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ENVIRONMENT TAXATION IN INDIA: NEED FOR GREEN FISCAL REFORM FOR A SUSTAINABLE FUTURE

-PARIDHI PODDAR*

ABSTRACT

Most developed nations have, of late, resorted to using taxation as a means to address the growing menace of environmental pollution. However, the Indian lawmakers have paid limited attention to this policy option. The primary premise of this paper is that eco-taxes must be deployed more effectively under the Indian law, as sound "eco-taxation" policy can turn out to be much more effective in addressing the issue of environmental pollution than traditionally prohibitive and regulatory laws. In light of this, the paper aims to highlight the role environmental taxation can play in reducing the consumption and demand for environmentally harmful goods. It will provide a brief overview of the history of taxation and the considerations that affect the design and scheme of eco-taxes. The paper would also specifically delve into the challenges that must be addressed in order to render eco-taxation as a successful policy measure in India.

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I. INTRODUCTION

Since the last century, environment, and in particular sustainable development, has become a central issue in the policy agenda of both developed and developing countries.[1] While traditionally governments have focussed on strengthening their legislations in order to address the problem of environmental degradation, of late, debates have revolved around the role fiscal policy instruments, like taxes and subsidies can play in this regard.[2]

Environmental taxation or pollution tax, popularly known as green tax,[3] refers to the duty imposed on goods and activities that cause environmental pollution with the objective of internalising externalities.[4] These taxes are also called Pigouvian taxes after Arthur Cecil Pigou, who was the first economist who argued for governmental intervention in prices through taxes, for the internalisation of negative externalities.[5]

The primary aim of eco-taxation is not to raise revenue for the government, but to drive consumers towards reducing their consumption of polluting goods and instead make a shift towards the use of environmentally sustainable substitutes.[6] For this reason, falling tax revenues from products and activities subjected to environmental taxation is interpreted as a sign of success of the policy. For instance, if a measure is sought to be imposed on waste disposal by households, in order to induce them to minimise it, a tax would be imposed proportionately on the number of garbage containers produced as opposed to charging a flat fee. Falling revenues from fees would thus be an indicator of the effectiveness of the policy, as it directly reflects the extent of reduction in waste generation. In fact, environmental taxation can generate a "double dividend" by not only raising social welfare by reducing polluting activities, but also creating an improved revenue system by reducing reliance on income, sales and other taxes which have a distorting effect on the market economy.[7]

One of the major advantages of eco-taxation is that it is cost-effective – in other words, it can aid in the achievement of environmental aims at the least possible cost.[8] Besides reducing the consumption of harmful products, eco-taxes promote efficient consumption of resources by encouraging expenditure on the innovation of newer technologies to reduce emissions.[9] In the long run, environmental taxes can increase the demand for eco-

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[1] United Nations Department of Economic and Social Affairs, *World Economic and Social Survey 2013: Sustainable Development Challenges*, Doc. No. E/2013/50/Rev. (2013), (Feb 8, 2017) https://sustainable development.un.org/cont ent/documents/2843WESS2013.pdf.

[2] International Monetary Fund, *IMF Survey: Fiscal Policy to Address Energy's Environmental Impacts*, (Feb 8, 2017) http://www.imf.org/en/News/Articles/2015/09/28/04/53/sopol073114a#.

[3] Sebastian J. Miller & Mauricio A. Vela, *Are Environmentally Related Taxes Effective?*, IDB Working Paper Series No. IDB-WP-467 (November 2013), (Feb 8, 2017) at https://www. cbd.int/financial/mainstream/ idb-tax.pdf.

[4] *Id.*

[5] Andre Folloni & Renata Zelinski*, Environmentally Oriented Tax Law and the Brazilian Tax Species*, 13(25) DOM HELDER 93, 99 (2016).[hereinafter 'FOLLONI'].

[6] Michael Rodi, Kai Schlegelmilch & Michael Mehling, *Designing Environmental Taxes in Countries in Taxation: A Case Study of Vietnam* in HANDBOOK OF RESEARCH ON ENVIRONMENTAL TAXATION 123, 135 (2012) [hereinafter 'Rodi'].

[7] *See Generally* Wallace E. Oates, *Green Taxes: Can We Protect the Environment and Improve the Tax System at the Same Time?*, 61(4) SOUTHERN ECONOMIC JOURNAL 915 (1995).

[8] Ashish Chaturvedi et al., *Environmental Fiscal Reforms*, 26 IIMB MANAGEMENT REVIEW 193 (2014)[hereinafter 'CHATURVEDI'].

[9] Zoltan Nagy, *The Role of Environmental Taxation in Environmental Policy*, 47 ZBORNIK RADOVA 515, 518 (2013) [hereinafter 'Nagy'].

friendly alternatives (like public transport, unleaded petrol etc.), thereby rendering such alternatives cheaper due to economies of scale.[10]

There are two main theories which justify the imposition of such taxes.[11] *First*, the economic theory suggests that imposition of taxes can disincentives polluting activities and brings behavioural changes in households and firms responsible for such pollution. This is because environmental taxes add the social costs of exploitation of resources to the other perceptible, tangible costs, thereby accurately reflecting the true costs of a commodity.[12] They thus increase the cost of the polluting activity or product, thereby resulting in a decline in its production and consumption. *Second*, the environmental theory[13] reasons that eco-taxes should be imposed for realisation of the 'polluter-pays principle',[14] as such taxes help in holding the polluter responsible for recompensing the losses caused by his polluting activities. Additionally, by encouraging the development of technologies which minimise generation of substances even before there is conclusive evidence of serious harm; eco-taxation facilitates the implementation of the 'precautionary principle'.[15]

While the issue of environmental taxation in India has garnered attention with the recent orders passed by the National Green Tribunal and the Supreme Court upholding green cesses imposed by the Government of Delhi on pollution-causing vehicles,[16] environmental taxes have not been sufficiently deployed in the instrument mix available to policy-makers. At present, eco-tax revenue in India constitutes only 0.95 per cent of the GDP and around 13.37 per cent of the total tax revenue.[17] Taxes are imposed only on 53 per cent of the CO_2 emissions from energy, with highest coverage in three sectors: agriculture, fisheries and road transport.[18] India has the fourth lowest eco-tax related revenue among the Organization for Economic Co-operation and Development [**"OECD"**] nations, which generate an average of 2 per cent of their GDP through eco-tax revenues.[19] One reason for this failure can be the lack of discourse in the Indian context on the role eco-taxes can play in the achievement of sustainable development in the long run.

In this background, this paper aims to emphasise upon the contribution eco-taxes make in reducing environmental pollution, in an attempt to put forth the idea that such taxes must be systemically entrenched within the Indian green fiscal policy. Part II would give a brief overview of the history of eco-taxation, followed by Part III,

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[10] Organization for Economic Cooperation & Development, *Environmental Taxation: A Guide for Policy Makers* (September 2011) 3, (Jan 25, 2017) https://www.oecd.org/env/tools-evaluation/48164926.pdf [hereinafter 'OECD GUIDE'].

[11] EUROPEAN ENVIRONMENT AGENCY, *Environmental Taxes: Implementation and Environmental Effectiveness* (1996), 15, available at http://www.geota.pt/rfa/docs/gt.pdf (Last visited on February 8, 2017) [hereinafter 'European Environment Agency'].

[12] *Id.*

[13] European Environment Agency, *supra* note 11.

[14] Rio Declaration on Environment and Development, 1992, Principle 16.

[15] European Environment Agency, *supra* note 12, at 18.

[16] Shreeja Sen & Amrit Raj, *SC lifts ban on sale of diesel cars in Delhi, imposes 1% green cess*, LIVEMINT (Jan 13, 2017) http://www.livemint.com/Industry/yHP6xg0RFW8hT4OxP5tywN/SC-lifts-diesel-car-registration-ban-in-Delhi-NCR-with-rider.html; Jayashree Nandi, *National Green Tribunal: No new diesel vehicles to be registered in Delhi till January 6, 2016*, THE TIMES OF INDIA(Jan 13, 2017), http://timesofindia.indiatimes.com/city/delhi/National-Green-Tribunal-No-new-diesel-vehicles-to-be-registered-in-Delhi-till-January-6-2016/articleshow/50136129.cms.

[17] Organization for Economic Cooperation & Development, *Environmentally Related Taxes* (2010-2014), (Jan 12, 2017) http://www.oecd.org/env/tools-evaluation/environmentaltaxation.htm.

[18] Organization for Economic Cooperation & Development, *Environmentally Related Taxes: Taxes on Energy Use: India* (2014), (Jan 29, 2017) https://www.oecd.org/tax/tax-policy/environmental-tax-profile-india.pdf.

[19] *Id.*

which leads to a discussion on the advantages of eco-taxes. Part IV of the paper would discuss the considerations that must be kept in mind while designing an effective eco-taxation policy; and Parts V and VI would highlight the challenges that are particularly faced in the Indian context in the making of such a policy.

II. HISTORY OF ECO-TAXATION: GLOBAL DEVELOPMENTS

The use of eco-taxation was first endorsed by the 1992 Rio Declaration under Principle 16 which requires states to "[…] *promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution* […]".[20] Subsequently, the Fifth Environmental Action Programme of the European Union in 1992 also noted the use of economic instruments, as one of the strategies for the attainment of sustainable development.[21] Similarly, the United Nations Environment Programme's [**"UNEP"**] Green Economy Report, written in preparation for the United Nations Conference on Sustainable Development (Rio+20), highlighted taxes and market-based instruments as one of the six key factors for the realisation of green world economy.[22]

Despite a general consensus over the benefits of eco-taxation, its focus has been defined differently by the OECD and the European Environment Agency [**"EEA"**].[23] For instance, the OECD defines environmentally-related taxation as follows:

"*Environmentally related taxes are defined as any compulsory, unrequited payment to general government levied on tax bases deemed to be of particular environmental relevance.*"[24] (emphasis supplied)

On the other hand, the EEA focuses on correction of the tax base in defining eco-taxation:

"*Environmental tax reform (ETR) is a reform of the national tax system where there is a shift of the burden of taxation from conventional taxes, for example from taxes on labour, to taxes on environmentally damaging activities, such as resource use or pollution. The burden of taxes should fall more on 'bads' than 'goods'* […]"[25] (emphasis supplied)

Despite these differences in orientation, eco-taxes have been used extensively. The European Union was first to experiment with environment fiscal reforms - with the Nordic countries being the first to implement such policies in the early 1990s followed by countries such as Germany, UK, France and Italy.[26] These nations have imposed a range of taxes on carbon, transportation fuel, electricity, motor vehicles, solid waste, air pollutants, agricultural and

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[20] United Nations Conference on Environment and Development, June 3-14, 1992; *Rio Declaration on Environment and Development*, 1. U.N. Doc. A/CONF.151/26, Principle 16.

[21] European Commission, *Towards Sustainability*, available at http://ec.Europa.eu/environment/archives/ action-programme/5th.htm (Last visited on January 29, 2017).

[22] Jacqueline Cottrell et al., *Environmental Tax Reform in Developing, Emerging and Transition Economies*, German Development Institute (2016), 10, available at https://www.die-gdi.de/uploads/media/Study_93.pdf (Last visited on January 25, 2017) [hereinafter 'COTTRELL'].

[23] *Id.*, at 6-8.

[24] Organization for Economic Co-operation and Development, *Glossary of Statistical Terms: Environmentally Related Taxes* (2004), available at https://stats.oecd.org/glossary/detail.asp?ID=6270 (Last visited on January 25, 2017).

[25] European Environment Agency, *Market-Based Instruments for Environmental Policy in Europe*, Technical Report No. 8/2005 (2005), available at https://www.cbd.int/financial/doc/eu-several.pdf (Last visited on January 25, 2017).

[26] Chaturvedi, *supra* note 10, at 194 (citing OECD Report).

industrial chemicals, etc. While the exact nature of these taxes varies from country to country, experience has shown that environmental taxes have largely been successful in bringing down the consumption of resources in most European countries.[27] Currently, the focus is on broadening the scope of environmental taxes such that the Green Fiscal Policy reflects the 'user pays principle' instead of the 'polluter pays principle'.[28] Under the 'user pays principle', taxes are being sought to be applied on a wide range of uses of ecological services as opposed to merely pollution-causing uses. Thus, the scope is wider than that of the 'polluter pays principle' under which only environmentally harmful activities are sought to be curbed through taxation. Of late, taxes have also become an important instrument for achieving environmental objectives even in Asian countries, with various countries such as Vietnam drafting special laws to govern environmental taxation.[29]

III. ADVANTAGES OF ECO-TAXATION

Eco-taxes have been considered better alternatives to the traditional command-and-control measures, such as legislations and regulations, for a number of reasons.

First, while economic measures like taxation provide an on-going incentive to reduce emissions, command-and-control measures provide no incentive towards achieving the target or make improvements beyond the legally stipulated level.[30] At the same time, command-and-control regulations often lead the government to prescribe approaches towards environmental remediation. This however not only prevents the polluter from resorting to cheaper alternatives but also carries significant risks of becoming sub-optimal with ever-changing technological conditions.[31] In this manner, economic instruments are more in line with the 'precautionary principle', for they encourage prevention of pollution-causing activities even before there is a conclusive proof of their harms.

Second, enforcement of environmental legislations not only entails significant costs but also becomes a challenging task in developing countries due to factors such as lack of awareness, inadequate regulatory resources for monitoring purposes etc.[32] On the other hand, economic measures aim at securing compliance by bringing in attitudinal changes, implying that desirable behaviour is generated not through the threat of penalties and sanctions,

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[27] *See* Green Fiscal Commission, *How Effective are Green Taxes?*, Briefing Paper Two (April 2009), (Jan 30, 2017)available at http://www.greenfiscalcommission.org.uk/images/uploads/GFC_BRIEFING_2_FINAL.pdf (Last visited on January 30, 2017).

[28] European Environment Agency, *Environmental Taxes: Recent Developments in Tools for Integration* (November 2000), 8, (Jan 13, 2017) https://www.cbd.int/financial/fiscalenviron/g-fiscaltaxes.pdf (Last visited on January 13, 2017) [hereinafter 'EEA REPORT']. The user pays principle was talked about by at the Community Platform for UNCED in 1992 as follows:

"In order to reach the necessary reallocation of economic resources to achieve sustainable development, full social and environmental costs should be integrated into economic activities so that environmental externalities are internalized. This means that environmental costs and others related to the exploitation of natural resources in a sustainable way and borne by the supplier country should be reflected in economic activities. Economic and fiscal instruments should be among the measures to achieve this."

[29] RODI, *supra* note 6.

[30] The Energy and Resources Institute (TERI), *Environmental Fiscal Reform in India: Where and How?*, Project Report No. 2009 RD 03 (2011), 9, available at http://trpenvis.nic.in/test/doc_files/Environmental_Fiscal_Reforms_in_ India.pdf(Last visited on January 13, 2017) [hereinafter 'TERI PROJECT'].

[31] OECD Guide, *supra* note 10, at 2.

[32] Chaturvedi, *supra* note 8, at 196.

but through measures which appeal to the rational considerations of consumers and producers.[33] This ensures that tax-related measures remain effective even without continuous supervision by the enforcement authorities.

Lastly, penalties under existing environmental legislations, especially those imposing hefty monetary liability or those ordering closure of industries for non-compliance, often lead poor employees to suffer the consequences of the faults committed by the industry-owners.[34] For these reasons, sophisticated developed countries seek to appeal to the logic of the market for bringing in environmentally-needed changes.

Nonetheless, while economic instruments are emerging to be used, command-and-control measures cannot be completely eliminated because environmental taxes do not provide emissions certainty. While economic instruments induce firms to reduce pollution, the decision largely depends upon characteristics specific to each firm, and hence, it is difficult to know the level of reduction an environmental tax can help in achieving.[35] On the other hand, command-and-control measures provide a certain degree of predictability in the reduction of pollution by clearly proscribing pollution beyond certain levels.[36] Similarly, if an environmental problem poses a serious threat and demands complete prohibition, then a command-and-control measure with immediate effect would be more appropriate.[37] In light of this, what is needed is a harmonious balance between the two approaches depending upon the local conditions of the economy in question.

IV. CONSIDERATIONS FOR DEVISING AN EFFECTIVE ECO-TAX POLICY

Designing an effective eco-tax instrument requires consideration of a number of factors. This section of the paper aims at discussing some of the crucial issues which affect the design of the policy.

A. DESIGN AND NATURE OF THE TAX

An eco-tax should generally be levied directly on the pollutant or the activity causing environmental damage.[38] This is because the aim of an eco-tax may not be achieved if it is imposed on proxies.[39] For example, a tax imposed on the purchase of coal does not provide any incentive to the user to deploy technology to reduce the emissions that are released on its combustion, even when it may impact the overall consumption of coal due to increase in prices.[40]

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[33] United States Environmental Protection Agency, *Regulatory and Non-Regulatory Approaches to Pollution Control* in GUIDELINES FOR PREPARING ECONOMIC ANALYSES (2010), 4-22, (Feb 8, 2017) https://yosemite.epa.gov /ee/epa/eerm.nsf/vwAN/EE-0568-04.pdf/$file/EE-0568-04.pdf [hereinafter 'US-EPA GUIDELINES'].

[34] US-EPA GUIDELINES, *supra* note 33.

[35] Centre for Climate and Energy Solutions, *Options and Considerations for a Federal Carbon Tax* (2013), (Feb 8, 2017)https://www.c2es.org/publications/options-considerations-federal-carbon-tax (Last visited on February 8, 2017) [hereinafter 'Centre'].

[36] US-EPA Guidelines, *supra* note 35, at 19.

[37] Cottrell, *supra* note 22, at 12.

[38] OECD Guide, *supra* note 10, at 4.

[39] OECD Guide, *supra* note 10, at 4.

[40] OECD Guide, *supra* note 10, at 4.

Nonetheless, emission taxes, which are imposed not on the basis of the pollution-causing capacity of a product but on the basis of the actual pollution caused by it, are unsuitable for developing economies like India.[41] This is because emission taxes require sophisticated technology for monetary valuation of the environmental harm done by emissions as well as an effective monitoring and enforcement mechanism.[42] Thus, for administrative convenience, taxes are imposed on a close proxy, for instance, on the amount of fuel consumed or in accordance with the design of the vehicle in question.

Similarly, policy makers are required to decide whether such taxes should be applied at the level of production or consumption. Ideally, the tax base should "maximize the coverage of emissions sources", implying that it should be applied at an early stage in the supply chain so that it can result in behavioural changes in all agents.[43] Taxes applied in the initial stages of the supply chain are also administratively feasible and ensure efficient tax collection.[44] However, often taxes applied at early stages of production on inputs are passed on to the consumers in the form of higher prices, failing to create enough deterrent for the producers.[45] If taxes are imposed at later stages on consumers, they can be effective in terms of inducing consumers to reduce consumption levels or to shift to non-polluting substitutes.[46] Even when taxes are imposed at the end of the supply chain on consumers, they can still create an impact on producers.[47] For instance, higher tax rates imposed on leaded petrol have not only compelled consumers to purchase unleaded petrol but have also resulted in reduction of the production of leaded petrol over time, thereby impacting producers. Nonetheless, such taxes remain administratively inconvenient.[48]

In addition to all this, to avoid leakages and evasions, it must be ensured that the applicable tax rules only provide narrow and specifically carved out exceptions, accompanied by conditions which can bring about environmentally-favourable structural responses in the long run.[49] All this renders designing of an eco-tax an extremely complex exercise.

B. OPTIMAL RATE OF TAXATION

The determination of optimal level of taxes is also extremely crucial to the success of the policy. If less than optimal level of taxation is imposed, the purpose of taxation can be rendered nugatory.[50] This is because if the cost of reducing pollution is higher than the tax rates, then the polluter, as a rational economic agent, would prefer to pay taxes as opposed to reducing pollution.[51] If this happens, the taxation policy would fail to bring in desired

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[41] Emission taxes are imposed depending upon the actual level of pollution caused by a polluting activity by measuring the emissions released through pipelines and chimneys. While imposing liability for pollution in a fairer manner, emission taxes require sophisticated technology which can continually measure the pollution released. In order to address this, taxes are imposed on the closest proxies, such as on the quantity of the pollutant (say the fuel used for combustion or the chemical used for treatment) in light of its pollution-causing potential.

[42] RODI, *supra* note 6, at 132.

[43] Cottrell, *supra* note 22, at 13.

[44] Cottrell, *supra* note 22, at 13.

[45] Cottrell, *supra* note 22, at 13.

[46] TERI Project, *supra* note 30, at 15.

[47] Cottrell, *supra* note 22, at 13.

[48] Cottrell, *supra* note 22, at 14.

[49] Cottrell, *supra* note 22, at 17.

[50] CENTER, *supra* note 37.

