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FISCAL INCENTIVES AND EXEMPTIONS: REFLECTIONS ON THE NEW INTERPRETATION STANDARD

TARUN JAIN*

ABSTRACT

Interpretation of fiscal statutes, as contrasted from interpretation of other enactments, is a nuanced task as a variety of additional considerations apply. Jurisprudential survey reveals that the complexity is accentuated when subordinate fiscal legislation particularly those relating to exemptions or extending concessions, form the subject-matter of interpretation. Ruefully noting the "unsatisfactory state of the law as it stands today", the Supreme Court a few years back reiterated the need "to resolve the doubts" and declare the legal position clearly.[1] *In this background, a recent decision of a five-judge bench of Supreme Court in Dilip Kumar*[2] *has revisited the entire law governing the interpretation of such fiscal exemption provisions which confer concessional treatment to the taxpayer. The decision is, in a sense, a course-correction as it simultaneously affirms and overrules various earlier decisions. In another sense, the decision categorically and substantially alters the legal standard of interpretation in such cases. This article*

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[1] Commissioner of Customs (Imports) v. Dilip Kumar & Ors., (2018) 9 SCC 40 (India) [hereinafter Dilip Kumar].

[2] *Id.*

appraises the changes brought about by this decision in the interpretative standard and the larger ramifications in the space of fiscal jurisprudence.

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I. INTRODUCTION: SETTING THE CONTEXT

It is now well settled that a subject can be taxed only when it is covered by the 'plain language' of the fiscal enactment which must "clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law."[3] Thus, while there can be no tax by *estoppel*,[4] there cannot also be any escapement from the rigours of a fiscal enactment on account of equitable considerations.[5] As per constitutional standards, no tax can be collected except by the authority of the law.[6] Conversely, therefore, a charge of tax arising under a statutory provision can be dispelled only under another provision which generally or specifically exempts the subject from such charge.[7]

The role of tax-exemptions, besides repelling the charge of tax, is diverse. Tax-exemptions are an indispensable part of tax-policy in so

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[3] Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667 (India).
[4] Bonanzo Engineering and Chemical Pvt. Ltd. v. Commissioner of Central Excise, (2012) 4 SCC 771 (India).
[5] De Vigier v. Inland Revenue Commissioners [1964] 2 All ER 907 (HL), per Lord Reid, *inter alia* observing that "… the Revenue do not and probably should not have any discretion to remit tax legally due on the ground that the innocent taxpayer has fallen into a trap". The decision in Bansal Wire Industries Ltd. v. State of Uttar Pradesh, (2011) 6 SCC 545 (India) is to similar effect. *See also* Tarun Jain, *Is Section 206AA Unconstitutional? Why is the Karnataka High Court, in Kowsalya Bai, Wrong?,* (2012) 349 INCOME TAX REPORTS (JOURNAL) 74-88, for detailed discussion of legal position on this aspect.
[6] INDIA CONST. art. 265.
[7] Tarun Jain, *Tweaking with Treaty Provisions: A Lawyer's Perspective on the Direct Taxes Code Bill, 2009,* (2011) 41 TAX'N L. R. 1041-1055.

much so that they directed towards objectives as wide as the attainment of social and economic goals to as minor as reducing tax-compliance and administrative burden. Given the wide range of objectives being pursued, the design of tax-exemptions is both flexible as also purely contingent upon the discretion of the executive government.[8] Thus, tax-exemptions cannot be claimed as a matter of right by anyone.[9] As a natural corollary, the underlying purpose of the exemption becomes a relevant, rather crucial, criteria for interpretation of the provision containing the exemption and it is for this principle reason that conflict arises in the choice of interpretative standard, as is evident in the following part. Suffice would be had to state that both the cause and the outcome are not of contemporary-origin alone. Instead, this state of affairs has prevailed for decades and the search for a categorical legal enunciation has been at best elusive.

II. INTERPRETATIVE STANDARDS PRIOR TO *DILIP KUMAR* DECISION

Prior to the decision in *Dilip Kumar*, a number of varying legal tests were in vogue for interpretation of exemption provisions. An enlistment of these principles, which in no manner can be exhaustive and at best are an enumeration of the fundamental tenets, clearly establishes the need for reconciliation. For ease of reference, the relevant variables are segregated in the sections below.

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[8] Amin Merchant v. Chairman, Central Board of Excise and Revenue, (2016) 9 SCC 191 (India).

[9] Union of India v. Aflon Engineering Corporation, (2001) 10 SCC 677 (India); Union of India v. Parameswaran Match Works, (1975) 1 SCC 305 (India).

A. 'STRICT' VERSUS 'PURPOSIVE' CONSTRUCTION

The principal reason for the conflicting interpretative standards is the inherent dichotomy between the strict-interpretation standard and the purposive-interpretation standard. This aspect is exemplified by the long-settled principle of strict construction of fiscal statutes which permits only adoption of the plain meaning of the statutory provision irrespective of its consequences.[10] On the other hand is the purposive construction rule which accommodates liberal expansion of the scope of the relevant exemption provision.[11] Thus, law reports are replete with instances reflecting the conundrum faced by the judges in their choice between strict construction versus purposive construction of exemption provisions[12], despite there being another set of decisions which

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[10] A.V. Fernandez v. State of Kerala, (1957) SCR 837 (India); Giridhar G. Yadalam v. Commissioner of Wealth Tax, (2015) 17 SCC 664 (India), (expressly rejecting purposive construction unless there is ambiguity in language of statutory provision or it leads to absurd results); State of Kerala v. M.K. Agrotech Pvt. Ltd., (2017) 16 SCC 210 (India), (advocating literal construction of relevant fiscal provision); Martand Dairy and Farm v. Union of India, (1975) 4 SCC 313 (India); etc.

[11] *See, e.g.,* Bajaj Tempo Ltd. v. Commissioner of Income Tax, (1992) 3 SCC 78 (India), *inter alia* observing that "since a provision intended for promoting economic growth has to be interpreted liberally, the restriction on it, too, has to be construed so as to advance the objective of the section and not to frustrate it." *See also* Commissioner of Customs v. Rupa & Co., (2004) 6 SCC 408 (India), *inter alia* observing that "an exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored".

[12] *E.g.,* Commissioner of Customs v. Reliance Petroleum Ltd., (2008) 7 SCC 220 (India); HMM Ltd. v. Collector of Central Excise, (1996) 11 SCC 332 (India); Collector of Central Excise v. Himalayan Co-operative Milk Product Union Ltd., (2000) 8 SCC 642 (India); Rohit Pulp and Paper Mills Ltd. v. Collector of Central Excise, (1990) 3 SCC 447 (India); Coastal Paper Ltd. v. Commissioner of Central Excise, (2015) 10 SCC 664 (India); etc.

unequivocally adopt the strict construction rule for interpreting such provisions.[13]

The outcome of the aforesaid pendulum-like swing of judicial opinion resulted into an interpretative standard which attributed strict construction to the eligibility criteria in the exemption provision and also simultaneously accorded a liberal construction to the conditions enumerated therein for claiming the exemption.[14] In addition, were the divergent declarations from the Supreme Court which compounded the issues against a clear legal position. For illustration, it was declared that "exemption is a stand-alone process" and "there is no question of equity", thus "either an industry claiming exemption comes within it or it does not."[15], meaning thereby that the overarching purpose of the exemption can be ignored as no amount of equitable claims can lead to an exemption. As another illustration of the divergence, which obviates as a non-issue the conflict between the strict and purposive standard, is the declaration that the "basic rule in the interpretation of any statutory provision is that the plain words of the statute must be given effect to. It is only in the case of ambiguity that the principle of strict/liberal

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[13] *E.g.,* Star Industries v. Commissioner of Customs, (2016) 2 SCC 362 (India); Uttam Industries v. Commissioner of Central Excise, (2011) 11 SCC 528 (India); Commissioner of Central Excise v. Rukmini Pakkwell Traders, (2004) 11 SCC 801 (India); Commissioner of Customs v. Variety Lumbers Pvt. Ltd., (2018) 16 SCC 806 (India); etc.

[14] *E.g.,* Commissioner of Customs v. Tullow India Operations Ltd., (2005) 13 SCC 789 (India); Compack Pvt. Ltd. v. Commissioner of Central Excise, (2005) 8 SCC 300 (India); Bombay Chemical Pvt. Ltd. v. Collector of Central Excise, (1995) Supp (2) SCC 646 (India); Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner of Commercial Taxes, (1992) Supp (1) SCC 21 (India); Union of India v. Wood Papers Ltd., (1990) 4 SCC 256 (India); etc.

[15] State of Gujarat v. Essar Oil Ltd., (2012) 3 SCC 522 (India).

interpretation would arise".[16] These clearly illustrate the extent of dichotomy.

B. 'SUBSTANTIVE' VERSUS 'PROCEDURAL' DEBATE

Besides the aforesaid debate on the manner of appreciating of exemption provisions i.e. strictly in line with the text versus in the larger context of the purpose sought to be served by the exemption, there was another interpretative issue which in view of the author can be described as the substantive versus the procedural debate. This essentially revolves around the level of primacy to be accorded to adjunct rules appended to the exemption provision or the exemption provision itself.

The *inter-se* conflict arising on account of these and other decisions came up for consideration before a five-judge bench of the Supreme Court in *Hari Chand* case[17] wherein the question of law framed by the Court specifically indicated that the debate between substantive and procedural compliance was not a non-issue[18] as the benefit of exemption had been extended to taxpayers in a set of decisions[19] on the basis of the doctrine of "intended use" and the principle of "substantial compliance".

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[16] Commissioner of Central Excise v. Bhalla Enterprises, (2005) 8 SCC 308 (India).

[17] Commissioner of Central Excise v. Hari Chand Shri Gopal, (2011) 1 SCC 236 (India).

[18] *Id.,* "1. The question that falls for consideration in these appeals is whether a manufacturer of a specified final product falling under the schedule of the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption from remission of excise duty on specified intermediate goods as per Notification No. 121/94-C.E., dated 11-8-1994, if captively consumed for the manufacture of final products on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" of the procedure set out in Chapter X of the Central Excise Rules, 1944".

[19] Thermax Private Ltd. v. Collector of Customs, (1992) 4 SCC 440 (India); Collector of Central Excise v. J.K. Synthetics, (2000) 10 SCC 393 (India).

Basis these principles the taxpayers contended before the Supreme Court in *Hari Chand* case that where the conditions for availing the exemption were procedural, they must be liberally construed to accommodate the taxpayer as the conditions had been substantially complied.

It was expected that this case, being specifically referred to a five-judge bench for a categorical pronouncement, would settle the legal position. Instead, the decision in *Hari Chand* case approved both the approaches. On the one hand the principle of strict construction of fiscal statutes was reiterated, on the other the Supreme Court in *Hari Chand* case acknowledged that "some of the provisions of an exemption notification may be directory in nature and some are of mandatory in nature" and it is essential that "distinction between provisions of statute which are of substantive character and were built in with certain specific objectives of policy, on the one hand, and those which are merely procedural and technical in their nature, on the other, must be kept clearly distinguished".[20] On this premise the Supreme Court accepted that substantial compliance in certain cases could indeed be considered as sufficient for an entitlement of exemption in as much as the "doctrine of substantial compliance seeks to preserve the need to comply strictly with the conditions or requirements that are important to invoke a tax or duty exemption and to forgive non-compliance for either unimportant and tangential requirements or requirements that are so confusingly or

[20] Commissioner of Central Excise v. Hari Chand Shri Gopal, (2011) 1 SCC 236 (India).

incorrectly written that an earnest effort at compliance should be accepted."[21]

In its facts while the Supreme Court concluded against the taxpayers, in *Hari Chand* case, however, the Supreme Court did not overrule the decisions which had accepted and applied the doctrine of "intended use" and the principle of "substantial compliance", thereby impliedly acknowledging the earlier decisions as laying down correct legal position as also permitting them to be relied upon as precedents to claim benefit of exemptions based upon substantial compliance alone instead of strict observance of all conditions attendant to the exemption provision. In short, the legal position continued to remain in a state-of-flux as far as the strict construction standard continued to be pitted-up with the doctrine of "intended use" and the principle of "substantial compliance" in context of interpreting exemption provisions.

C. BURDEN OF PROOF

Another angle of inquiry is determining who bears the burden of proof in so far as the claim for exemption is concerned? The standard principle under civil laws, which has also been extended to fiscal enactments, is that the burden lies on the person asserting the fact.[22] In continuation of this principle, the English view that "all exemptions from taxation to some extent increase the burden on other members of the community ...." and therefore, "the principle that in case of ambiguity a

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[21] *Id.* at ¶ 33.
[22] Uniworth Textiles Ltd. v. Commissioner of Central Excise, (2013) 9 SCC 753 (India).

taxing statute should be construed in favour of a taxpayer does not apply to a provision giving a taxpayer relief in certain cases from a section clearly imposing liability". [23] This view was endorsed by the Supreme Court to the effect that "a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision" and in the "case of doubt or ambiguity, benefit of it must go to the State".[24]

This principle has been recently reiterated that the onus lies upon the taxpayer "to show that its case falls within the four corners" of the exemption provision.[25] However, the position is far from settled as a number of decisions hold to the contrary on the premise that when two views are possible on the construction of the exemption provision then the view which is in favour of the taxpayer should be adopted.[26]

D. FAIRNESS PRINCIPLE

The contrarian principle i.e. to opine in favour of the taxpayer when two views are possible, has in fact been validated by another five-judge bench of the Supreme Court in its recent decision in *Vatika*

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[23] Commissioners of Inland Revenue v. James Forrest, [1890] 15 AC (HL) 334 and Littman v. Barron (Inspector of Taxes) [1951] 2 All ER 393 (CA), as noted in Novopan India Ltd. v. Collector of Central Excise and Customs, (1994) Supp (3) SCC 606 (India).

[24] Novopan India Ltd. v. Collector of Central Excise and Customs, (1994) Supp (3) SCC 606 (India).

[25] Meridian Industries Ltd. v. Commissioner of Central Excise, (2015) 15 SCC 469 (India).

[26] *E.g.,* Commissioner of Central Excise v. Calcutta Springs Ltd., (2007) 15 SCC 89 (India); Cemento Corporation Ltd. v. Collector of Central Excise, (2002) 8 SCC 139 (India); Poulose and Mathen v. Collector of Central Excise, (1997) 3 SCC 50 (India); Collector of Customs v. Lotus Inks, (1997) 10 SCC 291 (India); etc.

Township case[27] which introduced the principle of fairness in fiscal statutes for the first time. Prior to this decision, the following observations of Rowlett J. were often quoted that "in a taxing Act one has to look merely at what is already said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."[28] That there is no role of equitable considerations in the enforcement of fiscal enactments and actions was thus a fairly well settled legal proposition.[29]

The decision in *Vatika Township* case, albeit invoking the doctrine in the context of repelling implied retrospectivity in fiscal statutes,[30] turned the entire tide of settled fiscal jurisprudence in so far as it introduced the doctrine of 'fairness' as a balancing factor to the benefit of the taxpayer against the Revenue.[31] This decision has also been relied upon to determine the extent of liability of taxpayers and for construction

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[27] Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India).
[28] Cape Brandy Syndicate v. Inland Revenue Commissioners [1921] 1 KB 64 (CA).
[29] Commissioner of Trade Tax v. National Industrial Corporation, (2008) 15 SCC 259 (India); Baidyanath Ayurved Bhawan v. Excise Commissioner, (1971) 1 SCC 4 (India); Oswal Agro Mills Ltd. v. Commissioner of Central Excise, (1993) Supp (3) SCC 716 (India).
[30] *See*, Tarun Jain, *Doctrine of 'Fairness': Countering 'Implied Retrospectivity' of Fiscal Enactments*, 397 INC. TAX REP. 21 (2017).
[31] In Commissioner of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1 (India), it was *inter alia* observed that "at the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice — Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand."

of exemption provisions.[32] Thus, the legal standard regarding the interpretation of exemption provisions requires to be revisited.

E. Reference to a Larger Bench

It can, therefore, be said that a number of views and applicable standards prevailed which led to diverse and often contradictory variables and tests for interpreting exemption provisions. In fact, the complexity was compounded in case of indirect tax legislations which, in contrast to direct taxes where exemptions are part of the statutory enactment itself,[33] only provided the framework for exemption under the statute and enabled the executive government to notify the exemption.[34] Thus the exemption provision in indirect taxes, being an instance of delegated legislation, called upon additional variables for interpretation.[35]

These varying standards and tests came up for consideration before the Supreme Court[36] called upon to interpret a customs exemption notification which conferred exemption to 'prawn feed'. The taxpayer,

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[32] *See, e.g.,* Union of India v. Margadarshi Chit Funds Pvt. Ltd., (2017) 13 SCC 806 (India); Shanti Fragrances v. Union of India, (2018) 11 SCC 305 (India); Adani Power Ltd. v. Union of India, 2015 (330) ELT 883 (Guj) (India).

[33] The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 §§ 10, 80A, 80C, 80IA, 80IB and 80IC (India).

[34] The Central Excise Act, 1944, No. 1, Acts of Parliament 1944 § 5A (India); The Customs Act, 1962, No. 52, Acts of Parliament 1962 § 25 (India); The Chapter V of the Finance Act, 1994 § 93 (in context of service tax) (India), etc.

[35] *See, e.g.,* WPIL Ltd. v. Commissioner of Central Excise, (2005) 3 SCC 73 (India), adding a new dimension to interpret the exemption notification in that case opining it to be merely clarificatory of the government's intent and thus extending the exemption retrospectively to the taxpayer.

[36] Commissioner of Customs (Imports) v. Dilip Kumar & Ors., (2018) 9 SCC 40 (India).

relying upon an earlier decision[37] holding that animal feed also covered animal feed supplement, contended that exemption to prawn feed should also extend to prawn feed supplements. Doubting the interpretation standard emanating from the earlier decision as also taking note of the "unsatisfactory state of law", the Supreme Court bench found compelled to refer the issue for consideration by a larger bench which led to the decision in *Dilip Kumar*.

III. THE DECISION OF SUPREME COURT IN *DILIP KUMAR*.

The five-judges of Supreme Court in *Dilip Kumar Case*,[38] speaking through Ramana J., were unanimous on the need to restate the legal position on the interpretative standard in exemption provisions. However, the Supreme Court went much beyond to examine the interpretation standards of the fiscal statutes *per se* and addressing the conflict between the strict rule versus purposive construction, the role of equity, and other aspects declaring the legal position in the following terms:

> "*We are not suggesting that literal rule dehors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification.*

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[37] Sun Exports Corporation v. Collector of Customs, (1997) 6 SCC 564 (India).
[38] Dilip Kumar, *supra* note 1.

Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute."[39]

…

"There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee, may warrant visualising different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the Revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity

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[39] Dilip Kumar, *supra* note 1 at ¶ 55.

> *in a taxation liability statute, the benefit should go to the subject / assessee. …'*[40]

In respect of the specific issue before it the Supreme Court, without restraint, admitted that the earlier decisions to the effect that "if two views are possible in interpreting the exemption notification, the one favourable to the assessee in the matter of taxation has to be preferred … created confusion and resulted in unsatisfactory state of law" as it did so "in spite of catena of judgments of this Court, which took the *contra* view, holding that an exemption notification must be strictly construed, and if a person claiming exemption does not fall strictly within the description of the notification otherwise then he cannot claim exemption."[41] Explaining this point further, in *Dilip Kumar* the Supreme Court pointed out that "the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration". In respect of the former it confirmed the application of the strict interpretation standard generally in context of fiscal provisions so much so that "if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied". However, the Supreme Court in *Dilip Kumar* went on to state that the exact opposite standard was to apply in case of exemption provision.

Posing a question for itself, i.e. whether "the benefit of such ambiguity [should] go to the subject/assessee or should such ambiguity

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[40] *Id.*
[41] Dilip Kumar, *supra* note 1 at ¶ 12.

should be construed in favour of the Revenue, denying the benefit of exemption to the subject/assesse"[42] and after traversing the judicial opinion on the subject across the span of decades, the Supreme Court concluded that "three important aspects which comes out of the discussion are [i] the recognition of horizontal equity by this Court as a consideration for application of strict interpretation, [ii] subjugation of strict interpretation to the plain meaning rule and [iii] interpretation in favour of exclusion in light of ambiguity."[43] In other words the Supreme Court gave due weightage not just to the interpretative standards but also the effect of stretching the ambit of exemption and its adverse effect over other taxpayers and thus the reference to 'horizontal equity'.[44] For this reason the Supreme Court in *Dilip Kumar* concluded that while "in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State."[45]

In the aforesaid background, the following legal position was set out by the Supreme Court in *Dilip Kumar*;

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[42] *Id.* at ¶ 36.

[43] Dilip Kumar, *supra* note 1 at ¶ 49.

[44] *Id.* Also noteworthy is the observation in paragraph 61 (following Mangalore Chemicals and Fertilizers Ltd. v. Commissioner of Commercial Taxes (1992) Supp (1) SCC 21 (India) and Novopan India Ltd. v. Commissioner of Central Excise (1994) Supp (3) SCC 606) (India), that "exemptions from taxation have tendency to increase the burden on the other un-exempted class of taxpayers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity."

[45] *Id.* at ¶ 53.

"To sum up, we answer the reference holding as under -

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."[46]

IV. IS *DILIP KUMAR* THE FINAL ANSWER TO INTERPRETATIVE WOES?

The decision in *Dilip Kumar* makes significant impact on fiscal jurisprudence. What was earlier a gradual contribution of the division benches of the Supreme Court across decades of evolution, is now a firmly embedded law of the land with this categorical decision.[47] It not just restates the legal position in context of general interpretative standard to be adopted and the manner of appreciating the exemption provisions but also goes beyond to overrule a number of decisions which have in fact formed the basis for evolution of the fiscal jurisprudence itself across decades.

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[46] Dilip Kumar, *supra* note 1 at ¶ 66.

[47] *See, e.g.,* Chandra Kattha Industries Pvt. Ltd. v. State of Uttarakhand, 2018 SCC Online Uttr 1027 (India), which quotes and applies the legal position emanating from the decision in Dilip Kumar as the touchstone for determination of claims under exemption provisions.

