VOLUME 5 SUMMER 2018 ISSUE 1

NLUJ LAW REVIEW

ISSN: 2326-5320

5(1) NLUJ Law Review (2018)

ARTICLES

-A NATIONAL LAW UNIVERSITY JODHPUR PUBLICATION-

VOLUME 5 **SUMMER 2018** **ISSUE 1**

NLUJ Law Review

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KOSOVO'S PURSUIT OF INTERNATIONAL RECOGNITION: FOOTBALL ASSOCIATION v. UEFA

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ABSTRACT

Kosovo's Declaration of Independence in the year 2008 caused a massive stir within the International community which brought the debates of recognition to the forefront. The dispute between Serbia and Kosovo has not only resulted in countless lives being destroyed but economies being stalled with the failure of Belgrade-Pristina talks. Serbia has been adamant on not recognizing Kosovo as an independent sovereign state. This has led Kosovo to search for different battlefields to garner the consensus of the International Community regarding their free status. Sport is the new battlefield to show the soft power of diplomacy. In the past few years, Kosovo has tried to garner membership in countless governance bodies, inter alia, FIFA, UEFA, etc. This has largely helped Kosovo towards its aim of recognition by the United Nations and the European Union. To halt this approach Serbia challenged Kosovo's membership in UEFA in the Court of Arbitration for Sport. The contentious issue was the interpretation of Article 5(1) of the UEFA Statutes. This paper analyses the said proceedings in the light of Kosovo's battle for recognition. Through this the author aims to lay down the requisite ambit of sport diplomacy by the stakeholders and governance bodies.

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I. INTRODUCTION

Whatever reservations Europe may have for Kosovo to be integrated in the European Union, it is of importance to note that the EU High Representatives have emphasised, time and again that "Kosovo is Europe".[1] Kosovo's Declaration of Independence in 2008 and the issue of its international involvement on the basis of the Security Council Resolution 1244 passed under Chapter VII of the United Nations Charter, which affirms the status of Kosovo as a part of Serbia, still longs on.[2] Bearing in mind the concern over Kosovo's identity and official recognition, the Union des Associations Européennes de Football (hereinafter referred to as '**UEFA**') still went ahead and confirmed Kosovo as its 55th Member.[3] The Resolution was taken by a secret ballot and resulted in a close call of 28 votes in favour, 24 votes against and 2 being considered invalid.[4] Agitated, the Football Association of Serbia (hereinafter referred to as '**FSS**') filed a Statement of Appeal on 13th May

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[1] EU Press Release, *Kosovo: New EU Special Representative appointed*, European Union External Action (Aug. 22, 2016) *available at* https://eeas.europa.eu/headquarters/headquartershomepage_en/8599/Kosovo:%20new%20EU%20Special%20Representative%20appointed.

[2] S.C. Res. 1244 (June 10, 1999) *available at* https://documents-dds-ny.un.org/doc/UNDOC/ GEN/N99/172/89/PDF/N99 17289.pdf?OpenElement.

[3] Brian Homewood, *Kosovo becomes member of UEFA, paves way for FIFA application*, REUTERS (May 3, 2016) *available at* http://in.reuters.com/article/soccer-uefa-kosovo/kosovo-becomes-member-of-uefa-paves-way-for-fifa-application-idINKCN0XU14D [hereinafter Homewood].

[4] UEFA Press Release, *Football Federation of Kosovo joins UEFA* (May 3, 2016) *available at* http://www.uefa.com/insideuefa/mediaservices/newsid=2359883.html?redirectFromOrg=true.

2016 to the Court of Arbitration for Sport (hereinafter referred to as '**CAS**') under Article 62 of the UEFA Statutes.[5]

The proceedings under the auspices of the CAS raised intriguing propositions relating to the interpretation of the UEFA Statutes and the status of Kosovo as a whole. FSS claimed that the wordings of Article 5(1) of the UEFA Statutes clearly state that the membership is open to national football associations situated in the continent of Europe, based in a country which is recognized by the United Nations as an independent State. On the other hand, Kosovo is not recognised by the United Nations, assuming even if it is recognised by the International community as a whole.[6] UEFA contended that the whole idea of recognition is that, the countries unanimously recognize the State and the International Organization plays no part in the process of recognition. The membership of Kosovo in the UEFA through Article 5(1) depends less on the United Nations and more on the interactions of the sovereign states with Kosovo.[7] UEFA's legal director Alasdair Bell mentioned post resolution that, "*the United Nations has no competence to recognize states; states recognize states; you are either a member of the United Nations or not, the fact that you are not a member of the UN does not mean that you are not a state.*"[8]

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[5] Football Association of Serbia v. Union des Associations Europeenes de Football (UEFA), CAS 2016/A/4602; [hereinafter Football Association of Serbia v. UEFA] See Damiano Benzoni, *Questions remain after Kosovo's UEFA admission*, KOSOVO 2.0 (June 9, 2016) *available at* http://kosovotwopointzero. co/en/ questions-remain-after-kosovos-uefa-admission/.

[6] Football Association of Serbia v. UEFA, *supra* note 5.

[7] *Id.* at 7, 8.

[8] Homewood, *supra* note 3.

The CAS through its award enumerated the process of recognition and laid down its own interpretation of Article 5(1) of the UEFA statutes. The Tribunal consisting of the President, Mr. Ulrich Haas and fellow arbitrators Mr. Jose Juan Pinto and Mr. Patrick Lafranchi dismissed the appeal of FSS and upheld the membership of Kosovo.[9] The award has since then, had major ramifications on Kosovo's legal obstacle of getting recognition from the European Union and the United Nations respectively. The author through this paper has analysed the substantive part of the award in the first part [Part I]. Capturing the substantive essence of the award, the author also provides a brief about recognition of Kosovo and its continuing battle [Part V]. Thereafter, to pinpoint the core of the debate, the author has tried to critique the award by taking into account the interpretation provided to Article 5(1) of the UEFA Statutes in the case of *Gibraltar Football Association* v. *Union des Associations Européennes de Football* [Part III: B].[10] By contrast to the award, the author will try to show the intention of the UEFA Congress to bring in Article 5(1) through an amendment in the year 2001 [Part III: A].

In Part II, the author has tried to analyse the role played by the International community in the process of recognition of Kosovo. The author takes into account Serbia's objection against Kosovo on the process of recognition through sport rather than diplomacy. The author concludes that the inclusion of Kosovo in UEFA through the award passed by the CAS and the Olympic family represents not just a moral or

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[9] Football Association of Serbia v. UEFA, *supra* note 5, at 32.

[10] Gibraltar Football Association v. Union des Associations Européennes de Football, CAS 2002/O/410 [hereinafter Gibraltar Football Association v. UEFA].

sporting victory but also a symbolic statement against the countries who have objected to recognize Kosovo as a State. The arbitration proceedings show that Serbia is losing on all fronts to stop Kosovo's diplomatic goal of entering into the United Nations.[11] The Kosovar nation-building and branding process through the soft power of representative sport could be considered a novel approach in putting symbolic pressure on states to recognize Kosovo. While there are numerous impediments to the battle of Kosovo and Serbia, to this end, the award plays a scrupulous role in the furtherance of Kosovo's gradual progress towards European integration.

II. A FACTUAL MATRIX OF THE DISPUTE BEFORE THE CAS

On 9th March 2015, the Football Federation of Kosovo (hereinafter referred to as '**FFK**') submitted an application for membership to the UEFA.[12] The submission in itself was tumultuous with two major issues cropping up during the heated discussion at the UEFA congress; the first issue being Serbia's allegation against Kosovo of them taking the recognition battle through sport rather than diplomacy and second being players switching their nationalities, which in itself is against the FIFA rules and regulations. Serbia themselves provided two instances in the recent past during the Congress, first, that the International Olympic Committee in 2014, which had allowed Kosovo athletes to compete in the Olympic games in 2014 and second, permitting Kosovo to

[11] T.A.W., *Kosovo's recognition by FIFA is a step towards International legitimacy*, The Economist (May 17, 2016), *available at* https://www.economist.com/blogs/gametheory/2016/05/sport-and-statehood.

[12] *40th Ordinary UEFA Congress in Budapest*, UEFA (Apr. 8, 2016), *available at:* https://www.uefa.com/insideuefa/mediaservices/newsid=2350768.html.

enter the soccer corridors of Fédération Internationale de Football Association (hereinafter referred to as '**FIFA**').[13] In relation to the second issue of players switching their nationalities, examples of players included, Swiss International player Granit Xhaka and Albanian International player, Taulant Xhaka.[14] Thereafter UEFA placed FFK's application on the agenda of the 40th Ordinary UEFA congress on 3rd May, 2016 in Budapest and provided a Circular Letter No. 16/2016 dated 21st April 2016, with a brief summary of the agenda proposed by Kosovo.

Through a secret ballot, the UEFA Congress passed a resolution accepting FFK as its 55th member association on 3rd May 2016. Subsequently, the decision was appealed in the CAS on 13th May 2016. It is worth noting that Article 62 of the UEFA Statutes allow parties to appeal decisions of the UEFA Congress in the CAS within 10 days of the decision; the same was successfully complied with in this case, thereby removing any doubts as to the jurisdiction of the CAS. According to the author, the issues which cropped up in the CAS proceedings can be listed down into three essential criterions: (1) the interpretation of Article 5(1) of the UEFA Statutes, (2) the exhaustive definition of Article 69 of the UEFA Statutes, and (3) the analysis of the amendment of 2001 of the UEFA Statutes. All of these three issues are mutually co-related to each

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[13] Associated Press, *Kosovo to compete at Rio 2016 Olympics after recognition from IOC*, The Guardian (December 9, 2014), *available at* https://www.theguardian.com/sport/2014/dec/09/kosovo-recognition-international-olympic-committee-rio-2016; FIFA*: Kosovo and Gibraltar become members of world governing body*, BBC News (May 13, 2016), *available at* http://www.bbc.com/sport/football/36290169.

[14] James Montague, *UEFA's Recognition of Kosovo Angers Serbs*, N.Y. Times (May 3, 2016) *available at* https://www.nytimes.com/2016/05/04/sports/soccer/uefa-recognizes-kosovo-paving-way-for-fifa-membership.html?mcubz=3.

other. The CAS, however, did not take cognizance of the intention of the UEFA Congress to include Article 5(1). However, for the purpose of a holistic analysis, it is necessary to analyse the intention of the congress for such an amendment.

III. THE VEXED INTERPRETATION OF MEMBERSHIP:

A. ARTICLE 5 (1) OF THE UEFA STATUTES:

Under the UEFA Statutes, Chapter III titled 'Membership' entails a rather ill drafted Article 5(1). This article states that the Membership of the UEFA is open to national football associations in Europe that are responsible for organisation and implementation of football-related matters in their respective countries so long as they are based in a country which is recognised an independent State by the United Nations. The issue before the CAS was the interpretation of the words '*recognised by the United Nations as an independent state*'. Recognition in itself cannot be proceeded to be done by the United Nations or any other international organization. The power to recognise a country is only provided to other independent, sovereign states.[15] The literal interpretation of the words would make the entire proviso fallacious and the argument is preceded by UEFA in their submissions. Therefore, the Article can be interpreted in two ways; the first being the interpretation given by the CAS which is that Kosovo has been recognised by the international community at large and thereby must become a member of the UEFA,[16] and the second being

[15] United Nations, *About UN Membership*, *available at* http://www.un.org/en/sections/member-states/about-un-membership/index.html.
[16] Football Association of Serbia v. UEFA, *supra* note 5.

that the membership can only be availed by the United Nations member. The two interpretations are mutually exclusive to each other. It is necessary to analyse the intention of the UEFA Congress during the amendment of the said article in 2001 to correctly interpret Article 5(1).

According to the older version of the UEFA Statutes, membership of UEFA was open to national football associations situated in the continent of Europe which were responsible for the organisation and implementation of football-related matters in their particular territory. The idea for the amendment was to absolve lower ranking football associations from joining UEFA. To have an in-depth analysis, it is necessary to analyse the formation of UEFA as a whole. Article 60 of the Swiss Civil Code mentions that associations get legal personality as a corporate body and in connection, Article 1 of the UEFA Statutes mentions that it is a neutral association formulated under the Swiss Civil Code.[17] To this end, UEFA is an association which generally has the power to accept or refuse applications for its membership. The interpretation of Article 5(1) post amendment rather absurdly allowed Kazakhstan a place in the UEFA, as it constituted a member of the United Nations and not because of the interpretation of Article 5(1) taken by the CAS in its current proceedings.[18] To have a clearer view, the UEFA

[17] Swiss Civil Code, 1907, Article 60.
[18] *Progress aplenty in Kazakhstan,* UEFA, *available at* http://www.uefa.com/insideuefa/member-associations/association=kaz/index.html.

Congress allowed the application of Kazakhstan, post 2001 amendment as it was a member of the United Nations.[19]

The current version of Article 5(1) of the UEFA Statutes regards and provides utmost importance to the need for United Nations membership. The intention of the UEFA Congress was to restrict membership to the football associations of countries which have been declared as members of the United Nations.

The CAS in its previous Award in the *Gibraltar Football Association* (GFA) case had interpreted Article 5(1) of the UEFA Statutes,[20] which was relied upon by Serbia in its case against FFK. The CAS in the GFA case enumerated that Article 5(1) of the UEFA Statutes, when read plainly means that the respective applicant country must have to be admitted as a member of the United Nations. However, when relied upon by Serbia, the CAS in the Kosovo Case brushed the interpretation aside as being a mere 'obiter dicta'. Thus, the CAS did not pay much heed to this interpretation. To have a holistic interpretation of Article 5(1) of the UEFA Statutes, it is necessary to analyse the interpretation given by the arbitrators in the GFA Case.

B. PRECEDENTIAL VALUE OF THE GIBRALTAR FOOTBALL ASSOCIATION CASE:

On 16th August 2002, the Gibraltar Football Association (hereinafter referred to as '**GFA**') filed a request for arbitration and

[19] Gibraltar Football Association v. UEFA, *supra* note 10.
[20] *Id.*

wanted the CAS to declare that the UEFA Executive Committee be ordered to consider GFA's application for membership as per rules and regulations pre amendment.[21] The CAS took cognizance of Article 28 of the Swiss Civil Code and further added the principles of *lex mercatoria,* i.e. the principles of fairness including *inter alia* the obligation to respect fair procedure to analyse the loopholes in the application under Article 5(1). The issue in the said arbitration was the retroactive applicability of Article 5(1) of the UEFA Statutes to include GFA as a UEFA member.[22] The Panel consisting of Mr. Bruno Simma (Germany), Professor Pierre Lalive (Switzerland) and Mr. Dirk Reiner Martens (Germany) showed the need for a restrictive interpretation of Article 5(1).[23] The panel interpreted the text to mean that the country whose application is being considered must have been necessarily admitted as a member of the United Nations. It further adds that the United Nations does not recognize countries in the strict sense of the word; however, what is clear is that under the new rules, the GFA would not have been eligible to be elected as a member of the UEFA, since Gibraltar was not an independent state admitted to membership in the United Nations. [24]

The CAS analysed the factual basis and laid down the correct interpretation in the GFA award. Comparing this with the Kosovo proceedings, the same interpretation can be accorded. The Tribunal discarded the interpretation provided in the GFA proceedings as a mere

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[21] *Id* at 3, 4.
[22] Gibraltar Football Association v. UEFA, *supra* note 10, at 8, 9, 10.
[23] *Id.*
[24] *Id.* at 9.

obiter dicta provided by the Tribunal.[25] It went further to state that the necessary obiter does not have a *stare decisis* or precedential value on the CAS proceedings.[26] While the same is true, the interpretation does hold water and cannot be absolved with. The CAS in the Kosovo proceedings ought to have laid some persuasive value towards the said obiter in the GFA award.

C. AMENDMENT OF ARTICLE 5 (1): AN ATTEMPT AT FACILITATING KOSOVO?

At the most basic level, UEFA tried to amend the article before the Kosovo membership proposal was put forward. The proposed amendment to Article 5(1) included the words "*recognised as an independent state by most of the International community on the continent of Europe*" in place of the previous provision which read as follows, "*recognised by the United Nations as an independent state*".[27] This would have understandably removed any negative connotation regarding recognition and membership by the United Nations. There was a failure on the floor of the UEFA Congress to reach a 2/3rd majority to pass the said amendment. FSS contended that the said proposed amendment was aimed at facilitating the application of Kosovo in the Congress; the argument does hold well on some grounds. The proposed amendment by UEFA could have been carried out during the application of Kazakhstan and Yugoslavia. However, the timing of the

[25] Football Association of Serbia v. UEFA, *supra* note 5, at 26.
[26] *Id.* at 25.
[27] *40th Ordinary UEFA Congress Agenda*, UEFA (May 3, 2016).

proposal raised eyebrows.[28] To state whether there were any *mala fides objectives* on part of the UEFA to propose such an amendment would be a pure conjecture. Although, the fact that the proposed amendment failed to gain the requisite majority does clearly show that the intent of the Congress was to keep the wordings of '*recognised by the United Nations as an independent state*' in Article 5(1). The CAS on the point has rightly concluded that it would be baseless to conclude that the UEFA Congress has interpreted the recognition procedure in a particular manner. However, the tribunal should have gone in-depth into the matter of UEFA forwarding the proposal to amend article 5(1) at the time when Kosovo's application was being adjudged.