[51] Nagy, *supra* note 9.

behavioural changes, even when the government itself may generate revenue to undertake public services of an environmental nature.[52]

While the aim of an eco-tax policy should generally be to set taxes which can produce optimal behaviour, in case where compliance with environmental norms requires substantial investments, sometimes it would be necessary for the government to impose higher than optimal taxes.[53] However, imposition of excessively high environmental taxes can also result in unintended consequences.[54] For instance, imposition of a high eco-tax on the purchase of new vehicles with a view to control vehicular emissions can prevent people from replacing their old cars with energy-efficient new cars.[55] For this reason, policy-makers are required to undertake extensive analysis to determine the optimal rate of taxation.

C. REGRESSIVE IMPACT AND THE QUESTION OF CHOICE

Taxation often poses a difficult question of choice before the government, that is, whether taxes should be imposed according to the contributing capacity of the bearer or according to the environmental harmfulness of the activity in question.[56] If such a policy is not designed keeping in mind the socio-economic problems faced by a nation, it can become regressive by leading middle-income households and smaller firms to bear a disproportionately large burden of taxation.[57]

For instance, taxes that are imposed on polluting commodities of everyday use such as fuel, transportation etc. affect the middle class more by reducing their real income, without proportionately taxing the higher income groups which are often more capable of bearing such costs.[58] In a similar fashion, in developing countries, even when households with higher income demand more air travel;[59] imposition of tax on aviation fuel is impermissible due to the restrictions contained in international conventions.[60] On account of this, undesirable fuel subsidies (in the form of under-taxation) are offered to high-income households at the cost of common taxpayers' money.[61] Similarly, costs of compliance particularly injure the economic viability and competitiveness of small and medium enterprises, as

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52 Folloni, *supra* note 5, at 100.
53 Cottrell, *supra* note 22, at 15.
54 EEA Report, *supra* note 28, at 47.
55 EEA Report, *supra* note 28, at 47.
56 *See generally* Katri Kosonen, *Regressivity of Environmental Taxation: Myth or Reality?*, European Commission Working Paper No. 32-2012 (2012), (Feb 8, 2017) https://ec.Europa.eu/taxation_customs/sites/taxation/files/docs/body/taxation_paper_32_en.pdf [hereinafter 'Katri']
57 Katri, *supra* note 56.
58 Katri *supra* note 56.
59 Vivek Pai, *On the Factors that Affect Airline Flight Frequency and Aircraft Size* (2007), 8, available at http://www.economics.uci.edu/files/docs/workingpapers/2007-08/pai-03.pdf (Last visited on Feb 8, 2017).
60 Int'l Civil Aviation Org. [ICAO], December 7, 1994, *Convention on Civil Aviation ("Chicago Convention"),* (1994) 15 U.N.T.S. 295, art. 24.
61 Cottrell, *supra* note 24, at 33.

compared to that of large enterprises. For this reason, green taxes are often considered to be inequitable and regressive.[62]

In order to correct this, the government is required to bring in income tax reductions or offer tax credits to lower income houses which are disproportionately affected.[63] Concerns over equity can also be addressed by progressive tax rates, which are charged depending upon the rate of increase in consumption.[64] Further, large polluting companies should become the major persons taxable under the eco-tax policy, without any exemptions for public-sector bodies indulging in polluting activities.[65]Additionally if a measure aims at inducing businesses to invest in eco-friendly technology, the government must ensure that small enterprises are given both financial support and consultancy services so as to enable them to make a move towards the resource-efficient path.[66]

D.ADMINISTRATION AND ENFORCEMENT

Imposition of eco-taxes entails administrative and enforcement costs which are higher than costs of enforcement of regular taxation.[67] This is because efficient imposition of production taxes requires regulatory monitoring of emission rates, production levels, consumption of resources etc., which can turn out to be administratively inconvenient.[68] For this reason, administering bodies require more resources at their disposal for the implementation of eco-taxes, along with interdisciplinary expertise in economic, legal, taxation and environmental matters.[69] They also need to compile information on a regular basis in order to better understand the correlation between the fiscal initiatives taken by the government and the consequent reduction in pollution levels. If this is not effectively managed, polluting activities (such as discharge of waste in water pollution, etc.) can be surreptitiously concealed by the polluter, rendering the policy of taxation inefficacious. Thus, imposition of eco-taxes in a systematic manner in the long run requires sophisticated administrative machinery.

V.ECO-TAXATION IN INDIA

A.BACKGROUND

Green taxes have been in consideration in India since the 1990s.[70] The issue first garnered attention in the Policy Statement for Abatement of Pollution released in 1992 by the Ministry of Environment and Forests, wherein

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[62] Andew Morrison, *Green Taxes: A Brief Overview*, Parliamentary Library Background Paper No. 14, New Zealand (February 1996), 10, available at https://www.parliament.nz/resource/en-nz/00PLEcoRP9601½ 8f5a95b4228b9d d5e1bc722eddb7e7ad88ff6df (Last visited on January 25, 2017).

[63] Katri Kosonen & Gaetan Nicodeme, *The Role of Fiscal Instruments in Environmental Policy*, Working Paper No. 19/2009 (June 2009), 6, available at https://ec.Europa.eu/taxation_customs/sites/taxation/files/reso urces/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_19.pdf (Last visited on January 13, 2017) [hereinafter 'KOSONEN'].

[64] EEA Report, *supra* note 28, at 11.

[65] Nagy, *supra* note 9, at 526.

[66] TERI Project, *supra* note 30, at 22.

[67] Nagy, *supra* note 9, at 519.

[68] OECD Guide, *supra* note 10, at 4.

[69] Divya Datt, *Green Budget Reform in India: Opportunities and Challenges* in GREENING THE BUDGET: CASE STUDIES, 23, (JAN 13, 2017) http://www.teriin.org/ee/pdf/background.pdf [hereinafter 'Datt'].

[70] Datt, *supra* note 69, at 15.

it observed the need for addressing the menace of pollution, *inter-alia*, through fiscal measures.[71] Thereafter, the report of the Tax Reforms Committee, 1992 also recommended, that "*taxes on some raw materials could be levied […] for reasons of conservation and protection of the environment*".[72] It thus opened up the debate over the role taxes can play in generating desirable environmental consequences.

In 1995, a Task Force was constituted by the Ministry of Environment and Forests with the aim of evaluating the effectiveness of market-based instruments [**"MBIs"**] in the abatement of industrial pollution.[73] Simply put, MBIs refer to laws that encourage environment-friendly behaviour through market signals, as opposed to giving explicit directives regarding permissible pollution levels.[74] The Task Force recommended expansion of the use of MBIs in pollution control laws and replacement of criminal penalties by MBIs in the long run.[75] It also noted the need for imposing genuine effluent-based taxation, as opposed to taxation on the basis of the amount of resource consumed.[76] Thereafter, the State of the Environment Report prepared by the United Nations Environment Programme (UNEP) for India in 2001 also noted that economic instruments are necessary for encouraging a shift from curative to preventive measures and for achieving full internalisation of the costs of environmental degradation.[77]

Thereafter, the National Environmental Policy 2006 also emphasised the use of economic instruments for environmental regulation.[78] It recommended a system of natural resource accounting, to measure the rate of diminution of the natural resource base due to economic development.[79] It further emphasised that environmental costs and benefits associated with various activities should be taken into account in order to guide policy decision-making.[80]

However, the actual use of economic instruments for environmental purposes in India has been rather limited. The next section of the paper would give a brief overview of the existing fiscal framework pertaining to environmental tax in India.

B. EXISTING ECO-TAXES IN INDIA

At present, a few fiscal instruments are employed in the Indian context. For instance, a water cess is levied under the Water (Prevention and Control of Pollution) Cess Act, 1977, which was enacted under the Water

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[71] Ministry of Environment & Forests, Government of India, *Policy Statement for Abatement of Pollution* (1992), ¶7, (Jan 13, 2017) http://www.moef.gov.in/sites/default/files/introduction-psap.pdf .
[72] *Id.*
[73] TERI Project, *supra* note 30, at 35.
[74] Bei Zhang, *Market-Based Solutions: An Appropriate Approach to Resolve Environmental Problems*, 11(1) Chinese Journal of Population Resources and Environment87 (2013) [hereinafter 'Zhang'].
[75] *Id.*
[76] Zhang, *supra* note 74.
[77] *See* United Nations Environment Programme, *India: State of the Environment* (2001), (Jan 13, 2017) http://www.terii n.org/upfiles/projects/ES/ES1999EE45.pdf .
[78] *See generally* Ministry of Environment & Forests, Government of India, *National Environmental Policy 2006*, (Jan 13, 2017) http://www.moef.gov.in/sites/default/files/introduction-nep2006e.pdf [hereinafter 'NEP 2006'].
[79] NEP 2006, *supra* note 78, at 21.
[80] NEP 2006, *supra* note 78.

(Prevention and Control of Pollution) Act, 1974 [**"Water Act"**].[81] Under this Act, a cess is collected from specified categories of industries under Schedule I as well as from local bodies;[82] allowing a 25 per cent rebate to those industries which consume water within the prescribed limits or which have established effluent-treatment plants.[83] This Act gives power to the Central Government to amend Schedule I to add "any industry having regard to the consumption of water in the carrying on of such industry and the consequent discharge thereof resulting in pollution".[84] However, the power of addition has rarely been exercised; on account of this, the Schedule only applies to sixteen industries.[85] It is thus recommended that the government must bring in more hazardous industries within the scope of the Act, while making appropriate periodic revisions to the rates charged.[86]

Similarly, fees are often levied by state boards in lieu of permission for discharging pollutants into the environment.[87] For instance, under the Water Act, municipal corporations as well as industries in specified categories are required to get the consent of the concerned state board before commencing operations which are likely to discharge sewage/trade effluents into water bodies.[88] The concerned state board is empowered to impose appropriate fees,[89] and to prescribe conditions pertaining to the point of discharge, nature and composition of the discharged sewage etc.[90] A similar consent fee is also levied under the Air (Prevention and Control of Pollution) Act, 1981.[91] However, proceeds from such levies are particularly low since rates are rarely revised; and revenues raised are not effectively used for the management of the polluting activity in question.[92]

Since 2010, the Central Government has been imposing a Clean Energy Cess on coal, including coal which is imported and used in electricity generation, at the rate of INR 50 per tonne (subsequently increased to INR 200 in 2015).[93] The Central Government in its budget has also exempted various eco-friendly resources from taxes and customs duty, for instance, solar lanterns and solar cells.[94] Other fiscal benefits include a depreciation allowance under the Income Tax Act, 1961 on machinery which aid in controlling pollution.[95] The Central Government is also experimenting with newer forms of eco-taxes. For instance, Advance Recycling Fees [**"ARF"**] is being imposed on the sale of electronic goods since 2012 to generate funds for setting up infrastructure for the disposal of e-waste.[96]

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[81] Preamble, Water (Prevention and Control of Pollution) Cess Act, (1977).
[82] Water (Prevention and Control of Pollution) Cess Act 1977, §3.
[83] Water (Prevention and Control of Pollution) Cess Act, 1977, §7.
[84] Water (Prevention and Control of Pollution) Cess Act, 1977, §16.
[85] Water (Prevention and Control of Pollution) Cess Act, 1977, Schedule I.
[86]Mayank Agarwal, *Govt. mulling threefold hike in water cess*, LIVEMINT (2015), (Feb 8, 2017).http://www.livemint.com /Politics/JnCAd2im4hUVParl2DL1aI/Govt-mulling-threefold-hike-in-water-cess.html.
[87] *See infra* notes 88, at 91.
[88] § 25(1) Water (Prevention and Control of Pollution) Act, 1977.
[89] §25(2) Water (Prevention and Control of Pollution) Act, 1977.
[90] Water (Prevention and Control of Pollution) Act, 1977, § 25 (4).
[91] Air (Prevention and Control of Pollution) Act, 1981, §21.
[92] TERI Project, *supra* note 30, at 37.
[93] Organization for Economic Cooperation & Development, *Taxing Energy Use 2015: OECD and Selected Partner Economies* (2015), 106, (Jan 12, 2018)http://dx.doi.org/10.1787/9789264232334-en [hereinafter 'ORGANIZATION'].
[94] TERI Project, *supra* note 30, at 38.
[95] Income Tax Act, 1961, §32A.
[96] TERI Project, *supra* note 30, at 41.

Various other instruments are used by states and municipal authorities. For instance, in some states, consumption of electricity is subject to green taxes.[97] Many cities also levy monthly waste generation charges on households, shops etc.[98] Moreover, some states like Kerala have exempted paper bags from tax and increased the tax imposed on hazardous items such as plastic bags.[99]

Besides tax, some environment-friendly subsidies are also offered by the government in order to promote the use of sustainable technologies - for instance, subsidies offered for promoting the use of eco-friendly public transport.[100] Similarly, the Ministry of Environment and Forests has started a financial support scheme for facilitating the treatment of effluents generated by small-scale industries located in clusters. Under the scheme, the Central Government covers 50% and the concerned state government covers 25% of the capital cost, while the industry itself bears only 25% of the cost.[101] While subsidies strain the public budget and hinder the process of natural market development, they are effective in bringing about desirable changes in consumption patterns in a relatively shorter period of time.[102]

Despite all this, eco-taxes have largely remained ineffective in India[103] at two levels – *first*, they have not been successful in bringing an overall reduction in the consumption of pollutants; and *second*, funds generated from these taxes have either remained unutilised or have been diverted to other governmental projects.[104] This is contrary to both, the findings of various studies[105]and the experience with eco-taxes in other jurisdictions.[106] In this backdrop, the next section of the paper focuses on the areas of concern, which need to be addressed if eco-tax reforms are to be successfully implemented in India.

VI. CHALLENGES IN THE INDIAN CONTEXT

While the challenges plaguing the implementation of an effective eco-taxation policy have been discussed in Part IV of this paper, the aim of this Part is to elaborate upon the challenges that are specifically faced by policy makers in the Indian context. While most of these issues are the general problems affecting India's taxation structure in general, some of these issues are specific to the issue of environmental taxation.

A. NEED FOR A COMPREHENSIVE TAX REGIME

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97 *Coal India asks government to levy environment tax on pet coke*, ECONOMIC TIMES (Jan 16, 2017) http://economictimes.indiatimes.com/articleshow/53654982.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

98 TERI Project, *supra* note 30, at 38.

99 TERI Project, *supra* note 30, at 38.

100 *See, Government to spend Rs 14,000 crore to promote eco-friendly vehicles*, DNA, (Jan 16, 2017) http://www.dnaindia.com/money/report-government-to-spend-rs-14000-crore-to-promote-eco-friendly-vehicles-2114089.

101 Chaturvedi, *supra* note 8, at 196.

102 Chaturvedi, *supra* note 8, at 194.

103 Ragini Bhuyan, *How useful would additional green taxes be in India?*, LIVEMINT, (Jan 13, 207) http://www.livemint.com/Opinion/7GjpRE3P2mCdLZltv15kAM/How-useful-would-additional-green-taxes-be-in-India.html.

104 *Id.*

105 D.K. Srivastava & C Bhujanga Rao, *Reforming Indirect Taxes in India: Role of Environmental Taxes*, Working Paper 50/2010 (April 2010), 4, (Jan 13, 2017).

106 *Id.*, at 30.

While the government has already imposed a nationwide coal tax,[107] there is a need for uniformly taxing other non-renewable energy sources (like oil and gas) in order to provide sufficient incentive to use renewable forms of energy (like solar and wind energy).[108] At the same time, focus needs to be expanded from taxation on energy and transportation to include new forms of taxations.

For instance, countries like South Korea impose special road taxes in heavily congested areas of the city during peak hours in order to induce people to use public transport. This has helped not only in lessening pollution intensity but also in addressing excessive traffic jams.[109] In Austria, different registration charges are applicable on cars depending upon their fuel efficiency, and a higher tax rate is applied on diesel-driven vehicles as opposed to petrol-run ones.[110] Similarly, the Swedish government imposes a vehicle-scrapping charge on the purchase of new vehicles but offers refund of that amount when scrap cars are delivered to authorised scrappers, thereby ensuring that they are not abandoned.[111]

The Indian Government thus needs to design creative taxes in order to better achieve the aims of a green fiscal policy.

B. NEED FOR PREDICTABILITY

Experience has shown that eco-taxes in India, such as coal/diesel cess, have been applied in an *ad-hoc* fashion through executive orders.[112] In order to avoid the ramifications that taxes can have on investment decisions, taxes should remain stable and predictable, with periodic revisions in order to take inflation into account.[113] Thus, before any such taxes are imposed, a transition period must be allowed to the affected firms so that they can take mitigation measures by installing appropriate technology, instead of directly being penalised with financial liability for non-compliance.[114] In this manner, low initial tax rates can also help in fostering political acceptance, while predictable increases over time can help in ensuring the effectiveness of the policy.[115]

C. NEED FOR UNIFORMISATION

Under the Indian Constitution, power of taxation is shared by the Central Government and the State Governments, with most powers pertaining to environmental taxation being with the State Governments.[116]It thus becomes necessary that taxation measures are imposed uniformly across different regions of the country – this is because if different state governments impose different taxes for similar services, it can lead to an inequitable

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[107] Damandeep Singh, India Commits to Low Carbon Development by Imposing Coal Tax, WORLD WATCH INSTITUTE, (Jan 8, 2017), http://blogs.worldwatch.org/revolt/india-coal-tax/.
[108] TERI Project, *supra* note 30, at 25.
[109] TERI Project *supra* note 30, at 27.
[110] TERI Project, *supra* note 30, at 23.
[111] TERI Project *supra* note 30, at 47.
[112] OECD Guide, *supra* note 10, at 3.
[113] Nagy, *supra* note 9, at 516.
[114] OECD Guide, *supra* note 10, at 10.
[115] Cottrell, *supra* note 22, at 1.
[116] The Constitution of India, 1949, Schedule VII. *See* State List, List II, Entries 49, 50, 53, 57, 58.

horizontal treatment of similarly-placed industrial units and households.[117] Uniformity in policy is also essential to prevent a situation of race to the bottom, as states can cut down on environmental taxes in order to attract more corporate investment.

This requires that there must be a common understanding between states and the Centre on the criteria to be used for determining taxable pollutants and the tax base relevant for the purposes of such taxation (such the quantity or the value of the product, the taxpaying capacity of the polluter etc.).[118] This requires considerable effort by the Central Government to forge consensus among different states.[119] Once this is done, it would enhance overall transparency by clearly outlining the considerations and the criteria to be kept in mind while designing such taxes.

D. CONFLICT WITH ENVIRONMENTALLY-HARMFUL SUBSIDIES

The effect of these eco-taxes can be offset to a large extent by subsidies offered on energy resources, harmful to the environment.[120] The policy reason behind providing such subsidies is to improve accessibility of the poverty-struck sections of the society.[121] However, it cannot be denied that subsidies are inconsistent with the polluter-pays-principle as they make the general taxpayer compensate for the pollution done by specific polluters.[122]

Besides this, excessive subsidies often result in wasteful consumption. This is known as the 'rebound effect', under which lower prices of a product induces consumers to use it more intensively, leading to even higher energy consumption.[123] For instance, subsidies offered on the consumption of electricity and water for domestic purposes as well as for industrial purposes have been one of the major factors for excessive wastage of these resources in India.[124] Similarly, subsidies offered on chemical and synthetic fertilisers have also led to their indiscriminate use in agriculture.[125]

The problem is further exacerbated due to the 'free-rider problem',[126] which implies that subsidies are often availed by income groups which could otherwise afford the market price of such resources.[127] Cheap, subsidised kerosene is an example, which is often diverted to those classes of people who can well afford the same.[128] In fact,

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117 TERI Project, *supra* note 30, at 35.
118 Rodi, *supra* note 6, at 129.
119 Datt, *supra* note 71, at 25.
120 Datt, *supra* note 71, at 4. *See generally* International Institute for Sustainable Development, *A Citizens' Guide to Energy Subsidies in India* (2012), (Feb 8, 2017) http://www.teriin.org/events/INDIA_CITIZEN_ GUIDE.pdf.
121 *See generally* Asian Development Bank, *Fossil Fuel Subsidies in Asia: Trends, Impacts and Reforms: Integrative Report*, (Jan 13, 2017) https://www.adb.org/sites/default/files/publication/182255/fossil-fuel-subsidies-asia.pdf.
122 *See generally* Hyung-Jin Kim, *Subsidy, Polluter Pays Principle and Financial Assistance among Countries*, 34(6) JOURNAL OF WORLD TRADE 115 (2000), (Jan 10, 2017) http://www.lawleeko.com/chin/pdf/Article_ HJK_2.pdf .
123 Kosonen, *supra* note 65, at 12-13.
124 Datt, *supra* note 71, at 18-19.
125 TERI Project, *supra* note 30, at 38-39.
126 *See generally* Paul Pecorino, *Market Structure, Tariff Lobbying and the Free Rider Problem*, 106(3) PUBLIC CHOICE 203 (2001). The free-rider problem implies that individuals often share the benefits of public goods, without paying share of the costs. In the context of subsidies, free-rider problem implies that subsidies are availed of by persons who are otherwise not entitled to the same, due to a lack of effective dispensation by concerned authorities.
127 *Id.*
128 TERI Project, *supra* note 30, at 39.

sometimes subsidies are abused in order to circumvent environmental regulations.[129] For instance, small enterprises that have access to subsidised-water often dilute wastewater generated by them in order to escape the need for decontamination before discharge.[130]

This leads one to conclude that the policy of green taxation cannot achieve success, unless it is accompanied by subsidy reduction and provision of only targeted subsidies.[131] However, dismantling subsidies is often difficult in face of the realities of political economy; this is because it can invite fiery protests from the poor and render the politicians reluctant to advocate such a change.[132] Hence the requirements of supplementary programmes (such as compensatory cash transfers) which can relieve the households most adversely affected by the scrapping of such subsidies are the need of the hour.[133] At the same time, the government can choose to provide subsidies on eco-friendly alternatives as opposed to that on harmful goods, but the questionable efficacy of the subsidy regime in general leads one to conclude that it is time that such subsidies are dismantled.