Nonetheless, while the conclusion in *Dilip Kumar* is unequivocal, the reason assigned to reach to this conclusion suffers from the same infirmity as evident in the past decisions. There is more than one passages in the decision which point out that the earlier deviations may nonetheless have survived. To illustrate, first, the decision in *Dilip Kumar* expressly approves the reasoning in earlier decisions that there are two different stages of appreciating the exemption provision i.e. "whether a subject falls in the notification or in the exemption clause, has to be strictly construed" whereas "once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction."[48]

Thus, the rule of purposive construction in context of exemption provision does survive, albeit in a limited context, notwithstanding the categorical enunciation in *Dilip Kumar*.

Second and on a related note, given the approval in *Dilip Kumar* to the earlier decisions[49] wherein the two stage test were propounded and advocated for exemption provision, the interpretation process has become more arduous. This results in a complex task for any court faced with determining correctness of the claim for exemption wherein the court must not just bifurcate the exemption provision between its substantive criteria and other conditions but also attribute different legal

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[48] Dilip Kumar, *supra* note 1 at ¶ 59, approving Union of India v. Wood Papers Ltd., (1990) 4 SCC 256 (India) and Commissioner of Central Excise v. Parle Exports Pvt. Ltd., (1989) 1 SCC 345 (India).
[49] *Id.*

standards for appreciating the two. This is not an optimal solution as it confers more latitude and subjectivity upon the court rather than permitting an objective assessment regarding the scope of exemption. Since in any case equitable considerations are absent in tax, a throughout strict construction appears to be a qualitative superior standard in this interpretative process.

Third, in *Dilip Kumar* the reasoning of *Hari Chand* case regarding substantial compliance, etc. was not just quoted[50] but also expressly approved.[51] In fact in *Dilip Kumar* the Supreme Court specifically held that *Hari Chand* case rightly "indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption." Thus the acceptance of the substantial compliance in *Hari Chand* case continues to be good law and despite the test of strict construction laid out in *Dilip Kumar*, each future dispute will have to be decided on the touchstone of the specific language of the exemption provision depending on whether the parts of the provision are characterised as substantive or procedural.

Fourth, the decision in *Dilip Kumar* also does not examine the overarching role and mandate of Article 14 of the Constitution which precludes discrimination against the taxpayers. To illustrate, the decision

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[50] *Id.*

[51] *Id.* at ¶ 60.

of the Supreme Court in *Rathnam*[52] highlights that it is not permissible for the Revenue to discriminate between the taxpayers through the terms of the exemption notification and maintaining parity between them is essential. In this decision the Supreme Court, specifically rejecting the contention of the Revenue that the taxpayer not satisfying the conditions of the exemption notification was not entitled to claim it, approved the decision of the High Court quashing certain terms of the exemption notification so as to not to discriminate between the taxpayers. If the decision of *Dilip Kumar* is taken as an axiomatic and inviolable tenet, the taxpayer is absolutely without liberty to challenge the terms of the exemption notification as it would be bound by its terms. Thus clearly there is an imperative need to caveat the declaration in *Dilip Kumar* or else it runs the risk of being afoul Article 14 which is a part of the basic structure of the Constitution and a sacred obligation to be met by the Executive.[53]

Fifth, the decision in *Dilip Kumar* states that the "ratio in *Sun Export* case is not correct and all the decisions which took similar view as in *Sun Export* case stands overruled". From this declaration arise two complex situations. Firstly, the decision in *Sun Export* case was not just in context of exemption notifications but it also was also in context of classification for tax purposes wherein it observed that where two views are possible then one in favour of the taxpayer is to be adopted. With the

[52] Union of India v. N.S. Rathnam & Sons, (2015) 10 SCC 681 (India).
[53] *In* Re. Special Reference No. 1 of 2012 (Natural Resources Allocation), (2012) 10 SCC 1 (India).

overruling of the decision in *Sun Export* case, it is now unclear whether its enunciation in context of classification (and not just in context of exemption provisions) also stands overruled. Secondly, given that the Supreme Court in *Dilip Kumar* has not specifically enlisted all those cases it seeks to overrule, both as a student of law as also a practitioner in the field, one is required to be overcautious before placing reliance upon earlier decisions lest they be overtly or impliedly overruled by *Dilip Kumar*. In short, one must contradistinguish each earlier decision with the ratio of *Dilip Kumar* or else run the risk of placing reliance upon an overruled decision.

The decision in *Dilip Kumar* also has certain unpleasant consequences for the taxpayer in so far as the practical appreciation of the exemption provisions in context of tax-disputes is concerned. As the decision in *Vatika Township* has noted, there is a need to balance the rights of the taxpayer with those of the Revenue. This is for the simple reason that the Revenue is both the designer as also the execution-agency for the exemption provisions. Further, the Revenue is also statutorily conferred with the power to issue clarifications or instructions binding on the entire tax-administration regarding appreciation of exemption provisions.[54] In addition the Revenue has the ability, through appropriate parliamentary enactment, to channel an amendment to the statutory provisions which can also be directed during pendency of appellate proceedings where the

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[54] The Central Excise Act, 1944, No. 1, Acts of Parliament, 1944 § 37B (India); The Customs Act, 1962, No. 52, Acts of Parliament 1962 § 151A (India); The Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 § 119 (India).

Revenue has already suffered a loss in lower forums,[55] and moreover such amendments can also be enacted with retrospective effect, thereby wiping out the very basis for the claim of the taxpayer.[56] Thus the power-balance is unduly tilted in favour of the Revenue. In these circumstances requiring the taxpayer to establish its claim for exemption may be an additional and undue burden. The decision of the Delhi High Court in *Amazon*[57] is an appropriate illustration as to the consequences which befall the taxpayer consequent to following the ratio of *Dilip Kumar*.

In *Amazon* the issue related to construction of a notification which exempted "electrical machines with translation or dictionary function" and whether amazon kindle e-reading devices satisfied this description so as to be eligible for concessional tax treatment. The Authority for Advance Ruling (AAR), whose order preceded the declaration in *Dilip Kumar*, was of the opinion that "kindle apparatus is certainly not a game. It has the function of allowing the user to read various books and while reading, if the user comes across any difficult word incomprehensible to the user, he can access the dictionary meaning of the word." The AAR opined that the concessional tax treatment was available being of the view that the contention of the Revenue that "kindle device which is imported

[55] Union of India v. Martin Lottery Agencies Ltd., (2009) 12 SCC 209 (India).
[56] *See, e.g.,* Commissioner of Service Tax v. Great Lakes Institute of Management Ltd., 2010 (19) STR 481 (SC) (India), wherein the Supreme Court set aside the impugned order and remitted the matter back for fresh consideration in view of the retrospective amendment enacted during pendency of appeal; Home Solutions Retails (India) Ltd. v. Union of India, 2011 (24) STR 129 (Del) (India), wherein a full bench of the Delhi High Court overruled an earlier decision of the Division Bench of the High Court in view of a retrospective amendment even when the appeal against the Division Bench decision was pending consideration of the Supreme Court; etc.
[57] Union of India v. Amazon Seller Services Pvt. Ltd., 2018 SCC Online Del 10984.

does not have the translation or as the case may be dictionary functions as it is the main feature" did not emanate from a plain reading of the exemption notification and therefore was to be rejected. In appeal, however, the Delhi High Court followed the decision in *Dilip Kumar* to reverse the AAR's view.

The Delhi High Court, even though specifically noting that it was upon a plain reading of the exemption notification that the meaning and scope of exemption was to be drawn, observed that the translation or dictionary function not being the main function of kindle device, even though these devices had the dictionary function, were not entitled for exemption. The following reason was assigned to come to this conclusion;

> *"29. … Thus, the only issue is whether the said device is 'with translation or dictionary functions'. The words 'with translation or dictionary functions' have been used to restrict and keep the benefit of the exemption notification within bounds and not expand scope of exemption. Kindle device is an electronic device designed for use as an electronic book reader. As an electronic book reader, it has several e-books pre-installed in the device and other e-books can be downloaded. The product is developed and designed to function as an e-book reader and is sold and bought as a e-book reader and not as a translator or as a dictionary. The e-book reader has an inbuilt dictionary feature, which is a secondary or additional feature, useful for the reader. This secondary or additional feature would not make it and qualify the e-reading machine as an 'electrical machine with translation or dictionary function'. The word 'with' can have diverse and varied meaning depending upon the context in which it is used. A restricted meaning to the word 'with' is in consonance with the judgments of the Supreme Court on strict construction of exemption notification. In the context of the present notification, we observe and hold that the words 'translation' and 'dictionary' functions qualifies the words 'electrical machines' with the mandate that translation or*

> *dictionary function should be the primary and relevant function of the said machine for which they are purchased and used. The exemption is restricted to machines which translate or perform dictionary functions and not to other machines that primarily perform some other function.*
>
> …
>
> *32. In other words, our conclusion is that the exemption notification would apply where the device is an electrical machine covered under tariff item No. 8543 89/8543 7099, and its primary and basic function should be to translate or perform dictionary function. Primary function of kindle device is to enable the user to read e-books. It is an e-book reading device and not a translator, and is not procured or purchased to perform dictionary function. No one purchases a kindle device because it is a translator or device 'with' a dictionary function. E-book readers are purchased because a person wants to read e-books which are pre-loaded or can be downloaded from internet. Dictionary in a Kindle device enables the reader to make use of the dictionary while reading the e-book. E-book reader as such is not a dictionary or translator device. E-book readers would be appropriately classified in 'others' as distinct from 'electrical machines with translation and dictionary function'." (Emphasis supplied)*

From the above it is clear that the High Court was persuaded to accept that in order to be covered within the exemption notification it was essential that the electronic device should not only have a translation or dictionary function but also that such translation or dictionary function should be the main function of such electronic device. In order words the exemption notification providing for "electrical machines with translation or dictionary function" was read and interpreted to mean "electrical machines with translation or dictionary [*as its main*] function". Thus not only the Delhi High Court went beyond the plain meaning of the exemption notification but also cast upon the taxpayer the burden to

establish a condition[58] which was not part of the exemption notification itself but was instead a condition perceived to exist on basis of the context and attendant circumstances projected by the Revenue. The net result of applying the ratio of *Dilip Kumar* therefore turns out to position the taxpayer in a situation wherein the burden to substantiate the exemption claim is not just limited to the plain words of the exemption notification but instead extends to demonstrating the perceived intent underlying the exemption notification itself. The obligation for the taxpayer emanating from *Dilip Kumar*, therefore, can indeed turn onerous and in fact even ominous in certain circumstances as this decision of the Delhi High Court reveals. Given that the appeal against this decision in *Amazon* has already been dismissed[59] at the threshold itself, it is clear that the taxpayers need to undertake more than a due diligence before staking claim for exemption.

V. CONCLUSION

The reference to the larger bench was made in view of the expectation that it would satisfactorily settle the legal position governing interpretation of fiscal legislations. The decision in *Dilip Kumar* does not disappoint on this count at it categorically lays down the principles to be adopt viz., the strict construction rule, literal interpretation principle, relevance of horizontal equity (in context of exemption provisions) and

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[58] I.e., the 'common parlance' test for determining classification of goods and commodities. *See* Tarun Jain, *Principle of 'Substitutability' versus 'Common Parlance' Test: Ascertaining Classification of Goods*, (2019) 60 GOODS AND SERVICE TAX REPORTS (JOURNAL) 1-7.

[59] Vide order dated 01.02.2019 in SLP(C) No. 29/2019.

the interpretation to be adopted in case of more than one view arises from an appraisal of the statutory provisions. It is now a clear judicial fiat that the burden lies on the Revenue to establish the charge of tax whereas the burden lies upon the taxpayer to establish entitlement for exemption. What remains a work in progress despite *Dilip Kumar* in the context of fiscal jurisprudence, however, is the reconciliation of these axioms with the doctrine of substantial compliance and the principle of fairness, etc. which emanate from decisions of the Supreme Court of equal bench-strength and thus are nonetheless relevant and binding in the interpretative process.

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DOES THE CHIEF JUSTICE HAVE POWER TO ALLOCATE CASES?

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ABSTRACT

The recent controversy involving four senior most judges of the Supreme Court against the Chief Justice of India has created a wave of discussion pertaining to the power held not only by the Chief Justice of India but also the Chief Justices of various high courts. Through a letter of dismal by these four judges to the Chief Justice of India, they have shown how there exists a line of consistent abuse of power and partiality in allotment of cases in the Supreme Court. This has made the whole nation question as to what the restriction can be placed on the 'Master of Roster', a convention followed for the past thirty years. In an attempt to resolve this, we should be aware that there is no short-term solution to this problem. Only a complete overhaul of the approach taken by judicial members can bring back the glory days.

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I. INTRODUCTION

It was Lord Dicey who first coined the term "constitutional conventions".[60] According to him, constitutional law comprises of all rules that have some connection to the working of the sovereign power in England. These rules comprise of two distinct categories. The first category, known widely as Common Law, includes "written, unwritten, statutory and customary" laws. The second category are conventions of the constitution. These conventions are practices indoctrinated into bodies of law and the state.[61] The Indian political and civil system has adopted a variety of such conventions. Some conventions, in fact, are as crucial as a functional Constitution.[62]

Conventions, by virtue of not being codified or stagnant in form, keep changing over time to meet societal needs.[63] Their form is not binding on any courts but kept in mind regardless. Although, they arise out of precedence and practice, their creation is mainly dependent on expediency.[64] The fluid nature of conventions poses difficulty in certain situations that are tied up between politics and the judiciary. Therefore, even conventions must be laid out in a clear and succinct manner.

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60 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 19 (8th ed. 1915).
61 *Id.* at 14.
62 IVOR JENNINGS, THE LAW AND THE CONSTITUTION 13 (5th ed. 1959).
63 Ashutosh Salil & Tanmay Amar, *Constitutional Conventions: The Unwritten Maxims of the Constitution,* 3 PRAC. LAW. (2005).
64 BRIAN THOMPSON & MICHAEL ALLEN, CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 225 (4th ed. 1996).

For the past few decades, the Chief Justices of various courts in the country, primarily the Supreme Court (hereinafter "**SC**") have been given the complete responsibility of assigning cases to judges of the court. This institutionalized practice has made way for corruption and misuse of statutory power. The outcome of this has not only led to an undemocratic rule in the judiciary but has also led to wrong judgments being delivered. It is time that the judiciary wakes up to rectify its blunders. In an attempt to clear up doubts in relation to the recent stir involving the Chief Justice of India (hereinafter "**CJI**"), the authors will be looking at the controversial convention of the Master of the Roster as practiced in our country.

Part I of this paper gives a brief introduction to constitutional conventions and their importance in the functioning of the country. In Part II the authors will give a historical development of Master of the Rolls in England and how it has been modified into the Indian system. Through Part III the authors will be discussing the pertinent issues related to the convention in light of the recent outburst of the senior judiciary. In Part IV, the readers will get an insight into bench allocation methods used by foreign jurisdictions. Lastly, Part V will list institutional changes to the underlying abuse of power, and Part VI will conclude the essay by summarizing the key points of the discussion.

II. DERIVING THE MASTERY POWER

In order to understand the convention of the Master of the Roster, it is important to look at the history of its development into the

post it is today. This post is a tradition that India has borrowed from the English, albeit giving the convention its own spin. The Master of the Rolls was initially a clerical position arising out of the development of the Chancery Courts of the King.[65] The Master of the Rolls acted as the King's Secretary and was the guardian of his seal. As the importance of the King's seal grew, distinguished from other smaller seals, the Master of the Rolls found himself heading an entire department. He became responsible for keeping the record of important letters sent for the Chancery and was appointed directly by the King.[66] When the Chancery Courts were established as courts independent of the King, the Master of the Rolls became the court official who determined the roster. England, early on, realized the problems with giving such immense power to one person and eventually deviated from the system of having one Master of the Rolls. India, on the other hand, adopted and retained this tradition. The importance which the Master of the Rolls acquired in due course of time is something which has not been studied in depth, especially in the context of India and its courts.

In India, the Master of the Rolls is seen as an administrative position held by the Chief Justice of the High Courts in the High Court (hereinafter "**HC**") and the CJI in the SC. In terms of judicial power, the word of any of the judges of the SC carries the same weight as that of the

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[65] Lord Hanworth, *Some Notes on the Office of Master of the Rolls*, 5 CAMB L.J. 313, 313–331 (1935).
[66] WILLIAM HENRY STEVENSON & H C MAXWELL LYTE, CALENDAR OF THE CLOSE ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE 1288-1296, 454 (2010).

CJI. He is thus merely 'first among equals.'[67] In terms of administrative powers however, the CJI is put in a different position. Since the Constitution of India, 1950 (hereinafter "**Indian Constitution**") is ambiguous in defining the administrative duties of judges, conventions and rules have developed to do so. One such duty is the determination of the bench. In India, the HCs and SC follow the roster system to allot cases.[68] This system lists out which judges or benches are to hear matters pertaining to a particular subject matter or area of law.[69] The determination of roster is done by the CJI for the SC. This power of the Chief Justice is derived jointly from the Indian Constitution, Supreme Court Rules and judicial precedents.

The Indian Constitution, under Articles 145(3) and (4) dictates the minimum number of judges required to constitute a bench ruling on an important question of law, generally and for a petition under Article 143.[70] Further, the Supreme Court Rules state that the Registrar must prepare a roster under the instructions of the CJI.[71] It also provides the mandate to be followed for reference of a case to a higher bench.[72] It says that

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[67] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India), ¶6.
[68] State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India); Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).
[69] Supreme Court of India, Roster of the work for fresh cases, The Order of Hon'ble Chief Justice of India w.e.f. 05-02-2018, till further orders.
[70] INDIA CONST. art. 145.
[71] Supreme Court Rules, 2013, Gazette of India, section III(1), Chapter VI (May 29, 2014).
[72] Supreme Court Rules, 2013, Gazette of India, section III(1), Order 6, Rule 2, (May 29, 2014).

reference of a case by a lower bench to higher bench must be routed through the CJI who will decide whether there is need for the said reference. Neither of these provisions explicitly mention the role of the Chief Justice as sole determinant of the roster.

However, the Court in its jurisprudence has read that meaning into a combined reading of the two provisions. In *State of Rajasthan* v. *Prakash Chand,*[73] a full bench held that the power to constitute Division Benches and decide what cases these Benches will hear is a power that rests solely with the Chief Justice of the High Court. No Single or Division Bench of the High Court can give directions to the Registry which are contradictory to that of the Chief Justice's.[74] It further said that if a Single Bench or a Division Bench feels that a particular case must be listed before it, it should direct the Registry to obtain relevant orders from the Chief Justice for the same. Puisne judges on the other hand, possess no such authority. A counsel wanting to present his case before a puisne judge must be ordered to make mention before the Chief Justice to secure the necessary orders.[75] This case relied on Article 225 of the Indian Constitution[76] to derive constitutional validation for certain powers of the Chief Justice that include deciding benches and preparing cause list.

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[73] State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India).
[74] *Id.*
[75] *Id.*
[76] INDIA CONST. art. 145.

Recently, this case[77] was affirmed by a constitutional bench presided over by the CJI in its order passed in the matter of *Campaign for Judicial Accountability and Reforms v. Union of India.*[78] It was held in the order that the principle in *Prakash Chand* must apply *proprio vigore* to the Supreme Court. Thus, in light of the Supreme Court Rules[79] and Article 145(2) and (3) of the Indian Constitution, the Chief Justice of India is the Master of the Roster, and therefore the sole authority on constitution of benches and allocation of cases to the Benches so constituted. The Court further went on to say that no Division Bench or Full Bench could allocate a case to themselves or order the formation of a Bench. Any work done by a judge too has to be screened through the Chief Justice in order to be accepted.[80] Along the same lines, the judges in *CJAR* observed that even the Chief Justice of India plays the same role as those of the Chief Justices of the High Courts.[81] Additionally, even the SC's Practice and Procedure and Office Procedure[82] give power to the CJI to direct the Judicial Registrar to prepare a roster of cases.[83] It also mentions how the CJI can

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[77] State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India).
[78] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).
[79] Supreme Court Rules, 2013, Gazette of India, Section III(1), Order 6, Rule 2, (May 29, 2014).
[80] Amar Singh v. State of Uttar Pradesh, Crim. Appeal No. 4922 of 2006 (Allahabad HC) (India).
[81] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).
[82] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, http://supremecourtofindia.nic.in/practice-and-procedure (last visited Apr 1, 2019).
[83] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Chapter 5, http://supremecourtofindia.nic.in/practice-and-procedure (last visited Apr 1, 2019).

direct a particular bench to take up the work of another bench due to non-availability.[84]

III. SHORTCOMINGS OF THE EXISTING SYSTEM

The convention of Master of the Roster has been a celebrated practice of the Indian judiciary. It has been adopted by many countries all over the world with certain tweaks of their own.[85] On paper, the Chief Justice ought to follow the court rules and not exercise her/his power "arbitrarily or in a mala fide manner or for extraneous considerations".[86] However, this is not always the case.

In all courts, there are numerous benches listening to various cases of similar and different subject matters. This leads to difference in opinions amongst judges and substantial variations in the jurisprudence so formed, creating conflicting opinions. To solve such complications, the CJI must take the most efficient path and not let personal biases come in the way. In order to maintain normalcy and uniformity, former CJI M. N. Venkatachaliah had started the practice to computerize allotment of cases.[87] The former CJI Dipak Misra had prepared a roster allocating

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[84] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Chapter 5, http://supremecourtofindia.nic.in/practice-and-procedure (last visited Apr 1, 2019).

[85] Gautam Bhatia, *Master and the Roster*, THE INDIAN EXPRESS, http://indianexpress.com/article/opinion/columns/supreme-court-judiciary-chief-justice-jastichelames warmaster-and-the-roster-5024588/(last updated Jan. 15, 2018) [hereinafter Bhatia].

[86] Justice GC Bhakuria, *Master of Roster – Constitutional Limitation and way forward,* LIVE LAW, (January 15, 2018) http://www.livelaw.in/master-of-roster-constitutional-limitation-way-forward/#_ftn3

[87] Manoj Mitta, *CJI M.N. Venkatachaliah poised to radically alter the entire judicial system*, INDIA TODAY (Oct. 31, 1993), https://www.indiatoday.in/magazine/indiascope/story/199310

matters of particular subject matters to different sitting judges of the court.[88] The efficacy of system can be questioned only in due time but for now it has been observed that the four most senior most judges have been allotted the most important cases.[89] This is in line with the convention of the most sensitive cases going to benches presided by senior most judges.[90]

On the face of it, this seems like a well-functioning system. Restricting this intervention to the hands of one human being has ensured smooth functioning but at the same time this unfettered power derived from undefined conventions has created problems. A careful reading of the provisions though, makes it clear that the CJI has unfettered power over the roster. However, the Registrar while preparing the roster, is required to do so on the advice of the CJI.[91] The Chief Justices have, on several instances, misused their power as Master of the Roster to appoint cases to certain judges to get a favourable order for one particular side.

