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NLUJ LAW REVIEW

TABLE OF CONTENTS

ARTICLES

NOTES

Tanya Choudhary, *Regulation of Insider Trading in Private Companies – Are we Casting the Net too Wide?,* 3(1) NLUJ Law Review 1 (2015)

REGULATION OF INSIDER TRADING IN PRIVATE COMPANIES – ARE WE CASTING THE NET TOO WIDE?

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This Article attempts to analyze the desirability or otherwise of prohibiting insider trading in the context of private companies in the light of Section 195 of the recently enacted Companies Act, 2013. While earlier, 'insider trading' was considered as a civil/criminal wrong characteristically associated with public companies only, Section 195 arguably extends the reach of law to cover even private and public unlisted companies. This provision has invoked considerable criticism and apprehensions from scholars and legal practitioners alike; However no serious attempt has been made so far to understand the rationale of insider trading (if any) in the context of private companies. The present Article attempts to fill this lacunaby tracing the development of common law on insider trading and assessing whether the rationale for curbing this insidious activity in public companies can be extended to private companies. Further, the Article discusses the insider trading regimes of other jurisdictions such as United States, Canada and New Zealand to understand the different ways in which countries have previously sought to apply insider trading laws to private companies. An attempt has been made to highlight the problems and loopholes in Section 195 and the regulatory dilemmas likely to be encountered in extending the existing legal regime to private companies. Finally, the Article discusses alternative regulatory mechanisms or measures which can be adopted to mitigate these concerns in order to find a workable solution.

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TABLE OF CONTENTS

I. INTRODUCTION

- *Knowledge is Power. Advance knowledge is profit.*[1]

In today's information-driven society, the world is being increasingly structured around the collection, manipulation and use of information.[2] Information has almost become the new 'coin of the realm.' A Court in the United States has rightly pointed out that 'nowhere is this commodity (information) more valuable or volatile than in the world of finance, where facts worth fortunes while secret may be rendered worthless once revealed.'[3] This last statement lies at the heart of the concept of insider trading.

In a company, the directors, management, lawyers, accountants etc. routinely have access to information about the company that is not available to the general public. Some of this information might affect the price of the company's securities and these 'insiders' can make a profit by buying or selling securities in advance, before the information becomes public.[4] In legal parlance, this practice is known as 'insider trading.'

In India, the journey of regulating insider trading began in 1992 with the enactment of the Securities and Exchange Board of India Act (hereinafter "*The SEBI Act*") and the regulations

[1] GREGORY LYON & JEAN DU PLESSIS, THE LAW OF INSIDER TRADING IN AUSTRALIA 1 (2005).
[2] James Boyle, *A Theory of Law and Information: Copyright, Spleen, Blackmail and Insider Trading*, 80 CALIF. L. REV 1413 (1992).
[3] SEC v. Materia, 745 F.2d 197 (1984).
[4] PAUL ALI & GREG GREGORIOU, INSIDER TRADING: GLOBAL DEVELOPMENTS AND ANALYSIS 5 (2008).

made thereunder called the SEBI (Prohibition of Insider Trading) Regulations 1992 (hereinafter, "*The 1992 Regulations*").[5] The law imposes civil sanctions (fine up to twenty-five crore rupees or three times of the accrued profit)[6] and/or criminal sanctions[7] against any person who engages in insider trading.

After over a decade of enforcement of regulations pertaining to insider trading, the years 2013 and 2014 have turned out to be quite eventful for insider trading in India. In November 2014, the SEBI decided to substantially overhaul the 1992 Regulations[8] in the wake of the recommendations of Justice N.K. Sodhi Committee. The new regulations (*"The 2015 Regulations"*) plug several loopholes ailing the 1992 Regulations (such as definitions of 'insider,' 'unpublished price sensitive information' etc.) in an attempt to strengthen the regulatory framework of insider trading in India.[9] After years of deliberation, the Companies Act, 2013 was enacted in the previous year, which has made a provision for insider trading under Section 195.

While the 1992 Regulations only restrict insider trading in public listed companies, the Companies Act of 2013, arguably, extends this prohibition to cover private and public unlisted companies also. Unlike the Companies Act, 1956 which did not address the issue of insider trading, the Act of 2013 has made a general provision under Section 195, prohibiting any director or key managerial personnel from engaging in insider trading of securities of a 'company' regardless of whether the company is public or private, listed or unlisted.[10] The provision also prohibits communication of unpublished price-sensitive information but exempts any communication required in the ordinary course of business, profession or employment. The statute provides for civil and criminal sanctions for any violation thereof.[11]

The provision has sparked off considerable debate amongst scholars, academicians and legal practitioners about the scope of its application.[12] Since the concept of insider trading has been traditionally considered a characteristic solely associated with public listed companies, there are apprehensions about dragging private and public unlisted companies within the insider trading net. The issue is beset with uncertainty, in part due to its novelty and in part due to the lack of

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[5] Securities and Exchange Board of India (SEBI) Act of 1992, § 30 empowers SEBI to make regulations with the approval of the Central Government. [Hereinafter *SEBI Act, 1992*]
[6] *Id.,* at §§ 12(d) & 15G.
[7] *Id.,* at §§ 12(d) & 24.
[8] SEBI Board Meeting PR No. 130/2014; Against Insider Trading, Business Standard (Jan. 27, 2015).
[9] Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992, Justice N.K. Sodhi, 10 (Dec. 7, 2013). [Hereinafter *Justice Sodhi Report*]
[10] The Companies Act 2013, § 195(1).
[11] *Id.,* at § 195(2).
[12] Vinod Kothari & Shampita Das, *Insider Trading in Unlisted Companies: Understanding the operation of Section 195*, (July 21, 2014), https://www.india-financing.com [Hereinafter *Vinod &Shampita*]

any clear understanding about the possible uses or consequences of prohibiting insider trading in private companies.

In this background, the present Article seeks to analyse whether the prohibition against insider trading ought to be extended to private companies. Towards this end, Part I of the Article begins by exploring the possibility of the application of Section 195 of the Companies Act 2013 to private companies. It discusses the various possible interpretations of the provision, given its language and the legislative intent underlying the provision. Part II traces the development of common law on insider trading in an attempt to understand whether the rationale for prohibiting insider trading in public companies applies, in a similar way, to private companies. It is argued that, at least at a theoretical level, there is a need to regulate insider trading in private companies. Having reached that conclusion, Part III undertakes a comparative evaluation of the insider trading regimes of United States, Canada and New Zealand to identify and appreciate the approaches adopted by legal systems around the world to deal with the issue. Part IV then deals with the practical implications and regulatory dilemmas in applying Section 195 to private companies. Once the practical concerns have been identified, Part V debates and discusses the alternative regulatory mechanisms which can be adopted to mitigate those concerns and an attempt is made to find out a workable solution by taking a cue from the best practices in other jurisdictions.

II. DOES THE INSIDER TRADING PROHIBITION UNDER SECTION 195 APPLY TO PRIVATE COMPANIES?

Section 195 prohibits directors or key managerial personnel of a 'company' from engaging in insider trading, without making any distinction between a public or private company. So the provision, *prima facie*, suggests that it is uniformly applicable to all companies – regardless of whether they are public or private, listed or unlisted.

However, a closer reading of the provision reveals another story. Section 195 defines 'insider trading' as the activity of dealing in 'securities' of a company where the term 'securities' has the same meaning as under the Securities Contracts (Regulation) Act, 1956 (hereinafter, "*SCRA*").[13] In the SCRA, 'securities' only refers to marketable securities. There is settled judicial opinion that since there are restrictions on the transferability of securities of a private company, such securities are not marketable and hence do not qualify as 'securities' within the meaning of the

[13] The Companies Act 2013, § 2(81).

SCRA.[14] This has led some people to argue that though Section 195 prohibits insider trading in a 'company,' it refers only to trade in 'securities' of public company and it cannot be made applicable to private companies.[15]

This view has also found favour with the Sodhi Committee, which observed that 'any security that fits within definition of the term under the SCRA would be amenable to insider trading.'[16] Given that SEBI regulations are already in place to regulate insider trading in listed companies, the Sodhi Committee assumed that the *only* contribution of Section 195 of Companies Act 2013, to the existing insider trading regime is that it extends the coverage of law to companies who intend to get their securities listed on the stock exchange.[17] This assertion further derives its force from the fact that Section 458 of the Companies Act 2013 empowers the SEBI to prosecute insider trading in securities of 'listed companies or those companies which intend to get their securities listed.'[18] This has been used to argue that private companies are still not the subject of insider trading laws.[19]

Considering the proliferation of conflicting interpretations, it may be useful to consult the reports of the drafting committee for the Companies Bill to gain an insight into the true legislative intent behind the provision. Interestingly, during the process of drafting of the Companies Bill, several business associations (such as the Bombay Chamber of Commerce and Industry and Indian Merchants' Chamber) had recommended that Section 195 be deleted from the Act to prevent its overlap with the SEBI Act and the regulations made there under.[20]Alternatively, it was suggested that an explicit exception be carved out to prevent its application to the private companies since the concept of insider trading has always been understood within the framework of listed companies only.[21] The Ministry of Corporate Affairs, responding to the suggestions, explained that since 'insider trading' is not defined in any statute

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[14] Norman J. Hamilton v. Umedbhai Patel, (1979) 81 Bom L.R. 340(India); B.K. Holding v. Prem Chand Jute Mills, (1983) 53 Comp. Cas. 367 (Cal.).

[15] Tulika Sinha & Arun Mattamana, *The Viewpoint: Notified Sections of the Companies Act, 2013 – Analysis of Issues for M&A Transactions*, (Jan. 3, 2014), http://www.barandbench.com/); ASSOCHAM White Paper, *New Mergers & Acquisitions in the new era of Companies Act, 2013*, (Feb. 2014), http://www.ey.com.

[16] Justice Sodhi Report, *Supra* note 9, at 17.

[17] *Id.*

[18] Section 458 (1) reads:

[..] Provided that the powers to enforce the provisions contained in section 194 and section 195 relating to forward dealing and insider trading shall be delegated to Securities and Exchange Board for listed companies or the companies which intend to get their securities listed and in such case, any officer authorised by the Securities and Exchange Board shall have the power to file a complaint in the court of competent jurisdiction.

[19] Justice Sodhi Report, *Supra* note 9.

[20] Report of the Parliamentary Standing Committee on Finance on Companies Bill 2009, Ministry of CorporateAffairs (Aug. 2010) [hereinafter *Parliamentary Standing Committee Report, 2009*].

[21] Report of the Parliamentary Standing Committee on Finance on Companies Bill 2011, Ministry of CorporateAffairs (June 2012) [hereinafter P*arliamentary Standing Committee Report, 2011*].

(the SEBI Act or the SCRA), recognition of this concept in the 'principal legislation for corporate entities' is intended to empower SEBI to curb this pernicious activity.[22] The Ministry asserted that the intention is not to modify the existing regulatory structure formulated by SEBI and the provision should remain in consonance with the SEBI regulations.[23] The Ministry brushed aside any further demands for clarity in legislative drafting by stating that Section 458(1) of the Companies Act clearly empowers SEBI to enforce these provisions and accordingly, there ought to be no apprehension that the provisions under the Companies Act would be inconsistent with the SEBI regulations.[24]

This suggests that, contrary to popular perception, Section 195 of the Companies Act was perhaps never intended to extend the insider trading prohibition to private companies but merely to bolster the existing regime of insider trading in India. Nonetheless, given the amorphous language of Section 195, there would always be a lingering possibility of dragging private companies within the ambit of the provision. A clarification from the Ministry of Corporate Affairs can dispel this ambiguity, putting the speculation to rest. Unfortunately, such a clarification does not seem to be forthcoming in the near future, since, as recently as in June 2015, the Ministry of Corporate Affairs released a notification exempting private companies from certain provisions of the Companies Act 2013.[25] But no such proposal was made with respect to Section 195 and the Ministry of Corporate Affairs once again missed an opportunity to clarify the issue.

III. IS THERE A NEED TO REGULATE INSIDE TRADING IN PRIVATE COMPANIES?

Given the uncertainty in the scope of Section 195, concerns have been continuously raised regarding the possible extension of insider trading regime to include private companies.[26] The prevailing discomfort with Section 195 is grounded in the perception that the prohibition against

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[22] Parliamentary Standing Committee Report, 2009, *Supra* note 20.
[23] *Id.*
[24] Parliamentary Standing Committee Report, 2011, *Supra* note 21.
[25] Ministry of Corporate Affairs Notification, GSR 464(E), http://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.pdf (last visited July 20, 2015).
[26] Umakanth Varottil, *Overhauling the Insider Trading Regulations*, (Dec. 21, 2013), http://www.indiacorplaw.blogspot.in; Vinod & Shampita, *Supra* note 12; Similar concerns have been previously raised in certain other countries, see Kevin A Lewis, *A Decade On: Reforming the Financial Services Law Reforms, Lecture delivered at 6th Annual Supreme court Corporate Law Conference* (Aug., 2011) http://www.inhouselegal.com.au/Compliance_Course/SupCourtPaper.pdf.

insider trading exists to promote the efficiency, fairness and integrity of the financial markets and is therefore, ill-suited to a transaction of securities that is not carried out on a stock exchange.[27]

It is believed that stock exchanges exist to provide a fair, level playing platform where the potential buyers and sellers of securities meet to enter into a transaction.[28] In case of a public listed company, members of the public buy or sell shares on a recognized stock exchange on the faith that the relevant information has been made available to all market participants and no person can take an unfair advantage because he has access to additional material information.[29] Therefore, insider trading needs to be prohibited to preserve investor confidence and ensure the efficiency of the financial market.[30] The Sodhi Committee's report similarly argues that the prohibition of insider trading presupposes the existence of a price-discovery platform for security. There is no price discovery if the securities of a company are not listed and hence there cannot be a risk of speculative trading or misuse of corporate information involved in the transaction of securities of a private company.[31] In the latter case, the transaction is more often than not, a subject of direct negotiations between parties who know each other.[32] In that sense, it is considered to be similar to a trade in any other good or product which ought to be governed by the principle of '*caveat emptor*' (buyer beware) where neither party has an obligation to disclose any information to each other.[33]

However, it is argued that regulatory intervention in case of private companies is not as aimless as this argument assumes.

First, it is interesting to note that in the United States, recent times have witnessed a spurt in online marketplaces where securities of private companies are traded (much like the stock exchanges).[34] This concept originated in the context of social networking sites (then private

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[27] *Id.*

[28] Same views have been expressed by several scholars throughout the world. *See*, ASIC v. Petsas & Miot (2005) FCA 88; Roman Tomasic, CASINO CAPTIALISM? INSIDER TRADING IN AUSTRALIA (National Gallery of Australia, 1991); Michael Fishman & Kathleen Hagerty, *Insider Trading and the Efficiency of Stock Prices*, 23 RAND Journal of Economics 106 (1992).

[29] SEC v. Texas Gulf Sulphur Company, 410 F 2d.848.

[30] Report of the High Powered Committee on Stock Exchange Reforms, Ministry of Finance, Department of Economic Affairs (1986).

[31] Justice Sodhi Report, *Supra* note 9, at 15.

[32] AUSTRALIAN GOVERNMENT, CORPORATIONS AND MARKETS ADVISORY COMMITTEE, *Insider Trading Report*, (Nov. 2003), http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2003/$file/insider_trading_report_nov03.pdf.

[33] *Id.*

[34] Oren Livne, *Secondary Markets for Private Company Shares: Marketplace Overview and Predictive Capability*, (2012), https://www.stern.nyu.edu/sites/default/files/assets/documents/con_035718.pdf.

companies) such as Facebook and Zynga.[35] The stock of these private companies which were hitherto treated as non-liquid, began to be traded on online platforms[36]such as Second Market[37] and Shares Post.[38] These platforms are themselves private companies, facilitating the trade between potential buyers and sellers. The significance of this development can be gauged from the fact that the stocks of Facebook traded hands 689 times on Second Market between 2008 and 2012.[39] The volume of transactions handled by these marketplaces was $360 million in 2010 which further rose to $558 million in the year 2011.[40]

Though such online marketplaces offer countless advantages in terms of reduced transaction and negotiation costs, their legitimacy and efficiency is under question due to the asymmetric information available to buyers and sellers, and the perceived threat of insider trading.[41] To deal with such cases, Facebook put in place an Insider Trading Policy in 2010 while it was still a private company to prevent its employees from dealing in securities based on undisclosed price-sensitive information.[42] A year later, the services of a widely-respected senior manager were terminated for violating the company's insider trading policy when he bought the shares of the company ahead of the impending investment by Goldman Sachs, Sarah Lacy and Michael Arrington.[43] The incident made headlines as the world woke up to the reality of insider trading in private companies.[44] Owing to this incident, several countries across the world are now facing an increased demand for regulating insider trading for companies till the time a start up company reaches the stage of Initial Public Offer (IPO).[45]

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[35] These markets potentially emerged due to the changing dynamics of Initial Public Offer on Wall Street. After the Dot.com crash in 2000-01 and the recent 2008 financial crisis, the length of time required for a startup company to reach the IPO has significantly increased and the volatile market conditions forced many potential new public companies to withdraw from the IPO registration process. It is in this context that these new markets emerged to increase the liquidity of shares of private companies so that the investors have an option to exit. *See*, Peter Lattman, *Stock Trading in Private Companies Draws S.E.C Scrutiny*, N. Y. TIMES (Dec 27, 2010); RESEARCH HANDBOOK ON INSIDER TRADING 104 (Stephen M. Bainbrige, ed.)(2013). [Hereinafter *Bainbrige*].

[36] Elizabeth Pollman, *Information Issues on Wall Street*, 161 U. PA. L. REV. 179 (2012). [Hereinafter *Elizabeth Pollman*]

[37] It is a New York-based online platform which was founded in 2004. It is primarily used by former and existing employees of Facebook and other firms to sell their securities from time to time. *See also*, Jose M. Mendoza & Eric P.M. Vermeulen, *The "New" Venture Capital Cycle*, LEX RESEARCH LTD., (2011), http://direitogv.fgv.br/sites/direitogv.fgv.br/files/arquivos/anexos/mendonzavermeulen_the_new_venture_capital_cycle_part_1.pdf.

[38] SharesPost is an online trading platform founded by Greg Brogger. It provides an alternate means to trade in shares of popular startups without having to wait years for the company to go public in an IPO. See, Henry Blodget, *Finally, Another Option For Private Investors Who Can't Dump Stock in an IPO*, BUSINESS INSIDER (June 28, 2009).

[39] Paul Schultz, *Where we are Headed: Regulation and The Semi-Public Company,* 12 Centre for the Study of Financial Regulation, University of Notre Dame 4 (2012).

[40] Stephen F. Diamond, *The Facebook Effect: Secondary Markets and Insider Trading in Today's Startup Environment*, SANTA CLARA L. REV. (2012). [Hereinafter *Diamond*]

[41] Elizabeth Pollman, *Supra* note 36.

[42] Scott McKinney, *Facebook and the Challenge of Staying Private*, 25 INSIGHTS 1, 2 (2011). [Hereinafter *Scott McKinney*]

[43] Michael Arrington, *Facebook Terminated Corporate Development Employee over Insider Trading Scandal*, (March 31, 2011), http://www.techcrunch.com; Scott McKinney, *Supra* note 42.

[44] Bainbrige, *Supra* note 35.

[45] Diamond, *Supra* note 40.

Therefore, going by the 'market fairness' theory of insider trading which underpins the regulation of insider trading in public companies, the newly developing private secondary market for trading in the securities of private companies highlights the need to expand the coverage of law to make it applicable to private companies as well.

Second, and more importantly, it is argued that maintaining market fairness has never been the sole rationale for the rule against insider trading. A brief look at the development of common law on the issue would clarify that historically, insider trading was perceived as a breach of the directors' fiduciary duty.[46] The directors or officers of the company are 'fiduciaries' who are intended to have access to insider information for a corporate purpose, and not for their personal benefit. In such a case, fairness necessitates that the person be precluded from misusing this corporate information to make an undue profit. This is irrespective of whether or not the transaction is taking place at a stock exchange.[47]

Under common law, the initial reference point of insider trading is the English case of *Perceival v. Wright,*[48] where the insiders were insulated from liability for trading in the securities of the company based on insider information, as the Court concluded that the directors had no duty to disclose the material price-sensitive information to the shareholders. The Court reached this conclusion based on the general principle that the directors owe a fiduciary duty to the *company* and not to *individual shareholders of the company*. The decision remained uncontested for a long time[49] until the judgment of the Supreme Court of New Zealand in *Coleman v. Myers.*[50] The case involved minority shareholders of a family-owned private company alleging that the two directors of the company had induced them to sell their shares at an undervalued price by non-disclosure of material information. Moving away from the established position in *Perceival*, the Court held that certain special circumstances may impose a fiduciary duty on the directors which is owed to the shareholders. The directors of the company were therefore, found to be in breach of their fiduciary obligation not to mislead the shareholders and to disclose material matters at the time of trading in securities.[51]

In any case, even if it were to be assumed that directors owe a fiduciary duty only to the company and not to the shareholders of the company, it can be argued that the company itself

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[46] New Zealand Law Commission Company Law Report, NZLC PP5 1987 (Wellington).[Hereinafter *New Zealand Law Commission Report]*

[47] In re Cady, Roberts & Co., 40 S.E.C. 907 (1961).

[48] [1902] 2 Ch. 421.

[49] Barry Rider, *Percival v. Wright – Per Incuriam*, 40 MOD. L. REV. 471 (1977).

[50] [1977] 2 NZLR 225.

[51] A similar conclusion was reached in Allen v. Hyatt (1914) 30 TLR 444.

has an interest in ensuring that people trading in its securities receive a fair treatment.[52] Transferability of shares is one of the main reasons for the success of a company as a form of business and accordingly, the company, whether private or public, has an interest in ensuring that the public confidence in its securities is maintained.[53] This conclusion is further buttressed by the observations of the Supreme Court of Canada that the concept of 'insider trading' has aspects of both securities law and companies' law.[54] The proper relationship between a company and its insiders is central to company law since insider malfeasance adversely affects corporate powers, organization and internal management of the company. If the shareholders are not assured fair play, company's ability to raise capital and finance its business activity which constitutes an important component of the company law, would be impeded.[55] This rationale has prompted countries like the United States, Canada[56] and New Zealand[57] to enact a statutory restriction on insider trading which is uniformly applicable to all types of companies – regardless of whether they are private or public.

It is pertinent to note at this point that, in the Indian context, the 1992 Regulations and the 2015 Regulations, both have an expansive and open-ended definition of the term 'insider,' which includes anyone and everyone who has access to unpublished price-sensitive information such as lawyers, bankers, etc. regardless of whether or not they are connected to the company.[58] In contrast to this, the Companies Act 2013 describes 'insider trading' only with reference to 'director or key managerial personnel or any other officer of a company either as a principal or agent' who is 'reasonably expected to have access to any non-public price sensitive information in respect of securities of company.' It is arguable that the difference in language between the two legal instruments reflects the common law philosophy discussed above. While the rationale for prohibiting insider trading in SEBI Regulations is to uphold market integrity and confidence of the investing public, the Companies Act views insider trading as a breach of fiduciary duty. The provision is therefore applicable only to the directors/officers of the company who stand in

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[52] New Zealand Law Commission Report, *Supra* note 46.
[53] *Id.*
[54] Multiple Access Ltd. v. McCutcheon (1982), 138 D.L.R. (3d).
[55] *Id.*
[56] Submission of Canadian Bar Association on the Canada Business Corporations Act, 16 (May 2014). https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Canadian_Bar_Association.pdf/$FILE/Canadian_Bar_Association.pdf.
[57] New Zealand Law Commission Report, *Supra* note 46.
[58] Regulation 2(e) - "insider" means any person who,
(i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access to unpublished price sensitive information in respect of securities of 11[a] company, or (ii) has received or has had access to such unpublished price sensitive information

a fiduciary position to the company and to the shareholders. When viewed from this standpoint, the regulation of insider trading in private companies is not entirely devoid of merit.

In fact, a closer look at the difference between a private and public company would reveal that the risk of insider trading is perhaps even greater in a private company than a public one. Public companies in India operate under a strict disclosure regime. They are legally obliged to make regular, complete disclosures about almost every aspect of their functioning under the Companies Act and various SEBI Regulations such as the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009. Shareholders in a public company are generally familiar with the annual reports which provide extensive information about the company, its financial position, new developments, etc. Further information about the company can also be accessed on the website of the stock exchange where it is listed.[59] Accordingly, the members of the public including the shareholders are seemingly at a level-playing field in terms of the information that is known about the company. Essentially, this means that the possibility of insider trading in a public listed company would arise only at times when there is particular price-sensitive information which has yet not been disclosed to the public and is known only to some officials of the company. Given the elaborate and extensive disclosure requirements, it is argued that such undisclosed information is a rare commodity in the context of public companies.

Unlike public companies, private companies have scant reporting and disclosure obligations and at any given point of time, the information about the company is available only to the directors and persons in authority or employees depending upon their varying levels of responsibility within the company. This would mean that a member of the public intending to buy securities of a private company from an existing shareholder is bound to be at a huge disadvantage in terms of access to information[60] and the shareholders are quite literally at the mercy of the directors.[61]

Certain large investors like private equity funds investing in the securities of the private company can potentially bridge this information asymmetry by undertaking due diligence and demanding representations and warranties in the share purchase agreement regarding all the relevant information, thereby shielding themselves from any loss that might be caused due to non-disclosure or misrepresentation of material facts.[62] However, small retail investors in a private

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[59] SEBI (Prohibition of Insider Trading) Regulations 1992, Section 13(6).
[60] Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1978 (2013).
[61] Several cases in United States and Canada have made a similar observation while dealing with allegations of insider trading in private companies. For example, Tongue v. Vencap Equities Alberta Ltd. [1996] 6 WWR 761, SEC v. Stiefel Laboratories Inc, Case No 1:11-cv-24438 (S.D. Fl. Dec. 12, 2011).
[62] Benjamin Gliksman & Gary Solway, *Canada: Insider Trading at Private Companies*, (Feb 16, 2011), http://www.mondaq.com. [Hereinafter *Gliksman & Solway*]

company do not enjoy a similar bargaining power. In this context, insider trading laws are extremely important to fortify the interests of these small investors.

It is also important to note that private companies in India are now no longer restricted only to closely-held family businesses. While earlier, the membership of private companies was restricted to a maximum of fifty members only,[63] the Companies Act 2013 has increased this limit to two hundred.[64] As private companies expand in size and more and more small investors invest in private companies, not all of whom are involved in the decision making process of the company, the legislature needs to put in place measures to ensure that the interests of these small investors are adequately protected in their dealing with the large investors. In such a case, insider trading laws can help level the playing field among the buyers and sellers by mandating disclosure of relevant information about the company before a transaction in securities can take place.[65]

Having looked at the position under the common law, the purpose and benefit of such insider trading prohibitions can be further appreciated by analyzing the statutory insider trading regimes of other jurisdictions.

IV. A COMPARATIVE ANALYSIS OF THE MODELS OF INSIDER TRADING IN DIFFERENT JURISDICTIONS

Although insider trading incidents in private companies have never received much attention in academic writings or newspaper reports, it is interesting to note that India is not alone in its alleged experiment of extending insider trading regime to private companies. The insider trading laws in the United Kingdom, Ireland and Nigeria are only applicable to public companies but several countries like the United States, Australia, Canada and New Zealand have provisions to check the menace of insider trading in the context of private companies and public unlisted companies, albeit in different ways.

This section identifies two principal models through which legal systems around the world have sought to regulate insider trading. The first approach has been termed as the 'Abstain or Disclose' model which is adopted by countries like the United States and Canada and the second approach has been called the 'Abstain or Pay Fair Value' model which is prevalent in New Zealand.

[63] The Companies Act 1956, § 3(1)(iii).
[64] The Companies Act 2013, § 2(68).
[65] Bainbrige, *Supra* note 35, at 106.

A. ABSTAIN OR DISCLOSE MODEL

In the United States, the insider trading regime is based upon the 'disclose or abstain' principle which was established in *SEC v. Texas Gulf Sulphur Company.*[66] Under this model, any person in possession of material inside information, is presented with two alternatives – he 'must either disclose it to the investing public' or if such a disclosure is not possible or desirable, he must 'abstain from trading in or recommending the securities concerned while such inside information remains undisclosed.'

The statutory regime of insider trading in the United States comprises the Securities Act, 1933 which contains prohibitions of fraud in the sale of securities[67] strengthened further by the Securities Exchange Act, 1934. Section 10(b) of the Securities and Exchange Act 1934 and Rule 10b-5 formulated thereunder is an anti-fraud provision which prohibit fraud "in connection with the purchase or sale of any security." Rule 10b-5 substantially widens the common law obligations of directors[68] and though the word "insider trading" is not specifically mentioned, Courts have consistently used this provision to catch insider trading activities.[69] Further, the language of Rule 10(b) is sufficiently broad to include both public and private companies within its ambit.[70]

One of the most recent cases involving insider trading in private companies is *SEC v. Stiefel Laboratories Inc.,*[71] where the respondent (a private company) bought back stock from its current and former employees at grossly undervalued price. The Company entered into this transaction without disclosing that it was in the process of negotiating the sale of its preferred stock to five private equity firms at a price which was almost 300% higher than the buyback price. This caused an estimated loss of $110 million to the employees. In a suit filed by the employees, the Court acknowledged that since the respondent was a private company with scant public disclosure obligations, the employees of the company were completely dependent on the management for doling out relevant information. The court applied the 'disclose or abstain' principle and held the Company and its Chief Executive Officer guilty of violating Rule 10b-5.

Similar situations have previously arisen in *Smith v. Duff & Phelps*[72] and *Castellano v. Young & Rubicam*,[73] where the private company repurchased their own stock from their employees without

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[66] 410 F 2d.848.
[67] Securities Act of 1933, 15 U.S.C. § 77a, § 17.
[68] H Wortsman, *The Insider/A Survey in Corporate Disclosure*, 25 FAC. L. REV. 55, 63 (1967).
[69] *Id.*
[70] Diamond, *Supra* note 40; John Carney, *Does Silicon Valley have an Insider Trading Problem?,* (Apr. 1, 2011), http://www.cnbc.com
[71] Case No 1:11-cv-24438 (S.D. Fl. Dec. 12, 2011).
[72] 891 F.2d 1567 (11th Cir. 1990).

disclosing the fact of an impending merger, resulting in substantial losses to the employees. Similarly, in *Rizzo v. MacManus Group Inc.*,[74] the chairman of the board of a company filed a suit against the representatives of a company for not disclosing merger prospects to him while he was in the process of negotiating his severance agreement that involved sale of his stock to the company. In all of these cases, the officers of the private company were held liable for non-disclosure and trade in securities while in possession of publically unavailable information that materially affected the price of the stock.

Treading on similar lines, Canada imposes a liability for dealing in securities of a company (including a private company) while in possession of confidential price-sensitive information under the Canada Business Corporations Act (CBCA) 1985,[75] while there are independent provincial securities legislations prohibiting insider trading in the context of listed companies. Notably, in a departure from the US, Canada's legislation provides for an affirmative defence to the directors if the information was 'known or ought to reasonably have been known' by the person claiming to be affected by the alleged insider trading.[76] This means that an action for insider trading can be defeated if the person trading in the securities did not exercise due diligence while buying/selling the security.

In Canada, the first case of insider trading in private company to reach the courts was *Pelling v. Pelling,*[77] where the majority shareholder purchased shares from the minority at a time when he had already negotiated an arrangement to sell them for a profit to another company. When the case reached the Court, the majority shareholder contended that the insider trading provision should be limited to public companies because the provision prohibits a connected person from dealing in securities when he is in possession of information which, if 'generally known' would affect the price of securities. Since no information about a private company is 'generally known,' the section was intended to apply to only public companies. This contention failed to impress the Court and it was held that, in the absence of a specific exemption for private companies in the statute, the prohibition of insider trading would apply uniformly to all companies and the judiciary cannot supply an exception.

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[73] 257 F.3d 171 (2d Cir. 2001).
[74] 158 F.Supp.2d 297 (2001).
[75] Canadian Business Corporations Act,§ 131(4).
[76] *Id. at* 131(1)(h).
[77] (1981) 130 D.L.R. (3d) 761.

A similar conclusion was reached in *Tongue v. Vencap Equities Alberta Ltd.*[78] where the directors were held liable for insider trading because of their failure to disclose that a major international firm had expressed an interest to purchase their company. Though the directors had made a general disclosure that there were potential offers to purchase the company and the plaintiff shareholders had even signed acknowledgement and waivers to that effect, the Court held that the directors had failed to disclose that one of the offers was from a major international firm. In this case too, a major fact which weighed with the Court was that the aggrieved shareholders had limited or no source of acquiring this information. The waivers were held to be unenforceable because the directors could not be allowed to contract out of their duties in this manner.

In the Indian context, the Companies Act 2013 is modeled along the same lines as the 1992 Regulations (and now the 2015 Regulations),[79] which follows the 'abstain or disclose' approach of the U.S. and Canada.

B. ABSTAIN OR PAY FAIR VALUE MODEL

In New Zealand, insider trading came to be statutorily controlled for the first time in 1988 with the aim of regulating the securities market[80] and the restriction on insider trading was accordingly applicable only to "public issuers" (those issuing securities to the public). It was only in 1993 that the Companies Act came up with a general prohibition on insider trading across all companies.[81]

Unlike any other country, New Zealand has a slightly innovative way of dealing with the insidious activity of insider trading. Interestingly, the Companies Act of New Zealand does not impose an outright restriction on the director's right to deal in shares if he is in possession of any material price sensitive information which is not publicly available. Instead, the statute allows for such trade but only if the transaction takes place at the 'fair value of shares or securities.'[82] This

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[78] [1996] 6 WWR 761.

[79] The Companies Act, 2013, Section 195(1) No person including any director or key managerial personnel of a company shall enter into insider trading.

[80] Gordon Walker & Andrew Simpson, *Insider Conduct Regulation in New Zealand: Exploring the Enforcement Deficit*, 4 NZLR 521 (2013).

[81] New Zealand Companies Act 1993, Section 149.

[82] New Zealand Companies Act 1993, Section 149:

Restrictions on share dealing by directors

(1) If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other securities issued by the company or a related company, the director may acquire or dispose of those shares or securities only if, -

(a) in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or securities; or

(b) in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or securities

fair value is to be determined on the basis of all the information that is publicly available or known to the directors,[83] thus factoring in any unpublished price-sensitive information.

Any attempt to understand this provision is incomplete without a reference to the seminal judgment of *Thexton v. Thexton.*[84] The case involved a director who was the manager of a company in which his father was a minority shareholder. During the time of an ongoing merger negotiation, the director agreed to buy his father's share at a price which was lesser than the fair value of the shares, if the information about the impending merger were to be taken into account. In a suit filed by the director's mother alleging sale at lesser than the fair value, the Court held the son liable under the Companies Act and held that the liability was regardless of whether the information was disclosed to the father. As long as the information was not publicly available, directors are prohibited from entering into any transaction of securities that is lesser than the fair value at that time.

In this way, instead of the "abstain or disclose" approach followed by most countries, New Zealand follows the "abstain or pay fair value model."[85] So in *Insurego Limited v. Harris*,[86] the directors were held liable for acquiring shares from shareholders, while in possession of information about company's significant profits in recent months, since this information was not factored in while arriving at a price for the securities. To that extent, the Act imposes a strict liability and the intention of the parties is irrelevant. It is also inconsequential that there was a prior agreement between the parties on how to value the shares under the company's articles or under the terms of a shareholder's agreement or in a subsequent contract for sale.[87] The only question to be determined is whether or not the transaction took place at a 'fair value' which is an objective determination based on the facts and circumstances of the case. If not, the directors are liable to the seller/purchaser for the difference between the 'fair value' and the price at which the shares were traded.[88]

When viewed in contrast with the first model, the 'Abstain or Pay Fair Value' model has some obvious advantages. First, it has been largely recognized that though the 'Abstain or Disclose' rule is seemingly formulated in the alternative, upon enforcement, the rule practically operates as a complete ban against trading because it is not always possible to disclose information (due to the loss of competitive advantage flowing from disclosure of information, confidentiality

[83] New Zealand Companies Act of 1993, Section 149(2).
[84] [2001] 1 NZLR 237.
[85] Thexton v. Thexton, [2001] 1 NZLR 237.
[86] [2013] NZHC 2542.
[87] Fong & Anor v. Wong & Anor, [2008] NZHC 1918.
[88] *Id.*

obligations etc.).[89] As opposed to this, the 'abstain or pay fair value model' does not completely prohibit the insiders from trading in securities of the company while in possession of material price sensitive information so long as the transaction is at a fair price. Second, it has less onerous disclosure requirements because the director is under no compulsion to disclose the price sensitive information to the opposite party, because the law is only concerned with the information being reflected in the value paid.[90] Third, the directors are exempted from liabilities in cases where he did not gain an undue advantage by virtue of being in possession of that information. In that sense, 'abstain or disclose' model is a strict liability model which would hold a director liable even if he honestly paid the fair value of securities and did not make an undue profit by virtue of being in possession of price-sensitive information.

At the same time, the 'abstain or pay fair value' approach suffers from drawbacks too. The greatest disadvantage is that the obligation to deal at fair value continues even where both the buyer and seller are insiders and therefore, at a level playing field, as long as the price-sensitive information is not publicly disclosed. Moreover, the director would be obliged to pay fair value even if there is a prior agreement between the parties on the amount to be paid.

V. REGULATION IN PRIVATE COMPANIES – PRACTICAL REALITIES

The cases in the United States, Canada and New Zealand discussed in the previous Part exemplify that insider trading is as much a reality of private companies as for public companies and the law ought to address this issue if the interests of the potential buyers/sellers have to be protected. The difficulty arises from the fact that despite its many benefits, such a prohibition in the context of private companies is mired in numerous difficulties.

One of the greatest concern of such a prohibition is its potential adverse effect on the shareholder's right under the Right to First Refusal (hereinafter 'RoFR').[91] RoFR is a clause that is often included in the shareholders' agreements of private companies, whereby the existing shareholder is granted the right to purchase shares from a selling shareholder. Before the selling shareholder can sell his shares to a potential buyer (third party), he has to present the offer made by the potential purchaser to the party in whose favour the RoFR has been created. The shares

[89] Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 885 (1993); Willis W. Hagen, *Insider Liability Under Rule 10b-5*, 44 BUS. LAW.15 (1988).
[90] Kiriwai Consultants Limited v. Holmes, [2014] NZHC 512.
[91] Barry Reiter, *Insider Trading at Private Companies*, LEXPERT, (Feb., 2011), www.bennettjones.ca. [Hereinafter *Reiter*]

can be sold to the third party only when the existing shareholder refuses to purchase the shares at the price quoted.[92]

Ordinarily, director/key managerial personnel of a private company who has a RoFR in his favour can freely exercise his right to buy the shares on offer from the selling shareholder. However, with the introduction of Section 195 in the Companies Act 2013, a director would first have to consider whether he is in possession of any undisclosed price-sensitive information before he can exercise this right of first refusal. If he happens to be aware of any such insider information, he would be forced to disclose the information to the selling shareholder before he can buy the shares. The problem is further compounded in a scenario where the person who is in possession of such information is barred from disclosing it due to confidentiality obligations. In case of an inability to disclose the information, the only option available with the shareholder would be to refrain from buying the shares, thereby foregoing his contractual right.[93] Ironically, the same shares can then be bought by a third party at exactly the same price. The provision on insider trading would therefore, evidently result in depriving the shareholders of a legitimate contractual benefit under the shareholder's agreement.[94] The director/key managerial personnel would not only be unable to buy the shares, but, to add insult to the injury, he would also be left with a diluted stake in the company and the interference of a third party in the affairs of the company, thus, completely defeating the purpose for which the RoFR clause was incorporated in the contract.[95]

This problem recently confronted the Delaware Court in the United States where a private equity investor exercised the RoFR to acquire the shares of the former Chief Executive Officer (CEO) without disclosing that they were in the process of selling away certain patents of the company at an extremely high price.[96] This news caught the attention of the former CEO after the sales transaction, who then filed a suit alleging a violation of a fiduciary duty. The defendants responded that the transaction is governed by the contractual terms of the shareholders agreement and they did not owe any general fiduciary duty to disclose information about the asset sale.

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[92] A RAMAIYA, GUIDE TO COMPANIES ACT, PART I (17th ed., 2010).
[93] Reiter, *Supra* note 91.
[94] *Id.*
[95] *Id.*
[96] Latesco, L.P. v. Wayport Inc., A.2d, 2009 WL 2246793 Del.Ch.2009.

Surprisingly, the Delaware Court ruled in favour of the defendants in holding that the right of first refusal is an exception to the situations where the law imposes strict fiduciary fidelity.[97] This is because the exercise of such a right does not involve any negotiation of price between the fiduciary (in this case, the equity investors) and the selling shareholder (the former CEO) since the negotiation occurs between the selling shareholder and the third party. It is the price offered by the third party that becomes the minimum price to be paid by the fiduciary to exercise his right under the RoFR. The fiduciary does not solicit sales and does not even make an offer to sell purchase the shares from the shareholder. It is the selling shareholder who has already arranged separate sale requiring performance under the RoFR. Right of First Refusal is an 'unconstrained right to buy shares' and the selling shareholder signs a Right of First Refusal agreement knowing that any decision he makes to sell his shares will be made without access to the broad scope of information available to insiders. Therefore, a Right of First Refusal is governed by the terms of the contract itself and the normal prohibitions against fraud would not be applicable. The Court acknowledged that a broad rule of fiduciary disclosure would disrupt the intended right of the shareholder under the agreement and such 'rights generally operate on tight time schedules and certainly do not contemplate price negotiations.' Any requirement of disclosing information at this stage would not be pragmatic and would only cause the seller or the third-party purchaser to rethink the transaction.

The Court further eliminated any scope for doubts by clarifying that where the transactions do not fall within the four corners of the RoFR agreement, the general fiduciary principles would continue to apply. The factual matrix of the case was such that the equity investors had also persuaded the former CEO to sell additional shares to certain other directors/shareholders who did not have a RoFR in their favour. So to the extent of trade in these additional shares, the Court held the defendants liable for fraud since they induced the plaintiff to sell the securities at a lower price than they otherwise would have, if informed about the material facts.

Though on appeal, on the fact of the case, the Appellate court concluded that there was a waiver of RoFR and the case was finally decided based on common law fiduciary duty,[98] the Delaware Court's decision continues to be relevant as it manifests the Court's uneasiness in applying insider trading provision when it would have the effect of stifling the shareholders' rights under a valid agreement.

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[97] *Id.*

[98] In re Wayport, Inc. Litigation, 76 A.3d 296 Del. Ch. 2013.

Besides this, there are a plethora of other administrative and enforcement difficulties likely to arise out of an anti-insider trading provision. In the case of listed companies and those intending to get listed, Section 458 of the Companies Act 2013 conveniently delegates the power of enforcement of Section 195 to the SEBI while the authority responsible for enforcing the rule in the context of private companies is still shrouded in mystery. The method of enforcing or detecting insider trading is also similarly vague and unclear.[99] Listed companies have a centralized enforcement of insider trading laws whereby the SEBI detects cases of insider trading based upon unusual price and volume activity.[100] In the context of private companies, absent a trade on stock exchanges, there is no understanding on how the regulatory authorities will oversee the enforcement of the provision and detect cases of violation.

There is also no understanding of the mode of disclosure expected to be followed by the directors and key managerial personnel to avoid liability under Section 195. For instance, if a director of a private company, say A, intends to sell his shares to his friend, B, whether a disclosure to B would be considered sufficient compliance with Section 195 or whether the director is required to make a public disclosure of the price-sensitive information is unclear. As mentioned earlier, the law in New Zealand mandates public disclosure of price-sensitive information and B's knowledge of the information is not sufficient.[101] In the Indian context, there is no conclusive answer till date; but it can be noted that Section 195 defines 'insider trading' as an activity associated with '*non-public* price sensitive information.' Conversely, this means that the information needs to be *public* for a trade in securities to fall outside the bracket of insider trading.

This requirement creates difficulties at two levels. First, no mechanism exists, or can readily be imagined, for private companies to make effective public disclosure of information so that the information becomes generally available. In the context of listed companies, the SEBI Regulations require the companies to adopt and enforce a code of Corporate Disclosures which mandate that companies give price sensitive information to stock exchanges on a continuous and immediate basis and the information is then passed on to the investors through stock exchange websites.[102] In the absence of stock exchanges and the lack of SEBI's jurisdiction over private

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[99] Maneka Doshi, *Companies Act Episode 13: Private Companies*, THE FIRM, (July 28, 2014) http://thefirm.moneycontrol.com/story_page.php?autono=1139566 (Maneka Doshi was a member of the N.K. Sodhi Committee on Insider Trading. The Firm is her program on CNN-IBN where she gives opinions on law)

[100] Omkar Goswami, *Corporate Governance in India,* TAKING ACTION AGAINST CORRUPTION IN ASIA AND THE PACIFIC 85, 100 (2002); Manish Agarwal & Harminder Singh, *Merger Announcements and Insider Trading Activity in India: An Empirical Investigation*, 3 INVESTMENT MANAGEMENT AND FINANCIAL INNOVATIONS 140 (2006).

[101] Thexton, *Supra* note 85.

[102] SEBI (Prohibition of Insider Trading) Regulations 1992, § 12 & Schedule II.

companies, the time and manner in which the information is to be made public by the directors of a private company remains perplexing. Even if it were to be assumed that the private companies would be required to make a disclosure to the Ministry of Corporate Affairs (or any other regulatory body designated for this purpose), the sheer number of private companies in India makes the task of handling and disseminating such information to the public on a continuous basis, administratively impossible.

Secondly, the process of disclosure would evidently be costly, complex and time-consuming. To that extent, if private companies were to be imposed with an obligation to make continuous disclosures about their performance and key developments, that would rob the private companies of one of its greatest advantages (over a public company). This is because administrative ease, less reporting obligations and the ability to maintain the confidentiality of competitive business information are some of the important reasons why private company is often preferred as a form of business.[103]

Additionally, Section 195 also raises apprehensions regarding its potential impact on deal structuring.[104] Ordinarily, when a large investor such as a private equity fund invests their money in a private company, they would insist on conducting a due diligence exercise which would involve the company sharing substantial information about its finances, performance, future plans etc.,[105] some of which information may be price-sensitive. Now, the problem arises from the fact that communication of non-public price sensitive information to any person is also prohibited as insider trading under Section 195. In a similar fashion, in a transaction of mergers and acquisitions, when the Board of the target company shares company information with the acquirer during a due diligence exercise,[106] the directors can technically be held liable for insider trading. Ideally, the investment would benefit the country and therefore the release of information in this context should not raise concerns about fairness. The public companies earlier found themselves in a similar position due to the same restriction in the 1992 Regulations, which has now been rectified in the 2015 Regulations by exempting communication of information for legitimate business purposes.[107] In the absence of a similar exception under the company law, the provision against insider trading might potentially affect deal structuring.

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[103] Joan Farre-Mensa, *Why are Most Firms Privately Held?*, HARVARD BUSINESS SCHOOL WORK (2011); Arnoud W. A. Boot et al., *The Entrepreneur's Choice between Private and Public Ownership*, 61 JOURNAL OF FINANCE 806 (2006).
[104] ASSOCHAM White Paper, *Mergers and Acquisitions in the new era of Companies Act 2013*, (Feb. 2014), www.ey.com.
[105] Varun Sood, *Investment Strategies in Private Equity*, 6 THE JOURNAL OF PRIVATE EQUITY 45 (2003).
[106] Byron Fox & Eleanor Fox, CORPORATE ACQUISITIONS AND MERGERS, 2B-1 (2006).
[107] SEBI (Prohibition of Insider Trading Regulations) 2015, Regulation 3.

The discussion so far clearly suggests that the prohibition of insider trading in private companies poses considerable regulatory challenges which do not lend themselves to any easy solution. A similar set of practical difficulties have prompted Canada to rethink its insider trading regulations in the context of private companies.[108] The Bar Association of Canada has, on numerous occasions, suggested that the provisions regarding private companies must be removed[109] and the Statutory Committee set up to review the Canadian statute has finally acted on the representations, as a result of which the government is conducting broad public consultation on whether or not to retain the provision with respect to private companies.[110]

The example of Canada also highlights the paradox of applying insider trading regulations to the private companies. Ironically, the countries whose insider trading regime does not extend to private companies are facing an increased demand for an amendment to incorporate such a rule (Nigeria, for instance) based on the theoretical rationale of director's fiduciary duty and protection of investors.[111] On the other hand, the countries like Canada that already have such a law in place are uncertain whether or not to continue with the provision due to the inherent practicable difficulties that arise within such a regime.[112]

VI. POSSIBILITIES BEYOND SECTION 195 – IN SEARCH OF A WORKABLE SOLUTION

On the strength of the above analysis and on considering the critically important distinctions between a private and a public company and the different frameworks in which these companies operate, it becomes clear that the insider trading regime for private companies cannot be as rigorous as that for a public company.

It might be possible to overcome some of these practical difficulties by creating specific exemptions for private companies for which cue can be taken from best practices prevalent in other jurisdictions. For instance, the concern about unduly restricting the shareholders' contractual right under a RoFR, can be addressed by following in the footsteps of the United States. RoFR should be left to be governed by contractual principles and the normal fiduciary duty of directors ought not to be applicable in such a case. Alternatively, the 'abstain or pay fair value' model followed in New Zealand could be considered as a useful middle ground since that

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[108] Gliksman & Solway, *Supra* note 62.
[109] Reiter, *Supra* note 91.
[110] Report of the Standing Committee on Industry, Science and Technology, Statutory Review of the Canada Business Corporations Act, HOUSE OF COMMONS, CANADA, 28 (June 2010) http://www.ccgg.ca/siste/ccgg/assets/pdf/INDU_Report_June_2010.pdf.
[111] Diamond, *Supra* note 40.
[112] Gliksman & Solway, *Supra* note 62.

would not out-rightly restrict the directors' right of dealing in securities while in the possession of insider information. Since a complete shift from the existing model to a new model of 'abstain or pay fair value' is neither feasible nor desirable, merely a few elements of the second model can be incorporated within the existing regime, say by creating an exemption to ensure that allegations of insider trading do not arise if trades are done based on fair valuation.[113] This would ensure that the right of a director/shareholder is not unduly restricted under a Right of First Refusal but at the same time, a director who takes advantage of his fiduciary position would not be allowed to go scot free.

