
The Law Review

Volume 9



2017
Government Law College, Mumbai

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The Law Review

Volume 9

2017

Government Law College, 'A' Road, Churchgate, Mumbai 400 020.

PUBLISHED BY
The Principal
Government Law College
'A' Road, Churchgate
Mumbai 400 020.
INDIA

Tel.: +91-22-2204 1707 Fax: +91-22-2285 1315

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Recommended form of citation:

<Author><Title> (2017) 9 Law Rev. GLC <page no.>

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Acknowledgements

The Government Law College would like to thank the following contributors for their support.

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FROM THE PRINCIPAL'S DESK

Academic contemplation and oft, adventurism throws up newer inferences and challenges within the existing body of knowledge. However, it crystallises into a new line of thought and sometimes a theory, only when it is backed by thorough research and study, and presented through effective expression, both oral and written. The field of law owes much of its success to such expression. It is here that a democratising platform like *The Law Review* provides a promising opportunity in being able to showcase such articulation and deliberation, while engaging with undergraduate law students. Those currently in charge of *The Law Review* are quite conscious of their responsibilities to scout for new talents along with established ones.

One is glad to have witnessed the manner in which the eighth edition of *The Law Review* was received all over the country. Appreciation and acclaim for the student-written articles came in from law schools, academicians, jurists, judges of the Supreme Court and High Courts including the Bombay High Court, and law firms.

This year, the Law Review Committee commenced the process by conducting the customary orientation programme for its prospective student-authors and newly inducted committee members to enable them to develop their legal research and writing skills. The program dealt exhaustively with various aspects of writing articles, right from choosing the topic and researching on it to specifications and minute details that must be adhered to while publishing it, including issues such as copyright infringement.

In response, the Committee received nearly thirty submissions, of which seven articles have been chosen for publication on the basis of their content, relevance and coherence in the style of writing. Apart from the student editors, the Committee ensured that every article was also edited by experts in the area of law dealt with by the article. The Editorial Board, so constituted, comprises of a diverse pool of eminent practitioners in the legal domain, ranging from senior counsels to partners of law firms, who undertook the tedious task of editing the articles. Professor James Kraska, the

Howard S. Levie Professor in the Stockton Center for the Study of International Law at the U.S. Naval War College, was another felicitous inclusion to the Board for this publication, whose avid engagement added immense value to the editorial process.

The present edition of *The Law Review* carries a rich blend of legal topics from a variety of fields. The articles therein, have delved into the nuances of novel areas of jurisprudence that have led to much intrigue among lawyers and academicians alike in the recent times, while juxtaposing and analysing them in the context of existing and proposed legislations. This edition marks a point of departure from its predecessors, as it carries an article that has been based on primary research conducted by the author herself and proposes a firm critique on social legislations.

Over the years, the Government Law College has been fortunate to have received unconditional and wholehearted support in all its endeavours from judges and lawyers, amongst others. I thank the Editor-in-Chief, Hon'ble Dr. Justice D. Y. Chandrachud, as well as the members of the Editorial Board, whose invaluable inputs have made a qualitative contribution to *The Law Review*. This publication would have not been possible without the generous financial support of some of the most prominent law firms of the country and I thank the contributors for the same.

It is indeed heartening to see that with every passing year, this publication has evolved into a fostering ground not only for the student-authors but also for its readers. I sincerely hope that in the years to come, *The Law Review* not only achieves but also sustains its vision to contribute to the development of law and to initiate legal debate and reform.



Dr. Ajay Nathani
Principal, Government Law College

FOREWORD

The contributors of the ninth volume of *The Law Review* of the Government Law College, Mumbai have addressed contemporary legal issues with a remarkable depth and understanding of law. This edition of *The Law Review* emphasises the significance of legal research and writing not only for students but for the legal profession at large. It will undoubtedly contribute to the growing repository of legal scholarship in India.