31-cji-m.n.-venkatachaliah-poised-to-radically-alter-entire-judicial-system-811736-1993-10-31 (last updated July 23, 2013).

[88] Supreme Court of India, Roster of the work for fresh cases, The Order of Hon'ble Chief Justice of India w.e.f 05-02-2018, till further orders, https://www.thehindu.com /news/national/article22621850.ece/binary/JudgesRoster.pdf

[89] FirstPost, *Supreme Court crisis: CJI makes public new roster system for allocation of cases, but is it enough to resolve impasse?,* FIRSTPOST (Feb. 2, 2018), http://www.firstpost.com/india/cji-dipak-misra-makes-public-new-roster-system-for-allocation-of-sc-cases-four-senior-most-judges-assigned-important-cases-4331895.html.

[90] TNN, *How cases are allocated in Supreme Court,* THE TIMES OF INDIA, https://timesofi ndia.indiatimes.com/india/how-cases-are-allocated-in-supremecourt/articleshow/62483 360.cms (last updated Jan. 13, 2018).

[91] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, Rule 29, http://supremecourtofindia.nic.in/practice-and-procedure (last visited Apr 1, 2019).

In the case of *Kishore Samrite v. State of Uttar Pradesh*,[92] a criminal writ petition in the nature of habeas corpus was filed against, among others, Rahul Gandhi. There was a separate case filed against him accusing him of rape of a young woman in Amethi. The petition was filed to produce the accused to ensure he does not interfere with the investigation. A writ petition of such a nature under Article 226 of the Constitution has to be heard by a Division Bench.[93] The Chief Justice of the HC clearly deviated from the rule to place the writ as a private custody habeas corpus in front of a Single Bench which eventually slapped a hefty fine on the Petitioners for 'political mudslinging' on a politician of repute.[94]

In a recent order passed in the case of *CJAR v. Union of India*,[95] the SC relied on *Prakash Chand*[96] and the aforementioned rules to declare that the CJI had the sole authority to decide the roster for cases in the SC. This order was passed by the CJI to annul a Division Bench order deciding the roster for this case. The matter was taken up and heard by the CJI in spite of the fact that he was amongst the people against whom allegations were levelled in the petition. This was a strong rejection of the principle of *nemo judex in causa sua*. The CJI was aware of the allegations; in his defence, he claimed that it was improper to accuse the CJI in his own

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[92] Kishore Samrite v. State of Uttar Pradesh and Ors, (2013) 2 SCC 398 (India).
[93] Allahabad High Court Rules, 1952, Chapter 21, Rule 1.
[94] KUSH KALRA & LUV KALRA, BE YOUR OWN LAYER – BOOK FOR LAYMAN (1st ed. 2013).
[95] Campaign for Judicial Accountability and Reforms v. Union of India and Ors., (2018) 1 SCC 589 (India).
[96] State of Rajasthan v. Prakash Chand & Ors, AIR 1998 SC 1344 (India).

court and it amounted to contempt. He further went on to say that only the President of India can be approached with a complaint against the CJI.[97]

Giving absolute power to one individual is highly problematic as it creates possibility of not only mishandling but outright abuse of power. This is especially true when such a power is ex officio vested in someone holding as strong a constitutional post as that of the CJI. In almost 72 years of independence of the nation, the CJI has not been impeached even once. Both proceedings initiated for such impeachment have failed. In such a scenario, it would not be wrong to agree with the popular opinion that the Indian Constitutional Courts are amongst the most powerful in the world. As can be made out from recent judicial trends, the CJI has no incentive to change this system of absolute power conferment. Moreover, a legislative order passed in this regard would be struck down for interfering with the realm of the judiciary and therefore being violative of the basic structure doctrine of judicial independence.[98]

IV. COMPARATIVE ANALYSIS OF ALLOCATION OF CASES IN FOREIGN JURISDICTIONS

The problem of selection of benches for cases exists in certain jurisdictions while it does not in some. In countries such as the United

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[97] Mehal Jain, *Unprecedented Drama At SC: SC Annuls Two Judge Bench's Order On Medical College Scam Matters*, LIVE LAW (Nov. 10, 2017), http://www.livelaw.in/unprecedented-drama-sc-sc-annuls-two-judge-benchs-order-medical-college-scam-matter/.

[98] Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr, AIR 1973 SC 1461 (India).

State of America and Canada, all nine judges of the Supreme Court sit for a case at hand.[99] This is known as an *en banc* session or a plenary seating. Similarly, such a practice takes place in the High Court of Australia with a seating of all seven judges and the Supreme Court of New Zealand with five.[100] Such a practice makes it easier to set the law and does not leave way for contradicting opinions.

Since most judicial conventions and customs followed by India are adopted from the British system, the authors will be looking at the scheme followed by them in terms of bench allocation at the Supreme Court of the United Kingdom (hereinafter "**UKSC**"). In the United Kingdom (hereinafter "**UK**"), much of the changes brought into the judiciary were through the Constitutional Reform Act.[101] However, there still exist certain anomalies in the system. The usual practice followed in the UKSC is sitting in panels of odd numbers. However, there is very little insight as to the judge selection for a particular legal matter. There is nothing available on the official website or in its rules.[102] In contrast, our country has explicit mention in SC's Practice and Procedure and Office

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99 Bhatia, *supra* note 85.
100 Hugh Tomlinson, *Selecting the Panel and the Size of the Court*, UKSC BLOG (Oct. 4, 2009), http://ukscblog.com/selecting-the-panel-and-the-size-of-the-court-updated/.
101 The Constitutional Reform Act, (2005) (United Kingdom).
102 Daniel Clarry & Christopher Sargeant, *Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?,* 7 UK SUP. CT. Y.B. (2016)

Procedure[103] regarding the vesting of powers in the CJI regarding case allocation.

Regardless of non-availability of official statements, the trends evidenced from UKSC practises include the presence of a Scottish Justice in appeals from Scotland and similarly in matters appealed from Northern Ireland. In addition, justices who have sat through original suits do not seat themselves in the appeals, and cases involving a family member do not have judges from the same family.[104]

In a seminar regarding the UKSC, a law lord was interviewed on panel selection. It was shocking to note that according to him very few lords even had vague idea on methods used for panel selection.[105] He discussed one way of selection which is based on "jurisdictional expertise". The other way according to him probably involved two senior law lords looking through the list and selecting those who deem fit for the case.[106]

There are speculations in the UK that benches are allocated by Registrar in consultation with the President and Deputy President of the UKSC, but there is no confirmation regarding the same. Even though the

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[103] Supreme Court of India, Handbook on Practice and Procedure and Office Procedure, 2017, http://supremecourtofindia.nic.in/practice-and-procedure (last visited Apr 1, 2019).
[104] Jonathan Crow QC et al., *Commercial Law and Financial Regulation,* 7 UK SUP. CT. Y.B. (2016); Guy Fetherstonhaugh QC, *Land, Housing and Tenancy Law*, 7 UK SUP. CT. Y.B. (2016).
[105] Le Sueur Andrew, *A Report on Six Seminars about the UK Supreme Court*, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 1 of 2008.
[106] *Id.*

panel size is decided by this method, there is still no compulsion that for each case of the similar subject matter there has to be the same panel size.[107] All these instances reveal that even in the UK there are no unambiguous and transparent practices followed for selection of benches. However, due to the appointment of the President and Deputy President in the UKSC, the division of power allows for some checks in the system.[108] On the other hand, the *status quo* in our country wields the entirety of roster making power to the CJI. This system has a major setback in relation to distribution of power even though there is enough legal backing for the same. Thus, the authors have noted that both the systems are equally flawed and therefore there is no benefit of adopting the British practice in its present form.

As mentioned above, the American Supreme Court does not constitute different bench sizes. But this is not the same scenario at the Federal Appeals Courts of America, also known as Circuit Courts. For the longest time, scholars have debated that the three bench panels in all circuit courts are allotted on a random basis. This has been established as a "fact"[109] by many whereas some have even gone to say that it is a "hallmark"[110] of the American Appellate Courts. However, over the years

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107 ALAN PATERSON, FINAL JUDGMENT: THE LAST LAW LORDS AND THE SUPREME COURT 72, (1st ed. 2013)

108 Arghya Sengupta, *A question of probity*, THE HINDU, http://www.thehindu.com/opinion/lead/a-question-of-probity/article20445800.ece (last updated Nov. 15, 2017).

109 Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1009 (2005); Lee Epstein et al., *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 110 (2011).

110 Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216 & n.4 (1999).

there has been noticeable patterns followed by various Circuit Courts. Apart from the randomized benches followed in courts, there are some courts who create their oral benches by keeping the number of times each judge sits with another approximately equal.[111] For example, in the Seventh Circuit, the bench assignment is more or less random except the fact that there exists an electronically generated list that ensures that in a two-year timeframe, each judge sits with another judge approximately the same number of times. This sort of practice is also prevalent in some circuits as a weekly or yearly practice. But all these assumptions are mere speculations by American scholars and not widely available to the public.[112] Such a system is not exactly followed in India as the bench size differs with the matters at hand.[113] Although, the Indian system is comparatively different to that of the Federal appellate system, a customized system can be looked at as an alternative to the present model.

We have looked at two bench models followed, and as discussed none of them have a set standard on deciding which judge should sit for a particular case. Our analysis concludes that the Supreme Court of India cannot import the Federal appellate system in its entirety due to the fact that the new system of subject matter allocation in the SC does not mean that the number of cases allotted to each bench is equalized. In addition,

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[111] Adam S. Chilton & Marin Levy, *Challenging the Randomness of Panel Assignments in the Federal Courts of Appeals*, University of Chicago Pub. Law & Legal Theory Working Paper No. 529 (2015).
[112] *Id.*
[113] LAURAL L. HOOPER et al., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 140 (2nd ed., 2011).

the British system of representation also cannot be adopted entirely by us as there is no representation from every community of the country in the SC. Therefore, to have a diverse bench is something we can strive for but in all practicality, promotion to the SC takes place mainly through the convention of seniority.

V. RECOMMENDATIONS

Although, much of the cases heard in the Supreme Court these days are pertaining to public interest litigations, the court still remains subordinate to the Constitution.[114] This is line with the established fact of our courts being constitutional courts. Article 145 (1)[115] mandates the necessity of explicit rules for a sound judiciary. Clause (4) of Article 145 additionally lays emphasis on transparency.[116] This highlights that even though conventions are followed to fast track the process of justice, they should take the position of complementary guidelines to maintain composure of the court. The composition of a bench leads to speculation of the outcome and this needs to be kept at a minimum. The foremost responsibility of a judge is to abide by the Rule of Law and thereby abandon unconstitutional practices.

Much of the abuse by the CJI is due to the absence of clear directives. This, however, in no way allows for the CJI to indulge in

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114 Alok Prasanna Kumar, *Crises in the Judiciary: Restoring Order in the Courts*, 53 ECONOMIC & POLITICAL WEEKLY (ISSUE 3) 10 (Jan. 20, 2018) [hereinafter Kumar].
115 INDIA CONST. art. 145.
116 V.N. SHUKLA, CONSTITUTION OF INDIA 568 (12th ed. 2016) [hereinafter Shukla].

arbitrary practices. The leading case of *Maneka Gandhi v. Union of India*,[117] held that even constitutional authorities must adhere to non-arbitrary practices as envisaged in Article 14 of the Indian Constitution.[118] Further, even Article 145 lays an emphasis on transparency under clause (4).[119] However, in reality, the Constitution gives the Chief Justice almost unrestricted power when it comes to allotment of cases. The letter drafted by the four senior most judges of the SC opens a whole new world of public discourse and cannot be done away with. The authors, however, have certain structural reforms in mind which they would like to express. To inculcate these into the system will require resources and time. However, in the long run these will allow the judiciary to keep up with its most important objective, i.e. serving justice in a swift and accurate manner.

First, the formula used to create rosters should be dissipated to the public in order to make it a transparent and informative process. The scheme of enlistment must be either put up on the official SC website or through other widely available media. The present ambiguity as to how a particular subject matter is assigned to a judge has caused a lot of confusion in the country.

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[117] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[118] Justice GC Bhakuria, *Master of Roster – Constitutional Limitation and Way Forward,* LIVE LAW (Jan. 15, 2019, 12:28 IST), http://www.livelaw.in/master-of-roster-constitutional-limitation-way-forward/#_ftn3.
[119] Shukla, *supra* note 116.

Second, assuming that the present allotment is based on the personal choices of the CJI, we would like to present a simple model on creation of a roster with minimal influence and bias. The rosters must not only enlist the names of the presiding judges, but also the entire composition of the bench along with substitute judges in case a particular judge is unavailable at the time due to unforeseen circumstances. To create such a roster will require a team of highly proficient judicial member. The criteria for selection of panels must not only be based on seniority of judges, other attributes such as knowledge of a specific area of law should also be given significant consideration. This roster must be prepared by the CJI and a collegium of four senior most judges through a voting system. The presence of a five-judge panel will lead to engagement and varied opinions which is a better option than a one-man tyranny.

VI. CONCLUSION

The often eulogized 'Basic Structure' of the Constitution enlists judicial independence as one of its foremost doctrines. But the judiciary can be independent only if it is truly free of executive and legislative influences including the politicians who exert great power and are determinants of the future of democracy. In the current scenario of increasing bureaucratic interference with the judiciary in underhand ways, the authors observe a judiciary that is highly politicized. The judges are increasingly motivated by their political beliefs and allegiances to the ruling party. This hampers the delivery of justice. When the absolute power of deciding the roster is introduced in such a scenario, it can only ensure further denial of justice. The CJI has full power to pick and choose

judges with convenient political leanings and belief systems to ensure a particular case outcome is favourable to him.

The Master of the Rolls started out as an English convention which was later adopted by India and was moulded into its own judiciary model. The Chief Justices of the High Courts and the CJI were given this ex officio power. Thus, all power was vested in one person. This has so far helped in avoiding ego clashes and ensuring smooth functioning of the Courts. The system has not been without its faults though. Since the CJI has unfettered power over deciding the roster, he is also capable of misusing this power. Regarding the human nature of judges, Justice Felix Frankfurter has famously said that, "Judges are men, not disembodied spirits. Of course, a judge is not free from preferences, or, if you will, biases."[120] The current CJI has faced a lot of controversy for his determination of benches for important cases. These controversies are evidence of the need for a new system or one that places checks on the otherwise absolute power of the CJI.

The comparison with foreign models has failed to provide any sustainable solutions and thus the authors have recommended an independent overhaul of the present system to stop misuse. The judiciary should prepare to function as a public institution meeting standards of "fairness, accountability and transparency". Not only should the SC

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[120] Justice Felix Frankfurter, *Some Observations on the Nature of Judicial Process of Supreme Court Litigation*, 98 PROC. AM. PHIL. SOC'Y. 233 (1954).

judges be a part of reforming the system, but even members of the HCs should hold joint meetings to decide the future of our judiciary.[121]

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121 Kumar, *supra* note 114.

Manasi Chaudhari, *Triple Talaq Bill: Lacunae and Recommendations,* 5(2) NLUJ Law Review 49 (2018)

TRIPLE TALAQ BILL: LACUNAE AND RECOMMENDATIONS

MANASI CHAUDHARI*

ABSTRACT

Three words shook India in 2017- 'Talaq, talaq, talaq.' First, the Supreme Court of India, in a landmark judgment declared triple talaq illegal. Following this, the Lok Sabha passed the Muslim Women Protection of Rights on Marriage Bill, 2017 ("Bill"). This paper critically analyses the Bill and its consequences. Part I explains the ratio of the Triple Talaq judgment. In Part II, the author analyses the provisions of the proposed Bill. In Part III, the author identifies the lacunae in the Bill, in its present form. Finally, in Part IV the author makes recommendations to amend the Bill, to make it more effective and inclusive.

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I. INTRODUCTION

Triple Talaq or Talaq-ul-Biddat is a method of divorce available to the husband among Muslims. It is relatively new and considered improper.[122] It consists of a single pronouncement of Talaq between two menstrual cycles.[123] Triple talaq is instant, irrevocable, and becomes effective immediately upon pronouncement.[124] It is now the most common form of divorce in India.[125] A study conducted by the Bharatiya Muslim Mahila Andolan ((hereinafter "**BMMA**") found that 59% of the Muslim women surveyed had been divorced through Triple Talaq.[126] In most cases, the pronouncement was oral.[127] Muslim women have been fighting for the abolition of Triple Talaq for decades now.[128] However, this campaign picked up steam only in 2016. It was triggered by Shayara Bano's petition in the apex court against the practice of Triple Talaq.[129] This has been discussed in Part II.

II. THE TRIPLE TALAQ JUDGMENT

In 2002, the Supreme Court, in *Shamim Ara*[130] held that talaq had to be for a reasonable cause, and preceded by attempts at reconciliation

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122 MULLA, PRINCIPLES OF MOHAMMEDAN LAW 338 (22nd ed. 2017).
123 *Id.*
124 *Id.*
125 Amir-ud-din v. Khatun Bibi, (1917) 39 All 371, 375 (India).
126 ZAKIA SOMAN & DR. NOORJEHAN NIAZ, NO MORE "TALAQ TALAQ TALAQ" 11–20 (2017).
127 *Id.*
128 *Triple talaq: How Indian Muslim women fought, and won, the divorce battle,* BBC NEWS (2017), http://www.bbc.com/news /world-asia-india-40484276 (last visited May 21, 2018).
129 Shayara Bano and others v. Union of India and others, (2017) 9 SCC 1 (India).
130 Shamim Ara v. State of Uttar Pradesh and another, AIR 2002 SC 3551 (India) [hereinafter Shamim Ara].

between the couple.[131] The court also held that Talaq had to be 'pronounced.'[132] In effect, Shamim Ara made Triple Talaq illegal.[133]

Fast forward to 2016. Shayara Bano filed a writ petition in the Supreme Court questioning the constitutionality of Triple Talaq.[134] She sought a declaration that the Triple Talaq pronounced by her husband be declared void *ab initio*.[135] She contended that it violated her fundamental rights under Articles 14 (right to equality),[136] 15 (right against discrimination),[137] and 21 (right to life)[138] of the Indian Constitution.[139] She also challenged Triple Talaq as not being a part of Muslim Personal Law (Shariat).[140] Therefore, according to her, it cannot be protected under Articles 25(1)[141], 26[142] and 29(1)[143] (rights of religious denominations) of the Indian Constitution.[144] After Shayara Bano's petition, other Muslim

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131 *Id.* § 15.
132 *Id.* § 18, the court defined 'pronounced' as - "to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate."
133 Following Shamim Ara, the Kerala High Court in Kunhimohammed v. Ayishakutty, ILR 2010 (2) Kerala 140 (India), held that attempts at reconciliation are a non-negotiable pre-requisite to divorce; *see* Nur Ali v. Thambal Sana Bibi, 2007 (1) GLT 508 (India); Musarat Jahan and another v. State of Bihar and another, AIR 2008 Pat 69 (India); Smt Shahana v. State of Uttar Pradesh, 2011 (1) ACR 918 (India); Mohammed Naseem Bhat v. Bilquees Akhter, 2016 (1) JKJ 312 (India); Hina v. State of Uttar Pradesh and others, 2017 (2) ALL MR 1 (India).
134 W.P. (Civil) 118 of 2016, Supreme Court of India, (2016) (India).
135 Shamim Ara*, supra* note 130, § 106.
136 INDIA CONST. art. 14.
137 *Id.* art. 15, cl. 1.
138 *Id.* art. 21,
139 Shamim Ara, *supra* note 130, § 106.
140 *Id.*
141 INDIA CONST. art. 25, cl. 1.
142 *Id.* art. 26.
143 *Id.* art. 29,
144 Shamim Ara, *supra* note 130, § 106.

women also filed similar petitions in the Supreme Court. These were clubbed and decided together under the mammoth landmark judgment in *Shayara Bano v Union of India*.[145]

The Supreme Court constituted a five- judge multi-faith bench, comprised of- then Chief Justice Khehar (Sikh), and Justices Rohinton Nariman (Zoroastrian), U.U. Lalit (Hindu), Kurien Joseph (Christian) and Abdul Nazeer (Muslim). By a narrow majority of 3:2, the five-judge bench struck down the practice of Triple Talaq. Justices Nariman, Lalit and Joseph delivered the two majority judgements. Chief Justice Khehar and Justice Nazeer were dissenting. Although the majority opined that Triple Talaq is legally invalid, their reasoning was different- and partly conflicting.

The author discusses the individual opinions of the five judges below.

A. JUSTICE KURIEN JOSEPH

Justice Joseph delivered the majority opinion for himself. He struck down the practice of Triple Talaq on the ground that it is not an 'essential religious practice.'[146] Therefore, it cannot be protected under

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145 Shamim Ara, *supra* note 130.

146 An essential religious practice is that which is fundamental to follow a religious belief. Without this practice, the core of the religion will be altered, *supra* note 9, § 53.2.
Under this test, the courts are required to examine whether the practice in question is essential to the religion. A practice will be immune from a challenge under Part III of the Constitution only if it is an essential religious practice. To determine what is essential, the courts have to look at religious doctrines and tenets, Adi Saiva Sivachariyargal Nala Sangam and others v. The Government of Tamil Nadu and another, AIR 2016 SC 209 (India).

Articles 25 and 26 of the Indian Constitution. Justice Joseph's main question was- "whether what is Quranically wrong can be legally right."[147]

To answer this question, Justice Joseph first examined whether Triple Talaq is governed by any law. According to him, the Muslim Personal Law Shariat Application Act, 1937 (hereinafter "**Shariat Act**"), was enacted to declare Shariat (muslim personal law) as the law applicable to Muslims. But, it does not regulate Talaq. It only makes the Shariat Act applicable to the subject-matters covered in Section 2.[148] Therefore, although Talaq is governed by Shariat law, it has not been codified in the Shariat Act. The principles of Talaq are actually laid down in the Quran.