It is necessary to reasonably elaborate Article 5(1) of the UEFA Statutes and for that purpose, a systematic interpretation of the provision of Article 69 is essential. Article 69 provides that Article 5 does not apply to England, Scotland, Northern Ireland, Wales, Faroe Islands and Gibraltar.[29] This in itself is an exhaustive group of countries which have not been explicitly recognised by the United Nations. These are countries which have not been per se recognised by the international community as a whole. Be that as it may, the exhaustive list provided under Article 69 shows that the UEFA Congress wanted a few countries to have been specifically excluded from the purview of Article 5(1) essentialities.

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[28] *Did FIFA Chief Infantino Lobby for New UEFA president?*, REDIFF (Sept 16, 2016), *available at* http://www.rediff.com/sports/report/did-fifa-chief-infantino-lobby-for-new-uefa-pre sident/20160916.htm.

[29] UEFA Statues Rules of Procedure of the UEFA Congress, Regulations governing the implementation of the UEFA Statutes, Art. 69, ed. 2014.

On this basis, the argument which logically follows is that Article 5(1) lays down the criterion which essentially entails being a member of the United Nations; if the country is not a member of the United Nations then the same is mentioned explicitly under Article 69 titled 'exceptional and transitional provisions'.

If the interpretation of CAS with respect to Article 5(1) is taken, then there arises no explicit requirement for Article 69 to be mentioned in the UEFA Statutes, especially in the context of countries like Ireland and Scotland which have been internationally recognized by independent sovereign states.

IV. A CRITIQUE OF THE CAS VERDICT:

It is true that the history of Article 5(1) of the UEFA Statutes is to limit the number of member federations. The genesis of the term '*recognised*' is to protect the existing football federations and limit the number of member federations per country. The CAS to the extent of analysing the stricture of independent states in Public International Law and Sports Law is correct.[30] The circle of countries recognised as independent states in Public International Law is much larger than the independent states being members of the United Nations. The arbitral tribunal was of the opinion that the reference to the United Nations in Article 5(1) of the UEFA Statutes is not designed or intended to restrict the notion of independent state beyond the threshold of Public International Law. Thus, it further added that Article 5(1) of the UEFA

[30] Football Association of Serbia v. UEFA, *supra* note 5.

Statutes must be interpreted to mean that the territory of the federation (in this instance, FFK) must be recognised by the majority of the United Nations members as an independent state.

It would be naïve to not accept that the national sporting entities do not have certain political ambitions with regard to their need to join an international sporting framework, and the CAS recognizes the same. However, this is all the more true in the case of countries which require recognition on the international platform. The analysis of CAS with respect to not taking the restrictive meaning of the term 'recognition' is fallacious to the extent that the need to warrant a more restrictive understanding only arises when the federation wants to pursue a specific sporting interest.[31] The same can be countered, by the fact that the 2001 amendment by the UEFA Congress wanted to make only members of the United Nations parties to the UEFA *albeit* the exceptions being taken through Article 69 of the UEFA Statutes. The intention was to enrol members whose recognition has been accepted by the international community and are members of the United Nations. To construe the provision liberally would be to wash away the actual intention of the UEFA Congress. Above all, the CAS concluded by taking the words 'independent state' into account without laying much emphasis on the words 'United Nations'.[32] The interpretation of Article 5(1) by the CAS has shrouded the words 'United Nations'. The tribunal has evaded even

[31] *Id.* at 28.
[32] *Id.* at 23, 24, 26, 28.

remotely considering the words 'United Nations' under Article 5(1) and turned a blind eye towards the *Gibraltar Football* case.

If, it is established that the interpretation of the statutes of an association does not provide a clear and unambiguous result, priority may be accorded to "*the most reasonable and rational solution*".[33] The view of the panel was that the interest of the new member is of utmost importance and hence, using the doctrine of legitimate expectation, a new member may be taken into account as they have a dearth of knowledge regarding the intention of the framers of the Statutes.[34] The approach which the tribunal ought to have taken was for the protection of good faith of the new member. However, taking into account the doctrine of legitimate expectation of a new member or their protection in good faith approach, the most reasonable and rational solution would be to consider only United Nations members as falling under the ambit of Article 5(1) of the UEFA Statute.

Procedurally, the panel had 'free hands' to reach a conclusion regarding Kosovo's membership since the interpretation of article 5(1), apart from the Gibraltar *obiter dictum,* had never been provided. Indeed, the award contains numerous other procedural issues which have not been dealt with by the author in the paper. However, turning a blind eye towards the agenda of the 40th UEFA Congress shows that the CAS did not take a holistic view of the matter. The panel's analysis was mainly

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[33] DAVID ARMSTRONG, ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW (Routledge, 2009).
[34] *supra* note 5, at 23.

focused on Article 5(1) but a *de novo* approach to the interpretation of the same marred the proceedings. Kosovo's membership in itself may further the objectives of UEFA and hopefully allow the country to uplift the sport. Nonetheless, the issues which arise regarding the procedure followed throughout the 40th Congress, starting from the Kosovor agenda in relation to the proposed amendment of Article 5(1), do raise numerous questions on the crooked backbone of the UEFA.

V. A BRIEF BACKGROUND ON KOSOVO:

Historically, Kosovo has been an autonomous province of Serbia within the Socialist Federal Republic of Yugoslavia, until the abolition of its autonomous status in 1989.[35] Thereafter, the Albanian majority in Kosovo vigorously pursued the separatist and independence movement, which involved the United Nations in the year 1998 due to large scale international attention on the atrocities. The treatment of Albanians in Kosovo led the United Nations to establish the UN Mission in Kosovo by S/RES/1244 (1999) of 10th June 1999 to administer the territory and the Kosovo Force to provide for peace and security. In 2007, the final status of Kosovo was brought before the UN Security Council, on the basis of the plan submitted by UN Rapporteur Martti Ahtissari.[36] The intended objective of the plan was to internationally supervise the independence of Kosovo, which would have allowed giving an identity to Kosovo. Unfortunately, a rejection by Serbia and an opposition by Russia,

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[35] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (Oxford University Press, 2007).

[36] Letter dated from the Secretary General addressed to the President of the Security Council, (26th March 2007), (Doc. S/2007/168).

China, India and several EU member states followed, which marked the end of the Ahtissari plan. The doctrine of three elements of statehood analysed by Georg Jellinek in his treatise *Allgemeine Staatslehre* (General Theory of the State) requires an existing population, certain territory and being organized under an effective public authority.[37] Meanwhile, the Montevideo convention states that each State must possess a permanent population, a defined territory, government and the capacity to enter into relations with other states.[38] The process of recognition in International Law has been much debated post the disintegration of the former Soviet Union and the former Socialist Federal Republic of Yugoslavia. Admittedly, the Kosovo incident in 2008 led the charge of recognition of other countries such as the breakaways Georgia, South Ossetia and Abkhazia.[39] The process and procedure of recognition is different around the world and at times, ambiguous.[40] Although recognition of a State plays a huge role in the entering of diplomatic relations with another state, it can never be counted as a pre-condition.

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[37] G. JELLINEK, ALLGEMEINE STAATSLEHRE, 324 [Jellinek, Staatslehre] (2nd ed., 1905); CF IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed., Oxford University Press, 1998).

[38] Montevideo Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 165 L.N.T.S. 20.

[39] VOLKER FRANKE, ET. AL, SECURITY AND CONFLICT MANAGEMENT: UNDERSTANDING COMPLEX MILITARY OPERATIONS, A CASE STUDY APPROACH (Routledge, 2014).

[40] For example, the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the EU Member State Ministers for Foreign Affairs make recognition dependent on the fulfilment of certain minimum standards of the rule of law, democracy and human rights, minority rights, respect for existing boundaries, judiciary and acceptance of international commitments. On the other hand, the guidelines and the pertinent practice of Western States disregarded one of the classical criteria for recognition namely the criterion of effectiveness of the governments of the states which were aspiring for recognition. *See* Danilo Turk, *Recognition of States: A comment*, 4 EJIL 66, 68 (1993), *available at* http://www.ejil.org/pdfs/4/1/1227.pdf.

Sports can be a diplomatic bridge for countries to facilitate their causes in the international sphere viz. political or economic. Jeremy Goldberg has rightly stated that political conflict has always appeared in sports in varying forms – be it communism and capitalism, amateurism and professionalism, nationalism and internationalism, or integration and segregation.[41]

VI. EARLIER INSTANCES OF PURSUING INTERNATIONAL RECOGNITION THROUGH THE INSTRUMENTALITY OF SPORTS

In 2016, Kosovo participated for the first time in the Olympics with Majlinda Kelmendi making history in Brazil by claiming the gold medal in women's judo and becoming the first athlete from Kosovo to ever win a medal in the Olympics. She had been compelled to participate under the Albanian flag in the 2012 Olympics.[42] Another milestone was a nomination in the 2016 Oscar for best short film which created added buzz in the short history of Kosovo.[43] One of the major reasons for Kosovo's participation in the international sphere has been facilitated by the Belgrade-Pristina Political Arrangement between Serbia and Kosovo. This arrangement allowed Kosovo to carry out *inter alia* trade, freedom of

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[41] Jeremy Goldberg, *Sporting Diplomacy: Boosting the Size of the Diplomatic Corps*, The Washington Quarterly 23 no. 4 (Autumn 2000); *See generally*, Valeria Munt, *Game, Set, Match: Sports and the Future of Diplomacy*, CITY UNIVERSITY OF NEW YORK (2015).

[42] James Masters, *Majlinda Kelmendi wins gold for Kosovo's historic first Olympic Medal*, CNN (August 10, 2016, 10:01 HKT), *available at* http://edition.cnn.com/2016/08/07/sport/majlinda-kelmendi-kosovo-olympics/index.html.

[43] Erjone Popova, *Kosovo Film Makes History despite Oscar disappointment*, Balkan Insight (Feb. 29, 2016), *available at* http://www.balkaninsight.com/en/article/shok-couldn-t-get-the-oscar-but-it-made-the-history-02-29-2016.

movement and recognition of agreements between the two countries.[44] Mary Warlick, the US ambassador to Serbia, whilst supporting the talks and stating that both teams had opened the dialogue well, said that it was hoped that the Belgrade-Pristina Political arrangement would be a constructive step towards the betterment of lives of people of both countries. Unfortunately, the recognition of Kosovo as an independent state could not be resolved by the EU Mediator Robert Cooper. On 9th March 2011, the Serbian Minister Goran Bogdanovic stated that the negotiations were an opportunity to affect a historic compromise in the centuries-long problems between the Serbians and Albanians. However, he added that they would never recognise Kosovo as an independent nation and that it was good that the discussions in question had not been assigned a fixed term. One can deduce that the talks led the Kosovar battle to play friendly matches between members of the FIFA in 2013. It becomes necessary to analyse whether the articles of FIFA, IOC among others allow Kosovo to further its recognition battle and if so, to what extent do the statutes play a role.

A. ADMISSION OF KOSOVO IN FIFA:

The FIFA Congress followed the recommendation of the FIFA Council and confirmed the admission of Kosovo as its 210th member in

[44] KIPRED Policy Paper, *The Implementation of Agreements of Kosovo-Serbia Political Dialogue*, No. 4/13 (July 2013), *available at* http://www.kipred.org/repository/docs/THE_IMPLEMENTATION_OF_AGREEMENTS_OF_KOSOVO%E2%80%90SERBIA_POLITICAL_DIALOGUE_373680.pdf.

its 66th Congress held in Mexico.[45] Article 2(a) of the FIFA Statutes is the first objective which mentions that FIFA aims at improving the game of football constantly and promoting it globally in the light of its unifying educational, cultural and humanitarian values, particularly through youth and development programmes. Further, Article 11 of the FIFA Statutes 2016 provides for certain prerequisites for membership in FIFA, which are different from the requirements, under the UEFA Statutes. It states that any association responsible for organising, in all of its forms, in its country may become a member, with only one such association being recognised as a member association in each country. Further, such member associations are recommended to involve all relevant stakeholders within their own structure. The language used in Article 6 is quite peculiar; it uses the words 'an association in a region which has not yet gained independence may, with the authorisation of the member association of the country on which it is dependent, also apply for admission to FIFA'. The term 'country' in the definitions in FIFA Statutes circumscribes the term as an independent state that is recognised by the International Community. This allows the leeway to Kosovo to join the FIFA community as the decisive factor of United Nations membership is not a criterion as opposed to the UEFA Statutes.

[45] Press Release, 66th FIFA Congress, Mexico City 2016, available at http://www.fifa.com /about-fifa/news/y=2017/m=3/news=66th-fifa-congress-zurich-2016-2878197.html.

B. RECOGNITION OF KOSOVO BY THE INTERNATIONAL OLYMPIC COUNCIL:

Rule 30.1 of the Olympic Charter has a rather similar definition as that of FIFA for the word 'country'. The same states that the expression 'country' means an independent State recognised by the international community. Hence, it is relatively congregant with the definition of FIFA. It cannot be argued that Kosovo ought not to have been recognised by the Olympic Committee as the same comes under the ambit of the definition provided under the Charter.

Analysing the above mentioned definitions of the term 'country' and its relevant clauses in the IOC and FIFA, it can be argued that the clauses of UEFA were completely different. Be that as it may, efforts of Kosovo in navigating the system of strict governance in sports with the medium of sport diplomacy cannot be taken away. Dimitry Rogozin, the Russian Ambassador to NATO rightly put it, "Kosovo is a European crossroad. The EU is being creative on a crossroad. You can imagine that the EU is in a car, and that the lights show red. But the EU says it's not red, its pink, maybe we should go. Ok, go, but don't be disappointed or surprised if something comes in front of you from the right side."[46]

VII. CONCLUSION: A CASE OF POLITICAL DOPING IN SPORTS

The interpretation taken by the CAS despite all the objections taken by Serbia in the proceedings and without analysing the intention of

[46] Interview with Dmitry Rogozin, the Russian Ambassador to NATO, Kosovo Compromise 2007, (Mar. 4, 2008), *available at* http://www.kosovocompromise.com/admin/download/files/_id_662/a080304_1.pdf.

the framers has vitiated the provisions of statutory law regarding interpretation. In addition to this, analysis of Article 69 and the Gibraltar Case was entirely fallacious, which further disrupted the procedure. Even though the International community at large aims at allowing Kosovo to participate and become members in such treaties and federations, the language of the Statute must be held to be sacrosanct and interpreted as per the intention of the framers.

As far as the battle of Kosovo's recognition is concerned, the discussions which have preceded the decision to recognize Kosovo have been within the ambit of Sports. Above all, moral considerations have also played their part in the recognition of Kosovo which includes Serbia's loss of moral right to exercise authority over Kosovo. With the recognition of Kosovo, the world is assisting a new manoeuvre, which not only means a departure with the common principles of secession and state recognition, but is also based on absurd and paradoxical argumentation. For example, most of the States around the world including the United States and the EU members have recognized Kosovo as a sovereign and independent State while, at the same time, referred to the implementation of the plan proposed by Ahtissari which, in fact, neutralizes the sovereignty and independence of the State. The recognition appears often in the official declarations of States which have recognized Kosovo as the end of process of dissolution of the Yugoslav federation.

On its 69th session, the General Assembly of the UN has recognized the value of sports as a tool for peace and development. Further, the speakers in the session mentioned that "*sports could be a diplomatic bridge to peace and a vehicle for healing political and cultural rifts among*

communities."[47] In the contemporary diplomatic environment, sports diplomacy is an ideal way to proceed whether that entails recognition, trade foreign policy or ideology; a soft power which has relatively risen in International sphere. Joseph Nye describes soft power as "*the ability to influence behaviour of others to get the outcomes one wants*."[48] With this definition, diplomacy through International Sporting events can be considered a major component of soft power. The question still remains as to the ambit of sport diplomacy. If the use of diplomacy is regarded essential in the ambit of sport diplomacy, it is necessary for the sportsmen playing to partake in the process of diplomacy. According to Stuart Murray, sports diplomacy "*uses sports people and sporting events to engage, inform and create a favourable image among foreign publics and organisations, to shape their perception that is (more) conducive to the sending of governments' foreign policy goals."*[49] Murray is right in defining the concept and largely this concept does include the ambit of recognition. Levemore and Buss were the first to propound the concept of recognition. Their sole analysis of sport diplomacy as a soft power could be utilized for countries which are struggling to gain international recognition by international organizations such as the United Nations; acquiring status in organizations such as FIFA for that purposes represents an important step. They state that, "*Sport has often become an*

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[47] United Nations Meetings Coverage and Press Releases, General Assembly recognizes the Value of Sports as Tool for Peace, Development, During Debate Reviewing Resolution's Implementation, GA/11572 (October 20, 2014), https://www.un.org/press/en/2014/ga11572.doc.htm.

[48] JOSEPH NYE, THE PARADOX OF AMERICA POWER. WHY THE WORLD'S ONLY SUPERPOWER GO IT ALONE, (Oxford University Press, 2002).