E. NEED FOR PROPER UTILISATION OF REVENUES

While revenue generation may not be the primary motive behind eco-tax in developed countries, it nonetheless plays a significant role in developing countries like India. This is because increase in revenue can become a powerful tool in creating political acceptance for the tax imposed, in protecting the poorest sections from the impact of the policy, and in facilitating a transition to a greener economy.[134] At the same time, tax revenues are more likely in developing countries because the use of the taxed product or activity would not normally come down to zero immediately.[135] However, enough attention has not been given to the manner in which revenue generated from environmental taxes can be effectively used. For instance, newspaper reports have shown that funds generated from taxation of vehicles in Delhi have been lying unutilised.[136] Therefore, in order to render environmental taxation as a meaningful long-term policy, revenues generated from it must be deployed effectively.

F. NEED FOR INSTITUTIONAL COOPERATION

Eco-taxes cannot be effectively implemented unless the concerned institutional mechanisms are corrected. This is because, in the Indian context, there is also a serious lack of co-ordination between the state and central bodies responsible for controlling pollution under existing environmental laws on account of the subordination of the state boards.[137] These bodies face significant human and technical capacity constraints.[138] There is also a huge

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129 TERI Project, *supra* note 30, at 27.
130 TERI Project, *supra* note 30, at 39.
131 Datt, *supra* note 71, at 5.
132 *Cut in fuel subsidy sparks protests in India*, DAWN (JUNE 27, 2010), (Feb 8, 2017) http://www.dawn.com/ news/8552 76/cut-in-fuel-subsidy-sparks-protests-in-india.
133 *Direct cash transfer can reduce food, fertiliser subsidy by Rs. 60k*, THE HINDU), (Feb 8, 2017) http://www.thehindu businessline.com/economy/policy/direct-cash-transfer-can-reduce-food-fertiliser-subsidy-by-rs60k/article4570207ece.
134 Cottrell, *supra* note 22, at 43.
135 EEA Report, *supra* note 30, at 20.
136 Darpan Singh, *Delhi government sits on special air quality funds as pollution peaks in city*, INDIA TODAY (Jan 30, 2017) http://indiatoday.intoday.in/story/delhi-air-pollution-vehicles-funds-unused-aap-government/1/44 7659.html; Usman Nasim, *Environment Funds Lying Unused*, DOWN TO EARTH (Sept 20, 2017) http:// www.downtoearth. org.in/blog/environment-funds-lying-unused-57555.
137 TERI Project, *supra* note 30, 34-35.

disparity in the financial position of various state pollution control boards, on account of which they depend heavily on grants from the Central Government.[139]

Likewise, the capacity of municipal authorities to raise revenues through appropriate taxes is highly constrained. This is because fiscal powers of these institutions are subject to the authority conferred on them by the specific state legislature.[140] However, experience has shown that fiscal powers of municipal authorities are often not commensurate with the range of tasks they are expected to perform.[141] In addition, there is a serious lack of transparency in the budgets available to the local governments, their revenue sources and the expenses incurred by them.[142]

There is thus an urgent need to correct the balance of powers exercised by different tiers of the government, in order to ensure that adequate powers are vested with the concerned bodies to enable them to discharge their functions effectively.

VII. CONCLUSION

There is considerable evidence to show that eco-taxation can become a significant policy instrument for preventing environmental degradation. They are not only cost-effective, but also help in the realisation of environmental aims without threat of penalty or sanction. However, despite their obvious benefits, eco-taxes have not become part of the mainstream policy governing environmental regulation in India.

The need of the hour is that the government must take initiative not only by increasing the coverage of existing taxes, but also by devoting specialised administrative mechanisms for this purpose. Imposition of tax, being largely a political issue, is affected by business lobbying, electoral considerations, party politics etc. Hence, desired changes cannot be effected unless public consensus for the same is built. In this background, this paper has discussed the parameters which affect the design of eco-tax policy generally, such as the rate of taxation, the consideration of its regressive impact, designing of proper institutional structures etc. In addition, the paper has also elaborated on the unique challenges faced in the Indian context.

The paper has argued that if eco-taxation policy is to be rendered successful in India, it is necessary that the fundamental tenets of taxation such as uniformisation, predictability and comprehensiveness are solemnly obeyed by the policy makers. In addition, it is necessary that environmentally harmful subsidies are eliminated and any revenues generated from eco-taxation are properly utilised for the achievement of environmental goals with the cooperation of the central and the state governments. It can be hoped that once developing countries like India instate a sound eco-

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138 TERI Project, *supra* note 30, 34-35.
139 TERI Project, *supra* note 30, 34-35.
140 The Constitution of India, 1949, Arts. 243H, 243X.
141 For an overview of the environmental matters under the fiscal power of each tier of the government, *see* TERI Project, *supra* note 30, at 33.
142 TERI Project, *supra* note 30, at 33.

taxation policy, international cooperation on this issue would go a long way in addressing major environmental concerns facing the world today.

Nidhi Gupta, *The Myth of Live in Relationships in India*, 4(2) NLUJ Law Review 23 (2017)

THE MYTH OF LIVE IN RELATIONSHIPS IN INDIA

NIDHI GUPTA[ϕ]

ABSTRACT

This article draws attention towards a new social phenomenon of live-in relationships in India. Since the enactment of the Protection of Women from Domestic Violence Act, 2005, there has been a certain acknowledgement of the idea that live-in relationships have been given legal recognition in Indian legal system. This article challenges the above belief, naming it as a myth. While belief about the legal status of live-in relationships as a new social and legal phenomenon has entrenched its roots in judicial as well as scholarly discourses, the real situation, this article aims to argue, is rather different. Till date, there is no statute or judgment in India, which defines the term live-in relationships or grants legal recognition to it. The Apex Court has chalked out a distinction between 'marriage' and 'relationship in nature of marriage' to protect rights of women who find themselves in such intimate relationships which cannot be considered legally valid. However, this distinction, this article argues, is not about protecting rights of women in any new social phenomenon. Moreover, the above distinction has an undesirable effect of making definition of marriages narrow, which in turn is detrimental for the cause of women's rights in India.

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I. INTRODUCTION

Every society, generation, era, domain, institution or field of knowledge nurtures its own myths. Nobody really knows how and when these myths come into existence and find their way to the citadels of knowledge. However, repeated often, most myths grow so strong even amongst the intelligentsia that it becomes almost impossible to call them a myth as it assumes the mantle of fact.

One such myth which has grown in the domain of family laws in India relates to the legal validity of a new social phenomenon called the "live-in relationships" - loosely defined as the practice of a man and woman deciding to live together in intimate relationship without fulfilling formalities of a valid marriage. Until 2011, there was no clarity in Indian laws with respect to the term live-in relationships. However, since the enactment of the Protection of Women from Domestic Violence Act, 2005 [**"Act"**], scholars, activists, judges, lawyers, policy makers and almost everyone connected with women, family, laws and social change, have been comfortably acknowledging the idea that the Indian legal system, and also the otherwise conservative and traditional India society, has finally progressed ahead to approbate to the live-in relationships.

While the above myth about the legal status of live-in relationships as a new social and legal phenomenon has entrenched its roots in judicial as well as scholarly discourses, the real situation, this article aims to argue, is rather different. Till date, there is no statute in India which uses the term live-in relationships,[143] defines it or grants legal recognition to it. While there has developed a general belief amongst judges, lawyers, scholars and activists that the incidences of people choosing to be in intimate relationships (without solemnizing marriage or without even having an intention to fulfill formalities relating to marriage) are increasing, the Apex Court, far from granting legal recognition to live-in relationships under the 2005 Act, does not even seem to acknowledge live-in relationships as a socially acceptable phenomenon.[144]

What, then, are the reasons for the perpetuation of these new myths relating to live-in relationship? How did they generate? What are the reasons responsible for their perpetuation? What is the impact of these myths on the rights of women in the domain of 'family' in India? Is this campaign for legal recognition of live-in relationships in India turning out to be beneficial for women or is it ultimately becoming a means for denial of rights of women?

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[143] Domestic Violence Act, No. 43 of 2005, § 3.

[144] Two cases which are the focus of this article and which can be seen as laying law as far as meaning of the term relationship in the nature of marriage is concerned are: D. Velusamy v. D. Patchaiammal, (2010) 10 S.C.C. 469 and Indra Sarma v VKV Sarma, 2013 (14) SCALE 448. In both cases the judges took note of the fact that the Parliament in the 2005 Act has taken notice of a new social phenomena known as live-in relationship emerging in Indian society, which, the judges believed, is very common in North America and Europe. However, with respect to India, the judges in both cases, it appears, found it difficult to agree with the Parliament. In both cases the judges expressed their opinion that in India the phenomenon of live-in relationship was either very rare or not socially acceptable. In Indra Sarma's case, the opening sentence for the judgment is live-in or marriage like relationship is neither a crime nor a sin *though socially unacceptable in this country*.

This article endeavours to address the above-mentioned questions associated with the issue of legal validity of live-in relationships in India. It aims to draw attention towards the confusion and chaos which has developed around the issue of live-in relationships in India and how this confusion is becoming detrimental to the cause of women's rights.

Divided into three sections, this article first explores some of the factors which are responsible for the emergence of the said myth in the domain of family laws in India. The first section draws attention towards the contemporary scholarly and judicial discourses where this myth is thriving and developing strong roots with each passing day. The next section then explains the current legal position relating to the validity of live-in relationships. It offers an analysis of two judgments by the Supreme Court of India in the cases- *D. Velusamy* v. *D. Patchaiammal*[145] and *Indra Sarma* v *VKV Sarma*[146], - which are to be seen as authoritative pronouncements on the term "live-in relationships" or 'relationship in the nature of marriage.'[147] It also seeks to demonstrate in what sense it is a mythical idea that law in India gives recognition to a new legal phenomenon called live-in relationships. The third section draws attention towards the fact that the Courts' definition of the term "relationship in the nature of marriage" does not account for any such phenomenon which is new to the Indian society or even to the Indian courts. It argues that, on the one hand the restrictive definition to the term relationship in the nature of marriage adopted by the Apex Court would be disadvantageous for women; on the other hand, it raises questions about the relevance of legal provision and law relating to presumption of marriage. The last section underscores the requirement for a fresh debate on the understanding of the term live-in relationship in Indian context, in order to fulfill the objective of the 2005 Act to extend protection of law to women in non-marital relationships as well.

II. LIVE-IN RELATIONSHIPS IN INDIA: MAKING OF A MYTH

The myth relating to live-in relationships in India, thriving unabated in scholarly as well as judicial discourse is associated with the promulgation of the 2005 Act, which extends protection against violence to even those women who are in such kind of intimate relationships which do not fall into the category of legally valid marriage.[148] It is rooted in the fact that the 2005 Act, which uses the term 'domestic relationship' to cover various kinds of interpersonal relationships wherein women need protection, divides intimate relationships into two categories: "marriage" and "relationships in the nature of marriage" [**"RINM"**].[149]

Although the Apex Court, first in 2011 and then in 2013, has categorically denied legal acceptance to live-in relationships in general by giving a narrow and restrictive definition to the 'relationship in the nature of marriage', the

[145] D. Velusamy v. D. Patchaiammal (2010) 10 S.C.C. 469 [hereinafter 'D.Velusamy'].
[146] Indra Sarma v. VKV Sarma 2013(14) SCALE 448 [hereinafter 'Indra Sharma'].
[147] Domestic Violence Act, No. 43 of 2005, § 2(f).
[148] Indian Penal Code, No. 45 of 1860, § 498-A and § 304-B.
[149] Strangely enough D. Velusamy, which gave a narrow definition of relationship in the nature of marriage, is quoted even by the Judges to show that the Supreme Court of India has given legal acceptance to live-in relationships. As an example see, Smt. Sonam Pandey v. State of U.P. (2011) 6AWC2431(1), The division bench of the Allahabad High Court while dealing with a case of inter-caste marriages stated,
"*the Apex Court in the case of D. Velusamy v. D. Patchaiammal (2010) 10 SCC 469, has even recognized live-in relationship between a man and woman in the nature of marriage.*" ¶ 6.

myth relating to live-in relationships has found a fertile ground in the very fact that with the 2005 Act there is available a special law to hold men responsible not only towards their wives but also towards those women who cannot claim the title of wife.

While it is difficult to identify a specific point of time or event or exact reasons as to where and how the term live-in relation came to replace the term relationship in the nature of marriage used in the Act, the myth seems to have its genesis in general perceptions about the 2005 Act and the campaign which led to the above enactment. Proclaimed as one of the most progressive legislations in the history of independent India, the 2005 Act is often projected in Indian socio-legal discourses as a sign of the changing mind-set in India.[150] It is seen as a symbol of society and law in India keeping pace with the West by coming to a stage where marriage is not the only site of sexuality,[151] and even non-marital relationships are granted legal recognition. Perhaps it has been the enthusiasm of scholars, activists, lawyers as well as of judges to appear progressive or to be at one with the western society that introduced a more popular term 'live-in relationships' in the scholarly as well as judicial discourses, notwithstanding the fact that the Act nowhere uses it.

Although the 2005 Act does not use the term live-in relationship, the myth seems to have received fertile ground through the legislature's silence in defining the term 'relationship in the nature of marriage'. Legislative silence gave a reason, not only to the scholars, activists and lawyers to speculate on the meaning of the term, but also to the judiciary in India, which entrusted with the task of giving meaning to the term 'relationship in the nature of marriage' has also engaged itself in reflecting on various kinds of non-marital intimate relationships like 'pre-marital sex'[152], 'one night stands'[153], 'relationships for casual sex'[154], 'living together at times'[155], long term and short term co-habitation arrangements. In a case in 2010, the Delhi High Court defined live-in relationship as "a relationship of convenience where two parties decide to enjoy company of each other at will and may leave each other at will."[156] Despite huge inconsistency in judicial opinions, the mere fact that the judges were considering the issue of different kinds of intimate relationships seems to have become sufficient to propagate the idea that live-in relationships in India now have legal validity.

Although there is no authoritative definition of the term, last decade has seen emergence of significant literature with scholarly attempts to define live-in relationships, and also to attribute different reasons and aims for these

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[150] D. Velusamy, *supra* note 145, ¶ 21.

[151] PLD report Indra Sarma Case, p. 33: *Modern Indian society through the DV Act recognizes in reality, various other forms of familial relations, shedding the idea that such relationship can only be through some acceptable modes hitherto understood.* In both the cases, the Velusamy case as well as Indra Sarma case, the judges mention that the 2005 Act aims to give recognition to a new social phenomenon called live-in relationships.

[152] Aysha v. Ozir Hassan, (2013) 5 MLJ 31.

[153] D.Velusamy, *supra* note 145, ¶ 31.

[154] *Id.*

[155] Joby v. Elsy, 2013 (3) KLT 450.

[156] Alok Kumar v. State, MANU/DE/2069/2010, ¶ 6; Madan Mohan Singh v. Rajni Kant, (2010) 9 S.C.C. 209, ¶ 26.

relationships; such as, merely for the sake of convenience or to test compatibility before marriage, or to overcome legal obstacles in legal marriage, or to escape the responsibilities imposed by a formal marriage, or because the couples do not see any benefit or value in the institution of marriage.[157]

Interestingly enough, though connected to the 2005 Act, the term gained and received popularity not only in relation to the cases relating to this new piece of legislation. Since the promulgation of the 2005 Act, while for scholars mere mention of the term 'live-in relationship' has become sufficient to declare legal acceptance to this new social phenomenon, lately it has also become rather fashionable for judges to appear to be accepting live-in relationships or to make reference to the term 'live-in relationships', while dealing with various cases relating to women and personal relationships, irrespective of the law under consideration.[158]

Perhaps, one can put a larger part of the blame for perpetuating this myth on scholars, activists and legal journalists;[159] unfortunately the judiciary has not been far behind. It is true that very often judgments are misreported or mere passing observations by the judges are cited out of context or projected as the general legal position.[160] However, it

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157 Vijender Kumar, *Live-in Relationship: Impact on Marriage and Family Institutions*, 4 S.C.C. J-9 (2012).

158 Two cases, frequently misquoted by the academicians, lawyers as well as the judges to build in the myth of live-in relationships, are: Lata Singh v. State of UP, AIR 2006 S.C. 2522; S Khushboo v. Kanniammal, (2010) 5 S.C.C. 600. Incidentally none of these cases have been related to the 2005 Act, nor do they lay down anything relating to legal validity of live-in relationships in India. However, the passing remarks by the judges that pre-marital sex or live-in relationships are not criminal offences are often quoted as Supreme Court's endorsement to legal acceptance of live-in relationships. One of the earliest references by the Apex Court to the term came in 2006 in oft quoted case of *Lata Singh*, where the Court, while quashing a complaint by the father of the girl against the boy for offences of kidnapping and abduction, under sections 366 and 368 IPC, observed, "that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral." While the aim of the Court, apparently, was to highlight opposition to inter-caste marriage as anachronistic, the above statement with mention of live-in relationship has since then being cited continuously by judges, lawyers and scholars to prove that the Law and society in India now accept live-in relationships.

The above assertion in *Lata Singh's* case came to be quoted also in the *Khushboo* case, where the Court was dealing with a case relating to a well known actress. She had approached the Supreme Court to seek quashing of criminal proceedings pending against her in as many as 23 Criminal Complaints, mostly in the State of Tamil Nadu, for the offences contemplated under Sections. 499, 500 and 505 of the Indian Penal Code, 1860 and Sections. 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986 for having made remarks about increasing incidences of people engaging in pre-marital sex as a new social phenomenon. Allowing the appeal, and rightly so, the Court quashed the criminal complaints against the actress. However, in order to support its decision the Court observed, "*while it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under Section 497 IPC. At this juncture, we may refer to the decision given by this Court in Lata Singh v. State of U.P. and Anr. wherein it was observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral.*"

Both Khushboo and Lata Singh' s case are quoted frequently since then in scholarly as well as judicial discourses to show that the Apex Court approves live-in relationship and pre-marital sex. See for example, *Live-in Relationship- A Right to Life*, 2010 PL May 2, where the author states, "the Supreme Courts' controversial observation *okaying live-in relationships and pre-marital sex* has generated a fierce debate across the country". *(emphasis added)*

159 This myth is propagated in a most strange manner, repeated almost like a mantra, which needs to be chanted almost mindlessly. Ironically enough, assertions relating to acceptance of live-in relationships are made even in those pieces of writings which set out to show how Supreme Court denies recognition to live-in relationship. One such example is: Rashmi Shukla, *Legal Aspects of Live-in Relationship in India*, Livelaw, April 16, 2014: the author, a young student from a law school, gives an analysis of recent Supreme Court judgment in the Indra Sarma case. After describing that the Supreme Court did not consider that the 2005 Act takes within its ambit live-in relationship, the author concludes the article with the statement, *"now that the Supreme Court of the country has recognized the institution of live-in relationship formally* it is necessary to make our legal conditions sustainable for such kind of relationships and hence it is necessary to legislate upon the issue of live-in relationship and provide logical and clear structure regarding the rights and duties of parties involved in such a relationship so as to not confuse such a relationship with marriage because the two are essentially different in nature and hence should be treated differently so as to protect the interest of both the parties in the relationship." Such an assertion leaves one wondering how could the Court recognize an institution formally without having sustainable legal conditions.

160 Vijender Kumar, supra note 157.

is difficult to overlook judges' responsibility in perpetuating the myth with the evidence of a number of cases even from the Apex Court which feed into the misunderstandings about the legal validity of live-in relationships in India,[161] with scant attention to the specific requirements evolved by the Apex Court itself for a relationship to be called relationship in the nature of marriage under the Act.