1. Stemming from the plethora of separatist movements that have taken place all over the world in the last few decades, Amal Sethi's "Separatist Regimes and Human Rights Obligations" explores the question of whether States are liable for the failure to accord positive human rights guarantees in territories where they have lost *de facto* control but still retain *de jure* control. Thus, the author attempts to explore whether Russia would still be in violation of the right to life guaranteed by the European Convention on Human Rights for the failure to protect an individual's life in Chechnya or would Ukraine be liable for a parallel incident in 2014 Crimea. The article explores the answers to this question by propounding and discussing two judicially defined theories i.e., the 'Effective Control Theory' and the 'Existent Sovereign Theory'. In further exploration of this issue, the article also throws light on both the positive and negative implications of the theories for the laws of statehood and in the wider context of human rights.
2. Chinmayee Pendse's and Prakruti Joshi's article on "To Be or Not To Be'- The Conundrum of Arbitrability of Corruption and Subsequent Enforcement" elucidates the viability, effect and sustainability of arbitration as a dispute resolution mechanism in cases involving an element of corruption and the several obstacles faced by the arbitrators in such instances, in the context of domestic as well as international commercial arbitration. Given the extensive evolution of arbitration as an effective dispute resolution method in the recent past, the authors succinctly enshrine the need and benefits of resorting to arbitration, especially in instances of corruption, and ways of overcoming the various procedural hurdles. The authors articulate that "Many countries including

India ... have inclined towards arbitrability of allegations of corruption, overcoming the many procedural issues which are involved. Contrary to the highest standard of proof which is required for proving allegations of corruption otherwise, arbitral tribunals have lowered the standard of proof required and have found a midway approach so as to exercise its substantive jurisdiction to make determination upon the allegations of corruption.”

3. In his article, “Whose Airspace is it Anyway?: Decoding the ADIZ Enigma” on Air Defence Identification Zones (ADIZ), Joshua Abhay Patnigere explores the concept of an ADIZ and observes that an ADIZ is a security concept formulated and propagated by several States, but one which falls within the ambit of customary international law. In order to provide more discussion on this topic, Joshua has proposed a definition of an ADIZ, a concept which does not have an all-encapsulating definition, and also proposed his own theory of sovereignty in order to justify the indirect rights a State may enjoy in a demarcated ADIZ region. Arguing for a set of codified guidelines to govern ADIZs, Joshua writes that while such codified guidelines may be utopian in thought, they would perhaps serve as a guiding light in a highly globalised world where power struggles happen on a day-by-day basis, and would prevent States, which have armed themselves to the hilt, from going to war.
4. Nikita Sonavane’s seminal piece “Rape as an Atrocity: Analysis of Judgments Delivered by the District Court of Bilaspur, Chhattisgarh” looks at the manner in which an archetypal lower court delivers ‘justice’ in cases of sexual atrocity under the Prevention of Atrocities Act. Based on extensive primary research and data collected by the author from the Bilaspur district in Chattisgarh, the author analyses the provisions of the Act, particularly those that stipulate that knowledge of caste, and the commission of rape on that basis, must be proved for a rape to be deemed an atrocity. In light of this analysis, the article focusses on the plight of Dalit rape victims and asserts that “[T]he existence of a threshold, howsoever low, has no place in a legislation that seeks to eliminate the pervasive evil of caste since the experience of

victims-survivors of caste atrocity with the criminal justice system is greatly shaped by their (lower) caste identities. This is particularly true for Dalit women, who not only have to battle societal backlash but also tackle the callousness of the state machinery while striving to obtain justice in cases of sexual violence.”

5. “Reverse Patent Settlements in India,” by Rohil Bandekar and Maithili Parikh, encapsulates a concept that is yet to gain traction in the Indian markets. The crux of the issue, succinctly highlighted by the authors, is the longstanding conflict between Intellectual Property and Competition Laws in India. The article explains the mechanism and impact of such settlements on the pharmaceutical sector *vis-à-vis* Anti-Trust issues. It carries a detailed analysis of the developments in relation to such settlements in other economies, such as the United States of America (USA), the United Kingdom and the European Union, along with the landmark cases on the topic in the aforementioned jurisdictions. Also covered is the infamous Hatch Waxman Act of 1984, passed in the USA, which some believe provided an impetus to reverse patent settlements. The authors provide an insightful analysis by conceptualising a scenario where reverse patent settlements enter the Indian pharmaceutical sector and provide alternatives that may be adopted at various levels by the Indian pharmaceutical industry and the various Government regulators to tackle the same.
6. Shivangi Adani’s and Shivani Chimnani’s article on “Why the Net needs to Forget” discusses the significance and impact of the European Court of Justice’s judgment guaranteeing the Right to be Forgotten, a novel right in order to ensure effective virtual data protection and its profound impact on data protection legislations in the international sphere. The article highlights the dire need for data protection in the 21st century digital world and the fundamental role of search engines such as Google in manifesting such a right. The authors opine that “Given the Internet acutely overpowering our lives, and all our information being virtually available, our privacy rights ought to be considerably configured to include the digital protection of information. The Right to be Forgotten forces the autonomy of every person to protect his data; it guarantees an individual the choice whether to have personal

data, which may be detrimental to self, to be present or absent in cyberspace.”