Next, it is already clear that the insistence on affirmative public disclosure is unlikely to work in the context of private companies. So to the extent that the rationale of insider trading is to prevent abuse of fiduciary position and to ensure a level-playing field, the allegation of insider trading should ideally not arise if the director/key managerial personnel makes a disclosure of relevant material information to the opposite party before entering into a transaction.

These exemptions would successfully mitigate some of the regulatory challenges highlighted so far. However, a system of exemptions exclusively for private companies would lead to the creation of two parallel insider trading regimes–one for private and the other for public companies. The existence of two separate enforcement authorities for the same provision could potentially result in a regulatory overlap and inconsistency between the decisions of the two regulators. To avoid the problem of duplication of laws with respect to public companies, the New Zealand Companies Act specifically excludes public companies from the ambit of its insider trading prohibition, and these companies are left to be dealt exclusively by the securities laws. In this way, the Companies Act caters only to cases arising with respect to the securities of private companies which are not regulated elsewhere.

Enforcement and detection of insider trading cases in private companies is presumably the most important question. Interestingly, in the United States, Canada and New Zealand, the provision against insider trading provides a civil remedy to the aggrieved shareholder to bring an action against the director. The Canadian statute expressly provides the company and the aggrieved shareholders a right of compensation from the alleged insider. The right can be exercised within two years after discovery of the facts giving rise to the cause of action.[114] In the United States, though Rule 10b-5 does not expressly provide for a private right of action to injured buyers or sellers (and despite the judicial consensus that the provision was never intended to provide such

[113] Vinod & Shampita, *Supra* note 12.
[114] Canada Business Corporations Act (CBCA) 1985, § 131(10).

a right), the courts have inferred that since the intention is to protect the investors, the violation of the statute impliedly provides a civil remedy to shareholders.[115] The insider trading regime in New Zealand similarly relies heavily on private enforcement, where the aggrieved shareholder can prove that he relied on the untrue statement/non-disclosure resulting in losses in the transaction of securities.[116] In India, in the absence of a regulatory oversight mechanism, allowing shareholders to bring action against the insider would perhaps be the most effective manner in which Section 195 can be expected to be enforced. In order to incentivize such private causes of action, the shareholders can be given a right to claim damages from the accused insider to recover the losses caused due to alleged insider trading (much like Canada and New Zealand). Such a private right to claim compensation assumes significance because even if detection and prosecution of insider trading is otherwise successful, the victim i.e. the aggrieved shareholder who actually suffered monetary losses would be left without restitution for the injury suffered.

VII. CONCLUSION

It is conventional wisdom that clarity and certainty are the hallmarks of business. Commercial law must above all, attempt to provide workable and understandable rules so that the businessmen are given the complete opportunity to order their conduct accordingly.[117]

Through the inclusion of insider trading provisions in the Companies Act 2013, the legislature has raised more concerns than it ever hoped to address. Section 195 of the Act is a site of complete confusion and uncertainty regarding *first*, the scope of the application itself and *second*, in the event that the provision is finally made applicable to private companies - regarding the mechanism of enforcing the statutory restrictions. Under the law as it stands today, the director of a private company entering into any transaction of securities of his company is potentially engaging in insider trading which could expose him to the liability of a heavy fine or maybe even imprisonment. It is the submission of the authors that the fact that the provision which carries such serious penal consequences is so uncertain with respect to its scope and enforcement mechanism is lamentable.

The present Article attempted to highlight some of the loopholes and concerns arising out of Section 195, while also trying to debate some of the possible alternatives that the policy-makers can explore when grappling with the issue of regulating insider trading in private companies. The

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[115] Kardon v National Gypsum Co, 73 F Supp 798, 800 (1947); David S. Rudert, *Texas Gulf Sulphur- The Second Round Privity and State of Mind in Rule 10b-5 Purchase and Sale Cases*, 63 NULR 423, 431 (1968-1969)
[116] Peter Fitzsimons, *Enforcement of Insider Trading Laws by Shareholders in New Zealand*, 3 WAI L. REV. 101 (1995).
[117] J.A.C. Hetherington, *Insider Trading and the Logic of the Law*, 720 WIS. L. REV. 720, 736 (1967).

issues discussed in this Article are in no way, an exhaustive account of the problems that might arise when the provision is actually enforced in practice and to that extent, the present Article is merely intended to open up avenues of further discussion on the issue.

Ayani Srivastava, Avani Chokshi, *"I know it when I see it" - Obscenity and the Indian Judiciary* 3(1) NLUJ Law Review 26 (2015)

"I KNOW IT WHEN I SEE IT": OBSCENITY AND THE INDIAN JUDICIARY

AYANI SRIVASTAVA,* AVANI CHOKSHI†

Any judicial or legislative overture the application of which will curtail the constitutionally guaranteed fundamental right of an individual must undergo scrutiny and the grounds of such a restriction must find their rationale in a clearly demarcated objective, and the restriction itself should be proportional to such objective. In this Article, the authors argue for importing this principle into the law on obscenity which is, at present, a murky domain, and is vulnerable to exploitation by political parties and dominant social groups for the furtherance of their self-perpetuating propaganda. To this end, the authors have studied obscenity laws of various jurisdictions and analysed them in the context of the Indian legal position. A critical appraisal of the most recent judgement on obscenity, Aveek Sarkar v. Union of India, has been undertaken so as to comprehensively understand and scrutinise the contemporary requirements for a reform in the legislative provisions. Discerning therein the inconsistencies and ambiguities in the law on obscenity, the authors have called for a substantive overhaul of the law. The Article concludes with a detailed section on recommendations where the authors have put forth certain suggestions in the form of broad guidelines and a test, adherence to which, the authors opine would lead to a more rational, just and progressive application of the law on obscenity.

TABLE OF CONTENTS

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I. INTRODUCTION

> "*The world's greatest paintings, sculptures, songs and dances, India's lustrous heritage, the Konaraks and Khajurahos, lofty epics, luscious in patches, may be asphyxiated by law, if prudes and prigs and State moralists prescribe paradigms and proscribe heterodoxies.*"
>
> -Raj Kapoor v. State[1]

The law on 'obscenity' is one of the areas where criminal and constitutional law converge to form what has been proven to be one of the most significant restrictions on the Right to Free Speech across the globe. Obscenity is also one of the most obscure and conflicted legal terms. There have been numerous judgements and legislations that have tried, and failed to clearly demarcate the contours of obscenity.[2] Justice Stewart, of the United States Supreme Court, when faced with the task of defining obscenity, eloquently and infamously expressed this difficulty, in the concurring opinion of *Jacobellis v. Ohio*,[3] stating "I know it when I see it."[4] The Indian

[1] Raj Kapoor v. State, AIR 1980 SC 258.
[2] Robert C. McClure, *Obscenity and the Law,* 56-9 AMERICAN LIBRARY ARCHIVES BULLETIN 806-810 (1962). [Hereinafter *McClure*]
[3] Jacobellis v. Ohio, 378 U.S. 184 (1964).
[4] *Id.*

Judiciary too has sought to demarcate obscene content through its rulings. The most recent ruling pertaining to the topic at hand is *Aveek Sarkar v. State of Maharashtra.*[5]

While this judgement may be hailed as progressive,[6] it has numerous lacunae, one of which is that it does not clarify the Indian judicial position on obscenity. It is the opinion of the authors that keeping in mind the shifting patterns of the socio-political scenario in India, a test to demarcate the contours of obscenity is the need of the hour. In this Article, the authors have argued for reformation in the laws relating to obscenity. A central chord running through this Article is that the fundamental rights of an individual are sacrosanct and measures which infringe upon them ought to be scrutinised exhaustively before put to application. To this order, the Article has been divided into six parts. Part II relays an analysis of tests used by the judiciary to adjudge obscenity. Part III contextualises these tests in the stance taken by the Indian judiciary. A detailed critical appraisal of *Aveek Sarkar* has also been undertaken to better understand the contemporary issues. This has been followed by an explanation on the pronounced need for a test to demarcate the legal outline and to clarify the law on obscenity. In Part V, the authors have attempted to synthesise a test to determine the parameters of obscenity, having factored in the case laws and experiences of numerous jurisdictions.

II. AN ANALYSIS OF TESTS ADJUDGING OBSCENITY IN VARIOUS JURISDICTIONS

Indian case law on obscenity has traditionally followed tests formulated by the American Supreme Court in determining whether a work is obscene or not. The authors will primarily focus on American case law, while additionally examining the attitude of the courts of Canada, South Africa and Japan

A. AMERICAN POSITION

The discourse regarding the definition of 'obscenity' arguably originated in the *Hicklin Test.*[7] This test, synthesised in the 1868 case *Regina v. Hicklin*[8], is reflective of the sensibilities of that time period, laying down "*The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of*

[5] Aveek Sarkar v. State of Maharashtra, (2014) 4 SCC 257. [Hereinafter *Aveek Sarkar*]

[6] *See generally* Gautam Bhatia, *Obscenity: The Supreme Court discards the Hicklin Test,* IND. CONST. L.& PHIL. (Aug. 31, 2014), https://indconlawphil.wordpress.com/2014/02/07/obscenity-the-supreme-court-discards-the-hicklin-test/comment-page-1; *No obscenity and no offence in publication of Boris Becker and fiancée's nude picture; Supreme Court.,* LIVE L., (Aug. 31, 2014), http://www.livelaw.in/obscenity-offence-publication-boris-becker-fiancees-nude-picture-supreme-court.

[7] McClure,*Supra* note 2.

[8] Regina v. Hicklin, L.R. 2 Q.B. 360 (1868).

this sort may fall."[9] The repercussion of this decision and the test propounded there in was that isolated parts of a material could be held obscene without placing them in overall context of the work. In other words, if even a single paragraph of any work was thought to have the potential to deprave minds of the target audience, then the whole body of the work would be considered to be obscene.[10] Further, this test sought to check the impact of the material on the most sensitive, susceptible reader, instead of the reasonable reader.[11]

The Hicklin Test was soon adopted by most courts in America and was repudiated only in the 1930's b3y the *Ulysses case*[12], which involved the seizure of the novel Ulysses authored by James Joyce. This was the first instance of rejection of the Hicklin test where a US District Court judge ruled that the novel in question was not obscene and held that the barometer of obscenity of a work should be with respect to its impact on the mind of an average person.[13]This decision, on appeal, was reaffirmed by the United States Circuit Court of Appeals.[14] The Appellate Court underscored this decision ruling that the basis for judging obscenity of a work would be its "dominant effect".[15] This ruling dictated placing the "objectionable" portions of the work in the context of its literary and social value; thereby doing away with the Hicklin dictum of judging isolated portions of a creative work without the background.[16]

This liberal precedent was unfortunately not followed assiduously by the American Courts and a bona fide change in judicial outlook only came about with *Roth v. United States of America*[17] in 1957.[18] The Roth Test, derived from this judgement, lays down the test for obscenity as "*whether to the average person, applying contemporary community standards, the dominant theme of the material taken as whole appeals to the prurient interest."*[19] This test thereby underlined the ruling in Ulysses, and qualified it by incorporating the following clauses- the objectionable parts of the work should be measured against prevalent community standards of tolerance and such work, to be considered obscene, must be intended to excite licentious interest of individuals, thus leading to a stricter understanding of the term obscene[20]

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[9] *Id.*
[10] *Obscenity and the First Amendment: The Search for an Adequate Test,* 7 (2) DUKE L. J. 116 (1958).[Hereinafter *Obscenity and First Amendment*]
[11] *Id.*
[12] United States v. One Book Entitled Ulysses by James Joyce, 72 F2d 705 (2nd Cir. 1934) [Hereinafter *Ulysses*].
[13] McClure *Supra* note 2.
[14] Obscenity and First Amendment, *Supra* note 10.
[15] Ulysses, *Supra* note 12.
[16] *Id.*
[17] Roth v United States of America, 354 U.S. 476 (1957) [Hereinafter *Roth*].
[18] Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution,* 38 MINN. L. REV., 295 (1954).
[19] Roth, *Supra* note 17.
[20] *Obscenity,* LEGAL INFO.INST., (Aug. 31, 2014) http://www.law.cornell.edu/wex/obscenity.

The Roth Test was superseded twice, first by the case of *Memoirs v. Massachusetts*,[21] and next by the tripartite test derived from the ruling in *Miller v. California*[22]. After the Roth case, a three principled criterion was fashioned through these subsequent cases, which *inter alia* included the principle that the work must be said to be "utterly without social importance" in order to be adjudged as obscene. The court in the Miller case noted that a work could be classed as obscene despite possessing some minimal literary or social importance.[23]

The Miller test formalised the changes noted in the Memoirs case, liberating the recognised pre-Roth criterion. While the first prong reiterates verbatim the standard established by the tests evolved in the Ulysses and the Roth cases, the other two parts were formulated so as to realise the objective of liberalisation and tolerance. The second prong pertains to "patently offensive" conduct, whereas the third one mandates evaluating the literary, artistic, political or scientific value of the work 'taken as a whole'. Therefore, this ruling paves the way for a more liberal criterion for determination of obscene content than the Roth Test, by creating the additional parameter of the work being patently offensive, and mandating that the literary, artistic, political or scientific value of the work be factored in. Although this ruling has not been superseded, it is often not adhered to, and cases pertaining to obscenity are often decided on a case to case basis.[24] As a result, the legal determinants of obscenity in the United States are in a state of chaos, and hence there is a need to synthesise a test which has rational and acceptable criteria for adjudicating upon obscenity in content.

B. CANADIAN POSITION

Obscenity, as defined by the Canadian Criminal Code, is a comparatively broad concept, prohibiting a large class of works as obscene (including text and pictures). The Code categorises as obscene those works in which "a dominant characteristic of the publication is the undue exploitation of sex, or the combination of sex and at least one of crime, horror, cruelty or violence." [25] The courts, on the other hand, have generally taken a rather liberal stance on the issue of obscenity. The 'community standard' test has been consistently applied in deciding cases hinging on obscenity provisions. In *R. v. Dominion News & Gifts (1962) Ltd,*[26]the Court had noted that the community standards must be contemporary, and must respond to changing societal

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[21] Memoirs v Massachusetts, 383 U.S. 413 (1966)[hereinafter *Memoirs*].
[22] Miller v California, 413 U.S. 15 (1973)[hereinafter *Miller*].
[23] *Id.*
[24] Timothy M. Hagle, *But Do They Have to See It to Know It? The Supreme Court's Obscenity and Pornography Decisions* 44 (4) W. POL. Q., 1039 (1991), http://www.jstor.org/stable/448806 [hereinafter *Timothy M. Hagle*, *But Do They Have to See It to Know It? The Supreme Court's Obscenity and Pornography Decisions*].
[25] Canadian Criminal Code, R.S.C. 1985, c. C-46 s.163(8)[hereinafter *Canadian Criminal Code*].
[26] R. v. Dominion News & Gifts Ltd., [1963] 2 C.C.C. 103.

norms. In the landmark case of *R. v. Butler*,[27] the Canadian Supreme Court held that where sexual material was neither violent, nor unduly exploitative of sex, it would not be classed as obscene. The community standard of tolerance put forward was "concerned not with what Canadians would not tolerate being exposed to themselves, but with what they would not tolerate other Canadian being exposed to."[28] Thus, the test, as a concept, is such that must evolve with time. However, a major concern in applying this test is that it may exclude various sexual minorities, by looking only at the dominant view at the time.

The abovementioned case, however, did lay down very tolerant parameters for obscenity; thereby minimising censorship and promoting the right to free speech. The ruling adhering to the Canadian Criminal Code,[29] classifies work which portrays "undue exploitation of sex" as obscene, providing for an overriding exception for works of artistic merit.[30] Sex with violence and degrading or dehumanising sex were held to be subsets of this category.

The community standard test was made redundant in Canada after *R. v. Labaye*,[31] where a 'harm only' approach was taken. In addition to being a significantly more rational marker for imposing a restriction on free speech, harm or the risk thereof is simpler to prove than a community standard.[32]This judgement is exemplary in its progressive and tolerant approach, and may be perceived as a suitable prototype for the Indian criterion of determining obscenity to be based on.

C. SOUTH AFRICA'S STANCE ON OBSCENITY

South African legislators have created an elaborate list of prohibited material in Films and Publications Act, 1996 including "child pornography; explicit violent sexual conduct; bestiality; sexual conduct which degrades a person and constitutes incitement to cause harm[33] or the "explicit infliction of extreme violence or the explicit effects of extreme violence which constitutes incitement to cause harm."[34] The primary objective behind this was to clarify and narrow down the determinants of obscenity and prevent the abuse of the law. However, the ambiguity in the provisions of the law left it vulnerable to the paternalistic and overarching

[27] R. v. Butler, [1992] 1 SCR. 452 [hereinafter *R. v. Butler*].
[28] *Id.*
[29] Canadian Criminal Code, *Supra* note 25.
[30] *Id.*
[31] R. v. Labaye, [2005] 3 SCR 728 [hereinafter *R. v. Labaye*].
[32] *Id.*
[33] Films and Publications Act 56 of 1996, Schedule 1 § 1(b).
[34] *Id.* at § 1(e).

judiciary, as well as politically motivated propaganda.[35] Further, although the legislation provides a much more restrictive definition of obscenity than what previously existed, the courts have interpreted it liberally, and in the favour of free speech and expression. For instance, when an attempt was made to ban an art exhibition that displayed artwork of nude children, the South African Films and Publications Board ruled that rather than child pornography, this was artwork and could not be classed as obscene.[36]

D. JAPANESE POSITION

Article 21 of the Japanese Constitution prohibits formal censorship.[37] However, Section 175 of the Criminal Code of Japan prohibits the distribution of 'indecent material'.[38] This implies that pornography in Japan has to be minimally censored, with genitalia usually covered using a digital mosaic. The possession of images of child pornography was prohibited only in June, 2014, making Japan the last member of the Organisation for Economic Co-operation and Development to do so.[39] Possession of Manga depicting young children in sexually explicit manners is yet to be banned. The declaration of any work as obscene by the Censorship board occurs very infrequently.

This can be said to be a very drastic change from Japan's restrictive stance in the 1940's to 50's, when initial interpretations of the Japanese Constitution were still emerging. As was noted in the 1954Japanese Supreme Court case of *Koyama v. Japan*, if "it (any work) aroused and stimulated sexual desire, offended a common sense of modesty or shame, and violated proper concepts of sexual morality," it could be held to be obscene. [40] Thus, it can be noted that, like India, Japan had an extremely conservative, if not a repressive background. Unlike India, it went through a very rapid transformation- making it one of the most liberal countries with respect to obscenity and censorship. The authors do not advocate an adoption of the Japanese system; the thought is ludicrous in India's present scenario, given the societal and the dominant cultural view which is conservative in nature." However, the very transparent and straightforward method of determining obscenity is to be aspired for. Also, the Japanese example shows that the gradual

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[35] Joanna Stevens, *Obscenity Laws and Freedom of Expression: A Southern African Perspective* 12 S.AFR.DEV. COOPERATION (2000),http://www.article19.org/data/files/pdfs/publications/obscenity-law-paper.pdf.

[36] Laura Pollecutt, *SA Board passes vital test,* FREEDOM OF EXPRESSION INST. (Aug. 31, 2014) http://www.fxi.org.za/pages/Publications/Medialaw/vital.htm.

[37] NIHONKOKUKENPO [CONSTITUTION], art. 21 (Japan) "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. 2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated."

[38] KEIHO (PEN. C.) 1907,art. 175.

[39] Heather Saul, *Japan finally bans possessing images of child abuse - but Manga and anime depicting children remain legal,* THE INDEP. June 18, 2014,http://www.independent.co.uk/news/world/asia/japan-finally-bans-possessing-images-of-child-abuse--but-manga-and-anime-depicting-children-remain-legal-9545238.html.

[40] Koyama v. Japan, 11(3) KEISHU 997 (Sup. Ct., G.B., Mar. 13, 1957).

progressive shift in Indian law on obscenity might culminate in a tolerant and free thinking system regarding obscenity.

III. INDIAN CONTEXT

A. LEGAL POSITION ON OBSCENITY

In India, law relating to obscenity is primarily governed by the Indian Penal Code, 1860[41] and the Indecent Representation of Women (Prohibition) Act, 1986.[42] The IPC criminalises obscene acts and songs;[43] the dissemination of 'obscene' books, magazines and pamphlets[44], and the sale or distribution of 'obscene' objects to persons below twenty years of age.[45] The Act bans advertisement or publication of indecent representation of women in any form.[46] Both these legislations contain three exceptions to the classification of a work as obscene: i) when the work is used justifiably for public good, ii) when the material is being used for bona-fide religious purposes and iii) when the work is in any ancient monument. However, neither of these statutes define 'obscenity'. Therefore, the judicial interpretation of the term becomes significant.

Initially, the Indian legal position in this regard was very conservative, with the judiciary adhering to the Hicklin Test. This test was adopted in India by the ruling in *Ranjit Udeshi* v. *State of Maharashtra* which regarded the dissemination of D.H. Lawrence's celebrated work 'Lady Chatterley's Lover'.[47]In this case, the judges analysed the book at length, noting that they had no doubt about "the sincerity of Lawrence's belief and his literary zeal."[48] However, they concluded by stating that since the law seeks to protect "those whose prurient minds take delight and secret sexual pleasures from erotic writing" the book must be banned. This ruling conforms to the parameters of the Hicklin Test by alluding to the impact on the most susceptible audience, as opposed to a reasonable, average member of the target audience. It must be noted that Indian courts at the time had just completed two decades since independence, and held with the literal rules of interpretation. For a long time *Udeshi* was the precedent, and the Hicklin test was used to adjudge numerous other cases, which were decided in a similarly regressive manner.[49]

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[41] Indian Penal Code, No. 45 (1860) [hereinafter *IPC*].
[42] The Indecent Representation of Women (Prohibition) Act, No. 60 (1986) [hereinafter *the Act*].
[43] IPC, *Supra* note 41, at § 294.
[44] *Id.* at § 292.
[45] *Id.* at § 293.
[46] The Act, *Supra* note 42, at §§ 3 &4.
[47] Ranjit Udeshi v. State of Maharashtra, AIR 1965 SC 881 [hereinafter *Udeshi*].
[48] *Id.*
[49] *See also* Empress of India v. Indarman, (1881) ILR 3 All. 837; Bhattacharya J. in C. J. Prim v. The State, AIR 1961 Cal. 177; P.L.R.D.P. K. Somanath v State of Kerala, 1989 Indlaw KER 26; State of Uttar Pradesh v Kunji Lal, 1970 Indlaw ALL 241; Durlab Singh v State, 1970 Indlaw DEL 112; Vinay Mohan Sharma v Delhi Administration, 2007 Indlaw DEL 1967 113.

However, as the spirit of judicial review emerged in the courts of India, the understanding of what was obscene also became more liberal.

The Supreme Court, while retaining the Hicklin test, simultaneously liberalised the meaning of obscenity in the case of *Kakodar v. State of Maharashtra*.[50] The court noted that an overall view of the work must be taken by the court, thus introducing context to the concept of obscenity.[51]This evolution of the Indian undertaking of obscenity may be paralleled with the United States trajectory. *Kakodar* introduced the contextual approach in India much like the Ulysses and Roth did in United States Jurisprudence. In the case of *K.A. Abbas v. UOI*,[52] the court noted while further expanding the test that "*it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer.*"[53] The court discussed certain cases where the social or artistic value overweighed the 'offending character'.[54]In the case of *Samaresh Bose v. Amal Mitrait,*[55] it was held that the judge should attempt to place herself in the shoes of the author, to try and comprehend exactly what the author was trying to convey, and to adjudge whether that idea had any intrinsic artistic or literary value whatsoever.

In *Ajay Goswami v Union of India*,[56]a writ petition was filed before the Supreme Court on the grounds that the fundamental right of newspapers of freedom of speech and expression were not appropriately balanced with the right of children to be protected from harmful material. The court held that though obscenity is a limitation on the right to freedom and speech and expression, a blanket ban on publication of materials not suitable for a child's eyes would result in a state of affairs where adults would be pulled down to the entertainment level of children. The court also noted that an overall view of a publication must be taken, stating that *"members of the public and readers should not look for meanings in a picture or written article which are not conceived to be conveyed through the picture or the news item.*"

In *Maqbool Fida Husain v. Raj Kumar Pandey*,[57] the Supreme Court, while testing whether a painting of a nude woman shaped on India's map was obscene, commented that nudity in itself is not obscene. It was noted that,

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[50] Kakodar v. State of Maharashtra, (1969) 2 SCC 687 [hereinafter *Kakodar*].
[51] *Id.*
[52] KA Abbas v Union of India, (1970) 2 SCC 780.
[53] *Id.*
[54] *Id.*
[55] Samaresh Bose v. Amal Mitra, AIR 1986 SC 967 [hereinafter *Samaresh Bose*].
[56] Ajay Goswami v Union of India, AIR 2007 SC 493[hereinafter *Ajay Goswami*].
[57] Maqboo lFida Husain v. Raj Kumar Pandey, (2008) Crim. L.J. 4107.

> *"...the aesthetic touch to the painting dwarfs the so-called obscenity in the form of nudity and renders it so picayune and insignificant that the nudity in the painting can easily be overlooked... The line which needs to be drawn is between art as an expression of beauty and art as an expression of an ill mind intoxicated with a vulgar manifestation of counter-culture where the latter needs to be kept away from a civilian society."*

In the case of *S. Khushboo v. Kanniammal*,[58]the issue was whether an actress who recommended societal acceptance of consensual pre-marital sex had committed the offence of obscenity. While quashing all cases against Khushboo, the court noted the strict divide between morality and crime, ruling that "*Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive.*"[59]However, a question arises as to what is obscenity but disguised morality? The authors submit that though the two terms seem similar, there is a distinct divide between obscenity and morality in any form. Further, the authors will submit while formulating a test that this divide must be observed in its strictest sense so as to ensure an understanding of obscenity separately from any notion of morality

With the latest judgement on the law on obscenity, *Aveek Sarkar v. State of Maharastra*,[60]the Supreme Court moved on to the more progressive 'Roth Test'. A critical appraisal of the same has been undertaken in the following section.

B. CRITIQUE OF AVEEK SARKAR V. STATE OF MAHARASHTRA[61]

In this case, a photograph of a famous white tennis player, Boris Becker, and his dark skinned fiancé, Barbara Fultus, was published in a German magazine, and reproduced in two Indian ones. Both the subjects of the photo were nude. The self-proclaimed intention of Mr. Becker was to say "that an inter-racial relationship is okay."[62] An elderly advocate filed this case against the two Indian magazines, claiming relief under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986. After this photo was held to be obscene in both the lower courts, the magazines appealed to the Supreme Court.

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[58] S. Khushboo v. Kanniammal, AIR 2010 SC 3196 [hereinafter *Khushboo*].
[59] *Id.*
[60] Aveek Sarkar, *Supra* note 5.
[61] *Id.*
[62] *Id.*

With *Aveek Sarkar* , the Supreme Court, fresh from its oppressive ruling in *Suresh Kumar Koushal v. NAZ Foundation,*[63] has taken a very welcome liberal turn, ruling that "A picture of a nude or semi-nude woman, as such, cannot per se be called obscene".[64] However, the phrase immediately following this seemingly tolerant approach is "unless it has the tendency to arouse the feeling or revealing an overt sexual desire". With this ruling, the Apex Court has set a dangerous precedent by criminalising sexual arousal.

Further, the judgement itself is based on precarious legal grounds. The Court has relied primarily on the community standard put forth by the Roth Test, which has been overruled twice- first by the Memoirs case,[65] and again by the Miller case.[66] While the author concedes that *stare decisis* does not apply to judgements from other jurisdictions, which have mere persuasive value, it is pertinent to note that this persuasive value is substantially diminished if the ruling is no longer followed in the country where it was first made. The prevalent test in America at present is one synthesised in the Miller case.[67] The Court, by ignoring this judgement, has disregarded the qualifications of "patently offensive" and "no redeeming social value", which were added by the Miller dictum to the Roth Test so as to limit censorship and further the cause of Right to Free Speech. The last consideration of social value of the work laid down by the Miller ruling is integral to protect the works of art, literature, etcetera and has, in fact, even been mentioned by the Court in its judgement in *Udeshi*.[68] However, the ruling in *Aveek Sarkar* ignores this crucial consideration, thereby leaving works of art and literature vulnerable to litigation, if the content is perceived to be sexually titillating. This a step backwards from India's position laid down in *Samaresh Bose* case. Further, in the *Khushboo case*, the Court noted that even if the actress' statements could be said to encourage pre-marital sex, since that itself was not an offence she couldn't be held *legally* responsible for any crime.[69] Using the same argument, it is not legally tenable to declare any work obscene solely on the basis that it arouses sexual interest, as that in itself is not an offence. The author argues that applying the Roth Test and adjudging materials on basis of possibility of sexual arousal of their audience, is arbitrary and regressive, and a new criterion for determining obscenity needs to be evolved.

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[63] Suresh Kumar Koushal v. NAZ Foundation, (2014) 1 SCC 1.
[64] Aveek Sarkar, *Supra* note 5.
[65] Memoirs, *Supra* note 21.
[66] Timothy M. Hagle, *But Do They Have to See It to Know It? The Supreme Court's Obscenity and Pornography Decisions*, *Supra* note 24.
[67] *Id.*
[68] Udeshi, *Supra* note 47.
[69] Khushboo, *Supra* note 58.

The Court in the judgement under scrutiny has briefly referred to *R v. Butler*[70] to support the 'community standards' test. This view propels forth the idea of the simple majority, and marginalises those other ideas that don't fit into this category. This majoritarian standard seems incongruous in a country which has constitutionally undertaken to protect the rights of minorities. Further, the ruling has relied on *R v. Butler*,[71] which itself has been rendered obsolete in Canada after *R v. Labaye*.[72] Stepping away from the community standard test, *R. v. Labaye*,[73] advocated the more progressive 'harm only' approach. Thus, by following the *R. v. Butler* case, the Indian courts have relied on case law that has been cast out in its original jurisdiction.

Therefore, while this judgement has numerous lacunas and inconsistencies, it is undoubtedly a step forward and symbolises the beginning of a transition in the outlook of the Indian judiciary. In doing away with the Hicklin Test, and adopting the Roth test, the Court also did away with claims and accusations of the most orthodox sections of society that could find a judicial resort by way of the Hicklin Test. Further, the Court refers to 'contemporary community standards', thereby moving away from the traditional notions of purity and honour that represent our 'cultural' values. Nevertheless, this judgement has not filled the protracted void for clarity and unambiguity in the law on obscenity, and there is arguably a pronounced need for a test determining the parameters of the same,

IV. NEED FOR AN UNAMBIGUOUS TEST

The lack of clarity in India's judicial interpretation of the term obscenity has far-reaching consequences. The number of cases of publication or transmission of obscene materials doubled between the years 2012-2013.[74] With the phenomenal rise in the use of internet resources, there is an imperative need to define the term obscenity with clarity, so as to set down lucid guidelines for Indians to follow. One of the fundamental principles of jurisprudence is that laws that are vague in their application ought to be rendered void.[75] "Vague laws may trap the innocent by not providing fair warning."[76] More than merely failing to provide 'fair warning' to citizens, there are several other undesirable possible repercussions of judicial ambiguity. There seems to be an emerging trend of the Indian judiciary being used as a tool to pander to the ideology of the political party currently in power. With the Bharatiya Janata Party, a conservative and right wing

[70] R. v. Butler, *Supra* note 27.
[71] *Id.*
[72] R. v. Labaye, *Supra* note 31.
[73] *Id.*
[74] Devesh K. Pandey, *Pornography cases up 100 per cent last year,* THE HINDU, Aug. 8, 2014,http://www.thehindu.com/news/national/pornography-cases-up-100-per-cent-last-year/article6288856.ece.
[75] Kartar Singh v. State Of Punjab, (1994)3 SCC 569.
[76] *Id.*

political party, now in power in India, it may be impractical to expect the judiciary to interpret a vague law in a very liberal manner, if a more politically coloured judgement, inclined towards a more conservative and restrictive approach, may put them in favour of the party in power. For instance, the book "The Hindus: An Alternative History' by Wendy Doniger, which departs from the conventional history narrated in textbooks, attracted censure from all right-wing fundamentalist parties. All copies of this book were decreed to be destroyed as per a court-backed settlement.[77]Similarly, it has been noted that school text books today reflect the propaganda of the political party in power.[78]

In such a situation where politics and morality seem to pervade society, it is of utmost importance to ensure that the judiciary remains an impartial institution, free from the prevalent prejudices and persuasions of the dominant majority. Any ambiguity in the law could render judiciary a weapon in the hands of the executive. One way to prevent the political leanings of the judiciary from affecting their interpretation of law is by providing legislation that is unambiguous. The authors submit, thus, that the need of the hour is the formulation of a precise test for the determination of obscenity.

V. RECOMMENDATIONS

A. POSITIVE CENSORSHIP

The debate surrounding obscenity, as with any other restriction on the freedom of speech and expression often devolves as a quest against censorship. The authors emphatically state that the purpose of this article is not to serve as a tirade against censorship, but to argue for a standardised test to demarcate what content ought to comprise obscenity. The authors herein argue for a reform in regulation, not against the edifice of regulation itself.

Censorship norms, when advocated on just and well-thought out grounds, may be beneficial for society. For instance, recently, the Advertising Standards Council of India (ASCI) has banned endorsements depicting people with a darker skin as in any way inferior to their fairer counterparts.[79] Pandering to the primeval Asian belief that equates fairness with a high caste, success, good looks and marital eligibility, these advertisements have, over time, succeeded in

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[77] Amulya Gopalakrishnan & D K Rituraj, *Penguin India caves in, agrees to trash Wendy Doniger's book on Hinduism,* INDIAN EXPRESS, Feb. 12, 2014, http://indianexpress.com/article/india/india-others/penguin-caves-in-agrees-to-trash-wendy-donigers-book-on-hinduism.

[78] Teesta Setalvad, *In the Name of History,* SOUTH ASIA CITIZENS WEB, http://www.sacw.net/HateEducation/Teesta.html.

[79] *Advertising Standards Council clamps down on fairness products,* THE HINDU BUSINESS LINE, Aug. 19, 2014, http://www.thehindubusinessline.com/companies/advertising-standards-council-clamps-down-on-fairness-products/article6332424.ece.

perpetuating a hierarchy of values that prizes fairness.[80] These advertisements have been documented to have had a negative impact on the self-image of dark skinned women, promoting the notion that a lighter skin is the key to achieving desired behaviour from society and attention from the opposite sex.[81] The manifestations of the impact of such adverts can be found in matrimonial columns of all prominent newspapers; "milky white" complexion is a pre-requisite in a would-be-bride.[82] The authors opine that this protracted and sustained negative impact on the self-image of Indian women constitutes an appropriate ground to impose restrictions on such advertisements. The judgment call to ban these ads cannot be hailed as regressive even by the staunchest proponents of free speech, because there exists a just rationale underlying the censorship.

The authors argue that the benchmark for obscenity should be based on similar grounds. Judicial intervention should only be warranted if, and only if, the depiction of a particular phenomenon has been known to have caused real harm, and has proven to be detrimental to the emergence of a progressive society. For this principle to be imported to the law on obscenity, it is imperative to isolate morality from obscenity.

B. SEGREGATION OF OBSCENITY FROM MORALITY

Tenets of morality have been historically and continually imputed to the law on obscenity. Courts have often employed moral principles or values to impose restrictions on sexually explicit content, or to prohibit works which challenge the beliefs of the dominant majority.[83] This judicial paternalism is inconsistent with the constitutionally guaranteed freedom of speech and expression. This right is sacrosanct and ought not to be infringed upon by a criterion as subjective and fluid as 'morality'. Conceptions of morality are embedded in paternalistic cultural assumptions, and are a factor of the prevailing majoritarian religious and cultural beliefs. The use of obscenity laws to propagate these puritanical beliefs is hazardous to the freedom of speech and expression. The role of the judiciary must be to protect citizens from harm, and not to act as their moral custodians. The authors submit that for the law on obscenity to have its intended effect, 'obscenity' must be segregated from 'morality'.

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[80] Shevde, Natasha, *All's fair in love and cream: A cultural case study of fair & lovely in India.* 9(2) ADVERTISING & SOC'Y REV. (2008).

[81] Sohail Kamran*, Potential Issues of Skin Fairness Creams TV advertisements* 15 (1) ELEC. JOURNAL OF BUS.ETHICS ORG. STUDIES (2010), http://ejbo.jyu.fi/.

[82] *The Indian obsession with 'fair' skin,* TIMES OF INDIA, Oct. 1, 2009, http://timesofindia.indiatimes.com/life-style/beauty/The-Indian-obsession-with-fair-skin/articleshow/4950626.cms.

[83] *See generally* Amitabh Bachhan Corporation Ltd. vs Om Pal Singh Hoon, 1996 (37) DRJ 352; Om Pal Singh Hoon v. Union of India, 1996 IIAD Delhi 265.

Any restrictions on grounds of obscenity must be aimed at preventing real societal harm, not based on insubstantial and idiosyncratic grounds such as 'offence to public sensibilities' and 'harm to public morals'. These grounds have, in fact, been discarded as being excessively vague in some jurisdictions. For instance, courts in the US found the word 'indecent', without any further qualifications as to its parameters, to be "unconstitutionally vague".[84] The Canadian Supreme Court, in *R v. Labaye*, has advocated a "harm only" approach.[85] Even Indian courts have recognised the divide between morality and obscenity, stating that "*Notions of social morality are inherently subjective and criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy.*"[86] The authors submit that this distinction between content that is potentially harmful and content that is merely offensive must be the cornerstone of obscenity laws. Legitimate public interests such as prevention of crime and protection of vulnerable groups must be balanced against an individual's right to the freedom of speech and expression. This balance can only be struck if rational and just determinants of obscenity are applied, free from the persuasion of public morality.

C. DEFINING THE OBSCENITY STANDARD

The 'Community Standard' has prevailed as one of the most common indicators of obscenity, in American, Canadian as well as Indian case law. However, the authors argue that this test is not appropriate in the Indian context. Unlike America and Canada, where this standard is fitting due to the singular nature of community and sensibility, the sheer diversity of cultures and multiplicity of identities in India make it challenging to ascertain a rigid standard for determination of obscenity. Various dissimilar and distinct ways of life, as well as the varied cultural and ethnic origins lead to a plurality of sensibilities.[87] An adoption of any one such standard would inevitably lead to the exclusion of several other such standards. The authors thereby submit that this multitude of sensibilities makes a community standard of tolerance impossible to determine in India.

A comparison can be made with the Japanese stance on obscenity, which is a far cry from any position of law that could conceivably exist in India. As previously noted, Japanese legislature

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[84] ACLU v. Reno, 929 F. Supp. 824, 861 (1996); Reno v. ACLU, 521 U.S. 844 (1997).
[85] R. v. Labaye, *Supra* note 31.
[86] Khushboo, *Supra* note 58.
[87] *See generally* Vivek Kumar, *Cultural Heterogeneity and Exclusion in India,* MAINSTREAM WEEKLY Apr. 27, 2008, http://www.mainstreamweekly.net/article661.html; B Pradeep Nair, *Social heterogeneity and gender balance,*TIMES OF INDIA, Aug. 2, 2012, http://blogs.timesofindia.indiatimes.com/kaleidoscope/social-heterogeneity-and-gender-balance.

and judiciary have taken an extremely lenient stance on obscenity.[88] Content that in India, would be rejected as obscene instinctively- such as graphics of child pornography, are not classified as obscene in Japan.[89] Due to the inherent heterogeneity implicit in India's population- a majority of those who retain their conservative stance on anything commonly considered as obscene, a legislative state of affairs such as that which exists in Japan would be impossible to implement successfully in India.

The authors submit that in order to test obscenity of any work, it is important to use a 'Reasonable Man' test. This test uses the legal fiction of a 'reasonable man' who has been defined as "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."[90] This test has often been used with respect to other criminal offences, such as grave and sudden provocation-an exception to murder.[91] It has even been used in relation to obscenity as well. The European Court of Human Rights has ruled that ideas or information which "offend shock or disturb the State or sections of society" are protected by the freedom of expression.[92] In *R v. Butler,*[93] the Canadian Supreme Court explicitly stated that expression could not be restricted because it was not in conformity with dominant notions of morality. In *Pope v. Illinois,*[94] clarifying its stance in the Miller dictum, the US Supreme Court held that an objective, reasonable standard, and not community standards ought to be used in adjudging obscenity.[95] The Indian Supreme Court has also recognised this objective test, noting that "*The effect of words or written material should always judged from the standards of a reasonable strong minded, firm and courageous man i.e. an average adult human being.*"[96] For instance, the genre of films that depict superheroes saving the world through unrealistic stunts has been long associated with children getting seriously injured due to mimicry of these stunts.[97] However, to prohibit the film industry from making such films is perceptibly crossing the line between protection of vulnerable

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[88] Heather Saul, *Japan finally bans possessing images of child abuse - but Manga and anime depicting children remain legal,* THE INDEPENDENT, Jun. 18, 2014,http://www.independent.co.uk/news/world/asia/japan-finally-bans-possessing-images-of-child-abuse--but-manga-and-anime-depicting-children-remain-legal-9545238.html.
[89] *Id.*
[90] R v. Camplin, A.C. 705 (1978).
[91] IPC, *Supra* note 41, at § 300.
[92] Handyside v. United Kingdom, 1 EHRR 737, ¶49 (1976); *See also* Toby Mendel*, Public Service Broadcasting: A comparative Legal Survey,* U.N.E.S.C.O. (2010) http://www.unesco.org/webworld/publications/mendel/inter_standards.html.
[93] R. v. Butler, *Supra* note 27.
[94] Pope v. Illinois, 107 S. Ct. 1918 (1987).
[95] Lorri Staal, *First Amendment--The Objective Standard for Social Value in Obscenity Cases*, 78 J. CRIM. L. & CRIMINOLOGY 735 (1987-1988), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6569&context=jclc.
[96] Ajay Goswami, *Supra* note 56.
[97] Patrick Davies, *Superhero-related injuries in paediatrics: a case series,* NAT'L CTR. FOR BIOTECHN. INFO.,http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2083410/.

people and an individual's right to free speech and expression. Similarly, banning books such as Lady Chatterley's Lover,[98] which is a celebrated literary work under the guise of community standards and public morality will result in the country's entire adult population being subjected to the tolerance level and sensibilities of the country's most vulnerable social group. This would clearly infringe upon the fundamental right of free speech and expression, and prevent the free flow of information and knowledge. This fundamental right, *inter alia*, is guaranteed by the Constitution of India and its enjoyment is not contingent upon the will of the majority. Any encroachment upon the same, especially intrusions espoused by the judiciary, must be rooted in a clear and unambiguous law. Clarifying the position of law on obscenity is therefore the need of the hour.

D. THE 'HARM' TEST

Before delving into the details of the test, the authors would like to briefly reiterate the stance taken in the three sections above and lay down the broad guidelines which form the backdrop of a test demarcating the parameters of obscenity.

The test on obscenity must be such that it does not factor in considerations of public morality. Restrictions must be imposed if the dissemination, possession or publication of the concerned material would lead to harm to society, and/or may cause oppression and exploitation to the more vulnerable sections of society, including children. The test should be of an objective nature, the standard adopted being that of the reasonable man. Any restrictions imposed must therefore, be reasonable, necessary and justifiable. In order to ensure protection of the free speech, these restrictions must also be proportionate to the perceived harm of the concerned material. If a restriction is overarching, it ought to be deemed *ultra vires*.

Ambiguity in the laws on obscenity is a persistent issue, and in fact, the very reason why a substantial overhaul in markers of obscenity is required. This ambiguity on part of the legislature may be attributed to a desire to leave a lacuna in the law, so as to facilitate application for political gain or when public sentiments are hurt by a material. The authors opine that any law on obscenity should be extremely lucid in its interpretation and clear in its scope for application.

In light of these guiding principles, the authors have formulated a test christened 'the Harm Test'. As is evident from the nomenclature, the sole criterion for determining whether a material would be declared as obscene will be its potential to cause societal harm. In order to ensure clarity and transparency in the law, the authors have proposed to frame an indicative list of

[98] Udeshi, *Supra* note 47.

prohibited material. This concept has been borrowed from South Africa,[99] where there is a thorough list of statutorily prohibited material. The authors advocate importing this model *mutatis mutandis* to Indian Law, in the form of the following provision-

A visual, virtual, real or literary replication of the following will constitute obscene content, and the dissemination, publication and possession thereof will be constitute a violation of the law of the land-

i. *Child pornography*
ii. *Explicit sexual violence*
iii. *Undue exploitation of sex*
iv. *Explicit sexual activity degrading a person*
v. *Communal propaganda*
vi. *Derogation on grounds of race, gender, sex or caste*

This provision subject to certain caveats-

i. *If the treatment of the work is positive and progressive*
ii. *If the objective of the material is creating awareness in society*
iii. *If the work has any redeeming social value*

The scope of this provision does not extend to bona fide scientific, professional, educational, documentary, literary or artistic material.

The authors strongly believe that adherence to a test such as the one articulated above would lead to the development of a rational, just and impartial criterion for determining obscenity.

VI. CONCLUSION

Thomas Reid once said "There is no greater impediment to the advancement of knowledge than the ambiguity of words." This statement very eloquently summarises the present position of obscenity law in India. The ambiguity of the words of the statute has led to numerous rulings which have interpreted the provision broadly and obtusely infringed upon the individual fundamental rights. These restrictions on free speech and expression have proven to be *an impediment to the advancement of knowledge*. Through this Article, the authors have argued for restructuring the interpretation and application of obscenity law by the judiciary.

[99] In South Africa, legislators have opted for a detailed list of prohibited material. Schedule 1 of the 1996 Films and Publications Act, as amended, defines the classification of prohibited publications as material which contains a real or simulated visual presentation of child pornography; explicit violent sexual conduct; bestiality; explicit sexual activity which degrades a person and which constituted incitement to cause harm; or the explicit infliction of or explicit effect of extreme violence which constitutes incitement to cause harm.

At present, in numerous jurisdictions including India, there is no standardised test for judging the constituents of obscenity, and rulings are mostly on a case-to-case basis. This has resulted in dissimilar judicial approaches and inconsistent judgements. The varied judicial interpretations have created a chaos in the domain of obscenity laws. There is, at present, no stable position of law for determining the legal contours of obscenity. In this Article, the authors have attempted to elucidate upon the repercussions of the same on the freedom of speech and expression, as well as the free and unbiased transmission of knowledge and information. The authors have attempted to fill this lacuna in the law by formulating a set of guidelines, backed by a test, for adjudging the markers of obscenity, arguing for a divorce of moral considerations from the legal definition of obscenity. The authors have further argued that the only basis for demarcating obscenity ought to be social harm or a significant risk of the same. In proposing these guidelines, the authors have been conscious of the need to balance the possibility of social harm against an individual's freedom of expression. This balance is the cornerstone to a rational, just and progressive law on obscenity.

Pravesh Aggarwal, *Courts under Scrutiny in India through Media: A Comparative Assessment vis-a-vis Global Context*, 3(1) NLUJ Law Review 45 (2015)

COURTS UNDER SCRUTINY IN INDIA THROUGH MEDIA: A COMPARATIVE ASSESSMENT VIS-À-VIS GLOBAL CONTEXT

PRAVESH AGGARWAL*

Justice ensured to the people is the foundational principle behind the working of a judiciary. In order to command public confidence and faith in the judicial system of a country, it demands, inter alia, an easy and affordable access to the legal system that governs the people. Taking into cognizance a tool to keep a check on the accountability and transparency in the court proceedings, along with a medium to strengthen the judicial system of the nation both legally and morally, it is imperative for India to draft a legislation which permits audio or video recording and the subsequent telecasting of the court proceedings.

After delineating various events raising questions on whether audio/video recording of court proceedings shall be permitted, in India, the Article explores jurisdictions such as UK and US for assessing the outcome of audio/video recording and the subsequent live telecasting of the court proceedings. Evaluating both the positive as well as negative aspects, the Article attempts to understand its relevance in India by a detailed comparative analysis with UK and US. On assessing the prevailing situation and relevant laws in India, the author comes to a conclusion to permit the aforesaid subject to certain precautions that shall be taken into account by the legislators, as elucidated in the Article.

TABLE OF CONTENTS

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I. INTRODUCTION

Judiciary is regarded as a foundational pillar in the administration of justice. Justice is ensured, *inter alia*, when not only the parties to a dispute have access to the court proceedings but also the people of the country who are affected by it in the form of judicial precedents. In other words, as was noted by Lord Hewar, justice should not only be done but seen to be done in order to command public confidence and faith. In Indian courts, where people, due to geographical reasons or time constraints, do not generally have access to the courts, apart from the parties concerned therein and the people 'required' thereto, it becomes imperative to provide for a mechanism which ensures an 'open justice system'. In the contemporary era, where science and technology has reached a pinnacle of development and advancement, there has been a proposal for audio/video recording and the subsequent telecasting of the court proceedings in the Indian courts to account for greater transparency and accountability in the judicial proceedings. The importance of the need for such transparency is recognised in the common law system and European Convention of Human Rights (ECHR) which protects the defendant's right to a fair trial by legitimizing the right to a public hearing and a public pronouncement of judgment.[1] Such proposal has already been implemented in many states like the United States of America (U.S.A.), the United Kingdom (U.K.), and New Zealand. However, it is necessary to understand the implications of such a proposal for a developing country like India before bringing about an addition or change in the legislative provisions concerned therewith.