[49] Stuart Murray, "Sports Diplomacy: A Hybrid of Two Halves," Cultural Diplomacy, 2011, *available at* http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2011-symposium/SportsDiplomacy-a-hybrid-of-two-halves--Dr-Stuart-Murray.

important vehicle by which the state is accorded recognition in the international community. Membership of international associations such as FIFA is particularly important, as "other than being admitted as a member of the United Nations… it is the clearest message that a country's status as a nation state has been recognized by the international community."[50]

Multiple ways of proceeding to identify the modes of sports diplomacy can be done by the process of international achievement in sports. For example, the role played by the United States to facilitate their foreign policy goal through achievements such as the medal tally in the Olympics outweighs a country like India. Each international sport requires an international governance body to structure its success; the IOC and the FIFA are prime examples.[51] Murray and Pigman argue that the international sporting governance bodies themselves must act diplomatically to facilitate the cause of their members. They state that the international sporting bodies must themselves engage in diplomatic representation to and negotiation with the governments, the regional and national organizing bodies of the sport, large global firms that sponsor competitions and global media firms for broadcasting rights.[52] It is true that the sporting bodies have, in the recent past, provided specialized diplomacy. For instance, the 2002 FIFA World Cup, which was hosted

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[50] ROGER LEVERMORE AND ADRIAN BUSS, SPORT AND INTERNATIONAL RELATIONS: AN EMERGING RELATIONSHIP (New York: Routledge, 2004), 21.
[51] Valeria Munt, *Game, Set, Match: Sports and the Future of Diplomacy*, CITY UNIVERSITY OF NEW YORK (2015) *available at* http://academicworks.cuny.edu/cgi/viewcontent.cgi?article=15 57&context=cc_etds_theses.
[52] Stuart Murray and Geoffrey Pigman, *Mapping the relationship between international sport and diplomacy*, SPORT IN SOCIETY (2013).

jointly by Japan and South Korea. FIFA played a mediator and negotiated terms with the two countries and their respective national football federations to agree on viable terms for the co-hosting arrangement.[53]

Additionally, it can be argued that the governance bodies have limitations and must be bound by their charters or constitutions to facilitate diplomacy. Be that as it may, the governance bodies cannot go beyond their charters to facilitate the cause of countries.

The use of diplomacy in sport may be called the use of political doping in sports. As far as the use of diplomacy with respect to the Kosovo's battle of recognition is concerned, the country has gained significant margins. The Serbians look dejected and seem to have given up, which is a massive victory, thereby gaining big strides in the United Nations and EU membership goal. Unfortunately, the support provided by a particular football governance body, goes outside the purview of sports diplomacy. This is where the Serbians aimed at capturing what may be termed as 'cheating by political doping'. However, the CAS crushed all hopes. 'Kosovo is Europe' is not far from realization and all the applause can be given to hard fought sports battles in the arenas rather than the posh Congress houses.

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[53] Jon Thies Eden, *Major Research Paper: Soccer and International Relations, Can Soccer improve International Relations?,* University of Ottawa, (July 23, 2013), *available at* https://ruor.uottawa.ca/bitstream/10393/26069/1/EDEN%2C%20Jon%20Theis%202 0135.pdf.

Rudresh Mandal & Hardik Subedi, *Demystifying the concept of 'Control' in the Takeover Regime: Of Harmonisation and Whitewash Provisions*, 5(1) NLUJ Law Review 27 (2018)

DEMYSTIFYING THE CONCEPT OF 'CONTROL' IN THE TAKEOVER REGIME: OF HARMONISATION AND WHITEWASH PROVISIONS

-RUDRESH MANDAL[*] & HARDIK SUBEDI[*]

ABSTRACT

The extant Takeover Regulations are mired in ambiguity and indeterminacy with respect to the acquisition of control in a target company, has led to scholars debating on various, conflicting approaches to determine the meaning of the term 'control'. This paper argues for definitional clarity vis-à-vis 'control' and the need to re-introduce the whitewash provisions in the Takeover Regulations, specifically in the backdrop of SEBI scrapping the idea of a Brightline Test. Part I provides contextual clarity to the paper, by tracing the history of the 'control' regime in India. Part II goes on to highlight the response of the judiciary to the notion of control, one that has left the status of 'control' shrouded in ambiguity. Part III then examines the problematic nature of the oft mooted 'Brightline Test' for control, given the dynamism of 'control'. Part IV then proceeds to outline two possible suggestions in refining the process for determining acquisition of control under Regulations 2(e), 3 and 4 of the Takeover Regulations, 2011.

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I. INTRODUCTION

At the heart of the takeover regulation in India lies the mandatory bid rule, or the responsibility cast upon the acquirer (gaining 'control' over the target company through acquiring of a controlling stake, certain veto rights and so on) to make an 'open offer' to the minority shareholders to purchase their minority stake.[54] Tracing its origins to principles of '*equal opportunity to shareholders*'[55], the requirement to make an open offer on fulfilment of certain criterion seeks to safeguard the shareholders (who may later not be able to avail of preferable opportunities of exit) from possible infringement of their interests due to erratic behaviour on part of the acquirer.[56] However, the Indian takeover scheme itself along with the thresholds which need to be satisfied in order to trigger an open offer have been subject to numerous changes, due to staggering developments in the corporate market, and due to the fluid nature of a concept as elusive as that of 'control'.[57]

Upon acquisition of 25% stake in a listed company, the acquirer is required to make an open offer. In other words, the acquirer is mandated to make an offer (usually kept open for a month) to the existing shareholders to purchase an additional stake in the target company. Striving to provide an exit option to shareholders, an open offer seeks to

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[54] Edmund-Phillip Schuster, *The Mandatory Bid Rule: Efficient, after all?*, 76 Mod. Law Rev.3, 529, (2013).
[55] Dr. Ruth Luttmann, *Changes of Corporate Control and Mandatory Bids*, 12 Int. Rev. Of Law And Eco.,498 (1992).
[56] *Id.*
[57] Umakanth Varottil, *Comparative Takeover Regulation and the Concept of Control*, SJLS, 210 (2015) [hereinafter Comparative Takeover Regulation].

protect the shareholders from risks that may arise in the business, post-acquisition and a change in management.[58]

The fluidity of 'control' is one that must be tackled by developing a broad framework, which the regulator and other stakeholders alike can draw upon to resolve the ambiguity on the acquisition of 'control' in a target company. Although a case-by-case analysis of control is perhaps required, such a broader framework would enable transactions to take place with a greater degree of certainty amongst stakeholders.

The latest attempt to streamline litigation and judicial response to 'control' was the Securities Exchange Board of India's (*hereinafter* SEBI) proposal of a *Brightline* Test for determining acquisition of control.[59] Generally speaking, a Brightline Test or a brightline rule refers to '*an objective rule that resolves a legal issue in a straightforward, predictable manner. A bright-line rule is easy to administer and produces certain, though, arguably, not always equitable results*'[60] thereby ensuring certainty and consistency upon application. Applied in the control paradigm, a Brightline Test thus seeks to develop a framework devoid of ambiguity in determining control, through introduction of numerical thresholds. SEBI however dismissed the said proposal in early September this year, stating that a Brightline

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[58] Masoom Gupte, *What is an open offer*?, Business Standard (Sept 1, 2017), *available at* www.business-standard.com/article/pf/what-is-an-open-offer-111051000079_1.html.

[59] Securities and Exchange Board of India, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, SEBI, (Aug. 21, 2017), *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf. [hereinafter Discussion Paper].

[60] *Bright-line Rule*, Legal Information Institute (Sept. 9, 2017), *available at* https://www.law.cornell.edu/wex/bright-line_rule.

Test could be 'prone to misuse'.[61] One of the questions this paper seeks to answer is whether the SEBI was correct in dismissing the idea of a Brightline Test, one that would add a great degree of objectivity and consistency in the determination of control. The paper then ultimately charts out a course of action with regard to the acquisition of 'control' in a target company.

II. TRACING THE HISTORY OF 'CONTROL' IN INDIA

In the 1980s, the listing agreement between the stock exchanges and the listed companies stipulated the conditions precedent to the obligation of making a mandatory open offer.[62] Thereafter, in 1994, the Substantial Acquisition of Shares and Takeover Regulations (hereinafter referred to as the 1994 Takeover Regulations) was promulgated by the SEBI.[63] Due to various developments in the financial market and a large number of difficulties surfacing on application of these Regulations[64], the

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[61] PTI, *Acquisition of control: SEBI to continue with existing norms*, Hindustan Times (Sept. 12, 2017), *available at* https://www.hindustantimes.com/business-news/acquisition-of-control-sebi-to-continue-with-existing-norms/story-5Y3XCm6qk48xkH8RjxzNGO.html.

[62] JAYATI SARKAR & SUBRATA SARKAR, CORPORATE GOVERNANCE IN INDIA, 423 (2012). [hereinafter Sarkar]

[63] Nishith Desai Associates, *Public M&As in India: Takeover Code Dissected,* Nisith Desai Associates (September 1, 2017), *available at* http://www.nishithdesai.com/information/navigation/navigation2/ma-lab/malab/article/public-mas-in-india-takeover-code-dissected.html.

[64] Umakanth Varottil, *The Nature of the Market for Corporate Control in India*, SSRN, (Dec. 2, 2017, 3:15 PM), *available at* http://ssrn.com/abstract=2698474 [hereinafter Corporate Control In India].

Justice Bhagwati Committee was established to review the same.[65] Consequently, upon the suggestions of the Committee, the Substantial Acquisition of Shares and Takeover Regulations, 1997 was passed (hereinafter referred to as the 1997 Takeover Regulations).[66]

The Bhagwati Committee, in its report noted that while control could be acquired through acquisition of a particular percentage of shares or voting rights, control could also project itself through the control exercised upon the board of directors of a company (*de facto* and *de jure* control).[67] It however soon became apparent (following market volatility, inconsistent precedent and innumerable amendments) that the 1997 Regulations would need to be reviewed.[68]

Appointed in 2009 to review the 1997 Regulations, the Takeover Regulations Appointment Committee (*hereinafter* referred to as 'TRAC'), in its report emphasized that both de facto, as well as de jure control should necessitate the requirement to make an open offer.[69] It was further stated that the question of control was neither a question of fact, or of fact and law together, but had to be decided on a case-by-case basis. Ultimately, the Committee pronounced that the acquisition of 25% of shares/voting rights would empower the acquirer to exercise *de facto* control and thus

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[65] Securities and Exchange Board of India, *Justice P.N. Bhagwati Committee Report on Takeovers*, SEBI, (Aug. 18, 2017, 5:26 PM), *available at* http://www.sebi.gov.in/commreport/ bagawati-report.html. [hereinafter Bhagwati].
[66] Sarkar, *supra* note 62 at 116.
[67] Bhagwati, *supra* note 65 at ¶ 6.2.
[68] Corporate Control In India, *supra* note 64 at 4.
[69] Bhagwati, *supra* note 65 at ¶ 6.2.

should entail obligations of an open offer.[70] These recommendations were weaved in to the Substantial Acquisition of Shares and Takeover Regulations, 2011 (*hereinafter* referred to as Takeover Regulations) and consequently an amalgamation of objective and subjective approaches to control have been adopted by India. While, Regulation 3 of the Takeover Regulations imposes open offer requirement upon acquisition of 25% of voting rights[71], Regulation 4,[72] similar to Regulation 12 of the 1997 Takeover Regulations[73] focuses on open offer obligations with relation to the ability to exercise *de facto* control over the target company.

Internationally, there is no consensus on the definition and tests for determining the acquisition of control. In the United Kingdom, Australia and Germany the change of control is deemed to be identical to the acquisition of voting rights in excess of a specific threshold, regardless of whether such rights bestow the holder with *de facto* control or not.[74] Other jurisdictions such as France and Canada define control as the capability to determine the composition of a majority of members of the Board of the company.[75] Alternatively, these jurisdictions confer 'control' upon entities that exercise control over a majority of voting rights at the

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[70] Securities and Exchange Board of India, Report of the Takeover Regulations Advisory Committee Under the Chairmanship of Mr. C. Achuthan, SEBI, (Aug. 19, 2017), *available at* http://www.sebi.gov.in/commreport/tracreport.pdf. [hereinafter TRAC Report].

[71] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, at 8, 10, pt. III § 4 (Sept. 23, 2011) [hereinafter SEBI Regulations 2011]

[72] SEBI Regulations 2011, at 10, pt. III § 4.

[73] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, at 36, pt. III § 4 (Sept. 23, 2011).

[74] Discussion Paper, *supra* note 59 at 4.

[75] *Id.* at 4.

general meetings of the concerned company.[76] This divergence in the definition of control prompted the SEBI to promulgate the idea of a Brightline Test.

III. JUDICIAL RESPONSE TO THE CONCEPT OF CONTROL: SHROUDED IN INCONSISTENCY

While purchasing shares in a particular company, the investors, in order to protect their own interest may demand certain rights to veto decisions taken by the company. These rights may exist in the shareholders agreement, or the charter documents of the company being invested in. Regardless of the mode of granting of these veto rights, the problematic question often faced by the SEBI, Securities Appellate Tribunal (SAT) and the Courts is whether 'negative control' conferred by these rights could amount to control within the meaning of Regulation 2(1)(c) of the Takeover Regulations, 2011.[77]

In *Subhkam Ventures Pvt Ltd v. SEBI*[78], a case decided within the contours of the definition of 'control' in the 1997 Takeover Regulations, the SEBI had ruled that the certain affirmative voting rights or veto rights granted to the acquirer by the shareholder agreement were sufficient to effect control over the target company. While the SEBI equated negative control with control, the Securities Appellate Tribunal (SAT) disagreed with the view expressed by the SEBI and stated that control was a

[76] *Id.* at 4, 5.
[77] SHISHIR VAYTTADEN, SEBI'S TAKEOVER REGULATIONS: BEING A COMMENTARY ON THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS 1997, 23 (2010).
[78] Subhkam Ventures Private Limited v. SEBI, (2010) SCC Online SAT 35.

'*proactive and not a reactive power*.'[79] According to the SAT, control could be characterized as positive control and did not include within its ambit veto rights that would amount to negative control. Thus, only if the acquirer had the power to force the target company to engage in certain actions, could it be said that the acquired had gained (positive) control over the target.

However, in the earlier case of *Rhodia SA v. SEBI*[80], the SAT concluded that the acquirer had attained control over the target company owing to the fact that acquirer had veto rights over 'major decisions on structural and strategic changes'. Some of these rights related to dividends and other distributions, entry to or withdrawal from key markets, issuance of securities, major and strategic investment programs and so on. The order of the SAT, when read in harmony with the stated list of veto rights, exhibited that it was not imperative for the veto rights to be in relation to everyday functioning of the company.

Later, in the *Jet-Etihad* case[81], the SEBI held that the right conferred upon Etihad, *viz.*, the right to appoint only two directors, out of twelve, was not adequate to constitute control since all crucial decisions would be subject to oversight by both Jet Airways as well as Etihad. Further, the position of power and superiority enjoyed by the Board of Jet Airways was untouched. Most importantly, Etihad did not possess crucial veto rights and thus it was not required to make a mandatory open offer.

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[79] *Id* at ¶ 6.
[80] Rhodia SA v. SEBI, (2001) SCC OnLine SAT 30.
[81] Jet Airways (India) Limited by Etihad v. SEBI, (2014) SCC OnLine SEBI 283.

However, the judgment in this matter was based primarily on the specific facts of the case at hand, thus precluding the SEBI from inquiring into the jurisprudence of control and negative control. As a result, the controversy surrounding the question of control post the *Subhkam Ventures*[82] order was not resolved by the SEBI ruling in the *Jet-Etihad*[83] case either.

Similarly, in the *Kamat Hotels* case[84], the agreement between the acquirer, Clearwater Capital Partners and the target company, Kamat Hotels, provided to the acquirer, certain veto rights over corporate restructuring, policy making and decisions of the target company along with its share capital. Here, SEBI, in its interim order was of the opinion that these rights conferred upon the acquirer negative control, which could be equated with control and thus Clearwater was required to make an open offer in accordance with the Takeover Regulations, 2011. However, in its final order in March, 2017[85] the SEBI, seemingly softening its earlier rigid stance, and noted that *'the scope of the covenants in general is to enable the noticees to exercise certain checks and controls on the existing management for the purpose of protecting their interest as investors rather than formulating policies to run the Target Company.*'[86]However, though SEBI ruled that the protective clauses, granting veto rights, in the agreement did not amount to 'control', a prudent approach must be adopted while reading this order, given that the ruling was extremely fact-centric. Further, a mere single statement,

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[82] *supra* note 78.
[83] *supra* note 81.
[84] In the matter of Kamat Hotels (India) Limited, WTM/GM/EFD/DRAIII/20/MAR/ 2017.
[85] *Id.*at ¶ 21.
[86] *Id* at ¶ 21.

without elaborate reasoning (as was done in *Subhkam*) should not be taken as constituting a radical alteration of SEBI's earlier stance.[87]

With the Supreme Court stating[88] that the decision of the SAT in the *Subhkam*[89] case would not be treated as precedent, the question on control in the Takeover Regulations, 2011 was once again shrouded in controversy and ambiguity.[90]The clash between the stand long held by the SEBI, that affirmative veto rights enjoyed by the acquirer would entitle it to control the company and the persuasive value created by the *Subhkam* judgment invalidating the existence of negative control has only exacerbated the controversy.

The SEBI *"Discussion Paper on Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*[91] seeking to put an end to this ongoing controversy was a welcome step in the takeover regime in India. It was thought that a Brightline Test, objective and clear, would assist the judiciary in developing a consistent response to litigation surrounding 'control'. The following part of this paper analyses the (in)efficiency of the

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[87] Umakanth Varottil, *Has SEBI Altered its Position on the Question of Control?,* INDIACORPLAW (Aug. 10, 2017), https://indiacorplaw.in/2017/04/has-sebi-altered-its-position -on.html.

[88]Securities and Exchange Board of India v. Subhkam Ventures Pvt. Ltd, Civil Appeal No. 3371 of 2010, MANU/SC/1587/2011, ¶ 4. [hereinafter SEBI v. Subhkam Ventures Pvt. Ltd.]

[89] *Id.*

[90]Amudavalli Kannan *et al*, *Interpretation of 'Control': An Uncontrolled Increase in Ambiguity?,* NISHITH DESAI ASSOCIATES, (Aug. 30, 2017), www.nishithdesai. com/information/news -storage/news-details/article/interpretation-of-control-an-uncontrolled-increase-in-ambiguity.html.

[91] Discussion Paper, *supra* note 59.