7. Sweta Ananthanarayanan and Shreyas Narla review the emergent Real Estate Investment Trust Regulations 2014 in “India: On the ‘REIT’ Path”. The article seeks to analyse the provisions of the Regulations, specifically focusing on the structure proposed for the Indian REIT and the stakeholders involved in its operation. The article extends the analysis by discussing the REIT systems prevalent across the globe in order to locate the Indian REIT’s standing in the international space. The article also takes a look at the proposed tax system, which is meant to harmonise with the operations of the Indian REIT, and addresses its level of efficacy in light of its aim.

This volume makes a significant contribution to legal scholarship in the country. The editorial team of *The Law Review* has, once again, been able to gather articles of learning and scholarship. Having been reviewed by eminent professionals, these articles have navigated a challenging path towards publication. Professor Kishu Daswani, the faculty advisor, continues to sustain this volume dedicated to legal scholarship with his commitment and vision.

Dhananjaya Y Chandrachud

Hon’ble Dr. Justice D. Y. Chandrachud
Judge, Supreme Court of India

SEPARATIST REGIMES AND POSITIVE HUMAN RIGHTS OBLIGATIONS[†]

*Amal Sethi**

Human rights are every human being's entitlement by virtue of his humanity.

Mother Teresa¹

I. INTRODUCTION

In July 2000, somewhere in the Caucasus town of Tyrnauz, Russia failed to prevent the death of Vladimir Budayeva from a mudslide.² In the consequent hearing that took place, the European Court of Human Rights (European Court) held that Russia was in violation of the *European Convention of Human Rights* (ECHR) by failing to accord to its citizen the positive human right obligation, the right to life, which is protected by article 2 of ECHR.³

While the above incident happened in Tyrnauz,⁴ the debate that arises is whether Russia would still be in violation of the ECHR had this incident taken place in Chechnya or would Ukraine be liable for a parallel incident in 2014 Crimea.

The last couple of decades have seen a number of separatist movements be it in Kosovo, Serbia, Chechnya, South Sudan or Crimea. In many instances during a particular stage of the conflict, despite still being the *de jure* sovereign, States lose *de-facto* control over a certain part of

[†] This article reflects the position of the law as on 30 September 2016.

^{*} The author is an alumnus of Government Law College, Mumbai. He is currently a doctoral candidate at the University of Pennsylvania Law School. He can be contacted at amalsethi@outlook.com.

¹ Mother Teresa's Letter to the US Supreme Court on *Roe v. Wade*, *MIT Computer Science and Artificial Intelligence Laboratory*, available at http://groups.csail.mit.edu/mac/users/rauch/nvp/roe/mothertheresa_roe.html (last visited 30 September 2016).

² *Budayeva v. Russia* [2008] 15339/02 Council of Europe: European Court of Human Rights, paras 159 and 160.

³ *Ibid.*

⁴ *Budayeva v. Russia*, para 3.

their territory (henceforth for the sake of convenience such a situation will be referred to as the hypothetical situation). An example of the above would be – Country A has a part called X. X demands for independence and wants to separate from A. The result of this demand for independence is an intense separatist movement. In this separatist movement, A, despite being the *de jure* sovereign, has lost *de facto* control over X. At this moment the legal status of X *vis-à-vis* its recognition, membership of international organisations etc. remains in a limbo. Given the increase in the number of such situations in the recent years, there exists a high probability of a situation where a State fails to satisfy the positive human rights obligations that it ought to accord to individuals in its territory, owing to its inability to exercise control over a portion of its territory. In these situations, when a State is not capable of meeting its responsibilities, fascinating issues for human rights law arise. The dilemma that we face is – Who is to be blamed?