III. LIVE-IN RELATIONSHIPS OR RELATIONSHIPS IN THE NATURE OF MARRIAGE: THE CURRENT LEGAL POSITION

Since 2005, given the fact that the Act does not define the term 'relationship in the nature of marriage', the courts at all levels have interpreted the term in various ways. The first authoritative pronouncement by the Apex Court on the meaning of the term relationship in the nature of marriage or more liberally live-in relationships in the context of the 2005 Act appeared in 2011 in the case of *D. Velusamy* and then in 2013 in the *Indra Sarma* case. Incidentally, both judgments related to claims of maintenance, though covered by different statutes – the former under section 125, Cr.P.C. and the latter under the 2005 Act. Both cases rested on claims made by women who had been in relationships with previously married men.

In the *Velusamy* case,[162] although the petitioner did not invoke the provisions of the 2005 Act, the Apex Court went on to give a specific definition to the term relationship in the nature of marriage, considering that the issue of bigamous or adulterous relationship was also needed to be examined for the purposes of the 2005 Act. The judges in this case took note of the fact that there can be many kinds of intimate relationships which can be named as live-in relationships. However, striking a distinction between live-in relationships and relationship in the nature of marriage, the judges categorically stated that "not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005".[163] Enumerating upon the various kinds of live-in relationships, the judges made it clear that "one night stand, relationship for sexual services, keeps and concubines cannot be considered relationships in nature of marriage." Defining the term relationship in the nature of marriage, the judgment stated,

"*In our opinion a 'relationship in nature of marriage' is akin to a common law marriage. The common law marriages require that although not being* formally married: (a) The *couple must hold themselves out to society as being akin to spouses, (b) They must be of legal age to marry,*

[161] Also see, Madan Mohan Singh v. Rajni Kant, (2010) 9 S.C.C. 209: The court invoked both *Lata Singh* and *Khushboo* Case. It stated: "In *S. Khushboo v Kanniammal* this Court, placing reliance upon its earlier deicision in *Lata Singh v. State of U.P.* held that live-in relationship is permissible only in unmarried major persons of heterogenous sex." (¶ 23).
[162] D. Velusamy, *supra* note 145.
[163] *Id.* ¶ 32.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried, (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."[164] (emphasis original)

It was further stated,

"*A relationship in the nature of marriage under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'.*"[165]

The court took cognizance of the fact that with its definition "not all live-in relationships will amount to a relationship in the nature of marriage"[166] and that it would "exclude many women who have had a live-in relationship from the benefit of the 2005 Act."[167] However, despite this realization the judges found themselves constrained to adopt a narrow definition of the term relationship in the nature of marriage, as they were of the view that the "Parliament has used the expression relationship in the nature of marriage and not live-in relationship".[168] "The Court", the judges stated, "in the garb of interpretation cannot change the language of the statute."[169]

Although the *Velusamy* judgment has invited much criticism, mainly for use of objectionable language, it remains till date the authoritative pronouncement for the term 'relationship in the nature of marriage,' not having been overruled by a larger bench. A more recent attempt by the Apex Court to undertake a detailed analysis of the concept of live-in relationship emerged in 2013 in the case of *Indra Sarma v. V.K.V. Sarma.*[170] Taking further the line of reasoning developed by the Apex Court in the *Velusamy* case, the Court once again explained, elaborately, the differences between marriage, relationship in the nature of marriage and live-in relationships. The judges also made it clear that the 2005 Act does not give legal recognition to all kinds of live-in relationship. The judges in the *Indra Sarma* case stated, "through the DV Act, the Parliament has recognized a relationship in the nature of marriage and *not a live-in relationship simpliciter.*"[171] Marriage, the Court mentioned, "involves legal requirements of formality, publicity, exclusivity, and all the legal consequences flow out of that relationship"[172]. On the other hand, relationship in the nature of marriage, according to the Court, means:

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164 D. Velusamy, *supra* note 145, ¶ 31.
165 *Id.*
166 D. Velusamy, *supra* note 145, ¶ 32.
167 D. Velusamy, *supra* note 145, ¶ 33.
168 *Id.*
169 D. Velusamy, *supra* note 145, ¶ 33.
170 Indra Sarma, *supra* note 146.
171 Indra Sarma, *supra* note 146, ¶ 53.
172 Indra Sarma, *supra* note 146, ¶ 23.

"*A relationship which has some inherent or essential characteristics of a marriage though not a marriage legally recognized, and, hence, a comparison of both will have to be resorted, to determine whether the relationship in a given case constitutes the characteristics of a regular marriage*."[173] (emphasis added)

Distinguishing live-in relationship from a relationship in the nature of marriage, the court defined the former as,

"…*purely an arrangement between the parties, unlike a legal marriage. Once a party to a live-in-relationship determines that he/she does not wish to live in such a relationship, that relationship comes to an end. Further, in a relationship in the nature of marriage, the party asserting the existence of the relationship, at any stage or at any point of time, must positively prove the existence of the identifying characteristics of that relationship, since the legislature has used the expression in nature of*." [174]

The judges also laid down guidelines for understanding the difference between marriage and relationship in the nature of marriage. According to the Apex Court, the factors that are to be taken into account for a relationship to qualify as a relationship in the nature of marriage under section 2(f) of the Act are:[175]

1) reasonably long duration of period of relationship,
2) shared household,
3) pooling of resources and financial arrangements in joint names to support each other,
4) domestic arrangements or entrusting responsibility, especially on woman, to run the home,
5) sexual relationship, which is not just for pleasure, but for emotional and intimate relationship and also for procreation of children,
6) children – having children and sharing the responsibility for bringing up and supporting them,
7) socialization in public and holding out to the public as husband and wife, and
8) intention and conduct of the parties – common intention of parties to have a marriage-like relationship.

Taking a clear stand with respect to polygamous or bigamous arrangement, the judges in *Indra Sarma* stated:

"*A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character*."[176]

It further mentioned:

[173] Indra Sarma, *supra* note 146, ¶ 35.
[174] Indra Sarma, *supra* note 146, ¶ 36.
[175] Indra Sarma, *supra* note 146, ¶ 55.
[176] Indra Sarma, *supra* note 146, ¶ 56.

"*Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.*"[177]

In *Sarma*, the judges did express sympathy towards those women who knowingly enter into bigamous relationships; however, it expressed helplessness as they mentioned:

"Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times deserve protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive."[178]

Raising a demand for action from the Parliament, the judges further added,

"Parliament has to ponder over these issues, bring in proper legislation or make a proper amendment of the Act, so that women and children, born out of such kinds of relationships be protected, though these types of relationship might not be a relationship in nature of marriage."[179]

While taking a clear stand against bigamous/polygamous relationships, the Apex Court in the *Indra Sarma* case, however, made a small concession in favour of bigamous arrangements, which was not made in the *Velusamy* case. In the *Velusamy* case, the Apex Court was of the view that the unmarried status of man and woman is one of the essential conditions for a relationship in the nature of marriage.[180] However, in the *Indra Sarma* case the court took a slightly different view as it mentioned that a relationship between an unmarried woman and a married adult male can be considered a relationship in the nature of marriage within the definition of section 2(f) of the DV Act, as long as the woman ***unknowingly*** entered into the same. In other words, lack of knowledge on the part of the woman about the marital status of the man with whom she has been living for a long time in capacity of wife may entitle her to claim relief under the 2005 Act.

Apart from the above-mentioned difference, both judgments appear to present a consistent view on the term relationship in the nature of marriage. Although the more recent case of *Indra Sarma* does not make an explicit reference to the judgment in *Velusamy*, a combined reading of both cases also leads to the conclusion that according to the Apex Court a relationship in the nature of marriage under section 2(f) of the Act would mean a relationship between a man and woman, (i) who have eligibility to marry or to fulfill conditions for material validity of marriage, (ii) who have lived together for a sufficient period of time, (iii) who hold themselves out in the eyes of society as husband and wife, but (iv) whose relationship cannot be called a legally valid marriage. In other words, a relationship which has all the attributes of marriage, including eligibility of parties to marry, but which cannot be considered a marriage presumably for lack of

[177] Indra Sarma, *supra* note 146, ¶ 56.
[178] Indra Sarma, *supra* note 146, ¶ 57.
[179] Indra Sarma, *supra* note 146, ¶ 62.
[180] D. Velusamy, *supra* note 145, ¶ 31.

solemnization or fulfilment of some formalities prescribed under any of the personal laws. In other words, a relationship in the nature of marriage, the Apex Court seems to suggest, would mean a relationship between man and woman which fulfils all conditions of material validity but not of formal validity. To elaborate it further, although the Supreme Court does recognize that the 2005 Act addresses a new social phenomenon in society, it appears that according to the Court this new social phenomenon, which can be given recognition to under the 2005 Act, is nothing but the old practice of men and women living together for a significant period of time having common intention to hold themselves out to the public as husband and wife, without fulfilling those formalities which are necessary to constitute a legally valid marriage.

While the Supreme Court can be lauded for its efforts to impart clarity to a vital term in the 2005 Act, which unfortunately has not received due attention so far, the definition given to the term 'relationship in the nature of marriage' in these two cases, raises some important concerns and issues, which need to be debated next.

Is common law marriage or living together in the capacity of husband and wife or in a relationship in the nature of marriage a new phenomenon for Indian society and the Courts in India?[181] Have the courts in India not been dealing, for more than a century now, with cases involving the rights of women in relationships which are in the nature of marriage but which cannot be seen as legally valid marriages primarily in absence of proper marriage solemnization? Doesn't this idea of distinction, between marital and non-marital relationships on the basis of fulfilment of certain legal formalities, sound problematic in the Indian context? Doesn't there exist a clear legal position of presumption of marriage to deal with relationships having all attributes of marriage, save for fulfilment of legal formalities? Does this idea of restricting the term relationship in the nature of marriage to something akin to common law marriages further the objective of the 2005 Act to extend protection to women in non-marital relationships? There seems to be a deliberate silence about these kinds of questions, and it is useful to investigate this further.

The next section aims to address the above issues raised by the two judgments of the Apex Court. It argues that men and women living together in the capacity of husband and wife without having fulfilled legal formalities essential for a legally valid marriage is anything but a new phenomenon in India. It draws attention towards the well-settled legal position relating to presumption of marriage, specifically to deal with those relationships which have all attributes of marriage but where formal solemnization (in Indian context, solemnization can take place through any of the three methods: (i) following the procedures laid down by any of the laws relating to marriage, (ii) following those customs which can stand the "test of custom" accepted under Indian laws, (iii) having the marriage registered after following

[181] *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 Oregon Law Review 109 (1996): Bowman provides a detailed insight into the history of common law marriage in the United States, its abolition and its impact on the rights of women.

some informal customary patterns of marriage) cannot be proved.[182] It further shows that in the Indian context, the distinction between marital and non-marital relationships on the basis of fulfilment of legal formalities may be inappropriate due to wide diversity of forms available for marriage solemnization, especially amongst Hindus. Attributing the label of non-marital relationships to those relationships where marriage solemnization or formal validity cannot be proved by documentary evidence, the next section shows, may, far from being progressive, have the effect of denying many relationships the status of marriage, which has been available so far under Indian laws.

IV. RELATIONSHIPS IN THE NATURE OF MARRIAGE: NOT A NEW PHENOMENON IN INDIA

Matrimonial matters in India are governed by four sets of, what are seen as, religion-based personal laws for Hindus (including Buddhists, Jains and Sikhs), Muslims, Christians and Parsis. In addition to the religion-based laws there also exists a special enactment, the Special Marriage Act of 1954, which facilitates formation and dissolution of inter-religious marital relationships. These laws prescribe norms for formal as well as material validity of the marital relationships. There has always been a demand for compulsory registration of marriages; however, in India non-registration does not render a marriage invalid.

One of the peculiar features of Indian marriage laws, especially of Hindu marriage laws, is the recognition given to diverse forms of customary marriage solemnization[183] and wide discretion enjoyed by the courts in determining the issues relating to formal validity of marriages. The marriage laws in India are supported by a provision of the law of evidence,[184] which allows courts to draw presumptions of a valid marriage, albeit rebuttable, where no independent evidence of solemnization of marriage is available, but where there is proof of prolonged and continuous cohabitation between a man and a woman in the capacity of husband and wife in the eyes of society.

The courts' discretion in determining solemnization of marriage is derived from the fact that the Hindu Marriage Act though has section 7, which is presumed to prescribe conditions for formal validity of marriages, does not prescribe any particular form for a legally valid marriage. It grants validity to marriages performed in accordance with a wide range of customary ceremonies and rites, which may or may not be based on religious texts. The customs of marriage, which are given recognition in the Hindu Marriage Act, vary from elaborate ceremonies to simple rituals and the mere requirement of living together as husband and wife.[185] Such has been the diversity in the forms of marriage solemnization, especially amongst Hindus, that the issue relating to essential ceremonies of a Hindu marriage, continues to be unsettled even till date.[186] Since the pre-independence period, the courts in India are constantly being called upon to decide whether a particular customary ceremony claimed by one of the parties to a marriage can be considered legally valid for

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[182] In Indian context, solemnization can take place through any of the three methods: (i) following the procedures laid down by any of the personal laws relating to marriage, (ii) following those customs which can stand the "test of custom" accepted under the Indian laws, (iii) having the marriage registered after following some informal customary patterns of marriage.
[183] The Hindu Marriage Act, No. 25 of 1955, §5 and §7.
[184] The Indian Evidence Act, No. 1 of 1872, § 114.
[185] PARAS DIWAN, LAW OF MARRIAGE & DIVORCE, (6TH ED. 2011).
[186] *Id.*

the solemnization of a marriage.[187] While dealing with validity of marriage, another task for the Courts in India has been to decide questions relating to the status and the rights and obligations of those individuals[188] who have been living together in capacity of husband and wife for a significant period of time without being able to give proof of having fulfilled formalities necessary to constitute a valid marriage. This arises today most prominently in the context of claims for maintenance after the breakdown of such relationships. For the courts in India, from the time of the Privy Council onwards, a deciding factor which has weighed heavily while dealing with issues relating to formal validity of marriage, is the existence of the *de facto* marriage – the existence of the relationship in the nature of marriage.[189] The approach of the courts has always been to presume in favour of marriage, even if no independent evidence to prove fulfilment of formalities essential for a legally valid marriage is coming through. Confronted with an issue of relationship between man and woman who have been cohabiting as husband and wife for many years, but whose marriage could not be proved, the Privy Council,[190] considering the law as well settled as early as in 1929,[191] held that "the law presumes in favour of marriage and against concubinage, when a man and a woman have cohabited continuously for a number of years."[192]

There exists a series of cases[193] where the higher judiciary has consistently reinforced this well settled legal position of "presumption in favour of marriage, where partners have lived together for a long spell as husband and wife".[194] The courts in India have consistently been giving such relationships the status of valid marriages, for the simple reason that these relationships were akin to marriage relationships, possessing all the attributes or characteristics of a valid marriage but for the availability of evidence to prove fulfilment of formalities considered essential for a legally valid marriage.

It is true that there is not a single judgment so far which lays down the guidelines for drawing presumption in favour of marriage or for relationship in the nature of marriage. However, a combined reading of the case law relating to

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187 Chanmuniya v. Chanmuniya Virendra Kumar Singh Kushwaha and anr. (2011) 1 S.C.C 141 (India).

188 The courts have often been faced with questions on validity of marriage in the context of legitimacy of children.

189 So much has been the focus of the judges on attributes of marriage that one of the leading experts on Hindu Law, Professor J. Duncan M. Derrett once commented that in determining validity or invalidity of marriages, intention should be the criteria. He stated, "did they intend to become man and wife? If they did so, the choice of ceremony is irrelevant…If on the other hand she aimed to be no more than a permanent concubine, the ceremonies, no matter how elaborate, should not have the effect of turning her into a *patni* against her intention!"

190 Mohabbat Ali Khan v. Muhammad Ibrahim Khan, A.I.R. 1929 PC 135.

191 *Id.* ¶17. The court mentioned:
"the law applicable to such a case is quite settled. As Dr. Lushington, delivering the Judgment of the Board, observed in Khajah Hidayutoollah v. Rai Jan Khanum 3 M.I.A. 295 : 6 W.R.P.C. 52 : 1 Sar. P.C.J. 282 : 18 E.R. 510. Where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Muhammadan Law, the presumption is in favour of such marriage having taken place."

192 Similar proposition was laid down in by the Privy Council in Andrahennedige Dinohamy v. Wiketunge Liyanapatabendage Balshamy, AIR 1927 PC 185 where it was stated, that where a man and a woman are proved to have lived together as husband and wife, the law presumes that they are living together in consequence of a valid marriage.

193 Some examples are: Gokalchand v. Parvin Kumar, AIR 1952 S.C. 231; *S.P.S.* Balasubramanyam v. Suruttayan, (1994) 1 S.C.C. 460; Ranganath Parmeshwar Panditrao Mali v. Eknath Gajanan Kulkarni, (1996) 7 SCC 681; Sobha Hymavathi Devi v. Setti Gangadhara Swamy, (2005) 2 S.C.C. 244).

194 Badri Prasad v. Deputy Director of Consolidation, (1978) 3 S.C.C. 527.

presumption of marriage leaves no doubt that the relationships fit for drawing presumption of a valid marriage are those, where there is no proof of fulfilment of legal formalities of marriage, but which have all the attributes or inherent characteristics of marriage, as suggested by the Apex Court in the *Indra Sarma* judgment. However, the paradox is that, while in 1869 the proof of a relationship in the nature of marriage, made it possible for a woman to claim the status of a marriage relationship, in 2014 with the judgments of the Supreme Court in the *Velusamy* and *Indra Sarma* cases, the claim would only be to a kind of 'live-in relationship' or a relationship which has a status lower than that of marriage,[195] where women and children involved would be enjoying lesser rights than what could be enjoyed earlier. And, undoubtedly, by no stretch of imagination can this be considered a progressive move by taking into account a new social phenomenon. Instead, it is about giving a new name to an old phenomenon, with lesser rights for women and children involved.

It is true that to claim the benefit of the presumption of marriage the woman concerned has to claim some sort of solemnization of marriage. The judges cannot invoke the presumption of marriage in the absence of any such claim being made by the woman concerned. It can also be argued that because of this authoritative definition to the term 'relationship in the nature of marriage' by the Supreme Court in the *Indra Sarma* case, a woman need not make any claim relating to marriage solemnization. Neither does she have to wait for the judges to exercise discretion and make a presumption in favour of marriage under section 114 of the Indian Evidence Act. The reliefs under the 2005 Act can now be claimed by a woman who has been living in a relationship in the nature of marriage as a matter of right.

Does this mean that the provision relating to presumption of marriage is now to be rendered irrelevant? If not, then on the basis of interpretation of the term relationship in the nature of marriage by the Supreme Court, do we have to infer that women now have a choice between claiming marriage by invoking the presumption or relationship in the nature of marriage under the 2005 Act? And, can any woman, who would, in any case, be under an obligation to give evidence of prolonged, continuous cohabitation with a man in capacity of wife, be advised to settle for lesser status and transitory reliefs under the 2005 Act, when it is possible to claim the status of wife and all entitlements associated with it? Perhaps, the answer has to be in the negative. But then, has the Supreme Court in the recent judgments, discussed here, offered anything new? Perhaps, the answer again has to be in the negative.

The Supreme Court in the *Indra Sarma* case could be seen as offering something new in the spirit of the 2005 Act, had it meant giving an opportunity to the individuals to strike certain arrangements, oral or written, for living together in intimate relationships with or without intention to marry. But, no part of the two judgments lends itself to such an interpretation or can be read as laying down law for giving recognition to any such kind of co-habitation arrangement. Instead, it appears that relief under the 2005 Act can be claimed only by those women who have been in prolonged and continuous cohabitation as husband and wife, and, given the absence of a formal requirement of marriage registration, for India this by no means is a new phenomenon.

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[195] Indra Sharma, *supra* note 146.