Justice Joseph examined the relevant verses of the Quran- Sura LXV, Sura IV (Verse 35) and Sura II on Talaq.[149] According to his Lordship, these verses clearly show that the Quran considers marriage as sacramental and permanent.[150] Talaq should be resorted to only in extremely unavoidable situations.[151] It must always be preceded by an

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[147] Shamim Ara, *supra* note 130, § 1.
[148] The Muslim Personal Law Shariat (Application) Act § 2 (1937) (India),
Application of Personal Law to Muslims- Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat).
[149] Shamim Ara, *supra* note 130, § 9-11.
[150] *Id.* § 12.
[151] *Id.*

attempt for reconciliation.[152] If reconciliation succeeds, the Quran demands that the Talaq must be revoked.[153] In Triple Talaq, there is no scope for reconciliation.[154] This is against the basic tenets of Quran, and therefore, violates Shariat law.[155]

His Lordship finally held that Triple Talaq is not an essential religious practice under Shariat law, as it violates the Quran.[156] Beyond this, his Lordship did not find the need to examine the constitutionality of Triple Talaq. Although Justice Joseph's holding was in the majority, in his reasoning he supports the dissent- that the Shariat Act does not regulate Talaq. It is said that Justice Joseph's was the swing vote in this case.[157] It helped strike down Triple Talaq by a narrow majority.

B. JUSTICES NARIMAN AND LALIT

Justices Nariman and Lalit struck down Triple Talaq as unconstitutional, making it the majority opinion. Before striking it down, Justices Nariman and Lalit examined whether Triple Talaq can be tested under Article 13(1) of the Constitution. An existing precedent, *Narasu Appa Mali*[158], had laid down that personal law falls outside the realm of

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[152] Shamim Ara, *supra* note 130.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* § 25.
[157] Indira Jaising, *SC Strikes Down Triple Talaq, But Does Little for Gender Justice,* THE QUINT (2017), https://www.thequint.com/voices/opinion/indira-jaising-triple-talaq-gender-justice-judgement (last updated on August 24, 2017).
[158] The State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84 (India).

Article 13(1).[159] According to Narasu Appa, only codified personal law can be scrutinised for violation of Part III of the Constitution. Applying this principle, Triple Talaq would fall under Article 13(1) only if it is codified personal law (under Section 2 of the Shariat Act). If not, it could not be reviewed.

According to Justices Nariman and Lalit, Triple Talaq is enforced and recognised by the Shariat Act.[160] Therefore, "it would fall squarely within the expression 'laws in force' in Article 13(1)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency."[161]

Justices Nariman and Lalit then tested the constitutionality of Section 2 of the Shariat Act (with respect to Triple Talaq) under Article 14 of the Constitution. They determined that manifest arbitrariness is a ground for judicial review under Article 14.[162] According to them, manifest arbitrariness is an act of the Legislature done "capriciously, irrationally and/or without adequate determining principle."[163] It is also something which is "excessive and disproportionate."[164] Hence, Justices Nariman and Lalit held that:

> *"It is clear that this form of Talaq [Triple Talaq] is manifestly arbitrary in the sense that the marital tie can be broken*

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[159] *Id.* § 13.
[160] *Shamim Ara, supra* note 130, § 47.
[161] *Id.* § 48.
[162] *Id.* § 101.
[163] *Id.*
[164] *Id.*

> *capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression "laws in force" in Article 13(1) and must be struck down as being void to the extent that it recognises and enforces Triple Talaq."*[165] *(Emphasis supplied)*

Since they found Triple Talaq violative of Article 14, Justices Nariman and Lalit did not delve into the aspect of discrimination against women.[166] It is argued that this was a lost opportunity for the apex court to deliver a powerful precedent on women's rights. The bench could have also used this case to examine whether the Narasu Appa principle is good in law.

C. JUSTICES KHEHAR AND NAZEER

In their dissent, Chief Justice Khehar and Justice Nazeer upheld the practice of Triple Talaq. The opinion was delivered by Justice Khehar for himself and Justice Nazeer. Their Lordships held that Triple Talaq neither violates Article 25 nor any other fundamental rights. Hence, it cannot be struck down.

To arrive at this conclusion, Justice Khehar traced the history of triple talaq.[167] His Lordship noted that Triple Talaq is widely practised by the majority Muslim population in India.[168] Due to its popularity, his

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[165] Shamim Ara, *supra* note 130, § 104.
[166] *Id.*
[167] *Id.* § 317.
[168] *Id.* § 320.

Lordship held that Triple Talaq has the sanction and approval of the Muslims.[169] Hence, it has to be considered an integral part of their religious practice.[170] Even if it considered bad in theology, it is good in law.[171]

His Lordship then examined the purpose of the Shariat Act. According to him, the Shariat Act was enacted for a limited purpose- to make Shariat as the law applicable to all Muslims.[172] Its aim was to override existing customs and usages which violated Shariat law.[173] The Shariat Act only establishes Shariat law as a rule of decision.[174] It does not codify Shariat law.[175] Therefore, Shariat law cannot be considered statutory law. It is an uncodified personal law.[176]

On this ground, Justice Khehar held that Shariat law cannot be reviewed under Article 13(1) of the Constitution.[177] Justice Khehar upheld the principle in Narasu Appa.[178] He held that personal laws can be reviewed only against the parameters in Article 25- public order, morality, health, any other provision of Part III of the Constitution.[179] Justice Khehar then examined Triple Talaq against each of the above exceptions.

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[169] Shamim Ara, *supra* note 130, § 321.
[170] *Id.*
[171] *Id.*
[172] *Id.* § 332.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* § 383.
[178] *Id.* § 335-337.
[179] *Id.* § 337-339.

He held that Triple Talaq has no nexus to public order, health or morality.[180] Also, it does not breach any other fundamental rights, because these are only available against state action.[181] However, Triple Talaq is not a state action.[182] Justice Khehar concluded that Triple Talaq is a personal law and has the protection of Article 25 of the Constitution. It does not warrant any interference from the judiciary. Since Triple Talaq has constitutional protection, Justice Khehar found it unnecessary to examine whether the Quran and Hadiths validate Triple Talaq.[183]

It would be unfair to conclude that the Chief Justice was not in favour of Muslim women's rights. His only objection to striking down Triple Talaq was that the judiciary is not the appropriate forum.[184] He believed that this is the Legislature's prerogative.[185] Quoting the abolishment of social evils like sati, devdasi, and polygamy, Justice Khehar observed that none of these practices was challenged in any court of law.[186] They were discontinued through legislative enactments.[187] Therefore, exercising the Supreme Court's extraordinary powers under Article 142 of the Indian Constitution, the Chief Justice directed the Union of India "to consider appropriate legislation, particularly with

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180 Shamim Ara, *supra* note 130, § 340.
181 *Id.* § 341.
182 *Id.*
183 *Id.* § 313.
184 *Id.* § 392.
185 *Id.*
186 *Id.* § 297-300.
187 *Id.*

reference to Talaq-e-Biddat (Triple Talaq)."[188] In the interim, the Chief Justice granted a six-month injunction against divorce by Triple Talaq.[189]

III. TRIPLE TALAQ BILL

The Parliament is empowered to pass laws on matters of marriage and divorce. It draws this authority from Articles 25(2) and 44, read with Entry 5 of the Concurrent List (Seventh Schedule) of the Indian Constitution. On 28 December, 2017, Mr. Ravi Shankar Prasad, Minister of Law and Justice, introduced a historic bill in the Lok Sabha- the Muslim Women (Protection of Rights on Marriage) Bill, 2017 (hereinafter "**the Bill**").[190] The Bill was passed by the Lok Sabha on the same day.[191] It was advanced in its original form, without any amendments. The Bill is currently pending before the Rajya Sabha.[192]

The statement of objects and reasons of the Bill states that the Bill is a consequence of the Shayara Bano judgment. The State felt the need to end the practice of Triple Talaq immediately. Neither the Shayara Bano judgment nor the All India Muslim Personal Law Board's (hereinafter "**AIMPLB**") assurance of issuing directives, served as adequate deterrents

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188 Shamim Ara, *supra* note 130, § 393.
189 *Id.*
190 The Muslim Women (Protection of Rights on Marriage) Bill, 2017, No. 247-C, Bills of Parliament, 2017, http://164.100.47.194/Loksabha/Legislation/billintroduce.aspx (last visited: 21 May, 2018) (India).
191 *Id.*
192 *Id.*

against Triple Talaq.[193] It was still widely being practised.[194] Therefore, the State needed to give legal effect to the verdict.

The Bill makes the pronouncement of instantaneous and irrevocable Talaq illegal and void.[195] It defines 'Talaq' as Talaq-i-biddat or any other form of Talaq which is instantaneous and irrevocable (hereinafter "**Unapproved Talaq**"). The Unapproved Talaq may be declared in any form- spoken, written, electronic or in any other manner.[196]

The Bill criminalizes the practice of Unapproved Talaq. It makes the pronouncement of Unapproved Talaq punishable with imprisonment upto 3 years, and fine.[197] The Bill goes one step further and makes the offence cognizable[198] and non-bailable.[199] This means that a police officer may arrest the husband without a warrant.

The Bill also legislates on aspects ancillary to Unapproved Talaq such as- subsistence allowance and child custody. Every Muslim woman divorced through Unapproved Talaq, is entitled to subsistence allowance for herself and her dependent children.[200] The subsistence allowance is over and above maintenance under other laws. This is clear from the

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[193] *See supra* note 190, Statement of Objects and Reasons.
[194] *Id.*
[195] *Id.* § 2.
[196] *Id.* § 3.
[197] *Id.* § 4.
[198] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 2, cl. (c) (India).
[199] *Id.,* § 2 cl. (a).
[200] *Id.* § 5.

opening phrase of Section 5- "Without prejudice to the generality of the provisions contained in any other law for the time being in force..."[201]

Further, the Muslim woman is also granted default custody of her minor children[202], notwithstanding any other law in force. The terms of the custody may be determined by the Magistrate.[203] This provision appears to be a natural consequence of Section 7 of the Bill- under which the husband may be arrested without a warrant, and will not be granted bail. Therefore, the custody of the children must lie with the mother.

The Bill is a short legislation. It is divided into three chapters, spread out over seven sections. In fact, the statement of objects and reasons is longer than the provisions of the Bill. Although the Bill covers the major facets incidental to divorce, it fails on many aspects. These have been discussed in Part III.

IV. LACUNAE IN THE BILL

A noble cause with a hollow scheme-

The Bill was passed in the Lok Sabha on the same day it was introduced, without much debate. Naturally, it has several lacunae that need to be rectified. The author has discussed the shortcomings of the Bill below.

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[201] The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974, § 2, cl. (c) (India).
[202] *Id.* § 6.
[203] *Id.*

A. AMBIGUITY IN MARITAL STATUS ON PRONOUNCEMENT OF TRIPLE TALAQ:

The Bill merely makes pronouncement of Unapproved Talaq illegal and void. However, the Bill does not clarify the status of the marriage on pronouncement of Unapproved Talaq. It is unclear whether the marriage would subsist or dissolve.

It may be assumed that the marriage survives the Unapproved Triple Talaq, since the Legislature's intention was to end instantaneous divorce.[204] However, the Bill also provides for subsistence allowance and custody of children, which are typically enacted in divorce law.[205] Herein lies the inherent contradiction in the Bill.

The consequences of Unapproved Talaq prescribed in the Bill- such as immediate arrest and imprisonment up to 3 years- do not make for continuity of a marriage. The husband's imprisonment is likely to negatively impact the family's financial stability.[206] This will, in fact, create more hardship on the Muslim wife, than solve her problems. The Bill

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204 *See supra* note 190, Statement of Objects and Reasons.

205 *Editorial, on triple talaq bill: Re-examine the Bill,* THE HINDU (2018), http://www.thehindu.com/opinion/editorial/re-examine-the-bill/article22392015.ece (last updated Jan. 7, 2018).

206 Faizan Mustafa, *Legal excess The triple talaq bill is a textbook case of overcriminalisation*, THE INDIAN EXPRESS (2017), http://indianexpress.com/article/opinion/columns/triple-talaq-bill-passed-parliament-lok-sabha-legal-excess-5002913/ (last updated Dec. 29, 2017) [hereinafter Faizan]

does not consider how intricately imprisonment is linked with livelihood and maintenance.[207]

It is also unclear what recourse the Muslim wife may take while her husband is in prison. Her husband's imprisonment will force the wife to live as a single woman while he is in jail.[208] She can neither divorce him nor can she remarry. The Dissolution of Muslim Marriages Act, 1939 (hereinafter "**Dissolution Act**"), permits divorce upon imprisonment only if the sentence is for 7 years or more.[209] Under the Bill, the maximum sentence is for 3 years. Therefore, the wife will not be able to divorce her husband on this ground. The other grounds for dissolution of marriage may also not be applicable to her in this case. As a consequence, the Muslim wife will be left alone in an empty marriage, with possibly no steady source of income, and no way out.

Further, even though the Bill declares Unapproved Talaq void, it cannot compel the husband to have a loving marriage with his wife.[210] Thus, the Muslim wife is forced to remain married to a man who attempted to divorce her instantaneously and irrevocably. She is not

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[207] Esita Sur, *Triple Talaq Bill in India: Muslim Women as Political Subjects or Victims?*, 5 SPACE AND CULTURE, INDIA 5–12 at 7 (2018).

[208] Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking,* THE WIRE (Dec. 30, 2017)., https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking.

[209] Dissolution of Muslim Marriages Act, 1939, No. 8, Acts of Parliament, 1939, § 2 cl. (iii) (India).

[210] Faizan, *supra* note 206.

granted any say on her marriage, despite being an equal stakeholder. This seriously subverts her "individual choice and autonomy."[211]

B. CRIMINALISATION OF A CIVIL WRONG AND OVER-CRIMINALISATION

Muslim marriage and divorce are both civil acts, just like marriage and divorce in other religions. However, the Bill makes Unapproved Talaq a criminal act. The statement of objects and reasons of the Bill justifies the criminalisation of Unapproved Talaq on the ground that it is essential to prevent Triple Talaq.[212]

In Shayara Bano, the Supreme Court anyway set aside the practice of Triple Talaq.[213] As a result, Triple Talaq is no longer a valid form of divorcing a Muslim wife. Even if pronounced by the Muslim husband, it will not dissolve the marriage. As a result, the 'harm' that is sought to be remedied by Section 4 of the Bill, has already been rendered inconsequential. Further, mere criminalisation of Unapproved Talaq will not serve as an effective deterrent against it. For example, even cruelty by husbands is a crime punishable with three years of imprisonment.[214] However, statistics show that as many as 110,434 cases of cruelty by husbands/relatives were registered in India in a single year 2016.[215] Hence,

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[211] Faizan, *supra* note 206.
[212] *See supra* note 190, Statement of Objects and Reasons, § 4.
[213] INDIA CONST. art. 141.
[214] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 498A (India),
[215] National Crime Records Bureau, Ministry Of Home Affairs, Crimes In India (2016), 135, http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime in India - 2016 Complete PDF 291117.pdf (last visited May 22, 2018).

the efficacy of the three year imprisonment for Unapproved Talaq is questionable.

Moreover, the Bill does not just criminalise Unapproved Talaq- it over-criminalises Unapproved Talaq. There is no justification or rationale given for prescribing 3 years imprisonment for Unapproved Talaq. Three years imprisonment is reserved for crimes which have the potential to threaten public peace and security of the country. Examples of these crimes are- sedition,[216] rioting with deadly weapon,[217] counterfeiting Indian coins,[218] promoting enmity between classes of people,[219] etc. Other serious crimes, such as, causing death by rash and negligent act,[220] rioting,[221] bribery,[222] wrongfully restraining a person,[223] etc., have a maximum of two years imprisonment. Therefore, the 3 years for Unapproved Talaq do not fit into the scheme of the Indian Penal Code, 1860 (IPC).

C. DIFFICULTY IN IMPLEMENTATION

The thumb rule in criminal law is that the burden of proof lies on the prosecution.[224] The accused is considered innocent until proven guilty beyond all reasonable doubt.[225] Proving Unapproved Talaq may become extremely difficult. Since Triple Talaq may be declared orally without any

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[216] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 124A (India).
[217] *Id.* § 148 (India).
[218] *Id*, § 233.
[219] *Id*, § 153A.
[220] *Id*, § 304A.
[221] *Id*, § 147.
[222] *Id.* § 171E.
[223] *Id.* § 341.
[224] *Id.* § 101.
[225] Vijayee Singh v. State of Uttar Pradesh, (1990) 3 SCC 190 (India).

witnesses, it may not always be supported by evidence. At least if it is documented, in the form of email, text message, hand written, etc., it can serve as documentary evidence.[226] Consequently, conviction rate may become very low. This may serve as a disincentive for the Muslim wife to report the act of Unapproved Talaq by her husband.[227]

i. Mens Rea or Strict Liability:

It is also unclear whether the Bill requires mens rea or seeks to impose strict liability (that is, mens rea is not required). The essential ingredients of a crime are actus reus- wrongful act and mens rea- wrongful intention.[228] Actus reus is the physical action of the person.[229] Mens rea is his mental condition.[230] Mens rea is a necessary ingredient of a crime because the objective of criminal law is to punish a person only if he has a guilty mind.[231] The IPC, in most cases, describes the kind of mens rea that is required for a crime.[232] It uses terms like- dishonestly,[233] voluntarily,[234]

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[226] The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872, § 61 (India).
[227] Pramit Bhattacharya, *An epidemic of crimes against women?,* LIVE MINT (2013), https://www.livemint.com/Opinion/xvSrDvJQWT5Qd2KrhMRLgK/An-epidemic-of-crimes-against-women.html (last updated September 12, 2013).
[228] PSA PILLAI, CRIMINAL LAW 22 (9 ed. 2000).
[229] *Id.,* ch. 4 at 22.
[230] *Id.*
[231] *Id.*, ch. 5 at 39.
[232] *Id.* at 40.
[233] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 24 (India).
[234] *Id.* § 39.
"Voluntarily"— A person is said to cause an effect "volun-tarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it. Illustration A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery and thus causes the death of a person. Here, A may not have intended to cause death; and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

has reason to believe,[235] criminal knowledge,[236] etc. to show mens rea. However, for certain crimes, the Indian Penal Code, 1860 (IPC) by-passes the element of mens rea and imposes strict liability. That is, the person may be considered guilty even without intention to perform the crime. Strict liability can be gathered from the words used in the statute. For example, Section 292 of the IPC makes sale of obscene books, etc. a punishable offence, irrespective of knowledge or intention.[237] Courts have interpreted this section as imposing strict liability.

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[235] The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860, § 26 (India),
"Reason to believe"—A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing but not otherwise.
[236] *Id.* § 35 (India),
When such an act is criminal by reason of its being done with a criminal knowledge or intention- Wherever an act, which is criminal only by reason of its being done by several persons, each of such persons who joins in the act with such knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manners as if the act were done by him alone with that knowledge or intention.
[237] *Id.* § 292 (India),
Whoever—
(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
(e) offers or attempts to do any act which is an offence under this section, shall be punished on first conviction with im-prisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and,

Section 3 of the Bill does not prescribe mens rea for the husband pronouncing Unapproved Talaq. It merely states that- "Whoever pronounces Talaq...shall be punished with imprisonment."[238] This would mean that, even if the husband does not intend to divorce his wife, utterance of 'Talaq' thrice will be held as pronouncement of Unapproved Talaq.[239] The Bill does not consider that sometimes, such utterances could be made in the heat of the moment.[240] Under extreme anger, the husband may not realise what he is saying.[241] It is argued that imposing strict liability for Unapproved Talaq is excessive and unnecessary.

Further, criminalisation may prevent Muslim women from reporting Unapproved Talaq.[242] This is because her disclosure could land her husband in prison.[243] Most Muslim women would not want this, especially due to their socio-economic backwardness.[244] This will defeat the very purpose of the Bill.

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in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

238 The Muslim Women (Protection of Rights on Marriage) Bill, 2017, No. 247-C, Bills of Parliament, 2017 § 3 (India).

239 Faizan Mustafa, *Why Criminalising Triple Talaq Is Unnecessary Overkill,* THE WIRE (December 15, 2017), https://thewire.in/gender/why-criminalising-triple-talaq-is-unnecessary-overkill.

240 *Id.*

241 *Id.*

242 Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking,* THE WIRE (December 30, 2017), https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking.

243 *Id.*

244 Aravind Kurian Abraham, *Bill Criminalising Triple Talaq a Hasty Legislation, Exposes Gap in Indian Lawmaking,* THE WIRE (December 30, 2017), https://thewire.in/law/bill-criminalising-triple-talaq-a-hasty-legislation-exposes-gap-in-indian-lawmaking.

D. VAGUE PROVISION FOR SUBSISTENCE ALLOWANCE

The provision of subsistence allowance in Section 5 is also vague and arbitrary. The Bill does not define subsistence allowance. No guidelines are laid down for the Magistrates for determining subsistence allowance.[245] Basic factors such as, the amount of subsistence to be given, schedule of payment, which law will this subsistence fall under, etc, are left to the Magistrate's discretion.[246] Since Muslim personal laws (including property and inheritance) are not codified, the Bill should have prioritised determination of the subsistence allowance. This would have helped to safeguard the Muslim woman's right to receive an allowance.

Further, the Bill is unclear about payment of subsistence allowance when the husband is incarcerated. Upon imprisonment, the husband's income will discontinue.[247] There is no provision about how the husband will pay the subsistence allowance without any recurring income. Further, the Muslim wife will also be deprived of day-to-day sustenance, without a constant source of income.[248] This anomaly will especially affect the lower strata of society, which depends on daily income for survival.[249] The Bill is thus, indirectly placing additional hardship on the already 'hapless married Muslim woman.' By imprisoning her husband instantly, it

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245 Deva Bhattacharya, *Triple talaq bill: Draft law is more focused on victimising Muslim women rather than empowering them,* FIRSTPOST (2018), https://www.firstpost.com/india/triple-talaq-bill-draft-law-is-more-focused-on-victimising-muslim-women-rather-than-empowering-them-4281477.html (last modified Dec. 30, 2017).
246 *Id.*
247 *See supra* note 122.
248 MULLA, PRINCIPLES OF MOHAMMEDAN LAW 338 (22nd ed. 2017)
249 *Id.*

is depriving her of sustenance and income. This seems too harsh a repercussion for three inconsequential words.