In attempting to solve this dilemma, this article aims to delve into principles that run into the underlying tenets of international law such as jurisdiction, statehood and sovereignty. Part II of this article discusses the nature, scope and extent of States' positive human rights obligations. Part III of this article attempts to resolve the question- 'Who is to be blamed?' by proposing two theories. Part IV discusses the possibility of any extraterritorial liability for States in the hypothetical situation. Part V tests the proposed theories using the examples of Crimea and Guantanamo Bay. The article ends with concluding statements and this article's implications for the law of statehood and human rights.

II. OPERATION OF POSITIVE HUMAN RIGHTS OBLIGATIONS UNDER TREATIES⁵

A. Human Rights and Positive Obligations

Human rights are rights that are characterised by universality available to everyone and applicable everywhere.⁶ The primary responsibility for upholding them rests with the States, which extends over their whole territory.⁷ These human rights responsibilities of states are frequently characterised as negative and positive obligations.⁸ Negative obligations are those obligations that prohibit certain acts on the part of the State such as torture, genocide, slavery, etc.⁹ In contrast to negative obligations, which are ‘obligations to refrain from doing something’, the positive obligations are ‘obligations to do something’.¹⁰ These are obligations where States are compelled to act and to take suitable and reasonable steps to guarantee the people in their territory the effective

⁵ Even though it is a widely accepted opinion that all human rights fall within the umbrella of customary international law (*see* United Nations Human Rights: Office of the High Commissioner for Human Rights Official Statement, at <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx> (last visited 30 September 2016)) this article will consider it otherwise and confine itself to human rights guaranteed under treaties. The reason for this is that this article deals with positive human rights obligations which many critics believe are not a part of customary international law (*see* David Brown, Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles, (2010) 31 *Michigan Journal of International Law*, 821-853) as well as are not applicable in the absence of binding obligations (*see* Individual Rights, *Ayn Rand Lexicon*, available at http://aynrandlexicon.com/lexicon/individual_rights.html (last visited 30 September 2016)).

⁶ United Nations Human Rights: Office of the High Commissioner for Human Rights, ‘Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation’ (2006)1-31, available at <http://www.ohchr.org/Documents/Publications/FAQen.pdf> (last visited 30 September 2016).

⁷ General Assembly, ‘Report of Special Rapporteur on the Right to Food, Olivier De Schutter: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements’ (A/HRC/19/59/Add.5, December 2011).

⁸ Francis G Jacobs and CA Whete, *The European Convention On Human Rights* (2nd edn Oxford University Press USA 1996) 126.

⁹ Joint Committee on Human Rights, ‘Demonstrating Respect for Rights? A Human Rights Approach to Policing Protest’ (Vol. 1, 7th Report United Kingdom 2009), available at <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/47/47i.pdf> (last visited 30 September 2016).

¹⁰ *Belgian Linguistic case* (No. 2) (1968) 1 EHRR 252.

realisation of particular human rights.¹¹ These steps may be either judicial, legislative or administrative.¹² Positive obligations protected by international instruments such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR) and ECHR extend to protection of life and physical integrity, private and family life, pluralism, the guarantee of economic, social and cultural right, promotion of equality and, the positive obligations arising from the procedural safeguards.¹³ The illustration of Vladimir Budayeva mentioned above is a perfect example of how States have a duty to provide positive human rights obligations (in this case protection of right to life) and a corresponding liability in cases of failure to provide or protect them.

*B. Scope of Application of Positive Obligations under Human Right Treaties*¹⁴

A characteristic of treaties in international law is that they generally provide for the scope of their applications without making a distinction between positive and negative human rights obligations. As a result, most human rights instruments contain clauses which provide for the extent to which State parties have obligations for each and every kind of right under the respective treaties. In turn, this section will highlight these general application clauses in treaties which apply without any prejudice to positive human rights obligations.

The various human rights treaties differ as to the requirements of jurisdiction or territory in order to define the scope of their application yet, in essence they are fundamentally similar.¹⁵ The ICCPR provides that each 'State party ... undertakes to respect and to ensure to all

¹¹ Jean-François Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights* (1st edn Council of Europe 2007), No 7.

¹² *Vgt Verein Gegen Tierfabriken v. Switzerland* [2008] 32772/0228 Council of Europe: European Court of Human Rights, para 45 (The European Court refers therein to the State's obligation to pass domestic legislation).

¹³ *Ibid.*

¹⁴ See Oliver De Schutter, *International Human Rights Law* (1st edn Cambridge University Press New York 2010) 123 (For general discussion on the scope of human rights treaties).