Brightline Test, to understand the rationale behind SEBI's recent dismissal of the test.

IV. A BRIGHTLINE TEST FOR CONTROL: A STATIC SOLUTION TO A DYNAMIC PROBLEM

One of the options suggested by SEBI in its Discussion Paper on Control proposed to define 'control' as:

> "(*a) The right or entitlement to exercise at least 25% of voting rights of a company irrespective of whether such holdings give de facto control and/or*
>
> *(b) The right to appoint majority of the non-independent directors of a company*."[92]

In order to fortify the argument of the need for a Brightline Test, the discussion paper later cites experiences of several jurisdictions, and finally deduces that majority of the jurisdictions have a *de jure* measure of control.[93]The discussion paper also refers to several laws in force in India and demonstrates how the understanding of 'control' differs in each of these laws thereby leading to different conclusions and ambiguities thereto while looking at the same fact scenario, making the adoption of an objective standard contextually apposite. While the above approach to control may indeed bring a great degree of clarity through a significant reduction in the ambiguities involved in the assessment of whether

[92] *Id.* at 8.
[93] *Id.* at 4.

control over the target has been acquired or not, it is not without its own grave shortcomings.

In the first place, it is crucial to note that the threshold of 25% as proposed by the SEBI should not be seen as absolute figure, but should consider the pattern of shareholding in the Indian jurisdiction. The threshold should be rationally related to such pattern. Thus, in jurisdictions wherein there exists a dispersed shareholding, the corresponding quantitative trigger for 'control' should be pegged at a low level, as opposed to the high numerical trigger in concentrated shareholdings.[94] Thus, the 25% trigger proposed by the SEBI itself seems problematic since it may prove to be illogical and "*counterintuitive*" since shareholdings in India are largely concentrated.[95]

The primary shortcoming of the 25% acquisition of voting rights in the Brightline Test for control lies in its own certainty.[96]This fixed numerical threshold would allow investors, assisted by their lawyers and bankers to evade the Brightline rule.[97] Consequently, this would preclude them from making a mandatory open offer, thus damaging the interests of the minority shareholders who may seek a favourable exit opportunity to no avail.

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[94] Marco Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, 41 Tex. Int'l LJ 171, 197 (2006).
[95] Comparative Takeover Regulation, *supra* note 57 at 216.
[96] *Id.* at 216.
[97] Jeremy Grant, Tom Kirchmaier & Jodie A. Kirshner, *Financial Tunneling and the Mandatory Bid Rule*, 10 Eur Bus. Org. Law Rev. 233, 250 (2009). [hereinafter Grant, Kirchmaier & Kirshner]

The Brightline Test proposed in the Discussion Paper also disconnects the threshold required to launch a mandatory open offer from *de facto* control.[98]In other words, while the acquirer company may stay below the threshold to make an open offer, it may exercise *de facto* control owing to the shareholding structure of the target company or through derivative instruments. A Brightline Test ignores such realities of control, and in adopting an approach grounded in legal formalism often operates to the detriment of the minority shareholders. The underlying rationale of the threshold required to make an open offer, viz., the equality of opportunity to the minority shareholders would thus suffer irreparable damage due to such disconnection. Hence, a situation wherein an acquirer attains 24.9% of the voting rights in the target company (with no other similar shareholder), but still retains *de facto* control over the target company due to the pattern of shareholding of the target company cannot be disregarded.[99]In fact, economically it would be beneficial and prudent for the acquirer to stay below the open offer trigger, if he is in a position to exercise *de facto* control.[100]The acquirer would not be required to make a mandatory open offer since he is below the Brightline threshold, but yet could exercise a great degree of influence over the target company's management and policies. Once again, this requirement of a mandatory open offer would violate the basic aim of the Takeover Regulations (of furnishing an opportunity of exit to minority shareholders,

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[98] Discussion Paper, *supra* note 59 at 8.

[99] Prarthna Baranwal, *SEBI's Bright Line Tests for 'Control'- An Analysis*, LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (Sep. 1, 2017), http://www.lakshmisri.com/News-and-Publications/Publications/articles/Corporate/sebi-bright-line-tests-for-control-an-analysis.

[100] Comparative Takeover Regulation, *supra* note 57 at 10-13.

in case of displeasure with the acquirer and his policies).[101] With regard to a numerical Brightline Test, India could learn a lesson from the experience in the United Kingdom, wherein there is a noticeable trend of acquirers avoiding the open offer regulations by not only remaining under the Brightline trigger of 30%[102] but also through the usage of investment instruments of a complex nature, or of dexterous structuring strategies; a feature also seen in other jurisdictions.[103]For instance, it would not be altogether unrealistic to envisage a situation where the acquirer invests in a percentage of shares, a shade below the open offer requirement and then through the adoption of positions in derivative instruments, use swaps and options to fulfil the deficit in percentage. An option vests in a party the right to purchase or sell the underlying asset on a particular point in time in the future at a decided price. A swap on the hand refers to the exchange of two financial instruments.[104] Subsequently, the acquirer is also empowered to skirt disclosure requirements by discreetly obtaining positions (a position refers to a binding commitment to purchase or transfer a financial instrument. These positions may be long, or short[105])

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[101] Nishith Desai Associates, *Public M&As in India: Takeover Code Dissected,* NISHITH DESAI ASSOCIATES (September 1, 2017), http://www.nishit hdesai.com/fileadmin/ userupload/pdfs /Ma%20Lab/Takeover%20Code%20Dissected.pdf.

[102] PAUL L. DAVIES, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 1061 (Sweet & Maxwell, 2012).

[103] Grant, Kirchmaier & Kirshner, *supra* note 97 at 238-47.

[104] *Learn the basics of Future/Forward/Option contracts, Swaps*, Moneycontrol, (Sept. 8, 2017), *available at* https://www.moneycontrol.com/news/business/stocks/-1727777. html.

[105] MEG POLLARD, SHERRY T. MILLS, WALTER T. HARRISON, PRINCIPLES OF ACCOUNTING 79 (Pearson, 1st ed. 2007).

and then launching a surprise voluntary offer on the target company's Board.[106]

Further, the numerical Brightline proposed by the SEBI could also impede the interests of not only promoters, but also companies/firms managed professionally existing in sectors highly dependent on capital. In such capital-intensive segments of the market, the investors, although exceeding the threshold, would not desire to undertake the responsibilities associated with acquisition of control over a company.[107]

With regard to the appointment of a majority of non-independent directors, the question of whether an acquirer would be deemed to be in 'control' of the target company would turn on the usage of 'and/or' in the Discussion Paper. If the 'and' is employed, that could be circumvented by acquirers by staying below the 25% Brightline, but having the right to appoint a majority of non-independent directors by virtue of the shareholding structure of the target, or through covenants. On the other hand, if the 'or' criteria is employed, using the 'right to appoint' test solely, would take us back to the definition of control as already envisaged in Regulation 2(e), thus making it redundant. It could also result in a number of professional investors, like venture capital funds who wish to stay outside the net of 'control' being caught in it. Thus, instead of introducing

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[106] Comparative Takeover Regulation, *supra* note 57 at 217.

[107] N. Sundaresha Subramanian, *M&A lawyers see red in SEBI's control test*, BUSINESS STANDARD, (Sept. 2, 2017), http://smartinvestor.business-standard.com/market/ Marketnews-381460-MarketnewsdetMA_lawyers_see_red_in_Sebis_control_test.htm#.WpRfzWaB3q0.

objectivity, it would again be a subjective determination of whether or not the acquirer (here, the fund) actually exercises control over the company.

The authors argue that the SEBI's proposal of fixing the Brightline for open offer obligations at 25% cannot possibly be enforced as a universal rule in every circumstance due to the complicated nature of facts which may arise in the future, and would not exclude the possibility of future uncertainties arising.[108] The decoupling of the open offer trigger with *de facto* control endangers the underlying philosophy of the Takeover Regulations, that is, equality of opportunity to the minority. However, while it is undoubted that a greater degree of certainty would be infused in the Indian takeover regime, the opportunity cost of doing so is forsaking the exit rights of the minority stakeholders. Coupled with the capability of the acquirers to evade the open offer obligation by staying below the prescribed threshold and so on, as seen abroad, the consequences of a Brightline Test are highly problematic. In a Brightline Test, equity is sacrificed at the altar of certainty and predictability.

Thus it would seem that the SEBI averted a great corporate disaster by dismissing the notion of a Brightline Test. However, what is the way forward with regard to the concept of control in India? Is there any way to reduce the inconsistencies and ambiguities in determining whether control has been acquired or not? Can we refine the legal imagination of control in India? Or do we retain the extant notion? The authors believe that a subjective determination of control is imperative,

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[108] *Id.*

and an alternative to the existing model (following the dismissal of the Brightline Test) has been proposed in the section below pertaining to white wash provisions.

V. ENGAGING WITH THE PROBLEMATICS OF 'CONTROL': A POSSIBLE WAY FORWARD

A. RESOLVING THE NEED FOR DEFINITIONAL CLARITY: HARMONIZING REGULATIONS 2(E), 3 & 4

In proposing a Brightline Test, SEBI attempted to clear the definitional uncertainty.[109] At this point, the engagement with the Brightline Test is only on the basis of definitional ambiguity as opposed to the broader discussion on its viability that has already been done in the above section. The Discussion Paper proposed an 'either/or' test wherein fulfilment of *either* criterion of breaching the threshold of 25% voting rights *or* possessing the right to appoint majority of independent directors would determine control over a company. This is particularly important as the 'or' test would classify the breach of the numerical threshold as control keeping the subjectivities aside. However, the objective nature of the test discards the breadth of the definition of 'control' that is inferred from the wholesome reading of Regulation 3 with Regulation 4[110] and 2 (e).

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[109] Discussion Paper, *supra* note 59 at 8.

[110] SEBI Regulations 2011, *supra* note 71, regulation 4 -'Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public

As defined by Regulation 2 (e), a person is said to be in control if (i) he has right to appoint majority of (non-independent) directors, *or* (ii) he controls the management or policy decisions. The Regulation further stipulates that this control could be acquired by agreements and need not necessarily be from the acquisition of shares. The Takeover Regulations makes it mandatory for the acquirer to make an open offer when it acquires 25% of the shares under Regulation 3.[111] Notably, Regulation 3 does not speak of control, and regardless of the fulfilment of condition (i) and (ii) under Regulation 3, it mandates an open offer. This is at best a general compliance with the mandatory bid rule for substantial acquisition of share that is taken to be at the heart of the Takeover Code. However, acquisition of substantial shares does not always mean gaining control. Regulation 4, adopting a similarly broad phraseology as the definition under Regulation 2 (e) mandates an open offer regardless of shareholding. However, the Brightline test discards this express distinction of an open offer prompted by acquisition of substantial shares and acquisition of control. Selectively reading Regulation 3 as 'control' and leaving out the expansive definitions under the other two provisions is in clear discord with the scheme of the Takeover Regulations and betrays the express distinction laid by the framers itself between *'substantial acquisition of shares*

announcement of an open offer for acquiring shares of such target company in accordance with these regulations.'

[111] SEBI Regulations 2011, *supra* note 71, regulation 3(1) 'No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.'

or voting rights' and *'acquisition of control'*. The Discussion Paper nevertheless recognizes this distinction and remarks, *"in India, the Companies Act recognizes any holding in excess of 25% as the threshold at which special resolutions can be blocked. Further, the threshold for substantial acquisition under the Takeover Regulations is 25%. It would, thus, be appropriate that 25% may also be specified as the threshold level for trigger of control in Indian listed companies"*.[112] This patently flawed logic ignored the protective role and active role in control, and ostensibly discards the difference between and conflates substantial acquisition of shares with control to propose the Brightline test. This would result in absurd conclusions when the larger shareholder holds 74% of total shares. The other shareholder would clearly have a decisive role to play in controlling the management or policy decisions while the owner of 26% of voting rights would not even be a joint owner.[113] Can there be control of the company by two different persons at the same time? Who is to be held liable as the controller of the company in case of dispute and non-compliance? Gaining control is a higher threshold than merely acquiring substantial shares. Therefore, such acquisition of shares should not and possibly would not confer 'control' upon the shareholder, despite breaching the limit that the Brightline Test lays down. By isolating the subjective nuances of the meaning of control and laying down a strictly objective Brightline Test, the discussion paper proposed a test that is inconsistent with the intention of the framers of the Takeover Regulations.

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[112] *supra* note 109.

[113] Vinod Kothari, *Choosing between a blurred line and a bright line: SEBI proposes an objective test for "control"*, INDIACORPLAW, (Sept. 3, 2017), https://indiacorplaw.in/2016/03/choosing-between-blurred-line-and.html.

The proposal for the Brightline Test has been scrapped after extended consultations and the definition as provided under the Takeover Regulations is still being followed. Hence, the ambiguity that was perpetuated by the Supreme Court decision in *Subhkam Ventures*[114](and a prudent reading of the later *Kamat Hotels* case)still persists. Now if SEBI decides to resolve the ambiguity surrounding the meaning of control, it should take into consideration the interplay between Regulation 3, Regulation 4 and the broader definition as provided under Regulation 2 (e) of the Takeover Regulations, 2011.[115] The presumption of control should not exist against the shareholder merely because the threshold provided under Regulation 3 is triggered. The idea of active/positive control is implicit within the definition of control under Regulation 2 (e) thereby only including such rights that require a proactive action on the part of the acquirer to constitute control. Therefore, merely breaching the threshold without holding any right to influence the management or policy decisions and holding only certain rights for protection of one's own interest should not confer control upon the acquiring shareholder. The trigger under Regulation 4[116], which specifically applies in the case of control, should not be conflated with the general rule of an open offer by breaching the numerical threshold of 25% shareholding under Regulation 3.[117] Such an approach will help reap the benefits of a flexible approach of

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[114] SEBI v. Subhkam Ventures Pvt. Ltd., *supra* note 88.

[115] SEBI Regulations 2011, *supra* note 71, regulation 2(e)- '*control includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner*.'

[116] SEBI Regulations 2011, *supra* note 72.

[117] SEBI Regulations 2011, *supra* note 71.

a qualitative idea of control while significantly reducing uncertainty among the shareholders.

B. RE-INTRODUCING THE WHITEWASH PROVISION?

Often, major transactions may involve the acquisition of large amount of shares, usually not through the shares held by existing shareholders but through the issue of new shares, when the intention of the acquirer might not be to gain control. In such circumstances, the obligation to make an open offer could be waived through the approval of the existing shareholders. This exemption, referred to as a 'whitewash' is based on the rationale of the primacy of shareholder's interest to decide whether to take the benefit of the exit opportunity provided or to consciously renounce it.[118]

Whitewash, however is outside the purview of the Takeover Regulations, 2011. The provision to allow a whitewash existed in the erstwhile regime of the Takeover Regulations, 1997 under Regulation 12[119] wherein the rule of open offer could be dispensed with, if a *'special resolution is passed by the general meeting'*.[120] However the provision applied specifically to exempt triggering of mandatory open offer in case large number of shareholders acquiesced to such change. The TRAC committee viewed such a selective application of the provision only to situations wherein there was a change in control but not to situations of

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[118] TRAC Report, *supra* note 70 at ¶12.16.
[119] *supra* note 73.
[120] *Id.*

acquisition of substantial shares as an anomaly.[121] After exploring several possibilities of retaining the provision of a whitewash in the new Takeover Regulation by internalizing international practices, the Committee concluded it would be wise to dismiss the thought on account of absence of '*robust regulations on proxy solicitation*'.[122]

Proxy solicitation is often considered to be problematic, as it is perceived to be a mode of stifling dissident shareholders by using company funds.[123]The large shareholding pattern by promoters in India is seen with suspicion as they allow the misuse of proxy solicitation. However, instead of looking at the possibility to encourage diversified shareholding, scrapping the whitewash mechanism altogether in order to wait for the Indian market to ripen[124] is similar to misplaced notions of hoping that the problem would get solved automatically.

Whitewash provisions are definitely not a novel idea. Jurisdictions like Singapore and UK already have incorporated whitewash provisions in their respective takeover regimes. However, these provisions cannot be blindly imported to India without customizing them to the ground realities here. For example, in Singapore, for the whitewash waiver to be valid, the requirement is an up vote by a simple majority.[125] However,

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[121] TRAC Report, *supra* note 70 at ¶12.17.
[122] *Id.* at ¶12.19.
[123] SUBHASH CHANDRA DAS, CORPORATE GOVERNANCE IN INDIA: AN EVALUATION 97 (Phi Learning, 2012).
[124] TRAC Report, *supra* note 70 at ¶12.21.
[125] The Singapore Code on Take-Overs and Mergers, 99 (June 23, 2018), *available at* http://www.mas.gov.sg/~/media/resource/sic/2015%20Code%20Amendments%20Response%20Press%20Release/Annex%202.pdf.

since company shareholding in India is consolidated by promoters, usually members of the same family, and is not diffused, the minority shareholders are exposed to greater vulnerability if the requirement is merely a simple majority. Therefore, it is proposed that the threshold be increased. Further, keeping in mind that protection of the minority shareholders' interest is at the core of the Indian takeover regime, a figure as low as say, 10% minority shareholders could object to the waiver and place an application to SEBI to deny such waiver unless the minority shareholders' interests are paid attention. Such provisions to safeguard minority shareholders' interests when the majority attempts to bulldoze their way through are already in place in the Companies Act, 2013. For example, even when a special resolution is successfully passed in regards to variation of shareholder's rights under Section 48 of the Companies Act, 2013, 10% of the dissenting shareholders can apply to the Tribunal to have the variation cancelled. This approach strikes a balance between the autonomy enjoyed by the company in its affairs while keeping the minority interests safe. The provision from the UK Takeover Code to put forth an independent expert's opinion before the voting for waiver takes place could be transplanted to Indian law to reinforce the safety of shareholders by helping them make an informed decision.[126]

The authors believe that the introduction of whitewash provisions could facilitate additional clarity on the contours of 'control'. Further, the shareholders would be empowered to differentiate between the triggering

[126] The City Code on Takeovers and Mergers, F22 (June 23, 2018), *available at* http://www.thetakeoverpanel.org.uk/wpcontent/uploads/2008/11/code.pdf?v=8Jan2018.

of an open offer under Regulation 3 merely by breaching the cap of 25% shareholding and a change of 'control' mandating an open offer under Regulation 4.The additional regulatory burden on the SEBI would also thereby be reduced through such clarity. Even in a scenario wherein 'control' has changed hands, the mechanism would allow the shareholders to decide whether they would like to continue under the changed circumstances. This could also contribute towards the aversion of a chilling effect on transactions that are purely geared towards extending support in times of financial distress, and in scenarios where the investment is being provided by the party that has limited funds and cannot bear the onerous burden of acquiring additional shares in fulfilment of the obligation of an open offer. Therefore, a need to reintroduce whitewash provisions are manifest, of course, with additional policy measures to ensure that the provision is not misused to defeat the interests of minority shareholders.