V. LIVE-IN RELATIONSHIPS: NEED FOR FURTHER DEBATE

One of the important objectives of the Protection of Women against Domestic Violence Act, 2005, is to extend protection against violence to women in those intimate relationships which cannot be considered legally valid marriages. However, as the above analysis shows, both the judgments have an effect of laying importance on fulfilment of legal formalities as an essential condition for validity of marriages. And, in the Indian context, where 'common law marriages' are an old phenomenon and where the law gives recognition to diverse forms of marriage,[196] the distinction between marital and non-marital relationships on the basis of fulfilment of some legal formalities may lead to precarious consequences. Far from accounting for any new phenomenon or granting better rights to women, insistence on fulfilment of specific formalities as a criterion for determining legal validity of marriage, may have undesirable effects. This may result in a situation where many relationships would be deprived of the status of marriage and the woman involved therein would be denied the rights and entitlements associated with it. It may also have another undesirable effect in the form of judges' attempting to impose some specific forms of marriage solemnization as legally valid forms, thereby curtailing the freedom of individuals to choose custom-based or other forms, which were allowed to them even in the traditional system and which have been given protection under the modernistic and reformed Hindu Marriage Act.[197]

The 2005 Act, with its concern to extend protection against violence to women in non-marital relationships too, is undoubtedly a welcome initiative. However, in the Indian context, in order to ensure that this concern translates into meaningful measures for the rights of women, there is a need for further debate on the meaning of the term 'relationship in the nature of marriage'. And such a debate is required not only for some new social phenomenon, but also for the old phenomenon of bigamous or adulterous relationships, the old practices which have refused to be tamed even by the instruments of criminal law. There is surely an imminent requirement to deliberate on the issue of rights of women who, knowingly or unknowingly, become part of relationships which would be bigamous or adulterous in nature.[198]

Presuming that following the west, more and more couples in urban areas are willing to live together without fulfilling any kind of marriage formalities, the new phenomenon which may need consideration could be relating to the arrangements between men and women to live together in intimate relationships, to be in cohabitation of whatever duration, with or without intention to fulfil rights and obligations associated with marriage, or of presenting themselves as husband and wife in eyes of society. The issue of giving legal recognition to the relationships of the above nature requires, as is obvious, greater deliberation on vital matters such as nature of reliefs available under the 2005 Act. Once we agree on giving legal recognition to the co-habitation arrangements or to the contracts to live together, more

[196] Reference to above, from zero-ritual marriages to specific forms.
[197] The Hindu Marriage Act, No. 25 of 1955, § 7.
[198] Indra Sarma, *supra* note 146, ¶ 37.

discussions would also be required on issues such as: what should be the nature of rights granted to women in such relationships, which are not in the nature of marriage or which are mere arrangements or contracts to live together without having all or any of the attributes of marriage identified in the recent Apex Court judgment? What kind of economic rights can be granted to women in such relationships against the male partner as well as against the relatives, both male and female, of that partner? Would and should there be differences in entitlements during the relationship and after it ended? Can there be available right to residence derived from the idea of 'shared household' which is available against the male partner as well his relatives? What kind of instances will be covered under the category of emotional and psychological abuse? Will unilateral decision on the part of the male partner to break the relationship amount to emotional and psychological abuse?

It is true that none of the above questions yield to easy answers. But, difficulty is not and can never be a reason to avoid deliberation. However, till our socio-legal community responds to these issues, and specifically family lawyers stop making myths rather than telling us about the law as it is lived, we can and will perhaps need to revel in the myth, but the cost would be no less than the denial of rights to many women.

A DETAILED ANALYSIS OF THE "EQUALISATION LEVY"

S. GANESH ARAVINDH[*] & SHOBHANA KRISHNAN[°]

ABSTRACT

Confounded by the swift pace at which conventional business patterns and practices have been overshadowed and engulfed by the spectre of digital economies, one wonders if the alacritous permeation of the digitalization process would threaten to render the existing systems redundant. The consequential beneficiaries of this metamorphosis are Multi-National Corporations [**"MNC's"**] who more often than not make a contrived attempt, on the pretext of tax planning, to capitalize on the same and milk as much revenue as possible without incurring tax liabilities. Thus, the exaction in the form of an "Equalisation Levy" is a result of attaining a global consensus on the underlying causes of various tax challenges faced by countries that are part of OECD and G20. The subject matter of discussion in this paper is the recently introduced equalisation levy which has seen sizeable success within months of its inception.

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I.A CONSPECTUS OF VARIOUS PROACTIVE REFORMS

The multi-dimensional issue of inadequate tax revenue has to be addressed by taking note of various socio-economic factors that obstruct the passage of innovative tax reforms that are formulated. *"85 percent of India's net national income falls outside the tax net, according to the Economic Survey 2016-17 tabled before the Budget session of the Parliament, which supports that Equalisation Levy is a step in the right direction, bringing digital profits accrued in India within the tax ambit*."[199] While extensive efforts are being made to improve the tax compliance ratio in India, it is also germane to widen the tax bracket so as to include within its ambit sectors, occupations and businesses that are presently immune to taxation. Thus, it can be said that all the proactive measures of the Government beginning from the introduction of Service Tax to Transfer Pricing have been aimed at improving the above-mentioned factors, *i.e.*, tax base and taxpayers' base. These multitudinous measures to increase tax compliance include the creation of an environment conducive to honest payment of tax and the devising of a mechanism that facilitates and fosters the process of tax levy and collection. These radical measures include the introduction of a negative list of services, minimum alternate tax and all attempts of the State to unearth black money. Besides making a conscious effort to broaden the taxpayers' base, the Government has also put in a commendable effort to proffer the tax net to tax resident, non-resident foreign enterprises and e-commerce entities which, as of the present *status quo* of affairs, are immune to taxation.

The intriguing issue of taxing e-retailers and foreign enterprises which had its genesis only in the past decade or so has been subjected to intense confusion and extensive convolution. It would not be an exaggeration to state that the traditional form of commerce routed through and orchestrated by brick and mortar enterprises is now being taken over by e-commerce at a steadfast pace. It would soon be the exclusive mode of business and would compel the conformist population that is yet to refashion and acclimatize to the more demanding form of business. In fact, e-commerce has been the factor behind the integration of the conventional style of business with the contemporary one where entities such as Flipkart and Amazon operate through inventory and marketplace models. The increasing usage of such models has paved the way for such entities to generate enormous sums of money. The contours of the existing legislative framework, despite being moderately accommodative to bring under its realm and bracket sectors that are fairly recent, demand to be widened to effect a legislative overhaul. The new development on the subject is the provision of S.52 of CGST Act which casts an obligation on e-retailers to collect tax at source at a rate not exceeding 2% (1% SGST and 1% CGST or 2% IGST, as the case may be).

Having accomplished that, the Government – treading the same line - has decided to expand the spectrum of the taxing regime to tax trailblazers such as Facebook and Google whose principal source of earning is online advertising.

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[199]Preeti Balwani, *Google Tax: The Search for Equality in Equalisation Levy, Money Control* (Mar. 23, 2016), http://www. moneycontrol.com/news/expert-columns/google-tax-the-search-for-equalityequalisation-levy_5991101.html.

Facebook, the premier social networking site, earned $5.4 billion in the first quarter of 2016, with almost 97% of the same due to advertising. The move to impose tax in the nature of *equalisation levy* has come at a point of time when social networking websites and other online entities are earning massive sums and generating enormous turnovers. With a tax bracket whose straitened horizons have proved highly inadequate over the years, the levy comes as a welcome move to counterpoise fiscal deficits. Web advertising and mobile advertising are predominantly the two advertising platforms from which the major chunk of the revenue is earned. In this regard, it would be apposite to first refer to the global initiative that formed the basis for the incorporation of the levy through the Finance Act, 2016. Following this, in the next part of the article, the authors shall discuss the law on equalisation levy as it stands in India, succeeded by an analysis of the challenges to its effective implementation. Subsequent to this, the authors would then provide a global perspective on equalisation levy and conclude by providing suggestions to strengthen the place of equalisation levy within the Indian taxation environment.

II. GLOBAL INITIATIVE TO ADDRESS THE EVER-GROWING CHALLENGES IN INTERNATIONAL TAXATION

Enterprises with a global presence made use of the loopholes in double taxation treaties and domestic laws to hoodwink both countries of residence and source to avoid paying tax by establishing nexus in tax havens. The Organisation for Economic Cooperation and Development's [**"OECD"**] Committee for Fiscal Affairs set up a subsidiary body called the 'Task Force for Digital Economy'. The recommendations of this Task Force were released as Action No.1 Report which dealt with Base Erosion and Profit Shifting in the digital economy.[200] It acknowledged that "*new business models created new tax challenges in terms of nexus, characterization and valuation of data and user contribution*"[201] and that "*the application of a withholding tax on digital transactions could be considered as a tool to enforce compliance with net taxation based on this potential new nexus, while an equalisation levy could be considered as an alternative to overcome the difficulties raised by the attribution of income to the new nexus.*"[202] The Report proposed three ways to tax a non-resident's income: establishing an economic nexus, imposing a withholding tax and an equalisation levy. The methods proposed aim at better transparency between taxpayers and tax-collectors, and more accurate risk assessment measures through "*mandatory disclosure of tax planning arrangements and transfer-pricing documentation and a template for country-by-country reporting.*"[203] To gain a comprehensive understanding of the deliverables proposed by the OECD, the Action Reports must be read together. The Base Erosion and Profit Shifting Action Reports denote the reports on 15 issues that have paved the way for base erosion and profit shifting by companies and other organisations and were adopted by both the OECD and the G20 countries. These points are financial and economic concerns confronting both developing and developed economies. The various reports must, therefore, be read holistically so as to arrive at a fool-proof solution to tax income accruing online.

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[200] OECD/G20 Base Erosion and Profit Shifting Project, *Addressing the Tax Challenges of the Digital Economy*, *Action 1 – 2015 Final Report* (Oct. 2015).
[201] Report of the Committee on Taxation of E-Commerce, *Proposal for Equalisation Levy on Specified Transactions* (Feb. 2016).
[202] OECD, BROADER DIRECT TAX CHALLENGES RAISED BY THE DIGITAL ECONOMY AND THE OPTIONS TO ADDRESS THEM, p.7.6 (2015).
[203] Christopher J. Worek, BEPS and the Digital Economy, (Aug. 12, 2015), http://www.taxanalysts.org/content beps-and-digital-economy.

For instance, Action 6 which deals with the "Prevention of Treaty Abuse"[204] seeks to curtail tax treaty benefits and confer nations a way to enforce their domestic laws without violating international treaties. These agreements, originally established to give the benefit of avoidance of double taxation, are now being used by MNCs to avoid tax in both the market and the parent country.

In light of this, Action 1 recommends a nexus to be determined on the basis of "significant digital presence" of an entity. This test alternatively suggests that when any company is engaged in any specific completely dematerialised digital activities, it would be deemed to have a taxable presence in the country if the enterprise maintains significant digital presence within the country's economy. This report suggests a complete rejection of the concept of Permanent Establishment status and replaces it with *"significant presence test"* which entails a combination of the physical presence test and the digital presence of the enterprise with respect to the nation's economy. The other proposals include *withholding tax* and *"bit"* tax. The former recommends tax can directly be imposed on specified services for particular goods or services or imposing liability on financial institutions undertaking such payments to withhold tax, freeing customers from hassle to withhold such payments to the Government. The former proposal remedies the need to have a physical significant presence to impose tax while the latter is proposed to come into action if a company's website exceeds a minimum threshold of annual bandwidth usage, measured by the number of bytes expended. The above-mentioned methods are proposed with the intent to prevent avoidance of tax and to ensure that tax revenue is restored to both the market and the parent country.

A. INDIAN INITIATIVE THAT FORMED THE BASIS FOR THE LEVY

The definition of the term *"royalty"* must be thoroughly understood as it has been a subject matter of adjudication in various forums. Of these definitions, two categories are particularly important to the digital arena – those pertaining to supply of information or software in digital form, and the other dealing with provision of services like hosting, online advertising, etc. "*The distinction between intangible goods and services is to some extent artificial, since e-commerce may blur the difference between income from sale of goods and income from provision of services.*"[205] However, when the same is seen in the Indian context, there are notable differences. They are based on different parts of Explanation 2 to Section 9 of the Income Tax Act, 1961 where matters of digital goods fall within sub-clause (v), whereas service-related matters apply sub-clause (iva), (vi) or other service related provisions. The position of the Technical Advisory Group of the OECD on the same has been to treat income arising from goods traded online as business profits and not royalties. However, Indian Courts have ruled both ways on the issue.

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[204] OECD/G20 Base Erosion and Profit Shifting Project, BEPS Action 6 Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, (Oct. 2015), http://www.keepeek.com/Digital-Asset-Management/oecd /taxation/preventing-the-granting-of-treaty-benefits-in-inappropriate-circumstances-action-6-2015-final-report_978 9264241695-en#.WLv4mjt97IU.

[205] *See*, Jeffery Owens, The Tax Man Cometh to Cyberspace, 14 Tax Notes International 1833 (1997).

B. INDIAN CASES THAT DISCLOSED A VACUUM

It is appurtenant to take note of certain instances when the authorities were incapacitated from proceeding against such companies who were earning massive sums from online advertising. First, in *ITO v. Right Florists Limited*,[206] the ITAT Kolkata disallowed payment made by Right Florists Pvt. Ltd. to Yahoo USA under section 40(a)(i) of the Income Tax Act, ruling that deduction would be available when tax was liable to be withheld under section 195 of the Act. Thus, the issue in contest was whether the payment made to a foreign company as a consideration for advertising services rendered by the latter is taxable in India. The primary contention of Right Florists was that the payment was to be construed as the business profit of the company and thus could not be taxed in India. When the authorities sought to slap a certain percentage of tax on foreign firms and investors, they suffered a serious setback for the simple reason that the company neither had a business connection nor a permanent establishment in India. This was because search engines such as Google or Yahoo could not be construed to be a computer server and were held not to be 'tangible property' required to constitute a permanent establishment within the meaning of Article 5 of India-US DTAA. Resting on the same, the ITAT further held that in view of the apparent absence of a fixed place of operation, the revenue of such search engine corporates extracted from Indian customers was beyond the purview of the Indian tax law. Furthermore, the commentary by OECD on the point states that the website through which services are rendered cannot be said to be a permanent establishment. If at all web servers could constitute a permanent establishment, it is the main server from where the website functions. Propitiously for Yahoo and owing to the lack of a web server in the taxing jurisdiction, the authorities delivered a ruling in favour of the advertising company.

Although the ruling marks a significant departure from a series of adjudications where the Court has said that payments made for services provided by automated systems could be taxed in India,[207] it comes as a benison to the growing e-commerce populace. It may be seen that the diverging view was taken after taking note of the Government's reservation on the OECD's view which did not play any role in the judicial scrutiny of the subject. Subsequently, ITAT Mumbai also held that user fee received by eBay for operating an India specific website for facilitating an online auction could not be made taxable in India since it was neither "royalty" nor "fees for technical services" within the specific meaning attributable to these terms under sections 9(1)(vi) and 9(1)(vii) of the Income Tax Act. Albeit these rulings illustrate the succinct stance of the authorities, a *prima facie* necessity to plug the loopholes in the taxation laws is manifest. The issue was also of paramount importance for the basic reason that the authorities were not willing to abnegate such massive sums, especially when such companies were earning close to $600 million from Indian customers.

In another instance, the Mumbai ITAT Bench, in the case of *Dun & Bradstreet Information Services v. ADIT,*[208] held that the income earned by the US Resident company supplying credit information in the form of *"business information*

[206] ITO v. Right Florists Limited, I.T.A. No.: 1336/Kol./2011.
[207] In Re: Cargo Community Network Pte., **289 ITR 355** (2007); In Re: IMT Labs (India) (P) Ltd., 287 ITR 450 (2005); ONGC Videsh Limited v. ITO, 141 ITD 556 (2013).
[208] Dun & Bradstreet Information Services v. ADIT, 2010-TII-59-ITAT-MUM-INTL.

reports" [**"BIR"**], being *"business income"*, would not be taxable in India due to the absence of a permanent establishment in India. The Karnataka High Court, in its ruling in the case of *CIT v. Wipro Ltd.*,[209] rejected the above position and held the payments as royalty on the basis that the payment was for *"imparting of information"* as under sub clause (ii) of Explanation 2, placing reliance on a former judgment of the same court in *CIT v. Samsung Electronics Co.*,[210] wherein it held the income from sale of shrink wrap software as royalty. This reliance placed by the Hon'ble court seems to be of controversy as the ruling arrived at in the *Samsung Electronics case*,[211] is on the basis of an incomplete appreciation of the differentiation between copyright and copyrighted product in the case of *Tata Consultancy Services v. State of A.P.*,[212] by the Hon'ble Apex Court. Nevertheless, the abovementioned judgment is of importance because it propelled several decisions where payments for digital goods were subsequently classified as royalty,[213] and continues to protract litigation on the same.

Similarly, judicial precedents on the matter of taxation of digital services reflect the inconsistency shown in the context of digital products. For instance, in *ITO v. People Interactive (I) Pvt. Ltd.*,[214] the assessee company's portal had resident and non-resident users and thus, web hosting services were availed from Rackspace, a US based provider of cloud hosting services. The revenue officer relied on the United Nations Model Double Taxation Convention between Developed and Developing Countries, 2011 [**"UN Model Treaty"**][215] commentary to argue that Rackspace had allowed the assessee company the right to use its server, which should result in characterisation as royalty. Arguments were also made as regards the *"control"* exercised by shaadi.com over the server space to determine whether the relationship between the parties was of a lease of server capacity or mere provision of a hosting service. On a complete perusal of the matter, the Mumbai ITAT Bench passed an order that the services being in the nature of hosting, partly on the basis that the payer could not operate or "even have no physical access" to the equipment system. This ruling of the erstwhile ITAT Bench has opened up questions as to whether control can be objectively determined in cloud/digital services, as there seems to be a subjective line distinguishing the payment made for dedicated service of providing server space and hosting (which amounts to business income) and payment for leasing of cloud capacity (which amounts to royalty). The above mentioned judicial decisions raise perplexity around the area of taxation of digital services, which has led to the MNCs making use of these loopholes to evade payment of taxes in India and consequently prompted the government to implement the Equalisation levy to tax these MNCs for income earned from digital services provided in India.

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[209] CIT v. Wipro Ltd., (2011) 203 TAXMAN 621 (Kar).
[210] CIT v. Samsung Electronics Co. and others, ITA No 2808/2005.
[211] CIT v. Samsung Electronics Co. and others, ITA No 2808/2005.
[212] Tata Consultancy Services v. State of A.P., (2005) 1 SCC 308: (2004) 271 ITR 401.
[213] *See*, Gartner Ireland Limited v. ADIT, ITA No. 7101/Mum/2010; CIT v. Synopsys Internation -al Old Ltd., ITA No. 11/2008; Microsoft Corporation v. ADIT, (2010) 134 TTJ257 (Del); ING Vysya Bank Ltd. v. DDT, I.T.A. No.160/Bang./2010.
[214] ITO v. People Interactive (I) Pvt. Ltd., TS-129-ITAT-2012.
[215] United Nations Model Double Taxation Convention between Developed and Developing Countries, 2011, http://www.un.org/esa/ffd/documents/UN_Model_2011_Update.pdf.

C. UNVEILING THE MISCONCEPTIONS

It would be interesting to note that the Base Erosion and Profit Shifting Report on Action 1 only contemplates certain mechanisms by which countries could bracket advertisement revenue earned by search engine companies. In this regard, it is crucial to note that at no point does the Report recommend the imposition of an equalisation levy. It purely recognizes the various options considered by the Task Force on Digital Economy, an auxiliary of the Committee on Fiscal Affairs. The Report expressly states that it does not advocate recourse to any of the alternatives considered at that particular juncture. However, the Memorandum that seeks to throw light on the various provisions of the Finance Bill, 2016 faultily claims that the OECD, in Action Plan 1, had endorsed the imposition of an Equalisation Levy on the fee paid for certain digital transactions received by a non-resident. Following the recommendations of the OECD in its Action Report No. 1, the Committee for Tax for E-Commerce entities was formed by CBDT under the Department of Revenue, Ministry of Finance, and Government of India. While considering the options proposed by the OECD in its Action Report 1, the Committee rejected the idea of determining economic nexus on different factors as the same entails a lengthy process. It also rejected the idea of imposing a withholding tax on all transactions as this procedure would be lengthy and require the modification of all DTAA entered by the Indian Government with other countries. In its final report, the Committee – adopting and emphasizing the need for Equalisation Levy - states that it drew inspiration from various countries around the world, like Italy, Brazil, etc.

The Government took the report and the ensuing changes as the point of departure to transcend the existing impediments. The same becomes apparent on a bare perusal of the official memorandum that elucidates the Finance Bill of 2016. The digital business fundamentally challenges physical presence-based permanent establishment rules. The inherent challenges in taxing digital income are the underlying complications in characterising the payment, connecting the taxable event and the taxing jurisdiction and the location of the activity and the liability arising from the activity on a particular taxpayer.[216] Thus, India has been quick to realize that equalisation levy was the most viable option out of the various alternatives proposed. It is also essential to note that the implementation process of imposing the levy does not entail any major modifications or amendments in the domestic laws of countries and bilateral treaties between them. Keeping in view the fact that any imposition of tax can be made only with the prior sanction of law, a law was the desideratum of the hour. As of now, it has been a successful six-month period after the levy has been brought into force.