¹⁵ Oliver De Schutter, *International Human Rights Law* (1st edn Cambridge University Press New York 2010) 123.

individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant'.¹⁶ Similarly the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* states that each 'State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.¹⁷ Further, according to the *Convention on the Rights of Child*, 'State parties shall respect and ensure the rights set forth in the present convention to each child within its jurisdiction'.¹⁸ Even though the *International Covenant On Economic, Social and Cultural Rights* does not make any reference to jurisdictional competence or territory, the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* stated that the silence can be explained by the fact that the covenant guarantees rights which are primarily territorial in nature.¹⁹

In general, even the regional human rights instruments provide that they will impose obligations on States, which are owed to all persons under their jurisdiction.²⁰ The ECHR provides that the State parties shall secure to everyone within their jurisdiction the rights and freedoms recognised under the instrument.²¹ Additionally, even the *American Convention on Human Rights* states that the State parties undertake to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.²²

¹⁶ Article 2(1), *International Covenant on Civil and Political Rights* (16 December 1966, 23 March 1976) 999 UNTS 171.

¹⁷ Article 2(1), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984, 26 June 1987) 1465 UNTS 85.

¹⁸ Article 1, *Convention on the Rights of the Child* (20 November 1989, 2 September 1990) 1577 UNTS 3.

¹⁹ See De Schutter *supra* n. 15, 123 (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports 136, para 112).

²⁰ De Schutter *supra* n. 15.

²¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14* (4 November 1950, 3 September 1953) ETS 5.

²² Article 1(1), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, (22 November 1969, 18 July 1978) 1144 UNTS 144.

Hence, most human rights instruments highlight ‘territory’ and ‘jurisdiction’ as major factors in determining the scope of a State’s human rights obligations.

C. *What do ‘Territory’ and ‘Jurisdiction’ Signify?*

In the former part it was observed that the applicability provisions of human rights treaties make reference to two words to define their scope- ‘territory’ and ‘jurisdiction’. But what are these terms? And, are they to be read together or separately?

1. How are these terms defined in International Human Rights Law?

In answering the above question, as far as human rights law is concerned, the terms ‘territory’ and ‘jurisdiction’ have rather simple connotations and have the same meaning that exists for these terms across the body of Public International Law. Territory refers to any defined area with sufficient consistency over which a State exercises control.²³ The regime of human rights law has particularly adhered to this definition of territory. In this definition, territory is not addressed as a component of statehood but rather as an independent term in itself. Looking at the term ‘territory’ in isolation in contrast with defining territory as a component of statehood enables international adjudicatory bodies to guarantee the effective protection of human rights. On the other hand, jurisdiction is a concept used to describe the lawful power of a state to define and enforce the rights and duties as well as control the conduct of both natural and juridical persons.²⁴ This lawful power can be exercised in a number of ways such as by means of the territory principle, nationality principle, protective principle, passive personality principle and universality principle.²⁵

2. Are these Terms to be Read Jointly or Separately?

The notions of territory and jurisdiction are extremely essential to determine in which situations and to what extent can the international responsibility of States be engaged. The main question addressed in

²³ Alina Kaczorowska, *Public International Law* (4th edn Routledge Oxfordshire) 309.

²⁴ *Ibid.*

²⁵ The Research in International Law of the Harvard Law School, Jurisdiction with respect to Crime (1935) 29 *American Journal of International Law* (Special Supplement).

much of the literature is whether the notion of jurisdiction is to be taken separately or in combination with that of territory in designating conditions for a finding of State responsibility and attribution. This has become one of the most debated issues in International Human Rights law.

To answer the above question international jurisprudence provides sufficient data. From the standpoint of their usage in human rights treaties, these terms must be interpreted jointly ie within its territory ‘and’ subject to its jurisdiction.²⁶ Such a clause is used to enlarge the scope of these treaties to apply to everyone present within a State’s territory rather than merely those permanently residing. At the same time, the latter restricts the application of treaties in such a way that they do not infringe on the jurisdictional components of other States. Since territory and jurisdiction both reflect the sovereign independence and the sovereign equality of States, an extremely liberal interpretation would result in the breakdown of the essential principles on which international law rests.