VI. CONCLUSION

The lacunae present in the contemporary legal regime, owing to the dismissal of the proposed Brightline Test has sought to be addressed in this paper. This paper seeks to assist in the development of a broader framework that the SEBI should keep in mind while determining the acquisition of control on a (necessarily) case-by-case basis. This framework could achieve definitional clarity by harmonizing Regulations 2(e), 3 and 4 of the Takeover Regulations, 2011 and re-introducing the whitewash provisions, present in the former (although in a different form)

Takeover Regulations 1997. Introducing a Brightline Test would require a selective reading of control and would ignore the textual interplay between Regulation 2 (e), 3 and 4 of the Takeover Regulations, 2011. Further, the regulators should consider reintroducing the whitewash provisions, which are consistent with the democratic principles that allow the shareholders to decide their fate and working of their organization. A rigid and objective standard of the Brightline would increase the scope of unwarranted interference in the internal working of the organization and subvert the idea of shareholder primacy. However, the measures proposed above are by no means exhaustive and must be supplemented by additional policy measures to ensure a robust takeover regime in India, conducive to acquisitions. Control, by its very nature is a dynamic concept, and an objective test would not suffice therein. Only by developing a broader framework of principles, can consistency and clarity emerge in the interaction of the regulator and the stakeholders with the Takeover Regulations.

Kashish Makkar, *Transgenders: Identity and Position in the Family Law in India*, 5(1) NLUJ Law Review 54 (2018)

TRANSGENDERS: IDENTITY AND POSITION IN THE FAMILY LAW IN INDIA

-KASHISH MAKKAR*

ABSTRACT

This paper attempts to bring to light the problems and challenges that the transgender population of India have to face due to the non-accommodating nature of the existing personal laws in the country. Given that their right to a self-perceived gender identity has been recognized by the Supreme Court, several other challenges in bringing their lives under 'equal protection of laws', guaranteed under Article 14, continue to persist. This paper systematically analyses this problem, focusing first on the various identities that comprise the transgender community of India; namely Transsexuals and 'The Third Gender.' It then further examines various identities that constitute the third gender, and the various practices and customs which govern their personal lives. Further, considering that majority population of transgender is mostly Hindu or Muslim, an analysis of applicability of Hindu & Muslim marital and adoption law to transgenders is undertaken in this paper. A secular legislation in both respects has also been analysed to understand the scope of their rights under law. Finally, the paper concludes with a policy suggestion with regards to the improvement that can be made in the personal laws using a sui generis approach.

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I. INTRODUCTION

The term 'transgender' is derived from two words, namely, 'trans' and 'gender'. While the Latin term 'trans' means "across" or "beyond",[127] the term 'gender' is a complex concept. It forms the core of the problem that grapples within its fold more than 4 million people in India.[128] 'Gender', according to the World Health Organisation, refers to "the socially constructed characteristics of women and men – such as norms, and roles and relationships of and between groups of women and men."[129] Therefore, a transgender is a person who is beyond the socially and culturally defined difference between men and women.

At the outset, it is very important to understand the concepts of 'gender' and 'gender identity' in order to understand the transgender identity comprehensively. 'Gender' refers to the behaviour and characteristics that society expects out of a person on the basis of their assigned, biological sex. However, 'gender identity' is how that person psychologically perceives his/her gender. It is the way a person desires to express his/her gender through clothes, emotions, appearance or behaviour.[130] The gender identity of a person is exclusive of their assigned sex. Thus, a person whose gender identity aligns with his/her assigned sex

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[127] National Legal Service Authorities v. Union of India, (2014) 5 SCC 438 ¶107 [hereinafter NALSA v. UOI].

[128] Rema Nagarjani, *First Count of Third Gender in Census: 4.9 Lakh*, THE TIMES OF INDIA (May 30, 2014), http://timesofindia.indiatimes.com/india/First-count-of-third-gender-in-census-4-9-lakh/articleshow/35741613.cms.

[129] WHO, *Gender, Equity and Human Rights,* WHO INTERNATIONAL, http://www.who.int/gender-equity-rights/about/en/ (last visited July 14, 2018).

[130] Planned Parenthood, *Gender and Gender Identity,* PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/sexual-orientation-gender/gender-gender-identity (last visited July 14, 2018) [hereinafter Planned Parenthood].

is called cis-gender. While, a person whose gender identity is in conflict with his/her assigned sex is called a transgender.[131]

Over the course of time, with the growing consciousness about human rights, there has been significant advancement towards ensuring dignity of individual. One such advancement is the recognition or expression of their gender identity. It has been recognised as a fundamental right under right to life,[132] however, significant issues pertaining to their human rights still remain unresolved. One such issue is that of personal laws that govern their lives and relationships. Marriage and the right to have a family has been recognised as a fundamental human right. However, its recognition in both UDHR (ICCPR),[133] as well as Indian personal laws, has remained restricted to man and woman.

This paper is an attempt to analyse the position of transgender community in the context of application of marriage and adoption laws of India to them. However, a prerequisite to such an analysis necessarily entails an analysis of the unique characteristics of the transgender community in India. Therefore, the paper takes a trajectory starting from analysis of the characteristics of the community, followed by a critical analysis of the laws applicable to them in the status quo, and ends with providing a perspective for the required policy change for improvement of their position in a *sui generis* manner.

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131 *Id.*
132 NALSA v. UOI, *supra* note 127, at ¶121.
133 Ms. Juliet Joslin et al. v New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).

The researcher has used an analytical approach to understand the position of transgenders under family law. The data primarily relied on for this purpose is secondary data, however, personal observation has helped the researcher in comprehending the realities presented by the secondary data.

II. TRANSGENDER COMMUNITY IN INDIA

In *NALSA* v. *Union of India*,[134] the Supreme Court arrived at a classification of the transgender community of India. The Court in the judgment divided the transgender community into two categories. *First,* those who psychologically identify themselves as belonging to a gender on the opposite end of the spectrum vis-à-vis their assigned sex and prefer to get their sex reassigned. And *second,* those who are perceived publicly as 'third genders' and are recognised distinctly as a separate class/category in the subcontinent viz. Hijras, Aravanis, Jogtas, Kothis and Shiv-Shaktis.[135] The Court granted the legal status of 'third gender/other' only to the latter category.

However, there are caveats attached to such a classification. One such caveat is that the categories are not mutually exclusive of each other.[136] Additionally, the criteria relied on by the Court has mostly to do with the specific identities of transgender groups unique to the

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[134] NALSA v. UOI, *supra* note 127.
[135] *Id.* ¶ 79.
[136] V. Chakrapani, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion,* UNDP INDIA (December 2010) http://www. undp.org/content/dam/india /docs/hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf.

subcontinent rather than on the kind of conflict between the gender identity and assigned-sex.[137] This is problematic as all of the people who wish to identify themselves as a 'third gender' have to necessarily fall into one of the categories that the Court has recognised. However, had there been a classification on the basis of the conflict in the gender identity and assigned sex, any person having gender dysphoria, if they wished to get their sex re-assigned, could have qualified as transsexuals. Whereas, all others who wished to maintain their gender identity as different from the binary genders, could have qualified as a third gender or transgender.

The consequence of such a specific community-identity based recognition of the third gender, as done by the Court, becomes especially problematic in India. This is on account of the fact that the third gender identities in India have a specific culture and are generally ghettoised. Therefore, a person has to necessarily be a part of one of the pigeonholes identified by the Supreme Court and must conform to their norms in order to get the 'third-gender' recognition.

Understandably, the Court committed a folly in classifying the third gender category in pigeonholes. Nevertheless, the classification that the Court used to classify the transgender community into 'transsexuals' and 'third genders' has some value to the analysis of this community in India.

This is on account of the fact that the Court classified the community into two groups according to their desire to identify with their

[137] Planned Parenthood, *supra* note 130.

psychological gender identity. *First,* the people who wish to get their sex reassigned via medical procedures (i.e. 'transsexuals' or transgenders who wish to come out of their gender dysphoria). And *second,* those who don't wish to identify themselves as either male or female, and wish to maintain their gender identity confirming to one of the identified 'third gender' community in India.

It is imperative to analyse both these categories of transgender community and their characteristics in order to arrive at an understanding of their respective position with regard to the marital and adoption laws applicable to them.

A. THE TRANSSEXUALS

The first category as listed out by the Supreme Court is generally referred to as transsexuals. It is essentially composed of those people who wish to transition permanently to the gender that they identify themselves with. They constitute a subset of the transgender community whose sense of difference between their gender identity and assigned sex is very strong. Moreover, they are certain that they belong to the gender opposite (on the gender spectrum) to their assigned sex.[138]

The procedure is generally described as Sex Reassignment Surgery (SRS), but may also involve other medical procedures such as hormone therapy.[139] Transsexuals, as a community/category never came to light in

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[138] NALSA v. UOI, supra note 127, at ¶81.

[139] Planned Parenthood, *What Do I Need to Know About Transitioning?,* PLANNED PARENTHOOD, *available at* https://www.plannedparenthood.org/learn/sexual-

India because they are not organised as a political or social community. Their gender dysphoria was never recognised and their plight was never acknowledged until the unique case of *Aparna Mafatlal* captured the media attention.[140] In this case, a lady from the famous Mafatlal business house transitioned permanently, which resulted into a family property and inheritance feud. This case brought to light the distress, the discomfort and the legal challenges that the community faces due to their psychological conflict.[141]

The Supreme Court in the *NALSA* judgment recognised the constitutional right of the transsexual people to identify with their transitioned identity, i.e., their gender identity in the first place.

B. THE THIRD GENDER

The transgenders who reject both male and female as the normative gender categorizations constitute the second sub-set of the transgender community.[142] In the Indian subcontinent, these third genders have assumed a distinct identity owing to their behaviour, characteristics, and expression. Thus, this category is composed of a wide range of transgender-related identities, cultures, and experiences. In India, traditionally and popularly, queer identities such as Hijras, Eunuchs,

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orientation -gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning (last visited July 14, 2018).

[140] PTI, *Businessman Ajay Mafatlal, First Major Sex Change Case in India, Passes Away,* DNA INDIA (Aug. 23, 2015), *available at* http://www.dnaindia.com/india/report-businessman-ajay-mafatlal-first-major-sex-change-case-in-india-passes-away-2117607.

[141] Express News Service, *No Settlement, Mafatlal Feud Continues,* THE INDIAN EXPRESS (Aug. 10, 2012) *available at* http://indianexpress.com/article/cities/mumbai/no-settlement-mafatlal-family-feud-continues/.

[142] NALSA v. UOI, *supra* note 127, at ¶108.

Kothis, Jogas/ Jogappas, Aravanis and Shiv-Shaktis are recognised as third genders. They are not a homogenous group or community; there are differences in their identities and practices across regions and cultures.

It is also important to note that the modern taxonomical concepts of gender identity and sexual orientation might not be quite discernible among these identities.[143] There may be instances of people who are intersex or who have homosexual orientation being classified into these identities. This can be on account of societal taboos regarding sexual orientation or homosexual relationships.[144] However, predominantly these identities are based on gender dysphoria. Additionally, the Supreme Court has recognised just the above-mentioned identities as belonging to third gender, thus providing legal backing to only their gender identity.[145]

In order to understand the application of personal laws to this sub-set of the transgender community we need to understand the identities *a priori*. Hence, an analysis of the recognised identities is in order.

Hijras: They are the largest and most organised community among the third gender. It is composed of biological males who over the course of time reject their masculine identity in favour of a more feminine one. They identify themselves as "neither male nor female."[146] Most

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[143] Evan B. Towle & Lynn Marie Morgan, *Romancing the Transgender Native: Rethinking the Use of the "Third Gender" Concept*, 8 GLQ: A Journal of Lesbian and Gay Studies 469 (2002).
[144] *Id.*
[145] NALSA v. UOI, *supra* note 127, at ¶81.
[146] *Id.*

transgender people who choose to identify as third genders, generally, are ostracised by their families and community. As a result, they are left with just one resort to find solace, i.e., a community of similar people who too have been ostracised and come from the same background that they do.[147]

A transgender person belonging to any religious denomination can be associated with the Hijra identity. Mostly, the community as a whole worship a deity called Bahuchara Mata. Yet, they don't convert from their original religion. Thus, a Mohammedan joining the transgender community though may worship Bahuchara Mata, it is no less a follower of Islam vis-à-vis other men or women. This is evident by the fact that at the time of death the crematorium or burial takes place according to the person's religious denomination.[148]

Hijras are known by various denominations in different parts of the country. They are referred to as 'Aravanis' and 'Thirunagis' in Tamil Nadu.[149]

Eunuchs: Being a eunuch is not a question of gender identity; however, the Court has still classified them as third gender. Eunuchs are generally intersex individuals who have ambiguous genitals.[150]

Kothi: They are a heterogeneous group of people who are identified as male according to their assigned sex, but show varying degrees of

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147 Vaishali Raode, *Lakshmi's Story*, WORDS WITHOUT BORDERS (June, 2013) https://www.wordswithoutborders.org/article/lakshmis-story.
148 *Id.*
149 NALSA v. UOI, *supra* note 127, at ¶14.
150 NALSA v. UOI, *supra* note 127, at ¶44.

femininity. This category also slips mostly into being one based on sexuality rather than on gender, as most Kothis are bisexual or homosexual males. They show feminine characteristics in sexual relationships, to fulfil their desire of penetration.[151]

Jogas/Jogti Hijras: They are a unique community of transgenders formed on the basis of a long standing superstition. As per the superstition, male to female transgenders are believed to be possessed by the Goddess Yellamma or Renuka. Thus, they are estranged from their family and are supposed to serve Goddess Renuka throughout their life.[152] They enjoy a great amount of respect in the society. Majority of their religious denomination is Hindu. Their situation is very similar to devadasis in Maharasthra.

Shiva-Shakthis: Analogous to Jogas/Jogti Hijras, Shiva-Shaktis are male to female transgenders and therefore are married to the sword of Shiva, a representation of masculine power.[153] They belong to the Hindu religion and are unique to the states of Andhra Pradesh and Telangana.

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[151] G. Reddy & S. Nanda, *Hijras: An "Alternative Sex/Gender in India,* GENDER IN CROSS-CULTURAL PERSPECTIVE, 275-282.
[152] Makepeace Sitlhou, *Jogappas, the Men Who Marry a Goddess to Become Women,* THE WIRE, (Dec. 1, 2016) https://thewire.in/83643/jogappas-goddess-gender/.
[153] NALSA v. UOI, *supra* note 127, at ¶ 44.

III. ANALYSIS OF APPLICABILITY OF MARRIAGE & ADOPTION LAWS

The Supreme Court in *NALSA* has recognized the right to a 'self-perceived gender identity' as a fundamental right under right to life.[154] However, even after the recognition of their right to identity, there is a considerable amount of ambiguity regarding the applicability of personal laws to transgenders.

In this section, the position of transgenders is analysed with respect to laws relating to marriage and adoption under Hindu Law, Mohammedan Law (since the majority belongs to these two denominations) and secular law. The secular law for the purposes of this paper constitutes all the personal laws which can be applicable on the parties if they choose to opt out of their religious laws – viz., Special Marriages Act, 1954 for marriage and Juvenile Justice Act, 2000 for adoption.

A. APPLICABILITY OF MARITAL LAWS

i. Transsexuals:

Post *NALSA*, a person after undergoing a sex reassignment surgery can get their gender marker changed in all of the official documents and can be officially recognised as male or female. The process involves signing an affidavit swearing a change in the gender identity. It has to be signed and satisfied before a judicial magistrate, which is generally hassle-free if medical records indicating SRS are shown,

[154] NALSA v. UOI, *supra* note 127, at ¶ 121.

after which it is to be notified in two newspapers.[155] Consequently, no one can refuse to alter any or all of the documents.