Against this background, this Article ventures to comment upon the need for audio or video recording and the subsequent telecasting of the court proceedings in India so as to make them easily available under public scanner. Part II of the Article elucidates a gamut of events in India concerning such proposal of audio or video recording of the court proceedings, which in turn delves into many cases which have pronounced upon the illegality of such recording mechanism due to discerning and incongruous reasons. It further mentions a swift concern shown by many legal professionals to draft appropriate laws for the same. Part III of the Article explores the

1 European Convention of Human Rights, art. 6, June 1, 2010, Protocol No. 14 (CETS no. 194).

legal systems of the U.S.A. and the U.K. which allow recording of court proceedings by media and the relevant laws concerned therewith. India's existing state of affairs pertaining to media laws on the aforementioned subject matter, along with its comparative analysis with those in the U.S.A. and the U.K., is dealt with in Part IV of the Article. In addition, it enumerates various points of benefits, including surveillance on the conduct of legal professionals, and the associated pernicious effects like declining economic welfare, misuse of audio recording by private individuals, ignorance of the term "intention" and problems associated with making alteration in such recordings. The Article concludes with relevant submissions in favour of such proposal in Indian context.

II. EVENTS CONCERNING THE PROPOSAL OF AUDIO/ VIDEO RECORDING OF COURT PROCEEDINGS IN INDIA

There have been a series of controversies concerning whether audio/video recording should be permitted in Indian courts. The series of decisions began with *Ramakrishne Gowda* v. *Chairman, Zee T.V. and Others*,[2] where a Public Interest Litigation Writ was filed contending that the Court Halls of the Karnataka High Court cannot be used for any purpose other than conducting court proceedings during the court hours for dispensation of justice and such court proceeding cannot be video-taped and telecasted. The Karnataka High Court observed that:

> "*Court halls have a sanctity and symbolize the divinity of justice it seeks to represent. The Court halls cannot be used for any purpose other than the holding of Court proceedings for dispensation of justice. The proceedings in the Court are held in open and the public in general can attend the proceedings unless otherwise directed. But nobody can be permitted to defile the same. The Court proceedings in the High Court or any Court subordinate thereto cannot be video-taped, photographed or telecast without taking prior written permission from the High Court.*"

Later in the year 2009, a young lawyer, K V Dhananjay wrote a letter to Delhi High Court Chief Justice A P Shah, seeking permission to "non-intrusively" tape-record court proceedings.[3] He advocated the use of miniature digital audio recorders by the advocates participating in the judicial proceeding, thereby challenging Rule 20 (d) of Rules formulated by the High Court of Delhi.[4] The said Rule, dealing with "confidentiality, disclosure and inadmissibility of information" provides that "There shall be no audio or video recording of the mediation/conciliation proceedings."[5]

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2 Ramakrishne Gowda v. Chairman, Zee TV and Others, AIR 2000 Kar.276 [hereinafter *Ramakrishne Gowda*].

3 KrishnadasRajagopal, *Lawyer wants to tape proceedings, help client follow case*, THE INDIAN EXPRESS, April 4, 2009.

4 Mediation and Conciliation Rules, 2004 (Aug. 11, 2005), http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_QEP90BUB.pdf.

5 *Id.*

This issue was further expounded in the case of *Deepak Khosla* v. *Union of India*[6], where the petitioner Deepak Khosla sought a declaration for permitting audio/video recording in his own cases, either by himself or through the advocate-on-record. The petitioner sought such direction for being able to revive his memory of what transpired in the court and to keep a track of what was argued in the court, which could later be used to take cognizance of those points which were not argued or were not dealt with efficacy. In denying the request, the Delhi High Court held that there is no procedure available in the Court for authenticating the audio or video recording of the court proceedings. Stressing on the possible misuse by private individuals, it further stated that the introduction of the same in the court rooms is a policy decision of the High Court for which a writ of mandamus cannot be issued. Noting that a writ of mandamus means a command which is issued in favour of a person who establishes an inherent legal right in his case; the Court stated that such a writ is issued against a person who has a legal duty or obligation to perform but has failed or neglected to do so, which was absent in the present case. The Court underscored the importance of an established legislative rule in order to enforce the writ of mandamus, which, in the opinion if the Court was absent in the instant case. A review application was filed for the abovementioned case, in *Montreaux Resorts P. Ltd. &Ors.* v. *Sonia Khosla &Ors.,*[7]but the same was quashed, with directions given to the Registrar Vigilance to examine the gadgets used by the applicant Deepak Khosla to assure that such gadgets were used for recording court proceedings. It was found that the gadgets were used for such purpose and hence the information contained therein was deleted.

On September 28, 2012, the Bombay High Court issued a show cause notice to a student caught recording his brother, a lawyer, arguing a case, asking why a contempt of court proceeding should not be initiated against the accused. Jusitce Shahrukh Kathawalla observed, "Audio recording of the court proceedings by any individual amounts to interference with judicial proceedings and administration of justice."[8] This was further reiterated in *A. Venkatesan* v. *V. Arun*,[9] in which an order was passed for enquiry by Central Bureau of Investigation (CBI) against the petitioner in the matter of recording the court proceedings in his mobile phone. As per the direction of the High Court of Madras in the aforementioned case, guidelines were issued to the Government Officials to be followed while attending the Court proceedings, in which clause (c) stated that "*The Government Officials should not enter into the Court Hall with Cell phone or any*

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6 Deepak Khosla v. Union of India, AIR 2011 Del. 199[hereinafter *Deepak Khosla*].

7 Montreaux Resorts P. Ltd. &Ors.v. Sonia Khosla &Ors., Cont. Case (C) No. 165/2008.

8 Samarth Moray, *Only lawyers may be able to carry mobiles in Bombay High Court,* MID-DAY,June 14, 2012, http://archive.mid-day.com/news/2012/sep/290912-mumbai-Only-lawyers-may-be-able-to-carry-mobiles-in-high-court.htm [hereinafter *Samarth Moray*].

9 A. Venkatesan v. V. Arun, (2012) 8 Mad LJ 580.

other Digital or Electronic Devices/Gadgets having audio/video recording capability in any mode and should not take Court proceedings by audio/video/photo or any other means."[10]

The long-running battle of advocate Deepak Khosla for enforcing guidelines in favour of audio/video recording received limelight on 25th February, 2014, when he audio recorded five minutes of his appearance before the Company Law Board (CLB), arguing with the presiding member about why he should turn his dictaphone off.[11] Notwithstanding the repeated disapproval by the presiding judge over the said conduct, he continued to record the proceedings for some time, claiming that a new CLB rule, prohibiting audio recording,[12] had not yet been gazetted and was therefore not binding.

In the absence of the requisite legislative provisions allowing or prohibiting the audio/video recording in courts, these controversies have highlighted a serious issue of the validity of the aforementioned orders by the courts, disallowing such approach. Against this backdrop, the Government of India decided to give impetus for video recording of court proceedings as part of reforms in the legal system. In the year 2013, former Law Minister Kapil Sibal said that he, along with the Advisory Council of his ministry, believed that court proceedings must be video graphed and such technology must be put in place.[13] He regarded the said process as "transparent" and wanted to "start with the trial courts as it is the foundation of the justice system." He further said that "technology should not remain limited to video graphing court proceedings" and "we should integrate it with the jails and the investigating process."[14]

In late 2014, the Delhi High Court Bar Association (DHCBA) decided to meet the Ministry of Law and Justice and the Delhi High Court judges to provide for rules allowing video recording of court proceedings in Delhi. DHCBA president Rajiv Khosla stated that, "We will pick up this issue with the High Court and the Government also. Many judges are not interested but were saying that it is open court. Everybody has a right to know what a lawyer has argued [in court]. [Court recording] is a fair system; it is a very good idea. Why should anyone be scared of recording? It is open court; everybody has a right to know what the lawyer knows."[15]

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10 *Id.* at ¶7(c).

11 Kian Ganz, *Deepak Khosla records fight with CLB judge about audio recording before CLB*, LEGALLY INDIA,(June 15, 2014), http://www.legallyindia.com/201402284392/Bar-Bench-Litigation/deepak-khosla-records-fight-with-clb-judge-about-audio-recording-before-clb.

12 The CLB order dated 20 February, 20 stated that 'In Chapter IV of the Company Law Board Regulation, 1991 (hereinafter referred to as the said regulations), after Regulation 50, the following regulation shall be inserted namely "51. Restriction on Audio and Video Recording by the parties- There shall be no audio and video recording of the Bench proceeding by the parties".'

13 *Legal reforms: Government for video recording of court proceedings,* THE INDIAN EXPRESS, Nov. 11, 2013.

14 *Legal reforms: Govt for video recording of court proceedings,* BUSINESS STANDARD, Nov. 11, 2013.

15 Prachi Shrivastava, *Will court videos soon be reality? DHCBA to take up issue with judges, ministry after summer*, LEGALLY INDIA,(June 17, 2014), http://www.legallyindia.com/201405214731/Bar-Bench-Litigation/will-court-videos-soon-be-reality-dhcba-to-take-up-issue-with-judges-ministry-after-summer.

In the light of such controversy, it becomes imperative to critically analyze the advantages and the disadvantages of such proposal and draw a comparative analysis with other prominent jurisdictions such as the U.S.A. and the U.K. which have introduced the legislative provisions pertaining to 'the open justice system' through media, in order to understand the implications and viability, social, economic and legal, of such a system in Indian scenario.

III. FREEDOM OF MEDIA IN GLOBAL CONTEXT

A. UNITED STATES OF AMERICA

The U.S. Constitution recognizes the freedom of media as absolute. Amendment 1 to the US Constitution enshrines the right to freedom of media and impedes the Congress from making laws that prohibit such freedom. In *New York Times Co.* v. *L.B. Sullivan*,[16] the Court observed that:

> *"The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'. … 'The maintenance of the opportunity for free political discussion to the end that the Government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' … 'It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' … and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.'*

This right has further been acknowledged recently by the Judicial Conference of the United States, in the year 2010, which authorized a three-year pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings, and publication of such video recordings. The pilot project is limited to civil cases only. Under the project, proceedings are to be recorded only with the approval of the presiding judge, and the parties must consent to the recording of each proceeding in a case. Unless the presiding judge decides not to make the recordings publicly available, they are provided to be subsequently posted on 'www.uscourts.gov', as well as on local participating court websites at the court's discretion. The pilot project has been proposed to be studied by the Federal Judicial Center.[17] There are fourteen

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[16] New York Times Co. v. L.B. Sullivan, 376 U.S. 254 (1964).

[17] *History of Cameras in the Federal Courts,* UNITED STATES COURTS, (June 17, 2014), http://www.uscourts.gov/Multimedia/Cameras/history.aspx.

federal trial courts[18] taking part in the Federal Judiciary's digital video pilot project, which started on July 18, 2011, and will provide for an evaluation of the effect of cameras in courtrooms. All 14 courts volunteered to participate in the three-year experiment, which has been extended to run through July 18, 2015.[19]

Photographing in the courtroom, as well as broadcasting of judicial proceedings, is prohibited in criminal cases.[20] There is no inclusion of recording proceedings in federal bankruptcy courts as per the pilot project. Recording by other entities or persons, unless hired by or under the control of the court, are not allowed. A presiding judge can choose to stop a recording if it is necessary, for example, to protect the rights of the parties and witnesses, preserve the dignity of the court, or choose not to post the video for public view. Coverage of the prospective jury during *voir dire* is prohibited, as is the coverage of jurors or alternate jurors.[21]

As per the general guidelines, judges shall consider recording of different types of proceedings (e.g., trial and non-trial proceedings; a variety of case types; proceedings of varying sizes such as hearings, large cases, and multidistrict litigation; and proceedings with varying levels of expressed public interest);[22] the media or its representatives are not permitted to create recordings of courtroom proceedings; the equipment configurations for recording proceedings in the courtroom require the use of at least three but no more than four cameras with microphones; and the cameras should be inconspicuous and fixed on the judge, the witness, the lawyers' podium, and/or counsel tables.[23]

After the broadcasting of the judicial proceedings in some of the U.S. courts began, it received a massive response in terms of its viewers through television. One of the judges, who heard the case of *Perry v. Schwarzenegger*[24] which was broadcasted, wrote in a court filing that the argument "was viewed on television and the Internet by more people than have ever watched an appellate court proceeding in the history of the nation."[25] Ted Olson, one of the attorneys who

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18 The participating courts are Middle District of Alabama; Northern District of California; Southern District of Florida; District of Guam; Northern District of Illinois; Southern District of Iowa; District of Kansas; District of Massachusetts; Eastern District of Missouri; District of Nebraska; Northern District of Ohio; Southern District of Ohio; Western District of Tennessee; and Western District of Washington.

19 *Cameras in Court*, UNITED STATES COURT, (June 19,2014), http://www.uscourts.gov/Multimedia/Cameras/OverviewofPilot.aspx.

20 Federal Rules of Criminal Procedure, Rule 53.

21 *Supra* note 19.

22 *Guidelines for the Cameras Pilot Project in the District Courts*, JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, USA, (June 21, 2014), http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf. [Hereinafter *Guidelines for the Cameras Pilot Projects in the District Courts*].

23 *Id.*

24 Perry v. Schwarzenegger, 704 F. Supp. 2d.921, 1003 (N.D. Cal. 2010).

25 Derek Green, *Live! Broadcasting high-profile appeals reignites cameras in the courtroom debate*, REPORTERS COMMITTEE, (Apr. 6, 2015), http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2011/live-broadcasting-high-prof. [Hereinafter *Green]*.

argued on behalf of the plaintiffs in the *Perry* case, agreed that "The more people see judges in operation and interacting with the people whose rights they are adjudicating, the more people respect the process, and realize how well prepared judges typically are, how engaged they are, and how hard they are working to get it right."[26] A prominent supporter of more camera access to court proceedings, Alen Kozinski, who is a Judge of the U.S. Court of Appeals for the Ninth Circuit,[27] said that the court broadcasts allow the public to gain more insight into how a court operates and help to legitimize the court's decisions to the public.[28] In addition, Tim Rutten, an American journalist who worked for the Los Angeles Times between 1971 and 2011, agreed on the idea of broadcasting of the court proceedings, stating that "It is one of the glories of our court system that it continues to permit a principled and civil debate over just such contentious issues, and the American people deserve to see that".[29] Thus, the broadcast of the court proceedings has been able to gather support from many jurists and legal scholars, owing to its positive impact to the society.

The legislative provisions concerning the audio/video recording and the subsequent broadcasting of the court proceedings provide that the supreme authority has been vested with the presiding judges of the court proceedings over the grant or refusal of the video recording therein, managed and controlled under the authority of the government. The reason behind disallowing the recording by private individuals or body may be on account of the possibility of misuse of such recording, as has also been acknowledged in *Deepak Khosla* v. *Union of India*.[30]The economic cost attached to the installments of at least three but not more than four cameras has been restricted by first limiting the pilot survey to fourteen district courts in USA, in order to evaluate the result of the program for further assessment. While the recording is prohibited for criminal proceedings in the U.S.A., however, the serious implications involved in the same that form the underling rationale behind such prohibition haven't been stated in the guidelines expressly. Such approach can be explained through the mechanism established in the U.K. courts, which is dealt with in detail in the next Part.

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26 *See*, Rachel Dobson, Nick Eli, Nicholas Beatty and Joel Buchanan, *Should Cameras be Allowed in Federal Courtrooms?,* CLARK COLLEGE (Apr. 6, 2015), https://engl135group1.files.wordpress.com/2012/06/technical-writing-persuasive-report-final.doc.

27 *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTRE(Apr. 6, 2014), http://www.fjc.gov/servlet/nGetInfo?jid=1314&cid=999&ctype=na&instate=na

28 Green, *Supra* note 25.

29 Ashby Jones, *On the Prop.8 Arguments and the Cameras-in-the-Court Debate*, WALL STREET JOURNAL (Apr. 6, 2014), http://blogs.wsj.com/law/2010/12/07/on-the-prop-8-arguments-and-the-cameras-in-the-court-debate/.

30 Deepak Khosla, *Supra* note 6.

B. UNITED KINGDOM

There have been numerous judicial pronouncements which have given prime importance to the 'open justice' system in the British courts through audio/video recording in the courtrooms. In *Scott* v. *Scott,*[31] Lord Atkinson stated that:

> *"The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses… but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it public confidence and respect."*

In *R* v. *Sussex Justices*,[32] Justice Viscount Hewart stated that, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done." Unequivocally, the idea behind proclaiming such statement was to ensure free access of public to the court proceedings. In addition, Parliament has recognised the importance of contemporaneous media reports of legal proceedings by giving protection from liability for contempt of court[33] and defamation to fair, accurate and contemporaneous reports of court proceedings.[34] The important role of the media as a public watchdog is also recognised under the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECHR).[35]

Taking into account the inability of the people to attend court proceedings directly, out of their preoccupied life with work, they opine about the judicial system through what is portrayed through printed judgments and the corresponding views reflected through media. In retrospect, it is not possible to accurately describe what took place in the courts through the voluminous printed works. Such a limitations and hence the consequent need for a recording mechanism was contemplated and broadcasting in the U.K. Supreme Court was allowed through section 47 of the Constitutional Reforms Act, 2005.[36] This exemption from the Criminal Justice Act, 1925 and Contempt of Court Act, 1981, which prohibits the broadcasting of image and sound recording from courts in England[37] and Wales[38] respectively, was intended to replicate the arrangements for broadcasting which had existed in the House of Lords prior to the establishment of the Supreme Court.[39] The Supreme Court identified a key objective of making its proceedings more accessible to the public and for that reason its proceedings are filmed and

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31 Scott v. Scott, (1913) AC 417.
32 R v. Sussex Justices, (1924) 1 (K.B).
33 Contempt of Court Act 1981, § 4(1).
34 Defamation Act 1996, § 14.
35 Observer and Guardian v. U K, (1992) 14 EHRR 153.
36 Constitutional Reform Act 2005, § 47.
37 Criminal Justice Act 1925, § 41.
38 Contempt of Court Act 1981, § 9.
39 *Proposals to allow the broadcasting, filming, and recording of selected court proceedings,* UK MINISTRY OF JUSTICE, (June 27, 2014),https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf.

routinely broadcasted. The detailed operational framework and the rules on the approved circumstances for filming and broadcasting of Supreme Court proceedings are set out in an agreement which is signed by the major U.K. national broadcasters (BBC, ITN, Sky News). The footage is made available for the use of news, current affairs and educational or legal training programmes, and may not be used in light entertainment programmes, satirical programmes, party political broadcasts, and advertising or promotion. Any still images produced from the film must be used in a way that has regard to the dignity of the Court and its functions as a working body.[40]

Section 41 of the Criminal Justice Act, 1925 prohibits taking of photographs, or making of sketches, in or around the court, and the publishing of any such photograph or sketch. In *Re Barber* v. *Lloyds Underwriters,*[41] and *R* v. *Loveridge, Lee and Loveridge,*[42] it was interpreted that section 41 also prohibits filming in court. Section 9 of the Contempt of Court Act, 1981 prohibits recording of sounds except with leave of the court, and Section 9(2) makes it a contempt of court to broadcast recordings of court proceedings to the public. In Northern Ireland, section 29 of the Criminal Justice (Northern Ireland) Act, 1945 applies identical restrictions to photography or sketching in the courts in Northern Ireland and publication of the results.[43] Scottish legislation has never restricted court broadcasting in the same way as in England and Wales. Conditions governing broadcast from Scottish Courts are set out in Lord Hope's Practice Direction (1992).[44]

However, in 2011, Justice Secretary Kenneth Clarke said he would end the ban on television cameras in criminal courts in England and Wales for the first time, to improve public understanding of justice. He proposed to legislate on the matter allowing cameras in the Court of Appeal initially, with a plan to expand it to the crown courts, since filming is currently banned by two Acts of Parliament.[45] He said that he would restrict the broadcasting to the judge's sentencing remarks only, rather than footage of offenders, victims, witnesses and jurors, and this would "allow the public to judge for themselves how we are performing to hold us to account."[46] In April, 2012, the broadcaster STV was allowed to film the conclusion of the high-profile trial at the High Court in Edinburgh for reasons relating to public interest, with the footage being released a short time after the court rose. It was the first time the end of a murder trial had been

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40 *Id.*
41 Re Barber v. Lloyds Underwriter, (1987) 1 QB 103.
42 R v. Loveridge, Lee and Loveridge, (2001) EWCA Crim 973.
43 Criminal Justice (Northern Ireland) Act 1945, § 29.
44 *Supra* note 39.
45 *Court broadcast of judges' remarks to be allowed,* BBC NEWS UK, (June 27, 2014), http://www.bbc.co.uk/news/uk-14800838.
46 *Id.*

shown in the UK, although television cameras have been allowed into Scottish courts on a number of other occasions in recent years.[47]

1. STATUTORY RESTRICTIONS IN ENGLAND AND WALES

A joint publication titled "Reporting Restrictions in the Criminal Courts" (by the JSB—Judicial Studies Board, the Newspaper Society, the Society of Editors, and The Times Newspaper) whilst mentioning reporting restrictions in the criminal courts, contains a foreword by Lord Chief Justice of England and Wales, who proclaims that:

"*In any society which embraces the rule of law which is an essential requisite of the criminal justice system that it should be administered in public and subject to public scrutiny. For this purpose the representatives of the media reflect the public interest. However, as is well known there are a number of statutory exceptions to these principles: hence the occasions of difficulty and uncertainty which can sometimes arise*."[48]

The criminal courts in England and Wales have an inherent power to regulate its own proceedings, and may hear cases in secret (in camera) in exceptional circumstances. The only exception to the open justice principle at common law justifying hearings in camera is where the hearing of the case in public would frustrate or render impracticable the administration of justice.[49] The test is one of necessity. For example, the fact that hearing evidence in open court will cause embarrassment to witnesses does not meet the test for necessity. Further, court proceeding are automatically precluded from being recorded in cases to secure witness protection;[50] to exclude the public but not bone fide representatives of the media during the testimony of witnesses aged under 18 in any proceedings relating to an offence against, or conduct contrary to, decency and morality;[51] to exclude persons of any description from the court, during the evidence of a child or vulnerable adult witness in cases relating to a sexual offence, or where there are grounds for believing that a witness has been, or may be, intimidated;[52] and to any judicial proceedings of any indecent medical, surgical or physiological details which would be calculated to injure public morals.[53]

The discretionary reporting restrictions includes the court's power to restrict reporting about certain adult witnesses (other than the accused) in criminal proceedings on the application

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47 *David Gilroy sentenced in first televised court case,* THE TELEGRAPH, Apr. 18, 2012.

48 *Reporting Restrictions in the criminal courts,* JUDICIAL STUDIES BOARD, THE NEWSPAPER SOCIETY, THE SOCIETY OF EDITORS AND TIMES NEWSPAPERS LTD., (June 27, 2014),http://www.societyofeditors.co.uk/userfiles/file/Crown%20Court%20Reporting%20Restrictions%20011009.pdf [Hereinafter *Reporting Restrictions in the criminal courts*]; *See also* Sahara India Real Estate Corpn. Ltd. v. SEBI, (2012) 10 SCC 603.

49 AG v. Leveller Magazine, [1979] AC 440, at 450.

50 Contempt of Court Act 1981, § 11.

51 Children and Young Persons Act 1933, § 37.

52 Youth Justice and Criminal Evidence Act 1999, § 25.

53 Judicial Proceedings (Regulation of Reports) Act 1926, § 1.

of any party to those proceedings for a 'reporting direction';[54] the power to postpone the publications of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings;[55] to prevent the inclusion of any matter in a publication which appears to give rise to a substantial risk of prejudice to the administration of justice in a retrial.[56]

2. CONCLUSIVE STAND

In the light of a gamut of aforementioned legislative restrictions on the publication of court proceedings by media, audio/video recording is generally not permitted in the criminal courts of England and Wales. It is pertinent to note that such restrictions are imposed solely in public interest, associated with legal proceedings. As mentioned earlier, the aforementioned concerns may be the reason behind non-inclusion of audio/video recording for criminal cases in the pilot programme initiated in U.S.A. However, generally not many of such restrictions exist in the courts of Scotland which allow the recording of both criminal and civil cases. Further, unlike the U.S.A. which has given supreme authority to judges to decide on the matter whether to allow or disallow such recording, U.K. has given prime importance to the statutory restrictions over discretionary recording restrictions by the judges. Only the U.K. Supreme Court is vested with the audio/video recording devices during its judicial proceedings, unlike the fourteen district courts in USA under its pilot survey.

It was imperative to analyze the existing provisions regarding the recording of court proceedings in the U.S.A. and U.K. in order to draw a comparative analysis between such jurisdictions and India pertaining to such proposal and thereby, understand the benefits and repercussions of such a mechanism in India.

IV. FREEDOM OF MEDIA IN AN INDIAN COURTROOM: A CRITICAL ANALYSIS

Freedom of speech, enshrined under Article 19(1)(a) of the Constitution of India, impliedly includes freedom of media.[57] However, such right is not unbridled and is subjected to certain restrictions, in order to safeguard the fraternity and integrity of the nation, unlike what is prevalent in the U.S.A. where freedom of the press guaranteed by the First Amendment is absolute. There is no provision corresponding to Article 19(2) in the U.S. Constitution. Even then, in some cases, the U.S. courts have granted interim restraint orders where there was

54 Youth Justice and Criminal Evidence Act 1999, § 46.
55 Contempt of Court Act 1981, § 4(2).
56 Criminal Justice Act 2003, § 82.
57 M.S.M. Sharma v. Krishna Sinha, AIR 1959 SC 395.

pressing and overwhelming need.[58] Thus, the position of media in India varies in magnitude from that in the U.S.A.

As noted in the antecedent discussion, it is submitted that the absence of explicit legislative provisions governing the audio/video recording and subsequent telecasting of the court proceedings has engendered dubiety in decision making process of the courts in India. While some regard it as "interference with judicial proceedings and administration of justice"[59] or "its pernicious effects on the judicial process; others proclaim "absence of Higher Court rules to entitle such recording"[60] and "absence of legislative provisions for courts to act upon"[61] as the reason behind disallowing the recording of the judicial proceedings.

A. RESTRICTION ON PUBLICATION OF COURT PROCEEDINGS

Through various judicial pronouncements and legislative enactments, it is noted that there have been a horde of cases involving restriction on publication of the court proceeding by media.[62] The issues of "Witness Identity Protection and Witness Protection Programmes" were taken up by the Law Commission in 2006, *suo motu*, in the light of the observations of the Supreme Court in *National Human Rights Commission* v. *State of Gujarat*,[63]*People's Union for Civil Liberties* v. *Union of India*,[64]*Zahira Habibullah H. Sheikh* v. *State of Gujarat*,[65] and *Sakshi* v. *Union of India*,[66] that a law in this behalf is necessary. The same view was expressed by the Supreme Court in *Zahira Habibulla H. Sheikh (5)* v. *State of Gujarat*.[67] The Court stated that in all the aforementioned cases, having regard to what is happening in important cases on the criminal side in our courts, it is time a law is brought forward on the subject of witness identity protection and witness protection programmes.[68] In *Zahira*,[69] the Court observed:

> *"Legislative measures to emphasise prohibition against tampering with witnesses, victims or informants, have become imminent and inevitable need of the day".*

The Constitution of India permitted the legislature to impose reasonable restriction on the right, in the interests of various matters, one of which is fair administration of justice as protected by the Contempt of Courts Act, 1971.[70] If media exercises an unrestricted or rather

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58 K.A. Abbas v. Union of India, (1970) 2 SCC 780.
59 Samarth Moray, *Supra* note 8.
60 Ramakrishne Gowda*, Supra* note 2.
61 Deepak Khosla, *Supra* note 5.
62 Such publication does not include audio/video recording of the proceedings but the views of advocates, parties and witnesses concerned with the case along with their interpretation of the case.
63 National Human Rights Commission v. State of Gujarat, (2008) 16 SCC 497.
64 People's Union for Civil Liberties v. Union of India, (2004) 9 SCC 580.
65 Zahira Habibullah H. Sheikh v. State of Gujarat, (2004) 4 SCC 158.
66 Sakshi v. Union of India, (2004) 5 SCC 518.
67 Zahira Habibulla H. Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374.
68 Law Commission of India, *Witness Identity Protection and Witness Protection Programmes* (Law Comm No 198, 2006).
69 Zahira Habibulla H. Sheikh (5), *Supra* note 67.
70 Contempt of Court Act 1981, § 2.

unregulated freedom in publishing information about a criminal case and prejudices the mind of the public and those who are to adjudicate on the guilt of the accused and if it projects a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused.[71]

In *P.C. Sen, In re*,[72] the Supreme Court observed:

> *"No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a jury and not when it is triable by a Judge or Judges."*

It appears from the aforementioned case that it was accepted by the Supreme Court that Judges are likely to be "subconsciously" influenced, and thus projection by media may amount to contempt of court since such conduct "interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner."[73]

Many of the abovementioned curtailments on media can be taken into account while drafting the legal principles concerning audio/video recording in Indian Courts, such as restraining those recordings involving protection of witness, informant and victim's identity in certain case, which would otherwise frustrate or render impracticable the administration of justice. As mentioned under the statutory restrictions in the U.K. pertaining to the recording of court proceedings, these aspects have been given due credit. Thus, it is submitted that such factors may hold credence while drafting laws to legislate on the recording of court proceedings in India. In order to analyse the viability of the antecedent proposal, it is imperative to understand its various points of benefits and harmful effects to reach at an informed decision.

B. BENEFITS ACCRUING TO SUCH RECORDING

The idea behind implementing such proposal in the U.K. and the U.S.A. was to ensure greater transparency and accountability in the judicial proceedings. It provides an accurate accounting of what transpires in the peoples' judicial system which further strengthens the public understanding of the judicial branch and its processes, and as such should be allowable as a matter of practicality.[74] Thus, it is generally argued that the administration of justice must be done in the public; the public and the media must have a right to attend all court hearings and the media must be able to report those proceedings fully and contemporaneously.[75] This, it is

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71 R. Rajagopal v. State of T.N., (1994) 6 SCC 632 [Hereinafter *Rajagopal*].

72 P.C. Sen, In re, AIR 1970 SC 1821.

73 Contempt of Courts Act 1981, § 2(c)(iii).

74 Charles L. Howard, *Subcommittee on Audio Recording of Court Proceedings,* JUDICIAL-MEDIA COMMITTEE, CONNECTICUT, 5 (June 28, 2014), https://www.jud.ct.gov/Committees/media/audio/FinalReport09.pdf [Hereinafter *Charles L. Howard*].

75 *Reporting Restrictions in the criminal courts, Supra* note 48.

argued shall provide a stimulus to the confidence of the people towards the judicial system by making them well-informed.

The accuracy attached with such recordings in relation to what took place in the courts would escalate the fairness of the rulings in the appellate courts. It would obliterate the assumptions engendered in the appellate courts that may arose due to lack of availability of complete and accurate data pertaining to lower court's proceedings.

1. CONDUCT OF LEGAL PROFESSIONALS UNDER SURVEILLANCE

One of the major ascendancy associated with audio/video recording in court proceedings is to regulate the conduct of legal professionals, i.e. judges and advocates, in order to maintain the decorum and soaring standard of our judicial system. There have been a multitude of cases involving use of substandard language, both by judges as well as advocates, which impedes the discipline of the courtroom. In *C. Ravichandran Iyer*v. *Justice A.M. Bhattacharjee*,[76] the Supreme Court of India observed that:

> *"Judicial office is essentially a public trust. Society is, therefore, entitled to expect that a Judge must be a man of high integrity, honesty and required to have moral vigour, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge, higher than that expected of an advocate."*

In *Testa Setalvad* v. *State of Gujarat*,[77] the Gujarat High Court had made certain caustic observations casting serious aspersions on the appellants therein, though they were not parties before the High Court. Verifying the record that the appellants therein were not parties before the High Court, the Supreme Court observed:

> *"It is beyond comprehension as to how the learned Judges in the High Court could afford to overlook such a basic and vitally essential tenet of the 'rule of law', that no one should be condemned unheard, and risk themselves to be criticised for injudicious approach and/or render their decisions vulnerable for challenge on account of violating judicial norms and ethics. Time and again this Court has deprecated the practice of making observations in judgments, unless the persons in respect of whom comments and criticisms were being made were parties to the proceedings, and further were granted an opportunity of having their say in the matter, unmindful of the serious repercussions they may entail on such persons*."

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[76] C. RavichandranIyer v. Justice A.M. Bhattacharjee, (1995) 5 SCC 457.
[77] Testa Setalvad v. State of Gujarat, (2004) 10 SCC 88.

There have been many other cases involving such conduct by the judges.[78] Furthermore, burgeoning cases have emerged wherein advocates have deviated from judicial norms and ethics and have scandalized the court under Section 2(c) of the Contempt of Court Act, 1971, by making scurrilous abuse of a judge.[79] Notwithstanding the fact that the audio/ video recording of such proceedings may not be available to the public due to preservation of public confidence in the honesty and impartiality of the judiciary which is concerned with the personal reputations of Judges and other people affected by it, it would play a major role in instilling a sense of fear among such legal professionals since their recording could be adduced as an evidence in courts and also result in moral shame, apart from severe rules that govern the legal profession under which the stated penal consequences can take place.

In the light of proposal scheme of 365-days working courtrooms by the Chief Justice of India[80] having regard to the escalating number of pending cases,[81] the Supreme Court Bar Association (SCBA), through President Pravin Parekh, wrote to the Chief Justice of India, focusing on the alternatives to a no-holiday court year, to reduce case arrears, which, *inter alia,* included punctuality of judges and stringency against adjournments.[82] Justice S. N. Dhingra pointed out that such audio/video telecasting "will also be deterrent against judges who do not come to courts on time as then there will be evidence against them in this regard in the form of CDs and cassettes".[83] Thus, it becomes imperative to install audio/ video telecasting equipment in the courtrooms to strengthen the judicial process of the nation against the aforementioned concerns.

C. PREDICAMENTS INCIDENTAL TO COURT ROOM RECORDING BY MEDIA

1. POTENTIAL ABUSE OF THE AUDIO RECORDING BY PRIVATE INDIVIDUAL

Many advocates in India have argued for permitting audio recording devices in the courtroom. For instance, Dhananjay proposed to use miniature digital audio recorders being several times smaller than the smallest cell phone in use today.[84] Even in *Deepak Khosla* v. *Union of*

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78 State of W.B. v. Babu Chakraborthy, (2004) 12 SCC 201; State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566; A.M. Mathur v. Pramod Kumar Gupta, (1990) 2 SCC 533; Amar Pal Singh v. State of U.P., (2012) 6 SCC 491.

79 Rajesh Kumar Singh v. High Court of Judicature of M.P., (2007) 14 SCC 126, at 129; Pritam Lal v. High Court of M.P., AIR 1992 SC 904.; E.M. Sankaran Namboodripad v. T. Narayanan Nambiar, (1970) 2 SCC 325.

80 Dhananjay Mahapatra, *CJI wants courts to stay open all 365 days*, THE TIMES OF INDIA, May 16, 2014.

81 The Department of Justice (in the Law Ministry) informed that as on March 31, 2013, 2,68,51,766 cases were pending in subordinate courts; '2,00,00,000 cases pending in India's courts', (Feb. 9, 2014), http://www.rediff.com/news/slide-show/slide-show-1-legal-logjam-20000000-cases-pending-in-indias-courts/20140209.htm>

82 Letter from Mr. Pravin H. Parekh, on behalf of the Supreme Court Bar Association, to Justice R.M. Lodha, SUPREME COURT BAR ASSOCIATION, (June 14, 2014), http://scbaindia.org/SecretaryNotices/279.pdf.

83 Harish V Nair, *Man sent to mental institute for recording court proceedings* HINDUSTAN TIMES,Jan. 5, 2012.

84 Hemant Batra, *Audio Video Recording For The Judicial Proceedings: Blessing Indeed,* SPEAKING THREADS, (June 28, 2014), http://hemantbatra.wordpress.com/2009/04/06/audio-video-recording-for-the-judicial-proceedings-blessing-or-proscription-author-hemant-batra/.

India,[85] the petitioner insisted the court to permit him record the court proceedings. It is submitted that if personal recordings were made by the public, the very real possibility exists that such recordings could be manipulated or altered and then used to challenge the official court record. Fraudulent or inaccurate transcripts made from personal recordings could be produced and sold. An individual's personal audio recording could be used to challenge the validity of the court record, causing delays, appeals and other ultimately unnecessary proceedings. The lack of any real ability to keep a "personal" recording personal was also a concern and such recordings could be manipulated.[86] The problem concerning alteration of recorded material has been highlighted in *R.K. Anand* v. *Delhi High Court*,[87] in which Supreme Court observed:

> *"Alteration on an audio recording can be of addition, deletion, obscuration, transformation and synthesis. In video recordings the alteration may be with the intention to change either on the audio track or on the video track. In both the ways there is always disturbance on both the tracks. Alterations in a video track are usually made by adding or removing some frames, by rearranging few frames, by distorting certain frames and lastly by introducing artificially generated frames."*

The problems associated with such audio recording by private individuals may be the reason behind introducing a centralized government controlled recording devices in the U.S.A. and the U.K. courts. It is the submission of the author that the same must be given due consideration in India while dealing with audio recording in the courts by private individual.

2. CONCERN REGARDING THE ECONOMIC WELFARE OF THE NATION

Media recording of court proceedings may not prove satisfactory results in India due to a gamut of concerns. It may engender economic problems, when the recording devices such as camera, etc. are installed by the government. This could be illustrated with the example of U.S.A., as has been mentioned before, where equipment configurations for recording proceedings in the courtroom require the use of at least three but no more than four cameras with microphones.[88] Further, studies have been conducted in the U.K. which gave detailed mention on the potential costs of such proposal. In one of the study by the U.K.'s Ministry of Justice in 2012, the potential cost involves broadcasters (BBC, ITN, BSkyB) in setting up and running court broadcasts. Other media organisations may be affected by costs in the future, should they choose to show footage of court proceedings. These costs will depend on how many courts they broadcast from, the number of cases filmed, the length of time taken to broadcast and the number of staff required. It will also depend on the type of equipment used, along with

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85 Deepak Khosla, *Supra* note 6.
86 Charles L. Howard*, Supra* note 74.
87 R.K. Anand v. Delhi High Court, (2009) 8 SCC 106.
88 *Guidelines for the Cameras Pilot Projects in the District Courts, Supra* note 22.

the replacement and depreciation costs.[89] The aforementioned costs may arise while installing the recording devices in Indian courtrooms as well and may prove to be highly detrimental to the economic welfare of the nation.

3. RELEVANCE OF 'INTENTION' FOREGONE: HARM TO THE PEACE AND INTEGRITY OF THE NATION

The relevance of intention, albeit immaterial in Indian law of torts,[90] now holds key in deciding libel suits entailing public officials. This further decides whether the publication of any speech is prohibited under the law and the person making such speech is entitled to be sued or not. In simpler words, the person making a statement which may be deemed derogatory for the person listening to it should have an intention to cause harm to the listener as a result of such statement. There have been many cases wherein the courts have ruled that such intention is necessary in order to hold the person liable for libel. In *Rakeysh Omprakash Mehra* v. *Govt. of NCT of Delhi*,[91] wherein a suit was filed against the respondent for broadcasting a film that supports the practice of untouchability, the Court opined the absence of "intention" on the part of petitioner and thereby quashed an FIR under investigation at the initial stage itself. The Supreme Court of India, while deciding the case of *Rajagopal* v. *State of Tamilnadu*,[92] famously applied the standards laid down by the Supreme Court of the United States in *New York Times* v. *Sullivan*,[93] where it acquitted the accused despite its allegations against a few public officials turning out to be false, because of the absence of malicious "intention".

A question arises whether such "intention" would or would not be treated as a pre-requisite, while broadcasting the court proceedings in which a suit is filed in a court of law. Taking into cognizance the diversity of population in India with different or contrary views on the same thing, as well as some differences observed in legal and social structure in different parts of the nation, any part of the communication in a court proceeding may not sprout violent reaction in one part of the nation, but may arise unexpected debacle in other part of the nation, despite any "intention" to cause damage to such people. Thus, an easy access to such audio/ video recording by the people may be detrimental to the peace and integrity of the nation, which no legal ramification to counter such problem.

4. 'MENS REA' IMMATERIAL IN CERTAIN CASES: A CONCERN

It is submitted that the publication by media requires absence of any defamatory content which seriously injures the reputation of any person in the eyes of public, lest the same shall be

89 Contempt of Court Act 1981, § 9.
90 D.P. Choudhary And Ors. v. Kumari Manjulata, AIR 1997 Raj 170.
91 Rakeysh Omprakash Mehra v. Govt. of NCT of Delhi, (2013) 197 DLT 413.
92 Rajagopal, *Supra* note 71.
93 New York Times v. Sullivan, 376 U.S. 254 (1964).

held liable under the Contempt of Court Act, 1981. In criminal cases, where *mens rea* is regarded prime importance while deciding the innocence of the accused, publication by media takes an opposite stand. It is reflected in *D.C. Saxena (Dr)* v. *Hon'ble The Chief Justice of India*,[94] in which the court opined that:

> *"It is true that in an indictable offence generally mens rea is an essential ingredient and requires to be proved for convicting the offender but for a criminal contempt as defined in Section 2(c) any enumerated or any other act apart, to create disaffection, disbelief in the efficacy of judicial dispensation or tendency to obstruct administration of justice or tendency to lower the authority or majesty of law by any act of the parties, constitutes criminal contempt. Thereby it excludes the proof of mens rea. What is relevant is that the offending or affront act produces interference with or tendency to interfere with the course of justice."*

Thus, *mens rea* is immaterial in cases involving publication by media when the same is to be held liable under section 2(c) of the Contempt of Court Act, 1981. It may sprout concern in cases wherein there was no intention on the people communicating in the court to scandalize or tend to scandalize or lowers or tends to lower the authority of, any court,[95] and the same is also duly considered by the judge, but may be interpreted in wrong terms by the general population or any section of the population, whatever the intention or reason behind it, thereby undermining public confidence in the integrity of the court and its efficacy in judicial making process.

5. ALTERATION IN COURT RECORDING MAY PROVE DETRIMENTAL

It is submitted that a conduct of removing a part of the recorded court proceeding for display to the public, which may contain such content detrimental to the interest of people, may seem to be a way to ensure accountability and transparency along with peace of the nation from the malicious content contained therein, as happened in the U.S.A. But, this may forego justice by altering the meaning of the speech contained therein, when read as a whole. In *P.N. Duda* v. *P. Shiv Shankar and others*,[96] it was held that a speech delivered by a Law Minister in a seminar organized by the Bar Council of India, expressing his critical views in respect of the Supreme Court, though at places intemperate, did not amount to any contempt of court of the Supreme Court, on account of the reading of the speech as a whole and having regard to the select audience. Thus, a judicious approach is needed in such cases and the same shall be taken into account while making a proposal for any alteration in the recorded court proceeding for the interest of nation.

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94 D.C. Saxena (Dr) v. Hon'ble The Chief Justice of India, (1996) 5 SCC 216.
95 Contempt of Court Act, 1981, § 2(c)(i).
96 P.N. Duda v. P. Shiv Shankar and Ors., (1998) 3 SCC 167.

V. CONCLUSION: THE PATH AHEAD

The objectives behind introducing audio/video recordings and the subsequent telecasting of the court proceedings are multifold. In the era of scientific advancement, technology should be availed for the greater benefit of mankind. It is necessary to extract optimum benefit by installing audio/video recording devices in Indian courtrooms. The pernicious effects associated with recording the proceedings by private individuals require that such technology must be installed, managed and controlled by the government. There should be a separate department, independent of legislative and judicial branch, to deal with the matter of publication with the prior consent of the presiding judge in the courtroom, so that the power does not vest in one hand. Like the U.S.A., the recordings should be restricted to civil cases because of a gamut of explicit and implicit legal hurdles associated with the criminal cases. Alteration in the recordings, in order to remove undesirable content contained therein, should be done judiciously without changing the meaning of the complete sentence. However, it is submitted that in order to assess the viability of such mechanism in India, initially only the Supreme Court of India and the High Courts should have such recording devices, which could later be extended to lower courts depending on the success and failure of such proposal in Indian context, as is being done in the U.K. This would also help strike a balance between "open justice system" and "economic welfare" of the people. It is concluded that it is imperative for the legislature to draft laws pertaining to audio/video recording and subsequent telecasting of court proceedings to eliminate uncertainty over the abovementioned matter and to provide easier and affordable access to the people "governed" by such proceedings.

Akhil Kang, Dipankar Krishna Das, *Indian Hijras Lost In Space – Lack of Voice in Mainstream LGBT and Queer Movement* 3(1) NLUJ Law Review 65 (2015)

INDIAN *HIJRAS* LOST IN SPACE – LACK OF VOICE IN MAINSTREAM LGBT AND QUEER MOVEMENT

AKHIL KANG,* DIPANKAR KRISHNA DAS†

From being denied entry into the feminist movements to becoming mere tools of theorization, the transgender community today, seem to have been lost in the discourse which supposedly aims to address them. The hijras of India who have become the unnatural, fearful, phobia-igniting 'other', often get disparaged for mimicking uber femininity or masculinity. When one looks at the mainstream LGBT movement, one often wonders, how strong is the transgender representation? Layering the LGBT movement with queer-ness, one also wonders, how queer are the hijras of India? This Article seeks to address these questions in light of the celebrated judgment of National Legal Services Authority v. Union of India and in this context, further addresses the bigger issue regarding the problems faced by the transgender/transsexual/hijra community with the LGBT and/or the queer movement.

TABLE OF CONTENTS

I. INTRODUCTION

In the uncountable streets of India, where the transgender community is still devoid of any respectable public space, one does consider the question: has the 'other-ness' of *hijras* reached

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phenomenal levels? In the popular discourse, the phrase LGBT/LGBTIQ or simply 'queer' often becomes an umbrella term for sexual minority rights. Should the transgender oppression be addressed on the same platform as others? Is this oppression just a heterosexual vis-a-vis homosexual issue? While many believe that it was transgenders who made possible for the gay and lesbian movements to overlap their cross-gendered identification thereby aiding the queer movement,[1] others conceive that the 'queer' movement in its attempt to be 'multicultural, multigendered and multisexual'[2] has denied differences of individuals by incorporating them into one oppositional mass.[3] From being rebuffed entry into a women's organization,[4] to being labelled as raping women's bodies and reducing the 'real female to an artefact' by re-appropriating the bodies for themselves,[5] by the radical feminists the identity of transgender/transsexual/intersex/transvestite seems to have been lost in the transition from the LGBT to the queer movements. The displacement between the two theories was over the fact that the latter argued that sexual practices are not reducible to identity categories or cultural binaries.[6] Queer theory embraces the "vilified, denigrated, and ostracized identities and sees in these hybrid spaces, possibilities for a more thorough critique of normative culture and its repressive apparatuses."[7] Such an approach excludes a *hijra* who chooses to be identified as a woman and chooses a cultural binary. It is in this context that one needs to understand the extent to which the queer theory can be applied to the transgender community in India.

The movement of sexual minorities in India has had a history of its own wherein people, as individuals and in communities, have since centuries, overtly or covertly, violated dominant norms.[8] In fact, such practices weren't seen as a violation at all. However, the tracing of the history of such minorities only began in 1990s. This is because the women's movement in the 1980s, and to some extent even today, saw sexuality as an elitist problem and less urgent than

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[1] Jay Prosser, *Judith Butler: Queer Feminism, Transgender, and the Transubstantiation of Sex*, *in* THE TRANSGENDER STUDIES READER 257, 258 (Susan Stryker & Stephen Whittle eds., Routledge 2006) [hereinafter *Prosser*].

[2] Joshua Gamson, *Must identity movements self-destruct? A queer dilemma*, 42 SOCIAL PROBLEMS 390, 396 (1995).

[3] Steven Seidman, *Identity politics in a 'postmodern' gay culture: some historical and conceptual notes*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 105, 133 (M. Warner ed., 1993).

[4] Nixon v. Vancouver Rape Relief Society, [2003] 22 B.C.L.R. (4th) 254. Herein, an organization fighting for women against male induced violence refused to help a post-operative male-to-female transsexual for not being "women enough".

[5] JANICE G. RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE 104 (1994) [hereinafter *Raymond*].

[6] 18 INTERNATIONAL ENCYCLOPAEDIA OF THE SOCIAL & BEHAVIOURAL SCIENCES 12659 (Neil J. Smelser & Paul B. Baltes eds., 2001) [hereinafter *International Encyclopaedia*].

[7] *Id.*, at 12660.

[8] *See generally*, RUTH VANITA & SALEEM KIDWAI, SAME-SEX LOVE IN INDIA: READINGS FROM LITERATURE AND HISTORY (2000) [hereinafter *Vanita*]; *See also*, R. A. WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 67 (1997). Here, it has been rightly noted by Wilchins, "It is not so much that there have always been transgendered people; it is that there have always been cultures which imposed regimes of gender".

other more pressing ones.[9] In India, queer politics engages with sexuality as a fluid concept and sees 'queer' as a political and unstable term continuously challenging heteronormativity through different channels, either through gay/lesbian/transgender, feminist or other identities.[10] Ironically, even though *Koushal v.NAZ Foundation and Others*[11] re-established the unnatural-ness of the LGBT identity, *National Legal Services Authority v.Union of India and Others*[12] stepped away from commenting on Section 377 of the Indian Penal Code, 1860 and noted that the transgender community in India needed special attention as their legal claim to gender identity and sexual orientation is different,[13] with of course drawing a distinction between sexual orientation claim and gender identity claim.[14]

Keeping this uniqueness and difference in mind, this Article seeks to highlight the problems faced by the trans-community not just in the social and legal imposition of heterosexual binaries but within the queer community itself. References to the *NALSA judgment* have been made throughout the work. This Article, in Part I, makes an attempt to critically analyse this judgment and tries to situate the court's interpretation of trans-people's legal and constitutional right within the discourse around sex and gender identity. Part II puts forward the dilemmas queer theory presents for the trans-community in general, and *hijras,* in particular. Part III examines the debate between the immutability of gender and sex and the constitutional approach to these issues, followed by Part IV which looks at the accommodation of the transgendered discourse within the religious narrative. The conclusion summarises the Article, putting forth a few suggestions and discussing the scope for future endeavours in how engagement with the queer politics should be shaped in the light of active participation of trans individuals.