The *travaux préparatoires* of a regional instrument like the ECHR is a testimony to such reasoning. During the drafting stages of the ECHR, the Expert Intergovernmental Committee²⁷ had replaced the words ‘all persons residing within their territories’ with ‘persons within their jurisdiction’. This was mainly done with a view to expand the ECHR’s application to individuals who may not be legal residents but are, nevertheless, present on the territory of any of the contracting States.²⁸ The above also results in the exclusion of, from the State’s ambit, foreign diplomats, members of alien armies, other individuals with immunities etc.

²⁶ Select Committee of Experts on Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, ‘Extraterritorial Criminal Jurisdiction’ (1990) 8-30.

²⁷ The Expert Intergovernmental Committee referred to here is the consultative assembly of the Council on Europe on Legal and Administrative Questions. This Expert Intergovernmental Committee was primarily responsible for the drafting of the ECHR. The Council of Europe should not be confused with the Council of the European Union or the European Council. The European Union is not a party to the Convention and has no role in the administration of the European Court.

²⁸ Collected Edition of the *Travaux Préparatoires* of the ECHR Vol III, (Martinus Nijhoff 1976) 260.

Therefore ‘territory’ and ‘jurisdiction’ used together in the applicability provision of human rights treaties signifies that the State’s obligations to protect human rights extends to every person subject to its jurisdiction who is present in the territory over which the State has control.

III. WHO IS LIABLE WHEN AN INDIVIDUAL’S POSITIVE HUMAN RIGHTS GUARANTEES HAVE NOT BEEN FULFILLED IN THE HYPOTHETICAL SITUATION

The previous part of the article highlighted how the notion of territory plays a central role in determining the scope of jurisdiction of a State for defining the extent of its human rights obligations. However, territory should not be construed as extending to the entire territory or only to the territory that is considered as belonging to a State under international law. This is something that has been reiterated in past international case laws and should be retained in mind in attempting to resolve the question – ‘Who is to be blamed?’ This part of the article will first deal with the question of ‘Why can there not be a situation where no country is responsible?’ and will then go ahead to propose two theories: ‘Effective Control Theory’ and ‘Existent Sovereign Theory’ to assess which State will be liable for the failure to provide an individual his positive human rights in the hypothetical situation.

A. *Why can there not be a situation where no country is responsible?*

The introduction highlighted how in the hypothetical situation a *de jure* State loses *de facto* control over its territory. In such a scenario there is no State with legitimate control over the given territory. This leads to an important question that is to be dispensed with ‘Why can there not be a situation where no country is responsible?’

The answer to the above is simple – If there is no country that can be deemed liable for infractions of positive human rights it would create a void or a vacuum which would go counter to the principle of effectiveness.²⁹ Effectiveness refers to the efficacy of law as differenced

²⁹ *Loizidou v. Turkey* [1995] 40/1993/435/514, Council of Europe: European Court of Human Rights, 49.

from its validity.³⁰ For the positivist view that international law is not a mere speculation to stand, it is to be significantly efficacious and come to terms with reality to some extent.³¹ In other words, legal fictions are to be discouraged in international law.³² The principle of effectiveness underlies most of the human rights treaties promising positive obligations, like the ICCPR and the ECHR amongst others. This is a position that is even upheld by international court and tribunals.³³

Two fundamental rules underline effectiveness. Rule 1 – A legal order, as a whole, must be, by and large, effective in order to be valid.³⁴ Rule 2 – Treaties must be interpreted in accordance with the Latin maxim ‘*ut res magis valeat quam pereat*’ which translates to ‘the matter may have effect rather than fail’³⁵. Hence, in accordance with Rule 1 it is essential that, in order for the human rights treaty system to be effective a void or vacuum is to be prevented. For facilitating the same, international courts and tribunals should apply Rule 2 while interpreting human rights treaties.

Thus in order for human rights treaties to be effective, it is necessary that a void be prevented and a State is held liable whenever an individual is not given the positive human rights he is entitled to.

B. Attribution to External State vis-à-vis Effective Control Theory

There can be instances where a separatist regime that has control over a particular region of a country, receives aid and assistance from an external State. With the emergence of modern intelligence, strategic planning and advanced armies, it becomes impossible for separatist regimes to survive without the assistance of an external State. So much

³⁰ Hiroshi Taki, ‘Effectiveness’, (2013) *Max Planck of Encyclopaedia of Public International Law*.

³¹ Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ (2014) 25 *European Journal of International Law* 401-436.

³² Kaczorowska *supra* n. 23, 185.