Applicability of Hindu Marriage Act

Section 5 of this Act prescribes the essentials of a Hindu marriage. As per this section, two Hindus, one of whom can be identified as bride and other the bridegroom, can solemnize a marriage, unless it is barred by subsection (iii), (iv), and (v) of the section.[156] Therefore, transsexuals who have got their sex reassigned in all of their official documents and can legally identify themselves to be female or male, i.e., bride or bridegroom, can get their marriage legally recognised. Such a marriage is also not a subject matter of challenge by a third person , since a petition for nullity of marriage or for divorce can be brought only by the parties to the marriage.[157]

Validity of Marriage under Mohammedan Law

The contract of Marriage under Mohammedan Law can be entered into when there is an offer on the part of one party, acceptance on the part of other, and the same is done in the presence of sufficient witnesses.[158] Opposite sexes of the contracting parties is also a prerequisite for the marital contract.[159] Therefore, so long as a Muslim transsexual is

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[155] NeeNee, *How to change the gender marker and name*, Transgender India, June 23, 2016 www. transgenderindia.com/change-gender-marker-and-name/.
[156] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (India) §5 [hereinafter The Hindu Marriage Act].
[157] *Id.* at §11, §13, and §5.
[158] A.A FAYZEE, OUTLINES OF MOHAMMEDAN LAW 11.8 (5th ed., 2009) [hereinafter A.A Fayzee].
[159] *Id.*

entering into a heterosexual relationship of marriage, their marriage could be recognised and accepted as a valid Muslim marriage.

However, it can be contested that marriage under Mohammedan Law is defined to be a contract which has the procreation and the legalising of children as its object.[160] However, for people who have been operated via SRS, it involves the artificial creation of genitalia of the reassigned sex. As a result, there is no reproductive capacity on the part of the transsexual person contracting marriage. Therefore, on a primary requirement that object of such a marriage can never be procreation, Mohammedan Law does not provide for marriage among people who have undergone SRS.

Therefore, such a deduction leaves the status of marriage of transsexuals ambiguous. It could be argued that the term procreation be given a liberal interpretation and thus, transsexuals must be included as they can procreate via surrogacy. However, surrogacy via IVF is not possible for a transsexual, while traditional surrogacy is prohibited under Mohammedan Law.[161]

Despite all of this, there could still be a presumption in the favour of the validity of marriage by ignoring the second position that relates to procreation as an object of marriage. This can be done on account of the fact that the object of a contract is not an essential precondition and

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[160] M. MULLA, PRINCIPLES OF MOHAMMEDAN LAW 250 (21st ed., 1990) 250 [hereinafter Mulla].

[161] Suketu V. Shah, *Issues Of Surrogacy In India, 2* INTERNATIONAL JOURNAL OF CULTURE AND HISTORY 173, 173-177 (2016).

hence, they cannot be equated. Thus, the marriage must be recognised, even though it doesn't serve the object enshrined for it.

Registration under Special Marriage Act

Section 4 of this Act prescribes that any male above 21 years of age and any female above 18 years of age may solemnize marriage, unless it is prohibited by sub-section (d).[162] Thus, a transsexual person's marriage with someone from the opposite gender can be registered under this Act, as it is very similar to Hindu Marriage Act.

ii.**The Third Gender**

The analysis pertains to those who have got their gender legally recognised as 'third gender/other.' For transgenders who have maintained their legal status the same as their assigned sex can marry someone from the opposite sex (opposite to their assigned sex) and get the marriage validated under any of the personal laws.

Interestingly, the identities that were discussed, that come under the umbrella of third gender, do not all intend on marriage. Instead, some identities like Jogas/ Jogti Hijras, Shiva-Shaktis etc. are married to their Gods under long-standing superstitions. Thus, it is in the context of Hijras that this analysis may take place, since they have tried to get their marriage recognised in the contemporary times.

Applicability of Hindu Marriage Act

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[162] The Special Marriage Act, 1954, No.43, Acts of Parliament, 1954 (India), §4. [hereinafter The Special Marriage Act]

As per Section 5 of this Act, only a marriage of a bride and a bridegroom is valid and recognised.[163] The terms 'bride' and 'bridegroom' are gendered terms. It necessarily translates to 'woman' and 'man' on their wedding day. Thus, it provides no recognition to marriages for the third gender.

Validity under Mohammedan Law

The essentials required to be fulfilled under Mohammedan Law for a civil contract of marriage just require parties to be of opposite sexes, and not man and woman.[164] Hence, so long as the party belonging to the third gender marries someone from the opposite sex, the marriage is valid. Therefore, two parties who belong to third gender, but have different assigned sexes could marry under Mohammedan Law. Similarly, a third gender person could marry a cis-gender person so long as they are a heterosexual couple. This has been derived specifically from the textual interpretation of Mohammedan Law in India, as no reported fact-situation depicting conflicts in such an interpretation exist so far.[165]

Registration under Special Marriage Act

Similar to the Hindu Marriage Act, Section 4 of this Act requires a 'male' and a 'female' among other conditions to register a marriage.[166] Therefore, there is no scope for registration of a marriage for 'third gender' under the Special Marriage Act.

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[163] The Hindu Marriage Act, s*upra* note 156, at §5.
[164] Mulla, *supra* note 160.
[165] A.A. Fayzee, *supra* note 158.
[166] The Special Marriage Act*, supra* note 162, at §4.

B. APPLICABILITY OF ADOPTION LAWS

Adoption is one of the forms of relationship that is recognised under the umbrella of family, and thus makes it part of the fundamental right to have a family. Under personal laws, only Hindus were allowed to act as legal parents for the adopted child. No other personal law in India recognised such a right. However, the Juvenile Justice (Care & Protection of Child) Act, 2000, acting as a secular legislation has provided people from any religious denomination to adopt a child. For analysis of the position of transgenders, both the Hindu Act and the secular law is imperative:

i. ***Transsexuals:***

Validity of Adoption under Hindu Adoptions and Maintenance Act ["HAMA"]

Hindu Transsexuals after getting their sex reassigned can validly adopt a child after fulfilling the conditions under Section 7 in case of males and Section 8 in case of females.[167] There is no formal scrutiny required for adoptions under HAMA, and transsexuals can validly adopt children privately from their parents.[168] However, in case of adoption which doesn't involve their natural guardians, there is higher level of scrutiny where the transsexuals have to prove before the court that they are actually eligible, under Section 7 or Section 8 of the HAMA.[169]

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[167] The Hindu Adoptions and Maintenance Act, 1956, No.78, Acts of Parliament, 1956 (India) at §7, §8.
[168] The Special Marriage Act*, supra* note 162, at §9.
[169] The Special Marriage Act*, supra* note 162, at §9(5).

Validity of Adoptions under Juvenile Justice Act

The Juvenile Justice Act is a secular legislation. Section 41(6) of this Act, is an enabling provision which allows any 'person' to adopt a child. The term 'person' is not gendered. As a result, both male or female transsexuals can adopt a child under this Act. Hence, apart from enabling people from all religious communities to adopt a child, it also allows adoption to happen irrespective of the gender of the parent.

ii. ***The Third Gender:***

As discussed previously, there are various identities under the third gender umbrella. Of them, the most prominent and largest is the Hijra community. Hijras, as an organised community, function by way of adoptions. A person who decides to identify himself as Hijra undergoes a formal christening ceremony called reet. As a result, they become a family in themselves, by virtue of the guru being their mother and the disciples being her children. The tendency of adoptions in other communities under third gender is vastly unknown and undocumented. Nevertheless, an analysis of the provisions that are relevant for adoption by the third gender is still imperative:

Validity of Adoptions under Hindu Adoptions and Maintenance Act ["HAMA"]

The HAMA under Sections 7 & 8 recognises a valid adoption only if it is done by a male or female, and thus, third genders are out of the

scope of application of this Act.[170] Also, by virtue of Sections 4 & 5 of the said Act, adoptions by virtue of the custom of *reet* in Hijras have been delegitimized, by providing overriding powers to the provisions of the Act over customs.[171]

Validity of Adoptions under Juvenile Justice Act

Section 41(6) of this Act is a path breaking reform that provides the right to any 'person' to adopt a child, and not a 'male' or 'female.'[172] Additionally, it also confers the right on the third gender couple to raise a child (if they are recognised as a couple) since they can be classified as a childless couple under the provision.

III. POLICY SUGGESTION & THE WAY FORWARD

The Supreme Court in *Vishaka* v. *State of Rajasthan,*[173] observed that international conventions or norms could be relied upon for construing the domestic law wherever there is a void in law. However, the same cannot be in violation of or be inconsistent with the law of the land.[174] In *NALSA*, the Supreme Court relied upon this to use Yogyakarta Principles in order to ensure the right of self-perceived gender identity for the individuals.[175]

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[170] The Special Marriage Act*, supra* note 162, at §7, §8.
[171] *Id.* at §4, §5.
[172] *Id.* at §41(6).
[173] Vishaka v. State of Rajasthan, (1997) 6 SCC 241 [hereinafter Vishaka v. State of Rajasthan].
[174] *Id.* ¶14.
[175] NALSA v. UOI, *supra* note 127, at ¶22.

The same Yogyakarta Principles prescribe in principle number 24 that everyone has a right to found a family irrespective of the sexual orientation or gender identity. However, the only obstacle that stands in the way of co-opting these principles is Section 377 of the Indian Penal Code (IPC) which would not allow the Court to use these principles because they are in conflict with the domestic law.

Interestingly, an interpretation can be brought, as a solution, till the time section 377 is not decriminalised. This interpretation involves giving limited application to Principle 24 of the Yogyakarta Principles, i.e., by restricting it to gender identity and not extending it to sexual orientation. Understandably, it may not open up the route to marital recognition in some cases. However, it will surely open up the possibilities of adoption for this community.

IV. CONCLUSION

The Supreme Court in *NALSA* v. *Union of India*, recognized the trauma and oppression faced by the transgender community in India. As a result, it laid down that the transgender community must be treated with dignity. The Court recognized that the expression of one's own gender identity is an integral part of one's dignity. Therefore, it held that expression of one's gender identity is a vital part of their fundamental right to life and freedom of expression.

However, the Court fell short in elevating the rights of the transgender community to be at par with all the citizens. The Court

remarkably failed to ensure the protection of Article 14 to the transgender community. Simply put, the Court didn't recognize the principle of 'equality before law' and 'equal protection of law' to be applicable to the transgender community vis-à-vis other citizens. This is evident as the fundamental right to have a family is not ensured to the transgender community on account of the gendered nature of the personal laws.

Arguably, it could be said that on account of *State of Bombay* v. *Narasu Appa Mali*, the personal laws are not subject to scrutiny under Part III of the Constitution of India. And therefore, the Court couldn't have done much. However, it is pertinent to note that the *Narasu* judgment limited the judicial review of personal laws to only those laws that owe their origin to scriptures. As a result, the Court could have very well interpreted the gendered terms in the secular statutes to make them equally applicable to transgender persons vis-à-vis other citizens.

Yet, the Court left it for the legislature to ensure that equal rights are ensured to the transgender community. The legislature, soon after the judgment, came up with a Transgender Persons (Protection of Rights) Bill, 2016. However, the Bill lacked any provisions that would confer any rights to the transgender persons, relating to starting a family. Moreover, the Bill too had a number of problematic provisions which would even reduce the rights that were granted to them by the Court in *NALSA*.

As a result, it becomes clear that the legislature cannot be the saviour that ensures rights to the community. This is on account of the fact that there will always be a lack of political will in the legislature to

ensure equal rights to the community. Therefore, the reform that ensures equality before law, and by extension 'fundamental right to have a family' to the transgender community, has to come from the Judiciary. Understandably, the curative petition regarding the decriminalisation of S. 377 of the IPC, 1860 is being heard by the Court. And if it is decriminalised, it would be a harbinger of rights to the community. However, that seems to be a distant goal currently.

Therefore, given the current regime, the suggestion to give limited application to Yogyakarta Principles is a feasible one. It ensures the transgender persons to at least have minimum rights that can be provided to the community by legitimising adoption of children for them. It is time that an appropriate order be passed in accordance with the Yogyakarta Principles in order to alleviate this community and emancipate them from the regime that has restricted their rights for more than a 100 years.

Saurav Agarwala, *Anti-Profiteering Provision: A Toothless Provision or a Dangerous Weapon*, 5(1) NLUJ Law Review 76 (2018)

ANTI-PROFITEERING PROVISION: A TOOTHLESS PROVISION OR A DANGEROUS WEAPON

SAURAV AGARWALA*

ABSTRACT

The implementation of the biggest tax reform in India created major controversies and positives in the corporate world, resulting in ignorance to one of the major provisions relating to "Anti-Profiteering Measure." This provision is embedded in Section 171 of the Central Goods and Services Tax Act 2017, and can be presumed to be both interesting as well as ambiguous at the same time. With the National Anti-Profiteering Authority passing the third order, it is thought-provoking to see how this "socialistic" aspect of the Goods and Service Tax Acts will work out in the future. This comment intends to first explain the nature of this provision and then sheds light on why the author believes this provision to be a dangerous weapon/toothless provision.

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I. INTRODUCTION

With the implementation of the Goods and Services Tax Acts (Acts), anti-profiteering provision has also been affected. This provision is intended to prevent inflation in the wake of this gigantic tax reform. The experiences of various countries show that a period of inflation shortly follows the implementation of a single tax system. Learning from these incidents, the legislature thought it wise to provide for a safeguard in the Acts itself.[176] Similar measures have also been taken up by countries like Australia and Malaysia in the past.[177] It is also stimulating to note that according to a recent report, there have been no signs of inflation in India after the implementation of Goods and Services Tax (GST), due to reasons that include the presence of anti-profiteering clause.[178]

Regardless, this precautionary section provides that the supplier of a good has to reduce the prices in a commensurate manner, in case there is:

1) A reduction in the rate of tax on any supply of goods or;
2) A benefit of input tax credit has accrued to the supplier.

Illustration – The cost of a particular good was Rs.100, the tax charged on it was Rs.20 and it was sold for Rs.120; then if under the new

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[176] A. M. G. Gelardi, *Value Added Tax and Inflation: A Graphical and Statistical Analysis*, 6 ASIAN JOURNAL OF FINANCE & ACCOUNTING 1 (2014).
[177] The Competition and Consumer Act, 2010 Part VIIIA (Australia); The Price Control and Anti Profiteering Act, (2011) (Malaysia).
[178] Atul Gupta, *Why was there no inflationary impact of GST?*, FINANCIAL EXPRESS (June 8, 2018), https://www.financialexpress.com/opinion/why-was-there-no-inflationary-impact-of-gst/1196472/.

regime the tax has been decreased to Rs.18, then the good has to sell for Rs.118 and not Rs.120 anymore.

Similarly, if a particular raw material costs Rs.20 (including Rs.2 as tax) to the manufacturer and is used to produce a good which was sold at Rs.120 (including Rs.20 as tax), if under the new regime he could get input tax credit on that raw material, then the manufacturer has to decrease the rate of the good by Rs.2. Hence, the new price of the product would be Rs.118.

Hence, this section provides that if an assessee is getting a benefit due to reduced tax level or a higher level of input credit, he/she necessarily has to reduce the price of the good/service for the consumer. Even though anti-profiteering seems to be toothless, the same is enormously vague at certain parts which can make it a dangerous weapon. The author has discussed the same herein under:

II. PREVIOUS TAXES, CESS AND ANTI-PROFITEERING

The first condition under the section provides that any reduction in tax should be carried forward to the consumer such that the prices of the product should be decreased commensurately. Hence, it becomes important to understand the meaning and ambit of the term 'tax'. 'Tax' has not been defined in the Acts itself; however, it can be concluded by general and purposive interpretation, that this term would include all such taxes that are/were levied on a particular good/service. Hence, the taxes that need to be compared with the present GST rate would be a sum of

all the taxes that were applicable in the pre-GST scenario. However, whether cess would be included within the word "previous taxes" for the purpose of anti-profiteering or not, is something which is ambiguous under the Acts. At the time of writing this comment, three orders had been passed by the National Anti-Profiteering Authority (NAA). Two of these orders have considered cess while calculating the pre-GST tax incidence.[179] While the issue may seem settled, the author doubts the same as these procedures have been adopted at the whims and fancies of the NAA. At present, the legislature has asked the NAA to determine the procedure to assess whether there has been a "commensurate reduction of prices."[180] It is interesting to note that in both the cases, the anti-profiteering margin claimed was around 1-2%. This shows that minute differences in the tax incidences applied in the form of cess can become really important.

III. LEGITIMATE PROFITS AND ANTI PROFITEERING

As a necessary conclusion to the above explanation, even if a company wants to increase its profits in a *bona fide* manner it would not be able to do so, since the same could be interpreted as anti-profiteering. Though the idea of restricting profits in such a situation may sound reasonable to some, the problem which arises is the adjudication of the

[179] Kumar Gandharv v. KRBL Ltd., 2018 TaxPub (GST) 0131 (NAPA)[hereinafter Kumar Gandharv v. KRBL Ltd]; Dinesh Mohan Bhardwaj v. Vrandavaneshwree Automotive (P.) Ltd., 2018 TaxPub (GST) 0086 (NAPA)[hereinafter Dinesh M Bhardwaj v. Vrandavaneshwree Automotive (P.) Ltd.].

[180] Gautam Khattar and Nikhil Mendiratta, *GST and Anti-Profiteering Law! Are we complying? Is the Government ready?*, GST CONNECT, Nov. 6, 2017, http://blog.simbizz.in/2017/11/gst-and-anti-profiteering-law-are-we.html.

time frame which could be used as a reference – within which there should be no increase in profits. So, for instance, – suppose an assessee before GST sold its product at a price of Rs.100. Following GST, the tax incidence of the product remained constant and the assessee decided to continue with the same price for the next 3 months. However, in the month of October 2017, the assessee decides to increase the price of the product in order to increase his profits. Now, the question which arises is whether the same can be considered as anti-profiteering. If no, whether an increase in the price in the month of April 2018 would also be considered as anti-profiteering?