II. ARE *HIJRAS* QUEER ENOUGH?

> "*Theorists of gender have seen transsexuals as possessing something less than agency ... transsexuals are infantilized, considered too illogical or irresponsible to achieve true subjectivity, or clinically erased by diagnostic criteria; or else, as constructed by some radical feminist theorists, as robots of an*

[9] Nivedita Menon, *Sexuality, caste, governmentality: Contests over 'gender' in India*, 91 FEMINIST REV. 94, 98 (2009).
[10] *See generally*, J. Sharma & D. Nath, *Through the prism of intersectionality: same-sex sexualities in India, in* SEXUALITY, GENDER AND RIGHTS. EXPLORING THEORY AND PRACTICE IN SOUTH AND SOUTHEAST ASIA (G. Misra & R. Chandiramani eds., 2005).
[11] AIR 2014 SC 563 [hereinafter *Koushal*].
[12] AIR.2014 SC 1863 [hereinafter *NALSA*].
[13] *Id.*, at ¶18.
[14] NALSA, *Supra* note 12, at ¶20.

insidious and menacing patriarchy, an alien army designed and constructed to infiltrate, pervert and destroy 'true' women."[15]

A transsexual is an individual whose core identification of oneself is at odds with the gender one is socially designated.[16] The word 'transgender', since the late 1980s, has become an umbrella term for individuals identifying as transvestites, transsexuals, gender queer, intersex, no gender or multiple genders[17] and trans-subjectivities.[18]*NALSA* uses 'transgender' as an umbrella term to include those who identify as *hijras*, *kothis*, *kinnars*, *aravanis*, *jogappas*, eunuchs and pre-operative, post-operative, non-operative transsexuals who identify with the persons of opposite sex.[19]

The approach of this Article is to delve not just into the politics of knowledge of *hijras* but also into the *hijra* politics of knowlssedge.[20] The question that arises is whether trans-people are merely a tool of theory? What a humanist approach demands is the understanding that many within the transgender community itself have discomfort with the term 'transgender'. Preferring the term 'trans person' does not germinate into replacement of one term with the other but highlights that many self-identified transsexuals feel that their subjectivities are rendered frivolous when included under the umbrella of transgender. Furthermore, 'transsexual' people feel that they are not trans anything but misidentified.[21] One would only imagine if the category intended itself cannot comprehend the complexities of one's identity, then how would a generic 'queer' ever do the same? Sircar points out how 'queer' in India is here to stay, but cautioning against assimilating identities says that sexual orientation should not become a privileged defining factor of difference among non-heteronormative sexualities.[22]

Leslie Feinberg, while writing on transgender liberation, remembers that it was a gay transvestite at the forefront of the 1969 battle at the Stonewall Inn in New York, who gave birth to the modern lesbian and gay movement[23] but the transgender community today struggles to

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[15] (Quote by) Sandy Stone, *in*J. EPSTEIN & K. STRAUB, BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 294 (1991).
[16] 23 INTERNATIONAL ENCYCLOPAEDIA, *Supra* note 6, at 15889.
[17] 2 ENCYCLOPAEDIA OF SOCIAL PROBLEMS 953 (Vincent N. Parrillo ed., 2008) [hereinafter *Social Encyclopaedia*].
[18] *See generally,* Stephen Whittle, *Gender Fucking or Fucking Gender*, *in* BLENDING GENDERS: SOCIAL ASPECTS OF CROSSING-DRESSING AND SEX-CHANGING 196 (R. Ekins & D. King eds., 1996); Susan Stryker, *The Transgender Issue: An Introduction*, 4 GAY AND LESBIAN QUAR. 145 (1998).
[19] NALSA, *Supra* note 12, at ¶11.
[20] Vinay Lal, *Not this, Not that: The Hijras of India and the Cultural Politics of Sexuality*, 61 SOCIAL TEXT 119, 133 (1999).
[21] RICHARD EKINS & DAVE KINGS, THE TRANSGENDER PHENOMENON 28 (2006).
[22] Oishik Sircar, *Questioning 'queer'*, (Feb., 2006), http://infochangeindia.org/agenda/claiming-sexual-rights-in-india/questioning-queer.html.
[23] Leslie Feinberg, *Transgender Liberation: A Movement Whose Time Has Come, in* THE TRANSGENDER STUDIES READER 205, 206 (Susan Stryker & Stephen Whittle eds., 2006).

win the required understanding from the lesbian and gay movement. Interestingly, the public protests against the *Koushal judgment* almost always include trans persons hugely in numbers, yet many a time the judgment and the entire discourse around Section 377 of the Indian Penal Code, 1860 gets reduced to it being referred to as the 'gay' judgment or the 'gay' sex clause.[24]

The criticism of the queer theory is mainly premised on the fact that it assumes a 'white, gay maleness as the prototype of queer subjectivity,'[25] and of not giving enough importance to the struggle of trans persons for gender determination and recognition.[26] The queer movement has become so exclusionary that it focuses only on the notion that being gay is as good as being straight.[27] De-gendering, when pursued in a conventional manner denies people the choice who want to identify in a sexed and gendered way.[28] For instance, Serena Nanda documents her interviews with *hijras* who show their desire of being with their *husbands*.[29]Therefore, trans persons who do not necessarily see themselves as transsexuals or transvestites, depart from clear cut binaries. They seek to live as social *men* or social *women* who may or may not seek sex reassignment surgeries.[30] Here, trans persons again face the problem of not being allowed objectivity or sexuality. Objectivity is lost because they are put in the odious position of having to justify the sex-role change they might have undertaken to accommodate their gender incongruity, and loss of sexuality is due to imposition of repressed homosexuality by medical surgeons.[31]*Hijras*, who are known to over-accentuate the desired gender role's behaviourisms and habits, when don't undergo surgery are accused of reinforcing stereotypical model of uberfeminity or seeking to acquire male power and privilege[32] and when they do undergo surgery are seen as surgical constructions of imaginary masculinities or femininities.[33]

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[24] *See generally*, *Gay sex judgment greeted with delight and jubilation*, The Hindu, July 4, 2009, http://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/article219581.ece; Smriti Singh, *Day after,SC's gay order in spotlight*, The Times of India, Apr. 17, 2014, http://timesofindia.indiatimes.com/city/delhi/Day-after-SCs-gay-order-in-spotlight/articleshow/33834308.cms; Kian Giaz*, [READ 377 JUDGMENT]: Supreme Court bans gay sex again as 'constitutionally unsustainable'*, (Dec. 11, 2013), http://www.legallyindia.com/201312114179/Bar-Bench-Litigation/breaking-supreme-court-bans-gay-sex-again.

[25] 18 INTERNATIONAL ENCYCLOPAEDIA, *Supra* note 7, at 12661.

[26] *See generally*, V.K. NAMASTE, INVISIBLE LIVES: THE ERASURE OF TRANSSEXUAL AND TRANSGENDERED PEOPLE (2000).

[27] Pallavi Seshadri & L. Ramakrishnan, *Queering Gender: Trans Liberation and Our Lesbigay Movements*, 14.3 TRIKONE MAGAZINE 9 (1999).

[28] SURYA MONRO, GENDER POLITICS: CITIZENSHIP, ACTIVISM AND SEXUAL DIVERSITY 246 (2005) [hereinafter *Monro*].

[29] SERENA NANDA, NEITHER MAN NOR WOMAN: THE HIJRAS OF INDIA 39 (2nd ed. 1999).

[30] J. CROMWELL, TRANSMEN AND FTMS: IDENTITIES, BODIES, GENDERS & SEXUALITIES 25 (1999).

[31] STEPHEN WHITTLE, RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS 71 (2002) [hereinafter *Whittle*].

[32] SALLY HINES, TRANSFORMING GENDER: TRANSGENDER PRACTICES OF IDENTITY, INTIMACY AND CARE 17 (2007).

[33] WHITTLE, *Supra* note 31, at 72.

Queer theorists argue for the nature of gender or sexuality to be based on performativity. A logical relation then exists between performance and appearance. The performance at any given point determines the appearance of the individual. For a law to recognise an individual, that individual has to have an appearance. Yet that appearance does not need to have attributes attached to it, whence it becomes an 'identity'.[34] The problem in attaching appearance with identity is that the appearance thence invokes attached attributes. While placing transgenders within the discourse of sexuality, it is not necessarily true that all transgenders are sexually queer.[35]

The central tenets of queer theory are rooted in post-structuralism and anti-foundationalism and it pivots on transgression or permanent rebellion.[36] There is a need to embrace a theory of gender pluralism which would take greater account of the ways in which sex and gender are a spectrum that "include male and female as well as a range of (probably) less common, but socially viable, other-gendered positions".[37] Bornstein takes a step further from queer theory and offers a view of real life gender fluidity where she creates a third space (not third sex), a space outside of gender, taking cognizance of different and diverse truthful experiences and lived realities of many people undergoing gender transformations.[38] Regardless of whether trans persons want to fit in these spaces or not, queer theory which constantly tries to engage with the 'other' identities, fails to cater to the objectivity that the *hijras* look for.

Taking forward the discussion from gender fluidity, the fundamentality of this 'gender' and its relation with 'sex' takes the centre stage. Hence, the next part of the Article discusses what relevance does gender actually have in transgender jurisprudence.

III. GENDER V. SEX – BETWEEN THE LEGS OR IN THE HEAD?

> "*Intersexuals and transsexuals who attempt to "fit" into a sexually divided world reveal the regulatory mechanisms through which sexual difference is enforced; whereas intersexuals and transsexuals who refuse an either/or "sexed" identity disturb the infallibility of the binary*"[39]

Hijras, since the pre-British era had the right to beg as a legitimate *vatan* (hereditary right) and they held documents to prove this right recognized by the king.[40] This recognition was

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[34] ANDREW N. SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW 159 (2002) [hereinafter *Sharpe*].
[35] *Id.*, at 165; Prosser, *Supra* note 1, at 263.
[36] Steven Seidman, *Symposium – queer theory sociology: a dialogue*, 12 SOCIOLOGICAL THEORY 166, 173 (1994).
[37] MONRO, *Supra* note 28, at 19.
[38] KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 8 (1994).
[39] M.J. Hird, *Gender's nature: Intersexuals, Transsexuals and the "sex"/"gender" binary*, 1 FEMINIST THEORY 347, 359 (2000).

justified not by virtue of their being male or female or male impersonating as female but by virtue of these *hijras* belonging to the community. The beginning of institutional marginalization from the advent of colonialism can still be seen today. The discrimination and violence against the queer and trans community has been normalized to such an extent in India that even human rights groups generally shy away from collaborating with queer rights.[41]

The first and foremost contention of the transgender movement is destabilizing the traditionally undisputable binaries of male and female. The society in which sex is understood in binary terms, the hermaphroditic, the trans-sex, the other-sex, the third-sex, becomes the abnormal.[42] The transgender movement questions gender role identification without assuming any sexual preference.[43] While homosexuals' fluidity of sexual orientation also challenges traditional heterosexual binary assumptions, they themselves live within the female-male binary.[44] The past recognition of same-sex unions has generally occurred within the gender constructs mimicking the dominant-passive construct of heterosexual relationship.[45]

The societal insistence from generation to generation that certain bodies must perform socially and culturally assigned roles from birth and throughout the course of one's life creates an illusion that it is the body, and not social institution that dictates the performance of these acts.[46] If the two categories of male and female are not the ultimate deciding categories justifying certain social institutions, then a heterosexual relation ceases to be the most important one.[47]Trans persons get caught up in this oppressive societal gender as well as sexual expectations. Gender which is psychologically maleness and femaleness,[48] gets represented legally to be immutable through time and space and be equated with sex. By materializing gender as biologically determinable, law omits alterative realities of sex for trans litigants.[49] Hence, trans persons get side-lined from their rights by being confined to sex altering surgeries.

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[40] Laurence W. Preston, *A Right to Exist: Eunuchs and the State in Nineteenth-Century India*, 21 MODERN ASIAN STUD.371, 381 (1987).
[41] Arvind Narrain, *The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7 HEALTH AND HUMAN RIGHTS 142, 149 (2004).
[42] Jennifer Rellis,*"Please write 'E'inthis Box" Toward Self-Identification and Recognition of a Third Gender: Approaches in The United States and India*, 14 MICH. J. GENDER & L. 223, 239 (2006-2007) [hereinafter *Rellis*].
[43] 3 ENCYCLOPEDIA OF ACTIVISM AND SOCIAL JUSTICE 1389 (Gary L. Anderson & Kathryn G. Herr eds., 2007).
[44] Rellis, *Supra* note 43, at 19.
[45] William N. Eskridge, *The History of Same-Sex Marriage,* 79 VA. L. REV. 1419, 1437-46, 1453 69, 1510 (1993).
[46] Andrew Gildent,*Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 90 (2008) [hereinafter *Gildent*].
[47] VANITA, *Supra* note 8, at 23.
[48] Sam Winter,*Transgender Science: How Might it shape the way we think about Transgender Rights?*,41 HONG KONG L.J. 139, 140 (2011-2012).
[49] Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN'S L.J. 137, 160 (2007).

The Indian law's understanding of sex and gender is biological and to bring trans persons within constitutional and statutory provisions, this understanding needs to be dismantled by exposing the culturally contingent nature of sex/gender systems.[50] In fact, Judge Radhakrishnan in *NALSA* observes how the Indian law does operate on the paradigm of gender binary of male and female.[51] Therefore, *NALSA* recognizing the legal right of the trans persons to 'third gender' stresses on how (in the context of sex re-assignment surgery) psychological test instead of biological test should be applied because "psychological factor and thinking of a transsexual has to be given primacy *than binary notion of gender* of that person".[52] Reading Articles 14, 15, 16, 19 and 21 of the Indian Constitution in a gender-neutral sense, *NALSA* reads gender identity as an integral part of 'sex' and holds that no person should be discriminated based on their gender identity.[53] Seen as a fundamental part of an individual's core being, the court interpreted 'sex' in a much wider scope of an individual's choice of self-identified gender, protected by freedom of expression under Article 19 and fundamental right to dignity under Article 21 of the Indian Constitution.

Popular media and medical press have made transsexualism a matter of the body's surface.[54] Critical gender theorists argue that in a society where sex is equated with genitals, transsexuals are led to believe that in order to express their gender identity, they must undergo genital transformation.[55] It is also argued that a trans person's determination to match physical body with the psychical identity can be seen as a more complex relationship between the psychical body and the imaginary body.[56] The theorization of a transgender body has been in-between bodies, yet many argue that when it comes to picturization of a transgender body in flesh, it always emerges as a transsexual body.[57]

The judicial task of sex determination has been through two different approaches – the essentialist approach and the cluster approach.[58] The court in an essentialist approach looks at one essential feature and then assigns all individual features biologically to either the female sex

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[50] Gildent, *Supra* note 46, at 85.
[51] NALSA, *Supra* note 12, ¶49.
[52] NALSA, *Supra* note 12, ¶34.
[53] NALSA, *Supra* note 12, ¶75.
[54] Vernon Rosario, *Transgenderism comes of age*, 31 GAY & LESBIAN REV. 5 (2000).
[55] Anne Bolin, *Transcending and Transgenderings: Male-to-Female Transsexuals, Dichotomy and Diversity, in*THIRD SEX, THIRD GENDER 454 (Gilbert Herd ed., 1994).
[56] Moira Gatens,*A Critique of the Sex-Gender Distinction, in*IMAGINARY BODIES: ETHICS, POWER AND CORPOREALITY 3-20 (1996).
[57] JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE 76 (2005).
[58] KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN THE LAW 64-69 (1985).

or the male sex.[59] In the cluster approach, the court suggests whether an individual falls into one sex or the other by looking at a group of similar features.[60] Retreating from these two approaches and ensuing identity rights judicially seems to be the first step for trans persons but politics based on identity has been accused of being too narrow and impersonating the simplistic habits of minds of the oppressors.[61] Finding identity through equal protection claim for the same constitutional rights, therefore, turns out to be the next step. Nancy Levit argues that the equal protection claim is flawed as well. She argues that such an approach requires a comparison between the sexual other and an idealized heterosexual norm.[62] The court's approach becomes 'normalist', abandoning the equal protection doctrine. It becomes a "misguided search for sameness",[63] both by the courts and the petitioners, to fit these cases which have different patterns of discrimination with the rigid template established by race and gender cases.[64] People who live at the intersection of persistent racism, sexism, poverty would be further marginalized as mainstreaming will work selectively[65] and such an approach faces the constant risk of importation of frailties of heterosexual relationships, like traditional gender norms or divisions of labour.[66] While formal equality approach has been successful in India,[67] human rights theorists look for advancement of sameness approach which employ strategies which "emphasize shared humanity irrespective of sexual orientation: not what makes gays the same as straights, but what are good qualities that make straights and gays alike as people."[68]

The medicalization further results in heterosexualisation of the transgender jurisprudence, pronounced in (female-to-male) transgender men who are seen exclusively attracted to women.[69] In determination of which bodies are male or female, sex is arbitrated as a mixed question of fact and law. Courts and agencies become fact-finders and inspect transgender bodies, collecting testimonial evidence and scrutinizing medical records to reach a final conclusion to the question

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[59] For example, Corbett v. Corbett [1970] 2 All ER 33; C and D (Aus) [1979] FLC 90-636; SY v. SY [1962] 3 All ER 55.
[60] For example, European Court of Human Rights cases – Van Oosterwijk v. Belgium (1980) ECHR Series A, No 40; B v. France (1992) ECHR, Seroes A, No 57; MT v. JT 150 NJ Super 77 (1977); 355 A 2d 204.
[61] Elin Diamond, *Identity politics Then and Now*, 37 THEATRE RESEARCH INT'L 64 (2012).
[62] Nancy Levit, *A different kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L. J. 867, 885 (2000) [hereinafter *Levit*].
[63] Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 299 (1994).
[64] Kenji Yoshino, *Assimilationist Bias in Equa Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell",* 108 YALE L. J. 485, 487 (1998).
[65] Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 325 (1998).
[66] Levit, *Supra* note 62, at 26.
[67] Naz Foundation v. Govt. of NCT of Delhi, (2009) 160 DLT 277 [hereinafter *Naz*].
[68] Levit, *Supra* note 62, at 34.
[69] I. Pauly, *Female Transsexualism: Part I*, 3 ARCHIVES OF SEXUAL BEHAVIOR 487, 502 (1974).

– Are they male or female?[70] For instance, the Court in *Faizan Siddiqui v.SashastraSeema Bal,*[71] on the basis of medical records, conveniently placed the petitioner in the safe binary of female and pursued to grant her (the pronoun as used by the court) rights by the virtue of being a fit normal female. The Court failed to show any concern towards the realities and possibilities of alternative gender. *NALSA*, here again, takes a revolutionary step in following a different approach in giving voice to the unheard. The narratives of trans persons play a huge role in the judgment in defining abuse and atrocities they face in their daily lives.[72]

The inherent problem with the laws in India is that the court's approach has an arguable underlying presumption that it is headed in the right direction as compared to the western world, which took decades to reach where they are today. In the Indian context, applying post-modern queer theories directly without acknowledging the local gender transgressions creates more questions than answers. The transgender community may not be the same in and around the world but what is common among them is the shared dynamic of resistance.[73] Thus, this goes further to prove that the trans identity is not just limited to genital mutilation, crises of the socially assigned gender and incorrect use of social agencies.

IV. WITHIN RELIGION: A NECESSARY STEP?

A question generally arises: Could one 'fit' the transgender discourse in the narrative of the 'religion'? Could one evoke religion to its own aid, seeking to denounce opponents and find alliance in a relatively hostile environment? For answering these questions, it becomes important to first notice the way transgenders have been looked at in religions and mythologies.

The Greek mythology is filled with instances of 'gender transgression'.[74] From Gods[75] to mortals[76], there are wide documentations of 'transgendered performances' in both Greek and

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[70] ChinyereEzie,*Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination-The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 161 (2011).

[71] 2011 (124) DRJ 542. The petitioner was born an intersex, surgically altered to a female and filed a suit against discrimination based on medical examination employed for appointment for a job.

[72] NALSA, *Supra* note 12, ¶108.

[73] Peter A. Jackson, *Pre-Gay, Post-Queer: Thai Perspectives on Proliferating Gender/Sex Diversity in Asia*, *in*GAY AND LESBIAN ASIA: CULTURE, IDENTITY, COMMUNITY 1, 11 (G. Sullivan & P.A. Jackson eds., 2001).

[74] *See*, WHITTLE, *Supra*note 31, at 22. Though one could question the nature of transgression itself. The 'modern' boundaries between the 'male' and the 'female' cannot be super-imposed into Grecian times. Hence the transgression being talked about is in the modern sense. To understand the nature of such 'performances' then would require a much extensive inquiry into those times themselves, something which is beyond the scope of this paper.

[75] *See*, RAYMOND, *Supra* note 5, at 107. To cite an example, Zeus used to take a myriad of forms to engage in sexual activities with women, some of them being of women themselves. Similarly, there are instances of Gods, like Dionysus, taking the form of the 'other sex' to engage in sexual activities with individuals of the 'same sex' in Ovid's *Metamorphoses* itself. To risk another example is the peculiar birth of Dionysus himself. He was born of Zeus, after he had been sewn into Zeus' thigh after the latter had killed his mother.

Roman mythology. Christianity, though as such punishing transgender/transsexual performance[77], could also be said to imply the same.[78] Similarly Hinduism also has numerous instances of transgender performance in both its text,[79] and also in practice.[80]

The next logical step of inquiry would be to look at the positions of transgender performance in religions, to explore the attributes attached to them and appropriate them to the arguments that we have to make. But to do that would be to subvert the theme of this Article. To place the transgender discourse within the narrative of the religion would be to 'assume the voice of the authority' to speak against the authority itself. To place them under the narrative of the religion would be then asking for a re-appropriation of space, acknowledging that space is a commodity with the 'dominant'.[81] It would be acknowledging the values attached and the identity formed which would then be the basis for the arguments to be advanced. That is something that the author argues against. It is submitted thus, that there has to be a new discourse, a re-creation of space and not just re-appropriation within the existing power structure. Hence, a necessary departure is the next best step of action.

V. CONCLUSION

Breaking away from boundless trans-theorizations, the previous sections have made an attempt to look behind the veil of science and culture and actually see the person about whom the intellectuals never stop talking about. Conceptualizing and critiquing queer reading of trans subjectivities indeed brings out where and how trans persons are under/mis-represented in the

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[76] *See*, WHITTLE, *Supra* note 31, at 22. Transgender/transsexual performance was not limited only to Gods. There were documented instances, *inter alia*, of young men who wanted to live their lives as women to the extent of amputating their 'generative organs' also.

[77] Apart from Deuteronomy 22: v 5 which prohibits 'cross-dressing', the first codified condemnation of cross-dressing can possibly be traced back to Grotius' *Decretum* (1140). *See* WHITTLE, *id.*

[78] Initially one could look at the Holy Trinity to find an example of transgender performance. It presents an example of male mothering by God of Christ (with Mary just being the vessel through which Christ was born.) *See* RAYMOND, *Supra* note 5, at 107. One could also talk about the numerous instances of Saints who were later found out to be 'females', usually after their genitals were examined on their death. There also have been instances where the Church has allowed female cross-dressing, possibly because of values of 'chastity' while looking down upon male cross-dressing. *See*WHITTLE, *id.*, at 23-25.

[79] One needs only delve into Hindu mythological texts to find examples of transgender performances. The epic *Mahabharata* itself has two overt examples exhibited during the battle itself. One is the example of *Shikhandi*, originally born as *Shikhandini* who later goes on to be transformed into a male and then be instrumental to the death of *Bhisma* by *Arjun*. The other example involves *Krishna* in his female form of *Mohini* who marries *Iravat* to satisfy a boon granted to the latter.

[80] To mention but just one practice from South India, the cult of Kuttantavar which follows *Iravat* celebrates the death of *Iravat* on the 18th day of the *Battle of Indisprashtha*. The celebrations are said to have a major participation from transgenders (*alis*) who symbolically marry *Iravat* to symbolise the marriage between *Iravat*and *Mohini (Krishna)* and later get widowed upon his death. They also follow the rituals of a widow, *inter alia* donning white clothes for a period of thirty days. *See*, Alf Hiltebeitel, *Dying before the Mahabharata War: Martial and Transsexual Body-Building for Aravan*, 54 J. ASIAN STUD. 447 (1995).

[81] *See generally*, UpendraBaxi, *Constitutionalism as a Site of State Formative Practices*, 21CARDOZO L. REV. 1183 (2000).

mainstream queer politics. Transgender refusal of biological or mis-assigned gender mandatorily becomes a critique of gender/sex binary.[82] The *hijra* community claims their right to live as men and women positioning themselves within the departments of binary system.[83]Trans persons are seen as valued examples of gender performativity by non-transsexual queers only when they abandon their desire for congruence.[84]

The biggest problem that remains for the Indian trans persons is that due to rampant trans-phobia as a result of their blatant identity, very few have access to medical resources and even fewer can afford them.[85] Therefore, the assumption that transgender idealization of gender incongruence makes, which is that everybody has the luxury to take on gender roles,[86] is grossly wrong. Moreover, inspite of the societal and medical pressure, not all trans persons and intersex people want the operation and prefer living in the alternate gender options.[87] Rather, medical profession is accused of inventing transsexualism as a disorder[88] and sees the surgical *treatment* of transsexuals to fulfil "the wish of a transsexual person to re-enter the society as a person with the physical and mental gender of choice without being 'spotted' or without anyone's 'knowledge'"[89].

The inclusion of sexual orientation in the reading of Article 15 of the Indian Constitution by *Naz*[90] has been well and good but poses the problem of gendered view of sexual orientation. In this context, *NALSA* read Article 15 and 16 to include 'gender identity'. It did not conflate gender identity with sexual preference and answered the question whether trans persons will be protected against discrimination based on their sexuality or gender identity. The word '*gender identity*' itself showcases what the society perceives the individual to be, '*sexual identity*' on the other hand, is how the individual would identify themselves.[91] For instance, The International Bill of Gender Rights (ICTLEP 1995) recognizes an individuals' right to *self-identified* gender identity.

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[82] VIVIANE NAMASTE, SEX CHANGE, SOCIAL CHANGE: REFLECTIONS ON IDENTITY, INSTITUTIONS, AND IMPERIALISM 7 (2005).
[83] PATRICIA ELLIOT, DEBATES IN TRANSGENDER, QUEER, AND FEMINIST THEORY: CONTESTED SITES 36 (2010) [hereinafter *Elliot*].
[84] *Id.*
[85] Jennifer Wong,*Recasting Transgender-Inclusive Healthcare Coverage: A Comparative Institutional Approach to Transgender Healthcare Rights*, 31 LAW &INEQ. 471, 485 (2012-2013).
[86] ELLIOT, *Supra* note 83, at 38.
[87] SEXUAL ORIENTATION & GENDER EXPRESSION IN SOCIAL WORK PRACTICE 116 (Deana F. Morrow & Lori Messinger eds., 2006).
[88] Dwight B. Billings & Thomas Urban, *The Socio-Medical Construction of Transsexualism, in*BLENDING GENDERS: SOCIAL ASPECTS OF CROSS DRESSING AND SEX-CHANGING 99 (Richard Ekins & Dave King eds., 1996).
[89] Dasari Harish & B. R. Sharma, *Medical Advances in Transsexualism and the Legal Implications*, 24 AM. J. FORENSIC MEDICINE & PATHOLOGY 100, 102 (2003).
[90] Naz, *Supra* note 67, at ¶104.
[91] Julie A.Greenberg,*Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 282 (1999).

Therefore, the trans persons should not be seen as just another pathological creation of mental disorders or live demonstrations of gender dysphoria or gender terrorists or gender outlaws (although these two terms are quite popular among the trans discourses). The movement should be perceived to be breaking away not only from heterosexual prejudices but from queer prejudices as well. Although the *NALSA judgment* is an extraordinary judgment in terms of its understanding of gender/sex nuances and trans person's legal rights, the severe under-representation of transgender community in India still remains shadowed by the queerness of identities. One of the most telling things that stand out in the judgment is that recognizing the transgender rights is not justice to a particular set of people but to the entire society because it upholds the rule of law.[92]

Finally, a question raised is that is the political movement is just about assertion of identity? Perhaps no, perhaps yes. Because even with gay prides, feminist poetry and peace prizes, these humans still exist as vessels of humiliation and abuse, finding definition in slangs and medical irregularities. Their voices of resistance are stitched into the interstices of the cracks that define our community. They exist at the periphery of the periphery, begging, demanding and celebrating. It is time for us to acknowledge their presence, their voice and their diversity. It is not only about LGBTQ or I. It is about humanity.

[92] NALSA, *Supra* note 12, at ¶126.

Vanya Kumar, *"Sed quis custodiet ipsos custodes" – Conflicting Claims: Judicial Appointments and the Paradigm of Judicial "Independence"* 3(1) NLUJ Law Review 78 (2015)

"SED QUIS CUSTODIET IPSOS CUSTODES?"

CONFLICTING CLAIMS: JUDICIAL APPOINTMENTS AND THE PARADIGM OF JUDICIAL "INDEPENDENCE"

VANYA KUMAR*

This Article seeks to throw light on the contemporary debates on "judicial independence", specifically in the context of the pressing problem of appointments to the higher judiciary in India. Noting the naturalization of the phrase in popular discourse, it cautions against the same, drawing attention to the fact that far from exhibiting any sort of universal consensus, judicial independence remains one of the most contested concepts across the globe. It further delineates and dichotomizes the varied disputes as regards the issue; whether judicial independence is a pre or post-appointment guarantee; whether absolute judicial independence can be considered a democratic goal or is it inherently undemocratic, and whether accountability and independence can co-exist harmoniously or are antithetical to each other.

In tracing the history of the system of appointments in India through the course of the three Judges' Cases, it attempts to define "independence" with regard to international and domestic standards and interpretations. It argues that the term should not be pedestalized or serve as a means of insulating the judiciary from the representative system of checks-and-balances, while simultaneously also acknowledging the need for an ideologically uncompromised judiciary to protect the democratic values against political majoritarianism. Through a critical analysis of the Constitution (121st Amendment) Bill, 2014, and the National Judicial Appointments Commission Bill, 2014, it highlights the urgent need for relocation of the dialogue from its popular understanding as a tussle for supremacy between the judiciary and the executive, to the sphere of larger public interest, positioning it as the single largest stakeholder.

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TABLE OF CONTENTS

I. INTRODUCTION

"Judicial independence" is an often heard phrase in the Indian public domain nowadays. It has been lobbed around like the proverbial tennis ball from one side of the court to the other, as the judiciary and executive engage in a game of verbal one-upmanship regarding the pressing matter of judicial appointments and transfers within the higher judiciary. The passing of the enabling Constitution (One Hundred and Twenty-First Amendment) Bill, 2014 (hereinafter *Amendment Bill*), as well as the National Judicial Appointments Commission Bill, 2014, in both houses of Parliament, and the same having received Presidential assent, has once again led to the resurgence of the debate as to what precisely constitutes "judicial independence", and whether the proposed Bills run afoul of this constitutional mandate. The Judiciary hints at attempts by the political class to gain control over its functioning through an abridgment of its current relative insulation from the other organs of government, citing executive interference in the collegium

recommendation of Mr. Gopal Subramanium's name for elevation to the Supreme Court.[1] The political class, on the other hand, emboldened by allegations made against the collegium system by one of its own former members,[2] demands greater accountability in procedure.

The history of judicial appointments in India has largely been checkered. The seven-judge bench decision in *S.P. Gupta v. Union of India,*[3]popularly known as the *Judges' Transfer Case*, specifically upheld the primacy of the executive over the Chief Justice in the matter of appointments of judges to the higher judiciary. However, this decision was eventually overruled, on a seven by two majority, in *Supreme Court Advocates-on-Record Association v. Union of India,* [4] also known as the *Second Judges Case*, which went on to establish the current beleaguered model of judicial appointments and transfers— the collegium system. It is this near-absolute independence from executive control, unique to the Indian democratic system, which has seen the Indian judiciary being characterized as the "most powerful in the world."[5] The same is also considered the principal reason behind the judiciary's increasing activism and its ability to render politically unpopular decisions, including the cancellation of the 122 spectrum licenses in the infamous "2G Scam Case,"[6] or the barring of convicted legislators from serving in office,[7] or the various rulings on several Public Interest Litigations (PILs) for securing socio-economic rights of the citizens of the country against major State actors and agencies.

In contemporary times, however, nearly twenty years after the institution of the scheme of the collegium, it has become possible to argue that the decision, much feted at the time of rendition, has garnered far more infamy and notoriety than praise. It is noteworthy that the Supreme Court itself, as recently as 2013, dismissed a PIL filed by Suraz India Trust challenging the collegium system of appointments on account of the absence of locus standi.[8] Regardless, there appears to be a growing national sentiment, exhibited by both the legislators and members of the legal profession, including those within the judiciary itself, that the collegium system has failed its basic tenet— that of maintaining the independence of the judiciary.

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[1] *Government dropped Gopal Subramanium's name without my consent: CJI*, THE HINDU, July 1, 2014.
[2] *Katju's collegium can of worms: Why not fix a system that is broken?,* FIRST POST, (Aug. 12, 2014), http://www.firstpost.com/india/katjus-collegium-can-of-worms-why-not-fix-a-system-that-is-broken-1659725.html.
[3] S.P. Gupta v. Union of India, AIR 1982 SC 149. [Hereinafter *S.P. Gupta*]
[4] Advocates-on-record Association v. Union of India, AIR 1994 SC 268.[Hereinafter *Advocates-on-record*]
[5] Raju Ramachandran, *Judicial Supremacy and the Collegium*, *in* CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS (Santosh Paul ed., 2013).
[6] *2G Verdict: SC Cancels 122 Licenses Issued After Jan 2008*, MONEY CONTROL (Feb. 02, 2012), http://www.moneycontrol.com/news/current-affairs/2g-verdict-sc-cancels-122-licenses-issued-after-jan-2008_661271.html.
[7] Niharika Mandhana, *India Supreme Court Bars Felons From Legislatures*, WALL STREET JOURNAL, (Jul. 12, 2013).
[8] *Supreme Court Won't Revisit Collegium System*, THE HINDU, Jan. 8, 2013.

This standpoint, while not unanimous, eventually led to the passing of the Constitution (120th Amendment) Bill, 2013, in the Rajya Sabha, which was to function as an enabling provision for the National Judicial Appointments Commission Bill, 2014. Later, at a Cabinet meeting in December, 2013, the government gave the go-ahead to grant constitutional status to the proposed Commission to ensure that its composition could not be altered through an ordinary legislation. While the UPA government was hopeful of tabling the Bill in the following Parliamentary session,[9] the subsequent dissolution of the 15th Lok Sabha with the General Election of 2014, led to its lapse. The decisive rout of the incumbents and the radically altered political landscape suggested that the issue may be placed on the backburner till the new government found its political bearings, however, contrary to expectations, the issue was instead fast-tracked at a dizzying pace. Both Houses of Parliament almost unanimously passed, and with inexplicable haste, the two laws that sought to abolish the collegium system and replace it with a National Judicial Appointments Commission (hereinafter the "**NJAC**"). There was very little debate and it was clear that Members of Parliament were determined to cut the Supreme Court to size.[10] Contextually, though, this political maneuver may not be entirely unexpected as, interestingly enough, while differing on the process of introduction of the Bill and its provisions, both the former government and the former Opposition parties, were united in criticizing the functioning of the judiciary, while seeking to scrap the collegium system, stating it was essential to restore the delicate balance of power which had been disturbed.[11]

In a curious turn of events, the Amendment Bill, even before becoming enforceable law through the fulfillment of the additional requirements of ratification by more than half the number of states has already faced Constitutional challenges in the Supreme Court.[12] Since the inception of the Bill, inevitably and perhaps necessarily, a legal and public controversy has been generated**.** While its detractors, on the one hand, view it as a Parliamentary attempt to contain a judiciary that has become infamous amongst the political circles for what is alternately called its "activism" or "overreach", supporters of the Amendment Bill, on the other, perceive it as an attempt at bringing transparency into a system of judicial appointments, long plagued by allegations of corruption, nepotism, inefficiency and unaccountability.[13]

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[9] *Cabinet Grants Constitutional Status to Commission For Appointment of Judges*, INDIA TODAY, (Dec. 26, 2013).
[10] Arvind P. Datar, *A Fatally Flawed Commission*, THE HINDU, Aug. 18, 2014.
[11] *Rajya Sabha Passes Bill For New System of Appointing Judges*, THE INDIAN EXPRESS, Sept. 5, 2013.
[12] Kian Ganz, *What They Said: SC Refuses NJAC Petitions But Leaves Door Ajar*, (Aug. 25, 2014), http://www.legallyindia.com/201408254996/Bar-Bench-Litigation/sc-refuses-njac-petitions.
[13] L.K. Advani, *Collegium System Should Be Revisited*, DNA, March 25, 2013.

II. THE COLLEGIUM SYSTEM

A. BACKGROUND: INSTITUTION OF THE COLLEGIUM SYSTEM

It is an open secret that linguistic considerations often form the foremost role in interpretation. In the same vein, the historical context of the institution of the collegium system is one of varying interpretations of a single term; the term in question being "consultation" as used in Articles 124(2) and 217(1) of the Constitution of India, which are concerned with the appointment of judges to the higher judiciary. It can be argued that all judicial interpretations have been contingent on the systemic effect that the Supreme Court envisages as regards any particular reading of the term.

Justice Bhagwati, J., writing the judgment of a slim four by three majority in the *S.P. Gupta case* stated thus:

> …[I]t is obvious that when the appointment is to the post of the Chief Justice of India, it is not obligatory on the part of the President to consult any specified functionary…. When the 'primacy of judicial opinion' doctrine thus falls in the case of the appointment of the Chief Justice of India, it would not be appropriate to hold that it prevails in the case of appointments of other Judges of the Supreme Court and the Judges of the High Courts.[14]

Therefore, in the post-*S.P. Gupta* period, the executive, for all practical purposes, had the judicial approval in claiming the primacy of its opinion in the matters of appointments and transfers of judges of the higher judiciary. This, in the words of Justice M. M. Punchhi, led to the growing belief that:

> [T]he special and privileged position of the Institution of the Chief Justice of India….was lost. [Which] necessitated of putting to job a larger bench, to examine whether his primacy could be retrieved and restored back to him institutionally, in the context of appointment of Judges to the higher judiciary.[15]

It was this discontentment that led to the overruling of *S.P. Gupta* in 1994 by the *Second Judges Case*. Verma, J., writing on behalf of the majority, specifically noted:

> [As] the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability.… Th[e] reason given by the majority in S.P. Gupta for its view, that the executive has primacy, does not

[14] S.P. Gupta, *Supra* note 4 at ¶ 1014.
[15] Advocates-on-record*, Supra* note 5 at ¶ 520.

> withstand scrutiny, and is also not in accord with the existing practice and the perception even of the executive.[16]

The *Second Judges Case*, which laid down the foundation for the collegium system, largely did not delve into the question of primacy of the constitutional functionaries, but instead emphasized on the importance of increasing of consultation within the judiciary itself. It was argued that it was the Chief Justice and his senior colleagues, taking into account their knowledge in and experience of the legal field, who would necessarily have the competency over the executive regarding judicial matters of appointments and transfers. In such a scenario, the interpretation of "consultation" could only mean "concurrence", and "primacy" in this context would be, in effect, primacy of the opinion of the Chief Justice of India ("CJI") formed collectively, after taking into account the views of his senior colleagues.[17] The scope of the consultative procedure of the collegium was further enlarged in the opinion delivered by the Supreme Court in *In Re Special Reference No. 1 of 1998,*[18]or the *Third Judges Case*, on a question of law raised by the then President of India, K. R. Narayanan, regarding the collegium system. This opinion aimed at curbing concentration of power in the hands of a few by increasing the membership of the collegium, and laid down the collegium model that is followed till date: the Supreme Court collegium in its current form consists of five senior-most judges of the apex court, headed by the CJI.

The collegium system was instituted by the majority decision on the grounds that the word "consultation" must be given a meaning which is consistent with the constitutional philosophy of independence of the judiciary as enshrined in Article 50.[19] This Article provides that the "State shall take steps to separate the judiciary from the executive in the public services of the State."[20] Article 50, however, as under Part IV of the Constitution, is a part of the Directive Principles of State Policy and hence, functions as a guideline to the fundamental duties of the State in its law-making capacity. The provisions under Part IV largely exclude the judicial system from their purview through being explicitly non-justiciable.[21] In essentiality, the Supreme Court employed a constitutional executive mandate as the interpretative tool to reduce the role of the executive to mere tokenism on paper, and thus eliminated its functioning in judicial affairs. The irony is unmistakable.

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[16] *Id.,* at ¶ 45-46.
[17] *Id.*
[18] *In Re* Special Reference No. 1 of 1998, AIR 1999 SC 1. [Hereinafter *In Re Special Reference*]
[19] *Id.,* at ¶ 395.
[20] The Constitution of India, 1950, art.50. [Hereinafter *Indian Constitution*]
[21] *Id.,* art. 37.

B. CRITICISMS LEVIED AGAINST THE COLLEGIUM SYSTEM

While judicial independence has been held to be an essential attribute of the concept of Rule of Law, which is a basic feature of the Constitution,[22] it was also noted in the majority judgment in the *Second Judges Case* that, "even if [it is] assumed that rule of law is basic structure…. the meaning and the constituent elements of the concept must be gathered from the enacting provisions of the Constitution."[23] Nevertheless, it is possible to argue that in the formation of the collegium model of appointments and transfers to the higher judiciary, the Supreme Court ignored its own reasoning. The judicial interpretation of the word "consultation" to mean "concurrence" is against the natural and legal rules of grammatical construction,[24] and unwarranted by the plain usage of the words. Further, the interpretation was carried out in a vacuum, and due weight was not given to the text of the full Article also containing the phrase, "as the President may deem necessary". This clearly vests discretionary powers in the President, and, by the functioning of Article 74(1), in the executive branch of the Government. It can be well observed that within such a framework, the constitutional definition of judicial independence does not imply insulation of the judiciary from the executive. It rather seems to focus on judicial accountability, and decentralization of power, as well as a democratic system of checks-and-balances, sought to be facilitated by the consultative procedure between the judiciary and executive.

The majority decision of the nine judge bench in the *Second Judges Case* is largely notorious, not only because, as already mentioned, it has often been understood as virtually re-writing the Constitution under the guise of interpretation, but also as many of the judicial actors involved in the original judgment have gone on record to regret the formation of the collegium system. Justice J. S. Verma, writer of the majority judgment in the *Second Judges Case*, has himself stated that the collegium is "not working properly".[25] He also suggested the immediate setting up of an independent national commission empowered to appoint judges to the High Courts and the Supreme Court. At the same time, Fali S. Nariman has famously referred to it as "[a] case I won– but which I would prefer to have lost" in his autobiography.[26] Justice Ruma Pal has caustically

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[22] Sub-committee on Judicial Accountability v. Union of India and Ors., (1991) 4 SCC 699.
[23] Advocates-on-record Association, s*upra* note 5 at ¶ 13.
[24] BLACK'S LAW DICTIONARY (9th ed. 2009) (The definition of 'consultation' is given as "the act of seeking the advice or opinion of someone.")
[25] J. Venkatesan, *Collegium System Not Working Properly: Jurists*, THE HINDU, Dec. 13, 2009.
[26] Fali Nariman, *A Case I Won– But Which I Would Prefer To Have Lost*, *in* BEFORE MEMORY FADES: AN AUTOBIOGRAPHY 387-406 (Fali Nariman ed., 2012).

appraised the appointment of judges to the higher judiciary as "one of the best kept secrets in the country."[27] Justice P.N. Bhagwati too has unambiguously stated:

> Th[e] [collegium] system does not work satisfactorily. I am not in favour of it. I don't know what the truth is but going by rumours, bargaining goes on between the collegium judges. People are losing confidence in the mode of appointing judges. Therefore, it is necessary to change it.[28]

Further, recent allegations by a former Supreme Court judge and member of various collegiums, on the political sycophancy showcased in the elevation of a purportedly corrupt judge,[29] have sounded the death knell for the collegium. Such contentions have been successful in aligning the larger public sentiment with that of the political class. In addition, as the power of review in the process of appointment has been severely limited in the *Second Judges Case*, there is a sense of secrecy and finality about the proceedings of the collegium. In such a context, such allegations, even if false or unproven, heighten public distrust and severely damage the credibility of the judiciary as an impartial and independent institution.[30]

C. CONFLICTS OF INTEREST AND ALLEGED FAILURE OF THE COLLEGIUM MODEL

As articulated by Dr. Jill Cottrell in reference to the *S.P. Gupta* judgment, the real interest in these cases, domestically and internationally, was that they were *about* judges rather than by judges.[31] The incongruity therein is that the judiciary is the constitutional authority which decided a matter significantly concerned with its own interests, and in the course of it, created a system that virtually excluded any other functionary from participation. This *prima facie*, would appear to violate the very first principle of natural justice, *nemo judex in causa sua*, or the rule against bias, commonly understood as "no one should be a judge in his own cause."[32] The Indian judiciary, especially in the post *Advocates-on-Record Association* era has always presented an inherent paradox. It is the organ of government that the public reposes the most faith in the matter of securing their rights, while simultaneously being the least amenable to the actual will of the people, through the non-democratic process of its selection. It is not only the executive, but through the understanding of the executive as a part of a legislative body elected through universal adult

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[27] Ruma Pal, *An Independent Judiciary*, THE RADICAL HUMANIST, (Nov. 10, 2011), http://theradicalhumanist.com/index.php?option=com_radical&controller=article&cid=431&Itemid=56.
[28] *Lokpal Bill Is Not For Judiciary*, INDIA TODAY, (Aug. 29, 2011).
[29] *Justice Katju Stirs Up Fresh Controversy, Says Ex-CJI Balakrishnan Backed Corrupt Judge*, (Aug. 11, 2014) http://zeenews.india.com/news/nation/justice-katju-stirs-up-fresh-controversy-says-ex-cji-balakrishnan-backed-corrupt-judge_953825.html.
[30] Advocates-on-record, s*upra* note 5 at ¶ 74.
[31] Jill Cottrell, *The India Judges' Transfer Case*, 33(4) INT. AND COMP. L.Q. 1032-1045 (1984).
[32] Justice Brijesh Kumar, *Principles of Natural Justice*, 1(3) J.T.R.I. JOURNAL (1995).

franchise and representative of the people's will, that the actual citizenry of the nation can be deemed to be excluded from all judicial matters of appointments in the collegium model.

III. FACETS OF JUDICIAL INDEPENDENCE

The frequency with which the phrase "judicial independence" is employed without contextualization or further explanation often leaves the impression that the understanding of what the author or speaker intends to convey by its use is so universal, so absolute, that any clarification is manifestly redundant. This device is a patent falsity. "Judicial independence", far from exhibiting any sort of universal consensus is, in fact, one of the most debatable and debated concepts across the globe till date.[33] The dispute rages as to whether it is a pre or post appointment guarantee, whether absolute judicial independence can indeed be considered a democratic goal or whether the concept is inherently undemocratic, whether accountability and independence can co-exist harmoniously or are antithetical to each other, and whether there can indeed ever be a singular interpretation of the term, cutting across jurisdictions and organs of government. In the three *Judges' Cases*, the notion of "judicial independence" has been deliberated at length. *S.P. Gupta* struck a cautionary note through the words of Justice Desai, who, while stating that it was right that one should resist "value packing" of the courts with supporters of the party in power,[34] simultaneously also warned against the risk of conflating independence with remoteness and putting the independence of judiciary on a pedestal.[35] It was further observed by Justice Fazal Ali that "the high sounding concept of independence of judiciary…. are matters in which our masses are least interested.… [T]hey are mainly concerned with dangerous forces at work and evils reflected in economic pressures, inflationary tendencies, gruelling poverty, emancipation of women…."[36] Taking note of the need to uphold "high sounding concept" of judicial independence to control such"dangerous forces" , Justice Bhagwati outlined certain dimensions of judicial independence. He stressed upon the fact that these do not only imply freedom from executive control, but also "fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourish hed by the class to which the Judges belong."[37]

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[33] Michael DeBow et al., *The Case for Partisan Judicial Elections*, (Jan. 1, 2003) http://www.fed-soc.org/publications/detail/the-case-for-partisan-judicial-elections.
[34] S.P. Gupta, *Supra* note 4 at ¶ 705.
[35] S.P. Gupta, *Supra* note 4 at ¶ 705.
[36] S.P. Gupta, *Supra* note 4 at ¶ 515.
[37] S.P. Gupta, *Supra* note 4at ¶ 26.

The *Second Judges' Case*, on the other hand, took a nearly absolute view of independence, claiming to "now in the eleventh hour, boldly set.… with renewed energy to the task of reconsidering the decision in Gupta's case on a proper and just interpretation of the relevant constitutional provisions" and apocalyptically apprehending that "[if the] independence of judiciary [is] violated or impaired or damaged.… strikingly disastrous and calamitous results would follow in the proper functioning of the judiciary and that the system itself would become dysfunctional."[38] The majority opinion maintained that if the selectee bore a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority, then the independence of judiciary could not be secured "notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity."[39] It was further observed in the judgment:

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> [C]an there be an independent Judiciary when the power of appointment of Judges vests in the Executive? To say yes, would be illogical. The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the higher Judiciary.… The Union Executive has vital interests in various important matters which come for adjudication before the apex-Court. The Executive- in one form or the other- is the largest single-litigant before the Courts.[40]

This viewpoint is also based on the maxim derived from the oft-quoted case of *Rex v. Sussex Justices; Ex parte McCarthy*[41] wherein it was famously held that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.[42] It is considered to be one of the fundamentals of natural justice and hence, is also of vital importance in the case of independence of judiciary from executive interference. This is because the credibility and legitimacy of the judiciary as a matter of public opinion are categorically held to be contingent on the independence of the judiciary. In such a contradiction-ridden scenario, it becomes imperative to delineate the concept of what independence of the judiciary truly implies.