The Bill is also silent about when the subsistence allowance is to be paid- whether as an interim relief or only upon the husband's conviction.[250] Since this is left to the Magistrate's discretion, it could swing either way. If the allowance is permitted only after the husband's conviction, it would mean a long waiting period for the Muslim wife.[251] Without laying a framework for these basic issues on subsistence allowance, the Bill leaves too much scope for the Magistrate's discretion.

E. ARBITRARINESS- CUSTODY

In the Shayara Bano case, Justice Nariman reiterated that arbitrariness has always been a premise to strike down a law as unconstitutional. The Bill, in its present form, may not pass this test of arbitrariness. It is liable to be struck down for the exact reason for which the Supreme Court set aside Triple Talaq- manifest arbitrariness.

For instance, Section 6 gives automatic child custody to the Muslim wife if her husband pronounces Unapproved Talaq on her.[252] It is unclear whether this custody is provided in the interim (when the husband is incarcerated), or permanently. Unless criminal proceedings are initiated against the husband, there is no need to determine custody. Moreover, if the husband is incarcerated, the custody of the child will anyway lie with

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[250] *Id.*
[251] *Id.*
[252] *See supra* note 69, § 6.

the mother, as the natural guardian.[253] These are questions of fact, which courts determine on case-to-case basis. However, a blanket provision for custody to the mother, in all cases, seems arbitrary and excessive. This may set problematic precedents for further laws.

F. Prevents Reconciliation

The Bill suffers from the same problem which the Supreme Court had with Triple Talaq- there is no scope for reconciliation. This is because of the long 3 year imprisonment period, and classification of the offence as non-bailable. With the husband forcibly incarcerated, the door for a possible reunion is shut.

An attempt at reconciliation is a fundamental requirement for divorce under the Quran.[254] Divorce laws of other religions, such as the Hindu Marriage Act, 1955 (hereinafter referred to as "**HMA**"), also prioritise reconciliation before seeking a divorce. For example, even in a divorce by mutual consent, the couple should have lived separately for at least a year.[255] Further, the court can decree a divorce only after a 6 months waiting period.[256] This period is intended to "allow the parties to do some re-thinking because dissolution of a marriage is a serious matter

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[253] Ms. Gita Hariharan and another v. Reserve Bank of India and another, AIR 1999 SC 1149 (India).
[254] *See supra* note 9, § 12.
[255] The Hindu Marriage Act, 1955, No. 2, Acts of Parliament, 1955 § 13B (India).
[256] *Id.;* the Supreme Court recently held in Amardeep Singh v. Harveen Kaur, (2017) 8 SCC 746 (India) that the 6 months' waiting period is directory and not mandatory. It can be waived by the courts.

and has serious consequences for the parties and the children."[257] Unlike other divorce laws, the Bill has prioritised criminalisation over reconciliation. This deprives the Muslim couple from the opportunity to save their marriage.

Further, it also victimizes the Muslim wife. Divorce is heavily stigmatised in Indian society. The taboo against divorce is higher on women.[258] The Bill, with limited scope for reconciliation, sets up the Muslim woman to live the life of a divorcee. If she has children from the marriage, her situation as a single mother will be even more precarious.

V. POLICY RECOMMENDATIONS

Despite the various lacunae in the Bill, it cannot be denied that the ends that the Bill seeks to achieve are noble. It is important to understand the socio-political context in which it was passed. However, before being enacted as a law, the Bill requires certain amendments. The author would like to make the following recommendations to make the Bill more inclusive and empowering for Muslim women.

A. CLARITY IN STATUS OF MARRIAGE

The Bill needs to indicate the status of the marriage upon pronouncement of Unapproved Talaq. In Shayara Bano, the Supreme Court had set aside the practice of Triple Talaq by declaring it invalid.

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[257] Smt. Suman v. Surendra Kumar, AIR 2003 Raj 155 (India); see also Sureshta Devi v. Om Prakash, AIR 1992 SC 1904 (India).
[258] Vandana Shah, *Divorce Is A Special Type Of Hell For Indian Women*, HUFFPOST (2016), https://www.huffingtonpost.in/vandana-shah-/divorcenoun-the-legal dis_b_7077904.html (last updated July 15, 2016).

When the pronouncement itself is invalid, it cannot have any consequence on the marriage.

The author recommends that the Bill should clearly state that Unapproved Talaq will not affect the marriage in any manner. Further, if either partner seeks a divorce, they may do so through any of the legally approved methods of divorce under Muslim personal law.[259] Alternatively, the Bill could also state that pronouncement of Unapproved Talaq will count as a single pronouncement towards divorce by Talaq Ahsan or Talaq Hasan. This will take away the immediate and irrevocable character of the Unapproved Talaq.

On pronouncement of Unapproved Talaq, any of the following situations may arise:

- The couple sets aside the pronouncement and continues with the marriage
- The Muslim husband seeks divorce through other approved methods
- The Muslim wife seeks divorce either on the ground of pronouncement of Unapproved Talaq by her husband, or other ground/method available to her. She may also seek civil penalties from her husband, like- Mehr, damages, or any other civil penalty prescribed by law
- Both husband and wife seek divorce mutually

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[259] These have been discussed in detail in Part II of this paper.

In the first situation, the law need not interfere. However, in the remaining situations, the questions of subsistence allowance and custody of minor children, during the pendency of the divorce proceedings, will arise. Therefore, the Bill needs to clarify that the provisions for subsistence allowance and custody of minor children in the Bill are interim measures until the courts finally decree the divorce.

B. AGENCY TO MUSLIM WIFE TO SEEK DIVORCE

There is a dire need to empower Muslim wives. The Bill should entitle them to divorce their husband if he pronounces Unapproved Talaq upon them.

The author recommends that for divorce on this ground, the preponderance of probability should lie in favour of the Muslim woman. It could be argued that such this provision is unfair. However, we must keep in mind the socio-economic position of Muslim women in the society. Due to the Muslim woman's dependence on her husband for sustenance, and the stigma around divorce, it is unlikely that Muslim women will irrationally seek divorce under this provision on false grounds. It is more likely that she will try to safeguard her marriage and neither report the pronouncement of Unapproved Talaq, nor seek divorce for its pronouncement. However, in case she wishes to end her marriage, she should have the right to seek divorce on such ground.

C. DE-CRIMINALISE THE PRONOUNCEMENT OF UNAPPROVED TALAQ

The criminalisation of Triple Talaq has been the main criticism of the Bill. Scholars like Faizan Mustafa have repeatedly censured the lack of justification for criminalisation and its excessiveness.[260]

i. Criminal Wrong to Civil Wrong:

The author recommends that the state should maintain its distance from the private (family) sphere and de-couple criminal law from family law. Instead of punitive measures, the Bill should focus on reformation and reconciliation in the marriage. A Muslim husband's failure to perform his marital obligations or to maintain his wife is unlawful. However, the above two acts only attract civil consequences, in the form of divorce. Similarly, Unapproved Talaq should also be treated as a civil wrong and not made a criminal offence. There is no need to single out and give undue importance to Unapproved Talaq, especially when it has no consequence on the marriage.

Instead, the Parliament should make it compulsory for the couple to lay down the terms and conditions of marriage and divorce in the nikah-nama. The nikah-nama may stipulate the following conditions, inter alia:

- Prohibition of divorce by Triple Talaq

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[260] Faizan*, supra* note 206.

- Permitted reasons for divorce (other than what is already stipulated in law)
- Consequences for unilateral divorce by husband, such as- increasing the Mehr amount by five times[261]
- Wife will be permitted to seek punitive damages, like in breach of contract.[262]

Introducing heavy penalties for pronouncement of Unapproved Talaq may be an effective way to prevent it. The Mehr should be high enough to deter the husband from divorcing his wife. If he pronounces divorce, he will have to pay the stipulated amount.[263]

ii. Change in Nature of Offence:

If the Parliament insists on criminalising Unapproved Talaq, it should at least remove the strict liability on it. The provision should require intention or knowledge of the husband while pronouncing Unapproved Talaq. It should criminalise Unapprove Talaq only if the husband clearly and unambiguously intends to pronounce it. The Parliament could also create certain exceptions when pronouncement of Unapproved Talaq will be ineffective. For example, if the husband is inebriated, mentally unsound, insane, provoked, uncontrollably angry, etc.

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[261] Faizan, *supra* note 206.
[262] *Id.*
[263] *See supra* note 122, Ch. 15 at 383.

Countries like Egypt, Morocco, Iraq, Kuwait, Sudan, Jordan, and Syria have carved out such exceptions via reform legislations.[264]

Moreover, the nature of the offence should be changed from cognizable and non-bailable to non-cognizable and bailable. This will make the offence more proportionate to the harm it seeks to remedy. It will reduce the severity of the offence and give the Muslim couple scope to reconcile their marriage.

D. PROVISION AGAINST UNAPPROVED TALAQ IN THE NIKAH-NAMA

The nikah-nama is like a civil contract entered into between the husband and wife. In modern terms, it may be understood as a prenuptial agreement. It lays down all the terms and conditions of the marriage, including the amount of Mehr payable. If the Bill really seeks to uplift Muslim women, it should make it compulsory for the nikah-nama to have a provision against Unapproved Talaq.[265] This will make pronouncement of Unapproved Talaq a civil wrong. The wife will become entitled to civil remedies.

E. COMPULSORY RECONCILIATION PERIOD

The Bill could draw inspiration from the compulsory 'cooling-off' period under the HMA. On similar lines, the Bill should provide a reasonable amount of time before which the Court, cannot decree divorce. This should apply equally for divorce proceedings by either party-

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[264] TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD 145 (2 ed. 2016).

[265] Apoorva Mandhani, *Triple Talaq: Women's Rights Activist Flavia Agnes Submits Model Nikahnama Before SC,* LIVELAW (June 3, 2017), http://www.livelaw.in/triple-Talaq-womens-rights-activist-flavia-agnes-submits-model-nikahnama-sc/.

the husband or the wife. In the interim, it should be the couple's discretion whether to live together or separately. After the reconciliation period, the courts should not hesitate to look into the question of divorce.

It is, however, important to carve out an exception to the compulsory cooling off period, like in instances of- domestic violence, rape, sexual assault, cruelty, etc. against the wife. Determining the existence of these circumstances should be left to the discretion of the court. The Parliament may choose to create a presumption about their existence in favour of the wife, for the purpose of this exception.

F. STAKEHOLDER CONSULTATION

The two individual stakeholders in this Bill are the Muslim wife and her husband. To get an overarching understanding of the needs of the average Muslim, the Parliament should consult their representative groups like AIMPLB, AIMWPLB, BMMA, etc. Representative groups have the power to influence the masses because they have large support in the community.[266]

If the Bill is revised by considering the recommendations of representative organisations, it is more likely that they will support the Bill. Only if they are in favour of the Bill will they spread awareness about it within the Muslim community. Creating mass-awareness of the change in law and policy is the first step towards implementing the Bill. Further,

[266] Bharatiya Muslim Mahila Andolan organisation, https://bmmaindia.com/about/ (last visited May 23, 2018).

the approval of the Bill by representative groups sets an example for individual families to follow.

The Bill cannot be implemented in a vacuum by alienating the Muslim community. The Parliament should, therefore, strive to bridge the gap between the Bill and the community.

G. PROVISIONS ABOUT SUBSISTENCE ALLOWANCE

The author recommends that the Parliament should make provisions on the following details of subsistence allowance. These details will serve as guidelines for the Magistrate while determining the allowance:

- Subsistence allowance as an interim measure- The Muslim wife is already entitled to Mehr amount upon divorce, along with maintenance under Section 125 of the Criminal Procedure Code, 1973 (CrPC). Therefore, the legislative intent behind the subsistence allowance provision would have been to provide for the woman (and child's) sustenance during the pendency of legal proceedings. The Bill must clarify this so that the husband does not take advantage of the ambiguity in law to deny the Muslim wife her interim rights.
- Schedule of payment- The Bill must provide for the schedule for paying the subsistence allowance- whether it is to be paid as a lump-sum, or recurring periodically. Alternately, the Bill could also leave the determination of schedule to the Magistrate on a case-to-case basis, considering the preference of the parties. But, the Bill must at least lay down these two options.

- Amount of allowance- whether a minimum amount (such as-that equivalent to Mehr amount) should be set. The amount should be determined keeping in mind the husband's standard of living. It should enable the wife and children to maintain the status quo.

- Payment when the husband is incarcerated- If the husband is imprisoned under the current provisions of the Bill, he may lose his steady income. The Bill should make alternate provisions for the wife and child(ren) to receive subsistence allowance. This could be through the husband's personal property, other sources of income like rent, interest, etc., or through the other heirs and immediate family members of the husband. If Unapproved Talaq is de-criminalised, the need for this provision will not arise.

H. DETERMINATION OF CUSTODY

The current Bill gives the child's custody automatically to the mother. Also, it is vague about whether the custody is given for the interim period, during the pendency of criminal proceedings against the husband, or permanently. The author recommends that the child's custody should be given to the mother during the pendency of the criminal proceedings against the husband. However, if the proceedings are merely civil in nature, then custody may be determined on a case-to-case basis. The law cannot turn a blind eye to the possibility of misuse of the Bill, especially if Unapproved Talaq continues to be a cognizable and non-bailable offence. In case of misuse of the Bill, the father will be wrongly deprived of his child's company. The author recommends that, after the

interim period, the custody should be determined by the appropriate court.

I. <u>POLICY MEASURES FOR SUBSTANTIVE UPLIFTMENT OF MUSLIM WOMEN</u>

Merely giving Muslim women rights on paper will not improve their socio-economic position in society. Even if they have the right to seek divorce, they may be restrained by financial and social considerations. This will render their rights hollow.

The problem of lack of education and employment of Muslim women must be solved at the grassroot level. This needs a shift in policy from punishing the husband to empowering the Muslim woman. The author proposes the following policy guidelines to take substantive equality to Muslim women:

- The government should tie-up with Muslim womens' organisations, such as BMMA, AIMPLB and Awaaz-e-Niswaan, to help spread awareness about Muslim women's rights.
- The government could come up with a scheme to encourage Muslim families to educate their girl child. Similarly, the government could also incentivise Muslim families to marry their girl child only after she completes her education. This will empower the Muslim woman. The scheme could be modelled

after the 'Prerna Scheme' of the Ministry of Health and Family Welfare.[267]

- The government should take the help of NGOs and social welfare organisations to make Muslim women employable. This can be done by imparting skill-training and vocational learning to Muslim women.

[267] This scheme incentivises increasing the age of marriage of the girl, and also spacing out childbirth in the marriage. Couples who marry late, or have children after minimum 2 years of marriage are given monetary rewards. This scheme focuses on seven states, namely, Bihar, Uttar Pradesh, Madhya Pradesh, Chhattisgarh, Jharkhand, Odisha, and Rajasthan.
SCHEME FOR INCENTIVE TO PARENTS OF GIRL CHILD, Press Information Bureau, Govt. of India, Ministry of Health and Family Welfare, http://pib.nic.in/newsite/PrintRelease.aspx?relid=117479 (last visited May 23, 2018).

Dr. Rangin Pallav Tripathy, *Standard of Proof in Inquiry against Judges: A Case for a Lower Threshold,* 5(2) NLUJ Law Review 85 (2018)

STANDARD OF PROOF IN INQUIRY AGAINST JUDGES: A CASE FOR A LOWER THRESHOLD

DR. RANGIN PALLAV TRIPATHY*

ABSTRACT

Inquiry proceedings against judges to determine their suitability to continue to hold office are unique both in terms of their nature and in terms of the implications on a constitutional democracy. This article attempts to explore the dynamics of the standard of proof to be adopted in such inquiry proceedings.

The article is built around a simple and clear proposition that in order to continue in office, the suitability of a judge must always be beyond reasonable doubt and not his unsuitability. In other words, when a question arises as to whether a judge should continue to hold office, the question should not be whether his unsuitability is proved beyond reasonable doubt. The question should be; whether the suitability of the judge is beyond reasonable doubt? A corollary to this proposition is that if facts unfavourable to a judge are proved in inquiry proceedings on a balance of probabilities, it establishes a reasonable doubt regarding his suitability to hold office. Thus, if the standard adopted in inquiry proceedings is that of proof beyond reasonable doubt, it means we are unwilling to remove judges whose suitability is not beyond reasonable doubt.

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I. NATURE OF AN ADJUDICATIVE PROCESS

At the core each adjudicative process is the requirement to prove alleged facts so that the adjudicatory authority can take a decision. Much of the adjudicative process is essentially a contest between parties in proving contrasting versions of facts. The favourable verdict towards a party depends primarily on the capacity of the party to prove that the version of facts alleged by them is true.[268] Thus, the rules and principles governing the process through which facts are to be proved in an adjudicative process are of utmost importance in terms of ensuring the objectives of the adjudicative process.

II. LEGAL PROOF VIS A VIS SCIENTIFIC PROOF

The two questions which gain immediate importance in this context are - who has the obligation to prove facts and how are facts to be proven. The first question is tackled by the concept of 'burden of proof' which identifies the party who has the obligation to prove facts in the overall scheme of the case and also in relation to specific issues. In relation to the second question, we need to differentiate between the scientific notion of proof and the legal notion of proof.[269] Unlike the scientific understanding of proof which comprises of absolute certainty, the term proof in the legal sense is but a calculated estimation of the facts which are likely to have happened.[270] On the basis of the evidence

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[268] ADRIAN KEANE, THE MODERN LAW OF EVIDENCE 103 (8th ed. Oxford University Press 2008) [hereinafter Keane].
[269] STEVE UGLOW, EVIDENCE: TEXTS AND MATERIALS 76 (2nd ed. Sweet and Maxwell 2006).
[270] *Id.*

produced before it, the adjudicative authority seeks to convince itself of the facts which are likely to have transpired.[271] There is never any absolute objective proof of the facts and there is always a measure of estimation involved which is beyond the realm of direct knowledge.[272] Even with the advancement of technology and scientific techniques, there is always the subjective human involvement in the process. Thus, though we feel that something like fingerprints match is a sufficiently objective indicator of the proof of facts, we tend to ignore the subjective elements of proper collection of fingerprints, integrity of the crime scene and other such factors. Continuous technical advancement has also shown that our reliance on objective standards is contextualised by time.

III. STANDARD OF PROOF

Since, the idea of proof involves estimation by the adjudicative authority, the question of the extent to which evidence must be produced for the adjudicative authority to feel satisfied about making certain estimation, becomes very important.[273] This particular aspect is governed by the facets of 'Standard of Proof'.[274] The concept of standard of proof refers to the guidance as to the degree of conviction induced by the evidence on record which would be sufficient to hold a fact as proved.[275]

In terms of broad categorisation, there have been two standards of proof which are applied by the courts depending on the nature of the

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[271] STEVE UGLOW, EVIDENCE: TEXTS AND MATERIALS 76 (2nd ed. 2006).
[272] *Id.*
[273] *Id.*
[274] Keane, *supra* note 268.
[275] PETER MURPHY, MURPHY ON EVIDENCE 105 (11th ed. 2009).

case.[276] The standard of 'proof beyond reasonable doubt' is applied in criminal cases and the standard of 'balance of probabilities' is applied in civil cases.[277] Of the two, proof beyond reasonable doubt refers to a higher standard of proof where the evidence adduced must be sufficient so as to not leave a scope of reasonable doubt regarding the conclusion reached.[278] Thus, the evidence must not only be convincing but also free from contradictions. Proof beyond reasonable doubt however, does not mean proof beyond any doubt whatsoever.[279] The doubt must be based on reasonable propositions and not a product of faint possibilities.[280] Proof on balance of probabilities on the other hand, admits of the possibility of contradictory versions being true but favours the version which has more weight than the other. To prove a fact by balance of probabilities is to prove one's version better, even slightly,[281] than the version of the other party.[282] All the court needs to be convinced of is that though both the versions of fact are possible, one version is more likely than the other to be true.[283]

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276 PETER MURPHY, MURPHY ON EVIDENCE 105 (11th ed. 2009); Keane, *supra* note 268 at 103.
277 ALAN TAYLOR, PRINCIPLES OF EVIDENCE 27 (2nd ed. 2000) [hereinafter Taylor].
278 COLIN TAPER, CROSS AND TAPER ON EVIDENCE 167 (11th ed. 2007).
279 Thomas Mulrine, *Reasonable doubt: How in the world is it defined?,* 12(1) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 195 (1997).
280 Miller v. Minister of Pensions, (1947) 2 All ER 372, 373-4 (the United Kingdom).
281 *See* M. Redmayne, *Standards of Proof in Civil Litigation,* (62) MODERN LAW REVIEW 167 (1999).
282 Taylor, *supra* note 277 at 29.
283 Miller v. Minister of Pensions, *supra* note 280.

IV. BACKGROUND OF THE CHOICE OF STANDARD OF PROOF

While it is fairly simpler to classify the two standards of proof and then say that one applies to civil proceedings and the other to criminal proceedings, it is necessary to appreciate the larger context in which the choices of standards of proof are made.

Though the rule of proof beyond reasonable doubt is often cited as a necessary and essential safeguard to ensure that an innocent person is not mistakenly punished in law, it is interesting to note that the origin of this concept was not with the view to protect the accused.[284] This particular standard of proof was conceptualised to protect the soul of jurors in case they punish an innocent person.[285] However, regardless of the idealistic foundation of its origin, there is no doubt that the standard of proof beyond reasonable doubt retains its relevance primarily due to its role in minimising the risk of an innocent man being punished. The logic behind following the standard of proof beyond reasonable doubt, at least in criminal proceedings is very simple; while it is important to punish a person guilty of criminal wrong, it is more important to ensure that the punitive force of the state is not unleashed on a man who could be innocent[286] and thus, the need to ensure beyond reasonable doubt that the man facing criminal sanction is indeed guilty of the crime for which he is being punished. This particular precaution is critically important in

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[284] James Q. Whitman, *The Origins of Reasonable Doubt*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY 2005, (June 30 2016) http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=fss_papers.
[285] *Id.*
[286] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPARTICK, EVIDENCE 134 (5th ed. 2012).

criminal proceedings due to the nature of consequences which are likely to follow in case a person is convicted; loss of liberty and at times, life.[287] On the other hand, the consequences of a wrong decision in a civil proceeding, though damaging in one way or the other, does not match the severity of a criminal sanction.