In the 'India Gate Rice Order', the Respondent had claimed that the prices were increased partially due to the rise in the prices of paddy crops.[181] The NAA had accepted the contention of the Respondent in the case.[182] However, this points that a rise in prices due to a rise in cost is something which is acceptable under the Acts, the issue as to the increase of price due to an increase in profits is something which still has not come up. In furtherance to this argument, the next question that arises is whether anti-profiteering provision can be considered as a provision violating Article 19 of the Indian Constitution.[183]

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[181] Kumar Gandharv v. KRBL Ltd, *supra* note 179.
[182] *Id.* at 7.
[183] Mrinal Singh, *Comments on the Controversial issues arising under the GST Anti Profiteering Mechanism*, 91 taxmann.com 398 (2018).

IV. CONSTITUTIONAL VALIDITY OF ANTI-PROFITEERING

The Supreme Court of India in a variety of cases has held that economic stability[184] and price fixation[185] are reasonable restrictions to Article 19 of the Indian Constitution. However, the Courts have distinguished between essential commodities and non-essential commodities in such cases and have declared that such prohibitions are only valid for essential commodities.[186] Moreover, the rule that allows the NAA to frame its own procedure for considering whether "commensurate reduction" has been made or not can be considered to be excessive delegation.[187]

The author believes that though the Government has the right to fix the maximum price of an essential good/service in view of the economy of the country, it cannot force a blanket mandate to keep the prices constant for every product as the same would be violative of the freedom of trade and commerce.[188] Hence, as implemented in Malaysia (at a later stage), the Government should apply this principle over only certain essential commodities. Moreover, it is essential that the Parliament in its legislative function decide the procedure for determining whether there has been commensurate reduction in prices or not.

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[184] State of Assam v. Srisitkar Dowerah, AIR 414 (S.C. 1957); Glass Chatons Importers and Users Association v. Union of India, AIR 1514 (S.C. 1961).
[185] ONGC v. Association, N.G.C., Supp. SCC 397 (S.C. 1990).
[186] *Id.*
[187] Shubh Enterprises v. The Union of India and Ors., SCC OnLine 232 (Sikk 2015).
[188] Indraprastha Gas Ltd. v. Petroleum and Natural Gas, 9 SCC 209 (S.C. 2015).

V. BUSINESS VERTICALS AND ANTI-PROFITEERING

Another ambiguous aspect related to anti-profiteering is whether the provision is applicable only to a particular good or can be generally applied over a particular industry. This is doubtful due to the use of the words "*any supply of goods or services*."[189] Most manufacturers that produce a variety of goods in a particular business vertical use common materials, making it difficult for companies to pass on the exact benefit to the consumers, if the same is applied on a particular good. The lack of guidelines and the presence of ambiguity gives the NAA a free hand to analyze it at any level, i.e., individual, vertical, regional etc. Considering that these rules, in general, would involve a lot of litigation,[190] this small ambiguity may also trigger further litigation.

VI. MORE THAN COMMENSURATE INCREASE AND ANTI PROFITEERING

An issue that further arises is whether anti-profiteering measures would be triggered in cases where there has been "more" than a commensurate increase in the price of the good as compared to the increase in the tax under GST. This issue arises because of the fact that the Acts do not define what "*Anti Profiteering*" or "*Profiteering*" is.[191] So, for

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[189] The Central Goods and Services Tax Act, 2017, Gazette of India, pt. II sec. 1 (Apr. 12, 2017).

[190] Anandaday Misshra, *Anti Profiteering Incorporated in Revised Model GST Act, 2016- Its Impact & Litigation*, 75 taxmann.com 295 (2016).

[191] S. Ganesh Aravindh and Shobhana Krishnan, *Anti-profiteering under GST: An interminable inquest?*, 90 taxmann.com 257 (2018).

example, if a particular good was priced in the pre-GST period at Rs.120 (including Rs.20 as tax), then if under GST the rate of tax increases to Rs.22 and then the company increases the price to Rs.125, would the same be considered an anti-profiteering measure? On a literal interpretation, it seems that the provision only forces a company to reduce the price and does not stop a company from increasing the prices which are not commensurate to the increase in the tax. However, this would indeed defeat the scheme of the Acts. Hence, the author believes that such cases would also fall within the ambit of anti-profiteering provisions.

VII. FIGHTING ANTI-PROFITEERING

Though not an ambiguous part of it, the litigation related to anti-profiteering is extensive and burdensome. Under the rules provided, the following people can file a suit for anti-profiteering: (a) *an interested party*, (b) *a Commissioner* and (c) *any other person*.[192] The fact that the locus has been given to "*any other person*" will generate a lot of litigation. It may lead to harassment of Multinational Corporations as complaints can be filed by any person, including its rivals from the same industry.

However, according to the rules, only the "*supplier could be sued*" in case of an anti-profiteering case.[193] So, for example, suppose there is a manufacturer of a particular good who has produced the good without

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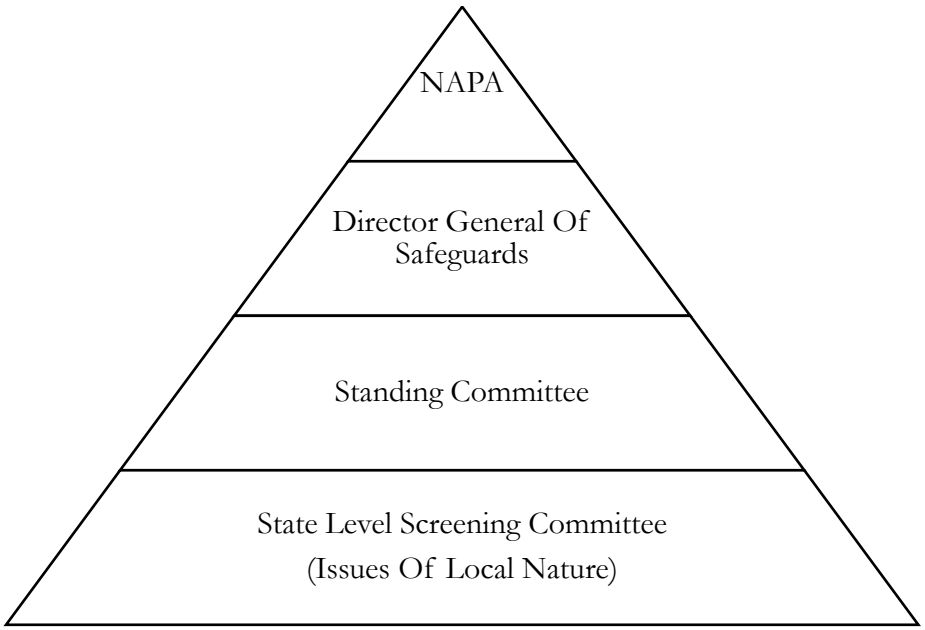
[192] The Central Goods and Services Tax (Second Amendment) Rules, Notification No.10/ 2017, Rule 128 (2017) [hereinafter The Central Goods and Services Tax Rules].
[193] *Id.* at Rule 129(1).

passing the benefit to the recipient. Later, the recipient cannot be sued by a further consumer on the basis that the benefit was also not passed to him. Nevertheless, since the rules provide the locus to "*any other person*," such a consumer can go on to directly sue the main manufacturing company.

Moreover, after the initial stage of filing of an application,[194] adjudication is conducted by 4 different authorities. These can be summarized as:

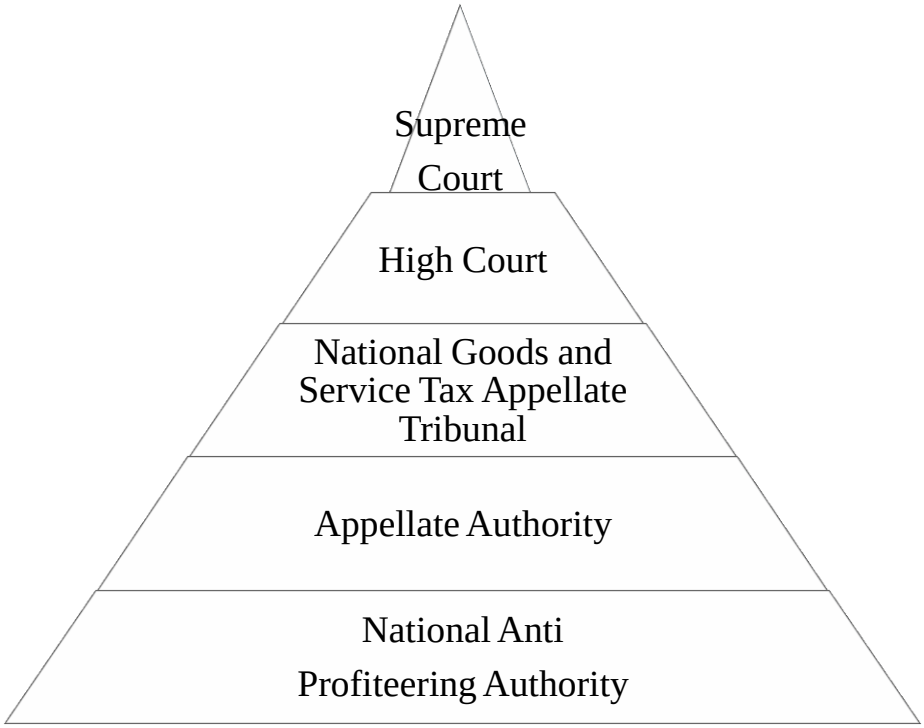


Another ambiguity is in cases involving "*issues of local nature*." In these cases, the application would first be considered by the State Level Screening Committee, who after due perusal of the case may forward the

[194] The Central Goods and Services Tax Rules, *supra* note 192, at Chapter XV (2017).

case to the Standing Committee.[195] It is unclear as to what would fall within the ambit of "*local nature*." On general interpretation it would seem to be areas of goods or services which are very specific to a particular region or area.

The adjudication by NAA can be followed by the following procedure:



Considering the above-mentioned scenario of MNC's being taken to the court of law by any person, this eight-level endless judicial proceedings would add on to the struggles of these MNCs.

[195] The Central Goods and Services Tax Rules, *supra* note 192, at Rule 129(2).

VIII. TOOTHLESS PROVISION

Contrary to all the presumptions to the problems posed by the provision as mentioned above, the anti-profiteering measures can also prove to be completely redundant and difficult to implement. This is primarily because of the lack of guidelines and the authority to interpret according to wishes given to the NAA.[196]

Another reason for this provision to be redundant could be that producers before the rollout of GST have already increased the prices of goods and services and would decrease it again under the new regime. This would completely take away the purpose behind the drafting of this provision. Contrary to this, the powers given to the Authority in case of an anti-profiteering case is wide including the power to "*cancel the registration*" of the companies which involve themselves in anti-profiteering mechanisms.[197]

IX. SUGGESTIONS AND RECOMMENDATIONS

It is also important to note that the anti-profiteering measure implemented in Malaysia after the GST roll out proved out to be a failure and had to be finally abandoned. However, this does not mean that the fears of the Government are unworthy and should not be looked upon. It is true that companies may use the garb of GST to increase their profits which are not legitimate and hence, must be regulated. However, creation

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[196] Radhika Singhal, *Anti-Profiteering- A Concept in GST Law*, 91 taxmann.com 401 (2018).
[197] PR Raamaanathan, *Anti-Profiteering Under GST*, 89 taxmann.com 35 (2018).

of an inexperienced authority without guidelines as regards determination of illegal profits, may just boomerang the Government.

The author suggests that the Competition Commission of India (also suggested by various lawyers and market experts),[198] should also be involved in this and help in the form of a formulation of procedures that can be undertaken. The Competition Commission has experience of dealing with unfair practices by producers and could indeed help in forming the policies.

The problems related to "anti-profiteering" relate not only to the implementation but are also relates to the general application of the provisions. The author suggests that to prevent the misuse of this highly litigious provision, a bare minimum deposit should be provided for, which could be refunded in case of a successful application. The Honda Case and the India Gate Basmati Rice Case are best pieces of evidences to such fears.[199] Further, the authority should be empowered to take up "*suo moto"* cases, since most of the cases would be hyper-technical and a layman would not be able to appreciate the collection of illegal profits.

In one of the cases initiated by the Director General of Safeguards, involved Hindustan Unilever Limited (HUL) was accused of not forwarding the benefits across its various segments of goods. HUL, in order to prevent its reputation decided to pay off the illegal profit and

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198 Gaurav S. Ghosh, *Using anti-profiteering rules under the GST*, LIVEMINT (September 7, 2017), https://www.livemint.com/Opinion/cZtYybHnqWCNmCrHPn2 v6J/Using-anti profiteering-rules-under-the-GST.html.

199 Kumar Gandharv v. KRBL Ltd *supra* note 179; Dinesh M Bhardwaj v. Vrandavaneshwree Automotive (P.) Ltd., *supra* note 6.

wanted to get rid of this matter at an initial phase itself.[200] Though the Government did not accept this pay-off due to technical reasons, this shows the huge impact that such a measure can cause to the reputation of the company. Thus, as a deterrent it is suggested that the NAA should name the assessees involved in anti-profiteering and publicize the same.

X. CONCLUSION

Presently, the anti-profiteering law does not provide for a method to determine whether there has been any anti-profiteering or not. The law has given the power to NAA to derive a procedure for the determination. The same has been excessively delegated due to lack of guidance within the Acts. Regardless, the NAA has presently followed the Net Dollar Margin Rule (used by Australia),[201] to determine the anti-profiteering value of the entity. However, the same has also not been crystalized. Moreover, the ambiguity remains as regards the other contentions are concerned.

As mentioned above, the anti-profiteering measures in Malaysia had to be abandoned as the same came out to be counterproductive. These provisions were then restricted to a particular set of goods/services which included household goods and certain other items. Another reason for the abandonment of these rules was that it was too detailed and was difficult to implement. On the other hand, the anti-profiteering measures

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[200] Nitin Agnihotri, *Anti-Profiteering under GST: Provisions, Validity, Issues & Challenges*, 93 taxmann.com 90 (2018).

[201] Shubhang Setlur, *Behind GST's Anti-Profiteering Provisions, a Legacy of Indian Socialism*, THE WIRE (September 7, 2017), https://thewire.in/business/gsts-anti-profiteering-provisions-lndian-socialism.

in Australia were rigorously applied by the Australian Competition and Consumer Commission from a year ahead of the roll out of the corresponding Goods and Services Tax Act. The Indian position on anti-profiteering is not similar to the one in Malaysia, wherein detailed provisions have been laid down. Also, the condition is unlike Australia wherein the Government has been very proactive with the implementation of "anti-profiteering measures." Thus, it is safe to say that the provisions relating to anti profiteering have been fairly ambiguous and lacking in the Indian context. Due to the uncertainty of these provisions, it can indeed be concluded that the provisions may either prove to be "*toothless*" or a "*dangerous weapon*."

Subhojit Das, *Humanizing the Ganga & Yamuna: A boon or bane?* 5(1) NLUJ Law Review 91 (2018)

HUMANIZING THE GANGA & YAMUNA: A BOON OR BANE?

-SUBHOJIT DAS[*]

ABSTRACT

Soon after river Whanganui of New Zealand was given the status of a living entity, India also had its share in the feat when the Uttarakhand High Court on 20th March, 2017 declared that the rivers Ganga and Yamuna be given the status of a legal entity. The primary objective of this paper is to critically examine the decision from various angles and contend that albeit being seemingly environmental-friendly, it needs to answer a plethora of difficult issues that would arise from its implementation, both procedurally and substantively. The author apart from raising legal and beyond-legal approaches, also emphasizes on the key contradictions between growth-led development and that of ecological sustainability from a human's perspective and contends that they need to be resolved or else the HC decision will be rendered meaningless. Few of the issues would involve the Ganga's transboundary nature, the consequent impossibility to interlink it to other rivers and the effect of conferring legal personality rights on a river. Lastly, the author contends that one needs to view the decision as an opportunity for man to revisit his relationship with nature and press for a deeper dialogue and, if necessary, legislation by the Centre.

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I. INTRODUCTION

For the first time in India, on 20th March, 2017, the Uttarakhand High Court **["UHC"]** in the case of *Mohd. Salim* v. *State of Uttarakhand & Ors.*,[202] **["Mohd. Salim"]** held that the Ganga and its longest tributary, Yamuna, along with all their tributaries and streams are to be declared as juristic/living entities having the status of a legal person read with Articles 48-A and 51A(g) of the Constitution with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve the two rivers.[203] A decision welcomed by certain environmentalists seemed to bear quite the significance as it purports the notion that polluting or damaging the rivers will be legally equivalent to harming a person. However, this ruling has also thrown up a few difficult issues, which deserve immediate attention.

On 5th December 2016, the UHC had directed the removal of illegal constructions, encroachments and mining operations on government land in the Ganga's riverbed and banned the same in its highest floodplain.[204] The Court's decision primarily revolved around the extant asymmetric nature of Indian federalism with respect to water rights.[205] On 20th March 2017, after the encroachers failed to evict the land despite mandatory directions, the Court addressed the critical situation

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[202] Mohd. Salim v. State of Uttarakhand & Ors. Writ Petition (PIL) No.126 of 2014 (20.03.2017), *available at*: http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014.pdf [hereinafter M. Salim v. State of Uttarakhand & Ors].

[203] *Id.* at ¶ 18.

[204] Mohd. Salim v. State of Uttarakhand & Ors. Writ Petition (PIL) No.126 of 2014 (Dated: 05.12.2016), p. 20, *available at* https://www.elaw.org/system/files/attachments/publicresource/in_Salim__decision_dec2016.pdf.