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[38] Advocates-on-record, *Supra* note 5 at ¶ 115.
[39] Advocates-on-record, *Supra* note 5 at ¶ 150.
[40] Advocates-on-record, *Supra* note 5 at ¶ 434.
[41] [1924] 1 KB 256.
[42] *Id.* at ¶ 259.

A. INTERNATIONAL CONCEPTUALIZATIONS OF JUDICIAL INDEPENDENCE: WHETHER POST OR PRE-APPOINTMENT GUARANTEE?

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Broadly speaking, the term "independence" in this context is used to characterize the relationship of the judiciary to other institutions or agencies.[43] The concept of independence is both systemic, that is, of the judiciary as a whole, as well as individuated, that is, of the judges in their individual capacities. The goal of a certain measure of political insularity is usually understood as the basic pre-condition of an independent judiciary.

The "Basic Principles on the Independence of the Judiciary" endorsed by General Assembly resolutions in December 1985 laid down guidelines relating to the independence and selection of judges, stating inter alia that "any method of judicial selection shall safeguard against judicial appointments for improper motives."[44] In the context of involvement of the executive in judicial appointments, the "Mt. Scopus Approved Revised International Standards of Judicial Independence"[45] state that:

> 2.14. Judicial appointments and promotions by the executive are not inconsistent with judicial independence as long as they are in accordance with Principles under 4.
>
> 4.2. a) The principle of democratic accountability should be respected and therefore it is legitimate for the executive and the Legislature to play a role in judicial appointments….
>
> b) The recent trend of establishing judicial selection boards or commissions in which members or representatives of the Legislature, the executive, the judiciary and the legal profession take part, should be viewed favourably….

It is apparent that, internationally, the independence of judiciary is largely coexistent with the principles of democratic accountability. One of the most fundamental questions that arise with regard to such "independence" is whether it is an aspect that should be considered at the post or pre-appointment stages. The independence of the judiciary in various other jurisdictions is a post-appointment guarantee and does not figure at the pre-appointment stage. It is the post-

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[43] Owen M. Fiss, *The Limits of Judicial Independence*, 25(1) UNIV. MIAMI L. REV.57-76 (1993).

[44] *Basic Principles on the Independence of the Judiciary*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, (Dec. 13, 1985), http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx.

[45] Shimon Shetreet, *Mount Scopus International Standards of Judicial Independence*, *in* THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 501-520 (Christopher Forsyth et al. eds., 2012).

appointment considerations of security of tenure, fixation of salary, etc. that are deemed necessary for the separation of the executive from the judiciary.

In various jurisdictions, common law based and otherwise, it is clear that the executive has a major role to play in the process of judicial appointments. In the United States, it is provided that the President shall nominate, and by and with the advice and consent of the Senate, appoint judges of the Supreme Court.[46] During the 1984 Presidential Campaign when judicial appointments were debated, Mr. Justice William Rehnquist is reported to have said: "there is no reason in the world why a President should not.... appoint people.... who are sympathetic to his political or philosophical principles," and buttressed it by noting that the President is the "one official who is elected by the entire nation" and therefore the public has "something to say about the membership of the court."[47] This was noted favorably in the minority judgment in the *Second Judges Case* to highlight that the independence of the U.S. Supreme Court is not questioned on grounds of administrative interference in matters of appointment.[48]

Under the Australian legal system, judges are appointed by the executive government, without intervention by the existing judiciary.[49] Conforming to Section 72 of the Australian Constitution, the justices of the High Court and other federal courts are appointed by the Governor General in Council. In practice, an appointment is made by the Cabinet, generally on the recommendation of the Attorney General.[50] Once appointed, the judges are independent of the executive[51] as they have a fixed tenure and there are restrictions on their removal from office. In New Zealand, judicial appointments are made by the Governor-General on the recommendation of the Attorney-General. However, it is a strong constitutional convention in New Zealand that, in deciding who is to be appointed, the Attorney-General acts independently of party political considerations. Following the protocol, judges are appointed according to their qualifications, personal qualities and relevant experience.[52] In Germany, half the members of the Federal Constitutional Court are elected by the upper chamber of Parliament (the Bundesrat) and half by

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[46] The Constitution of United States of America, art.II, § 2(2).
[47] Artemus Ward, *The Nominations Presidents Make: Appointing Supreme Court Justices*, 28 (1) CONG. & THE PRESIDENCY 63-84 (2001).
[48] Advocates-on-record, *Supra* note 5 at ¶ 380 ("Surely, it cannot be argued that and was indeed not argued, the people of America who were jealous in enforcing the doctrine of separation of powers with a view to ensuring the total independence of the Judiciary were at the same time willing to dilute it.")
[49] Attorney General (NSW) v. Quin, (1990) 170 CLR 1.
[50] Anthony Mason, *The Appointment and Removal of Judges,* in FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE NINETIES AND BEYOND 7 (Cunningham H. ed., 1997).
[51] Advocates-on-record, *Supra* note 5 at ¶ 381.
[52] *Judicial Appointments*, (May 28, 2014), https://www.courtsofnz.govt.nz/about/judges/appointments.

the lower chamber (the Bundestag).[53] It has been noted that Germany follows three systems of appointments, i.e. appointment by the executive, by the Parliament, and through Judicial Selection Committees. Amongst the systems which are explicitly rejected is that of co-optation, whereby the judges refill their ranks by choosing their own peers and leave to the executive power the purely ceremonial act of appointment. It is envisaged that such a system will lead to the "obvious danger" of the judiciary developing outside popular control.[54]

In Canada, judicial appointments to the Supreme Court of Canada, are made by the Governor General on the recommendation of the Federal Cabinet. However, recently in *Reference re Supreme Court Act, ss. 5 and 6*,[55] the Court held that Prime Minister Stephen Harper's appointment of the Honorable Mr. Justice Marc Nadon to the Supreme Court of Canada was void. On a six to one majority's reading of the Supreme Court Act, Justice Nadon was held to be unqualified to fill one of three spots reserved for jurists trained in the law of Quebec. In opining that Parliament's attempt to modify the Supreme Court Act to clear the way for Justice Nadon was unconstitutional, the majority stated that reference to the Court's "composition" in the amending formula constitutionalized sections 5 and 6 of the Act.[56] Therefore it is obvious that, political appointments to the judiciary, notwithstanding executive attempts at post-appointment infraction of the independence of the judiciary, are clearly frowned upon in most jurisdictions.

B. POST APPOINTMENT JUDICIAL INDEPENDENCE IN THE INDIAN CONTEXT.

The Supreme Court of Canada in *Valente v. The Queen*[57] noted two crucial aspects of judicial independence, observing that it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to other, particularly to the executive, that rests on objective conditions or guarantees.[58] Within the Indian Constitution as well, various safeguards are provided to lead to the presumption of post-appointment independence: a tenure up to sixty five and sixty two years for the Supreme Court and High Courts respectively,[59] the inability of the Parliament to alter any privileges and allowances etc. to the judge's disadvantage after their appointment,[60], the status of the Supreme Court and every high court as courts of record, having such powers including the inherent power to punish for contempt of

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[53] Basic Law for the Federal Republic of Germany, art. 94(1) (Grundgesetz, GG).Translation at: http://www.iuscomp.org/gla/statutes/GG.htm

[54] Volker G. Heinz, *The Appointment of Judges in Germany*, 4 Berliner Anwaltsblatt178 (1999).

[55] 2014 SCC 21.

[56] Robert Leckey, *Constitutionalizing Canada's Supreme Court*, (Mar. 25, 2014), http://ukconstitutionallaw.org/2014/04/01/robert-leckey-constitutionalizing-canadas-supreme-court/.

[57] (1985) 2 SCR673.

[58] *Id.* at ¶¶ 685-687.

[59] Indian Constitution, arts.124(2) & 219.

[60] Indian Constitution, arts.125(2) & 221(2).

themselves.[61] Further, definitive and exhaustive grounds for impeachment are laid down under Articles 124(4) and 217(1)(b) read with Article 124(4). In addition, no discussion can take place in Parliament with respect to the conduct of any Judge of the Supreme Court or High Court in the discharge of his duties. The Constitution of India under Article 145 further empowers the Supreme Court, with the approval of the President, to frame its own rules for regulating the practice and procedure of the Court (vide Articles 121 and 211) as and when required. That the processes for appointment and impeachment are significantly different and involve different constitutional functionaries and varying levels of political difficulty also may be interpreted as exemplifying the Constitution's explicit recognition of the "independence of judiciary" largely as a post-appointment concept.

However, the counter contention often is that independence of the judiciary as an institution cannot be guaranteed merely by the security of tenure or salary provided to an individual judge. Further, even if a case for independence of a politically appointed judiciary can be made, such appointments adversely affect the belief of the public in the independence of the judiciary, and inter alia, the trust in a free and fair decision is compromised. Shri J.N. Kaushal, who later became Union Law Minister, speaking in the Rajya Sabha on November 23, 1959 stated thus:

> People feel that the Executive does not work properly. It is the Judiciary that works properly. That feeling is still there. We should respect such a feeling. Let the Chief Justice of the State and the Chief Justice of India make the appointment. Why should there be a hand of the Executive in the appointment of High Court Judges?[62]

It was further noted in the majority judgment in the *Second Judges Case* that "only the consummation or totality of all the requisite conditions beginning with the method and strategy of selection and appointment of Judges will secure and protect the independence of the judiciary."[63] This concept was not judicially developed through the years, but was a central concern during the Constituent Assembly Debates on Article 39-A [later adopted as Article 50], wherein it was observed:

> These two functions [State and Judiciary] must be separated if you really want impartial justice to be done to the accused persons.… If the Honourable Ministers of the provincial governments feel that these two should not be separated, it is

[61] Indian Constitution, arts.129 & 215.
[62] R. K. Sidhwa, Vol VII, CONSTITUTIONAL ASSEMBLY DEBATES, http://parliamentofindia.nic.in/ls/debates/vol7pm.htm .
[63] *Id.* at ¶ 137.

> because they feel the power of appointments which is in their patronage, would go away from them to the high court judges.[64]

Unquestionably, the power of judicial review as derived from Article(s) 13, 32, 226 and 227 is contingent on the insulation of the judiciary from the executive, so that the judges are not compromised through ideological biases. Absolute power of the executive in the appointment to the higher judiciary runs the risk of the judges from the lower courts adjudicating in a manner beneficial to the government. Even though it is not necessary that the political appointments of judges will result in judges pliant to the executive, it is possible that the appointment is done on the basis of ideological similarity to the party in power, which will necessarily inform their judicial decisions. The Supreme Court of the United States has often been criticized for its political appointments on these grounds. Historical precedence has also shown that the appointment stage itself affects the functional independence of the judiciary. Justice A. N. Ray's supersession to the post of Chief Justice during the Emergency period in India oversaw a domino effect of right's violation. The infamous majority judgment rendered in the *Habeas Corpus* case[65]led to the judicial approval for unrestricted, unjusticiable powers of detention during the Emergency and the suspension of Article 21. The proposed Amendment Bill, therefore, requires close scrutiny in deliberating the political inclinations of the body sought to be formed.

C. JUDICIAL INDEPENDENCE: WHETHER ABSOLUTE?

Moving away from the "exclusionary rule"[66] which made Constituent Assembly Debates inadmissible for purpose of interpretation, it has now been settled that textual ambiguities in the Constitution may be resolved by reference to these Debates.[67] An ideal of absolute independence of judiciary which would lead to it "operating as a sort of superior body to the general body politic"[68] was rejected in these Debates. It was observed that if judicial independence was made a

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[64] R. K. Sidhwa, VIICONSTITUTIONAL ASSEMBLY DEBATES (1949),http://parliamentofindia.nic.in/ls/debates/vol7pm.htm.

[65] A.D.M Jabalpur v. Shiv Kant Shukla*,* AIR 1976 SC 1207.

[66] As per traditional English view, Parliamentary material or Hansard were inadmissible as external aids, on the basis of 'exclusionary rule'. This rule was slowly given up and finally in Pepper v.Hart [(1993) 1 ALLE.R. 42 (HL)] it was held that Parliamentary material or Hansard may be admissible as an external aid for interpretation of a statute, subject to Parliamentary privilege.

[67] State of Mysore v. R.V. Bidop, AIR 1973 SC 2555 at ¶ 5 ("There is a strong case for whittling down the Rule of Exclusion followed in the British courts and for less apologetic reference to legislative proceedings and like materials to read the meaning of the words of a statute"); Fagu Shaw etc. v. State of West Bengal**,** AIR 1974 SC 613*,* para.45 ("We may therefore legitimately refer to the Constituent Assembly debates for purpose of ascertaining what was the object which the Constitution makers had in view and what was the purpose which they intended to achieve when they enacted [the provisions]"); S.R. Chaudhuri v. State of Punjab &Ors.**,** (2001) 7 SCC 126 at ¶33 ("it is a settled position that debates in the Constituent Assembly may be relied upon as an aid to interpret Constitutional provision because it is the function of the Court to find out the intention of the framers of the Constitution.")

[68] TT Krishnamachari, VII CONSTITUTIONAL ASSEMBLY DEBATES 389 (1949), http://parliamentofindia.nic.in/ls/debates/vol8pm.htm.

self-contained goal of the judiciary instead of involving other branches of the government, then the institution, shorn of its restraints, could assume the role of a super legislature or super executive.[69] That "consultation" implies "concurrence" was also explicitly rejected,[70] and amendments seeking concurrence of the CJI, both for Supreme Court appointments[71] and High Court appointments were negatived.[72] Therefore, the complementary nature of the appointments was highlighted and it was established that the provision of consultation was not a concession as to the power of appointment, but merely adheres to a system of checks-and-balances. The scope of absolute power as regards Article 124(2) was reduced not only vis-à-vis the individual, but also with regard to any particular constitutional functionary, including the judiciary itself. In our constitutional scheme, the question of primacy over other constitutional functionaries does not usually arise as there is no hierarchy amongst the consultees and such a view would be inherently inconsistent with the very concept of consultation.[73]

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In *Subhash Sharma and Ors.v. Union of India*[74], judicial appointments were viewed as a result of collective process, and essentially a participatory constitutional function. It was noted that "in India, the judicial institutions, by tradition, have an avowed a political commitment and the assurance of a non-political complexion of the judiciary cannot be divorced from the process of appointments." It was further iterated that reference to any power or right to appoint judges was perhaps inappropriate, as it was essentially a discharge of a constitutional trust of which certain constitutional functionaries were collectively repositories. Therefore, the ideal of harmonious functioning of the three institutions of democracy permeates the entire democratic structure and prevents the concentration of power in any one. In this context, the collegium system has also faced criticisms on grounds of being arbitrarily restrictive, as it contains the scope of consultation amongst the Chief Justice and four senior most judges. This *prima facie* seems unjustified and unwarranted because as per the proviso, the constitutional mandate is to allow the President to consult "such of the Judges of the Supreme Court and of the High Courts in the States as [he] may deem necessary for the purpose."

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[69] Alladi K. Ayyear, XICONSTITUTIONAL ASSEMBLY DEBATES 837 (1949), http://parliamentofindia.nic.in/ls/debates/vol11pm.htm.
[70] BR Ambedkar, VIIICONSTITUTIONAL ASSEMBLY DEBATES258 (1949), http://parliamentofindia.nic.in/ls/debates/vol8pm.htm.("The Chief Justice of India despite being a person of high integrity, could only be expected to suffer from infirmities and biases as any mortal would.")
[71] VIII CONSTITUTIONAL ASSEMBLY DEBATES261, http://parliamentofindia.nic.in/ls/debates/vol8pm.htm.
[72] VIII CONSTITUTIONAL ASSEMBLY DEBATES674, http://parliamentofindia.nic.in/ls/debates/vol8pm.htm.
[73] Advocates-on-record, *Supra* note 5 at ¶ 374.
[74] AIR 1991 SC 631.

3. INTERNAL DEPENDENCE OF THE JUDICIARY

It is indisputable that internal independence is an equally important aspect of judicial independence as freedom from outside control. The IBA Minimum Standards of Judicial Independence, 1982, require thatin the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.[75]The current system of appointments and transfers substantially infringes this standard of judicial independence as the *Third Judges Case*, while ostensibly describing "merit" as an outweighing criterion of elevation,[76] does not define the term, leaving it to the subjective satisfaction and idiosyncrasies of the members of the collegium. This engenders the danger of sycophancy and pliancy of judges of the High Courts to those of the Supreme Court, and therefore may affect their internal independence in decision-making. The collegium has also been accused of blocking elevation of deserving judges on basis of personal vendetta of members of the collegium.[77]

Often overlooked in the debates around judicial independence is the fact that a uniplanar focus on insularity from the executive does not in itself guarantee absolute systemic freedom within the realm of the judiciary itself. The same is because of the functioning of the doctrine of *stare decisis*, wherein the decisions of the lower courts are necessarily bound by those of the higher courts. While ostensibly creating uniformity in the application of law, it is undeniable that the doctrine of precedent reduces the discretion available to the individual judges to disagree with the rulings of a higher court. They are constrained, in every case, to apply the ratio of applicable precedents. The only course usually available is to declare a particular holding as *obiter dicta* or to distinguish a particular case on its facts. Yet, this constraint has rarely been viewed as an abrogation of the independence of the judiciary, which seems to suggest that the conceptualization of the "independence" of judiciary is not of absolute individual and systemic independence of the judges, but is largely confined to freedom of the judiciary as a whole from executive interference.

Additionally, though judicial independence is one of the facets of the basic structure, as laid down in *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*,[78] there is no static definition of or consensus on the elements that actually constitute the basic structure. To take an example, secularism has unambiguously been held to be a part of the basic structure;[79] however, experience substantiates that the definition of secularism is not uniform in different

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[75] Shimon Shetreet, *International Bar Association Code of Minimum Standards of Judicial Independence*, *in*JUDICIAL INDEPENDENCE 392 (Jules Deschênes et al. eds., 1985).
[76] *In re* Special Reference, *Supra* note 18 at ¶¶ 769B - 770B.
[77] *Justice Denied To Judge*, THE SUNDAY TIMES, Feb. 21, 2010.
[78] AIR 1973 SC 1461.
[79] *Id.*

nations. The Constitutional Council of France has held that secularism implies "prohibit[ion]…. from taking advantage of religious beliefs to exempt themselves from the common rules governing the relations between public authorities and private individuals."[80]At the same time, the Indian model of secularism, as gleaned through the constitutional provisions relating to the same, especially under Part III rights, has been enumerated as "religious tolerance and equal treatment of all religious groups and protection of their life and property and of the places of their worship."[81] These two conceptualizations of secularism, even while relating to the same theory, are inherently different. Judicial independence too, therefore, has to be envisaged as not merely conceptual or unconditional, but rather, as dependent on its meaning as specifically enumerated through provisions of the constitution.

It can thus well be established that absolute independence of the judiciary as an organ of government is a practical impossibility given the constraints and hierarchies within the judicial system itself, as well as the elusive definition of "independence". The question then arises as to whether "judicial independence" implies complete insulation from the executive and the Parliament.

4. External Independence of the Judiciary: Whether Absolute

While the "basic structure doctrine" prevents the Parliament from altering or amending the fundamental framework of the Constitution, all aspects of the basic structure including secularism, federalism, separation of powers, etc., are qualified through various provisions within the Constitution itself. Article 3, for instance, allows for the formation of new states by the Parliament through a simple majority, or the special provisions of Emergency under Article 352. Therefore, judicial independence too, following the same logic, cannot perhaps escape certain qualifications. The Constitution does not allow for the concept of "independence of the judiciary" to be read in absolute terms as complete omission of the powers of the Parliament, but merely as constrained in order to prevent undue influence. There are some provisions related to the judiciary which are explicitly within the domain of the Parliament.

Under Article 125(1), the salaries to be paid to the Judges of the Supreme Court can be determined by Parliament by law, subject to the condition that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to

[80] Maurice Barbier, *Towards a Definition of French Secularism*, 134 LE DÉBAT 129 (2005) (Fr.), http://www.diplomatie.gouv.fr/fr/IMG/pdf/0205-Barbier-GB.pdf (Gregory Elliott, trans.).
[81] S.R. Bommai v. Union of India, AIR 1994 SC 1918.

his disadvantage after his appointment. The process of impeachment has also deliberately been made complex for the post-appointment guarantee of independence of the judiciary and minimization of executive influence in the decision-making process of the individual judges. Article 124(4) provides that "a Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity." Similar provisions exist in Article 217(1)(b) for the removal of Judge of a High Court, while the detailed process is laid down in the Judges (Inquiry) Act, 1968.

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Additionally, the 42nd Constitutional Amendment, which inserted Article 323-A, authorizing the Parliament, and Article 323-B, the State Legislatures, to create Tribunals to which the power of adjudication of disputes on various subjects can be transferred, also undercuts the idea of a complete separation of judicial and executive processes. The Supreme Court in *S.P. Sampath Kumar v. Union of India*[82]propounded the theory of "alternative institutional mechanisms," upholding the constitutional validity of the provisions. In *L. Chandra Kumar v. Union of India &Ors.*[83], even though the seven-judge Constitutional Bench held that the power of judicial review was a part of the basic structure of the Constitution and the orders of the Tribunals were subject to scrutiny of High Courts by way of writ jurisdiction and superintendence, the constitutionality of the administrative tribunals themselves was not questioned. The Supreme Court in *T. Sudhakar Prasad v. Govt.of A.P and Ors.,*[84] established that a Central Administrative Tribunal had the power to punish for its contempt, in a manner akin to that of a High Court. In *Bar Council of India v. Union of India,*[85]it was held by the Supreme Court that the Parliament is unquestionably competent to make a law creating tribunals to deal with disputes arising under or relating to a particular statute or particular disputes. Further, the Companies Act, 2013, under section[s] 408 and 410 has provisions for creation of National Company Law Tribunal and National Company Law Appellate Tribunal by the Central Government.[86] The tribunals necessarily have judicial functions, and all the members, including the judicial members, remain subject to the administrative and financial control of the executive. While this is often seen as an

[82] AIR 1987 SC 271.
[83] AIR 1997 SC 1125.
[84] (2001) 1 SCC 516.
[85] (2012) 8 SCC 243.
[86] Gopal Krishna, *When Tribunals Undermine The Judiciary*, REDIFF(Oct. 25, 2013), http://www.rediff.com/news/column/when-tribunals-undermine-the-judiciary/20131025.htm.

unfortunate encroachment into the judicial territory by the executive, it nevertheless undercuts the idea of unqualified independence of the judiciary.

On the basis of the above grounds, it can therefore be contended that even within the current understanding of "independence", the implication is not of complete freedom from any and all influence by the executive or Parliament in the functioning of the judiciary. Judicial independence necessarily has to be balanced by judicial accountability. That the Indian Constitution explicitly leaves the matter of determination of salaries and impeachment to the Parliament, while simultaneously providing for checks and balances, negatives the idea of judicial independence being an absolutist concept. When the internal independence of the judiciary is compromised, and political insulation too seems a far-off goal in the current system considering the allegations of executive influence[87], there appears to be a strong case for disbanding the collegium system.

IV. COMPETING RIGHTS OF PUBLIC INTEREST

A. INDEPENDENCE V. ACCOUNTABILITY

Accountability means answering for one's actions or inactions. Some suggest that, instead of answering to voters, judges should answer to the law, however, the law is not self-enforcing.[88] Stephen Burbank, in his analysis of the twin needs of independence and accountability in the matter of inter-branch judicial relations, has noted that just as independence must be conceived in relation to other actors, so must accountability, i.e. the question of accountability to whom or what is paramount:

> Judicial accountability should run to the public, including litigants whose disputes courts resolve, and who therefore have a legitimate interest in court proceedings that are open to the public and in judicial decisions that are accessible. Judicial accountability should also run to the people's representatives, who appropriate the funds for the judiciary and whose laws the courts interpret and apply, and who therefore have a legitimate interest in ensuring that the judiciary has been

[87] Upendra Baxi, *Change Must Respect Basic Structure,* INDIAN EXPRESS, Aug. 8, 2014. ("Are the CJIs, in some cases, constrained to approve executive-dominated elevations? Justice Markandey Katju's recent expose suggests that the CJI is vulnerable to alleged manoeuvring by the prime minister's office.")

[88] Jack Park, *Judicial Elections: The Case for Accountability,* 2 AKRON J. CONST. L. &POL'Y 163.

> responsible in spending the allotted funds and that, as interpreted and applied by the courts, public laws are functioning as intended.[89]

Accountability to the people, instead of being antithetical to the idea of judicial independence, is, in fact, one of the fundamental facets of the same. Independence without accountability would make the legal institution autocratic and meaningless. The judiciary inevitably lacks accountability to the public due to the absence of any democratic process in its appointment, which has further been compounded by the closed-door collegium system. The Indian judiciary is often referred to as anomalous, since in no other country of the world is the judiciary so insulated from the will of the executive and legislative branches, and, by extension, from the will of the people. That the judiciary currently is the least accountable branch of government, has been acknowledged in several judicial decisions themselves, wherein judges have been cautioned against encroaching beyond their proper bounds, as "all power is of an encroaching nature and Judicial power is not immune against this human weakness."[90] In *Asif Hameed v. State of J&K*,[91] it was noted that while exercise of powers by the legislature and executive is subject to judicial restraint, the only check on the judiciary's own exercise of power is the self-imposed discipline of judicial restraint.[92] Therefore, the inclusion of the executive and parliament in the matter of appointments *prima facie* increases the accountability of the judiciary itself, as both organs are directly responsible to the people. Further, the fear of politically charged appointments that favor the executive may be unfounded, as— in a true construction of a democratic system— they will make the executive lose favor with the electoral base and the democratic self-correcting mechanism will assert itself in the next elections through ousting of such an executive, as the post-Emergency precedent has aptly demonstrated.

B. DOCTRINE OF SEPARATION OF POWERS V. JUDICIAL INDEPENDENCE

The enacting provisions of the Constitution provide for an executive hand in the appointments and transfers within the higher judiciary. As marked by Owen Fiss, while the qualified nature of the commitment to political insularity might seem puzzling since it is one of the foundations of the judiciary's authority, however, when the judiciary is placed within a democratic framework, then it is less of a puzzle, as the realization sets in that a judiciary that is insulated from the popularly controlled institutions of government – the legislative and executive branches – has the power to curb the actions or decisions of those institutions and thus to frustrate the will of the

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[89] Stephen B. Burbank, *Judicial Independence, Judicial Accountability &Interbranch Relations*, 137 (4) DAEDALUS: ON JUDICIAL INDEPENDENCE 16-27 (2008).
[90] Trop v. Dulles, 356 US 86 (1958), at 119.
[91] AIR 1989 SC 1899.
[92] *Id.* at 31.

people.[93]

In contemporary times, most countries reflect a dialectic tension between the need to de-politicize the judiciary and also curb the trend toward judicializing politics. There is no constitutional or judicial suggestion that independence of judiciary has primacy over the doctrine of separation of powers in case of a conflict between these two aspects of the basic structure, as in the case of the collegium. The collegium system has often been seen as destructive of the doctrine of separation of powers as it completely eliminates the executive, one of the three pillars of any democratic structure, from any say in the appointments or transfers of judges; a power which is explicitly conferred on it by the Constitution. While adequate institutions might enhance judicial independence and minimize the problems of a politicized judiciary, increasing the powers and independence enjoyed by judges may lead to over-judicializing of public policy.[94]

A specific distinction can be drawn between countries like India wherein the power of judicial review of legislative policies is possible, as opposed to the U.K., where a primary legislation enacted by the Parliament cannot be called into question in any court of law. It is in the former that the executive is a legitimate stakeholder in the cause of accountability and competency of the judiciary as there is a reasonable concern of the policies of the government being thwarted on technical grounds. This viewpoint is compounded by the fact that the power of judicial review has been given to the courts in India via Article 13 wherein the inconsistency or contravention of Part III rights in both pre- and post-Constitution laws can be adjudged by the judiciary. The same sentiment is also supplemented by other provisions of the Constitution, as in the case of Article 32 which makes the other organs of government amenable to the writ jurisdiction of the Supreme Court in a case of violation of the fundamental rights. The doctrine of basic structure, as mentioned previously, has further expanded the scope of judicial scrutiny of legislative action.

It was this concern which led to the insertion of the Ninth Schedule in the Constitution by the First Amendment. However, the history of the abuse of the protection granted by Ninth Schedule itself makes a strong case for executive non-interference in judicial matters. In *I. R. Coelho (Dead) By Lrs v. State Of Tamil Nadu,*[95] it was categorically stated that:

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[93] Owen M. Fiss*, Supra* note 43.
[94] Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 (1) AJCL 103 (2009).
[95] I. R. Coelho (Dead) By Lrs v. State Of Tamil Nadu,AIR 1999 SC 3179. [Hereinafter *I. R. Coelho*]

> ..
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> The unchecked and rampant exercise of this power, the number having gone from 13 to 284, shows that [it's use] is no longer a mere exception. The absence of guidelines for exercise of such power means the absence of constitutional control which results in destruction of constitutional supremacy and creation of parliamentary hegemony….[96]

Contrariwise, in the *Second Judges case,* it was argued by the petitioning counsel that the setting up of a National Judicial Commission contemplated by a constitutional amendment may provide the answer. But till the same materialized, the court must authoritatively lay down that the opinion of the CJI shall be binding on the President.[97] Therefore, it can be said that it was only till the setting up of the now-proposed Commission that the question of primacy was contained. Yet, the threat of abuse of the rights of the people by governmental functionaries cannot solely be categorized as irrational fear-mongering, as the Emergency experience has illustrated the threat that an autocratic government can pose to the citizenry without a strong judiciary to counterbalance it.

It can also well be discerned that non-politicization of the process of judicial appointments might actually serve to bolster the cause of judicial accountability. Historical precedent has shown that impeachment proceedings are often cumbersome, not because of the demands of the constitutional provisions involved, but the reluctance of the party in power to question its elevation of an accused judge. Politically appointed judges thus gain further immunity in cases where the majority party forming the executive has a decisive say in the selection process. In a post- *S.P. Gupta* era, the failure of the impeachment of Justice V. Ramaswami through abstention of the M.P.s of the Congress, the party in power in the Lok Sabha,[98] was because of the status of the judge as a political appointee. A non-political system can be said to enhance the separation of powers, as it ensures that the executive has no partisan affinity to any of the judicial appointees, and therefore, impeachment proceedings against an accused judge can be carried out in an unbiased and impartial manner. Therefore, neither mandate of separation of powers as well as of independence, can be abrogated or given preference over the other while dealing with matters of appointments and transfers.

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[96] *Id.* at ¶ 32.
[97] Advocates-on-record,*Supra* note 5 at ¶ 372.
[98] M. Mitta & Z. Agha, *Congress's Albatross*, INDIA TODAY, May 31, 1993.

V. JUDICIAL BILLS, 2014: CONSTITUTION (121ST AMENDMENT) BILL, 2014 AND THE NATIONAL JUDICIAL APPOINTMENTS COMMISSION BILL, 2014

Earlier, the question of primacy arose on grounds of conflict of interest between the judiciary and the executive, as the judiciary often determines cases in which the government is a party. However, the proposed Commission is geared towards higher participation of all three democratic wings, and not solely the executive. The two eminent persons to be appointed by the Panel are to be appointed by a collegium consisting of the Prime Minister, the CJI and the Leader of Opposition in the House of the People. Herein, the problem of executive bias does not arise as the three branches are given equal representation. Regardless of the number of seats that majority party has in the Lok Sabha, the Leader of the Opposition is necessarily not a member of the executive. Therefore, there is *prima facie* no scope for conflict of ideology. On that note, however, it is a matter of disquiet that political parties across the board have been critical of the judicial processes, and are largely in agreement about the need for an executive hand in the matter of judicial appointments.

A. NEED FOR A JUDICIAL APPOINTMENTS COMMISSION

Judicial councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of public accountability. They lie somewhere in between the polar extremes of letting judges manage their own affairs and the alternative of complete political control.[99] While there is near-universal consensus on this, legal systems have devised a wide range of selection mechanisms in practice, often trying to balance independence with accountability through institutional design. The diversity of systems of judicial selection suggests that there is no consensus on the best manner to guarantee independence.[100]

It is widely accepted that independence is a complex and multifaceted phenomenon, and thus, even though judges may be independent from political control, they may become dependent on other forces, such as senior judges in a judicial hierarchy; with just as much potential to distort individual decision-making as the more conventional fear of political influence. Judicial decisions have explicitly excluded the higher judiciary from the functioning of Article 12,[101] which implies that the Judiciary is incapable of violating Part III rights, and appointments cannot be challenged on grounds of violation of fundamental rights including those of discrimination, etc. The

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[99] I.R. Coelho*, Supra* note 95.
[100] I.R. Coelho*, Supra* note 95.
[101] Rupa Ashok Hurra v. Ashok Hurra & Anr, AIR 2002 SC 1771. ("Superior courts of justice do not also fall within the ambit of State or other authorities under Article 12 of the Constitution.")

decisions of the collegium have also largely been exempted from the purview of judicial review on the practical consideration that the challenge would inevitably lie before the same body making the appointments. However, there is no presumption that the same would apply to the Commission. The definition of "State" under Article 12 being an inclusive one, the Supreme Court has often ruled that where there is significant involvement of the State in any activity, such bodies, entities and organizations fall within the definition of the "State". Therefore, the involvement of executive and parliamentary functionaries in the Judicial Appointments Commission, it can be argued, will lead to greater transparency and greater scope of challenge of appointments in case of abridgment of Part III rights of an individual in the appointment process. This may be viewed as both a boon and a bane, considering the need for challenge in case of an improper decision, and contrariwise the scope of endless challenges. However, following the maxim that "justice should not only be done, but also seen to be done," greater the transparency in appointments and transfers, greater is the legitimacy of the judicial system in discharge of its constitutional functions.

It is also anticipated that the formation of the Commission will address the growing problem of vacancies. Currently, the logistics and vastness of the number of appointments far exceeds the capacity of the collegium to handle it, as the judges in question are also embroiled in their day-to-day cases. This raises the issue that all the appointments cannot be carried out with equal diligence. According to the Parliamentary Panel on the now-lapsed Amendment Bill of 2013, because of the inherent deficiencies in the collegium, as many as 275 posts of judges in various High Courts are lying vacant, which has a direct bearing on the justice delivery system and thereby affecting the judiciary.[102]

Further, apart from the perennial questions of transparency and accountability, one important concern is the lack of minorities and women on the bench, thus providing a sense of bias of privilege in the appointments mechanism.[103] Although the Constitution provides that there are three categories of individuals considered eligible to be appointed judges of the Supreme Court— High Court judges with five years' experience, High Court lawyers with 10 years' experience, and "distinguished jurists", that is, well-regarded law professors, between 1950 and 2012, only four lawyers[104] were directly appointed to the Court, with the recent addition of Rohinton Nariman and Uday U Lalit to the list.[105] Amongst 189 judges appointed to the Court

[102] J. Venkatesan, *Cabinet Clears Constitutional Status for Judicial Appointments Commission*, THE HINDU, Dec. 26, 2013.
[103] I.R. Coelho*, Supra* note 95.
[104] Abhinav Chandrachud, *The Age Factor*, 28 (21) FRONTLINE(2011). The names of the lawyers are S.M. Sikri, S.C. Roy, Kuldip Singh, and Santosh Hegde.
[105] J. Venkatesan, *Supreme Courtto Get Four More Judges*, THE HINDU, May 14, 2014.

between 1950 and 2009, only three were women. Amongst approximately 50 judges appointed to the court between 2000 and 2009, only two were Muslim. Judges from "backward" or scheduled castes have only made it to the court since the 1980s, and in small numbers.[106] "Inclusive" courts are considered more legitimate the world over, on the basis of the principle of "fair reflection of society."[107] The *U.K. Constitution Reform Act, 2005*, mandates diversity in the process of judicial appointments. However the same in the appointments to the Supreme Court in India has largely been restricted to regional diversity. As noted by Abhinav Chandrachud, it is the "final unwritten rule" that if two or three judges from the same High Court are serving in the Supreme Court, it would render any further candidates from the same High Court ineligible for appointment, regardless of their qualifications.[108] However, there is no clarity as to why regional diversity has been prioritized over "gender, religion, and caste"[109] in the appointment process.

This lack of diversity has often drawn criticism from both, the public as well as Parliamentarians, as judges are viewed to be divorced from the people of the country. In *Faculty Association of AIIMS v. Union Of India &Ors*,[110] wherein the question of applicability of reservation to specialty and super-specialty faculty posts in the All India Institute of Medical Sciences was before a five judge Constitution bench of the apex court, the penultimate paragraph of the judgment written by the then CJI stated that "the very concept of reservation implies mediocrity." In the wake of the inevitable Parliamentary uproar, questions such as "will only five people (bench of the apex court) decide the future of the country or the representatives sitting in Parliament?"[111] have been raised. It is apparent that such a declaration not only ignores the affirmative action inscribed within the Constitution, but also the judicially elaborated and reaffirmed conceptualization that "equality is amongst equals" as regards the interpretation of Article 14. It has also ignored the ruling in *Indira Sawhney & Ors v. Union of India,*[112]wherein the contention that reservations were

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[106] National Commission for Scheduled Castes: Special Report on Reservation in the Judiciary, (Laid in Parliament on 11.12.2014), available at http://www.ncsc.nic.in/pages/display/114.This Report, highlighting that the "present system of appointment of judges is vague and arbitrary", argues for explicit provisions for the reservation and representation of backward classes among the judges of the Supreme Court and High Courts, and states thus: "judges take oath to uphold the Constitution and the law of the land but even Hon'ble Supreme Court has failed to follow the Constitutional provision under Article 16(4) & 16(4A). From 1950 onwards only four Scheduled Castes candidates namely Shri K.Ramaswamy, Shri K.G.Balakrishnan, Shri B.C.Ray and Shri A.Varadarajan were considered fit for appointed in the Supreme Court."

[107] Shimon Shetreet, *Introduction*, in JUDGES ON TRIAL: THE INDEPENDENCE AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY 16 (Sophie Turenne et al. eds., 2013) (noting that transparency in particular supports the prioritization of merit and fair reflection of society).

[108] Abhinav Chandrachud, *Age, seniority, diversity*, FRONTLINE, (May 3, 2013), http://www.frontline.in/cover-story/age-seniority-diversity/article4613881.ece.

[109] *Id.*

[110] (2013) 40 SCD 578.

[111] Sanjay Hegde, *Doing Justice To Language: The Supreme Court Must Refrain From Making Sweeping Generalisations*, DAILY MAIL, Aug. 9, 2013.

[112] AIR 1993 SC 477.

inherently "anti-meritorian" was firmly rebutted by the bench by taking note of the historical context of and pressing need for reservations. Hence, the inclusion of the executive and the legislative bodies in the appointment process is important, in the context of increasing diversity within the judiciary, and bringing multiplicity of views and backgrounds to the judicial table, especially as the government has the constitutionally inscribed mandate of affirmative action.

B. DRAWBACKS OF THE BILL IN ITS CURRENT FORM

The Amendment Bill, along with the National Judicial Appointments Commission Bill, 2014, amends provisions relating to appointment and transfer of judges to the higher judiciary. The move to enforce these Bills entails amendments to Articles 124(2), 127(1), 128(1), 217(1), 222(1), 224 and 231(2) of the Constitution and the insertion of a new Article 124A which seeks to replace the current collegium system with the NJAC, for the appointment of judges to the Supreme Court and appointments and transfers of High Court judges. The aim and objective of the amendment has been elucidated as "provid[ing] a meaningful role to the executive and judiciary to present their view points and make the participants accountable while introducing transparency in the selection processes."[113]

What is interesting about the proposed body is that some of the most stringent legal critics of the collegium system, including the likes of Fali Nariman and Prashant Bhushan, have been equally, if not more, censorious of the NJAC Bills in their current form.[114] The Bills now bear the dubious distinction of having been the subject matter of a failed Constitutional challenge in the Supreme Court, before so much as becoming enforceable law.[115] *Prima facie*, the general consensus shared by a significant proportion of the legal fraternity seems to be that the cure should not be worse than the disease. It has been noted that the Amendment Bill deviates from its derivative U.K. model in the essential requirement of freeing judicial appointments from the executive. Though it is modelled on the U.K. Judicial Appointment Commission ("JAC"), the U.K. JAC, in contrast, deliberately excludes politicians and those connected with politics from being part of the same. This is done in order to secure the independence of the judiciary.[116] The Amendment Bill, on the other hand, expressly politicizes the architecture of the NJAC by not only levelling the numbers of judicial members with those of the non-judicial members, but also empowering the NJAC with a veto exercisable by a consensus requiring a minimum of two members. This in turn raises the fear of appointments being thwarted at the behest of two non-

[113] J. Venkatesan, *Executive Will Have Equal Say In Judges' Appointment*, THE HINDU, Sept. 4, 2013.
[114] Prashant Bhushan,*Lay Down Standards of Transparency,* INDIAN EXPRESS, Aug. 11, 2014. ("The bill…. is much worse than the existing system since it suffers from the vices of both the pre-1993 system and the existing system, and does not offer any improvement.")
[115] L.K. Advani, *Supra* note 13.
[116] Santosh Paul, *Fading Judicial Independence*, THE HINDU, Oct. 26, 2013.

judicial members. While the collegium has often been censured for partisanship, it is ironic that the scope of subjective satisfaction of persons who will recommend judicial appointments is enhanced in the Amendment Bill.[117] Further, for the eminent persons to be chosen, there exists no delineation of the definition of "eminency", which raises uncertainty as to the requirement of a judicial background amongst such members.

The counter argument to the oft-quoted example of the avowedly apolitical U.K. JAC is that such a contention fails to note that the U.K. is governed by the doctrine of Parliamentary Sovereignty, wherein the courts do not have the power to "strike down" primary legislations passed by the U.K. Parliament. No court of law is imbued with the power to invalidate a parliamentary enactment. On the contrary, every court is constrained to enforce every provision of the law of parliament.[118] This is expressly different from the Indian scenario wherein the power of judicial review is one of the most powerful checks on government excesses. Therefore, the Indian scenario is closer to that of the U.S. than the U.K. system, where the appointments are highly politicized, and envisages the three pillars of democracy as a system of checks-and-balances for each other.

However, the politicization of a judicial process always contains some inherent dangers which need to be addressed in advance. While the independence of judiciary as largely a post-appointment concept is debatable, a point of consideration is that the proposed Amendment Bill relates not only to matters of appointment, but also to transfers of the judges of the various High Courts. It is generally accepted that in certain cases transfer is tantamount to removal and that the power to transfer judges without their consent is inconsistent with judicial independence.[119] For example, due to language barriers and major differences between the various regions, transfer may amount to *de facto* removal.[120] Hence, judges ordinarily should not be transferred from one jurisdiction or function to another without their consent. This requirement is included in both the IBA Standards[121] and in the Montreal Declaration.[122] If the transfer of judges is left to a politically aligned committee, then it results in an effective curb on the independence of the High Courts, especially as Article 222(1) does not enumerate the grounds on which the judge may be transferred. Following disqualification of Indira Gandhi by

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[117] Mohammed Salim, *Seven Qualities of Highly Effective Judges*, INDIAN EXPRESS, Aug. 14, 2014.
[118] Chinmoy Roy, *Judicial Review and the Indian Courts*, (2012), http://dx.doi.org/10.2139/ssrn.1990601.
[119] Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, *in* JUDICIAL INDEPENDENCE 608, 631 (Jules Deschênes et al. eds., 1985).
[120] *Jill Cottrell, Supra* note 31.
[121] Shimon Shetreet, *Supra* note 119
[122] Shimon Shetreet, *Supra* note 119.

the Allahabad High Court in 1975, the transfer of 16 independent High Court judges were effected, which made Justice Krishna Iyer declare that "[t]he creed of judicial independence is our constitutional religion and, if the executive use Article 222 to imperil this basic tenet, the court must do or die."[123] Transfer can be a potent weapon of oppression or retaliation, and to vest the power of transfer in the executive would be to give it the power to control the judiciary. The executive can transfer a judge from one place to another and by doing so, it can not only punish him but also convey a message to other judges and command obedience.[124] Therefore, the politicization of the transfer of judges invokes the inherent danger of punishment transfers. In addition, selecting about 100 judges of the higher judiciary every year in a rational and fair manner is an onerous task requiring a full-time, and not an ex-officio body. An ex-officio body of sitting judges and ministers cannot devote the kind of time required for this job.[125]

Further, while the debate rages on, some finer points of the Amendment Bill have not come under equal public glare. Article 124C of the proposed amendment empowers the Parliament, by law, to regulate the procedure. It further empowers the NJAC to "lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it." It is disquieting that the exact definition of "manner of selection", one of the fundamentals of the appointment process itself, is not codified. The misinterpretation of such a term is potentially vast. What the Amendment Bill lists is only the base composition of the NJAC, however, its conduct and the distribution of powers between the members is easily alterable by a simple majority in Parliament. This implies that while the members listed in the Amendment Bill are constitutionally fixed, the value of their individual votes can still be altered. A simple majority in Parliament can shift the balance of power between the members of the NJAC, allowing, for instance, greater weightage to the vote of a political member, or allowing for a final recommendation by a political member, or a single veto. Statutorily, the appointments cannot be challenged on the grounds of defect of composition. Such a concern cannot be dismissed as merely fear-mongering as it is the very same ground that eventually led to the constitutionalising of the composition of the NJAC. Further, as reiterated in *Kuldip Nayar v. Union of India*,[126] ordinary laws cannot be challenged on grounds of violation of the basic structure, and therefore the nebulous cause of judicial independence, which does not exist in a definitive form enshrined in any Constitutional provision or bequeath any violable fundamental right, suffers the possibility of erosion through these loophole mechanisms.

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[123] *Towards a Better System in Judicial Appointments*, Editorial, THE WEEKEND LEADER, (Jul. 27, 2013).
[124] P. N. Bhagwati, *Independence of the Judiciary in a Democracy*, 7(2) HUMAN RIGHTS SOLIDARITY: AHRC (1997).
[125] *Prashant Bhushan*, *Supra* note 114.
[126] AIR 2006 SC 3127.

Regardless of t she proposed Constitutional status, the composition of the NJAC has been described as having a "mathematics that is far from comfortable."[127] The currently proposed panel comprises of the CJI, two other senior most judges of the Supreme Court, the Union Minister for Law and Justice, and two eminent persons to be nominated by the Prime Minister, the CJI and the Leader of Opposition in the Lok Sabha. The ratio of the legal appointees to the largely political appointees falls evenly, which creates the possibilities of further dissent in the matters to be handled by the NJAC. Once again, in the post-*Judges Cases* era, the question of primacy is bound to arise in case of a conflict of opinion, which the Amendment Bill does not seek to clarify. Another disturbing factor to be taken into account in any discussion involving the Amendment Bill is that the NJAC's powers extend to the appointment of the CJI, which seems to imply that the traditional system of succession by seniority may not be followed in specific cases, and may give the NJAC the power to bypass seniority in such matters on potentially arbitrary and undefined grounds. Further, as the CJI is one of the members of the NJAC itself, such a decision on indeterminate grounds may lead the entire NJAC thereon to be compromised. Granting a constitutional status to the Amendment Bill, with the unavoidable implication of making it far more difficult to amend, and that too without preempting the issues which essentially led to the creation of the same system the NJAC seeks to replace, cannot be labelled anything but short-sighted.

C. THE SCENARIO POST 2014 GENERAL ELECTION

There is no doubt that the changed polity and the unexpected majority in Parliament attained by the BJP after nearly three decades of coalition politics renders the implication of uncomfortable numbers of the NJAC even more ominous than they would otherwise have been. It also brings the question of independence of judiciary into sharp focus, as the other two organs of the democratic system— the Parliament and the executive— are now effectively governed by the same body of individuals, or, at the very least, exhibit a commonality in ideology, which makes the case for an independent judiciary much stronger, so as to maintain an effective check on any possible government excesses.

It is nobody's case that the courts often have to go against what might even be the national majority opinion on some key issues, especially on grounds of equality and equal protection of law. And in a representative democracy, this includes protection of rights of the minorities, as political parties are often burdened by their own partisan agendas, ideologies and electoral vote-banks, and therefore, more prone to giving in to popular pressure in matters of policy.

[127] Santosh Paul, INTRODUCTION IN CHOOSING HAMMURABI: DEBATES ON JUDICIAL APPOINTMENTS (2013).

According to Burbank, Judge Arnold often stated that the judiciary must have the "continuing consent of the governed" in order to do its job. He also believed that, once a court has observed all jurisdictional limitations on its power, it must render and accept responsibility for a decision, however unpopular, that the law requires.[128] Gerald Rosenberg has noted that for proponents of judicial activism, independence allows the courts to avoid the prejudice and short-sightedness to which elected officials sometimes succumb. Electorally unaccountable and institutionally insulated judges can preserve rights under attack. An activist court is defensible in a democracy then, precisely because it is independent. Its independence allows it to act to uphold rights where democratic majorities are paralyzed by prejudice. A non-independent activist court would simply reinforce the discrimination and prejudice of the other branches.[129]

The case of *Suresh Kumar Koushal & Anr. v. NAZ Foundation,*[130] as regards decriminalization of homosexuality under Section 377 of the Indian Penal Code ("IPC"), is one of the recent examples of this tussle, wherein the Supreme Court firmly put the mandate of legal change back on the Parliament. The Court reasoned that while Section 377 of the IPC did not suffer from any constitutional infirmity, the competent legislature is free to consider the desirability and propriety of deleting itfrom the statute books or amend the same.[131] In considering that the converse ruling of the Delhi High Court was not contested in the Supreme Court by the then government, which had, in fact, contested the same matter in the High Court, it is implicit that the political agenda was to bring about change through the medium of the judiciary. Even amongst the executive, rather than attempts to engender social or legal change through actual legislation and introduction of motions in Parliament, it is the judiciary which is often made the scapegoat for welfare decisions which would otherwise, perhaps, be unpopular with the majority.