III. EQUALISATION LEVY: THE LAW AS IT EXISTS

Chapter VIII of the Finance Act, 2016 which deals with Equalisation Levy, codifies the law on this subject. Any payments received or receivable by a person, being a non-resident, from a person resident in India and carrying on business or profession or a non-resident having a permanent establishment in India, will be subject to tax at the rate of 6

[216] Pankaj Kumar Sharma, Equalisation Levy on Online Advertisement, (June, 2016), https://expertmile.com /arti.php?article_id=1328.

per cent as equalisation levy from the gross amount paid for the specified services.[217] It is important here to understand that the term *specified service* has been defined to include within its realm online advertisements and other online platforms that could be used as an advertising space.[218] The Bill provides for three scenarios where equalisation levy shall not be charged, namely, where the non-resident providing specified service has a permanent establishment in India and such service has nexus with such establishment, where the aggregate amount of consideration received by the non-resident does not exceed one lakh rupees, or where the payment for the specified purpose is not for carrying out business or profession.

IV. LOGJAMS AHEAD IN IMPLEMENTATION

The imposition of Equalisation Levy garnered eyeballs not only within Indian soil, but globally too. Though countries like the UK and Australia too have legislations similar to that of Chapter VIII of the Finance Bill, 2016, India was the first country to actually implement this levy. The unexpected speediness of the Government in passing and implementing the law has raised several questions and doubts in the minds of various stakeholders about the effective implementation of this move. The authors of this paper seek to critically analyse the various criticisms against Equalisation levy in a holistic manner.

A. WILL START-UPS BE FURTHERED BURDENED?

Many stakeholders believe that the levy, directed as a charge on the gross amount payable to the online advertising agency, also has a possibility of being added to the total amount payable to the non-resident business and could turn out to be counterproductive, thereby precipitating an economic crisis affecting start-ups and small businesses. The e-commerce entities which the Government plans to tax are companies with a huge global presence and thus have huge bargaining power. Owing to this, analysts suggest that the rationale behind levying an equalisation levy would fail as the burden would ultimately shift to taxpayers who are already subjects of various other taxes levied. It is believed that this move will adversely affect start-ups and small and medium enterprises [**"SMEs"**] and place them at an inferior position compared to their well-established counterparts. However, while holistically approaching the idea behind implementation of the levy, it is clear that the same is not aimed with a view to suffocate start-ups or SMEs. In exercise of the powers conferred by sub-section (1) and sub-section (2) of section 179 of the Finance Act, 2016, the Central Government has made rules for carrying out the provisions of Chapter VIII of the Act relating to equalization levy. These rules clearly provide that any payments made to the extent of Rs. One Lakh are exempt from the purview of equalisation levy. A new section namely section 40(a)(ib) has been inserted to disallow expenses pertaining to payment for advertisement services to a non-resident without deducting the equalisation levy. In other words, where a taxpayer

[217] Finance Act, 2016, §165(1).
[218] *Id*, §164(1).

has deposited the equalisation levy, the same shall be allowed as expenditure under the head Profits or Gains from Business or Profession, incidentally reducing the overall amount on which Income Tax shall be paid by such taxpayer. The move incentivises SMEs and start-ups to deduct equalisation levy before making payment, and thereby be subjects of comparatively lesser tax in the home country. One may argue that the imposition of the levy will negatively impact all SMEs and other start-ups hugely reliant on online fora for advertising. However, it is pertinent to note that this levy has been imposed only on non-resident e-commerce entities with no permanent establishment in India. Thus, the start-ups and SMEs still have access to other domains of enterprises resident in India or domains of companies having economic nexus in India. In fact, it is argued by a few analysts that this move will benefit not only the Revenue, but all such Indian domains which will now be preferred as a mode of digital platform for advertising, and it would also provide an impetus for many to start routing businesses to these companies, thereby pushing Indian e-commerce entities to the forefront. However, to better protect the interests of start-ups and SMEs, it is suggested that exemptions be made for these enterprises. It is also opined that a proper mechanism has to be put in place to ensure that the brunt of the levy does not fall on the shoulders of these enterprises.

B. WILL FOREIGN ENTERPRISES COMPLY?

To ensure compliance from foreign enterprises to the requirement of 6% equalisation levy, the Bill proposed that such income will be exempt in the hands of the non-resident under the newly introduced section 10(50) of the Income Tax Act, 1961 to avoid double taxation of income which has been subject to an equalisation levy. The imposition of equalisation levy raises a risk for these enterprises that the same income would be subject to equalisation levy under Indian laws and corporate income taxes in either their country of source or country of residence accordingly. The risk that in such cases, companies have to shell out huge moneys towards the compliance of different taxes in different places and adding on, equalisation levy not being a part of Income Tax Act, DTAA would not be applicable. The end-scenario is that e-commerce entities, which initially wanted to avoid tax, now end up paying more than what they would pay had they had a permanent establishment in India. As an end result, many foreign e-commerce enterprises, such as Facebook, according to various media reports are considering opening a place of permanent establishment in Indian Territory. This in fact increases the revenue of the Government, and at the same time opens up gates for several biggies to establish a permanent establishment in India, which positively impacts the Indian economy. In fact, "*the revenue accrued for the Government exchequer through the equalisation levy amounts to INR 1.46 billion from June 1, 2016, to December 3, 2016*."[219]

C. WILL IT STAND THE TEST OF CONSTITUTIONALITY?

Any law passed by the Parliament must be tested on the constitutionality of the legislation so passed by the Houses, which would require one to evaluate what the term "specified services" would entail. The Centre's power to tax income is derived from Entry 82 of List I read with Articles 245 and 246 of the Indian Constitution. The levy clearly

[219] Lorys Charalambous, Indian Equalisation Levy Implementation Successful, (Dec. 19, 2016), http://www.taxnew s.com/news/Indian_Equalis ation_Levy_Implementation_Successful_73015.html.

does not fall within the ambit of income tax. As it is a separate chapter in the Finance Bill, 2016, one can infer that the Parliament has drawn its power to impose the levy under Entry 97 of List I, which is a residuary entry. This understanding is pivotal as the topic in hand is about how the government has tried to tax foreign income without resorting to negotiations of tax agreements. This could be challenged as illegitimate and thus, must be viewed more as a circumventing measure rather than an exercise of legislative power.

D. IMPACT OF THE LEVY ON BILATERAL TREATIES

'Comprehensive' is what one must term the tax treaty network of India. In view of the same, the momentous reform will have to be tested on the touchstones of various bilateral treaties to which India is a party and additionally, after having successfully implemented the strategic gambit for six months, it is cardinal to examine the ramifications and discern the contrariety between the equalisation levy proposed by the OECD and the one construed by the Government. On a fastidious examination of the various relevant provisions of the Finance Act, 2016, it can be seen that the levy is in the nature of 'direct tax' obtruded on the non-resident foreign entity's income. To solve typical taxation issues relating to e-commerce and to equalize any differences prevalent between the non-resident enterprise and the local businesses is what is expected of the levy. However, the question as to whether it is consistent with treaty commitments is of paramount importance and is to attract protracted litigation, the answer to which is to be provided by the judiciary.

The Indian Committee has stated that the levy is not in the nature of tax on a foreign entity's income, whereas it is to be noted that the amount of tax charged is collected by withholding 6% of the sum paid by the resident to the non-resident. If a withholding tax imposed in consonance with section 115A of the Act as a levy on royalties or fees for technical services is regarded as a tax on the foreign company's income, it is unfathomable as to how an equalisation levy in the form of a withholding tax could be any different.

In this background, it is of utmost necessity to understand how a similar claim made by the Brazilian tax authorities has been defeated by the higher judiciary in the jurisdiction. In the famous case of *Veracel Cellulose*,[220] when a Brazilian company availed certain services from Finnish companies, the consideration payable to them was exempt as per the prevailing tax treaty between the two nations. Howbeit, when the Brazilian tax authorities sought to withhold tax, the Court ruled with precision that merely because the amount was in the nature of 'revenue', it could not be brought outside the purview of Article 7 (Business Profits) of the treaty. Similarly, in the case of *Copesul,*[221] the service provider companies did not have a permanent establishment in Brazil; neither were the services in the nature of 'technical services'. Accordingly, the revenue was to be characterized as 'business profits' under Article 7 of the tax treaty. Instead, the claim of the Brazilian company was discountenanced by the authorities citing the same reason as above. The Superior

[220] Federal Regional Court of 2nd Region, 2004.50.01.001354-5/ES (16 Mar., 2010).
[221] Federal Regional Court, 2002.71.00.006530-5/RS (4 June, 2009).

Court of Justice with intelligibility declared that the term 'profits' could not be confined to 'net profits' as described in the Brazilian tax law, and awarded an exemption under the treaty thereby absolving the company of the obligation to withhold tax. These judgments adhere to appreciable logic and it is only natural to expect the higher judiciary of India to tread on the heels of the former and hold that equalisation levy is of course a tax on income.

Furthermore, the Indian Committee also observes that, *"the Base Erosion Profit Shifting Report conceptualizes Equalisation Levy as a tax that is different from the Corporate Income Tax, and thus the same may not necessarily be subjected to the limitations of the tax treaties. Such a tax on the gross amount of payment, would thus be very similar to the second option of withholding tax, except that it, not being a tax on income, would not be covered by the obligations of tax treaties, and hence can be levied under domestic laws, even without changes in the tax treaties."*[222]

Thus, the Indian equalisation levy appears to have emerged from a postulate different from the one on the basis of which the original idea was hypothesized. It is predominantly in the nature of a withholding tax in contradistinction to the actual equalisation levy that is levied on the gross worth of the goods or services provided/rendered by the foreign enterprise to the resident customer, which in turn has to discharge the pay the same to the non-resident entity. The amount of tax is then collected by the service provider or a local intermediary. Therefore, the contention of the Indian Committee that the levy is distinguished from a corporate tax is untenable and seems to be a facile generalization. The constitutive characteristic of the Indian tax is analogous to the withholding tax on fees for technical services and royalties under Article 12 of tax treaties. However, it is ironical to note that the Indian Committee acknowledged that the withholding option proposed by the OECD was the same as the one to tax royalty and fees for technical services under Article 12. Thus, the idea was abandoned and the third alternative of implementing an equalisation levy was finalized. What is flummoxing to observe here is that the Indian levy, intended to be borne by the recipient entity, is in reality the second option clothed with a different nomenclature.

Although it might give the appearance of being patently implausible, the inherent features of the imposition suggest otherwise. As much as the view is disconcerting, it also gives rise to a view that the intrinsic differences apparent in the Indian levy would have been deliberately included in order to protect the plight of the indigenous enterprises and businesses which contribute heftily to the enormous fortune such companies accumulate. It is definitely amusing to see how the Government would ensure the smooth passage of the levy while adhering to obligations under bilateral treaties. Thus, the authors prognosticate the likelihood of treaty dodging or treaty override if the Government proceeds to implement the levy without making any perceptible efforts to renegotiate the existing bilateral treaties.

Another striking dimension in which the Indian levy differs is the manner in which the tax has been applied to non-resident enterprises. It is feared that the differential application of the levy would engender various international taxation issues appertaining to DTAAs and other trade agreements entered into by the Government. Despite the

[222] Dr. Amar Mehta, Is the Indian Equalisation Levy compatible with India's existing tax treaty network?, (June 20, 2016), https://dramarmehta.com/Equalisation-Levy-White-Paper-2-June% 202016.pdf.

recommendation of the OECD to impose the levy on domestic enterprises and adjust it against their corporate tax liability, the Government has made its intention clear by obtruding the levy upon foreign entities alone. This is another reason why the Indian levy is a perfect example of a law formulated purposively and devised deliberately with intrinsic differences to be in line with the wishes and demands of the Indian economic setup. Thirdly, the Indian Committee in its report at paragraph 133 stated that "*the objective of the levy is to tax only those entities that enjoyed an unfair tax advantage*"[223] and the Report further stated that income of foreign enterprises that have a permanent establishment in India would be exempt from Equalisation Levy if such payment forms part of the total business revenue and is liable to be taxed under the Income Tax Act.

The objective of the levy makes an unfounded generalization that all foreign entities that operate without a permanent establishment in India enjoy an unfair tax advantage. In this regard, it is opined by the authors that there are tax jurisdictions which impose an equal rate of tax as India does, if not greater. For instance, German companies are liable to pay tax at a rate of over 30% in their resident state, while the United States charges a combined tax rate of 35% on the business income of companies. Companies from such entities do not enjoy an advantage, let alone an unfair benefit. In addition to the same, the amount of equalisation levy is not likely to be offset against the tax liability in their resident state. Hence, it may be reasonably inferred that the tax while resulting in undue hardship, would naturally prompt the entities to pass on the sum to the customers. The Committee in its report also stated that the rate of the levy has to be fixed so as to be analogous to the rate of tax that would have applied had the income been taxable under the existing bilateral tax treaties. This remark of the Indian Committee augments the stance of the authors that the tax is a direct tax and is only a scheme devised to accommodate the income of non-resident enterprises rendering certain distinct and specified services. It also gives inkling that the tax is an effort to outmanoeuvre the restraint in the form Article 7 of tax treaties according to which incomes not attributable to a permanent establishment in India are not taxable. The levy would not spark issues in relation to countries with whom India does not have a treaty or with countries, the treaties with whom are bilaterally amended to authenticate the levy. Hence, as of the present, incomes of foreign enterprises – irrespective of whether they are ascribable to permanent establishment or not – are taxed. The tax introduced through Chapter VIII of the Finance Act of 2016, despite giving the impression of being Machiavellian, is in actuality not so and only reflects the *bona fide* intent of the Government to bypass the impediments in the form of specific provisions of DTAA treaties placed in the path of the government to tax incomes of a sophisticated nature. The only potentially problematic dimension of the matter is the suspicion regarding the course of action the Government decides to adopt to perpetuate the presently precarious fortune. It cannot be denied that the tax is a benison to the Indian exchequer.

[223] *Id.*

On tracing the judicial trends on the subject, it could be discerned that, beginning from *Azadi Bachao Andolan*,[224] the judiciary has laid down the law clearly insofar as it relates to treaty obligations. A tax treaty shall prevail over a domestic law and govern the taxpayer to such extent as it is beneficial. It has been propounded that any attempt to dodge treaty obligations is impermissible and reprehensible. *Siemens Aktionesellschaft*,[225] is an authority on the specific point that no Contracting State can tax income which is not otherwise subjected to tax by effectuating a unilateral modification to the tax treaty. In *Sumitomo Mitsui Banking Corporation v. Dy. Director of Income-tax*,[226] the court noted, *"If there is an express provision made in the convention giving benefit to the assessee which is contrary to the domestic law, then the provisions of treaty can be relied upon which shall override and prevail over the provisions of the domestic law to give any benefit expressly given to the assessee under the treaty. The decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) fully supports this view."* Similarly, in *Reuters Transaction Services Ltd. v. DDIT*,[227] the law has been laid down with precision that when a particular income was not taxable in the source state, no unilateral amendment could validate and subject the same to tax. In *Deputy Commissioner of Income Tax v. Mustaq Ahmad Vakil*,[228] the Tribunal had an opportunity to venture into the aspect of 'double taxation'. It held that a tax treaty aimed at preventing not only double taxation present, but also potential and prospective double taxation. With the point clarified by a plethora of judgments delivered by the lower judiciary, one has to wait in anticipation for the position the Apex Court will declare. In light of the aforementioned aspects, it would be appropriate to conclude that a bilateral modification of treaties would be the permissible and secure way forward.

E. REMEMBERING THE VIENNA CONVENTION ON LAW OF TREATIES

Having said that the tax paves way for a speculation that the tax could be an act of elusion in light of the above-mentioned cases, the scenario now warrants a reference to the Vienna Convention on the Law of Treaties.[229] Although India is not a signatory to the treaty, most of the principles enshrined in the treaty are predominantly principles of customary international law. Article 18 of the treaty provides for the principle that States must abstain from acts which would negate and frustrate the objective and intent of the treaty. Article 26 of the treaty states that every treaty to which a particular State is a party is binding and must be obeyed and complied with in good faith. Furthermore, Article 27 of the treaty also provides that parties shall not invoke their domestic law to justify their failure to fulfil obligations under a treaty. Article 46 of the treaty provides that no party shall state that its decision to ratify the treaty or be bound by it was against the provision of its domestic law in relation to legislative competence, unless the violation was patent and appertained to a law of primary importance. Thus, it can also be argued that the tax, besides being against the spirit of Article 51 of the Constitution, which casts a duty on the Government to maintain peaceful relations with other States, is also inimical to established principles of international law. Therefore, the perdurable solution is to bring about a regime with uniformity at a global level and evolve an equitable way of taxing digital transactions.

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[224] Union of India v. Azadi Bachao Andolan, (2003) 184 CTR (SC) 450.
[225] CIT v. Siemens Aktiongesellschaft, 310 ITR 320 (Bom.).
[226] Sumitomo Mitsui Banking Corporation v. Dy. Director of Income-tax, ITA No. 5402/Mum/2006, dated 30 March 2012, 61.
[227] Reuters Transaction Services Ltd. v. DDIT, ITA Nos. 6947 and 7211/Mum/2012, dated 18 July 2014.
[228] Deputy Commissioner of Income Tax v. Mustaq Ahmad Vakil, ITA No. 1531/Del/2011, dated 26 August 2011.
[229] *Vienna Convention* on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

V. EQUALISATION LEVY: A GLOBAL PERSPECTIVE

Realizing the fast pace with which the digital economy has penetrated into everyday business transactions across borders, Action Report 1 suggested various methods to tax cross-border transactions happening on the digital platform. Taking cue from this Report, various countries globally have implemented different versions of the equalisation levy – such as permanent establishment taxation, VAT, etc. For instance, Argentina has introduced a turnover tax withholding system for revenues derived by non-residents from rendition of online services, wherein 3% of the net price is to be withheld at the time of remitting funds abroad.[230]

Likewise, Japan under its 2015 tax reforms has introduced a consumption tax on digital transactions at 8 per cent on provision of cross-border digital services to Japanese residents. This consumption tax applies to services such as distribution of e-books via the internet, downloading music or video, use of online software, e-commerce (online space to sell products), online advertisements, and even consulting services provided continuously over the phone or email. Japan's consumption tax applies under a reverse charge mechanism for B2B digital services. In fact, the Japan consumption tax is wider than its Indian counterpart of equalisation levy, as it applies to even B2C digital services where the overseas supplier mentions his overseas business registration number and would remit the consumption tax arising from such specified transactions. The Australian Government too has introduced the Multinational Tax Avoidance Act to counter tax avoidance across borders digitally. The focus of this Act is on arrangements which attempt to avoid establishing a permanent establishment presence in Australia with a view to avoid being subjects of the local Australian tax laws. The Government has gone a step further and levied GST on offshore supplies of digital products and services, and thereby covered in its horizon all Business to Consumer transactions entered into on the digital platform.

While discussing other countries which have implemented similar taxes, one must not fail to consider the progress that the United Kingdom has made in taxing digital e-commerce entities, for much of Indian judicial and parliamentary practices are influenced by the functioning of these bodies there. The UK Government through its Finance Act of 2015 had introduced "*Diverted Profits Tax*" to tax and cap in revenue from huge transactions taking place on online fora. Under the Diverted Profits Tax, taxpayers are hit with a 25% levy on profits which are actually generated from sources situated in Britain, whereas avoid paying any tax by artificially shifting base to other tax havens. *"This levy is imposed on company profits that are routed via "contrived arrangements" to tax havens and excludes small and medium enterprises, thereby giving tax relief to these growing units. These arrangements can concern either those that involve entities or transactions lacking economic substance or efforts by a non-UK company to avoid a UK taxable."*[231] The Government purposefully placed this tax outside the purview of tax laws, and therefore the tax treaty benefits cannot be availed of by taxpayers who fall within the nets of

[230] Mukesh Butani & Sumeet Hemkar, Indian Equalisation Levy – Progressive or Regressive? (June 27, 2016), http://kluwertaxblog.com/2016/06/27/indian-equalisation-levy-progressive-regressive/.
[231] Delloite, Equalisation Levy 2016: Is It Equitable?, (Mar. 3, 2017), www.delloite.com/in.

DTP. One can clearly say that India – taking cue from its counterpart - has placed Equalisation Levy outside the ambit of income tax laws and introduced it as a new chapter under the Finance Bill, 2016 with the same motive.

At the same time, measures such as those taken by the UK to provide incentives to SMEs must be taken to ensure that these enterprises do not bear the brunt of large MNCs escaping tax obligations. The measures taken clearly indicate a shift in tax policies from taxing only companies with significant physical permanent establishment to taxing companies with significant physical and digital presence in the countries.