[205] *Id.* at ¶ 19.

with regard to the preservation and conservation of Ganga and Yamuna, and accordingly declared the two rivers as legal entities. However, two months later, the Centre approached the Supreme Court due to certain administrative issues relating to the implementation of the order.[206] The State of Uttarakhand pleaded that since both the rivers flowed across multiple states, the Centre would have the exclusive right to take decisions and not the concerned state government. Consequently, the Supreme Court on 7th July, 2017 stayed the UHC's order.[207] Currently, the legal status of the rivers is in limbo, pending the outcome of the appeal.

II. DECONSTRUCTING MOHD. SALIM V. STATE OF UTTARAKHAND

At the very outset, it becomes imperative to take note of the UHC's heavy emphasis on Ganga & Yamuna's crucial role in Hinduism. It drew on Hindu spirituality and religious faith and stated that the two rivers *"support and assist both the life and natural resources and health and well-being of the entire community."* It also observed that the two rivers are *"central to the existence of half of the Indian population and their health and well-being."*[208] Albeit factually unquestionable, this seemingly singular focus on Hinduism bears the potency to be abused by right wing nationalists for their own cynical

[206] PTI, *Centre approaches SC over Uttarakhand HC order on Ganga*, INDIAN EXPRESS (May 21, 2017) at A1, http://indianexpress.com/article/india/centre-approaches-sc-over-uttarakhand-hc-order-on-ganga-4666732/.
[207] Apporva Madhani, *SC Stays Uttarakhand HC's Order Declaring Ganga And Yamuna Rivers As Living Entities*, LiveLaw, (July 8, 2017) http://www.livelaw.in/sc-stays-uttarakhand-hcs-order-declaring-ganga-yamuna-rivers-living-legal-entities-read-order/.
[208] M. Salim v. State of Uttarakhand & Ors, *supra* note 202, at ¶ 17.

agendas.[209] For instance in 2009, the anti-Tehri dam movement was used in a similar fashion by the Vishwa Hindu Parishad where the Ganga was described as India's 'National River' and the 'international symbol of the nation's identity.'[210] Understandably, the intention of the UHC was to uphold ecological protection and ensure conservation of the rivers in question. However, this has an equally worrisome flip side to it. Associating the Hindu faith with the national identity bears the potential to subjugate and marginalize various religious minorities in the country.[211]

The UHC also traced the Supreme Court jurisprudence on "personhood" with regard to Hindu deities, temple endowments and trusts. It cited the cases of *Yogendra Nath Naskar* v. *Commission of Income Tax*[212] and *Ram Jankijee Deities* v. *State of Bihar*,[213] wherein it was held that a Hindu idol is a juristic entity which is capable of holding property and get taxed as well, stated that *"to protect the recognition and the faith of society, rivers Ganga and Yamuna are required to be declared as legal persons/living persons."* Indian jurisprudence over the course of the last few decades has equated God to a legal entity who is represented by the administrative staff of the temple as they have corresponding rights and obligations, e.g., cash given to religious trusts. However, with regard to the rivers, the Court conceded

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[209] Ashish Kothari & Shrishtee Bajpai, *Rivers and Human Rights: We are the River, the River is Us?*, ECONOMIC AND POLITICAL WEEKLY (Aug 31, 2017) http://www.epw.in/engage/article/we-are-river-river-us [hereinafter Kothari & Bajpai on Rivers and Human Rights].
[210] Mukul Sharma, *Nature and Nationalism*, THE FRONTLINE (Feb. 3, 2016) http://www.frontline.in/static/html/fl1803/18030940.htm.
[211] Vrinda Narain, *Indian Court Recognizes Rivers as Legal Entities*, INT'L J. CONST. L. BLOG (June 13, 2017) http://www.iconnectblog.com/2017/06/indian-court-recognizes-rivers-as-legal-entities/.
[212] Yogendra Nath Naskar v. Commission of Income Tax, (1969) 1 S.C.C. 555.
[213] Ram Jankijee Deities v. State of Bihar, (1999) 5 S.C.C. 50.

the *parens patrie* powers to state delegates, with the Director of NAMAMI Ganga, the Chief Secretary of the State of Uttarakhand and the Advocate General of the State of Uttarakhand being declared persons *in loco parentis* as the human face to secure, conserve and save rivers Ganga and Yamuna and their tributaries.

The said decision lacks more than it possesses. The primary focus of this ruling was on the nature of Indian federalism and the water management duties of federal and state governments and not on the rights of nature, which is discussed here in this paper.

A. LOOKING BEYOND BORDERLINES

The UHC cited the example of the Whanganui River in New Zealand, revered by the indigenous Māori people, which was declared a living entity with full legal rights by the New Zealand government on March 15, 2017.[214] The local Maori Iwi (tribe) and Hapu (sub-tribes) hold the river sacred and consider the entire river system, including *"all its physical and metaphysical elements from the mountains to the sea"* as a living being. It is worthwhile to mention that prior to New Zealand, Ecuador became the first country to recognize the *"Rights of Nature"* in its Constitution in 2008. Rather than treating it as a property, and hence right-less, their constitution treats nature as having the '*right to exist, persist, maintain and regenerate its vital cycles.*'[215] Similarly, in 2010, Bolivia created broad legal

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[214] TE AWA TUPUA (WHANGANUI RIVER CLAIMS SETTLEMENT) ACT 2017, Public Act 2017 No. 7, Date of assent March 20, 2017, *available at:* http://www.legislation.govt.nz/act/public/2017/0007/latest/whole.html.

[215] 'Ecuador Adopts Rights of Nature in Constitution', *available at*: http://therightsofnature.org/ecuador-rights/.

rights for nature when it passed the "*Law of Mother Earth*."[216] The objective was to reduce the risks posed by climate change through several lines of action like a system of integral planning, adoption of risk management of disasters etc. In 2012, Bolivia expanded the 2010 law naming it *'Framework Law on Mother Earth and Integral Development on Living Well',* recognizing Mother Earth as a 'living dynamic system' and granted it legal rights comparable to human rights.[217]

Nonetheless, the situations in Ecuador and Bolivia are slightly different from the case in New Zealand. In Ecuador, the issue was related to the rights of nature, and not as an equation of the river with living entities in the same way as humans. In Bolivia, the legislation was to epitomize the dedication to sustainable development.[218] On the other hand, in New Zealand, the local Maori culture and its beliefs about the river were key in the decision of their parliament to grant it rights. It was the culmination of more than a century worth of struggle by the Maori people of the country's North Island.[219] In 1840, the Treaty of Waitangi was signed between various Maori chiefs and the British crown, which declared British sovereignty and defined Maori's land ownership. Soon

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216 '*Law of Mother Earth – The Rights of Our Planet: A Vision from Bolivia',* World Future Fund, *available at:* http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.ht ml.

217 Tamlyn Jayatilaka, *Rights of Nature: The Right Approach to Environmental Standing in the EU?* 10 (2016-17), *available at*: https://lib.ugent.be/fulltxt/RUG01/ 002/349/652/RUG01-002349 652_2017_0001_A C.pdf.

218 Anna Hernandez, *Defending Mother Earth in Bolivia*, CULTURAL SURVIVAL (June 19, 2016) https://www.culturalsurvival.org/news/defending-mother-earth-bolivia.

219 Vakasha Sachdev, '*Ganga a Living Entity': What Does That Mean for the River?,* THE QUINT (March 20, 2017) https://www.thequint.com/news/environment/ ganga-is-now-a-living-entity-what-does-it-mean-for-the-river-uttarakhand-high-court-order [hereinafter Sachdev on Ganga].

enough, a few years later, a substantial portion of the tribe was dispersed along the Whanganui River and its tributaries as many of them felt that the Crown failed to fulfil its obligations under the Treaty.[220] The tribes of Whanganui Iwi became less involved in the management of the river and its ownership over the riverbeds were subsumed by litigation before courts. In 1962, the Court of Appeal dismissed their hitherto customary ownership over the riverbeds. In 2014, a settlement was reached which granted Whanganui its own legal identity and consequent rights and duties until 2017 when this was turned into the 'Te Awa Tupua Act', which allowed representation in court proceedings,[221] i.e., one from the crown and another from the Whanganui tribe.[222]

There is an essential distinction between New Zealand's acknowledgment of Whanganui as a living entity and that of the UHC concurring the status to two of India's prominent rivers. Unlike the backdrop to New Zealand's enactment, the Ganga & Yamuna are widely used as a part of the irrigation system with vast dams and numerous tube-wells. The former had two designated guardians – one from the Crown and another from the Whanganui Iwi tribe itself, whereas in India, the three custodians are government authorities. The absence of local representatives as custodians of rivers poses quite a challenge. Making the government authorities the sole custodians of the rivers was a major slip-

[220] Lidia Cano Pecharroman I, *Rights of Nature: Rivers That Can Stand in Cour*', 7 (Feb 14, 2018), *available at:* http://www.mdpi.com/2079-9276/7/1/13/pdf.
[221] Williams, J. *Te Awa Tupua. Kokiri: Raumati*, 2016, 28–31, *available at:* https://www.tpk.govt.nz/en/mo-te-puni-kokiri/kokiri-magazine/kokiri-33-2016/te-awa-tupua.
[222] Davison, I., *Whanganui River Given Status of a Person under Unique Treaty of Waitang Settlement*, NEW ZEALAND HERALD (March 15, 2017) http://www. nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858.

up as they themselves were one of the major polluters. It failed to consider the rivers as the commons, which needs to be viewed as an integrated whole and not owned and managed in pieces by various agencies of the government. Since we already have various environmental agencies responsible for the protection of public lands, it is unclear how appointing more guardians will bring about a change in perspective in this regard.[223] Furthermore, it also failed to establish any form of democratic representation and participation of the communities whose lives are inextricably linked with the sustenance of these rivers.[224]

B. FOOD FOR THOUGHT?

According to statistics, more than 3,000 million litres of untreated sewage are pumped into the Ganga on a daily basis from towns along the river.[225] At the same time, this decision brings up issues about the repercussions for the controversial river linking plan proposed by the central government including the diversion of water through the construction of reservoirs, dams, and canals, from the Ganga to areas of water shortage. It also has potential consequences for the cross-border use of water as these rivers cross India's borders with Nepal and

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[223] Christopher Stone, *Should Trees have Standing? Towards Legal Rights for Nature,* SOUTH CAROLINA LAW REVIEW 45 (1972), 471, https://iseethics.files.wordpress.com/2013/02/stone-christopher-d-should-trees-have-standing.pdf.

[224] Parineeta Dandekar, *Damaged rivers, collapsing fisheries: Impacts of dams on riverine fisheries in India* (2012) http://www.indiawaterportal.org/articles/damaged-rivers-collapsing-fisheries-impacts-dams-riverine-fisheries-india-article-sandrp.

[225] Sachdev on Ganga, *supra* note 219.

Bangladesh.[226] Ganga is a Trans-boundary river. It does not flow through various Indian states exclusively as it additionally has tributaries coming in from Nepal, and is one of Bangladesh's significant rivers as well – where it is known as River Padma.

Several questions can be raised in this regard. How will the officers of Uttarakhand represent the other Indian states, and the neighbouring countries? Will all state governments that are a part of the Ganga and Yamuna basins be bound by this ruling? While it is a HC decision, it has legal implications for the entire length of both rivers and which pass through multiple states. For the rights of these rivers to be given firmer footing, a national-level law or a constitutional provision is essential.[227] Notwithstanding the complete absence of any representation from the people whose lives depend on the river, how will the *in loco parentis* going to cut across political, geographical and administrative boundaries?[228] If the river is viewed as a living entity, i.e., viewing it as a whole rather than in parts, then should the unfettered development-led deforestation underway in Uttarakhand be put to a stop so that the river's cyclic ebb and flow can be maintained? Maybe, or maybe not. Mining and forestry licenses are generally issued by government bodies who have the last word when it comes to deciding exploration permits as they tend to generate considerable revenues for the state. As the government continues

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[226] Juhi Chaudhary, *India renews "disastrous" river-linking project*, THE THIRD POLE (Nov 20, 2014), https://www.thethirdpole.net/2014/11/20/india-renews-disasterous-river-linking-project.

[227] Kothari and Bajpai on Rivers and Human Rights, *supra* note 209.

[228] Radha Gopalan, *Why the Court Ruling to Humanize the Ganga and Yamuna Rivers Rings Hollow*, THE WIRE (Mar 27, 2017), https://thewire.in/119099/ganga-yamuna-whanganui-human/.

to permit a certain level of environmental degradation in the name of 'sustainable development', this becomes increasingly difficult as their short-term interests would unquestionably conflict with their long-term ecological ones.

What happens if the parents or custodians fail to discharge their duty? Do they get penalised personally, do they get replaced? If an agriculturist pumps water onto his property from the river, is he damaging the "person" of the river? Will the authorities *in loco parentis* compensate the people harmed in case of a flood? Quite obviously, the 'legal person' Ganga & Yamuna would have the ability to sue and be sued. Allowing nature to sue in its own right might lead to the incrimination of individuals who had previously escaped liability on account of destructive behaviour. At the same time, this would provide eager litigants with an opportunity to set out for the already over-burdened courts with claims of environmental degradation. Lastly, assuming that the Chief Secretary is serious about facilitating a participatory process involving communities, could this decision inadvertently be used against communities who use these rivers and their catchment areas? If so, farmers and fishermen are the ones who stand to lose immediately and heavily. These grey areas, which were left undefined by the UHC, are in a major need to be addressed succinctly.

C. NATURAL PERSONS V. JURIDICAL PERSONS

The UHC's decision in *Mohd. Salim* declaring the two rivers as a 'legal person' could be described as a measure, which would be met with limited success, if at all. Despite the obvious religious connotations as

evidenced by the judgment, the primary aim of the court in conferring legal personality and rights on Ganga & Yamuna was most likely to grant them a certain dignity, which is legally recognized.[229] If a river is the living symbol of the life that it sustains (aquatic animals, amphibians and fishermen/farmers etc.),[230] then as a plaintiff, it will represent and speak for the ecological unit of life that is a part of it for its own preservation.

The basis for personhood on non-living entities is two-fold. Either the interests of the entity concerned could be taken into account or the interests of recognized human beings. This binary framework through which new categories are created rests on shaky foundations for the simple reason that living entities (human beings) have rights and obligations, whereas non-living entities do not.[231] There is an essential distinction between a *'natural person'* and a *'juridical person'*. The former refers to human beings who have inalienable legal rights from birth itself, whereas the latter refers to a non-living entity upon whom certain rights and obligations are conferred. The primary basis for conferring a legal status on a non-living entity has a lot to do with its characteristics and interests. To have an interest has been equated with having a stake in certain things, which is dependent on the entity being consciously aware and how much they care for their own well-being. If not, the concerned entity cannot be conferred legal personhood on the basis that it would protect its own interests for its *own* sake.

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[229] Tom R. Moore, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 2 FLA. ST. U. L. REV. 672 (2014) http://ir.law.fsu.edu/lr/vol2/iss3/12.
[230] M. Salim v. State of Uttarakhand & Ors, *supra* note 202, at ¶ 17.
[231] WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, 75-76 (Walter Wheeler Cook ed., 1923).

The alternative to this could possibly be having the entity protect its interests for *others'* sake. Legal personhood based on the interests of *others* may be more limited than legal personhood based on the interests of the entity itself. Legal personhood based on an entity's interests is not possible until the entity has actually developed interests. Despite all this, ascertaining the basis for conferring personhood on nature itself is still difficult. Until the entity develops interests of its own, according personhood is not possible. Even if it were to be accorded, it would be nearly impossible to ascertain it.[232]

III. CONCLUSION

To conclude, granting rights to nature is no longer associated solely with environmental law. Legal rights for rivers can be used to address a range of issues commonly observed in water resources management as well. Unless the Centre and the State Governments come together with an approach of concerted action through political dialogues and discussions, no beneficial arrangement for protecting the rivers can be evolved. The absence of institutional capacity and financial support by the central government casts doubt on the guardians' ability to act in the first place. Of course, the government as a stakeholder will not be able to deliver results by itself. For that, co-operation with religious leaders and private companies is required.[233] Nonetheless, they are likely to need some sort of

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[232] JOEL FEINBERG, HARM TO OTHERS, 34 (Oxford University Press, 1984).

[233] Pia Peterson and Thea Piltzecker, *India's Yamuna River Now Enjoys Legal Personhood. Will that be enough to clean it up?*, SIERRACLUB (Sept. 14, 2017) https://www.sierraclub.org/sierra/india-s-yamuna-river-now-enjoys-legal-personhood-will-be-enough-clean-it.

independence from the Centre and State governments and enough real-world power to take actions, especially if they are politically controversial.

The decision in Mohd. Salim is unprecedented, laudatory and a breakthrough at best from a certain perspective. However, it remains imprinted on paper instead of being reflected in reality. Maybe this was never meant to be a solution but only an opportunity for us to revisit our relationship with nature and press for a deeper dialogue and if necessary, legislation by the Centre. Since the difficulties or possibly even impossibility of respecting the rights of rivers (and more generally of nature) within the current context of unbridled economic growth is predominant in India, and given the consumption-demographic patterns, perhaps it may also be possible for us to go beyond a legal rights-based approach. If we want the rights of the rivers and that of nature to be safeguarded, then a change in the consciousness and values of the people is desired.[234] Rivers are comprised of not only the body of water, but also the forests and the seas. There is an urgent need to look beyond our relationship with nature, what could perhaps be described as an exploitative one, especially at a time when human beings have been affecting the planet like never before. Eventually, these rights (beyond the law) have to extend to other non-human objects, helping us move towards a society whose concern or moral consideration expands not just to the human community, but the entire earth.

[234] Kothari and Bajpai on Rivers and Human Rights, *supra* note 209.