Thus, the choice of the standard of proof reflects the risk that the society is willing to take in a given situation if a wrong decision is reached.[288] Generally, the risk is not considered worthy when the consequence can result in an innocent man being incarcerated. On the other hand, the risk seems more manageable in a civil proceeding. For example, if the standard of proof on preponderance of probabilities were to be adopted in criminal proceedings, while the possibility of guilty persons being found innocent will decrease, the possibility of innocent persons being found guilty will increase.[289] Considering the nature of consequences attached to criminal proceedings, this has been found to be a risk not worth the reward.

This risk assessment of the cost of errors in civil and criminal proceedings is at the core of the choice in applying the standard of proof beyond reasonable doubt to criminal proceedings and the standard of proof by preponderance of probabilities in civil proceedings.[290]

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[287] *Id.* at 134.
[288] CHRISTOPHER ALLEN, PRACTICAL GUIDE TO EVIDENCE 175 (4th ed. 2008).
[289] *Id.* at 176.
[290] *Id.*

V. DEGREES WITHIN A STANDARD OF PROOF

Though it is accepted as a generally uncontested proposition that 'proof beyond reasonable doubt' and 'proof on preponderance of probabilities (also known in some jurisdictions as 'preponderance of evidence'[291]).' are the only two standards of proof,[292] there exists layers of variations in terms of how these standards are applied in individual cases and these are not absolute and rigid formulations.[293] Within the bandwidth of a singular standard of proof, the appreciation of evidence by the court will differ depending on the nature of the facts involved.[294] Thus, the court's inclination to hold something as proved is necessarily dependent on the nature of misconduct being alleged.[295] Therefore, within a

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[291] *See* Murphy, *supra* note 275 at 105.

[292] Keane, *supra* note 268 at 103.

[293] It needs to be noted, however, in the United States of America, there is a sufficiently wide belief that there are as many as three standards of proof. *See* TERENCE ANDERSON, DAVID SCHUM AND WILLIAM TWINING, ANALYSIS OF EVIDENCE 243 (Cambridge University Press 2010): "In the United States, it is now widely accepted that there are at least three distinguishable standards: proof beyond reasonable doubt, proof on the preponderance of evidence and intermediate standard variously expressed as proof by 'clear and convincing', 'clear, cogent and convincing' or 'clear, unequivocal and convincing' evidence."

[294] Taylor, *supra* note 277 at 29; Bater v. Bater 1951 2 All ER 458 (the United Kingdom), Denning LJ: "It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best CJ and many other great judges have said, 'in proportion as the crime is enormous, so ought the proof to be clear'. So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter."

[295] Taylor, *supra* note 277 at 29; Bater v. Bater 1951 2 All ER 458 (the United Kingdom) Denning LJ: "A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even

particular standard of proof categorisation, there are different layers of thresholds which are applied by the courts.[296] Between the standard of preponderance of probabilities/balance of probabilities and proof beyond reasonable doubt, there is the possibility of different degrees of proof being applied by the court depending on the nature of the allegation and the consequences of the proof.[297]

Thus, though at times known by different nomenclature; in any adjudicative process, the choice for standard of proof boils down to proof beyond reasonable doubt and proof by preponderance of probabilities.

VI. NATURE OF INQUIRY PROCEEDINGS AGAINST JUDGES IN INDIA

In most constitutional democracies, members of the higher judiciary are subject to an accountability mechanism wherein they can be removed from office on the ground of some misconduct. Judges of the High Court in Australia can be removed from office on the ground of misbehaviour or incapacity.[298] In South Africa, judges of the Constitutional Court can be removed from office on the ground of incapacity, gross incompetence or gross misconduct.[299] In United States of America, a judge of the Federal Supreme Court can be removed from office on the ground of treason, bribery or other high crimes and

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when it is considering a charge of criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

[296] Taylor*, supra* note 277 at 30: "Thus, the standard 'floats' according to the subject matter; the more serious the allegation, the greater degree of proof required."

[297] I. H. DENNIS, THE LAW OF EVIDENCE 483 (3rd ed. 2007).

[298] AUSTRALIAN CONSTITUTION § 72(ii).

[299] S. AFR. CONST. 1996 § 177(1)(a).

misdemeanours.[300] In all such jurisdictions where judges can be removed on certain grounds, there is also usually a prescribed or established procedure to inquire into the proof of such grounds.[301]

A. CONSTITUTIONAL AND STATUTORY SCHEME

In India, the judges of the Supreme Court can be removed from office on the ground of proved misbehaviour or incapacity.[302] The Constitution authorises the Parliament to make laws regarding the investigation and proof of the allegations of misbehaviour or incapacity against the judges. Pursuant to this mandate, the inquiry procedure against the judges of the Supreme Court in India is regulated by the prescriptions of the Judges Inquiry Act, 1968. Under the statutory scheme, an inquiry committee is constituted by the Speaker of the House of the People or the Chairman of the Council of States, as the case may be, depending on which House the motion of removal has been initiated.[303]

The proceedings before the inquiry committee are characterised as a judicial process and thus the legality and regularity of the functioning of the inquiry committee can be scrutinised by the courts.[304]

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300 U.S. CONST. § 2.
301 Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act, 2012 (Austl.); Judicial Service Commission Act, 1994 (S. AFR.).
302 INDIA CONST. art. 124, cl. 4.
303 The Judges (Inquiry) Act, 1968, No. 51, Acts of Parliament, 1968 § 3(2) (India).
304 Sub Committee on Judicial Accountability v. Union of India, AIR 1992 SC 320 (India).

B. CHARACTERISATION OF INQUIRY PROCEEDINGS

In independent India, the first inquiry committee was constituted in the year 1991 in relation the allegations against J. V. Ramaswami. The committee consisting of Justice P. B. Sawant of the Supreme Court, Chief Justice P. D. Desai of the Bombay High Court and Justice O. Chinnappa Reddy, retired judge of the Supreme Court (hereinafter **"the P.B. Sawant Committee"**) in its report, *inter alia*, also made observations regarding the nature of the inquiry proceedings. The committee was clear that the proceedings before the committee are neither completely civil nor completely criminal in nature;[305] instead, they were of a sui generis character.

The terminology that the committee settled for in describing the nature of the inquiry proceedings was 'quasi-criminal proceedings'.[306] This determination was based on the use of the word 'investigation' in both Article 124(4) of the Constitution and the Judges Inquiry Act, 1968, the requirement of framing 'charges' against the judge and finding to be recorded in the form of 'guilty' and 'not guilty'. The usage of these terms convinced the committee that the proceedings were 'quasi-criminal' in nature.[307] Since then, there has not been any statement or observation to

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305 Law Commission of India, *Judges Inquiry Bill 2005* (Law Commission No. 195, 2006) 109.
306 *Id.* at 106.
307 *Id.* at 39, 110.

the contrary by either the higher judiciary in India or the subsequent inquiry committees set up under the Judges Inquiry Act, 1968.[308]

VII. POLICY ON STANDARD OF PROOF IN INDIA

A. P.B. SAWANT COMMITTEE

While enquiring into the allegations against J. V. Ramaswami, the P.B. Sawant Committee held that for a finding of guilt of misbehaviour or incapacity to be sustainable in law, it has to be proved beyond reasonable doubt and not merely on preponderance of probabilities.[309] This determination of the committee was based substantially on its characterisation of the proceedings as quasi-criminal. The committee stressed that 'proof beyond reasonable doubt' provides the most adequate balance in ensuring judicial accountability without breaching the goal of judicial independence. The committee emphasised on the gravity of the charges against a judge of the higher judiciary, the unique nature of the impeachment proceedings, and the possible consequences in case charges against a judge are proved, as relevant factors in settling for the standard of proof beyond reasonable doubt.[310] The committee also cited the fact that corrupt practices in elections are considered as quasi-criminal conduct in nature by the Supreme Court and are required to be proved

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[308] Subsequent to the case of J. V. Ramaswami, inquiry committees have been set up to inquire into allegations made against J. Soumitra Sen (Judge, Calcutta High Court) and J. P.D. Dinakaran (Chief Justice, Karnataka High Court).

[309] Report of the Inquiry Committee (Volume-I) in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice v. Ramaswami, Judge, Supreme Court of India, ¶ 101.

[310] *Id.* at ¶ 99.

beyond reasonable doubt.[311] Further, it also refused to equate the removal proceedings of a judge with departmental inquires where proof by preponderance of probabilities is the accepted stating that the removal proceedings of judge is a solemn proceeding. It insisted on a higher degree of proof while removing a judge of the High Court or Supreme Court.[312]

B. KRISHNA SWAMI V. UNION OF INDIA

The same view was reiterated by the Supreme Court of India in the case of Krishna Swami v. Union of India.[313] Though the observations of the court were not in relation to any issue in dispute and thus should not be considered as a binding ratio, the Court was quite emphatic in its inclination to the standard of proof beyond reasonable doubt. However, it is interesting to note that the Court in the same paragraph describes the procedure before the committee as that of a trial of a civil suit under the Code of Civil Procedure, 1908. Despite characterising the inquiry procedure as that of a civil suit, the Court favoured a criminal trial evidentiary standard primarily due to the nomenclature of 'guilty' or 'not-guilty' in Section 6 of the Judges Inquiry Act, 1968 which according to the Court meant that the assessment of the evidence has to be in the same manner as it is done in a criminal case.[314]

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[311] *Id.*
[312] Report of The Inquiry Committee (Volume-I) In Regard To Investigation and Proof of The Misbehaviour Alleged Against Mr. Justice V. Ramaswami, Judge, Supreme Court of India, ¶ 99.
[313] Krishna Swami v. Union of India, AIR 1993 SC 1407, ¶60 (India).
[314] *Id.*

C. INQUIRY COMMITTEE ON SOUMITRA SEN

Though it did not elaborate on the issue or even discuss it as a point of dispute, the inquiry committee in relation to J. Soumitra Sen applied the standard of proof beyond reasonable doubt to determine the allegations. In its report, the committee has accepted the adoption of this standard without any explanation or reasoning.[315]

D. JUDGES INQUIRY BILL 2006

A similar view was also reflected in the Judges Inquiry Bill, 2006 which proposed to substitute the Judges Inquiry Act, 1968 and contained a specific provision clarifying that the standard to be applied in inquiries against judges would be proof beyond reasonable doubt. [316]

E. REMOVAL MOTION AGAINST J. DIPAK MISRA

The matter concerning the removal motion against CJI Dipak Misra presents a curious development in this respect. The matter never reached the stage of an inquiry as the motion was not admitted by the chairperson of the council of States. The allegations against J. Misra centred on abuse of authority, fabrication of documents, submitting false affidavit, and participating in a criminal conspiracy.

A motion to remove J. Dipak Misra was submitted to the chairperson of the council of State by 64 members on 20th April 2018 and the chairperson issued his order refusing to admit the motion on 23rd

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315 Report of the Inquiry Committee [Constituted by the Chairman, Rajya Sabha] Volume-I in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice Soumitra Sen of Calcutta High Court, at 4.

316 The Judges (Inquiry) Bill, 97 of 2006, explanation to § 20(1) (India).

April 2018. Interestingly, the chairperson adopted the standard of proof beyond reasonable doubt to assess the veracity of the allegations.[317] He held that allegations do not meet the standard of proof beyond reasonable doubt.

The termed 'proved misbehaviour' in Article 124 of the Constitution has been interpreted to mean that the Parliamentary process for the removal of a judge can begin only if the misbehaviour has already been proved by a non-parliamentary authority.[318] This is the interpretative justification of the mechanism of inquiry committee created under the Judges Inquiry Act, 1968. However, it has also been clearly established that the parliamentary process for removal does not begin unless the inquiry committee returns a verdict of guilty in relation to the judge.[319] The motion for removal of a judge is considered pending before any of the Houses of the Parliament only when the inquiry committee has submitted its report holding the judge guilty of either misbehaviour or incapacity. There is no constitutional or statutory mandate that allegations need to be proved before the motion is submitted either in the House of the People or the Council of States.

VIII. QUASI-CRIMINAL PROCEEDINGS?

It is submitted that the characterisation of the inquiry proceedings under the Judges Inquiry Act, 1968 as quasi-criminal and using the

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[317] M Venkaiah Naidu, Order in the impeachment matter of CJI Misra, (27th April 2018), http://www.livelaw.in/vice-president-venkaiah-naidu-rejects-impeachment-motion-cji-misra/.

[318] Sub Committee on Judicial Accountability v. Union of India AIR 1992 SC 320 (India).

[319] *Id.*

standard of proof beyond reasonable doubt to prove the allegations against judges in the inquiry proceedings are flawed at a very fundamental level.

While it is true that words like 'investigation' and 'proof' have been used in Article 124 (5) and words like 'charge', 'guilty', 'not guilty' have been used in the scheme of the Judges Inquiry Act 1968, to characterise the nature of the proceedings merely on the basis of nomenclature is not logically sound. It is important to locate sufficient elements in substance which will justify the characterisation of 'quasi-criminal' proceedings.

A. REMOVAL NOT A LEGAL SANCTION

Though the inquiry proceeding is a statutory process, the sanction of removal from office itself is not a legal sanction as the same is *non sequeter* to the proof of allegations against a judge.[320] In case of a legal sanction, though the nature and degree of sanction to be imposed once the wrongdoing is proved may be up to the discretion of the adjudicating authority, the very fact that a sanction has to be imposed is not optional unless the wrongdoer is excused under any provision of law. When a person is found guilty of theft and a maximum term of imprisonment is prescribed as a punishment, the judge can very well decide in his discretion the exact duration of the imprisonment within the maximum range. However, the judge cannot, unless under the provision of any law,

[320] *See* Rangin Pallav Tripathy, *Defining Misbehaviour for Removal of Judges: The Logical Fallacy and Necessary Politicisation,* 6(1) NIRMA UNIVERSITY LAW JOURNAL 1 (2015).

refuse to imprison the wrongdoer. On the other hand, even after the allegations against a judge are proved, he may or may not be removed. The question of removal of a judge is entirely up to the discretion of the Parliament and there is no constitutional infirmity if a judge is not removed from office even if allegations against him are proved through the inquiry proceedings.

B. CONSTITUENT OF QUASI-CRIMINAL PROCEEDINGS

It is instructive to explore the pronouncements of the higher judiciary in relation to proceedings which do or do not qualify as quasi-criminal proceedings. While reiterating the established principle that proceedings for contempt of court are quasi-criminal proceedings, the Supreme Court has relied on the nature of the consequences which can arise from contempt to court proceedings as justification for its conclusion.[321] The fact that contempt of court proceedings can result in the punishment of imprisonment was an important factor in its attribution. The court noted that traditionally the same is not characterised as criminal proceedings but as quasi-criminal because the procedure is not regulated by provisions of Code of Criminal Procedure, 1973.[322]

Similarly, while holding that the proceedings under Chapter VI A of the Securities and Exchange Board of India Act, 1992 are neither criminal nor quasi-criminal in nature, the court stressed upon the absence

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[321] Haridas Das and another v. State of West Bengal and others, AIR 1964 SC 1773 (India).
[322] *Id.*

of any punishment contemplated under criminal proceedings.[323] The court identified the nature of liability as arising out of breach of statutory obligations. In another case, while dealing with the same penalty provisions of the SEBI Act, the Bombay High Court has emphasised that use of word like 'penalty' in the statutory scheme are not definitive indicators of the nature of proceedings being criminal or quasi-criminal.[324] The court instead put greater reliance on the nature of the function being discharged by the adjudicatory authority and the determination of the liability of the contravener.

Thus, unless the consequences are in the nature of a criminal sanction or are conceptualised as a penal sanction, there is little reason to classify the proceedings as quasi-criminal in nature. In order to determine whether a legal sanction is in the nature of a penalty, it is important to look into the impact the legislature sought to create through such sanction. Thus, when a provision of law is sought to be enforced in order to create deterrence in relation to certain actions which the legislature considers to be against public interest, the same can be characterised as a penalty.[325] The primary reason behind imposition of a criminal sanction is to discourage people from indulging in actions which are deemed to be harmful to societal interests.[326]

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323 The Chairman, SEBI v. Shriram Mutual Fund and another, AIR 2006 SC 2287 (India).

324 SEBI v. Cabot International Capital Corporation, 2004 (4) Bom CR 700 (India).

325 Commissioner of Income Tax, West Bengal v. Anwar Ali, AIR 1970 SC 1782 (India).

326 Gujarat Travancore Agency, Cochin v. Commissioner of Income Tax, Kerala, Ernakulam, AIR 1989 SC 1671 (India).

C. THE PARALLEL WITH ELECTORAL CORRUPT PRACTICES

At this point, it is interesting to note that the Sawant Committee report refers to the fact that corrupt practices in elections under the Representation of People Act, 1951 are considered quasi-criminal in nature and are required to be proved beyond reasonable doubt as an aid in its determination of applying the same standard in inquiry against judges.[327] The Representation of People Act, 1951 definitively has a penal scheme with imprisonment as the prescribed punishment for the violation of many of its provisions. Although indulging in corrupt practices as defined under Section 123 of the Act is not in itself punishable by imprisonment unless the conduct is also covered under the other offences created under the statue.[328] It is important to remember that proof of having indulged in corrupt practices does not merely lead to the concerned candidate's election being invalidated; there are further disqualifications from contesting elections for a certain number of years. This additional sanction of disqualification from contesting elections for a certain number of years in the future is a definitively punitive sanction and is at the core of the adjudication being considered quasi-criminal in nature.[329]

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[327] However, the report on Soumitra Sen on the other hand categorically states that there is no similarity between inquiry proceedings under the Judges Inquiry Act, 1968 and electoral offences under the election laws. Report of the Inquiry Committee [Constituted by the Chairman, Rajya Sabha] Volume-I in Regard to Investigation and Proof of the Misbehaviour Alleged against Mr. Justice Soumitra Sen of Calcutta High Court, at 4.

[328] *E.g.*, booth capturing, which is a corrupt practice under §123 (8) is also punishable under §135-A with imprisonment up to three years.

[329] Razik Ram v. Jaswant Singh Chouhan, AIR 1975 SC 667 (India).

D. NON-PUNITIVE NATURE OF REMOVAL MECHANISM

However, no such punitive scheme can be located in the process concerning the removal of judges. The provisions which deal with removal of judges are not meant as a deterrent but more in terms of suitability of a person to continue in office. No criminal sanction follows from the inquiry proceedings. The most that might happen to a judge in pursuance of these proceedings is loss of job. There is no criminal sanction like imprisonment, fine, and forfeiture of property which can be imposed on a judge. The clearest indication of this is in the fact that the inquiry proceedings against a judge can be held not simply for alleged misbehaviour but also for alleged incapacity. Thus, the moot point of the removal mechanism is not a punishment for an errant judge which will serve as a caution to the other judges but to deal with the situation when a person is no longer suitable to hold such an important office, whether due to some kind of misconduct or because of physical/mental incapacity. Thus, the provisions are not meant to be penal in nature.

Interestingly, though the inquiry committee which inquired into the allegations against J. Soumitra Sen adopted the standard of proof beyond reasonable doubt, it categorically mentions that inquiry proceedings under the Judges Inquiry Act, 1968 are not comparable to the electoral offences under election laws on the reasoning that the purpose these proceedings is to maintain and uphold proper standards of judicial behaviour by inquiring into judicial conduct.[330] Therefore, the thrust of

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[330] Report of The Inquiry Committee, *supra* note 315 at 4.

the inquiry proceedings is not to penalise the judges but to ensure that standards of judicial conduct are maintained.

The inquiry proceeding against a judge are not a necessary consequence of the violation of criminal law and more importantly, do not lead to the imposition of any sanction which can be characterised as punitive. There is no constitutional or statutory mandate of any further disqualification for the judge as one can see in the Representation of People Act, 1951. In such a scenario, there is not much ground to hold that the inquiry proceedings are quasi-criminal in nature.

In such a scenario, applying the standard of proof beyond reasonable doubt is not an essentiality as it would be if consequences of the inquiry proceedings entailed a penal sanction. There is no compelling reason to persist with the standard of proof beyond reasonable doubt. On the other hand, it makes much greater sense to rely on the standard of proof by balance of probabilities.

IX. THE DYNAMICS OF PUBLIC CONFIDENCE

Judges of the higher judiciary hold a critically important office in the scheme of constitutional governance which requires of them utmost integrity. At the same time, it requires of the people a considerable amount of trust that judges will not fail them. People retaining this trust

and confidence in the judges is fundamental to the judiciary's capacity to discharge its functions properly.[331]

A. HIGHER STANDARD OF CONDUCT EXPECTED FROM JUDGES

This trust on the part of the people is based on the logical supposition that as constitutional functionaries of considerable importance, judges will abide by a higher standard of ethical conduct. The same is evidenced even in the Restatement of the Values of Judicial Life adopted by the Supreme Court itself.[332] The Bangalore Principles also exalt the need for the judges to adhere to strict codes of ethical conduct in order to maintain the confidence of the public in the institution.[333] Judges are entrusted with considerable power and responsibility in order to discharge their designated functions. When entrusted with such high offices and responsibilities, they are also expected to abide by a stringent code of conduct.[334] It is to ensure the faith and confidence of the people in the democratic institutions is not corroded.[335]

The standard of conduct expected of a judge is commensurate with the magnitude of responsibilities on his shoulder and the depths of trust reposed in him by the people of the country. The public trust and confidence on the judiciary are based on the understanding that judges are

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331 Shimon Shetreet, *Judicial Independence and Accountability: Core values in Liberal Democracies,* JUDICIARIES IN COMPARATIVE PERSPECTIVE 6 (CAMBRIDGE UNIVERSITY PRESS 2011) [hereinafter Shetreet].
332 Judges Inquiry Bill, *supra* note 305 at 334.
333 Bangalore Principle of Judicial Conduct 2002, cl. 1.6, https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (India).
334 Randy J Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability,* (5) WIDENER LAW SYMPOSIUM JOURNAL 117 (2000).
335 Shetreet, *supra* note 331 at 8.

held to a standard higher than that to other governmental functionaries; and are not likely to be influenced by the corrupting elements which may affect others. A course of conduct which would be excusable for any other person may not be excusable in case of a judge as the whole point of people trusting the judiciary with so much of independence is betrayed.[336] By virtue of the office that they occupy, judges are entitled to significant privileges and facilities. These privileges and facilities are extended to the judges because the functions they discharge is fundamental to the survival our constitutional democracy and thus a certain sphere of independence is ensured. In such a scenario, they are also expected to be much more mindful of their conduct.[337]

B. STANDARD OF PROOF SHOULD PRESERVE PUBLIC CONFIDENCE

The judiciary derives much of its authority from the public faith that it shall remain beyond the influence of the corrosive elements which might affect the other institutions. When there is a sufficient case of such faith being broken, though not necessarily an incontrovertible one, it is difficult for the judiciary to maintain its moral standing.[338] The best example of this can be seen in terms of how the principle of bias operates. Principles of natural justice are violated when there is a sufficient

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336 Greg Mayne, *Judicial integrity: the accountability gap and the Bangalore Principles*, (June 23, 2018), https://www.birosag.hu/sites/default/files/allomanyok/kozadatok/obh/7._sz._melleklet__gcr_chapter_3_final.pdf.