VI. CONCLUSION

The placement of the tax outside the Income Tax Act, and an express recommendation of the Committee to incorporate it in the Finance Act, shows to a great extent, the object of the Report to characterize the levy as a charge different from that of a tax on income, and to isolate it from the ambit of tax treaties. However, if one were to scrutinise the relevant provisions with assiduity, it would transpire that the description of the tax is Indian in nature and varies to a great degree from the proposal over which a global consensus was achieved. Instead of emphasizing the lines of difference, it would be of interest to refer to paragraph 128 of the Indian Report. It is indeed laudable how the Committee has acknowledged the fact that there could be lack of consistency in the way different countries would pursue to equalize. Hence, the questions that emerge are whether the lack of conformity in approach, and the introduction of country-specific and perception-driven interpretation to the term equalisation levy, has tangible tax ramifications in the forthcoming years. "Variations in design" is precisely how such divergent approaches have been construed by the Committee and the Report also goes on to state that international differences in 'designs' would make the implementation difficult, costly, and incompatible. Resting on the same, the Report also opines that the feasible option would be to enforce the levy as part of the domestic statute instead of incorporating it in the applicable tax treaties. The levy, which is the only one of the three alternatives to not affect treaty obligations, has been brought into force for the same reason. Whether the decision has been taken with circumspection or as a measure of circumvention cannot be ascertained and is in fact an irrelevant consideration when a claim to declare the validity of the tax knocks the doors of the Apex Court. Theoretically speaking, the observations of the Committee are impeccable and rule out the slightest of suspicions, but the authors seek to augment the stand taken by submitting that the imposition of the tax on the gross consideration alone cannot alter the essence and the characterization of the levy. What is amusing to note here is that there is a strong possibility that India, being totally aware of the context, would pioneer an approach and set a precedent for other governments to adopt a similar stance. It can be unequivocally stated that the ambivalence about the issue is not likely to survive for long, noticing that the tax is only an interim measure and is expected to be scrapped after the international rules of taxation are modified to make them consonant with the broader tax challenges that threaten to render the laws a triviality. On the positive side, it can be said that the promptness with which the tax has been launched will definitely catalyse the process of progress that the international community endeavours to attain. The Indian Committee in paragraph 135 of its report strongly advocates the subjection of a range of services under the realm of

equalisation levy. The Exchequer has garnered close to Rs.146 crore till December, 2016. Having witnessed formidable success in ensuring compliance, it would not be long before the scope of the levy is expanded to other services as well. Thus, the authors strongly believe that despite the fact that the OECD does not expressly impel jurisdictions to adopt and execute the various options; countries could play a strong role in accelerating this transition by pursuing any of the options at the earliest.

Rahul Bajaj, *Adopting A Demosprudential approach for the empowerment of Sexual Subalterns in India: Imperatives and Impediments,* 4(1) NLUJ Law Review 63 (2017)

ADOPTING A DEMOSPRUDENTIAL APPROACH FOR THE EMPOWERMENT OF SEXUAL SUBALTERNS IN INDIA: IMPERATIVES AND IMPEDIMENTS[232]

RAHUL BAJAJ*

ABSTRACT

At a time when countries across the globe are increasingly recognizing the importance of accepting alternative sexuality as a manifestation of human diversity, sexual subalterns continue to remain culturally fragmented, economically confounded and socially sequestered in a country that has traditionally been hailed as a gold standard in diversity. The term 'sexual subalterns', coined by Ratna Kapur, refers to all groups that can be characterized as sexual minorities in India.[233] This article uses this term, instead of the more commonly used 'LGBTs' in recognition of the fact that the term 'LGBTs' does not fully capture the diversity that exists within sexual minorities. In India, which is home to one of the world's largest LGBT populations, estimated to be between 50 and 100 million,[234] alternative sexuality is widely viewed as a disease which must be cured; a vice which must be curbed. Against this backdrop, this article explores how Lani Guinier and Gerald Torres' theory of demosprudence can pave the way for a transition from criminalization and legal prohibition of homosexuality to the creation of a societal and legal framework that recognizes and protects the dignity of sexual subalterns. More specifically, it examines how the strategic use of a distinct identity through the use of democracy-enhancing tools, such as organizing mass mobilization efforts and citizen-driven movements, coupled with a push for wider citizenship, can fundamentally transform unfair and unequal laws and societal perceptions in ways that purely court-based strategies simply cannot.

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233 Ratna Kapur, *Out of the Colonial Closet, but Still Thinking 'Inside the Box': Regulating 'perversion' and the Role of Tolerance in Deradicalising the Rights Claims of Sexual Subalterns*, 2(3) NUJS L. REV. 381, 384-385 (2009) [hereinafter 'Ratna Kapur'].

234 Nish Gera, *Where Are the Gay Indians? Being Gay in the World's Largest Democracy,* HUFFINGTON POST (Jan. 30, 2013), http://www.huffingtonpost.com/nish-gera/where-are-the-gay-indians_b_2578486.html?ir=India.

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I. WHY COURT-CENTRED STRATEGIES AIMED AT EMPOWERING SEXUAL SUBALTERNS ARE BOUND TO FAIL

During the last decade, the primary focus of LGBT advocates in India has been to work towards the abolition of Section 377 of the Indian Penal Code, 1860 which punishes 'carnal intercourse against the order of nature' with a maximum term of life imprisonment. That this provision has been widely used as an instrument of blackmail and extortion against sexual minorities is a platitude.[235] In 2009, a two-judge bench of the Delhi High Court effectively de-criminalized consensual homosexual intercourse by holding that Section 377 is violative of the Indian Constitution insofar as its application to consensual sex between adults is concerned.[236] However, the Supreme Court reversed this decision four years later, on the ground that there was no compelling evidence to show that the provision was being used as a tool of oppression against sexual minorities and left it to Parliament's wisdom to repeal this retrograde provision.[237] It is submitted that this court-centered strategy has not yielded expected results and has led to wastage of substantial resources because of three important reasons. First, as Ratna Kapur has rightly noted, it is wrong to assume that decriminalizing homosexuality will ipso facto lead to "*liberation and incorporation into a space of freedom and happiness*." Instead, it would merely pave the way for the release of sexual subalterns into a heteronormative order that seeks to cabin and constrain nonconformist sexual desire.[238] Favourable court decisions, which are predicated upon the virtue of tolerance, merely reinforce the difference and otherness of that which is tolerated.[239] Second, as Gerald Rosenberg has argued, the inherent limitations of courts render them incapable of offering anything more than a "hollow hope" – a battle won, but a war lost.[240] Court victories, which can only ensure formal fairness, often lull activists into a false sense of security and can actually have a detrimental impact on the overall success of a movement. Finally, judges are very conscious of the delicate relationship that they enjoy with other branches of government and do not want to contravene perceived preferences of other governmental branches, by acting in ways that threaten the delicate nature of the relationship.[241] In sum, Bruce Ackerman's example of courts being like brakemen sitting in the last car of a train, who are able to make it stop but not able to make it go,[242] perfectly encapsulates the fundamental flaw in any strategy that relies principally on courts to effectuate social change.

II. RELEVANCE OF DEMOSPRUDENCE IN THE STRUGGLE FOR ACCEPTANCE OF ALTERNATIVE SEXUALITY IN INDIA

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235 Namita Bhandare*, The use and misuse of Section 377,* LIVEMINT (Oct. 31, 2014), http://www.livemint.com/Opinion/dPP x81iocnHy9hX4MjBA OK/The-use-and-misuse-of-Section-377.html.

236 Naz Foundation v. Government of NCT and Ors.*,* 2010 Cri LJ 94 (Delhi).

237 Suresh Kumar Koushal and Anr. v. NAZ Foundation and Ors., A.I.R 2014 S.C 563 (India) [hereinafter 'Suresh Kumar'].

238 Ratna Kapur, *Sexual subalterns, human rights and the limits of the liberal imaginary,* OPEN DEMOCRACY (Aug. 20, 2014) [hereinafter 'Ratna Kapur'], https://www.opendemocracy.net/ratna-kapur/sexual-subalterns-human-rights-and-limits-of-liberal-imaginary.

239 Ratna Kapur, *supra* note 238 at 394.

240 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed. 1991).

241 Douglas NeJaime, *Winning Through Losing,* 96 IOWA L. REV. 941, 949-950 (2011).

242 Bruce Ackerman, *Constitutional Politics/Constitutional Law,* 99 YALE L.J. 453, 546-547 (1989) [hereinafter 'Bruce Ackerman'].

The theory of demosprudence, developed by Lani Guinier and Gerald Torres, problematizes the facile notion that favourable judicial decisions can offer a panacea to historically deprived minorities.[243] Instead of expecting lawyers to solve all their problems, Guinier and Torres argue, those who demand durable social change must recognize that such change can only result from sustained collective action and must become "advocates in themselves and for themselves."[244] Put simply, demosprudence is an "acid bath to remove the corrosion that has isolated the realm of the state from the legitimizing power of the people."[245] It is submitted that the failure of the judiciary to adequately address the concerns of sexual subalterns, coupled with the inability of the Indian Government to foster respect for and acceptance of alternative sexuality, makes Guinier and Torres' theory the only logical alternative to put an end to the ostracization of sexual minorities and to do so in ways that aim at substantive equality, and not just formal fairness. According to Guinier and Torres, three important components form the bedrock of most successful social movements:[246]

A. Shifting the rules that govern social institutions;
B. Transforming the culture that controls the meaning of legal changes; and
C. Affecting the interpretation of those legal changes by working towards naturalizing those changes into the doctrinal structure of law and legal analysis.

A brief word about each of these three components would be in order. The first component refers to the need to question the inarticulate premises that inform the manner in which sexual subalterns are treated by the existing social institutions in which they operate. It recognizes the principle that deep and pervasive change cannot be effectuated until such time as the rules that inform the conceptualization of sexuality by existing social institutions are fundamentally altered. In the same way, the second component is based on the idea that seeking legal change before altering the culture within which laws operate would be equivalent to putting the cart before the horse. As a result, it is aimed at questioning the manner in which alternative sexuality is viewed in the existing culture and changing these existing norms in a manner that helps promote the interests of sexual subalterns. Finally, the third component is concerned with the ways in which this enlightened perspective on alternative sexuality can be translated into favourable court rulings and legal norms that are favourable for sexual subalterns.

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[243] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L. J. 2740 (2014 [hereinafter 'Lani, Gerald']).
[244] Lani, Gerald*, supra* note 243 at 2749.
[245] Lani, Gerald *supra* note 243 at 2750.
[246] Lani, Gerald *supra* note 243 at 2755.

It would be apposite to examine how these three components can be pressed into service in the context of the Indian LGBT movement to transform and reshape popular notions of alternative sexuality, sexual freedom and substantive equality.

III. TRANSFORMING SOCIAL INSTITUTIONS AND CULTURAL NORMS

Those who argue for the empowerment of sexual subalterns in India primarily use the human rights rhetoric to make the claim that criminalization of homosexual intercourse undermines India's commitment to secure to all its citizens a set of inalienable rights and provides a legal sanction to gender-based discrimination. However, this human rights-based approach has been unable to yield concrete results, because even though human rights are something that 'we cannot not want', there is very little that these rights can do until we address the biased notions about alternative sexuality that continue to inform interactions with sexual subalterns in cultural and social settings.[247] Therefore, the gravitational pull of heteronormative sexuality can only be resisted by calling for critical reflection about the meaning of justice, gender equality and personal autonomy.

LGBT activists must seek to contextualize the grievances of sexual subalterns by asking deeper questions about what it means to be human, to be Indian and to be a part of a democracy committed to the rule of law. Instead of reducing their struggle to a battle of sexual minorities for legal recognition, they must seek to make non-movement actors feel invested in this cause by explaining how their struggle, in principle, is a struggle for deepening the meaning of Indian democracy. Only by situating their struggle within a broader social context will they be able to offer a persuasive response to the argument that developing countries, like India, should focus on bread-and-butter issues instead of attaching undue importance to the interests of a minuscule minority. Similarly, the construction of a narrative that expresses the hopes and aspirations of sexual subalterns can go a long way in restructuring public discourse on alternative sexuality. More specifically, as Guinier and Torres argue, three kinds of narratives can be especially powerful in raising public consciousness:[248] the meta story, which should lay down a broad vision of how sexual subalterns conceptualize justice and how the injustice meted out to them eviscerates an important strand of that conception; the micro story, which should highlight the concerns of specific individuals who are forced to live under the shadow of criminality; and the resonant story, which should be a call to action to the society at large to right the wrongs of this form of social stigmatization.

The 2005 Bollywood movie, *My Brother Nikhil*, which depicts the homophobia and discrimination that a homosexual HIV patient has to grapple with and the 1998 movie, *Fire*, which explores a same-sex relationship between two married women, are excellent examples of the role that well-structured narratives can play in reshaping public opinion in a positive way.[249] A recent example of this phenomenon is the 2016 movie, *Aligarh*, which throws into sharp

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[247] Suresh Kumar, *supra* note 237.
[248] Bruce Ackerman, *supra* note 242 at 2775.
[249] Ratna Kapur, *supra* note 238 at 394.

focus the discrimination that a professor at the prestigious Aligarh Muslim University faced on account of being gay, culminating in his suicide. It is also critical to establish decentralized structures such as student groups and LGBT taskforces at the local level who must debate and question prevailing gender norms and work towards mainstreaming LGBT issues in development discourse. The success of a Delhi-based student collective, called *Queer Campus*, which seeks to restructure the meaning of gender and sexuality, perfectly epitomizes the transformational role that such groups can play.[250] Lastly, but most importantly, only when sexual subalterns stop looking upon themselves as the 'sexual other' will they be able to translate the rhetoric of diversity and inclusion into durable change.

A. TRANSLATING CULTURAL NORMS INTO LEGAL CHANGE: BOILING THE FROG

Even though it is critical to challenge prevailing social and cultural conceptions of alternative sexuality to create an enabling environment, the ultimate goal of the LGBT movement has to be to work towards the creation of a legal architecture that can concretize those transformed conceptions. To this end, LGBT activists must seek to effectuate 'incremental' as opposed to 'exponential' legal change. Judge Richard Posner has used the analogy of boiling a frog to describe the importance of incremental legal change – the underlying idea is that, if you put a frog into boiling water, it will jump out at you immediately, but if you put it into warm water and gradually increase the temperature, you can boil it effectively.[251] In the U.S. for example, after the U.S. Supreme Court upheld the constitutionality of anti-sodomy statutes,[252] LGBT activists through a carefully crafted strategy of state-court activism, coupled with favourable narrow rulings, were able to create a socio-legal environment in which the decision in *Lawrence v. Texas*,[253] which held anti-sodomy statutes unconstitutional, seemed all but inevitable. Therefore, sexual subalterns in India must adopt a threefold strategy to give a concrete shape to their aspirations of decriminalization and legal recognition. Recently, the Indian Supreme Court recognized transgender as the third gender and held that they are entitled to the same substantive rights that are enjoyed by the other two genders.[254] Therefore, the first goal of LGBT activists has to be to build upon this judgment as also the plurality opinion in the nine-judge bench right to privacy judgment, which recognizes the rights of sexual minorities to freely express their sexuality within the confines of their homes.[255] This can be done by demanding that transgenders be provided the same privileges and immunities, such as reservation in education, employment, public health policies, etc., that other historically deprived sections are entitled to. Second, LGBT advocates must make a concerted effort to seek judicial pronouncements against many subtle forms of discrimination that sexual subalterns face which courts would be willing to strike down without having to take a strong moral position. A good example of this

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[250] Pallavi Polanki, *Where Queer is Cool*, OPEN MAGAZINE (Jul. 9, 2011), http://www.openthemagazine.com /article/living /where-queer-is-cool.
[251] Chintan Chandrachud, *Limiting the Impact of Section 377,* THE HINDU (Dec. 12, 2014), http://www.thehindu.com/ opinion/op-ed/limiting-the-impact-of-section-377/article6683396.ece.
[252] Bowers v. Hardwick*,* 478 U.S. 186 (1986).
[253] Lawrence v. Texas, 539 U.S. 558 (2003).
[254] National Legal Services Authority v. Union of India and Ors., A.I.R. 2014 S.C 1863 (India).
[255] Justice K. S. Puttaswamy (Retd.) and Anr. v. Union of India And Ors.,Writ petition no. 494 of 2012, Decided on 24.8.2017.

would be the recent case of *Kirankumar Rameshbhai Devmani* v. *State of Gujarat,*[256] in which a state high court held that the state's refusal to grant tax concession for a film depicting the life of a homosexual was unconstitutional, as it was a common practice to grant such concessions for other films. Third, it is vitally important for LGBT activists to organize themselves into a powerful constituency and to forge partnerships with policymakers at the local level which can be leveraged for removing smaller structural and legal barriers. While this cannot be an exercise in expediency, for concrete legal changes can only be effectuated once favourable social norms are deeply embedded into the Indian social fabric, it can nonetheless provide a socio-legal foundation which sexual subalterns can build upon for the actualization of their conception of justice.

IV. CONCLUSION

The underlying assertion of this article is twofold: First, only by recognizing the importance of contextually situated grievances, new patterns of cooperation and tactical and ideological experimentation can sexual subalterns create a favourable environment for implementing their broader reform agenda. Second, because of the inherent limitations of court-centered strategies, not only must the expectations of sexual subalterns be tempered by the constraints of the judicial process, but they must also actively engage in larger social conversations to secure their rights on firmer legal moorings. To be sure, this strategy will require tremendous grit and perseverance and its success will largely be determined by the ability of actors to make tough choices and act creatively. However, it has the potential of heralding a new era of activist citizenship and fundamentally restructuring the meaning of Indian democracy.

[256] Kirankumar Rameshbhai Devmani v. State of Gujarat, (2014) 71 VST 555 (Guj).

Gowthaman Ranganathan, *The Mental Healthcare Act, 2017: An Evaluation,* 4(2) NLUJ Law Review 71 (2017)

THE MENTAL HEALTHCARE ACT, 2017: AN EVALUATION

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ABSTRACT:

The Rights of Persons with Disabilities Act, 2016 and the Mental Healthcare Act, 2017 have been enacted to ensure India's compliance under the United Nations Convention on the Rights of Persons with Disabilities [**"UNCRPD"**]. The objective of this paper is to evaluate if these legislations, in particular the Mental Healthcare Act, comply with the letter and spirit of the UNCRPD. The evaluation will be on two aspects. First, if the 'universal legal capacity', which is at the heart of the UNCRPD, has been achieved. Second, whether the shift from 'substituted legal capacity' to 'supported legal capacity' as required under Article 12 of the UNCRPD has occurred. I conclude by stating that the Mental Healthcare Act, 2017 is India's reluctant acceptance of its International obligations. The Act speaks in two voices, the first carries forward its predecessor's intention to deny capacity for people with psycho-social disability, and the second is a reluctant attempt towards complying with the UNCRPD. The resultant confusion does not bode well for the true realization of the rights of persons with disabilities.

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I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities [**"UNCRPD"**] is based on the "social model" of disability as opposed to the "medical model."[257] The "social model" was formulated by Michael Oliver,[258] and is a move away from the "medical model," which is based on an understanding of impairments being the sole reason for disability.[259] The social model, on the other hand, defines disability as a product of "social and environmental factors, which in interaction with the individual's impairments, presents a barrier to full participation and inclusion in the society."[260] Thus, the social model shifts the focus from the impairment to the external factors that lead to disability. For instance, a visually impaired person would not be disabled merely by virtue of his/her impairment; but instead not having access to technology would result in the disablement. This shift from the internal aspect of impairment to external factors is the driving force behind the drafting of the UNCRPD. The social model, thus, is a powerful response to the discrimination endured by disabled persons.

However, one could argue that the UNCRPD goes beyond the social model and is anchored within the human rights framework. As Degener puts it, "*whereas the social model merely explains disability, the human rights model encompasses the values for disability policy that acknowledges the human dignity of disabled persons.*"[261] Thus, the human rights model is anchored in the dignity of every person. In the words of Degener and Quinn:

> *"Human dignity is the anchor norm of human rights. Each individual is deemed to be of inestimable value and nobody is insignificant. People are to be valued, not just because they are economically or otherwise useful but because of their inherent self-worth… The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual center stage in all decisions affecting him/her and most importantly, locates the main 'problem' outside the person and in society."*[262]

The UNCRPD was adopted by the General Assembly of the United Nations on 13th December, 2006. The purpose of the Convention, as stated in Article 1, is "to promote, protect and ensure the full enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their dignity." Article 1 defines "persons with disabilities" to "include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an

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[257] Theresia Degener, *A Human Rights Model of Disability*, *in* ROUTLEDGE HANDBOOK OF DISABILITY LAW AND HUMAN RIGHTS (Peter Blanck & Eilionóir Flynn eds., 2016) [hereinafter 'Degener'].
[258] Mike Oliver, *The Individual and Social Models of Disability*, *in* JOINT WORKSHOP OF THE LIVING OPTIONS GROUP AND THE RESEARCH UNIT OF THE ROYAL COLLEGE OF PHYSICIANS (vol. 23, 1990) [hereinafter 'Oliver'].
[259] *Id.*
[260] EILIONÓIR FLYNN, DISABLED JUSTICE?: ACCESS TO JUSTICE AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 6 2016).
[261] Degener, *supra* note 257 at 34.
[262] Degener, *supra* note 257.

equal basis with others."[263] The UNCRPD does not make any distinction between disabilities. However, this paper will be focusing on 'psycho-social disabilities'.[264]

At this juncture, a brief note on terminology is warranted. Here I use the terms 'disabled persons' or 'persons with psychosocial disability'. These terms are in consonance with the UNCRPD. The term most often used is 'persons with disability'. This insistence is made in line with the 'person first' approach that puts the person before their disability.[265] I use 'disabled person' at times to suggest that a person is 'disabled' as a result of social factors and not merely because of their impairment. Where the legislature uses terms like 'unsound mind', 'insanity', 'lunacy' etc., I will use it critically.