In a single-party majority in the Parliament wherein attaining a simple majority is not as burdensome, the judiciary has the prime position in maintaining and upholding the constitutional fabric of the country's democratic structure to prevent the ideal of democracy from becoming synonymous with the dystopia of majoritarianism. Therefore, any genuine infractions into the independence of the judiciary would be destructive of the basic structure, and any bill, as with the Amendment Bill under question, with even the slightest potential to undermine the independence of the judiciary would have to first go through intense judicial scrutiny to adjudge the implications of the same.

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[128] *Stephen Burbank, Supra* note 89.
[129] Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REVIEW OF POLITICS 369 (1992).
[130] Civil Appeal No. 10972 of 2013.
[131] *Id.* at 56.

VI. CONCLUSION

It is commonly accepted that the word of the law is often in conflict with the law in practice, as are the frequently antithetical dictates of ideality and pragmatism. In a nation wherein the citizens are routinely disappointed by the government, the need for an insulated judiciary is often felt to bring about real change in *status quo* and prevent majoritarian tendencies of the polity to affect all three branches of the State. However, having become a closed-door system in itself, and beset with more problems than it has positives, there now exists an urgent necessity for replacement of the collegium system. In this light, an Appointments Commission involving all branches of democratic functioning seems the ideal solution for balancing the contesting claims of judicial independence and accountability, which do not yield to any cost-benefit analysis.

Political theorists such as Thomas Hobbes in *The Leviathan,* and John Locke in his *Second Treatise of Government*, argue that legitimate political authority is grounded in an agreement among equals—a social contract— in which citizens consent to exchange their natural freedom for the order and protection a government supposedly can provide.[132] This "contractarian" objection begins from the premise that a constitution is only legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them.[133] While the theory itself is both criticized and valorized, it can well be understood that ultimately, all the branches of a democratic government, be it the Parliament, the executive or the judiciary have to be accountable to the public. Their respective freedoms in the exercise of their constitutional powers are valuable only as far as they maintain the social contract, by the medium of which the sovereign people of this nation have given themselves the Constitution. This can only be attained when the judiciary is free and independent from both, outside as well as inside influence and interference. It is ironic then, as in the words of Upendra Baxi, that "neither [the pre or post-1994 system of appointment,] can be said to have failed or succeeded, because the citizen has no way of knowing who the candidates are, how they are selected and why. No empirical study of judicial appointments is possible because the records are not available, and like the electoral nomination of candidates, the right to information does not exist so far as judicial elevations or transfers of high court justices are concerned."[134] That the independence of the judiciary is the *sine qua non* of any democratic system is indisputable. However, judicial independence can never be defined in isolation, but only in relation to the people it seeks to secure justice for. The conceptualization of judicial independence cannot, or should not, be solely a means of

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[132] Christine Keating, DECOLONIZING DEMOCRACY: TRANSFORMING THE SOCIAL CONTRACT IN INDIA, (Penn State Press) (2011).
[133] Rehan Abeyratne, *Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy*, 39(1) BROOK. J. INT'L L. (2014).
[134] Upendra Baxi, *Change Must Respect Basic Structure,* INDIAN EXPRESS*,* Aug. 8, 2014.

establishing judicial supremacy, as is often alleged, but rather with the ultimate aim of securing the greater cause of public interest. Any interpretation of "judicial independence" that serves to insulate the judiciary from accountability or transform it into a sort of superior legislature in the matters of policy-making is not beneficial to the cause of the nation, and is essentially an empty intellectualization.

The question then arises as to whether the proposed NJAC is the appropriate model for the same. Several concerns have been raised by members of the legal fraternity about the sustainability of a model which has the potential to create a state of stasis by its even division of legal and non-legal entities, detrimental to the functioning of the nation state. Further, the ill-effects of both, the grant of constitutional status to the Amendment Bill in its current form, or the non-granting of constitutional status at all, and allowing a simple majority to amend the provisions related to the Commission, need to be addressed. That the country and its citizens are often reliant on an activist judiciary for justice against a largely apathetic state machinery cannot be denied. Hence, it is the citizenry that will be most affected by any overt politicization of the judiciary or compromise on judicial independence on the pretext of equal participation. The presence of a single party majority in the current Parliament, after a long reign of coalitions, also cements the need for a more vigilant judiciary and to debate the merit of allowing executive, already in control of the Parliament, control in the third branch of the democratic structure i.e., the judiciary. The potential domino effect of the NJAC is evident; the judges selected by such a system will further effect the selection of other judges, and once politicized, the entire selection process may thereafter remain overtly political.

In this context, it is important that the composition of the proposed Commission be numerically favorable to the judiciary, with the functionaries of the executive and the Parliament largely playing a consultative role in the decision-making process, rather than a decisive one. The executive, even if given a say in this crucial matter, should accept the position as an actor in public interest, rather than in hopes of protecting the interests of its individual members or the party in power, as so often is the case. The greater aim of accountability of the judiciary and curbing of partisan interests will *prima facie* be satisfied by this delineation, as all the branches of the democratic structure will be privy to and participants in the process of judicial appointments and transfers, thereby ensuring transparency. However, the influential role will be played by the judiciary, which it is indisputably the best suited for, thereby ensuring its independence.

The Amendment Bill, having apparently received the assent of 17 of the 29 state legislatures, and the assent of the President[135] was only awaiting notification, which formality was duly completed on the 13th of April, 2015.[136] There was always very little doubt that the Amendment Bill in question, when and if ratified by not less than half the state legislatures, as per the constitutional requirements, would undergo another constitutional challenge as being destructive of the basic structure doctrine, as is currently in question in the Supreme Court. Thus, any such bill that rests on the premise of an imbalance of powers of the three organs of the State, and which is unfavorable to the cause of judicial independence, raises the presumption that it may be ultimately rejected by the judiciary, and prove nothing more than an exercise in futility. In such a scenario, it is the mandate of the government to frame a bill capable of passing the strict judicial scrutiny, such that its composition itself provides a definitive and unassailable reassurance that the legitimate fear of accountability is not being used as merely a guise to abridge judicial independence in favor of greater politicization.

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[135] *President signs NJAC Bill to change the way judges are appointed*, THE INDIAN EXPRESS, Jan 1, 201).

[136] *National Judicial Appointments Commission Act Notified,* PRESS INFORMATION BUREAU, Ministry of Law and Justice, (April 13, 2015, http://pib.nic.in/newsite/PrintRelease.aspx?relid=118224: "Accordingly, in exercise of the powers conferred by sub-section (2) of section 1 of the Constitution (Ninety-ninth Amendment) Act, 2014, the Central Government appoints the 13th day of April, 2015, as the date on which the said Act shall come into force."

Shashank Singh, *Spectrum Auction and the Problem of Winner's Curse: Arguing for a Consumer Centric Approach* 3(1) NLUJ Law Review 112 (2015)

SPECTRUM AUCTION AND THE PROBLEM OF WINNER'S CURSE: ARGUING FOR A CONSUMER CENTRIC APPROACH

SHASHANK SINGH*

Spectrum auctions have long been surrounded in controversy. This is mostly due to the ineffective and unplanned policy of the government. After the formation of TRAI, in 2001, there was some uniformity in spectrum policy; however, with increasing political interference, it was rendered ineffective. The key challenge before the government is to design an auction that reduces the burden on the consumers while providing the government with maximum revenue. There are two main problems that the auction designers are facing today - collusion among the bidders and the problem of winner's curse. While the government policy has increased transparency and reduced collusion, the problem of winner's curse persists.

This Article deals with the various methods of spectrum assignment. It then looks at the concept of auction design and analyses the various auction designs adopted by the government. Further, it looks into the problem of winner's curse and the corollary problems faced by the telecom industry due to the increasing cost of spectrum. In conclusion, it is argued that the government must take active steps to avoid the problem of winner's curse by amending the existing auction design so that the ultimate benefit is transferred to the consumers.

TABLE OF CONTENTS

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I. INTRODUCTION

Spectrum is a collection of various electromagnetic radiations of different wavelengths through which communication signals travel. Initially, these were solely used for defence communication but with the advancement of technology, other sectors like mobile communication (GSM & CDMA), broadcasting, radio navigation, mobile satellite services etc. have also been allocated spectrum. Spectrum is a natural resource[1] which needs to be efficiently utilised. Unlike other natural resources, spectrum does not exhaust or deplete on usage, but inefficient use of spectrum leads to wastage of the precious resource.[2] Globally, the International Telecommunication Union ("ITU") is responsible for effective allocation of spectrum to various nations.[3] In India, the Wireless Planning & Coordination ("WPC") Wing of the Department of Telecommunication ("DOT") under the Ministry of Communication and Information Technology is the nodal agency responsible for issuance/renewal of radio frequency spectrum and its effective management.[4]

Pre-liberalisation, the spectrum was subject to the monopoly of the government and private individuals were not given telecommunication licences. In 1992, the government started proposals for issuing licences for basic telephone services and other value-added services like cellular mobile telephone, radio paging, and internet services. Nonetheless, it was only after the 1995 decision of the Supreme Court in *Ministry of Information and Broadcasting v. Cricket Association of Bengal,*[5] that the government monopoly in the telecommunication and broadcasting industry

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[1] Patrick Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, MICH.TELECOMM.& TECH. L. REV. 285 (2010).
[2] Douglas W. Webbink, *The Invisible Resource: Use and Regulation of the Radio Spectrum*, WASH. U. L. REV. 712 (1971).
[3] Martin A. Rothblatt, *Satellite Communication and Spectrum Allocation* AM. J. INT'L L. 56 (1982).
[4] VIKRAM RAGHAVAN, COMMUNICATIONS LAW IN INDIA 667 (2006).
[5] (1995) 2 SCC 161.

ended. The Court held that spectrum cannot be the monopoly of the government and efficient use of the resource demands that private telecommunication companies be allocated spectrum licences for its optimum utilisation.

Over the past fifteen years, the deliberation surrounding methods of allocation has extensively taken place within the government departments and the civil society. Three policy papers, titled 'National Telecom Policy' ("NTP"), have been introduced in the years 1994, 1999 and 2012. Nonetheless, there has never been any uniformity in the policy of alienation of spectrum to private individuals and corporations. Recently, after allegations of corruption and administrative misdemeanour, the courts intervened in the policy matters surrounding spectrum allocation. It was held that auction would be the only equitable method of alienation of spectrum in the country and other methods would go against the Constitution.[6] However, auction itself is an intricate process and the ultimate outcome depends solely on the auction design that the government adopts. Auctioning spectrum does not guarantee effective rollout of services or transfer of benefits to the consumer. In fact, since the policy to auction spectrum has been adopted, it has always been surrounded with controversy. Before 2010, the controversy was regarding the opaque and ambivalent auctioning policy. After the judicial intervention in 2012, the controversy has been regarding the rising cost of spectrum and whether the auctioning policy has ultimately benefited the end consumers. Specifically, the problem of 'bidder's curse' has been rising, with the winning bid amount increasing with every successive auction. While the government exchequer has maximised its revenue in the short term, it is argued that such a policy would have a detrimental long term effect on the telecommunication sector.

In this Article, the author looks to critically examine the policy previously adopted by the government and subsequently analyses the problem of winner's curse. The Article has been divided into seven parts. In Part II, the author would look at some of the popular methods, apart from auction, that are used for spectrum allocation. These include lotteries, administrative process and first-come first-serve. From 1991 to 2011, there was no blanket policy adopted for allocation of spectrum. The government adopted the method as per its capricious will and there was widespread allegation of corruption and nepotism. In a Public Interest Litigation ("PIL") before the Supreme Court,[7] which has been dealt with under Part III, the judges specifically analysed the varying policy adopted by the government; and henceforth mandated that auction should be the preferred method for allocation of spectrum to private firms and individuals. Part IV examines the popular methods of auctioning spectrum. Auction of such vast natural resource,

[6] Special Reference No. 1 of 2012 (Under Article 143(1) of the Constitution of India).
[7] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.

being complicated in nature, it is argued that the auction design adopted by the government should keep in mind the overall objective that the auction seeks to achieve. The auction designs adopted by the government from 1991 to 2013 have been outlined under Part V. In Part VI, the author specifically looks at the increasing problem of winner's curse and reasons that the auction design of the government must be amended to benefit the consumers. Finally, Part VII provides the conclusion.

II. POPULAR METHODS OF SPECTRUM ASSIGNMENT

A. ADMINISTRATIVE PROCESS

The administrative process for spectrum assignment is the most common spectrum allocation method in the world. In common parlance, it has also been termed as "beauty contests". Under this, the government invites proposals by releasing a comparative tender for evaluation. It can set specific criteria like financial feasibility, geographic and population coverage, technological advancement, infrastructure requirements for considering applications.[8] While setting such parameters, the Executive has absolute primacy over all matters relating to the same. There is massive lobbying on behalf of various applicants and collusion between the applicant and the government is common. The executive can choose the applicants arbitrarily without giving any reasons for selection. There is a complete lack of transparency and the system can easily be manipulated by undeserving applicants by offering unrealistic business plans or rigging the procedure.[9] Such a policy of administrative selection was adopted by most economies pre-liberalization. This policy is increasingly on a decline throughout the world as the economies continually seek more efficient methods like auction wherein there is a greater degree of transparency and revenue maximisation to the government exchequer.

However, in certain cases, administrative process may have certain benefits. For instance, the government may impose certain conditions for allocation of spectrum citing national security. Also, when new technology is introduced and massive private investment is required to support such a technology, the government often prefers administrative process of allocation to secure its interests. In India, administrative process was used to allocate spectrum in 1994-95 for the

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[8] Andrea Prat & Tommaso Valletti, *Spectrum Auctions versus Beauty Contests: Costs and Benefits*, OECD WORKING PARTY ON TELECOMMUNICATIONS AND INFORMATION SERVICES POLICIES, (June 28, 2014), http://istituti.unicatt.it/economia_impresa_lavoro_OECD-draft.pdf.

[9] Rob Frieden, *Balancing Equity and Efficiency Issues in the Management of Shared Global Radio Telecommunication Resources*, 24 U. PA J. INT'L ECO L. 289 (2003).

four metros (Delhi, Chennai, Kolkata and Mumbai) in cellular services.[10] Later, such policy was shunned in favour for competitive bidding.[11]

B. LOTTERIES

In a lottery, the licenses are allocated at random from among the applicants.[12] There is no particular advantage that this scheme has over beauty contests, apart from creating a level playing field.[13] Like beauty contests, this too does not guarantee that the best suited applicant gets the licenses. However, lottery offers a speedy process when services need to start immediately. In the U.S., the 1980s saw the government allocating spectrum licences through lottery system.[14] In India, there is no record that the government ever adopted such a method.

C. FIRST COME FIRST SERVE ('FCFS')

Under the First Come First Serve method for spectrum assignment, the government department allocates spectrum at a certain price to the applicant that applies first. The applicants are allowed to apply after they qualify a set of predetermined criteria. In some cases, the government does not even introduce such criteria. This method sought to remove the shortcomings of beauty contests and lotteries like arbitrariness in decision making and collusion. Nonetheless, this system is also full of inefficiencies. The allocation in the name of 'first come' is often pre-disclosed and rigged. In India, the policy of FCFS was generously followed between 2001 and 2008.[15] The 2G spectrum bundled with license was distributed for pan-India operation between these years for Rs. 1651 crores.[16] It was argued that this valuation was seven-eight times lesser than the prevailing market price.[17] This distribution was later challenged in the Supreme Court and came to be infamously known as the 2G case.[18] The main contention of the civil society members, who were the appellants, against the government officials and the service providers was that the policy of FCFS was detrimental to the objective of price realisation and caused huge losses to the government. Presently, the policy has been discarded and replaced with competitive bidding.

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[10] Alok Kumar, *3G Spectrum Auction in India: A Critical Appraisal*, 46(13) ECON. & POL. WKLY. 121 (2011); *See also*, Telecom Regulatory Authority of India, *Recommendation of Auction of Spectrum,* (June 28, 2014), http://www.trai.gov.in/WriteReadData/Recommendation/Documents/Finally%20final%20recommendations230412.pdf [hereinafter *Kumar*].

[11] *Id.*

[12] A Jayanthila Devi, et al., *Methods for Spectrum Assignment, Pricing and Access in Dual Technologies*, 1(1) INT'L J. COMPUTER APPLICATIONS IN ENGINEERING SCI. (2011).

[13] John Mcmillan, *Why Auction the spectrum?*, 19(3) TELECOMMUNICATIONS POLICY 191, 199 (1995).

[14] Thomas W. Hazlett, *Optimal Abolition of FCC Spectrum Allocation,* 22(1) J. ECON. PERSP. 105 (2008).

[15] Paranjoy Guha Thakurta & Aditi Roy Ghatak, *TRAI Recommendations The Next Round of Telecom Tussles*, 47(22) ECON. & POL. WKLY. 51 (2012).

[16] *Id.*

[17] *Id.*

[18] 2G case, *Infra* note 22. The judgment has been extensively dealt with under Part III.

III. SUPREME COURT'S OBSERVATIONS IN THE 2G CASE AND PRESIDENTIAL REFERENCE

Traditionally, policy matters, especially the ones that have economic ramifications, have remained the prerogative of the government and courts have refrained from commenting on such matters. However, despite several policy papers like NTP 1994 and NTP 1999,[19] several recommendations on the subject by TRAI and communication between Telecom Commission, Prime Minister's Office ("PMO") and the Telecom Minister, it is evident there was no clear policy that the government adopted for distribution of spectrum among private telecom operators.[20] This left a lacuna that was grossly abused by the government officials and ministers which allegedly lead to a huge financial loss to the government exchequer.[21] Pursuant to these findings, the Centre for Public Interest Litigation and several members of the civil society filed a suit in the Supreme Court challenging the licensing and spectrum assignment policy followed hitherto. In this particular case, the officials in charge manipulated the last date for submitting applications to favour a few applicants by eliminating any further competition. They also used the archaic and corruption prone FCFS method for allocation.

Among other contentions raised, two significant issues that sought to be addressed, related to the existing licensing policy of the government. *First*, whether the government is allowed to alienate, transfer or distribute natural resources without following a fair and transparent method consistent with the fundamentals of equality.[22] *Second*, whether the FCFS policy was *ultra vires* Article 14 of the Constitution, and contrary to public interest.[23]

To answer these questions, Justice Singhvi delved deep into the telecom policy and reforms introduced in the sector since 1984, only to find reason in the 'public trust doctrine'. This doctrine was first introduced in the *Central Railroad Company v. People of the State of Illinois*,[24] and was incorporated in Indian jurisprudence through the *M.C. Mehta v. Kamal Nath*[25] case. Subsequently, it was applied in several cases[26] dealing with actions of the State and its instrumentalities with respect to distribution of public resources for public cause. In its true form, the doctrine seeks to

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[19] *See generally*, National Telecom Policy 1994, http://www.trai.gov.in/Content/telecom_policy_1994.aspx [hereinafter *National Telecom Policy 1994*]; National Telecom Policy 1999, http://www.trai.gov.in/Content/ntp_1999.aspx hereinafter *National Telecom Policy 1999*]; National Telecom Policy 2012, http://www.dot.gov.in/telecom-polices/national-telecom-policy-2012 [hereinafter *National Telecom Policy 2012*]

[20] Sudhir Krishnaswamy, *The Supreme Court on 2G: Signal and Noise,* (June 29, 2014), http://clpr.org.in/wp-content/uploads/2013/02/5-Sudhir-Format.pdf. [hereinafter *Krishnaswamy*]

[21] *See generally,* Paranjoy Guha Thakurta & Akshat Kaushal, *Underbelly of the Great Indian Telecom Revolution*, 45(49) ECON. & POL. WKLY. (2010).

[22] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1, ¶ 1 [hereinafter *2G case*].

[23] *Id.*

[24] 146 U.S. 387 (1892).

[25] (1997) 1 SCC 388.

[26] Jamshed Hormusji Wadia v. Board of Trustee, Port of Mumbai (2002) 3 SCC 214; Intellectuals Forum, Tirupathi v. State of A.P., (2006) 3 SCC 549; Fomento Resorts & Hotels Limited v. Minguel Martins, (2009) 3 SCC 571.

provide a legal right to the general public against the actions of the government which are against the environment.[27] It also seeks to evoke a sense of obligation towards future generations with respect to the natural resources and holds accountable the persons who impair such resources. In *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal,*[28] the court held that airwaves and frequencies are public property and considering that they are limited, the best interest of the society must be kept in mind while allocating such resources to private persons.[29]

Therefore, allocation of spectrum is dictated by a well-deliberated policy that benefits the public, and not by the arbitrary and capricious will of the government.[30] It has been noted that airwaves and frequencies are public goods, and the procedure adopted for the distribution of such goods must be non-arbitrary and transparent. The resultant procedure should ensure that such resources are equally distributed and the transfer of such resources to private parties must yield adequate compensation.[31]

The court then went on to denounce the FCFS policy adopted for distribution of licenses and held that it involves an element of pure chance or accident and invocation of such a policy can have dangerous implications. The court observed that any person who has access to the government information about the alienation of public property would be more likely to be awarded the contract as such a person would stand first in the queue. Such a process would lead to unfair competition. The operative part of the judgment that has led to several key policy implications reads:

> *The State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum etc., it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while*

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[27] Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).
[28] AIR 1995 SC 1236.
[29] *Id.* at ¶ 81.
[30] *Id.* at ¶ 63.
[31] *Ibid.*

> *transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.*

The court mandated that spectrum should only be distributed through auction, which would not only be financially beneficial to the State, but would also fall within the parameters envisaged under Article 14. There are several criticisms to the judgment, according to which the Court failed to apply the basic tenets of Article 14;[32] however the analysis of such critique is outside the scope of this Article. Consequently, the government sought a clarification on the verdict under Article 143(1) through a Presidential Reference. The point that the Government sought to clarify was whether auction is the only method of distribution of spectrum.[33] The Court noted that while auction is not a constitutional mandate, it is the best possible method for maximisation of revenue for the Government exchequer. On a conjoint reading of Article 14 which seeks non-arbitrariness, and Article 39 (b) which seeks distribution of natural resources to serve common good, one can conclude that by application of economic logic, auction is one of the preferable methods of alienation of natural resources like spectrum.

IV. AUCTION FORMATS

A. OPEN BID AUCTIONS

In open bid auctions, the bidders reveal their bids as the auction progresses.[34] All other bidders can assess the bids being made by their competitors and can accordingly put forward their bids. Under this, there are two categories of auctions.

1. ASCENDING PRICE AUCTION

In an ascending price auction, the auctioneer progressively increases the bids.[35] The format can be divided into two separate categories depending on the entry and elimination process.

a. ENGLISH AUCTION

This is the most common type of auction. In this, the auctioneer initially fixes the price in a low range. The bidders increase their bids as the auction continues. The bidders can join in anytime

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[32] Krishnaswamy, *Supra* note 20.
[33] Special Reference No. 1 of 2012 (Under Article 143 (1) of the Constitution of India), (2012) 10 SCC 1, ¶ 1.
[34] Peter Cramton, *Spectrum Auction*, *in* HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 605, 610 (Martin Cave, Sumit Majumdar & Ingo Vogelsang eds., 2002) [hereinafter *Crampton*].
[35] Peter Cramton, *Ascending Auctions*, 42(3) EUR. ECON.REV. 745, 746 (1998).

and silence of the bidders does not lead to elimination, until there is no increase in the bids.[36] The auction ends when there is no increase in the bids.

b. JAPANESE AUCTION

This auction is very similar to the English auction and suits the situations where a large number of bidders are present. The auctioneer calls out the bids, and if the number of bidders who want to purchase the spectrum is more than one, then the auctioneer again increases the bids by a predetermined amount.[37] This predetermined amount is known as 'bid increment'. The auction ends when only the highest bid, without any clash among the bidders, is received. However, unlike the English auction where the bidders are free to join anytime, the Japanese auction does not allow them to do so. Once the bidders fail to express their willingness to buy, they are eliminated from the auction and are not allowed to bid again. This highest bidder wins the auction, but pays the amount equivalent to the second highest bid. This type of auction is commonly known as cloak auction.[38]

2. DESCENDING PRICE AUCTION (DUTCH)

Contrary to the English auction where the auctioneer increases the price progressively, in the Dutch auction the auctioneer sets a high price and decreases the price as the auction progresses.[39] The bidder who first expresses their willingness to buy at a particular price wins the auction. No other bidder can then enter the auction as to deprive the winner of their bid. While this method may initially increase the price maximization objective, it is quite detrimental to the bidder's interest. This is mainly because for the auction to reveal the true price of the spectrum, the bidders would need to have full access to all the information, which is practically not possible. Paradoxically, if the auctioneer does not reveal certain information about the auction, then the price discovery objective may not be accomplished as the bid might fall below the true value leading to loss of revenue for the public exchequer.

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[36] *See generally*, Kevin McCabe, Stephen J. Rassenti &Veron L. Smith, *Auction Institutional Design: Theory and Behaviour of Simultaneous Multiple Unit Generalizations of Dutch and English Auctions*, 80(5) AM. ECON.REV. 1276 (1990).

[37] Charles Noussair, Robin Stephane & Bernard Ruffieux, *Revealing consumers' willingness to pay: A comparison of the BDM mechanism and the Vickrey auction*, 25(6) J. ECON. PSYCHOL. 725 (2004).

[38] *Id.*

[39] Paul Klemperer, *What really matters in auction design,* J. ECON. PERSP. 169, 189 (2002).

B. SEALED BID AUCTIONS

1. FIRST-PRICE SEALED BID AUCTION:

In this format, each bidder can submit only a single bid equal to their valuation. The bidder with the highest amount wins the auction by paying the bid amount.[40] This type of auction is extremely simple and theoretically yields similar results as the English auction. However, while in English auction the bidders can bid more than once, in sealed auctions only a single bid is allowed. Here, the price realisation does not depend upon the bidders' perception of the value of the spectrum, but on their perception of others' valuation. Thus, sometimes for large auctions this may reveal an obscure or inflated value of the spectrum. This is the most commonly used method of auction.

2. SECOND-PRICE SEALED BID AUCTION ('VICKREY AUCTION'):

Under this format, the highest bidder wins the auction; however, the amount paid by them is equal to the second highest bid.[41] This removes the drawbacks of inflated valuation by the bidders. Nonetheless, despite the proven advantage of true price discovery over first-price sealed bid auction, this format is not particularly popular.

V. AUCTION DESIGNS IN INDIA

The mandate to auction spectrum does not guarantee the successful rollout of the telecommunication services. Ultimately, it is the auction design that directly determines the overall success or failure of an auction and the achievement of the goals that the distribution policy seeks to achieve.[42] Auction design is the mechanism through which the auctioneer encourages the bidders to reveal the true value of the item being auctioned by lowering the chances of collusion, and bid rigging, thereby maximising the revenues.[43] The auction design depends directly on the objective that the auctioneer seeks to achieve. For instance, some auctions solely focus on maximising revenue, while others seek a combination of revenue maximisation and speedy rollout services and therefore establish a minimum entry barrier. On the other hand, there may be auctions that might simply want to increase demand in the market and stimulate competition. Such considerations are directly linked to the overall objective that that the auction seeks to achieve.

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[40] *See generally*, B. Elyakime *et al, First-price sealed-bid auctions with secret reservation prices*, ANNALESD' ECONOMIE ET DE STATISTIQUE 115-141 (1994).

[41] John Riley & William F. Samuelson, *Optimal Auctions*, 71(3) AM. ECON. REV. 381, 392 (1981).

[42] Lawrence M. Ausubel & Peter Cramton, *Auction Design Critical for Rescue Plan*, 1 ECONOMISTS' VOICE 3 (2008).

[43] Leslie R. Fine, *Auctions*, THE CONCISE ENCYCLOPAEDIA OF ECONOMICS (July 30, 2014), http://www.econlib.org/library/Enc/Auctions.html.

The NTP 1999, which had a significant impact on the spectrum allocation policy post-2000, had several important objectives. Among others, the policy sought to make available affordable and effective communication services, increase tele-density, encourage penetration in remote areas, create greater competition among the service providers and create a level playing field for them.[44] More recently, the NTP 2012, which was released after the reprimand by the judiciary in the 2G case, introduced new objectives apart from the ones in NTP 1999. The new policy sought to provide secure and affordable telecommunication services, increase internet broadband penetration, introduce audit of spectrum usage, ensure adequate availability of spectrum and a transparent allocation of spectrum through market-related processes. These objectives have directly impacted the auction design that the government has adopted over time.[45] In this Part the authors have looked at the previous policies adopted by the government and its impact on spectrum auction.

A. 1991 AUCTION FOR BASIC SERVICES

In India, auction for basic services started as early as 1991.[46] The policy of competitive bidding was mainly introduced to increase government revenue. The entire process was handled by the DoT, which not only handled policy, as the Telecom Regulatory Authority of India ("TRAI") was created much later in 2001, but was also the regulator and the service provider. The minimalist approach in policy matter by the courts also ensured that DoT remained the ultimate arbitrator for any dispute as well. For the purpose of auction, the country was divided into twenty circles which were categorised as A, B, or C depending upon their revenue potential.[47] The bidding was to take place through a two-stage process. In the first stage, the service providers had to go through a pre-qualification test. Here, the service providers were evaluated on the basis of their financial strength and experience. In the second stage, the selected service providers that qualified the first stage had to bid on the circles that they wanted. The auction nonetheless was a single-stage auction, with the highest bidder winning the license. The licences for the four metros (Delhi, Calcutta, Madras and Bombay) were auctioned separately.[48] The auction design was equivalent to the first-price sealed bid auction.

Before the bidding process commenced, there was no restriction on the number of circles that a single service provider could be awarded. However, after the bidding process was over, a single

[44] *See generally*, National Telecom Policy 1999, *Supra* note 19.
[45] *See generally*, National Telecom Policy 2012 *Supra* note 19.
[46] R.S. Jain, *Spectrum Auction in India: Lessons and Experience*, 25 TELECOMMUNICATIONS POLICY 671, 672 (2001) [hereinafter *Jain*].
[47] Srobonti Chattopadhyay & Sumita Chatterjee, *Telecom Spectrum Auctions in India: The Theory and the Practice* 9, Indian Institute of Management, Kolkata, Working Paper Series, WPS No. 741/ February (2014) [hereinafter *Chattopadhyay & Chatterjee*].
[48] Jain*, Supra* note 46 at 590.

company was awarded nine of the twenty circles. This meant that the company had to pay US$ 15 billion over 15 years while its turnover was a meagre US$0.06 billion in comparison.[49] Consequently, the government was left speculating about the financial ability of the company to pay such an amount. Also, one company gaining such a large market share was antithetical to the government's objective of increasing competition and diluting the existing government monopoly. The government therefore asked the service provider to choose three of the nine circles that it was initially awarded. In doing so, the government lost the "minimum reserve price" that is generated by such withdrawals. There was an array of other problems as well. For instance, the C-circle bids were very close to the B-circle bids, which defeated the initial stratification. Also, the service providers felt that the reserve price was too high which discouraged several bidders. This was also the plausible reason for a poor response from the private sector. Consequently, nine circles did not have service providers and only six service providers signed the agreement. This resulted in rebidding in fifteen circles as the government changed its policy of not allowing a single operator in more than three circles.[50] Even the bidders who obtained the license thought that the bid amount exceeded the true value of the spectrum and the business at the going rate was not viable.[51]

B. AUCTION POLICY UNDER NTP 1994

In 1994, the National Telecom Policy was introduced for the first time. The policy sought to make telecommunication more accessible to the consumers, make telecom services more reasonable and affordable, introduce world class quality services, availability of telephone services on demand and to introduce value added services by the end of the 8th Five year Plan (1992-1997).[52]

In 1995, auction of cellular services was introduced for the first time and the Code Division Multiple Access ("CDMA") was sought to be auctioned. The government also separated the auction of Basic and Cellular licenses for each circle. It encouraged the private companies to participate and mandated foreign partnership for better technological assistance. This time around as well, the government divided the circles into Categories A, B and C, depending on the concentration and density of telecom users. The government policy sought to give two licences per circle. This was also a single stage sealed bid auction and the highest bidder was to be

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[49] *Id.*

[50] Snehashish Ghosh, *Spectrum Management*, THE CENTRE FOR INTERNET AND SOCIETY, (Aug. 7, 2014), http://cis-india.org/telecom/resources/spectrum-management

[51] Siddharth Sinha, *Spectrum Auction in India,* CENTRE FOR TELECOM AND POLICY STUDIES, INDIAN INSTITUTE OF MANAGEMENT, AHMEDABAD 4 (2001) [hereinafter *Sinha*].

[52] *See*, Objectives, National Telecom Policy, 1994.

awarded the license. Considering that two operators were to be selected, the second highest bidder was supposed to match the highest bid in order to obtain the license.

On receiving the bids, it was found that a single company, Himachal Futuristics Communications Limited ("HFCL") had bid the highest in nine circles. In many instances, the highest bid by HFCL was more than double the second highest bid.[53] Much like the 1991 auction, the government intervened again and announced a cap of three circles for a single bidder in Category A and Category B circles. On the other hand, in ten circles, the government rejected the highest bids as they were below the reserve price.[54] What was peculiar about this rejection was that the government had not announced any reserve price in the first place.

Subsequently, when the reserve price was announced, it was perceived to be too high for the bidders. This subsequent announcement also led to second rounds of bidding for the same circle.[55] This policy was detrimental to the initial auction design as the government used the first round bidding process to fix the reserve price of the second round. In the interim, there was a high possibility that the bidders colluded to lower the reserve price. Of the twenty-one circles up for auction, eight were left unallocated as the reserve price was too high.[56] The selected bidders of each circle were asked to replicate the license fee of the highest bidder to qualify for the second bidding round.

The second round bidding itself reproduced dismal results. This was mainly because the lucrative circles had been awarded in the first round itself. Consequently, there was lack of incentive for the bidders to increase their bids resulting in only six bids being received in the second round of bidding. The payment rules set by the government required the second highest bidder to match the highest bid. In many cases this difference was so high that the second highest bidder failed to match the highest bid.[57] Overall, the policy adopted by the government was a huge failure resulting in slow rollout of services and high license fee. The government's tendering process was also questioned as there was no lock-in period or restriction on transfer of license. A restriction on transfer of license was finally imposed only after the bidders started transferring their licenses. The matter was finally settled through negotiation, but only after a delay of thirty-three months.[58] The ultimate burden of such policy failure was faced by the consumers.

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[53] Chattopadhyay & Chatterjee, *Supra* note 47.
[54] Rafiq Dossani & S. Manikutty, *An Institutional View* in TELECOMMUNICATION REFORM IN INDIA (Rafiq Dossani ed.) 50 (2002) [hereinafter *Dossani & Manikutty*].
[55] *Id.*
[56] Chattopadhyay & Chatterjee, *Supra* note 47.
[57] *Id.*
[58] Dossani & Manikutty, *Supra* note 54.

C. SPECTRUM AUCTION UNDER NTP 1999

NTP 1999 was seen to be a reformist policy which sought to remove the drawbacks of the NTP 1994. The main problem with the previous policy was with respect to the role of the DoT within the whole setup. The opposition came from the fact that the DoT, apart from formulating the policy, was the majority manufacturer and had the majority market share. Further, it was also the spectrum distributor and arbitrator of disputes. The 1999 policy sought to reverse this by introducing a telecom regulator, which it later did in the form of the Telecom Regulatory Authority of India. It also formed the Telecom Dispute Settlement and Appellate Tribunal ("TDSAT") for resolution of the disputes, with the ultimate appeal lying before the Supreme Court of India.

1. AUCTION FOR THE FOURTH OPERATOR IN 2001

In the 1995 auction, for each circle, the spectrum was distributed to two operators. Later, in 2001, the government service providers (BSNL and VSNL) were allotted *pro bono* spectrum as the third operator in the circle.[59] Subsequently, in the same year the government announced that it intended to introduce a fourth operator in each circle through auction. By this time, the policy prerogative was outsourced to TRAI and the auction was handled by the DOT. The TRAI in its recommendations highlighted the imminent need to improve the quality of services while providing the services in a cost effective manner.[60] In particular, TRAI recommended that the minimum foreign capital must not exceed 49%; that the existing license holders could not bid for the same circle and rollout obligation covering 50% area of district headquarter within three years.[61] It also forbade one company to have more than 10% stake in more than one participating entity.[62] Further, as an important policy measure, TRAI allowed transfer/re-assignment of license to any other entity that fulfils the essential criteria.

For the purpose of this auction, the government set up a three-staged auction design.[63] The government shunned the previously opaque and inefficient auction design and introduced Informed Ascending Bidding Process ("IABP") for this auction. Under this, the prospective

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[59] Justice Shivraj V. Patil, *Report on Examination of Appropriateness of Procedures followed by Department of Telecommunications in Issuance of Licences and Allocation of Spectrum during the Period 2001-2009*, 32 (2011) (Aug. 7, 2014), http://www.scribd.com/doc/49238461/Justice-Shivraj-Patil-committee-report-on-2G-soectrum-allocation. [hereinafter *Patil*].

[60] Sinha, *Supra* note 51; *See also,* Telecom Regulatory Authority of India, *Recommendations of TRAI with regard to Cellular Mobile Service Providers (CMSPs) – Induction of fourth operator* 2 (2001).

[61] Rekha Jain, *Contexts in Models for Auction Designs: Lessons for Experience*, 37th Annual Convention of Operations Research Society of India, January 8-11, 2005.

[62] Press Information Bureau, *Decision to Award Licences to Fourth Operator for Cellular Mobile Telephone Service* (June 17, 2014), http://pib.nic.in/focus/foyr2001/fojan2001/fo050120011.html.

[63] Rohit Prasad & V Sridhar, *A Critique of Spectrum Management in India*, ECON. & POL. WKLY.15, 15 (2008). [hereinafter *Prasad & Sridhar*]

licensees were asked to submit a pre-qualification offer.[64] The highest pre-qualification offer was treated as the reserve price for the subsequent rounds. The entity with the lowest bid amount was to be eliminated from the auction procedure provided there were more than five and three bidders in the first and the second round respectively. This elimination would take place for two rounds, subject to the minimum number of bidders, and at the end of the third round of bidding; the highest bidder would have been declared the winner.

Reliance Communication, which was affiliated to Reliance Group, was asked to withdraw its application as Reliance Internet Services had also submitted a bid. This was done in light of the rule that prohibited one company to have more than 10% stake in another participating company. If DOT would have allowed both companies to participate in the auction, then according to the rule that sought elimination of the bidder with the lowest bid would have been redundant as Reliance would have qualified mandatorily. This would have defeated the competitive nature of the auction. Similarly, BSNL and VSNL whose majority stake was held by the government were also not allowed to participate considering they were already distributed licenses as third operators.

In comparison to the previous auctions, this auction was hailed to be largely successful.[65] From the 21 circles up for auction, only 17 received successful bids. There were six companies which bid for the licenses, out of which five companies were already holding a license for some other circle.[66] Out of the 51 licenses up for auction, 44 were acquired by the five companies that already had licenses. DOT also asked the participants in the auction to furnish bank guarantees to avoid any delay and payment failure. The success of this auction design not only increased revenue for the government exchequer, but also increased competition resulting in improved quality of services.[67]

However, despite being described as a success, there was a drawback to the entire auction. After the formation of TRAI, the license and spectrum assignment were delinked. Thus, while the bidders did get the license at a price determined by the auction, the initial spectrum assignment was only 4.4 + 4.4 MHz.[68] In future, if the licensees wanted to acquire additional spectrum, they had to prove that their subscriber base had crossed a certain threshold. This was the first time

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[64] Patil, *Supra* note 59.
[65] Kumar, *Supra* note 10, at 122; Rekha Jain, *Contexts in Models for Auction Designs: Lessons for Experience, in* VISION 2020 19, 27 (Narasimhan Ravichandraned.) (2005).
[66] These were Reliance Internet Services, Bharti Cellular, Escotel, BATATA (promoted by Birla AT&T and Tata Cellular), Barakhamba Sales and Services (promoted by Hutchison and Essar).
[67] Press Information Bureau, *Decision to Award Licences to Fourth Operator for Cellular Mobile Telephone Service*, *Supra* note 62.
[68] *Id.*

that such a method was being used for spectrum assignment and it came to be known as Subscriber Linked Criterion.[69] Obtaining subsequent spectrum was on FCFS basis, subject to successful rollout of service condition, after payment of additional license fee. This FCFS allotment along with the 2G spectrum allotment was the bone of contention in the 2G scam.[70]

2. AUCTION OF 3G SERVICES IN 2010

In 2008, the DOT announced that it would allocate spectrum for 3G services in 2.1 GHz band through auction.[71] The essential qualification parameter for the prospective bidder was that they must either hold a Unified Access Services ("UAS") license or must be eligible for obtaining one.[72] The reserve price for the circles of Categories A, B and C was set at Rs. 160 crores, Rs. 80 crores and Rs. 50 crores respectively. The reserve price for pan-India license was Rs. 3500 crores. For the first time, the DOT adopted the controlled, and a simultaneous ascending e-auction design which was divided into two stages.[73] The two stages were to be known as Clock Stage and Assignment Stage.[74]

In the Clock Stage, the bidders were to bid for generic lots, which consisted of a single spectrum block delinked from any specific frequency. The clock stage consisted of unspecified number of clock rounds. These rounds were to continue until the demand for lots in service areas is less than or equal to the available supply at the price set in the previous round. Once the rounds would stop, it would give the common winning price (lowest bid) as well as the winning bid (highest bid) of that area. This would establish a bidder which is to be awarded a lot in each of the 22 telecom circles.[75] Once this is determined, the auction moved into the second stage, known as the assignment stage. In the second stage, a single round bidding was conducted and the winning bidders from the previous stage were allocated specific frequencies as per their preferences. The purpose of this round was only to determine the specific frequencies that would be awarded to the bidders. Nonetheless, all the bidders from the Clock Stage would be guaranteed a frequency block even if they chose not to bid at the Assignment Stage. The winners

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[69] Rohit Prasad, *Value of 2G Spectrum in India*, 45(4) ECON. & POL. WKLY. 25, 25 (2010).
[70] *See*, Natural Resources Allocation, In Re, Special Reference No. 1 of 2012, (2012) 10 SCC 352.
[71] Govt. of India, Ministry of Communication and IT, *Guidelines for Auction and allotment of Spectrum of 3G Telecom Services,* (June 12, 2014), http://www.dot.gov.in/sites/default/files/sprectrum_2_0.pdf.
[72] Govt. of India, Ministry of Communication and IT, *Guidelines for Unified Access Services Licence* (Dec. 14, 2005), http://www.dot.gov.in/access-services/guidelines-access-services-licences.
[73] Govt. of India, Ministry of Communication and IT, *Guidelines for Auction and allotment of Spectrum of 3G Telecom Services, Supra* note 71.
[74] Govt. of India, Ministry of Communication and IT, *Auction of 3G and BWA Spectrum (Information Memorandum)* 11, 12 (May 19, 2014), http://www.dot.gov.in/sites/default/files/3G%20%26%20BWA%20Auctions_IM%20-%2012%20Dec%2008_0.pdf .
[75] *Id.*

would then pay the summation of the winning price at the Clock Stage and the accepted assignment bid.[76]

There were 9 bidders who qualified to the Clock Stage.[77] After the Assignment Stage was over, all 71 blocks in 22 circles were sold, leaving no unsold blocks. The DOT ensured that they put in place specific provisions stipulating rollout obligations and payment mechanisms, which was a problem in previous auctions. The auction realised Rs. 16,750.58 crores for the government exchequer. By looking at the revenue generated, one might conclude that the auction was successful; however, on a closer scrutiny, a clear disparity in the cost of the circles could be seen.[78] Nearly 80% of the revenue generated came from the seven Category A circles, while the two metros (Mumbai and Delhi) contributed over 40% of the total revenue generated from the auction.[79] Paradoxically, the five Category C circles jointly contributed a mere 2.7% of the revenue.[80]

Previously, much of the policy work involved creating a "level playing field" between the new entrants and the previously existing operators. However, the nine bidders who were finally awarded the licenses in various circles had already rolled out 2G services. Thus, the objective of attracting new entrants and generating more investment in the telecom sector had completely failed.[81] Similarly, some bidders had rolled out 2G services only a few months before winning the license for 3G spectrum.[82] Therefore, this obviously meant that the price disparity between the two services would be quite vast, with the rural telecom users unable to reap benefits of such services. Despite some imperfections, the 3G auction was largely successful. However, much of the revenue realisation could be attributed to the under-pricing of the 2G spectrum.[83]

D. SPECTRUM AUCTION UNDER NTP 2012

The National Telecom Policy, 2012 was released within months of the Supreme Court's decision in the 2G case. Under this, TRAI recommended that future spectrum assignment must take place through competitive bidding process, as mandated by the Supreme Court. Specifically, they proposed that auction must take place through Simultaneous Multiple Round Ascending Auction

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[76] Govt. of India, Ministry of Communication and IT, *Auction Rules*, 14 (May 19, 2014,) http://www.dot.gov.in/sites/default/files/Pre-bid%20conference%20presentation%20on%20Auction%20Rules_1.pdf.

[77] Aircel Limited, Bharti Airtel Limited, Etisalat DB Telecom Private Limited, Idea Cellular Limited, Reliance Telecom Limited, S Tel Private Limited, Tata Teleservices Limited, Videocon Telecommunications Limited, Vodafone Essar Limited were eligible to bid after fulfilling the prequalification requirement.

[78] Kumar, *Supra* note 10, at 124.

[79] *Id.*

[80] *Id.*

[81] *Id* at 127.

[82] *Id.*

[83] Prasad & Sridhar, *Supra* note 63.

System ("SMRA").[84] This auction design was also favoured by majority of the stakeholders. This format was analogous to the auction design used for the 2010 3G spectrum auction.

In comparison with other auction formats, SMRA has four main advantages. *Firstly*, the price discovery under this format is more efficient than under the other formats. The bidders are able to react to price information of individual spectrum blocks as well as to the relative prices of the blocks. *Secondly*, this format is quite simple for the bidders. The auction mechanism only requires the bidders to accept/reject the price announced by the auctioneer. *Thirdly*, there is efficiency of outcome as the auctions of all blocks close simultaneously. The bidders can see all the prices before the auction ends. This also helps avoid the problem of non-allocation of a particular block. *Lastly*, this format being straightforward and uncomplicated takes little preparatory time for the auctioneer.[85]

1. AUCTION OF SPECTRUM IN 1800 MHZ & 800 MHZ BANDS (2012)

The auction design was similar to that of the 2010 3G auction. However, considering that the frequencies were predetermined, there was to be no Assignment round. The eligibility criterion was also similar, apart from the provision for treating the companies/licensees whose licences were cancelled by the Supreme Court as new entrants.[86] For the first time, the auction notification contained 'Objectives'. Under this, the DOT sought to obtain a market determined process of spectrum, ensure efficient distribution of spectrum, promote rollout, maximisation of revenue etc.[87]

In pursuance of increasing competition in the market, the existing bidders were allowed to bid for half of the blocks while the new entrants were allowed to bid for $4/5^{th}$ of the blocks.[88] Further, the bidder had to demonstrate a certain level of bid activity in each round or exceed a certain percentage of eligibility in each round to remain in contention for the subsequent rounds. The bidding activity must progressively increase as the overall bidding declines across all circles.[89]

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[84] Telecom Regulatory Authority of India, *Recommendation of Auction of Spectrum,* 73 (June 28, 2014,) http://www.trai.gov.in/WriteReadData/Recommendation/Documents/Finally%20final%20recommendations230412.pdf.
[85] *Id.*
[86] Govt. of India, Ministry of Communication and IT, *Guidelines for Auction and Allotment of Spectrum in 1800 MHz & 800 MHz Bands,* (May 19, 2014), http://www.dot.gov.in/sites/default/files/7.pdf.
[87] *Id.*
[88] Govt. of India, Ministry of Communication and IT, *Auction of Spectrum in 1800MHz and 800MHz bands Auction Rules*, (May 19, 2014), http://www.dot.gov.in/sites/default/files/17_0.pdf.
[89] *Id.*

There were five prospective bidders who applied and subsequently passed the pre-qualification requirement for 1800 MHz.[90] Similarly, for the 800 MHz there were two prospective bidders who qualified.[91] The auction ended after 14 rounds of bidding[92] and all the blocks were auctioned successfully.

2. AUCTION OF SPECTRUM IN 1800 MHZ, 900MHZ AND 800 MHZ BAND (2013)

This auction was exactly similar to the auction of spectrum in 1800 MHz and 800 MHz band in 2012, wherein the SMRA method was used. Auction was to be conducted in Service Areas of Delhi, Mumbai, Karnataka and Rajasthan for 1800 Mhz. The 900 MHz auction was to be conducted in Delhi, Mumbai and Kolkata and the 800 MHz band auction was to be conducted in all 21 circles except Rajasthan.[93]

To be eligible for the auction, the prospective bidder had to hold either a CMTS/UAS/ULAS license or be fully eligible to obtain one. There was only one bidder, Sistema ShyamTeleServices Limited,[94] which went on to win all the blocks in which it submitted a bid.[95] From the 30 blocks that were up for auction, 5 remained unsold.[96]

VI. THE PROBLEM OF WINNER'S CURSE AND COROLLARY MATTERS

The spectrum assignment through auction has raised many questions surrounding the efficiency and fairness of the procedures involved. In order to standardise the policy, the Court mandated that auction was the best way for assignment of spectrum. From the aforementioned spectrum auctions, one can conclude that despite auctioning spectrum, there is still no uniformity in the procedure. Further, the question still stands, whether spectrum auction has ultimately benefited the consumers? Here, the author does not question the economic rationale behind auction, but questions the present auction design and reasons why the auction design for future auctions needs to be re-evaluated.

