pave the way for smoother and more consistent dispute resolution under the Act.

It may be argued that the above reasoning is inherently contradictory, as it places limits on administrative decision-making but condones disproportionate judicial activism, which some would, in light of the impugned Supreme Court directives, even term judicial legislation. Indeed, the author states in no uncertain terms that the Court has not only

⁸³ *Id.*, at ¶ 76.

⁸⁴ *Id.*

⁸⁵ *Id.*, at ¶ 85.

⁸⁶ *Id.*, at ¶ 98.

⁸⁷ *Id.*

breached the scope of the Act (which in his opinion, is limited to making information available to the public as conveniently as possible), but has also completely rewritten the provisions regarding eligibility criteria.⁸⁸ However, this is a rebuttable assertion.

What the author is essentially arguing is that the Court has usurped the legislative function. However, it is a settled principle of Indian constitutional jurisprudence that any law that permits arbitrary action violates Article 14 and is liable to be struck down upon judicial review.⁸⁹ The present RTI regime with its vague eligibility criteria has created a cadre of Information Commissioners with qualifications that do not equip them to satisfactorily discharge the essentially judicial nature of their duties. This creates the possibility of arbitrary decision-making, which would violate the right to equality, and fail the test of arbitrariness evolved under Article 14. As such, the current regime threatens to trespass the order of constitutionality into the wilderness of unconstitutionality.

This is a two-pronged argument. First, the right to know has been globally recognized as the lifeblood of participatory democracy, and as a fundamental right under Article 19(1)(a) of the Constitution in India. Thereby, the functions discharged by the Information Commissions have a tremendous impact upon the rights and obligations of the parties involved. An arbitrary order passed by a judicially ignorant Information Commission would be a gross violation of both the right to information and the protection from arbitrary action guaranteed by Article 14 of the Constitution.⁹⁰

Secondly, as has been deduced, the Information Commissions form part of an elaborate court system whose independence and impartiality itself forms part of one of the fundamental tenets of our constitution. Having administrative personnel at the helm of a judicial system constitutes a clear threat to its impartiality, as they would lack the training of persons of legal acumen, expertise and experience. Moreover, in the present scheme of things under the RTI Act, there is always the possibility of institutional bias,⁹¹ which threatens the efficient administration of justice. Thereby, the case for Information Commissioners with a judicial bent of mind is indeed a very strong one.

⁸⁸ Naib, *supra* note 4, at 214.

⁸⁹ E. P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 (Supreme Court of India).

⁹⁰ Namit Sharma, *supra* note 5, at ¶ 100.

⁹¹ Under the status quo, information authorities at the levels of PIO and first appeal may be required to take action against their peers. Such a situation highlights the both the possibility of bias that would contravene the right of the applicant, and the clear need for impartiality and a judicial bent of mind in order to ensure a fair process.

Having stated the dangers qua constitutionality of the present regime, we would reiterate that the Supreme Court directives are completely justified and fall within the ambit of its powers. To ask the questions posed by Upendra Baxi:⁹²

*“Should Courts and Justices remain mute spectators when the executive does not implement its statutory and constitutional obligations, in response to an adequate showing to this effect by the social action litigation petitioners? Should they not feel constitutionally constrained to intervene in the face of stark governance failures? Are Justices and Courts usurping in any sense of that word the powers of other institutions of governance in issuing orders and directions to cease and abate from unlawful and unconstitutional administration on part of the executive?”*⁹³

IV. CONCLUSION

The above analysis shows that while the state of the RTI appears to be satisfactory in isolation, its interaction with constitutional law doctrines showcases principled tensions. One might argue that these doctrinal predicaments are nothing but examples of ‘an old wine in a new bottle’ and that they have persisted since time immemorial. However, given the unique nature of the RTI, the central place it has come to occupy and its expanding coverage, it would only be sensible to conclude that the RTI regime must find unique solutions to these age old quandaries. One solution might be to give large amounts of discretion to the Public Information Officers appointed under the Act. However, as our critique has shown, that too can be problematic.

It is hoped that every reader who comes across Naib’s work is compelled to think as deeply as these two readers were. All in all, this present work stands head and shoulders above the many commentaries and short introductions on the RTI that have flooded the market in the recent past. If the decisions given in the past few months are anything to go by, the RTI will garner even more attention in newspapers and across media in general. It is thus that if a citizen is to be made familiar with the fundamentals of the subject, he would do good to refer to this book.

⁹² Upendra Baxi, *The Myth and Reality of Indian Administrative Law*, in I. P. Massey, ADMINISTRATIVE LAW, XLVIII (2008).

⁹³ *Id.*, at XLIX.