The paper is divided into four parts. The first traces the contours of the "universal legal capacity". The second describes the shift from 'substituted' to 'supported' capacity as prescribed by the UNCRPD. The third part evaluates the support mechanism under the Mental Healthcare Act, 2017 for compliance with the UNCRPD. The article concludes with the evaluation of the Mental Healthcare Act, 2017.

II. UNIVERSAL LEGAL CAPACITY

A. LEGAL CAPACITY AND THE UNCPRD

'Legal Capacity' is defined in the General Comment I [**"GC-I"**] to the UNCRPD to include the capacity to be both, a holder of rights and an actor under the law. Legal capacity to be holder of rights entitles a person to full protection of his or her rights by the legal system. Legal capacity to act under the law recognizes the person as an agent with the power to engage in transaction and create, modify or end legal relationships.[266] Both these aspects are crucial to realize legal capacity; that is, the former without the latter denies legal capacity. For instance, if a person's right to equality is recognized but she is not allowed to marry, it violates the right and denies her legal capacity.

B. DENIAL OF PERSONHOOD

The denial of legal capacity is "paramount to the denial of personhood."[267] Illustratively, the law relating to contract, marriages and voting disqualify persons with mental disabilities. In effect, through the operation of such laws, the personhood of people with disabilities is robbed. Denial of legal capacity, and hence, personhood, has occurred in

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263 Convention on the Rights of Persons with Disabilities: Resolution/Adopted by the General Assembly, 24 January 2007, Article 1, A/RES/61/106.

264 Amba Salelkar, *"Why persons with 'psychosocial disability' over 'persons with mental illness?'",* http://www.whiteswanfoundation.org/article/why-persons-with-psychosocial-disability-over-persons-with-mental-illness.
"The reason why the term 'persons with psychosocial disability' is preferred to 'persons with mental illness/disorders' is because the former is more in spirit with the social model of disability, placing the focus on the barriers being created which impede a person's participation in all aspects of life and society."

265 *Id.*

266 UN, Fachausschusszur UN-BRK. *General Comment No. 1. Article 12: Equal recognition before the law. UN Dok.* CRPD/C/GC/1 vom (April 11, 2014), at 12.

267 Eilionóir Flynn & Anna Arstein-Kerslake, *The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?*, 32 BERKELEY J. INT'L LAW 124, 126 (2014) [hereinafter 'Flynn & Arstein-Kerslake'].

the past "on the basis of perceived characteristics of inferiority" in the case of women, slaves, and racial and ethnic minorities.[268] Each of these grounds for denial have now been reconsidered and reversed. A similar relook at persons with psychosocial disability is warranted.

Legal capacity is inherently tied to the idea of who is or is not deemed to be a person. As Quinn puts it, "the war over legal capacity is a proxy war over personhood."[269] Quinn's argument is that legal capacity is an instrument to personhood. It "provides the legal shell through which to advance personhood [sic] in the life world. Primarily, it enables persons to sculpt their own legal universe – a web of mutual rights and obligations voluntarily entered into with others. So it allows for an expression of will in the life world."[270]Arstein-Kerslake develops the idea of a web of mutual rights and obligations with the metaphor of a web of strings for the legal system. She says:

> *"In order to understand legal capacity, it is helpful to think of the legal system as a large web of strings. Every individual is connected to the larger web which is ever-moving and changing, pulling and pushing individuals along in different directions. Individuals can also build webs between themselves – i.e. create legal relationships between themselves which will affect their position in the web and, potentially, the position of others in the web. A person who has her legal capacity recognized can participate in this movement of the web. She can create these connections to other individuals and she can push and pull the strings in different directions that affect her relationships and placement with different individuals within the web. A person, whose legal capacity is not recognized, has no power within that web. She is simply being pushed and pulled by others' actions within the web. She is like a puppet, flailing around at the whim of others."* [271]

The use of the image of a helpless puppet to describe people with psychosocial disabilities is apt, evidenced from first person accounts.[272] Take for instance simple tasks like agreeing to the terms and conditions for online transactions, with the capacity to contract being denied; these everyday tasks go unnoticed under law, with respect to people with disabilities.

Further, the labelling of madness and insanity diminishes the inherent dignity of a person. Professor Dhanda comments on the consequences of denial of legal capacity. She draws from Amartya Sen and Nussbaum and argues that for the development of human capabilities, it is vital to recognize the legal capacity of every individual. Only through

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[268] *Id.*

[269] Gerard Quinn, *Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD*, *in* CONFERENCE ON DISABILITY AND LEGAL CAPACITY UNDER THE CRPD, HARVARD LAW SCHOOL, BOSTON, Vol. 20, 3-5, (2010).

[270] Flynn & Arstein-Kerslake, *supra* note 267.

[271] Anna Arstein-Kerslake & Eilionóir Flynn, *The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: A Roadmap for Equality before the Law*, 20 INTERNATIONAL JOURNAL OF HUMAN RIGHTS 471, 474 (2016).

[272] HUMAN RIGHTS WATCH, *Treated Worse than Animals: Abuses against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India* (December 03, 2014), https://www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual [hereinafter 'Human Rights Watch'].

legal capacity can someone be given an opportunity to "live life as to realize his or her own genius."[273] She cites Bruce Winick to suggest, "A label of incompetence can often play out as a self-fulfilling prophecy."[274] Such a labelling hinders the opportunity of disabled persons to engage in certain activities and hence deterring their ability to develop the capability to do these activities. In such situations, the person's choices and preference are ignored and someone else makes decisions for them.

C. DENIAL OF PERSONHOOD IN INDIA

In the Indian context, the denial of legal capacity can be adduced through laws relating to contract, marriage and voting. The Indian Contract Act, 1872 states that a person is competent to contract if he/she is of sound mind.[275] It goes on to explain that a person is of sound mind, if at the time of making the contract, he/she is capable of understanding it and forming a rational judgment as to its effect upon his/her interest.[276] The Hindu Marriage Act, 1955 disqualifies a person from marrying if he/she is incapable of giving a valid consent as a consequence of unsoundness of mind.[277] Further, unsoundness of mind and mental disorder is also a ground for divorce.[278] Similarly, unsoundness of mind acts as a disqualification for voting under the Constitution of India[279] and under the Representation of People's Acts of 1950 and 1951.[280] In addition to laws that disqualify disabled persons, there are laws that designate a guardian to make decisions for disabled persons, an Illustration of which is found in the Medical Termination of Pregnancy Act, 1971 which allows a woman with mental illness to terminate her pregnancy only with the written consent of a guardian.[281] There are over a hundred and fifty laws in India that bar a person of unsound mind from full legal capacity in various aspects.[282] Despite the enactment of the Mental Healthcare Act, 2017 these laws continue to exist and thus, deny "universal legal capacity" to disabled persons, contrary to the objective of UNCRPD.

D. CLASSIFICATION OF LAWS

Professor Dhanda provides a three-way classification of laws that deny legal capacity of persons with disabilities, *viz.* 'Status Attribution', 'Functional Test' and 'Outcome Test'.[283]

'Status Attribution' denies legal capacity on the basis of there being a disability; many laws in the Indian context, aforementioned, would be illustrative of the same.[284]

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273 Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L L. & COM. 429, 436 (2006).
274 *Id.* at 436.
275 The Indian Contract Act, 1872, No. 9 of 1872, § 11 (1872).
276 The Indian Contract Act, 1872, No. 9 of 1872, § 12 (1872).
277 Hindu Marriage Act, 1955, No. 25 of 1955, § 5 (1955).
278 Hindu Marriage Act, 1955, No. 25 of 1955, § 13 (1955).
279 INDIA CONST. Art.326.THE CONSTITUTION OF INDIA, art. 326.
280 Representation of the People Act, 1950, No. 43 of 1950, § 16 (1950).
281 The Medical Termination of Pregnancy Act, 1971, No. 34 of 1971, § 3(4)(a) (1971); S*ee generally,* Amita Dhanda, *Legal Order and Mental Disorder*, SAGE Publications Pvt. Limited (2000) for an exhaustive survey of such laws denying legal capacity and its judicial treatment.
282 Bhargavi V. Davar, *Legal frameworks for and against people with psychosocial disabilities*, 47 ECONOMIC & POLITICAL WEEKLY 125 (2012).
283 Human Rights Watch, *supra* note 272 at 431.

The 'Functional Test' denies legal capacity if a person is unable to carry out certain functions like the inability to read and understand a contract.

The 'Outcome test' denies capacity on the basis of the outcome of decisions taken by a person with a disability.[285] An illustration of this can be found in Section 4(1)(b) of the Mental Healthcare Act, 2017 which relates to the capacity to make mental healthcare and treatment decisions and provides that a person with mental illness is deemed to have capacity only when she has the ability to "appreciate any reasonable foreseeable consequence of a decision on the treatment or admission or personal assistance." This would imply that if a person denies treatment or institutionalization, they may be deemed to not understand the 'outcome' of their decision and hence, their capacity denied. This law can result in the continuation of forced institutionalization or medication.[286]

III. FROM 'SUBSTITUTION' TO 'SUPPORT'

A. MENTAL & LEGAL CAPACITY

The subsistence of laws denying capacity is the result of not recognizing the difference between 'mental capacity' and 'legal capacity'. Legal capacity cannot be determined on the basis of mental capacity. Determination of mental capacity is arbitrary, and evolution in science allows us to decipher mental capacity of even those who are acutely impaired. In such a scenario, a presumption must be made in favour of capacity and not against it. Such an approach will be consistent with the UNCRPD. For instance, if a person is in a comatose state, all attempts must be made to discern the 'will and preference' of such a person and a presumption of capacity ought to be made.

Legal capacity is independent of the mental capacity of a person. As Professor Dhanda puts it, there are two choices before us; one is a presumption of capacity and one against it:

> *"Fundamentally, there are two choices before humankind. One recognizes that all persons have legal capacity and the other contends that legal capacity is not a universal human attribute. To ask for the making of the first choice does not mean that it is also being contended that all human beings in fact possess similar capacities. Even as all human beings are being accorded similar value, the differences between them is not being ignored or devalued. The second, on the other hand, recognizes the fact that there are some human beings who do not possess legal capacity and hence can be declared incompetent. One system is premised on the universal presence of competence; the other on the selective presence of competence."*[287]

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[284] Human Rights Watch, *supra* note 272 at 41.
[285] *Id.*
[286] *See generally*, Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the right to be free from nonconsensual psychiatric interventions*, 34 SYRACUSE J. INT'L L. & COM. 405 (2006).
[287] Human Rights Watch, *supra* note 272 at 458.

The delinking of 'mental capacity' and 'legal capacity' is the basis for a shift from substitution to support. As mentioned in the earlier section, there are laws that deny capacity through substitution, which is done by 'status attribution', 'functional test' and 'outcome test.' However, once one acknowledges that legal capacity is not determined on the basis of mental capacity, it is possible to provide 'support' even to those with differing levels of mental capacity in order for them to enforce their capacity.

B. RECOGNITION OF LEGAL CAPACITY

The recognition of "universal legal capacity" and the shift from substitution to support is enshrined in Article 12 of the UNCRPD. It pertains to 'equal recognition before the law' and in Paragraph 2, it is stated that, "State parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life." Paragraph 1 affirms "persons with disabilities have the right to recognition everywhere as persons before the law." Paragraph 3 provides for *access to persons with disabilities to the support they may require in exercising legal capacity* (emphasis added).

Paragraph 4 of Article 12 provides the safeguards to ensure that the support provided is not misused. These safeguards "shall ensure that measures relating to the exercise of legal capacity, respect the rights, will and preferences of the persons, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body."[288]

C. WILL AND PREFERENCE

The GC-I states that the key difference between 'substitution' and 'support' is that, in the former, the 'will and preference' of the disabled person is not considered; whereas, in the latter, the 'will and preference' of the disabled person is crucial.

Further, the GC-I states that substituted decision-making takes various forms including "plenary guardianship, judicial interdiction and partial guardianship." It delineates a few common characteristics of a substituted capacity regime, which are as follows:

"(i) legal capacity is removed from a person, even if this is in respect of a single decision;

(ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and

[288] Convention on the Rights of Persons with Disabilities: Resolution/Adopted by the General Assembly, 24 January 2007, Article 12, A/RES/61/106.

(iii) any decision made by a substitute decision-maker is based on what is believed to be in the objective of "best interests" of the person concerned, as opposed to being based on the person's own will and preferences."[289]

While moving away from such instances of substituted capacity, one must always keep the 'will and preference' of the disabled person at the forefront. The GC-I mandates that, "where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations… the 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others."[290] Thus, the 'will and preference' of the disabled person must be the deciding factor while providing support.

It is pertinent to note that all of us are in need of support. Merely because a person requires support, his/her legal capacity cannot be negated. From seeking the support of technology to the counsel of friends, everybody seeks some form of support and it is not different for disabled persons as well.[291]

I conclude this section with a poignant quote by Prof. Dhanda that captures the idea of support:

"Analogically, all human beings are accorded the lead role in the dramas of their lives with everyone and everything else which assists in the effective performance of that drama being only cast in support. The support players can shore up the lead player but cannot displace or replace him or her. As this script is common to all human beings, everybody has one drama in which they play the lead, along with several in which they are members of the supporting cast."[292]

IV. EVALUATING THE MENTAL HEALTHCARE ACT, 2017

As mentioned earlier, the UNCRPD makes no distinction between disabilities. Therefore, a comprehensive law on disabilities covering psychosocial disabilities would be sufficient. This was indeed achieved through the Rights of Persons with Disabilities Act, 2016 that recognized mental disability. Despite this, the Mental Healthcare Act, 2017 that is a specific law on 'mental illness', is against the spirit of the UNCRPD, which mandates the non-distinction of disabilities.

A. COLONIAL RELICS CONTINUED

[289] UN, Fachausschusszur UN-BRK. *General Comment No. 1. Article 12: Equal recognition before the law. UN Dok.* CRPD/C/GC/1 vom (April 11, 2014) at 27.
[290] *Id.* at 21.
[291] Gerard Quinn, *Rethinking Personhood: New Directions in Legal Capacity Law & Policy*, UNIVERSITY OF BRITISH COLOMBIA, CANADA 21, no. 7, 10 (2011).
[292] Human Rights Watch, *supra* note 272 at 459.

The Mental Healthcare Act, 2017 replaces the Mental Health Act, 1987. The latter, in turn replaced the Indian Lunatic Asylums Act, 1858 and the Indian Lunacy Act, 1912, both colonial legislations that focused on detaining disabled people in custody.[293] While replacing these legislations, the 1987 Act carried on colonial continuities of forceful detention through 'involuntary commitment'.[294]

In this section, I argue that the Mental Healthcare Act, 2017 though a deviation from its predecessors, continues with some of the colonial relics. This is evident from the provisions relating to the admission of persons with high support needs, which could result in involuntary confinement. This is provided in Section 89 of the Mental Healthcare Act, 2017. It relates to admission and treatment of persons with mental illness, with high support needs, in mental health establishment for up to thirty days, which may further be extended up to a period of 90 days as prescribed in Section 90. Admission under Sections 89 and 90 may be made by way of an application by a nominated person. Thus, the decision relating to admission is delegated to a nominated person, which amounts to substituted decision making. Nominated persons are prescribed in the Act as a support mechanism. However, as discussed below, 'nominated persons' are not effective support mechanism as they may be removed and replaced by the Mental Health Board. In addition to 'nominated persons', the other support mechanism provided for in the Act is 'advance directives'. The evaluation of these two support mechanisms is undertaken below:[295]

The Act provides for the appointment of a nominated person under Section 14. The duties a nominated representative is mentioned in Section 17 which states that, "while fulfilling his duties under this Act, the nominated representative shall consider the best interest of the person with mental illness."[296] As mentioned earlier, the GC-I requires a shift from 'best interest' to 'will and preference'. Therefore, the Act's continued reliance on the 'best interest' as opposed to the 'will and preference' is in contravention of the UNCRPD and the GC-I.

Further, chapter XI of the Act provides for the constitution of a Mental Health Review Board comprising the district magistrate, district collector and persons with mental illness. This board is bestowed with wide ranging powers including the power to remove a nominated person and appoint another person. Allowing the possibility for the board to interfere with the nomination of a person, amounts to the board substituting the decision of the disabled person.[297] Further, in the absence of a nominated person, a wide range of persons are deemed to be 'nominated person' including officers from the department of social welfare.[298] Deeming the nomination of a person, not explicitly nominated by a disabled person, amounts to substitution. This is a clear violation of India's commitments under the UNCRPD.

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293 Mental Health Act, 1987, No. 14 of 1987, Part II and Part III (1987).
294 *Id.*
295 For a detailed analysis of the Act in light of the UNCRPD see, Amba Salelkar, *How the Celebrated Mental Healthcare Act Restricts Individual Liberty and Fails to Comply with International Standards,* LAW AND ORDER, (April 11, 2017), http://www.caravanmagazine.in/vantage/mental-healthcare-act-restricts-individual-liberty-fails-international-standards [hereinafter 'Amba'].
296 Mental Healthcare Act, 2017, No. 10 of 2017, § 17.
297 Amba, *supra* note 295.
298 Mental Health Act, 1987, No. 14 of 1987, §17.

The other support mechanism is the 'advance directive' provided for in chapter III of the Act. The Act states that a person who is not a minor can make an advance directive in which she can mention the way she wishes to be cared for and treated for through a mental illness, and also the way not to be treated and cared. The advance directive is also subject to review by the board and the board may alter, modify or even cancel the advance directive. As seen in the case of 'nominated persons', such wide powers in the hands of a board constituted of members disconnected with the person is contrary to the spirit of UNCRPD.

Further, the advance directive may not apply to emergency treatment, which includes treatment to prevent a person from harming themselves, preventing death or harming property. In her analysis of the Act, Salelkar states, "a state of emergency is where the expression of an individual's will and preference is most likely at risk and it is at this very point that the Act allows for it to be absolutely ignored."[299]

Thus, the translation of international norms from the UNCRPD to the municipal law is incomplete. The global analysis of reform trends in legal capacity show that many countries are at varying degrees of compliance with universal legal capacity.[300] The resistance in embracing universal legal capacity in municipal law will have to be overcome in ways similar to what was done at the international level, i.e. through advocacy, negotiations and putting the voices of disabled persons at the forefront.

V. CONCLUSION

The UNCRPD mandates universal legal capacity to all. Towards this end, the UNCRPD and the GC-I clarifies the need to shift from substituted capacity to supported capacity. The two key support mechanisms provided in the mental healthcare act are 'advance directives' and 'nominated person.' As demonstrated above, both these mechanisms fall short of compliance under the UNCRPD.

However, it is worthwhile to note that the Mental Healthcare Act, 2017 for the first time has mandatory rights affirming provisions for persons with psycho-social disability. Chapter V on 'Rights of Persons with Mental Illness' guarantees the right to access mental healthcare, the right to community living, the right to protection from cruel and inhuman and degrading treatment, the right to equality and non-discrimination, and the right to information and confidentiality. These provisions are compliant with the UNCRPD.

However, it is pertinent to note that because of absence of the right to legal capacity in the Act, which has been guaranteed under Article 12 of the UNCRPD, the realization of these rights will also be jeopardized. Therefore, I

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[299] *Id.*

[300] Lucy Series et.al.,, *Legal Capacity: A Global Analysis of Reform Trends*, *in* ROUTLEDGE HANDBOOK OF DISABILITY LAW AND HUMAN RIGHTS 137 (Peter Blanck & Eilionóir Flynn eds., 2016).

conclude that the Mental Healthcare Act, 2017 itself falls short of compliance under the UNCRPD. Further, the continuing existences of laws that deny legal capacity to disabled persons also add to our non-compliance. A legislation that truly imbibes the letter and spirit of the UNCRPD and revokes laws that deny legal capacity is the need of the hour. Until then, the rights assured under the Mental Healthcare Act, 2017 would remain illusory.

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