337 Maurice J Sponzo, *Independence vs Accountability,* 26 JUDGES' JOURNAL 13 (1987).

338 J Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why,* 58 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 241 (2001-2003).

possibility of a judge being biased. One does not need to prove that a judge was indeed biased.[339]

It does not require proof beyond reasonable doubt for faith to be compromised. The standard of proof adopted in inquiry proceedings should reflect respect towards preservation of public confidence in the judiciary. The standard of proof beyond reasonable doubt is an artificial legal construct which is unusual in regular life. While taking decisions or forming opinions, it is unlikely for individuals to adopt the standard of proof beyond reasonable doubt. It is not the prevailing standard for decision making in societal life. Many decisions in both private and public life are in fact riddled with doubts of viability and suitability.

For the image of judiciary to be tarnished, it is not necessary that the unsuitability of any judge has to be proved beyond reasonable doubt. For questions to be raised on the integrity of judiciary, it is adequate if there exists sufficient proof for the unsuitability of the judge to be more probable than his suitability

X. BEYOND REASONABLE DOUBT- SUITABILITY OR UNSUITABILITY?

While knowing something beyond reasonable doubt is indeed desirable, it is important to identify the thing which needs to be ensured beyond doubt. There are two approaches that may be undertaken in this respect. First, it may be insisted that the unsuitability of a judge must be proved beyond reasonable doubt to merit a removal. Otherwise, it may be

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[339] Shetreet, *supra* note 331 at 8.

insisted that a judge's suitability must be proved beyond reasonable doubt for him to continue to hold office. Under the first approach, even a high probability of unsuitability is not sufficient to trigger the removal mechanism. Under the second approach, a higher probability of suitability is not adequate to if there are reasonable and persistent suspicions about the suitability of the judge. In other words, proof of allegations against a judge on balance of probabilities will be sufficient to raise reasonable doubts regarding his suitability.

A. IMPLICATIONS OF ADOPTING THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

When we allow judges to continue in office because their misbehaviour or incapacity has not been proved beyond reasonable doubt, we permit them to remain in office even though their suitability is not beyond question. Even a proof on balance of probabilities raises reasonable doubt regarding the suitability of the judge to continue to hold office. As we have discussed already, proof beyond reasonable doubt is a higher standard which accommodates the risk of the guilty being declared innocent for the sake of the innocent not being adjudged guilty. Thus, if we stick with the standard of proof beyond reasonable doubt in inquiry proceedings against judges, it means we are willing to take the risk of unsuitable judges continuing in office in order to ensure that a suitable judge is not removed from office. In the parlance of a criminal sanction, this approach makes sense as the cost of an innocent man being punished is much greater than the benefit of a guilty man escaping punishment. On the other hand, to preserve the enormous trust reposed in the judiciary, it

is much more important to ensure that unsuitable judges do not continue in office than to ensure that a suitable judge is never removed. Unsuitable judges continuing in office and adjudicating matters will do greater damage to the integrity of the judiciary than the cost of some suitable judges being removed. The whole edifice of rule of law is dependent on the people seeking the redressal of their grievances with an independent judicial institution and not adopting means of their own. If there is a reasonable perception that judges who are unsuitable are deciding the fates of people, it jeopardises the faith of the public in the viability of the legal system to redress their grievances. This lack of faith strikes at the very foundations of a legalised society by regularising the perception that the judicial mechanism might not be capable of being fair. This perception severely hampers the exclusivity of the judiciary to settle legal disputes in the society. Once people resort to extra-legal arrangements for settlement of their disputes because they do not have sufficient faith in the judges; the whole paradigm of rule of law collapses.

B. THE RIGHT QUESTION

In such circumstances, it needs to be understood that greater the trust, higher the responsibility to uphold it. When faced with the issue regarding the suitability of a judge continuing in office, the question should not be whether the truth of the allegations against him has been proved beyond reasonable doubt. The question should be whether the falsity of the allegations against him has been proved beyond reasonable doubt. One need not be convinced beyond reasonable doubt that a judge is not suitable to continue in office. It is the suitability of a judge which

should be beyond reasonable doubt. Any lingering reasonable suspicion regarding the suitability of a judge to continue in office is damaging to the credibility of the institution. Even a prima facie proof of the lack of suitability of a judge is sufficient to shake the confidence of the people in the credibility of the judicial process. A judge must be beyond reproach at all levels and must be held accountable to a much higher standard of expectations.

Thus, the standard of proof in inquiry proceedings should be proof by preponderance of probabilities. Adoption of this standard would ensure that judges of doubtful suitability do not continue in office. It will ensure that only such judges hold office whose suitability is beyond question and indisputable. The society does not deserve judges whose unsuitability has not been proved beyond a reasonable doubt. It deserves judges who suitability has been proved beyond reasonable doubt.

XI. SIMILAR PROPOSITION IN OTHER JURISDICTIONS

In recognition of the approach discussed above, the Judicial Conduct Tribunal constituted under the provisions of the Judicial Service Commission Act of South Africa[340] is required to make its determination regarding the alleged incapacity, gross incompetence or gross misconduct of a judge of the Constitutional Court of South Africa on a balance of probabilities.[341] In Australia, the members of the second Select Committee constituted by the Senate in relation to the allegations against J. Lionel Murphy, judge of the High Court of Australia, had the liberty to

[340] Judicial Service Commission Act, 1994, Act 9 of 1994 §19 and §21 (S. Afr.).
[341] *Id.* § 26(3) (S. Afr.).

determine the proof of the allegations either by the standard of proof beyond reasonable doubt or by balance of probabilities.[342] The commission of inquiry which inquired into allegations against J. Angelo Vasta, judge of the Supreme Court of Queensland in Australia, also held that the inquiry proceedings were not criminal in nature and thus it is not mandatory for the allegations to be proved beyond reasonable doubt.[343] The commission instead held that the degree of satisfaction will vary according to the gravity of the fact which had to be proved.[344]

XII. CONCLUSION

Preserving the independence of the judiciary is critical in constitutional democracies. Inquiry proceedings against judges should not become a framework of persecution and harassment. It should not become far too easy and simple for a judge to be removed from office. A precarious tenure for judges is most damaging to the fabric of an efficient governance mechanism.

It is important to protect the integrity of the judiciary. A Judge should not be allowed to retain office in the pretext his unsuitability not being proved beyond reasonable doubt when there remain sufficient reasons to question his continuance in office. To reiterate the point; people don't need judges whose unsuitability has not been proved beyond doubt but judges whose suitability is beyond doubt. It is more important to preserve the public confidence on the judiciary than to let judges

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[342] Judges Inquiry Bill, *supra* note 195 at 212.
[343] *Id.*
[344] Judges Inquiry Bill, *supra* note 195 at 212.

continue in office simply because their unsuitability has not been proved by the strict evidentiary standard of proof beyond reasonable doubt. Adopting the standard of proof by balance of probabilities does not undermine the sanctity of the judicial office. Rather, it provides greater ground for the public to retain confidence in the integrity of the judges.

In any case, determination of unsuitability in inquiry proceedings does not necessarily lead to removal from office. After the inquiry proceedings determine against the concerned judge, the political process in the Parliament to decide upon the removal of the judge still remain. It is not necessary for the Parliament to remove a judge if the inquiry committee has recorded findings against the judge as the removal of the judge is a political sanction. The same was evident in the case of J. V. Ramaswami when he was not removed from office even though the inquiry committee had held the charges against him to be proved. However, if the determination of the inquiry committee is favourable to the judge simply because of a higher standard of proof, then there is no possibility of any further action being taken against the judge.

In such circumstances, it is not desirable that judges be provided a convenient route of escaping effective accountability by adoption of a higher threshold of proof.

To reiterate the point made above; the suitability of a judge to hold office should be beyond reasonable doubt, not his unsuitability to do so. Even a prima facie proof of unsuitability is hazardous to the integrity of the judicial process. Thus, the broader objective of the removal

mechanism should not be to ensure that judges are not removed unless their unsuitability has been proved beyond reasonable doubt. It should be to ensure that only such judges continue in office whose suitability is beyond doubt. The said objective cannot be effectively pursued as long as we adhere to the standard of proof beyond reasonable doubt to test the allegations of misbehaviour or incapacity against judges. The standard of proof which will best serve the interest of the judiciary as an institution is proof by balance of probabilities.

Simran Kathuria, *Leniency Programme under Competition Regime in India,* 5(2) NLUJ Law Review 116 (2018)

LENIENCY PROGRAMME UNDER COMPETITION REGIME IN INDIA

SIMRAN KATHURIA*

ABSTRACT

Cartels are considered to be the utmost violation of competition law in India under the Competition Act, 2002. Leniency programme under the present law is the most effective tool for cartelists seeking leniency, to dodge significant punishment. These programmes involve a commitment to a pattern of penalties designed to increase incentives in form of lesser penalties for cartelists to self-report to CCI.

The article examines the rationale behind the leniency programme, its procedural aspects as an effective tool to combat cartelisation. An attempt has been made to assess the recent changes that have been made to the leniency programme in India, along with its constitutional validity as examined by courts. Most of the competition enforcement authorities around the world have adopted leniency program. In order to understand the policy drawbacks in the leniency protocols we have scrutinized other law enforcement measures adopted by European Union, Japan and USA. The benefits yielded by immunity programmes are many, and in order to increase the benefits we have listed a few conclusive suggestions.

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The data used has been collected from archives, news articles, published statistical reports along with expert opinions of renowned lawyers specialising in competition law.

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I. INTRODUCTION

Supreme evil of antitrust, cartels are the most flagrant of all anti-competitive practices.[345] In order to deal with the growing rampage of cartels disrupting fair markets and promoting unfair practices like price raising, limiting output levels and credit terms the Indian government has, to a certain extent, effectively introduced the subordinate legislation of Leniency Provisions. Cartel agreements are problematic to discern due to their clandestine operations and strict enforcement. However, with adequate severe monetary penalties, cartel members evaluate the risk of penalty to outweigh benefits from the illegal conduct. This subsequently compels them to confess about their anti-competitive practices.[346]

Cartels are considered to be the utmost violation of competition law in India under the Competition Act[347] (hereinafter **'Act'**). Leniency programme under the present Act and the Competition Commission of India (Lesser Penalty) Regulations, 2009[348] (hereinafter **'Regulation'**) along with the Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017[349] (hereinafter **'Amendment'**) secures lenient treatment for early confessors and conspirators who in exchange, supply information that proves helpful to the Competition Commission

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345 D.G.GOYDER, GOYDER'S EC COMPETITION LAW 8 (5th ed. 2009); Verizon Communications Inc. v. Law Offices of Curtis V Trinkino, LLP 540 U.S. 398, 408 (2004).

346 R S KEMANI, A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLICY (1999).

347 The Competition Act, No. 12 of 2003, INDIA CODE (1993).

348 The Competition Commission of India (Lesser Penalty) Regulations, No. 4 of 2009, (Ind.) [hereinafter *Lesser Penalty Regulations*].

349 The Competition Commission of India (Lesser Penalty) Amendment Regulations, No. 1 of 2017, (Ind.) [hereinafter *Lesser Penalty Amendment Regulations*].

of India (hereinafter '**CCI**') for proving and penalising other cartel members.[350]

Leniency Provision under the current law does not lure the cartel members for avarice of leniency in a rat trap. Instead, leniency provisions are universally accepted as one of the best way to detect cartels since the activity is so guarded that internal information is necessary to break such agreements.[351] The culmination of all the necessities and thought-processes brought about the leniency program in India.

II. RATIONALE FOR INCORPORATING A LENIENCY PROGRAMME

In order to raise the probability of detecting cartels, the leniency program has been implemented in many countries, such as the EU, the US, Canada, Australia, Korea. They have proven that the program is a very effective device to detect cartels.[352] This is because the activity is so guarded that internal information is necessary to break such agreements.[353] The idea has been extensively borrowed from Prisoner's dilemma theory and the Nash equilibrium theory. In order to investigate these institutional design issues within the leniency programme, we must understand what these theories are.

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350 Competition Commission of India, *Mission 2020,* 8th Advocacy Series, http://cci.gov.in.

351 MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 193 (2004) [hereinafter Motta].

352 Monti, M., "*The Fight Against Cartels*", Summary of the Talk by Mario Monti to EMAC (Sept. 11, 2000), http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm.

353 Motta, *supra* note 351.

According to the Prisoner's Dilemma theory a prisoner's dilemma exists when two parties pursue their own individual interests and act in a manner which provides them with maximum mutually exclusive benefits, thus resulting in both parties ending up in a worse position than if they had cooperated with the group's interests instead of their own.[354] In such a scenario the confession of either would be enough to convict the other of the major crime. The police wants to convict at least one, and hopefully both of the prisoners for the major crime, so they offer each the same deal, which will lead to a reduced sentence if they testify against the other prisoner. In such a scenario if both of them don't testify and follow the group interest then they will be least harmed as the police will not be able to convict them of the major crime, but in case one testifies and the other does not then one of them will be at a great disadvantage as he will be convicted for both, major and minor crimes. If both of them testify then they will both serve equal sentences. The difference between the first and the last case scenario is that if both the prisoners follow the dominant strategy and confess, then both prisoners will be worse off than they could be if neither of them confesses. According to John Nash's game theory the first is known as globally optimal solution, whereas the last scenario is the Nash Equilibrium.[355] Nash Equilibrium can be defined as an action profile with the property that no single player can obtain a

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[354] Ulrich Blum, Nicole Steinat & Michael Veltins, *On the Rationale of Leniency Programs: A Game Theoretical Analysis,* 25(3), EUR. J. L. & ECON. (2008).

[355] John F Nash, *Equilibrium Points in N-Person Games. Proceedings of the National Academy of Sciences,* 36(1), 48–49 (1950); NEUMANN, JOHN AND OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

higher pay off by deviating unilaterally from this profile.[356] If we apply the game theory to the prisoner's dilemma each prisoner pursuing his own short-term self-interest would most likely confess. This makes confession a dominant strategy since both of them are better off confessing regardless of what the other prisoner does.

In relation to competition law, the above theories provide for the structural programme upon which the leniency policy is based. The theories provide a realistic arrangement for applicants to obtain amnesty by competition authorities. This is because; arrangements are framed to create a 'race for confessions' by providing bait to cartel members to admit thereby aiding the competition authorities, in return for amnesty. Such a reward can be given to one or more, whistleblowers leading to substantial reduction in penalties imposed upon them as compared to other cartel members.[357]

III. PROCEDURAL ASPECTS UNDER THE LENIENCY PROGRAMME AND CHANGES IN THE REGULATION

A. INFRINGEMENTS OF COMPETITION LAW COVERED UNDER THE LENIENCY PROVISIONS

The leniency provision states, "The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and

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[356] Kreps, David, P. Milgrom, John Roberts & Robert Wilson, *Rational Cooperation in the Finitely Repeated Prisoner's Dilemma,* 27 J. ECON. THEORY 245, 252 (1982).
[357] Rep. of the UNCTAD, TD/RBP/CONF.7/4 (August 26, 2010).

such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations."[358] Thus, it covers infringement of section 3(3) of the Act which deals with cartels, among other things like:

- Price-fixing.
- Bid-rigging (collusive tendering).
- The establishment of output restrictions or quotas.
- Market sharing or market allocation.

There is no criminal liability for cartel conduct under the Act. The leniency programme only extends to the administrative liability imposed on cartel members under the Act.[359] Chapter VI of the Act contains various provisions relating to penalties that can be imposed by the Commission. Section 46 confers power upon the Commission to impose lesser penalty. [360]

B. TIME FRAME TO BE ADHERED TO WHILE FILING LENIENCY APPLICATION

The application for leniency must be made at the earliest possible point. Although the Act specifically provides that leniency applications can be made after the investigation has started, they do require that any application be made before the Competition Commission of India

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[358] The Competition Act, 2003, No. 12 of 2003, INDIA CODE § 46 (1993).
[359] *Id.* §§ 3 & 53N (1993).
[360] Alkem Laboratories Limited and others v. Competition Commission of India and others, 2016 Comp LR 757 (Comp AT) (2016) (India).

receives an investigation report from the Director General.[361] In the Brushless DC Fans case[362], the applicant was only awarded a 75% reduction in penalty because the investigation of the DG had already commenced. Therefore, those applicants who apply under the programme after the investigation commences, are at a loss, than those who apply before the commencement of the investigation. The reason for such a disadvantaged position of an applicant who obtains second or third priority status has the onus of adding value over and above stating a vital disclosure. Therefore, it is crucial and imperative that a leniency application is extremely exhaustive and includes all evidence to show the presence of a cartel. An application made which does not add value will have twin negative effects from the applicant's perspective: (a) not getting lesser penalty from the CCI; and (b) since the applicant has made the leniency application, they have admitted that they are involved in a cartel, and hence their scope of defence will get jeopardized. Thus, if a decision has been made to file a leniency application, the concerned applicant must act without any delay whatsoever in order to be able to clinch any leniency from the CCI. It would be ideal to approach the CCI orally and get a priority marker along with an additional time frame of 15 days to file a detailed application. Recently Amendment regulation brought about procedural changes, leniency applicants now have a 15-day window from the date of communication with CCI via receipt to file a leniency

[361] The Competition Act, 2003, No. 12 of 2003, INDIA CODE 2nd proviso to § 46 (1993).
[362] Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, Suo Moto Case No. 03 of 2014, Order dated 18 January 2017 (2017) (India).

application with the CCI by amending sub-regulation (4) of regulation 5. This move has essentially provided more time for the applicant to deliberate and file an application encouraging applicants to file a leniency application instead of being indiscriminately time bound.

C. CONDITIONS TO AVAIL BENEFITS OF LENIENCY PROVISIONS

Regulation 3[363] and the Act[364] provide the conditions for grant of lesser penalty, which include:

- Applicant should cease to be a member of the cartel from the time of its disclosure unless otherwise directed by the Commission.[365]
- Applicant should provide 'vital disclosure' in respect of violation under the Act.[366] 'Vital disclosure' has been defined under Regulation[367] to mean full and true disclosure of information or evidence by the applicant to the Commission, which is sufficient to enable the Commission to form a *prima facie opinion* about the existence of a cartel or which helps establish the contravention of the provisions of Section 3 of the Act. The ambit of vital disclosure is extremely specific and it should assist the CCI in forming a *prima facie* view that there exists a cartel and based on such disclosure provided in the leniency application,

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363 Lesser Penalty Regulations, *supra* note 348.
364 The Competition Act, 2003, No. 12 of 2003, INDIA CODE § 46 (1993).
365 Lesser Penalty Regulations, *supra* note 348, Regulation 3(1)(a).
366 *Id.* § 3(3).
367 *Id.* Regulation 2(1)(i).

the CCI can direct the offices of the DG to investigate the matter.[368]

- Applicant has to provide all relevant information, documents and evidence as may be required by the Commission.[369]

- Applicant has to co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission.[370]

- Applicant should not conceal, destroy, manipulate or remove the relevant documents in any manner, which may contribute to the establishment of a cartel.[371]

- The reduction in monetary penalty levied upon the applicant will depend upon following situations:-

    - The stage at which the applicant comes forward with the disclosure.
    - The evidence already in possession of the Commission.
    - The quality of the information provided by the applicant.
    - The entire facts and circumstances of the case.[372]

In addition to the above conditions, the CCI may subject the Applicant to additional restrictions or conditions, as it may deem fit. The commission may reject the leniency application if there is non-compliance with the condition on which the lesser penalty was imposed by the

368 Lesser Penalty Regulations, *supra* note 348, Regulation 4.
369 *Id.* Regulation 3(1)(c).
370 *Id.* Regulation 3(1)(d).
371 *Id.* Regulation 3(1)(e).
372 *Id.* Regulation 3(4).

Commission; or for giving false or incomplete evidence which in turn proves to be non-vital.[373] Post the amendment the new definition of applicant in Amended Regulation includes individuals who are involved in cartel activity to come forward as applicant or party to the proceeding. As an extension, the amendments also clarify that the leniency applicant shall also mention the name(s) of the individual(s) who were involved in the cartel activity and are now seeking leniency.

D. CATEGORIES OF LENIENCY AVAILABLE (MARKER SYSTEM)

The Regulations[374] also provides for a priority marker system.

- **If the concerned applicant is the first to approach the CCI:** The Applicant may be granted benefit of reduction in penalty up to or equal to 100% or immunity, if the applicant is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a 'prima-facie opinion'[375] regarding the existence of a cartel. CCI must not have prior knowledge of the information given.[376]

- **If the concerned applicant is the second or third to approach the CCI:**

[373] Amit Sanduja, Report On Leniency Program: A Key Tool To Detect Cartels, available at http://cci.gov.in/images/media/ResearchReports/leniencyproject_amitsanduja11032008_20080715104637.pdf ; last visited on July 26, 2015
[374] Lesser Penalty Regulations, *supra* note 348, Regulation 4.
[375] *Id.* § 26(1).
[376] *Id.* Regulation 4 (a).

> The applicant marked second in the priority status may be granted reduced monetary penalty up to or equal to 50% of the penalty leviable as per the Act[377]; and the applicant marked as third in the priority status may be granted reduction of penalty up to or equal to 30% of the penalty leviable as per the Act.[378] More than two Applicants can obtain the third marker status.[379]

All the conditions as stated above must be met by the Applicant regardless of the status they have been marked within the Brushless DC Fans, it was held that even though the applicant had obtained first position in the priority marker system he was not eligible for 100% waiver, this was because of the stage at which the Applicant approached the Commission i.e., not at the very beginning but at a later stage in the investigation, and of the evidence already in possession of the Commission at that stage.[380] Inspired by the US leniency program[381], the Amendment Regulation provided a provision for Markers to be allotted to refer to the first and subsequent applicants that provide vital disclosure to the Commission about the cartels. Prior to the amendment, a limitation on three markers was levied with a quantum of up to 100%, 50% and 30% leniency in fine, respectively. However, as of now there is no cap on the number of markers, all of them after third marker eligible for 30%

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[377] Lesser Penalty Regulations, *supra* note 348, § 46.
[378] *Id.* Regulation 4(b).
[379] *Id.*
[380] Re: Cartelization case*, supra* note 361.
[381] Frequently asked questions about the antitrust division's leniency program and model leniency letters, 6, https://www.justice.gov/atr/page/file/926521/download (Jan. 26, 2017).

leniency. This ensures that more applicant come forward to tip about cartels.