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[90] Govt. of India, Ministry of Communication and IT, *Spectrum Auction in 1800 MHz Bands- List of Applicants, (May 19, 2014),* http://www.dot.gov.in/sites/default/files/26.pdf; Govt. of India, Ministry of Communication and IT, *1800 MHz and 800 MHz Bands Spectrum Auction- List of pre-qualified bidders,* (May 19, 2014), http://www.dot.gov.in/sites/default/files/28.pdf .

[91] *Id.*

[92] Govt. of India, Ministry of Communication and IT, *Auction Result* (May 19, 2014), http://www.dot.gov.in/sites/default/files/34.pdf.

[93] Govt. of India, Ministry of Communication and IT, *Auction of Spectrum in 1800 MHz, 900 MHz and 800 MHz- Auction Rules,* (May 19, 2014), http://www.dot.gov.in/sites/default/files/11-2-13_0.pdf.

[94] Govt. of India, Ministry of Communication and IT, *Auction of Spectrum in 1800 MHz, 900 MHz and 800 MHz— List of Applicants,* (May 19, 2014), http://www.dot.gov.in/sites/default/files/25-2-13_0.pdf

[95] Govt. of India, Ministry of Communication and IT, *800 MHz Band Public Report- Auction Results,* (May 19, 2014), http://www.dot.gov.in/sites/default/files/11-3-13_0.

[96] *Id.*

There has been no spectrum auction in India that has not been surrounded by controversy. The 1995 auction was accused of generating such high bids that winning bidders were not able to fulfil the payment requirements. Ultimately this delayed the rollout obligations of the operators. The 2001 auction for fourth operator license was considered to be a success after the auction was completed; however, the Subscriber Linked Criteria which allowed for grant of additional spectrum was subsequently questioned in the 2G scam and the Justice ShivrajPatil Commission.[97] Further, until the Court mandated 2G spectrum auction, there was hardly any firm or strict spectrum assignment policy. The only policy framework which sets a definite policy is the National Telecom Policy 2012, the effect of which still cannot be judged.

However, ever since the Court mandated auctions, service providers are increasingly becoming more vocal about the increasing cost of spectrum. In essence, they point to the problem of winner's curse. The problem essentially occurs when a bidder over-values the price of spectrum to beat the competition.[98] This leads to a situation where the winner is not able to execute the contract and in certain situations fails to pay the bid amount. In the Presidential Reference, the Court specifically looked at the potentially hazardous nature of this problem, but failed to provide any justification for mandating auction unless actual detriments of 'winner's curse was proved.[99] The same warning has been posed by a number of academicians since the adoption of NTP 1999.[100] It has been pointed out that:[101]

> "*From a regulatory and policy perspective, spectrum auctions ensure the efficient use of spectrum by allocating it to those entities that value it most, while also generating revenues for governments. But auctions may lead to unexpected outcomes due to unanticipated problems with their design leading to unexpected bidder behaviour such as collusion and over-bidding. The key challenge before regulatory agencies is to design auctions in such a way as to meet the objective of fostering competition while at the same time ensuring that bidders can effectively use the spectrum for their business.*"

The policy of revenue maximisation for the government has incrementally led to an increase in the spectrum cost. This policy is in direct conflict with the policy of enhancing customer affordability as the ultimate cost of spectrum and all other charges are passed on to the consumers.[102] Consequently, with the increasing cost of spectrum, there is a declining quality of

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[97] Patil, *Supra* note 59.
[98] Jeremy Bulow & Paul Kempler, *Prices and the Winner's Curse,* RAND JOURNAL OF ECONOMICS (2002).
[99] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1 at ¶136.
[100] Kumar*, Supra* note 10 ; Jain, *Supra* note 46.
[101] Jain, *Supra* note 46.
[102] National Telecom Policy, 2012 at 12.

service. Auction is certainly the best method for allocation of spectrum, but the contradictory problems of collusion and over-bidding must be solved. The government has effectively solved the problem of preventing collusion. This can be concluded from the progressively increasing cost of spectrum.[103] However, it has largely ignored the vices of over-bidding which leads to the problem of winner's curse. While bidders have expressed their discomfort about the increasing capital costs with respect to spectrum,[104] the extent of this problem can be inferred from the increasing call rates and decreasing service quality. Further, it is important to note that the aforementioned detriments are only short term effects. The larger problem with such increasing bids can only be realised in the long term by taking into account the growth of the industry in permutation with benefits to the consumers.

Cramton, in his seminal work on spectrum auctions, mentions two objectives of auctioning spectrum.[105] The primary objective of auctioning spectrum is to assign it to the person who can best utilise the spectrum.[106] The secondary objective is revenue maximisation. The success of an auction is also measured on the same grounds. Therefore, unlike in India where the success of an auction is directly linked to the revenue realised, the real test of an auction design can only be calculated in the long term when the consumers benefit. This reasoning is also consistent with the Supreme Court's invocation of the public trust doctrine while deciding the 2G Case.[107] However, the court erred in simply analysing the constitutional aspects of non-arbitrariness and equality in distribution, without referring to the transfer of benefits to the consumer. The doctrine itself looks at long term gains, while the increasing spectrum cost realises the short term objective of revenue maximisation.[108]

Even if competitive bidding stabilises the price of spectrum, it would be wrong to assume that customers would be the ultimate beneficiaries. This is mainly because of two reasons. *Firstly*, to transfer benefits to the consumer, positive steps, in the form of capital expenditures would have to be undertaken by the service providers. *Secondly*, the telecom industry, like all other businesses, seeks to maximise its profits and would ensure that the benefits accrue to it. Hence, there is an imminent need for governmental intervention to set quality standards for the services offered. This would also entail keeping a check on the increasing call rates and other charges for value-

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[103] Kumar, *Supra* note 10.
[104] Rajesh Kurup, *3G bids: Industry fears 'winner's curse',* THE BUSINESS STANDARD, (September 21, 2009); Anonymous, *Spectrum auction: Bids rise to Rs. 44,500 cr,* THE HINDU BUSINESS LINE,(February 4, 2014).
[105] Cramton*, Supra* note 34, at 609.
[106] *Id.*
[107] Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1.
[108] *See generally*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

added services. While TRAI has recently tried to intervene,[109]there have been no binding orders. In fact, TRAI has, through its recommendations, tried to improve the working environment by allowing telecom companies to share spectrum in different circles,[110] however, the same has not been reciprocated with decrease in tariff and increasing quality of network and services.

Essentially, the eventual beneficiaries of spectrum auction and the governmental policy have not been the consumers. The rising price of spectrum has only increased the revenue of the government exchequer. This can be attributed to the problem of winner's curse. However, even the government has failed to alleviate the problems currently faced by the consumers. What is urgently required, while the proposals to increase Foreign Direct Investment in telecom to 100% are being mooted, is to take a step back and evaluate the current practices in the industry. An attempt must be made to transfer benefits to the consumers, and the government must take active steps to put mandatory strictures on the underperforming service providers.

VII. CONCLUSION

The ambivalence in the spectrum assignment policy adopted in India is quite evident. Increasingly, the success of an auction is being associated with maximisation of revenue and there is complete ignorance of the aggregate transfer of benefits to the consumer. The courts have also specifically ordered auctioning of spectrum, while refusing to analyse the problem of winner's curse until it arises. However, the problem of winner's curse is not illusionary anymore, and every successive year the telecom industry is becoming more vulnerable to its dangers of the winner's curse. This is inclusive of but not restricted to high cost of investment, non-fulfilment of rollout obligation and infrastructural burden. The author suggests that the telecom policy be revised to amend the existing auction design. The resultant auction design must ensure that while the spectrum must be assigned to the telecom operator who can best utilise the spectrum, the price of spectrum itself is contained.

With more financial resources available at the disposal of the service providers, the burden on the consumers would reduce. However, this has to be supported by effective governmental control on the quality of services being offered. The government must ensure that mandatory service quality rules are put in place and the governmental policy hereafter is oriented towards the consumers' interests.

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[109] Telecom Regulatory Authority of India, Consultation Paper on "Review of the Standards of Quality of Service of Basic Telephone Services (Wireline) and Cellular Mobile Telephone Services", (August 1, 2014), http://www.trai.gov.in/Content/ConDis/714_23.aspx.

[110] Telecom Regulatory Authority of India, *TRAI releases Recommendations on "Guidelines on Spectrum Sharing",* (Aug. 1, 2014), http://www.trai.gov.in/WriteReadData/WhatsNew/Documents/Press%20Release21072014.pdf.

Apoorva Mishra, *Surrogacy Transaction – A Perspective on the Constitutional and Contractual Aspects* 3(1) NLUJ Law Review 134 (2015)

SURROGACY TRANSACTION – A PERSPECTIVE ON THE CONSTITUTIONAL AND CONTRACTUAL ASPECTS

APOORVA MISHRA*

With the help of technology, medical science has been able to invent a number of techniques through which a couple can procreate and have a child of their own. 'Surrogacy' has emerged as one such opportunity for childless couples.

However, a surrogacy transaction by its very nature, is complex as it involves several aspects surrounding constitutional law, family law, human rights law and, contractual relationships. Thus, in this context, it has become difficult for the prevalent legislations to deal with surrogacy effectively. The burden now, is on the judiciary to explore and develop this branch of law. But in doing so, the judiciary cannot surpass its inherent limitations. Ultimately, it is for the legislature to bring certainty and clarity in case of a surrogacy transaction by bringing in an effective legislation.

This Article aims to delve into the specific areas of law that are invoked in case of a surrogacy transaction: the constitutional, human rights and contractual aspects, and to study the response of the legal system in addressing the prevailing issues regarding citizenship and identity of such children, and the Right to Livelihood and the Right to Reproduce of the concerned parties.

TABLE OF CONTENTS

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I. INTRODUCTION

The idea of "Surrogacy" contract is one that has challenged both society and law, in terms of its recognition & regulation. Surrogacy can be viewed as a technique as well as a form of transaction, which parties resort to in order to give rise to new relation towards each other. This relation is based on necessity and desire of the parties concerned to have their own genetically or biologically related child. Surrogacy is a 'necessity' for those who are economically vulnerable and are unable to maintain themselves with the help of available resources, and a 'desire' of those who are otherwise unable to procreate or conceive the child of their own.

The natural desire to have one's own child has paved the way for recognizing the new techniques which aim at fulfilling the desire to have a child. Surrogacy is one such technique which is used across the globe. Moreover, surrogacy across India is extremely rampant, and in fact, India is being considered as the hub of surrogacy transactions. This transaction is beneficial for both the parties: a commissioning parent, in fulfilling the need to have a child of their own, and a surrogate or gestational mother, to have some economic security through a sure source of livelihood.

Surrogacy is a well-known method of reproduction, whereby a woman agrees to give birth to a child who she will not raise, but hand over to a contracted party. She may be the child's genetic mother (the more traditional form of surrogacy) or she may be, as a gestational carrier, carry the pregnancy to deliver after having been implanted with an embryo.[1] In this Article, the author deals specifically with issues regarding the constitutional, human rights and the contractual aspects of a surrogacy transaction and the contractual aspect of surrogacy transaction: a review of national and international practice.

[1] J. Arijit Pasayat in *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84 [hereinafter *Baby Manji*].

It is pertinent to take note of certain authoritative explanations or definitions, which throw light on the concept. American Law Reports[2] defines surrogacy as "..a contractual undertaking whereby the natural or surrogate mother, for a fee, agrees to conceive a child through artificial insemination with sperm of the natural father, to bear and deliver the child to the natural father, and to terminate all of her parental rights subsequent to the child's birth."[3]

Additionally, the Black's Law Dictionary[4] categorizes *Surrogacy* into two classes: traditional and gestational surrogacy. It may be commercial or altruistic depending upon whether the surrogate received financial reward for her pregnancy or relinquishment of child. Looking at the Indian scenario, the Indian Council for Medical Research[5] defines "Assistive Reproductive Technology" ['ART'] as:

"For the purpose of these guidelines, ART would be taken to encompass all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus."

Further, the Supreme Court of India[6] has defined surrogacy as:

"..a method of reproduction, whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracting party."

Surrogacy is being identified as one of the most complicated transaction encountered by the legal system or the legal fraternity. The number of issues and different stakeholders associated with a surrogacy transaction; lack of clarity of law or the absence of law to deal with surrogacy; and, certain prohibitions in the existing framework that make the enforcement of surrogacy transaction difficult for the parties involved, are the major reasons that lend complexity to this concept.

In India, there exists a peculiar situation where surrogacy is not being regulated efficiently. This is because the legal status of a surrogacy transaction is unclear and hence, surrogacy is neither legal nor expressly prohibited by law.[7]

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[2] *In Re Baby M*, 1988 N.J.77 A.L.R.4th 1.
[3] Smita Chandra, *Surrogacy & India*, (Jan. 18, 2013), http://ssrn.com/abstract=1762401.
[4] Jyoti Bhakare, *Surrogacy- A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspectives*, 2 INDIAN JOURNAL OF LAW & JUSTICE 80 (2011) [hereinafter *Surrogacy-A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspective*].
[5] INDIAN COUNCIL MED. RES. *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India,* (Dec. 3, 2013), http://icmr.nic.in/art/art_clinics.htm. [hereinafter *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India*]
[6] *Baby Manji*, *Supra* note 1

II. CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE OF SURROGACY TRANSACTION

Surrogacy is a complex relationship involving the transfer of custody of a child born out of an artificial reproductive technique, as against the order of nature or the conventional mode of reproduction, making it difficult for the parties to validly complete the transaction. The problem with international trade in surrogacy is its potential for abuse and exploitation of women, for example, for prostitution. The very well-known American feminist Andrea Dworkin states that, "motherhood is becoming a new branch of female prostitution with the help of scientists who want access to the womb for experimentation and power." Like adoption,[8] surrogacy needs to be regulated on an international level. In the present scenario, there exists neither any convention nor any agreement regulating surrogacy at the international level. In such circumstances, where foreign parties travel for surrogacy services and enter into surrogacy agreements, the issue of the child's citizenship arises because the home country of the international parents' where the child is to be taken, may refuse to recognize the surrogacy agreement or the transaction might encounter prohibition.

From the human rights perspective, surrogacy should be viewed in relation to three parties: (i) Commissioning parties or those who are availing the services; (ii) Surrogate or Gestational mother or the one who is rendering the service; (iii) Surrogate child or pregnancy conceived through surrogacy or the one who is born due to a surrogacy transaction.

A. SURROGACY UNDER THE FRAMEWORK OF THE INDIAN CONSTITUTION:

Under the Indian Constitution, a surrogacy transaction can be recognized indirectly by interpreting certain constitutional provisions. One of the vital interpretations is with respect to Article 21 which is understood to be wider than mere 'animal existence,'[9] and includes all aspects of life which make it worth living.[10] As opposed to the negative right of freedom from state interference, Article 21 has a 'positive' content encompassing the quality of life and 'the right to carry on such functions and activities as constitute the bare minimum expression of the human self.'[11]

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[7] *Jan Balaz vs. Anand Municipality,* AIR 2010 Guj 21 at ¶14.[hereinafter *Jan Balaz*]

[8] The Hague Convention on Protection of Children and Co-operation in respect of Inter-country Adoption, May 29, 1993, 32 1.L.M. 1134.

[9] *P.Rathinam v. Union of India*, (1994) 3 SCC 394.

[10] *Id.*

[11] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, AIR 1981 SC 746; *C.E.R.C. v. Union of India*, AIR 1995 SC 922; Kapila*Hingoraniv. State of Bihar*, (2003) 6 SCC 1; *Mohini Jain v. State of Karnataka*, AIR 1992 SC 1858.

B. WHETHER RIGHT TO PRIVACY INCLUDES RIGHT TO REPRODUCTIVE CHOICES?

In India, 'the right to have reproductive choices' has been declared as a part of Article 21 of the Constitution[12]. The Supreme Court in the case of *R. Rajgopal v. State of Tamil Nadu,*[13] held that the right to life includes the 'right to privacy'. A citizen has a right to safeguard not only his own privacy but also of his family, marriage, procreation, motherhood, child bearing and education among other matters. The Andhra Pradesh High Court in *B.K. Parthasarthi v. Government of Andhra Pradesh*[14] recognized reproductive rights as a fundamental right and upheld 'the right to reproductive autonomy' of an individual as a facet of his right to privacy. When the concept of privacy is extended to matters of procreation, state's interference or restrictions on procreation amount to a direct encroachment on one's privacy. Hence, even though the Supreme Court in *Javed v. State of Haryana*[15] upheld 'the two living children' norm to debar a person from contesting a Panchayati raj election, it refrained from stating that the right to procreation is not a basic human right.[16]

Generally, couples are unable to conceive or give birth to a child owing to the defects in the reproductive faculty of their body or owing to their infertility.[17] So, if parties are unable to conceive a child on their own, and in case they desire such, the only choice available to such a couple is that of surrogacy. Moreover, surrogacy, from the perspective of the 'Surrogate Mother' or 'Gestational Mother', is being considered as an opportunity for them to maintain themselves and as a tool to empower them financially.[18] Even though surrogacy is considered as an immoral or unethical transaction and at times, also equated with prostitution,[19] it has opened new avenues for poor women in India who are otherwise unable to fulfill their livelihood. It is in this sense that it has now become an organized industry in some parts of the country, which provides the poor women with living.[20]

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[12] *B.K. Parthasarthi v. Government of Andhra Pradesh*, AIR 2000 AP 156.[hereinafter *B.K. Parthasarthi*]
[13] *R. Rajgopal v. State of Tamil Nadu*, (1994) 6 SCC 632.
[14] *B.K. Parthasarthi*, *Supra* note 12.
[15] *Javed v. State of Haryana*, (2003) 8 SCC 369.
[16] Law Commission of India, *228th Report on Legislation to Regulated Assisted Reproductive Technology Clinics as well As Rights and Obligations of Parties to a Surrogacy*,(Aug, 2009), http://lawcommissionofindia.nic.in/reports/report228.pdfat ¶ 1.9. [hereinafter *228th Report of the Law Commission of India*]
[17] *Find Out the Reasons for Needing a Surrogate Mother*, (Aug. 28, 2014), http://children-laws.laws.com/surrogacy/surrogacy-mother/reasons-for-needing-one.
[18] Amana Fontanella Khan, *India, the Rent-a-Womb Capital of the World, (*Aug. 23, 2010), http://www.slate.com/articles/double_x/doublex/2010/08/india_the_rentawomb_capital_of_the_world.html.
[19]Jean M. Sera, *Surrogacy and Prostitution: A comparative analysis*, 5 JOURNAL OF GENDER & THE LAW 315 (1997).
[20] Niyati Rana, *Surrogate Moms give Livelihood to Women,* (Oct. 22, 2013), http://www.dnaindia.com/india/report-surrogate-moms-give-livelihood-to-women-1906929.

C. STATE'S POSITIVE OBLIGATION TO RECOGNIZE AND REGULATE SURROGACY

There is a widespread perception in the society that surrogacy offers a good chance to the childless couple to fulfill their desire. But, since surrogacy is not specifically recognized by law,[21] it becomes difficult for the parties to enter into a legal transaction of surrogacy or contract of surrogacy. This is because surrogacy involves 'human being' as an object or subject matter of transaction and such a contract may be against public policy and hence, void.[22] It is in this situation that the state, as a part of its positive obligation[23] under Article 21, must make provision or must recognize the mechanisms like surrogacy, so that parties who are unable to procreate child on their own, can legitimately exercise their right to 'reproductive choices'.[24]

D. WHETHER SURROGACY FALLS WITHIN THE BRACKET OF RIGHT TO LIVELIHOOD?

It is again, a matter of right of those women who are striving to meet their livelihood concerns and hence, an obligation on the state to recognize or provide a legal validity to surrogacy so that surrogates can legally opt for it to meet their financial and economic concerns. In fact, the state has a constitutional obligation to ensure the livelihood of its citizens, by creating or opening new avenues which may provide them with an opportunity to feed themselves.[25] The expression 'right to life' under Article 21 includes 'right to livelihood'[26] and a 'right to access resources of livelihood'[27] as fundamental rights.

Hence, the State is under an obligation to make suitable arrangements or to recognize those techniques that can provide an opportunity to infertile couples and those who are otherwise unable to have their own genetically or biologically related child.

E. SURROGACY AND ADOPTION- A RAY OF HOPE FOR THE UNBLESSED

Adoption law provides an opportunity to not only the child (destitute or abandoned) to have a family but also to the couple to fulfil their desire of having a child. Following the same rationale, it can be argued that the state must recognize surrogacy transactions or techniques through which surrogacy transaction may be carried out.

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[21] *Id.*
[21] *Jan Balaz, Supra* note 7.
[22] Indian Contract Act, 1872, Section 23. [hereinafter *Indian Contract Act*]
[23] Mahendra P. Singh, *Constitutionalization and Realization of Human Rights in India, in* HUMAN RIGHTS, JUSTICE & CONSTITUTIONAL EMPOWERMENT 36 (C. R. Kumar & K.Chockalingam eds., 2007).
[24] *B.K. Parthasarthi*, *Supra* note 12.
[25] *Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180.
[26] *Id.*
[27] *State of H.P. v. Umed Ram*, AIR 1986 SC 847.

The Supreme Court in the landmark decision of *Baby Manji Yamada v. Union of India and Anr.,*[28] legalized commercial surrogacy with a direction to the legislature to pass an appropriate law governing surrogacy in India. At present, a surrogacy contract between the parties and Assisted Reproductive Technique (ART) Clinics Guidelines[29] are the only two guiding forces for governing this transaction.

In another recent case, *Jan Balaz v. Anand Municipality,*[30] a German couple entered into a contract with a surrogate mother in India and consequently, twin children were born. The question that arose was whether the children would be entitled to Indian citizenship by birth as they were born in India to an Indian national. The passport authorities had withheld the children's passports on account of the pending litigation. In its final decision, the Supreme Court granted an exit permit to the children, thus evidencing again, a pro-surrogacy contract stance of the judiciary.

F. SURROGACY LAW IN FOREIGN JURISDICTIONS

As far as the legality of the concept is concerned, reference to the Universal Declaration of Human Rights (UDHR), 1948 must be made, which ensures that *"men and women of full age without any limitation due to race, nationality or religion have right to marry and find a family."*[31] Under a wide interpretation of this provision, a surrogacy arrangement will be regarded as the opportunity for the infertile couple to have their own child, which they were otherwise incapable of conceiving. States are under an obligation to respect this right as a part of the right to reproduction ensured under this provision.

In Germany,[32] as the law stands today, surrogacy agreements are not recognized. Further, donation of eggs is prohibited and procedures such as artificial insemination or embryo donation are considered to be criminal offences but a recent ruling by the highest court of Germany has paved a way towards the legalization of children born abroad via surrogacy by confirming status of Legal Parents.[33] The case was concerning two gay men whose child was born via surrogate in California. The baby, born in 2010, was registered in the United States as the child of the two men. Upon returning home, the couple had been unable to persuade the German authorities to recognize the child as theirs, though the baby had been living with the fathers in Berlin for the

[28] *Baby Manji*, *Supra* note 1.
[29] National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, *Supra* note 659.
[30] *Jan Balaz*, *Supra* note 7.
[31] Universal Declaration of Human Rights, art. 16, Dec. 10, 1948. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III).
[32] Section 1(1) No. 7 German Embryo Protection Act and § 14b Adoption Placement Act
[33] Richard Vaughn, *Children Born Abroad via Surrogacy Entitled to Legal Parents, German Court Rules*, (Dec. 23, 2014), http://www.iflg.net/children-born-abroad-via-surrogacy-entitled-to-legal-parents-german-court-rules/.

last three-and-a-half years. The issue was brought up before the German Supreme Court, which ruled that the decisions of foreign authorities in such matters must be respected as a "part of a child's welfare to be able to rely on the parents to have continuous responsibility for its well-being," but maintained that surrogacy on German soil remains forbidden.[34] The situation is similar in Sweden, Norway, and Italy where the above-mentioned procedures may culminate into criminal prosecution.[35]

Some countries like Belgium, Netherlands and England, on the other hand are more liberal. In England, surrogacy arrangements are legal and the Surrogacy Arrangement Act, 1985 prohibits advertising and other commercial aspects of surrogacy.[36] The Act declares initiation and involvement in commercial surrogacy agreements to be a criminal offence.[37]

In United States of America, the Uniform Parentage Act, 1987 neither expressly precludes nor approves the use of techniques with the help of which it can be carried out. Article 7 of the Uniform Parentage Act, (as revised in 2000 and amended in 2002) discusses the parental status of the donor to state that the donor is not a parent of the child conceived by means of assisted reproduction.[38] The Federal Supreme Court of USA in *Eisenstadt v. Baird*[39] has recognized the 'right to privacy' as a fundamental right which includes the right to marriage, family, abortion, child rearing, procreation and education. The right to procreate, either as a married couple or as a single individual, was broadened and was given constitutional protection. Also, the Californian Supreme Court in *Johnson v. Calvert*[40]extended the constitutional protection to surrogacy contracts and held them to be valid on the grounds of public policy as the surrogacy contracts involve free, informed and rational choice by a woman to use her body.

In Australia, surrogate mother is regarded as the legal mother of the child that creates legal obligations between them and hence, any surrogacy agreement giving custody to others is void and not enforceable. This discourages surrogacy agreements by making it a criminal offence in cases involving transfer of custody after surrogacy transactions. The only legal arrangement to take custody is to take the surrogate child through adoption process which validates this

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[34] Deutsche Welle (DW-International Broadcaster), *Limited win for surrogacy, gay parenthood in Germany* (Dec. 19, 2014), http://www.dw.de/limited-win-for-surrogacy-gay-parenthood-in-germany/a-18142883.

[35] Ukrainian Family Law Group, *The ABC's of Ukranaian Family Law*, (2012), http://www.familylaw.com.ua/images/Family%20Law%20Group%20Brochure.pdf.

[36] Surrogacy Arrangements Act, 1985, Section 3.

[37] Margaret Ryznar, *International Commercial Surrogacy and its parties*, 43 THE JOHN MARSHAL LAW REVIEW 1009 (2011).

[38] National Conference of Commissioners on Uniform State Laws, Uniform Parentage Act, (Feb. 10, 2003), www.okdhs.org/NR/rdonlyres/68D8ACFD-3A37-4AA7-832F-962DE13A7D31/0/UniformParentageAct_css_10212013.pdf.

[39] Eisenstadt v. Baird, 40 5 U.S. 438, 453-54 (1979).

[40] Johnson v. Calvert, 5 Cal. 484 (May 20, 1993).

transaction. Moreover, commercial surrogacy is illegal and recognition is given only to altruistic surrogacy.[41]

In Canada, the Assisted Human Reproduction Act, 2004 prohibits commercial surrogacy wherein a surrogacy arrangement involves an agreement with consideration. In France, surrogacy is completely prohibited irrespective of its nature as commercial or altruistic surrogacy. Thus, any surrogacy arrangement which involves transfer of custody of surrogate child is of no legal consequence.[42]

G. SURROGACY IN INDIAN SCENARIO

In India, surrogacy transactions are very rampant and foreigners come to India in search of a surrogate. As such, it is being considered as the hub of surrogacy in the world.[43] It is also being considered as a suitable place for the surrogacy industry which is regarded as the genetic pool banks of India.[44] India is emerging as a leader in commercial surrogacy and a destination of the so-called fertility tourism,[45] because of low cost of medical services, easy availability of surrogate wombs, abundant choices of donors with similar racial attributes and lack of an effective law to regulate these practices. Specifically, no Indian law governs or regulates or prohibits surrogacy till date. Surrogacy arrangements in India are taking place in ignorance of law to just cater to the needs of the parties involved in the surrogacy transaction. 'Surrogacy contract' and National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005 ("National Guidelines on ART") are not sufficient to deal with the regulatory aspect of surrogacy transaction as it gives rise to questions of citizenship and identity that are not addressed adequately. To deal with such questions of law, issues and situations, a proper and effective regulatory framework is required that is capable of covering, governing, defining and regulating relationships and allied matters arising out of a surrogacy transaction.

III. CONTRACTUAL ASPECT OF SURROGACY TRANSACTION: A REVIEW OF NATIONAL AND INTERNATIONAL PRACTICE

In case of a surrogacy transaction, the primary difficulty lies in recognizing its exact nature. Some view it as an industry, some as a service or as a contract for certain purposes. The absence of uniform regulations but the presence of certain regulations which may prohibit such transactions adds to the complications of a surrogacy transaction. The centre of a surrogacy transaction is the

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[41] *The Law Handbook*, http://www.lawhandbook.org.au/fact_sheets/ch38.php.
[42] *Id.*
[43] *As India emerges as a hub of surrogacy, surrogate mothers are underpaid and uncared for,* (July 17, 2013)http://www.dnaindia.com/india/report-as-india-emerges-as-a-hub-for-surrogacy-surrogate-mothers-are-underpaid-and-uncared-for-1862252.
[44] Surrogacy-A Reality Eclipsed by Ethical, Social, Legal Issues-Indian Perspective, *Supra* note 4.
[45] *Id.*

involvement of a third party. Such a transaction and the legitimacy of the relationship arising out of it is alien to most legal systems across the world. Most of the countries across the world either deem it partially or completely illegal or make it valid to the extent of altruistic surrogacy. In some countries, intended parents are recognized as the legal parents of the child born out of it either statutorily or by recognizing surrogacy agreements.

Surrogacy, considering the fact that it affects almost all the disciplines of learning is being studied, researched and discussed upon all across the world.. The need for the, deliberation and adoption of surrogacy as a part of society in general and legal system in particular is felt by the legal fraternity.[46] Legally, a surrogacy arrangement has been defined by the Indian Supreme Court as an agreement whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise, but hand over to a contracted party.[47] Often it is done with intention of entering into a contract, at times the intention of the parties can be inferred from the transaction. In common parlance, the term refers to arrangement made between the two parties under which a woman (surrogate mother) agrees to (i) to donate the egg and by artificial insemination, carry a fetus in the embryo of her own and give birth; (ii) to carry the term of pregnancy with the help of fertilized egg. In the case of surrogacy, a woman undertakes to bear a child for a childless couple and agrees to relinquish all parental rights at the birth of the child for a payment or other consideration which becomes void for its contravention of statutory enactments, since the contract involves bartering of human lives and also, infringes public policy. As per the provisions of Indian Contract Act, 1872 legal contracts can be, either General contract,[48] or Special Contracts, or[49] Specific contracts.[50]

Thus, contracts can be classified into different heads depending upon the subject matter or purpose of the contract. With respect to surrogacy, it is difficult to decide under which type or under which head it falls. If surrogacy transactions were to be considered legal, then it must fall in the category of either specific or special contract. However, for them to be legal, it must satisfy all the requirements of a contract as laid down under the Indian Contract Act, 1872.

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[46] N.Y. Legislators Call for Legalised Surrogacy Contracts, (Feb. 21, 2014), http://go.nationalpartnership.org/site/News2?page=NewsArticle&id=43695&news_iv_ctrl=0&abbr=daily2.
[47] *Baby Manji*, *Supra* note 1.
[48] Those set of contracts the purpose of which can be anything but must be legal, e.g. Contract to supply goods.
[49] There are certain contracts the subject matter or purpose of which is special and different from usual contracts, for e.g. Contract of Indemnity.
[50] Mostly such contracts are extended forms of general forms contract where it is compulsory for a particular transaction to be preceded by a usual contract, for e.g. Transfer of Property.

Apart from the contractual point of view, surrogacy may be treated as a statutory transaction. However, this requires a particular statute which can govern such transactions. In such a scenario, the question of legality of a surrogacy contract may not arise, as it would then be backed by statute governing the surrogacy relationship. However, in the absence of a statute governing surrogacy, several issues arise:

1) Surrogacy is neither protected by law, nor prohibited by law. There is no separate statute dealing with surrogacy and nor does the current legal system support it.[51]
2) Despite absence of any statutes or position in the legal system, surrogacy transactions are being extensively entered into in some parts of India.[52]
3) Subject matter of surrogacy contract i.e. surrogate child is a human being and as such cannot be the subject matter or object of contract.[53]

As per the provisions of Indian Contract Act, 1872, a valid contract should have both, lawful consideration and object.[54] At the same time, an agreement is considered to be immoral or opposed to public policy if its object or consideration is unlawful, forbidden by law or if it contravenes the provisions of any law.[55] In this context, even though surrogacy arrangement fulfils the preliminary requirements of an agreement, the same may not be converted into a contract since it may not be an agreement enforceable by law.[56] Hence, it is very difficult to term a surrogacy agreement as a surrogacy contract, which raises doubts with respect to the enforceability of the claims, obligations and liabilities of the concerned parties. Since a contract/agreement made by the parties cannot violate the law of the land, it is necessary that surrogacy be given recognition and governed by a special statute to protect the parties concerned.

The legality of a surrogacy transaction can be challenged on two grounds:

1) Surrogacy transactions are against public policy
2) Surrogacy transactions involve human being as a subject-matter of the contract.

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[51] *Jan Balaz*, *Supra* note 7

[52] Lakshmi Ajay, *Gujarat, a hub of rent-a-womb industry in India*, INDIAN EXPRESS, (Feb. 13, 2014), http://indianexpress.com/article/india/india-others/gujarat-a-hub-of-rent-a-womb-industry-in-india/.

[53] Though the expression 'object' is not defined in the Indian Contract Act, 1872, it has held to mean a 'purpose' or 'design' of the contract. If the object is opposed to public policy or tends to defeat any provisions of law, it becomes unlawful and thereby it is void under Section 23 of the Act: *Nutan Kumar v..IInd Additional District Judge,* AIR 1994 All 298.

[54] Indian Contract Act, 1872, *Supra* note 22, at Section 10.

[55] Indian Contract Act, 1872, *Supra* note 22, at Section 23.

[56] Indian Contract Act, 1872, *Supra* note 22, at Section 2(h).

It is worthwhile to understand the meaning of 'public policy' so as to find out an answer to the question of; whether a surrogacy agreement is against public policy and whether it can be, as such, subject to the prohibition of public policy clause as given in Section 23 of Indian Contract Act, 1872.

The "public policy" is defined in The Major Law Lexicon[57] as:

> *"the policy of the law; the policy in relation to the administration of the law and practically synonymous with public good or public welfare."*

The Words and Phrases Legally Defined[58] defines public policy to mean:

> *"the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest…public policy is not, however, fixed and stable."*

In the case of *Murlidhar Agarwal v. State of U.P.*,[59] the Court tried to explore the concept of public policy by saying:

> *"Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time."*

Further, in the case of *Indian Financial Association of Seventh Day Adventures v. M.A. Unneerikutty,*[60] it was explained in the following words:

> *"the term 'public policy' has an entirely different and more extensive meaning from the policy of the law. It is the principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and varies from generation to generation."*

After reading the observations made by the Court in above cases and by referring to the explanations given by authoritative dictionaries mentioned above, it can be concluded that Public Policy is a relative term and it depends in which context or society or country it is being used. It is to be judged considering the need of the case and there can be no common parameter defining the same. Further, this concept cannot be static and changes with the pace of time and demand of the society.

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[57] P. RAMANATHAAIYAR, THE MAJOR LAW LEXICON 5526 (4th ed., 2010).
[58] DAVID HAY, WORDS AND PHRASES LEGALLY DEFINED 694(Vol. 2, 4th ed., 2005).
[59] *Murlidhar Agarwal v. State of U.P.*, AIR 1974 S.C. 1924.
[60] *Indian Financial Association of Seventh Day Adventures v. M.A. Unneerikutty*, (2006) 6 SCC 351.

A part of the legal fraternity understands a surrogacy contract to be against public policy.[61]

Admittedly, the position of law seems to be uncertain, and there is no clarity as to whether surrogacy transactions can be termed as a contract or not. However, it must be noted that the judiciary in India, including the Supreme Court has accepted the concept of surrogacy to be legal by giving due regard to the surrogacy agreements or transactions which are being carried out throughout the country. As a principle of law, courts cannot turn a blind eye towards the factual realities of the society including some of the popular trends.[62] Surrogacy, being a factual reality, has in this manner, received legal recognition by the judiciary. Several discussions and debates are being organized to discuss this new kind of reproductive technique, and its legality so as to spread awareness about surrogacy and its benefits for those who are infertile, and also to those whose livelihood is dependent upon it. Thus, in light of the above, one may conclude that a surrogacy contract may not go against the doctrine of public policy. In fact, a surrogacy mechanism is now, the need of the hour.[63]

Another important definition to look into is Section 2 (cc) of the Draft Assisted Reproductive Technologies Bill, 2010, which is being branded as the 'Code of Surrogacy', It defines a 'surrogacy agreement' to mean:

"a contract between the person (s) availing of assisted reproductive technology and the surrogate mother."

This definition creates a few more problems such as what contents are to be incorporated, what terms and conditions can be drafted, on what points can there be a common agreement of parties, what steps and what compliances are to be taken of, what will be the format of such a draft, who can be a part of the contract of surrogacy, what kind of breach may occur in case of the surrogacy contract and all other necessary things are required to be kept in mind while drafting a surrogacy contract.

Therefore it can be seen that surrogacy agreements have to be drafted with great care and caution, since there are several factors surrounding surrogacy, which are sensitive, such as:

1. The subject matter of the contract is a human being;

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[61] Robert D. Arenstein, *Is Surrogacy Against Public Policy? The Answer is yes,* 18 SETON HALL LAW REVIEW (1988), http://heinonline.org/HOL/Page?handle=hein.journals/shlr18&div=43&g_sent=1&collection=journals#853.

[62] Nimerta Chawla, *How celebrities are leading the way by helping turn surrogacy into a popular trend,* DAILY MAIL, (July 6, 2013), http://www.dailymail.co.uk/indiahome/indianews/article-2357646/IVF-frontrunners-As-surrogacy-takes-popular-turn-heres-celebrity-cases-bringing-limelight.html.

[63] 228th Report of the Law Commission of India, *Supra* note 16.

2. The object of the contract is to conceive pregnancy by artificial ways of reproduction which was not yet known the society at large;
3. There is a compensation or monetary consideration to be given to surrogate mother/gestational mother;
4. Several ethical considerations surrounding surrogacy transaction;
5. The identity and privacy of the surrogate mother;
6. The rights of the parties before, during and after the contract including that of the would be surrogate child;
7. Risk attached to the life/body of the surrogate mother;
8. Clause with respect to the legal status of the child.

It is worthwhile to note that surrogacy transactions are being entered into despite not having legal recognition. Agreements are being made, entered into, being followed and are being executed with the support of all those involved in the surrogacy transaction. There are institutions, organizations or companies, which are offering surrogacy services by ensuring and providing comprehensive surrogacy services including that of:

1. Legal compliances;
2. Media services and medical operations involved therein;
3. Commercial, taxation and related aspects;
4. Selection of or databases of Surrogate mothers willing to go for surrogacy services.

It may also be noted that some law firms in India have also started their area of practice providing surrogacy services or ensuring legal compliances with respect to surrogacy transaction. Surrogacy agreements are being drafted as a matter of legal service from some of the reputed law firms in India.[64]

Assuming that a surrogacy contract is legal, if any of the parties to the surrogacy contract fails to perform any of the above mentioned steps, then as per the provisions of the Indian Contract Act, 1872, an action for breach of contract can be initiated. At the same time, if we were to say a surrogacy agreement can never be legal or are invalid, then despite executing a contract, parties can no longer enforce the same through the courts of law. The problem pertaining to a surrogacy agreement or a surrogacy transaction occurs when any dispute arises, either because of a clash of interests, or non-performance of any conditions or the terms of the contract. When

[64] Fatima Ansari, *Surrogacy: An Emerging Area of Law,* 46 LEGAL ERA (2014).

such a dispute is brought before the court, it may not enforce the surrogacy agreement despite the fact it is between consenting parties due to the illegal nature of such a contract.

It is difficult to decide whether society is ready to accept the artificial process of procreation of a child and that too with the help of a surrogate since there are a number of ethical issues involved therein, but fact of the matter is that a number of surrogacy transaction are being carried out in India right now, voluntarily or out of need of the parties.

IV. CONCLUSIONS AND SUGGESTIONS

It is the cardinal principle of law that the *'law cannot be remain static'* and there is always a legitimate expectation from the State that the laws must be changed whenever there is ongoing demand from the society or stakeholders or the ones whose interest is at stake either in recognition or non-recognition of something. The case of surrogacy is not different from such a scenario. After having discussed surrogacy in its entirety, it is evident that a surrogacy process is the need of the hour, especially for those who, owing to their physical incapability are unable to procreate a child of their own. No doubt, the process of adoption is recognized in the legal system of India but it has its own limitations. Moreover, human beings cannot hide the natural desire of having their own child. The right to have reproductive choices has been upheld as part of fundamental right under Article 21 of Indian Constitution. From the perspective of the surrogate mother, though the participation of the surrogate mother is criticized severely, as being against public policy, surrogacy can be the best mechanism through which in a country like India, people can meet their daily needs and livelihood. Hence, it is for the state to take some steps in furtherance of realization of this right to have reproductive choices and the right to access to resources of livelihood, by recognizing surrogacy transaction. The Law Commission in its 228th Report,[65] has made certain recommendations with respect to surrogacy transactions including proficient recommendations such as prohibition of sex selective surrogacy, financial support for the surrogate child and life insurance for the surrogate mother. Such recommendations may be looked into by the legislature while drafting legislation to govern surrogacy contracts.

While talking about the contractual perspective of surrogacy transaction, I would like to recommend that these transactions must be interpreted in the light of the provisions of Indian Contract Act, 1872. Just because surrogacy contract involves a human being as a subject matter of contract, it must not be held to be invalid. It is the need of the hour and the demand of the society. There is nothing in the Indian Contract Act, 1872 which can specifically prohibit

[65] 228th Report of the Law Commission of India, *Supra* note 16.

surrogacy transaction. The term 'public policy' as given in Section 23 of Indian Contract Act, 1872, may not be applicable to the surrogacy because of two reasons; *first,* Public policy is not defined anywhere specifically and is a relative term; *Second,* surrogacy, being need of the hour and demand of the society, is hard to define and hence, it is uncertain if the prohibition of public policy also encompasses a surrogacy transaction.

With this strive, the author would like to also leave a word of caution that under the garb of absence of any specific prohibition for surrogacy contract, surrogacy transactions are being made detrimental to the interests of the surrogate mother and also at times to the detriment of the interests and overall wellbeing of a surrogate child. So, it is necessary for the legislature to also keep in mind the rights of a surrogate mother/gestational mother and that of the surrogate child, apart from providing legal recognition to the surrogacy agreement.

Though there are several legal hurdles attached with surrogacy transactions, it being a complex area of law to be dealt with, it is a good opportunity for couples to fulfill their desire in a legitimate way. Thus, the author concludes that the final step to legitimize surrogacy transactions and to make such transactions easier for the parties involved as well as the judiciary can only be taken by the legislature.

Amudavalli Kannan & Supratim Guha, *Humanising the Indian Refugee Policy: A case for the Refugees' Right to Work* 3(1) NLUJ Law Review 150 (2015)

HUMANISING THE INDIAN REFUGEE POLICY: A CASE FOR THE REFUGEES' RIGHT TO WORK

AMUDAVALLI KANNAN* AND SUPRATIM GUHA†

The 'right to work' guarantees to every individual the freedom of opportunity to obtain gainful employment and to secure a life of dignity and worth. In a world with scarce resources, providing such benefits for refugees and asylum-seekers becomes a contentious issue. The principle of 'right to work' is intrinsically woven into several international conventions with universalistic application. In India, however, most refugee communities and asylum-seekers are obstructed from realising this right, pushing them into exploitative and illegal employment arrangements, largely in the informal sector. The socio-economic well-being of refugees and asylum-seekers in India is ill-protected and they remain perpetually vulnerable to abuse and maltreatment. They are further debilitated from integration into the society of their host country which accentuates their traumatic experiences and hinders their movement towards self-reliance. In this Article, the authors will examine the legal status of refugees in India vis-a-vis the international human rights law. The authors will further argue that the 'right to work' is integral to human rights jurisprudence and is secured by major international human rights instruments. Finally, they will attempt to justify the need for a constructive refugee-policy in India, as a matter of obligation to the international community and to humanity.

TABLE OF CONTENTS

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I. INTRODUCTION

Forced migration of entire populations has been a recurring feature of human history. The flight from persecution, deprivation or natural calamity with the sole intent of survival is a basic human instinct. Indeed, such exoduses have been a driving force in history, making man more resilient, and guiding socio-political development in a manner responsive to the pressing needs of the times. The international regime for the protection of refugee populations was formulated with the intent of alleviating the desperate circumstances of the victims, while allowing the natural flow of social development, albeit along acceptable and humanitarian lines. International Law has evolved to provide mechanisms which ultimately allow for the re-integration of the refugees with a society.

The Convention Relating to the Status of Refugees, 1951[1] was a watershed in the development of laws regarding the protection of refugees. Having been drafted in the aftermath of the Second World War, the Convention embodies the prevalent humanitarian spirit[2] of the war-weary international community. However, in reality, the implementation of the standards laid down in the Convention proved to be difficult and led to the fragmentation of approach and opinion towards the global refugee crises.

In 2009, the *World Refugee Survey*[3] had estimated that, at the end of 2008, over 13.5 million individuals were refugees or seeking asylum outside their country of origin. India hosts a sizeable population of refugees, both from the neighbouring countries and other countries like Sudan and Iran amongst others.[4] However, it neither has a specific refugee law in place nor is it a party to any of the international conventions governing the protection of refugees. Consequently, refugees in India lack clearly defined rights and privileges; the government adopts an *ad hoc*

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[1] Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, http://www.unhcr.org/3b66c2aa10.html. (Hereinafter *1951 Convention*)

[2] Ivor C. Jackson, *The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection*, 3INTERNATIONAL JOURNAL OF REFUGEE LAW 403(1991)

[3] World Refugee Survey 2009, http://www.uscrirefugees.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_4_Archived_World_Refugee_Surveys/5_5_4_7_World_Refugee_Survey_2009/5_5_4_7_1_Statistics/RefugeesandAsylumseek.pdf. (Hereinafter *World Refugee Survey, 2009*)

[4] REPORT OF REFUGEE POPULATIONS IN INDIA, HUMAN RIGHTS LAW NETWORK (November 2007), http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf . (Hereinafter *HRLN Report*)

approach towards the refugee groups[5] and their treatment is largely dependent on political will and public opinion, as in the case of the Tamil refugees from Sri Lanka.[6] Due to this uncertain legal framework, the refugees in India do not have a legal right to work,[7] which prevents them from seeking gainful employment. This not only forces them to take up exploitative and illegal employment arrangements,[8] largely in the informal sector, but also hinders their integration with the Indian society, thereby accentuating their traumatic experiences and hindering their movement towards self-reliance.

The issue of recognising rights for refugees within the Indian legal framework can be solved by situating refugee rights, such as the right to work, within the broad and expansive body of international human rights law and international humanitarian law. India is a party to several international instruments that recognise the right to work as a legal right to be granted without any discrimination on grounds like caste, gender, etc.

By identifying the right to work for refugees within these international instruments, and within the scheme of international humanitarian law, it is possible to ascribe, to all States that are party to the instruments, an obligation to provide certain basic rights to the refugees that the State harbours. Such an obligation ensures that the State is aware about its duties with regard to refugees, where earlier it seemingly had none. In this manner, the State will be required to perform its duties in the form of granting rights and privileges to refugees that were previously denied. The above interpretation of identifying refugees' rights within international instruments related to humanitarian law is beneficial to refugees in countries, like India, which have accorded no legal recognition to the rights of refugees, and have signed no convention relating to the same. Hence, such a regime can create a duty upon India requiring it to treat its refugees in accordance with international standards and provide them with basic rights such as non-refoulement, right to work, etc.

Such obligations can be met by enacting specific refugee laws in compliance with the international legal regime. However, India has amply demonstrated that it is in no hurry to pass

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[5] Arjun Nair, *National Refugee Law for India: Benefits and Roadblocks*, INSTITUTE OF PEACE AND CONFLICT STUDIES, (New Delhi, 2007), http://www.ipcs.org/pdf_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf (Hereinafter *Arjun Nair*)

[6] HRLN Report, *Supra* note 4.

[7] Penelope Matthew, *Fifth Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on the Right to Work Explanatory Note*, 31 MICHIGAN JOURNAL OF INTERNATIONAL LAW 289 (2009), as cited in Saurabh Bhattachrjee, *Situating the Right to Work in International Human Rights Law: An Agenda for the Protection of Refugees and Asylum –seekers*, 6 NUJS LAW REVIEW 41 (2013). (Hereinafter *Penelope Matthew*)

[8] *Id.*; *See also*, World Refugee Survey 2009, *Supra* note 3.

any legislation for the protection and governance of refugees and their rights. For several decades now, India has neglected to formulate such a law.[9]

Another dimension which is relevant to the refugee crisis is the uneven position of host states, depending on whether they qualify as developed or developing countries. The developing countries, like India, disproportionately face the burden of the 'refugee problem' without assistance from the other countries of the world, even though the 'refugee problem' is an international one.

In the course of this Article, the authors will discuss the problem and the possibility of the wide interpretation of refugee rights under Part II and III, respectively. In Part IV, the possible solutions of a 'comprehensive and uniform policy' on refugees, and the theory of 'International Burden Sharing' will be discussed to address the issues faced by the developing countries.

In all, refugees' rights need to be recognised and protected by host nations in order to ensure that their traumatic experience in their country of origin is mitigated by humane treatment in their host countries or countries of integration.

II. THE STATUS OF REFUGEES: PRESSING ISSUES

A. REFUGEES UNDER INTERNATIONAL LAW:

The international concern for refugees is centred on the protection of human rights, an immediate reaction to the horrors of the Second World War. The international regime on refugee rights finds basis in Article 14 of the Universal Declaration of Human Rights, which recognises the right of persons to seek asylum from persecution in other countries.[10] Conventionally, international law recognises the 'refugee' as a person who is forced to flee his or her home for certain specified reasons and who, furthermore, is outside the country of his or her origin and does not have its protection.[11] The 1951 Convention, a status and rights-based instrument, defines refugees as persons who have a 'well-founded fear' of persecution by reason of race, religion, nationality, membership of a particular social group or political opinion, which renders them unable or unwilling to return to their country of origin or to avail of its protection.[12] In effect, the basic tenets of International Refugee law, which seek to protect the

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[9] *Wanted, A Law for Refugees*, THE HINDU, (August 24, 2012), http://www.thehindu.com/opinion/editorial/wanted-a-law-for-refugees/article3812816.ece.