The Competition Commission may decline or withdraw leniency if the leniency applicant breaches any of the conditions stipulated for grant of leniency.[382]

E. PROCEDURE TO BE FOLLOWED UNDER THE LENIENCY SCHEME

The Regulations[383] provides for practical procedure to apply as an applicant under the Leniency Scheme.

i. Step 1: Initial Communication

The Applicant must provide the Secretary, CCI (designated authority) with all information, documents and evidence available to it regarding the cartel activity. This includes information that supports a finding of infringement, any exculpatory material in the leniency applicant's possession of which it is aware and information on possible leads or sources of information that the CCI can pursue.[384] It would be ideal to approach the CCI orally and get a priority marker along with an additional time frame of 15 days to file a detailed application.

ii. Step 2: Contents of the Application

The application for lesser penalty shall, inter-alia, include details about the applicant, description of the alleged cartel member govern arrangement and the estimated volume of business affected by such

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382 Lesser Penalty Regulations, *supra* note 348, Regulation 3(2).
383 *Id.* Regulation 5.
384 *Id.*

alleged cartel. All the claims must be supported via incriminating evidence.[385]

iii. Step 3: Assigned priority status

The CCI will mark the priority status of the applicant and the Secretary will convey the same to the Applicant. In case only preliminary information is given by the Applicant to CCI, complete information has to be given to the CCI within 15 days after designation of the priority status. If the said information is not provided, the Applicant will lose its priority status. [386]

F. CONFIDENTIALITY

The Commission treats the information provided by the Applicant and the identity of the applicant confidential unless:

- The disclosure is required by law; or
- The applicant has agreed to such disclosure in writing; or
- There has been a public disclosure by the applicant.[387]

In the recent past the judicial opinion has thoroughly evolved on the confidentiality provision under the Amendment Regulation.[388] Ever since the grant of first leniency order to an applicant by the CCI there have been several apprehensions regarding the confidentiality of the identity of the informant. In Brushless DC Fans case, the informant

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[385] Lesser Penalty Regulations *supra* note 348, Schedule to sub-regulations (1) and (2) of Regulation 5.
[386] *Id.* Regulation 5(2).
[387] *Id.* Regulation 6.
[388] Somi Conveyor Beltings Ltd. and Another v. Union of India and others, (2017) 242 DLT 220 (DB) (India).

waived confidentiality on its identity as well as the information furnished.[389] The apprehension arises when the informant uses their right under the Regulation to maintain their identity concealed. The commission lands in a thorny situation when the opposite party raises a concern about the access to evidence in order exercise their right of defense. In Somi Conveyor belt the law on this point was settled,

> *"Thus, it is clear that the entitlement of a party to the proceedings to inspect the documents or to obtain copies of the same is not absolute and it is always open to CCI to reject permission for inspection or furnishing copies if it is of the view that the documents/information require confidential treatment."*[390]

This move sanctioned under the Amendment Regulation single-handedly addresses the malaise of not having access to documentary evidence or "file" claimed by various parties. In a significant move, Regulation 6A allows not only leniency applicant but non-leniency applicants to have access to file. This move allows those who have right of access to file to claim the non-confidential version of the file after Director General's investigation report has been forwarded to parties. Furthermore, the Amendment introduced Regulation 6 and 6A allowing the Director General (DG) to disclose information, evidence and documents submitted by the applicant, to a party to the proceedings if such disclose is deemed to be necessary by the DG even if the applicant has not agreed to such a disclosure. However, given the DG's ability to

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[389] Somi Conveyor Beltings Ltd. and Another v. Union of India and others, (2017) 242 DLT 220 (DB) (India).
[390] *Id.*

disregard the leniency applicant's consent to not disclose, the matter shall be subject to a hearing.

IV. CONSTITUTIONALITY OF THE LENIENCY PROVISIONS

The core provisions of the leniency program enacted by the CCI as a piece of subordinate legislation have been subject to challenges in litigation on various grounds. It is, however, a fortunate benediction by the judicial arm of the Indian Constitution that has ensured that legal sanctity of Leniency Provisions has been upheld through intense reasoning. The narrative of challenges against the Leniency Provisions harks back to where formation of a *prima facie* opinion by the CCI on the basis on vital disclosure was in question.

A. PRIMA FACIE OPINION

Section 26(1) in the Competition Act, 2002 mentions that "On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director General to cause an investigation to be made into the matter." In addition to this section, Regulation 4(a) of The Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017 mentions that CCI may also be allowed to form an opinion on the basis of the vital disclosure made by the applicant in leniency program. The validity of this section 26(1) was contested in Competition Commission of India v. SAIL[391] where the power or

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[391] CCI v. SAIL, (2010) 10 SCC 744 (India).

function to form a *prima facie* opinion departmentally was challenged. The court observed "formation of a *prima facie* opinion departmentally, i.e., by the Director General (DG) appointed by the Central Government to assist CCI does not amount to an adjudicatory function but is merely of administrative nature." Therefore, the power to form an opinion is not an adjudicatory function performed by the DG or the CCI, it pertains to administrative nature that does not condemn any person immediately.

The opinion generated by *prima facie* gaze over the evidence is an administrative action that initiates a proceeding and therefore, cannot be held as a prejudicial to fair proceedings. In the same case, the court also observed "At the very threshold, the Commission is to exercise its powers in passing the direction for investigation; or where it finds that there exists no *prima facie* case justifying passing of such a direction to the Director General, it can close the matter and/or pass such orders as it may deem fit and proper."[392] This further elucidates that the *prima facie* opinion formed by the DG is itself subject to scrutiny and can be disposed. In contradistinction, the *prima facie* opinion, in both the provisions of Section 26(1) of the Act and Regulation 4 of the notification are mere departmental action to cause investigation into the matter without entering the realm of adjudicatory process.

B. PRINCIPLES OF NATURAL JUSTICE AND CONFIDENTIALITY

One of the most recurring challenges to the constitutionality of the subordinate legislation of leniency provision is the principle of *audi*

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[392] CCI v. SAIL, (2010) 10 SCC 744 (India).

alteram partem not being aligned to. In the case of Premier Rubber Mills v. Union of India[393], it was observed by the court that *prima facie* formation of opinion due to the vital disclosure does not generate an adjudicatory action against any party. "At that stage, it does not condemn any person and therefore, application of *audi alteram partem* is not called for."

Since, Section 36 of the Competition Act, 2002 mandates that CCI shall be guided by the principles of natural justice, the argument pertaining to principles of natural justice has been further highlighted. Even though the contentions in aforementioned cases against attack the *prima facie* opinion and the confidentiality of evidence, individual and documents under Leniency Provisions, it is pertinent to note that the principles of natural justice are not infallible constants germinated in the application of every statute. The purpose of the leniency provisions is to ensure safety, secrecy of the applicant who is essentially a whistleblower of the cartel operations. With due respect to the aggressive presence of the cartel and the power surge, it is also imperative as a purpose of the statute to encourage more individuals or parties to help detect cartels.[394] Therefore, it is only reasonable to infer and apply the principles of natural justices according to these circumstances. In the case of Natwar Singh vs. Director of Enforcement[395] it was observed that flexibility arises even in cases of natural justice. The court observed that there is no such thing as a merely technical infringement of natural justice. The requirements of

[393] Premier Rubber Mills v. Union of India, (2017) (163) DRJ 599 (India).
[394] Competition Commission of India, *Mission 2020, supra* note 351.
[395] Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255 (India).

natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. In order to ensure a fair hearing, courts can insist and require additional steps as long as such steps would not frustrate the apparent purpose of the legislation.

One of the most recurring arguments that arose against the constitutionality of the Leniency provisions is inability of the accused to access the evidence, information or documents of "vital disclosure"[396] In the Regulations, there was no scope of the accused having a chance to access the confidential documents, files or evidence. The contention brought forth in various cases is that the restriction due to confidentiality of documents or evidence did not allow the accused to prepare for the case to the best of their ability. Therefore, in the absence of access to files due to confidentiality, "the contention is that the regulations are arbitrary and in violation of Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India to the extent that they do not provide the information/documents in the possession of CCI and Director General to the parties to an inquiry and investigation to present their views and defend their position."[397] It is a right that fair hearing is guaranteed to every individual and it is their right to know the evidence used against them.[398]

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[396] Lesser Penalty Regulations*, supra* note 348.
[397] Premier Rubber Mills v. Union of India, (2017) (163) DRJ 599 (India).
[398] Dhakeswari Cotton Mills Ltd. v. CIT, (1955) 1 SCR, 941 (India).

It is imperative, as a republic, to ensure that right of fair hearing is not merely enlisted but guaranteed to every person before an authority exercising the adjudicatory powers. However, disclosure not necessarily involves supply of the material.[399] Therefore, elucidating this, principle that nothing should be used against a person that hasn't been brought to his notice is supplant and the tangible access to evidence is merely suppliant. The law is fairly well settled if prejudicial allegations are to be made against a person, he must be given particulars of that before hearing so that he can prepare his defense. However, there are various exceptions to this general rule where disclosure of evidential material might inflict serious harm on the person directly concerned or other persons or where disclosure would be breach of confidence or might be injurious to the public interest because it would involve the revelation of official secrets, inhibit frankness of comment and the detection of crime, might make it impossible to obtain certain clauses of essential information at all in the future[400] It is also pertinent to note that such terse and absolute paradigms of fair hearing apply to an actual adjudicatory process and not a departmental action or administrative. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. In other words, they (principles of natural justice) do not supplant the law of the land but supplement it.[401]

[399] Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255 (India).
[400] R. v. Secretary of State for Home Deptt., [1995] 2 AC 513 (India).
[401] A.K. Kraipak v. Union of India, (1969) 2 SCC 262 (India).

C. RECENT AMENDMENT ON CONFIDENTIALITY AND ISSUE OF ITS CONSTITUTIONALITY

In addition to well-settled applications of principles of natural justice that have been found in conformity with the Leniency Provisions, the recent amendment in the confidentiality clause ensures access to file that allow a non-confidential version of the file to leniency applicants and non-leniency applicants.[402] This allows not only the applicants but non-applicants including third parties to the proceeding to access a non-confidential version of the file. "Non-confidential version" of the document is another issue that might come to the forefront pursuant to this amendment. The "non-confidential version" of the file does not provide the absoluteness of the original document. In essence, the original document is altered, concealing the details that could reveal the identity of the applicant. That implies the change in the minute details of the evidence that could change the entire evidentiary value of the document. A change in detail could lead the accused to miss out a semantic or an argument that might have changed the entire orchestrated arguments of the case.

On the contrary, the paradigm remains the same. Concept of fairness is not a one-way street. The principles of natural justice are not intended to operate as roadblocks to obstruct statutory inquiries. Duty of adequate disclosure is only an additional procedural safeguard in order to ensure the attainment of fairness and it has its own limitations. The extent

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[402] Regulation 6A, Lesser Penalty Regulations, *supra* note 348.

of its applicability depends upon the statutory framework.[403] Therefore, discarding the entire statute of Leniency Provisions by quoting semantics is to ignore the essence and purpose of the statute. The purpose of the statute is to maintain confidentiality and to gain information about cartels. Since *prima facie* opinion is a mere departmental administrative function, it does not reduce the chance of the accused to participate in a fair proceeding.

D. SUBORDINATE LEGISLATION

The Act and the amending notification are subordinate legislation. When legislation's validity is attacked, the law is well settled that there is a presumption in favour of the validity of the Act.[404] However, subordinate legislation does not carry the same amount of immunity which a legislation that is passed by the parliament enjoys. There was no restriction on a subordinate legislature's power to delegate within its field as it had plenary powers of legislation', except that it could not create a parallel legislative body without preserving its own capacity.[405]This implies that subordinate legislation does not enjoy the same power as a regular piece of legislation does but it has no restriction to delegate within its field. Since Leniency laws are delegated legislation spawned out of the purpose of Section 3 of the Competition Act, 2002, the purpose was served.

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[403] Natwar Singh v. Director of Enforcement, (2010) 13 SCC 255 (India).
[404] Charan Lal Sahu v. U.O.I., (1990) 1 SCC 614 (667) (India).
[405] In re George Edwin Gray (1918) 57 S.C.R. 150 (Canada), Chemical Reference case, (1940) 1 DLR 248 (Canada), Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan, (1931) 46 CLR 73 (Canada).

As held in Supreme Court Employees' Welfare Association Vs. Union of India[406], the validity of a subordinate legislation is open to question if it is ultra vires the constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fair minded authority could ever have made it. The grounds upon which a subordinate legislation can be challenged are summed up in State of T.N. v. P.Krishnamurthy & Ors.[407] as under:

(a) Lack of legislative competence to make the sub-ordinate legislation.

(b) Violation of Fundamental Rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest Arbitrariness/unreasonableness (to an extent where the Court might well say that the legislature never intended to give authority to make such rules).

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406 Supreme Court Employees' Welfare Association v. Union of India, (1989) 4 SCC 187 (India).
407 State of T.N. v. P.Krishnamurthy and others, (2006) 4 SCC 517 (India).

Noting the above cases, the court observed[408] that there was no manifestly arbitrary or if son, unreasonable that Parliament never intended to confer such power. Therefore, there is nothing to suggest that parliament never intended the CCI to formulate a case-centric statute (In this case, Leniency Provisions) that would ensure better application of the parent stature.

V. LENIENCY PROGRAMS IN OTHER COUNTRIES

In comparison to other countries, India's Leniency program is not as successful as ones in Japan, the US or the EU. The problem lies not merely in a relatively small subordinate legislation that has fewer-than-needed provisions but the amount of meticulousness with which their implementation should be. It is imperative to understand that an applicant in a leniency program is analogous to a whistleblower in a whistleblower program that requires secrecy. Since the entire premise of having the Act is to derive information about cartels that is almost impossible to discern without the help of these applicants, it is imperative to introduce a better framework. Even after the introduction of the said statute, India has been unable to even marginally disrupt the cartel activity.[409]

A. AMNESTY PLUS AND LENIENCY POLICY UNDER THE DOJ, US

The US is the foremost leader in apprehending most number of cartels in the past decades within the countries and showing promising

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408 Premier Rubber Mills v. Union of India, (2017) (163) DRJ 599 (India).

409 Cyril Shroff et al., *Cartel Enforcement in India: Standard and Burden of Proof*, CPI ANTITRUST CHRONICLE (Feb.2013), http://awards.concurrences.com/IMG/pdf/india.pdf.

activity with respect to apprehending international cartels associated with local companies.[410] The US has a comprehensive marker system that includes a certain amount of time period allotted to the first person in the queue for the marker. This ensures that the applicant is protected till the time application is responded. Leniency programs reduce fines for cartel members that bring evidence to the antitrust authority. Amnesty refers to the complete exemption from fines. Amnesty Plus aims at attracting amnesty applications by encouraging subjects of ongoing investigations to consider whether they qualify for amnesty in other than the currently inspected markets where they engage in cartel activities. In particular, Amnesty Plus offers a firm, which currently plea-bargains an agreement for participation in one cartel, where it cannot obtain guaranteed amnesty, complete immunity in a second cartel affecting another market. Provided that the firm agrees to fully cooperate in the investigation of the conspiracy of which the DoJ was previously not aware, it is automatically granted amnesty for this second offense. Moreover, the company benefits from a substantial additional discount, i.e. the Plus, in the calculation of its fine in any plea agreement for the initial matter under investigation.[411]

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[410] Christopher Hockett, Arthur Burke, Neal Potischman, Samantha Knox Davis Polk & Wardwell LLP, *United States: Anti-cartel Enforcement; The Antitrust Review of the Americas* 2015, THE ANTRITUST REVIEW OF THE AMERICAS 2015, at 11, http://www.davispolk .com/sites/default/files/hockett.aburke.potisch.shknox.GCR_.article.sep14.PDF.

[411] Yassine Lefouili & Catherine Roux, *Leniency Programs for Multimarket Firms: The Effect of Amnesty Plus on Cartel Formation* at 3, (Oct. 2008), https://pdfs.semanticscholar.org/1f e4/d65a077538d03b9e93ef950d802c32c02239.pdf

B. CLASSIFICATION OF TIME PERIOD OF OFFENCE AND JAPAN

The number of cases in Japan as per the statistics of the JFTC (Japan Free Trade Commission) reveals that total 775 leniency applications have been filed till 2014, with 50 in 2014 and 102 in 2013. Among the prominent cases, JFTC penalised five companies with JPY 16.9billion for being involved in cartel of optical fibre cables in 2010 JFTC (Japan Free Trade Commission) [412] is the authority that is vested with the power, function and responsibility of curtailing unfair trade practices. Cartels have been defined under Article 3 of the Law No. 54/1947, also known as Anti-Monopoly Act (AMA) as "unreasonable restraint of trade". Therefore, the law addresses cartels as a restraint in fair trade. Japanese Free Trade Commission has demarcated various categories within which respective quantum of punishment lies. Unlike Indian law, different categories of punishment and fine are levied with respect to the background in cartel practices. For instance, if the accused is involved in cartel activity for less than two years pleads guilty then a leniency of 20% is granted and so on.

C. EU LENIENCY POLICY AND THE CARTEL SETTLEMENT PROCEDURE

Under the EU Leniency Policy the first to approach the authority with information and evidence incriminating the cartel is given complete immunity.[413] In order to make the leniency program watertight, several

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[412] JFTC, The JFTC regulates illegal acts promptly, and takes strict measures, (2010) http://www.jftc.go.jp/en/about_jftc/role.files/1009role_3.pdf.

[413] Case T-251/12, EGL and Others v. Commission, ,2016 E.C.R.114.

conditions are laid down in the notices.[414] Some such conditions include providing with a corporate leniency statement; severing all ties with the cartel; cooperating genuinely, fully, and on a continuous basis. [415] In order to maintain the integrity of the leniency program the Commission does not allow those firms/ individuals to participate and obtain immunity, who coerced other members to join the cartel. The EC further provides for a marker system for those who were not the first to approach the Commission. In such cases if the evidence presented by them adds significant value to the investigation, then such informants are eligible for significant reduction from any fine that the Commission might levy on the other cartel members.[416] In 2008, the European Commission introduced a cartel settlement procedure, under which, , undertakings were made eligible to obtain an additional fine reduction of 10 % if they made a formal settlement submitting to their direct involvement in the infringement and acceptance of statutory liability for the same.[417] A recent empirical study of 52 EC cartel decisions adopted between 1 May 2004 and 1 May 2014 found that in 94% of these cases at least one undertaking had applied for leniency.[418] The statistics confirm that the introduction of the leniency program has indeed allowed the EC to effectively combat and penalize cartel activity.

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[414] [2002] OJ C45/3; [2006] OJ C298/17.
[415] Lesser Penalty Regulations *supra* note 348.
[416] OECD Policy Roundtable, Leniency for Subsequent Applicants (2012), http://www .oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf.
[417] Commission Regulation No 773/2004 of 7 April 2004, art. 10a 2004 O.J. (L 123/18); Commission Notice, [2008] OJ C167/1.
[418]S. Broos, A. Gautier, J. Marcos Ramos & N. Petit, *Analyse statistique des affaires d'ententesdansl'UE* (2004-2014), 67 Revue économique 79, 85 (2016).

VI. CONCLUSION

The objective of competition laws is not only to prevent practices that have an adverse effect on competition, but also to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade. This is truly reflective of the changing economic conditions. Therefore, proper care and protection should be taken to ensure that the measures taken against anticompetitive practices do not go to the extent of interfering with the liberty of the traders and business people.

The same intent is reflected in leniency policy of India that is to cover violations under Section 3 of the Act and the infringements under Section 3(3) at the same time sticking to its root aims of cartel disclosure, luring cartel members and applicant's confidentiality. In order to realize these meticulous aims, this law does not merely have to fulfill its theoretical bulwarking but at the same has to ensure that it drives cartel members to want to cooperate with the government by making process "applicant-friendly" and non-cumbersome.

It was observed in this article that it is obviously imperative obligation of the legislation to ensure constitutional sanity. The arguments and rebuttals covered in various & sundry of cases evaluated herein allow the research paper to conclude that the constitutional sanity on the basis of *prima facie* opinion, principles of natural justice, fair hearing and fundamental rights is maintained. However, the avenue of mutual cooperation among the applicant and the government has been abandoned for most degree.

The article analyzed and compared other countries' leniency programs along with India's, critically evaluated the Regulations and Amendment and examined the debate of its constitutionality. With following suggestions, the article concludes:

- Optional allotment of "queue" in the marker system that allows for the protection of the applicant till the time application has been responded to.

- An additional "discount" or leniency system like Amnesty Plus that allows the cartel members to further cooperate with the government to provide vital disclosure.

- A schematic that enumerates the precise manner in which a file shall be turned to its "confidential version". For instance, the manner in which name, identity shall be protected. This further ensures fair hearing to the defence.

- Instead of merely taking "relevant turnover" into consideration, the government should take into consideration different tiers of cartels and different demarcations of their turnovers. This will allow all tiers of cartel members to be interested in the program.

One of the major drawbacks is that the anti-cartel enforcement activity of the Competition Commission of India has been wanting, largely as the result of the collection of inadequate evidence. In order to ensure an effective anti-cartel regime, it is essential to have a strong and

robust leniency programme. The CCI's existing programme is unpredictable and does not incentivise whistle-blowers. In past cases, even the identity of the whistle-blower has not been protected. In contrast, in the European Union for example, over the last three years all cartel decisions have emanated from leniency applications. The advantage of an effective leniency regime is that it provides smoking-gun evidence, ensuring a finding of breach of law.[419] Therefore, the CCI must redesign its leniency programme and follow international best practices

[419] Naval S. Chopra, *Need for a strong, effective leniency programme, Business Standard: Need for Robust Competition Law*, BUSINESS STANDARD.COM, (Feb. 21, 2016 22:51 IST), http://www.business-standard.com/article/opinion/fora-robust-competition-law-116022100753_1.html.