[10] Introductory Note by the Office of the United Nations High Commissioner for Refugees, Convention Relating to the Status of Refugees, 1951, http://www.unhcr.org/3b66c2aa10.html.

[11] B.S. Chimni, INTERNATIONAL REFUGEE LAW: A READER, (Sage Publications Ltd., 2005). (Hereinafter *B.S. Chimni*)

[12] Article 1, 1951 Convention, *Supra* note 1.

freedom and dignity of refugees, are in consonance with the human rights jurisprudence as enshrined in the Universal Declaration for Human Rights, 1948.[13]

Further refinements in the international framework came by way of subsequent multilateral international refugee-related instruments, such as the Protocol Relating to the Status of Refugees, 1967, OAU Convention Governing Specific Aspects of Refugee Problems in Africa, and the Cartagena Declaration of 1984. These instruments, which emerged as a result of the developing political situation, seek to broaden the scope of refugee law by including a variety of people in diverse circumstances in need of assistance and protection. The rights[14] secured by these instruments include, *inter alia*, non-discrimination[15] and an assurance of the right to work.[16] In addition, there now exist several regional and universal human rights instruments, which, read in conjunction with the refugee-specific rights regime, 'set a wide-ranging, if not fully adequate or integrated' measure of respect for the basic dignity of refugees.[17]

In the final analysis, all these instruments aim at the preservation of human dignity and the re-integration of the victims into a stable society. In this regard, Article 17 of the 1951 Convention requires refugees to be given the equivalent of a 'most-favoured nation' treatment, with respect to wage-earning employment.[18] The 1951 Convention further requires the State parties to respect and provide refugees with the opportunity to be self-employed[19] and to recognise professional diplomas of refugees.[20] Within this framework, the Office of the United Nations High Commissioner for Refugees (hereinafter *UNHCR*) was created in 1950 to protect refugees and ensure their eventual integration into a society. The UNHCR still plays a leading role in over-seeing the welfare and development of refugee communities across the world.

B. REFUGEES UNDER INDIAN LAW:

India's geo-political situation in the subcontinent makes it an attractive destination for refugees. This is further evidenced by the steady flow of refugees in India through its porous border;

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[13] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 12, 1948).
[14] Guy S. Goodwin-Gill, THE REFUGEE IN INTERNATIONAL LAW(Clarendon Press, 1985) at 136-140.
[15] Article 3, 1951 Convention, *Supra* note 1.
[16] Article 17, 1951 Convention, *Supra* note 1.
[17] James C Hathaway & John A Dent, REFUGEE RIGHTS: REPORT ON A COMPARATIVE SURVEY 1 (York Lanes Press, 1995) as cited in B.S. Chimni, *Supra* note 11.
[18] Article 17(1), 1951 Convention: "Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment."
[19] Article 18, 1951 Convention, *Supra* note 1.
[20] Article 19, 1951 Convention, *Supra* note 1.

statistics show that as of December 31, 2008, India was housing a total of 411,000 refugees on its land.[21]

India is not a party to the 1951 Convention nor has it enacted a statute specifying the rights of the refugee population. Quite interestingly, however, India is a member of the Executive Committee of the UNHCR. This leaves the fate of the refugees in India to be determined by the provisions of the Constitution of India.[22] Refugees are managed through *ad hoc* administrative decision-making, more often influenced by political considerations rather than any genuine sympathy for the plight of the displaced communities. As a result, refugees are governed by the laws applicable to aliens in India (unless a specific provision is made as in the case of Ugandan refugees of Indian origin, when the Foreigners from Uganda Order, 1972 was passed[23]), which are the Foreigners Act, 1946 and the Foreigners Order, 1948.[24] Section 2 of the Foreigners Act, 1946 defines a foreigner to mean 'a person who is not a citizen of India';[25] this definition automatically pulls into its ambit the meaning of a 'refugee'. These laws apply to all non-citizens equally and, consequently, fail to distinguish the special status of refugees fleeing their countries of origin. Under the Foreigners Act, 1946, it is a criminal offence to be within the territory of India without valid travel or residence documents.[26] Moreover, the provisions of the Act place several restrictions upon the movement and residence of 'foreigners' (inclusive of refugees), which will hamper their ability to obtain gainful employment. Thus, there exists a conspicuous gap between the treatment of refugees in India, as ordinary foreigners, and that accorded to them under the international legal framework for refugees.

The absence of a well-defined law or policy for refugees in India serves as a limitation on the power of the judiciary, especially the Supreme Court, to formally recognize the human rights of refugees in the country. Though the Supreme Court has held that even foreigners possess certain rights under Indian law,[27] these rights are limited to the right to life and liberty contained in Article 21 of the Constitution. The Supreme Court, in *NHRC v State of Arunachal Pradesh,*[28] held that it was the duty of the State of Arunachal Pradesh to protect the life and liberty of the

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[21] World Refugee Survey 2009, *Supra* note 3.
[22] B.S. Chimni, *The Legal Condition of Refugees in India*, 7(4) JOURNAL OF REFUGEE STUDIES378-81 (1994) as cited in B.S. Chimni, *Supra* note 11. (Hereinafter *B.S. Chimni, The Legal Condition of Refugees in India*)
[23] *Id.*
[24] Arjun Nair, *Supra* note 5.
[25] Foreigners Act, 1946, http://mha1.nic.in/pdfs/The%20Registration%20of%20Foreigners%20Act,%201939.pdf
[26] Section 14A, Foreigners Act, 1946
[27] *Loius De Raedt v. Union of India*, 1991 [3] SCC 554; *State of Arunachal Pradesh v. Khudiram Chakma*, JT 1993 [3] SC 546, 552.
[28] AIR 1996 SC 1234.

Chakma refugees.[29] Taking a progressive stand on the refugee issue, the Court refused to accept the parochial arguments of the State Government that a large refugee population can disturb the ethnic balance and destroy the local cultural identity.

India has acceded to the International Covenant on Civil and Political Rights, 1966 (hereinafter *ICCPR*), and the International Covenant on Economic, Social and Cultural Rights, 1966[30] (hereinafter *ICESCR*); however the two Covenants have not been enacted into Indian law and consequently do not have the force of law in India.[31] This fact does not exonerate India of its international obligations under the Covenants because the judiciary has the power to take them into consideration while interpreting the constitutional provisions in appropriate situations.[32] Admittedly, Article 21 can be expanded to include within its wide scope[33] such principles as *non-refoulement,*[34] which is a well-established principle of international law requiring that no State shall expel or return a refugee to his/her country of origin. Such an interpretation would be consistent with India's international obligations under the ICCPR and ICESCR and thereby further the cause of adequate refugee protection.

It is a fact that a vast majority of the population of refugees in India continue to survive without meaningful employment. They are systematically denied access to the labour market and opportunities for self-employment.[35] As a result, several refugees seek employment in the informal sector where they are subject to police extortion, non-payment and exploitation.[36] In the absence of any municipal law guaranteeing certain identifiable rights or privileges to refugees, no right to work or self-determination can be asserted by refugee communities in India.

The status of the refugees in India is dismal, and it is easy to infer that refugees are not provided with basic human rights, including the right to work, the latter being essential to self-determination and securing a life of dignity and worth. Scholars have been pushing for the enactment of National Refugee Law, or accession to the International instruments related to

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[29] *Id.*
[30] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966).
[31] B.S. Chimni, The Legal Condition of Refugees in India*, Supra* note 22.
[32] P. Chandrasekhara Rao, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW (Taxmann, Delhi, 1993).
[33] B.S. Chimni, The Legal Condition of Refugees in India, *Supra* note 22.
[34] Article 33(1), 1951 Convention, *Supra* note 1.
[35] Penelope Matthew, *Supra* note 7.
[36] HRLN Report, *Supra* note 4.

refugees in order to bring about a semblance of order[37] but so far, both the options remain a distant reality. The issue of refugee rights remains a sensitive issue in Indian politics.[38]

It is however possible to trace a firmly entrenched right to gainful work in International Law jurisprudence. Over the decades, International Human Rights Law (hereinafter *IHRL*) has evolved to form part of "the same legal schema and tradition"[39] as international refugee law; it is now generally accepted that IHRL can 'support, reinforce or supplement refugee law'.[40] In other words, the lacunae in international refugee law have been disappearing through the development of new principles in human rights law that are capable of filling such legal vacuums[41] and providing relief to refugees.

Such reliance on IHRL is especially necessary for countries like India and other South Asian countries, which have not signed and acceded to the 1951 Convention. The universality of these newly developed principles casts an inescapable obligation on all nations, including India. Identifying the right to work within the framework of these principles will rightfully empower refugees to obtain gainful employment and sustain themselves.

III. THE RIGHT TO WORK

A. IDENTIFYING THE RIGHT TO WORK IN INTERNATIONAL AND INDIAN LEGAL FRAMEWORK

The right to work has, in fact, been acknowledged as forming an inseparable and inherent part of human dignity,[42] providing a sense of economic independence and self-sustenance. It is only by exercising the right to work that other human rights are realised by an individual, as it contributes inexplicably to the survival of the individual and his/her family, and to his/her development and recognition within the community.[43]

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[37] Saurabh Bhattacharjee, *India Needs a Refugee Law*, 43(9) ECONOMIC & POLITICAL WEEKLY71-75 (March 1, 2008). (Hereinafter *Saurabh Bhattacharjee*)

[38] Arjun Nair, *Supra* note 5.

[39] Alice Edwards, *Human Rights, Refugees and the Right to Enjoy Asylum*, 17 INTERNATIONAL JOURNAL OF REFUGEE LAW 293(2005). (Hereinafter *Alice Edwards*)

[40] E. Mason, *UNHCR, Human Rights and Refugees Collection and Dissemination of Sources*, 25 INTERNATIONAL JOURNALOF LEGAL INFORMATION 35 (1997).

[41] Saurabh Bhattacharjee, *Supra* note 37.

[42] Minister of Home Affairs & Ors. v. Watchenuka & Anr., No. 10/2003, South Africa: Supreme Court of Appeal, 28 November, 2003 (The South African Court of Appeal emphasized on the relationship between the right to work and human dignity in this case).

[43] *See* Preamble to the Employment Promotion and Protection against Unemployment Convention, 1988, ILO Convention No. 168, 1988: "… the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them."

Three distinct interpretations of the 'right to work' have evolved in international jurisprudence: 'right to employment', 'freedom to work' and 'rights at work'.[44] The right to work as a 'right to employment' involves a guarantee of a job, i.e. it places the duty on the State to guarantee a job to the individual. 'Freedom to work' envisages a negative right that prevents the State from interfering with a person's freedom to work. Supporters of this view are of the opinion that international instruments do not espouse any positive guarantee of work, but only a freedom to gain a living by work freely chosen or accepted.[45] 'Rights at work' denote the set of labour rights that establish just and fair conditions at work. Some writers, however, have asserted that the rights at work are secondary to the right to work to the extent that they become applicable only where a relationship of employment already exists.[46] Of these, the right to work as a guarantee of employment is a concept that is not politically or socially acceptable, due to the scarce availability of resources and rising hostility against refugees in various parts of the world.[47] As a result, the interpretation of right to work as a negative right envisaging non-interference of the State on an individual's freedom to gain a living is the most endorsed view, and best fits the current international regime.[48] As India is not a party to any of the international instruments relating to refugees, it may appear that its legal system not only refrains from according any recognition towards refugees, but also does not identify an obligation toward refugees under any of its laws. However, such a view may not be correct; India's diffidence towards signing the refugee conventions can be compensated by the fact that it is still a signatory to various conventions on human rights and humanitarian law under which the right to work can be positioned. It is within these universal principles under human rights law that the right to work can be positioned, in order to impute an obligation upon India to secure employment for refugees in its territory.

The following is an analysis of various relevant international instruments to which India is a party, which recognise the right to work:

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[44] Saurabh Bhattachrjee, *Situating the Right to Work in International Human Rights Law: An Agenda for the Protection of Refugees and Asylum –seekers*, 6 NUJS LAW REVIEW 41 (2013). (Hereinafter *Saurabh Bhattacharjee, Situating the Right to Work*)

[45] *The Michigan Guidelines on the Right to Work*, 31 MICHIGAN JOURNAL OF INTERNATIONAL LAW 293 (March 16, 2010), http://www.law.umich.edu/centersandprograms/refugeeandasylumlaw/Documents/Michigan_Guidelines_on_the_Right_to_Work.pdf.

[46] Jose Luis Rey-Perez, *The Right to Work Reassessed: How We Can Understand and Make Effective the Right to Work*, 2 RUTGERS JOURNAL OF LAW& URBAN POLICY 217 (2005), as cited in Saurabh Bhattachrjee, *Situating the Right to Work, Supra* note 44.

[47] B.S. Chimni, *Globalisation, Humanitarianism and the Erosion of Refugee Protection*, 13(3) JOURNAL OF REFUGEE STUDIES, 243 (2000), as cited in Saurabh Bhattachrjee, *Situating the Right to Work, Supra* note 44.

[48] Saurabh Bhattachrjee, *Situating the Right to Work, Supra* note 44.

1. UNITED NATIONS CHARTER:

The right to work is primarily derived from the right to life and is recognized under Article 55 of the United Nations Charter, which declares that the UN shall promote, *inter alia*, higher standards of living, full employment, and conditions of economic and social progress and development.[49] Article 56 of the Charter requires Member States to take 'joint and separate action for the achievement of the purposes articulated in Article 55', thereby envisaging 'full employment' as a state duty rather than an individual human right. International Labour Convention No. 122[50] talks about "full, productive and freely chosen employment", thereby connecting the obligation of State parties to create conditions of full employment with the obligation of ensuring the absence of forced labour.

2. UNIVERSAL DECLARATION OF HUMAN RIGHTS[51]:

The Universal Declaration of Human Rights, in Article 23, protects the right to work, just and favourable conditions of work and further goes on to obligate states to provide the right to compensation while unemployed through the words "protection against unemployment", which also encompasses measures to protect people against the occurrence of involuntary employment.[52] Although the UDHR was implemented as a soft law instrument, it has now attained the status of customary international law, and is thereby treated as obligatory.

3. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS[53]:

Article 6 of the ICESCR recognises the right to work as including the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts",[54] and includes within its ambit the right not to be deprived of work unfairly.[55] This underlines the importance of work for enhancing personal development as well as for social and economic inclusion.[56] Article 7 also provides for the right to just and favourable conditions of work, fair wages and equal remuneration for work of equal value, safe and healthy conditions of work, rest and leisure. Article 2 of the ICESCR further requires States to utilize "all appropriate means, including particularly the adoption of legislative measures" for the implementation of their obligations

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[49] United Nations Charter, 1 U.N.T.S. XVI (October 24, 1945).

[50] Employment Policy Convention, 1964 (No. 122) *Adopted on 9 July 1964 by the General Conference of the International Labour Organization at its 48th Session.*

[51] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc.A/810 (December 12, 1948).

[52] Saurabh Bhattachrjee, *Situating the Right to Work, Supra* note 44.

[53] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (December 16, 1966).

[54] Art. 6(1), ICESCR – "The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

[55] United Nations Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 18: The Right to Work*, E/C.12/GC/18 (February 6, 2006), http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/493bee38093458c0c12571140029367c/$FILE/G0640313.pdf. (Hereinafter *General Comment No. 18*)

[56] *Id.*

under the Covenant.[57] However, these obligations are subject to the qualification of available resources.

Nevertheless, the provisions concerning the right to work, among other rights, are universally applicable and embrace all human beings. States are obligated under international law to fulfil the right to work when individuals or groups are unable, for reasons beyond their control, to realise that right themselves by the means at their disposal. The obligation includes, *inter alia*, the obligation to recognize the right to work in national legal systems, and to adopt a national policy on the right to work as well as a detailed plan for its realisation.[58]

As the language of the international treaties and conventions suggests, certain rights, including the right to work, are awarded to both citizens and non-citizens, thereby including refugees and asylum seekers. Article 6(1) of the ICESCR, which provides that state parties should recognise *everyone's* right to work, is to operate in tandem with Article 2(2) of the same, which provides that the rights enumerated in the Covenant are to be exercised without any discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or 'other status'. Although 'nationality' is not one of the grounds of discrimination that is prohibited, the residuary clause of 'other status' makes the list of grounds non-exclusive and non-exhaustive, thereby bringing nationality within its sweeping ambit, and prohibiting discrimination against refugees and asylum seekers. Overall, it can be successfully argued that the right to work, in principle, applies to nationals and non-nationals alike, by virtue of a literal interpretation of Article 6 and the non-discrimination basis of IHRL in general.[59]

B. REALITY OF THE SITUATION FOR REFUGEES:

Though the states are under an obligation to guarantee the right to work to every person as discussed above, the same is not being recognised with respect to refugees and asylum seekers in many parts of the world. Despite the fact that the United Nations has persistently described all human rights to be 'universal, indivisible, interdependent and interrelated',[60] States continue to flout international norms and give unequal weight to economic rights.

A significant proportion of the world's refugees stay on in the countries of their asylum for long years and ideally, they should be integrated into the local community or be resettled in a third

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[57] Article 2(1), ICESCR: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[58] General Comment No. 18, *Supra* note 55.

[59] Alice Edwards, *Supra* note 39, at 320-328.

[60] UNGA Res. 36/133, 14 December 1981, Preambular para. 6.

country. However, in reality, they remain confined to their camps for several years, are deprived of the right to free movement, access to educational opportunities, and are denied the opportunity of income-generation.[61] This leads to severely negative consequences that accentuate the traumatic experience already undergone by refugees. Developing nations, in particular, are reluctant to allow the involvement of refugees in the labour market, due to concerns about the negative impact on the economy of large scale refugee populations, when the said nations are themselves struggling to meet the needs of their own citizens.'[62] Further, local populations, who were affected by mass influxes, took offence at the material assistance accorded to refugees and asylum seekers which was at times of a higher standard than that received by the local population.[63]

It is pertinent to note that access to employment opportunities is particularly important and necessary for refugees and asylum-seekers not only as a means of survival but also to reinforce their dwindling sense of dignity[64] and self-worth.[65] Given the particular vulnerability of this class of persons, caused by the conflict or persecution faced in the country of origin, the right to work is of vital importance in restoring a sense of self-respect in every individual refugee. Their participation in the local economy will provide them with the opportunity to mingle with and contribute to the local community, learn the local language and be socially accepted. Such economic independence reduces reliance on social assistance and avoids the creation of an under-class of persons dependent on welfare schemes.[66] It is a way to ensure that refugees integrate into the local community and achieve self-sufficiency, thereby providing a solution to the refugee problem. In contrast, languishing in camps, detention centres or in society indeterminately in a state of economic dependence can only adversely affect their future resettlement, local integration and/or return prospects.[67]

In addition, denial of economic rights to refugees and asylum seekers, insofar as it prevents the refugee from achieving a decent standard of living, amounts to *constructive or indirect refoulement.*[68] This viewpoint is based on the fact that absence of freedom of work is likely to compel refugees and asylum seekers to return to their countries of origin where they had been persecuted, as they

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[61] Alice Edwards, *Supra* note 39, at 320-328.
[62] UNHCR, *Local Integration*, Global Consultations on International Protection, 4th Meeting, UN Doc. EC/GC/02/6, 25 April 2002, para. 18.
[63] B.S. Chimni, *Improving the Human Condition of Refugees in Asia: The Way Forward*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA 146-53 (V.S. Mani ed., Oxford University Press, 2007).
[64] Minister of Home Affairs, s*upra* note 42.
[65] Alice Edwards, *Supra* note 39, at 320.
[66] *Id.*
[67] *Id.*
[68] Penelope Matthews, REWORKING THE RELATIONSHIP BETWEEN ASYLUM AND EMPLOYMENT(Routledge, 2012).

have no prospect of development in the host country. *Refoulement* being prohibited by international law,[69] the denial of employment would be an effective way to expel refugees and asylum seekers from a State without actually taking any positive action toward their expulsion.

In India, very little protection is afforded to the refugees and they do not have the legal right to work.[70] Further, unemployment rates are very high; as a result, employment opportunities are scarce and a large proportion of refugees take up work in the informal or unorganized sector. The lack of regulation in the informal sector exposes refugees to exploitation, abuse and in the case of women refugees, sexual and gender-based violence. In fact, their vulnerability might make them the targets of exploitative and unscrupulous employers. Refugees are unlikely to report such mistreatment out of fear of arrest, deportation or harassment by the authorities. Further, lack of employment opportunities may relegate refugees to "negative coping mechanisms"[71] such as begging, thievery, child labour, prostitution, etc. Xenophobia and different forms of hostility toward refugees from the local population also serve to impede the refugees' process of integration into the society. A simple example of the same would be when a bank denies a loan for private business to a refugee for fear of default, denial of education facilities, health facilities, etc.

It would appear that India considers the refugee issue as one within the purview of bilateral relations and not multilateral relations, and entering into international agreements could constrict its freedom of action.[72] The Tibetan refugees for instance, are actively encouraged to propagate their own culture in India.[73] Similarly, Sri Lankan refugees are allowed a limited right to work from their camps.[74] However, the same freedoms are not accorded to other refugee communities such as, ethnic Nepalese from Bhutan or Hindu Pakistani Refugees.[75] Both these communities are neither formally nor informally recognised as refugees by the State, and consequently are unable to acquire residence permits or obtain gainful employment for sustenance.

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[69] Article 33(1), 1951 Convention: "No Contracting State shall expel or return ("refouler") a refugee in any many whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.", *Supra* note 1.

[70] Elizabeth Umlas, *Urban Refugees, the Right to Work and UNHCR's Advocacy Activities*, POLICY DEVELOPMENT AND EVALUATION SERVICE, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, (May 2011) http://www.refworld.org/docid/4e4b75ed2.html.

[71] *Id.*

[72] Sarbani Sen, *Paradoxes of the International Regime of Care*, in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000 404, 405 (Ranabir Samaddar ed., Sage Publications, 2003).

[73] HRLN Report, *Supra* note 4.

[74] World Refugee Survey, 2009, *Supra* note 3.

[75] *Id.*

It is thus clear that India's stance on refugees is not in accordance with its obligations under international law. As a result, several hundred thousands of refugees that find asylum in India are denied their rights and opportunities and are rendered incapable of coming out of the dark periods of trauma in their lives. After fleeing persecution, they are denied adequate means of livelihood, heightening their distress and capturing them in an endless cycle of helplessness and despondence. It is important that India takes adequate measures to ensure that such grave injustice does not happen on its land.

IV. RECOMMENDATIONS: THE RAMIFICATIONS OF A COMPREHENSIVE REFUGEE POLICY

A. INDIA'S POSITION ON A LEGISLATION FOR REFUGEES:

There is a definite need to create and implement a constructive policy towards refugees in India. However, India has been hesitant to adopt a firm refugee law in light of political and security considerations that are unique to the geopolitical circumstances of the subcontinent. It is politically more convenient to deal with refugee communities on the basis of bilateral arrangements with neighbouring countries.

The inconsistencies in the treatment meted out by the Indian Government to different communities of refugees on its land reflect the administrative, political and economic considerations of the Government in dealing with refugee flows. Several advocacy groups, such as the Human Rights Law Network (HRLN) and the National Human Rights Commission (NHRC) have been pushing for a refugee law, along the lines of the 1951 Convention and the Protocol of 1967. This view has been actively supported by the NHRC, which has consistently advocated the need for a uniform policy towards the refugee communities in India and the guarantee of basic human rights,[76] including the right to work. A 'Model Law'[77] formulated by the Justice P.N. Bhagwati, based on international instruments on refugee law, and pushed forward by the NHRC has, however, not found favour in the Legislature.

It would probably be unjust to place blame solely upon the Indian authorities; there are two sides to every story. It would appear that available literature focuses almost entirely on refugee rights and the humanitarian obligations of the host country governments, i.e. the theories have a refugee-centric characteristic.[78] It is appealing to our humanitarian notions to allocate resources

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[76] Rajeev Dhavan, *India's Refugee Law and Policy*, THE HINDU, (June 25, 2004), http://www.thehindu.com/2004/06/25/stories/2004062501791000.htm.

[77] *Id.*

[78] Robert Chambers, *Hidden Losers? The Impact of Rural Refugees and Refugee Programs on Poorer Hosts*, 20 INTERNATIONAL MIGRATION REVIEW 245 (1986). (Hereinafter *Robert Chambers*)

to the finding of a durable solution for refugees and refugees alone. It is easy to argue the need to provide aid and assistance to refugees, and thereby justify the concerns of organisations like the UNHCR. However, there is very little literature on the impact of refugees on the host countries.

It is possible that the refugees may benefit the economy of the host country; the additional manpower generated by refugees will allow the citizens of the host country to employ refugees as labourers at a lower wage rate and enable them to allocate their own labour to a more profitable enterprise. This situation is perhaps characteristic to developed nations that are able to sustain the new population of refugees and reap more benefits from their presence than costs. However, the experience of poorer host nations has been unfortunate. The poorer sections of the society may not be able to compete with the refugees for job positions.[79] Moreover, drastic cuts in the prevailing wage rates disrupt the lives of poorer host citizens.

The same is true for India considering that our huge population exerts immense strain upon available resources, which are scarce. Hence, providing such benefits for refugees and asylum-seekers becomes a contentious issue. The presence of refugees proves extremely strenuous to local population, especially to the poor, who have to bear the brunt of greater competition for income opportunities and public services. Several scholars have documented the gradual breakdown of cultural and social fabric, leaving hosts vulnerable to internal strife and instability.[80]

The international refugee protection regime would require India to extend facilities in the nature of vocational training, health facilities and primary education, in order to enable refugees to exercise the universal right to work. This remains difficult, in light of India's security concerns.[81] Refugee flows present a risk to national security; armed refugees prove difficult to manage and the increase in the demand for available resources aggravates conflicts over scarce resources. Refugees also threaten the domestic political process and create pressures on the government. Moreover, the demographics of the subcontinent make it difficult to distinguish between refugees and migrant workers.[82] Indeed, it has been documented that a uniform law would encourage larger migrant flows by allowing greater access to employment opportunities. The Costa Rican situation in the 1990s was notorious in this regard, with undocumented aliens

[79] *Id.*
[80] *Id.*
[81] Arjun Nair, *Supra* note 5.
[82] *Id.*

having greater access to employment, than did many refugees.[83] Further, where job competition and depression of wage levels are attributed to the presence of aliens, it seems improbable for an elected Government to extend privileges to the 'visible' refugee communities.

B. COMPREHENSIVE REFUGEE POLICY

It has been observed that the negative economic impact of influx of refugees can be mitigated by the Government if it proactively responds to the presence of refugees, i.e. by providing more services to that region or by focussing on improving the overall economic development of the region.[84] The reluctance of the Government to formulate a law for refugees leaves only one avenue open, which is to formulate a constructive and uniform policy towards refugees. By addressing the refugee problems and providing more resources to refugee-stuck regions of the country, the Government can maintain the economic stability of the country while simultaneously enabling the protection of refugee rights, thereby allowing them to seek employment. The present policy followed by the Government is largely administrative in nature. However, a definite policy towards refugees will facilitate the formation of determinate rights of refugees in the due course.

In this manner, India will fulfil its international obligations undertaken by the numerous human rights instruments, as well as maintain its obligations under the treaties with neighbouring countries. Such a constructive policy will also allow India to maintain a security database of all refugees in the country, which will ensure the accountability of each and every refugee, and address the issue of illegal migrants finding their way into the country. Further, a constructive policy will eradicate any friction between the host country and the country of origin of the refugee. The act of granting asylum will be governed by a well-defined policy, thereby ending speculation of decisions being taken on mere administrative or political whims.

However, in the current international legal framework, the burden of ensuring the integration of the refugee to a society falls entirely on the host country (in this case India), even though the refugee problem is an international and not a national one. As mentioned earlier, developing nations are the ones that face the most refugee problems. This stretches their resources to breaking point, while developed nations steer clear of the costs of refugees. In other words, some states bear an inequitable share of the burden of refugee protection and have to deal with a

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[83] James Wiley, *Undocumented Aliens and Recognized Refugees: The Right to Work in Costa Rica*, 29 INTERNATIONAL MIGRATION REVIEW 423 (1995).
[84] Robert Chambers, *Supra* note 78.

disproportionately large number of displaced persons in relation to other states. It is a fact that the world's poorest countries are the ones hosting the biggest refugee populations.[85]

C. INTERNATIONAL BURDEN SHARING OF THE 'PROBLEM' OF REFUGEES:

As far as the system of international refugee protection is concerned, the Preamble to the 1951 Convention outlines a desire for the equitable distribution of the burden of refugees.[86] This has given rise to theories of international burden-sharing, whereby every state can allocate an optimal amount of its income towards contributing to the establishment and maintenance of an international supply of funds, which they can benefit from at times of need. The international supply will thus be a combination of contributions from all states wherein, the countries with larger incomes will bear a larger proportional share of the burden.

In this manner, every country in the world will be required to contribute to the international supply, and countries that receive refugees can extract resources from this supply and utilise it for the protection of refugee rights. This is beneficial for individual countries like India as well, who have not signed the 1951 Convention, as it will provide a method to deal with the influx of refugees that it regularly faces across its porous borders, without adversely affecting the national economy and resources, as well as without denying refugees their rights.

V. CONCLUDING REMARKS:

Refugees in India are languishing in refugee camps without any protection for their basic rights, including the right to work and gain economic independence, which is integral to develop their dignity and self worth, after having a traumatic experience at their countries of origin. However, India not having signed any convention or any other international instrument relating to refugees, the only way to impute to it an obligation to protect the rights of refugees, is to extend the widening jurisprudence of international human rights law and international humanitarian law to include international refugee law and refugee protection within its wide ambit. In this manner, it is possible to ensure that refugees in India are accorded the recognition and rights that they deserve under the international standard. India's hesitancy toward formulating a law for refugees can be countered by adopting a comprehensive and uniform refugee policy which will allow it to maintain its bilateral relations with neighbouring countries and, at the same time, address the problem of protection of refugees' rights. However, it has been seen that this burden of protection almost always falls disproportionately on developing nations than on developed

[85] World Refugee Survey 2009, *Supra* note 3.

[86] The Preamble to the 1951 Convention Relating to the Status of Refugees states: "…the grant of asylum may place unduly heavy burdens on certain countries, and… a satisfactory solution… cannot therefore be achieved without international cooperation."

nations, even though the problem of refugee protection is an international one. This stretches the host countries' resources and finances beyond a level of sustainability, and creates adverse effects for its citizens. As a result, it is pertinent to implement the theory of International Burden Sharing whereby all nations will contribute resources to a common pool from which nations afflicted with refugee protection problems can extract in order to protect refugees on their land.

Hardik Singh, *Case Analysis of S.A.S. v. France*, 3(1) NLUJ Law Review 168 (2015)

CASE ANALYSIS OF S.A.S. V. FRANCE

HARDIK SINGH*

In the judgement delivered by the European Court of Human Rights on July 1, 2014, in *S.A.S. v. France*,[1] the Court upheld the law introduced by the French Government, regarding the imposition of ban on clothing that intends to conceal one's face. The present case analysis comprising four parts, first deals with the details of the Court and the parties involved. The second part deals with the impugned legislation, followed by the next part analysing the various arguments raised by the parties in the background of the existing jurisprudence of the Court and lastly, the author has put forth a conclusion, noting the far-fetched consequences and implications of the Court's ruling on the diminishing scope of religious freedom for the minority groups and the rising phenomenon of Islamophobia.

THE COURT AND THE PARTIES CONCERNED

This matter was heard and decided by the Grand Chamber of the European Court of Human Rights (hereinafter ECHR), which consisted of seventeen judges. The case was initiated by the Applicant through an application to the Court which was subsequently referred to the Grand Chamber. Primarily, the parties to the matter were the Applicant and the Government of France on the opposing sides, but the matter witnessed a large number of third party submissions. Such interveners included both state actors, like, the Government of Belgium, and non-state actors, like the Amnesty International.[2]

The case name is called so because the Applicant requested the permission for anonymity, which was authorized by the Grand Chamber.[3]

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[1] S.A.S. v. France [GC], App. No. 43835/11, 2014 Eur. Ct. H.R. [hereinafter *Burqa Ban case*]

[2] These included the Belgian government and non-governmental institutions like Amnesty International, ARTICLE 19, Human Rights Centre of Ghent University, Open Society Justice Initiative and Liberty.

[3] The provision for the anonymity of the applicant is provided in the Rules of the Court Rule 47, §4, ECHR, http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf. The judgement quotes Rule 47, §3 as the provision for the same, this discrepancy may be due to the fact that current Rules of the Court were notified on July 1, 2014.

THE IMPUGNED LAW

The provisions of the Law No. 2010-1192[4] of 11 October 2010 (effective from 12 April 2011) were challenged in the present case. The provisions of this legislative piece were aimed at prohibiting people from wearing any sort of clothing which might conceal their face in public spaces (mainly full-face veils like *burqa, niqabs* etc.)[5] Apart from this general prohibition, the law provided for certain exceptions in the form of clothing which were either prescribed by other legislations or were used for justifiable reasons including health reasons or by reasons of festivities.[6] Any contravention of the impugned law was punishable with a fine of maximum 150 Euros or an obligation to follow a citizenship course in addition to or instead of the payment of the fine.[7]

Since the Government was required to address both concurring as well dissenting opinions[8] on the law prior to its passing; this law was passed only after intense legislative and executive deliberations. Since the primary group which was affected by such a ban was the *burqa*-clad Muslim women, the case has been popularly known as the '*Burqa Ban* case'. Another reason for such terminology is the course of development of the law, which was first intended to only cover full veil.[9] Thus, it can be said that the subsequent developments were legal-eyewash to ensure the constitutionality of the impugned law.

From the very beginning, freedom of expression and religion remained the dominant & recurrent theme in this case. As will be discussed later in detail, the genesis of the impugned law lying in such themes was used by the Applicant to challenge the law itself. The Applicant challenged the law on the ground that it was in violation of Articles 3, 8, 9, 10, 11 and 14 of the European Convention on Human Rights ('Convention'), that essentially deals with freedom of religion and expression (Arts. 9 and 10), general non-discriminatory provision (Art. 14),

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[4] Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage de l'undans les lieux publics [Law No. 2010-1192 of 11 October 2010 (effective from April 12, 2011) for prohibiting the concealment of one's face in public places, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022911670&fastPos=1&fastReqId=747931512&categorieLien=id&oldAction=rechTexte [hereinafter *Law No. 2010-1192*].

[5] Law No. 2010-1192, *Supra* note 4, § 2.

[6] The other exceptions which were enumerated in the legislation are the clothing justified for health or occupational reasons (for example, protective mask for swine flu patient and gas mask for a construction worker), or for the sports activities (for example, the mask wore during fencing) or for any festive or traditional event.

[7] Law No. 2010-1192, *Supra* note 4, § 3.

[8] Burqa Ban case, *Supra* note 1, at ¶¶ 6-7 (The dissenting opinion was provided by the National Advisory Commission on Human Rights and *Conseild'État*. While the former was not in favour of a law prescribing any such general and absolute ban, the latter was more concerned with legal aspect and opined that it was impossible to recommend a ban on the full veil alone and was in favour of ban on concealing face in general.).

[9] Burqa Ban case, *Supra* note 1, at ¶¶ 4-5 (As to legislative history, a Parliamentary Commission was established on 23 June 2009 to draft the Report on 'the wearing of the full face veil on national territory'. Further, even the aforesaid opinion of National Advisory Commission on Human Rights was titled 'opinion on the wearing of the full-face veil').

prevention from degrading treatment (Art. 3) and freedom of association and respect for one's private life (Arts. 11 and 8).[10]

Many international laws and practices were quoted by the Court to establish a comprehensive background of the laws imposing a similar ban on full-veil clothing. The Resolution 1743 (2010)[11] and the Recommendation 1927 (2010)[12] of the Parliamentary Assembly of the Council of Europe on Islam, Islamism and Islamophobia in Europe were specially dwelled upon. The other important international treaty which was relevant, but not utilized adequately, was the International Covenant on Civil and Political Rights (hereinafter as 'ICCPR').[13] The Belgian law, which provides for a similar ban was also utilized by the Court.[14]

ISSUES CONSIDERED AND ARGUMENTS ADVANCED IN THE CASE

There were preliminary objections raised by the French Government regarding the Applicant's status as a 'victim';[15] exhaustion of domestic remedies in the matter;[16] and abuse of the right of individual application.[17] The Court dismissed each of these objections after individually examining them. As to the status of victim, Court opined that, a specific instance of infringement or enforcement was not mandatory and a mere possibility of violation could also suffice. With respect to non-exhaustion of domestic remedies, Court linked it to the preceding reasoning, i.e., once the applicant has been provided with the victim status, exhaustion of domestic mechanisms was not required. The last objection was rejected as the Court found that the Application was not frivolous and fell under the category of *actiopopularis*.[18]

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[10] Burqa Ban case, *Supra* note 1 at ¶3.

[11] *Id.* at ¶35 (This elaborated the position of burqa as a part of cultural obligation which may/may not be supported by a religious authority, but any kind of blanket ban might result in the curtailment of desires of those women who want to wear it freely).

[12] *Id.* at ¶36 (This recommendation was in the form of a call on the member states to not prescribe a blanket or general ban on the full veiling or any other form of religious or special clothing).

[13] International Covenant on Civil and Political Rights, art. 18, Dec.16,1966, vol. 999, 171 and vol. 1057, 407(Deals with the right to freedom of thought, conscience and religion. This right itself provides for the derogation in case provided by the law for the reasons like public safety, public order, health or morals etc. France has acceded to the Covenant. Article 18 extends to both religious beliefs and the rituals or customs associated with it. Thus, this logical extension can be used to bring *burqa* or other head dressings within the protective ambit of religious freedom).

[14] Article 564bis was introduced in the Criminal Code of the Belgium on June 1, 2011 on the lines of the French law. This provision criminalized the covering of face (completely and partly), punishable with a fine up to 25 Euros or detention up to 7 days. This provision has withstood the judicial scrutiny of the Belgian Courts. The Belgian Constitutional Court upheld its constitutionality via a judgement dated 6 December 2012 in the case of Belkacemi v. Pety de Thozée, 2012-145f, http://www.const-court.be/public/f/2012/2012-145f.pdf.

[15] Burqa Ban case, *Supra* note 1, at ¶¶53-58.

[16] *Id.* at ¶¶59-61

[17] *Id.* at ¶¶62-68.

[18] *Id.* at ¶68. The last objection was dealt by the Court at length, wherein different categories of abuse of individual application were enumerated. These included, application based consciously upon untrue facts; application based

The Applicant presented a three-tier argument to establish that the law was invalid. The *first* argument advanced dealt with the inhuman and degrading treatment meted out by such a law.[19] The *second* argument was based on the reasoning that a ban on full-veil clothing might legitimately hinder the freedom of assembly and association aspect.[20] The *third* argument put forward by the Applicant was that a blanket ban on full-veil clothing in public places might endanger the freedom of expression and religious consciousness[21] and might also trespass the right to respect for private life.[22] Further, the provision for non-discrimination was creatively utilized by the Applicant to substantiate the aforesaid arguments, as it was not separately argued upon but clubbed along with the arguments under other provisions.[23]

The Court dismissed the first argument of the Applicant on the ground that it did not satisfy the threshold (or minimum) severity level required for Article 3 of the Convention to come into play.[24] The Grand Chamber further dismissed the second argument built upon restriction on freedom of assembly and association on the ground that the submission was unsubstantiated by

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upon certain false documents; omission of an essential evidence etc. In the present case, Court found the application to be not falling under any such category.

[19] European Convention on Human Rights art 3, Nov.4, 1950, Europ.T.S. No. 005, '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*.' [Hereinafter *European Convention on Human Rights*]

[20] European Convention on Human Rights, art. 11 reads:

'1.Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.'

[21] European Convention on Human Rights art. 9 reads:

'1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

European Convention on Human Rights art. 10 reads:

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

[22] European Convention on Human Rights art.8 reads:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence…'

[23] European Convention on Human Rights art.14 reads:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Applicant argued on the basis of violation of art. 3 along with art.14; violation of art.11 with art.14 etc.

[24] Burqa Ban case, *Supra* note 1, at ¶¶69-71.

the applicant.[25] However, the Court conceded to the relevance of the argument based upon Article 8, 9 and 10 and hence rendered it admissible.[26]

Thus, the Court's assessment was majorly concerned with the questions raised on the subject-matter of Article 8 (Right to respect for private and family life) and Article 9 (Freedom of thought, conscience and religion). In its appraisal, the Court rejected the Government's stand that the law was based upon the respect for gender equality and furthered respect for human dignity. It held that such a reasoning is insufficient to justify a blanket ban as envisaged under the law.

However, after considering the arguments of the parties concerned, the Court justified the ban on the sole ground of 'living together'.[27] This principle of 'living together' can be understood in the background of state paternalism, wherein the state has legitimate interests to interfere in one's individual sphere to make it compatible with the larger group. This led the Court to consider the veil as an obstacle to the concept of people socializing and living together. The Judges appended their reasoning with many judicial precedents.[28] It must be noted that, the Court finally by a vote of fifteen to two, held that there was no violation of Article 8 and 9 of the Convention.

MINORITY OPINION

Apart from the aforesaid majority opinion, there was a partly dissenting opinion of two judges.[29] They put forward a two-fold argument for not agreeing with majority's opinion. At the outset, they dropped a hint as to wrong approach of majority in sacrificing individual rights in the name of abstract principles like 'living together.'[30]

As per the minority opinion, the principle of 'living together' could not be authoritatively traced to any provision of ECHR or judicial precedents of the Court. For them, this principle could not be used to assert that veiled face acts as an obstacle in the socializing process. Thus, French law could not be termed as pursuing any legitimate aim under Art. 8 or 9.[31]

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[25] *Id.* at ¶73.
[26] *Id.* at ¶75.
[27] *Id.* at ¶142.
[28] The Court quoted many judicial precedents, but they could be easily distinguished from the present case. This approach of majority opinion is criticized in the subsequent sections of the paper.
[29] Judges Nußberger and Jäderblom.
[30] Burqa Ban case, *Supra* note 1, at ¶2 (Dissent).
[31] Burqa Ban case, *Supra* note 1, at ¶¶5-9 (Dissent).

Second limb of minority's dissent is based upon disproportionate impact of blanket ban. For these two Judges, the impugned law specifically targeted dress-code associated with one's religion and personality. Such law could not be camouflaged as a secular law by changing the terminology. Further, less restrictive measure could have been adopted to dampen the effect on minority group.[32]

There were further arguments by third-party interveners during the course of the case. While the Belgian government was in favour of the ban, other non-state actors like ARTICLE 19, Open Society Justice initiative etc. were against such a discriminatory ban.

EXISTING JURISPRUDENCE

The ECHR has a rich past, dotted with instances of adjudication on issues involving freedom of religion, conscience and respect for private & family life. The Court has been 'harsh', when dealing with the subject of religious consciousness and expression, especially pertaining to the minority populations.

There have been many cases, like *Mann Singh v. France,*[33] where a Sikh individual (wearing a turban) was denied the driving license as the identity photograph required a person to be bareheaded. The Court did not even admit the application in this case. The public safety approach may seem valid in the *Mann Singh* case, however, in the *Burqa Ban* case, this holds no proper judicial precedent as the Applicant never argued for wearing *burqa* at any identification checks.

In another case of *Dahlab v. Switzerland*,[34] there was an issue regarding a primary school teacher wearing a headscarf as symbol of her religious and cultural orientation. The ECHR again declined to admit the application for any relief on the ground that there was no violation of the provisions of the Convention. This case can be easily distinguished from the present case, as in the *Dahlab* case, there was conflict of religious freedom vis-à-vis duties attached to the social post. A similar attitude of indifference has been adopted by the Court towards religious manifestation in schools and universities in the other cases too.[35]

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[32] Burqa Ban case, *Supra* note 1, at ¶¶13-24 (Dissent).
[33] Mann Singh v. France (dec.), App. No. 24479/07, 2008 Eur. Ct. H.R.
[34] Dahlab v. Switzerland, App. No. 42393/98,2001 Eur. Ct. H.R.
[35] These include LelyaSahin v. Turkey [GC], App. No. 44774/98, 2005 Eur. Ct. H.R (ECHR found no violation of Article 9, when the girls wearing Islamic headscarf were not allowed to attend class or appear in examinations by Turkish university); Dogru v. France, App. No. 27058/05,2008 Eur. Ct. H.R; Kervanci v. France, App. No. 31645/04, 2008 Eur. Ct. H.R (Muslim applicants were expelled from the school for not taking off their religious scarf).

In the same league lies the case of *Ahmet Arslan and Other v Turkey,*[36] wherein a group of Turkish nationals were prosecuted for wearing their traditional dresses in the public areas. The Court granted relief in this case by holding that such conduct constitutes a breach of Article 9 and ordered the Turkish State to pay the damages to the victims. Nevertheless, it can be assumed that the existing jurisprudence did not favour a radical approach of Court towards the issues involving religious consciousness, especially the sentiments of minority.

CRITICISM

It is the hypothesis of the author that the Court's decision in the *Burqa Ban* case is just another pointer to the prevalent 'Islamophobia' in the European society. The truth of this hypothesis will be substantiated in the following paragraphs.

The mere re-iteration of the maxim 'liberty, equality, fraternity' does not by default inculcate them in the State's policies and the same is true for the French Government. There is a growing resentment against religious minorities in Europe, especially against the Muslim population. This is a post-2001 phenomenon, which is linked with the so-called 'Islamic terrorism'. Some recent reports[37] and resolutions[38] by authorities in Europe reveal the wide-spread discrimination against the Muslim population. The entire argument advanced in favour of the ban on *burqa* on the grounds of public safety might be legitimate, but if viewed from another dimension, it is equivalent of labelling an entire community and its practices as potentially dangerous. This flouts the basic tenets of the natural justice. The Applicant in the *Burqa Ban* case had accepted the legitimate need to show the face for any identification purposes and thus, in a way tranquilized the safety argument advanced by the Government.[39] A blanket ban on a cultural practice of Muslim women is in derogation of principles laid down in the Convention and the Resolution

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[36] Ahmet Arslan and Other v. Turkey, App. No. 41135/98,2010 Eur. Ct. H.R.

[37] Tufyal Chaoudhary et. al, *'Perception of Dicrimination and Islamophobia'*, EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA (EUMC), (2006), http://www.oicun.org/uploads/files/articles/Perceptions_EN.pdf [Muslims in the European Union feel that they are under intense scrutiny, especially after 9/11 terrorist attacks]; *See also*, Sara R Farris, *'On anti-Semitism and Islamophobia in Europe'*, Al Jazeera, Opinion, (June 4, 2014), http://www.aljazeera.com/indepth/opinion/2014/06/anti-semitism-islamophobia-europ-20146414191330623.html.

[38] *See*, Parliamentary Council of Europe, Resolution 1743 (2010) [Council considered Islamic extremism and extremism against Muslim communities to be phenomenon, which reinforce each other.] Similar hazy approach has been appointed in the Recommendation 1927 (2010): Islam, Islamism and Islamophobia in Europe, 23 June 2010, Council of Europe [While it prioritized combating religious intolerance, it also cautioned against religiously disguised attacks on European values].

[39] Burqa Ban case, *Supra* note 1, at 13.

1743 (2010)[40] and in a way further marginalizes the Muslim population living in Europe, especially the Muslim women.[41]

The last criticism is regarding the usage of 'living together' principle to uphold such a blanket ban. The fundamental values of democratic society[42] cannot be skewed to pave the path for State's intolerance towards the vital notions of religion. In a secular and democratic society, religion is practically a personal subject in which state does not interfere (or perhaps, should not interfere). The responsibility of state is restricted to ensuring that the freedom of religious expression is not curtailed by any group in the society. On the contrary, in the present case, it is the government itself which is violating the 'equality, liberty and fraternity' principles. The Government's stand, which was subsequently accepted by the Court, is that full-veil clothing does not (or may not) allow people to live together as a society. This argument itself in a way condones the prevalent discrimination in Europe on the basis of religious and cultural orientation. The inherent flaw in this argument is that, the living-together principle has a 'voluntary' aspect to it, which cannot be catalysed through such legal statutes and rulings. Further, the Court's view leads to a larger question as to whose cultural, religious or social traditions have to be followed in such a society, those of the majority or the curtailed-minority.

CONCLUSION

The judgement in *S.A.S v. France* concluded the prevalent debate about legality of the law banning full-veil clothing to cover face by ruling in the favour of the French government. The court examined various legal issues, involving freedom of thought, conscience and religion, etc. to arrive at such a conclusion. The Court does not deviate from its existing judicial precedents and provides a 'harsh' evaluation of facts and law.

It can be concluded that this judgement has the potential to reinstate the prevalent stereotype against religious minorities in Europe. The majority judgement lacks the radical introspection of the existing jurisprudence and the insight into the far-fetched consequences of the Ban. The judgement relies upon the doctrine of 'living together', it is not a distant possibility that, the consequences might be just the opposite, i.e., rather than assisting people to live together, it

[40] Parliamentary Assembly, Council of Europe, Resolution 1743 (2010): Islam, Islamism and Islamophobia in Europe, (June 23, 2010), http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1743.htm.

[41] It must be understood that that the emphasis on Muslim women and equating the ban on full-veil clothing to burqa ban is due to the fact that it is the former group which is worst and primarily affected by the law.

[42] These include equality, liberty and fraternity from which the respect for minority communities directly emanates, be it religious, linguistic, cultural or any other sort of minority group.

might exclude the minorities from the mainstream society altogether. It would not be an astonishment if some other European nations are quick to come up with similar antagonizing legislations.