³³ Kaczorowska *supra* n. 23.

³⁴ Hans Kelsen, *Principles of International Law* (Rinehart & Company New York 1952) 414.

³⁵ *Ibid.*

so, that in accordance with the law of State responsibility the separatist regime becomes a part and parcel of the external State and its conduct can be attributed to the latter.³⁶ An example of this can be seen in the current crisis in the Crimean Peninsula where Russia was providing financial and military support to the separatist regime.³⁷

A State's positive human rights obligation extends to all territories over which it exercises effective control.^{38, 39} This goes to say that the jurisdiction⁴⁰ of a State can extend to areas beyond its national territory even in instances such as military invasions and occupations.⁴¹ In fact, in such situations international law recognises the legitimacy of certain legal arrangements and transactions such as registrations of marriage, births

³⁶ See James Crawford, Alain Pellet, and Simon Olleson (eds), *The Law of International Responsibility* (1st edn Oxford University Press New York 2010), (For the various modes of attribution of State responsibility in international law).

³⁷ 'Ukraine Crisis—Russia vows troops will stay', (3 March 2014) *BBC News World*, at <http://www.bbc.com/news/world-europe-26414600> (last visited 30 September 2016).

³⁸ Effective control can be defined as the ability of foreign forces to exert authority, in lieu of the territorial sovereign, through their unconsented-to and continued presence with respect to a particular territory. To clarify a State could be said to have effective control over another States territory when the latter Government has been rendered incapable of publicly exercising its authority in that area and when the occupying power is in a position to substitute its own authority for that of the latter Government. See Tristan Ferraro, 'Determining the Beginning and End of an Occupation under International Humanitarian Law' (2012) 94 *International Review of the Red Cross* 133-163.

³⁹ See Letter to President Obama, House of Congress (29 October 2014), available at http://hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/use_of_torture.pdf and see also Mark Gibney & Sigrun Skogly, *Universal Human Rights and Extraterritorial Obligation* (1st edn University of Pennsylvania Press 2010) 65.

⁴⁰ It has to be understood that the issue of jurisdiction and attribution are not the same thing. Even though these two concepts were clearly confused by the European Court of Human Rights in earlier cases attribution refers to the act of ascribing the work of a particular entity as that of the State (see James Crawford, 'State Responsibility' (2006) *Max Planck of Encyclopaedia of Public International Law*) whereas jurisdiction refers to the power of a State to define and enforce the rights and duties. Further even if the conduct of the separatist entity can be attributed to the State only when the separatist regime with the help of the external State exercises effective control over the territory, can the occupying State be said to have jurisdiction over the territory in question.

⁴¹ De Schutter, *supra* n. 15, 125.

and deaths etc.⁴² The reason being that if the validity of the above are ignored, it would be contrary to the interests of the inhabitants of the territory.⁴³ It is for the same reason that human rights obligations of States that illegally occupy foreign territories should extend to territories over which such States have effective control. As Olivier De Schutter remarks ‘any other solution would result in depriving the population under occupation from the protection of human rights instrument for the reason that the occupation is illegal under international law, which would be highly paradoxical’.⁴⁴

The ‘Effective Control Theory’ purports that in the hypothetical situation the liability for failure to provide positive human rights guarantees will ‘primarily’ lie on the State that can be said to have effective control over the territory. An example of the same in the backdrop of separatist movements can be seen in the case of *Loizidou v. Turkey*. In this case, Cyprus had lost control over a part of its northern territory which had fallen into the *de facto* control of Turkish Republic of Northern Cyprus.⁴⁵ The Turkish Government was held to be directly exercising detailed control over the policies and actions of the authorities of Turkish Republic of Northern Cyprus.⁴⁶ Further, even the Turkish army exercised a large degree of control over Northern Cyprus.⁴⁷ The European Court had stated that Turkey⁴⁸ had effective control over Northern Cyprus as a result of which it was under the jurisdiction of Turkey and since the above actions of Turkey were contrary to international law, the European Court held Turkey liable for positive human right violations in Northern Cyprus.⁴⁹

⁴² *Loizidou v. Turkey* [1995] 40/1993/435/514, Council of Europe: European Court of Human Rights, 45 referring to the ICJ decision in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1970] ICJ Reports 1971 16.

⁴³ *Ibid.*

⁴⁴ De Schutter, *supra* n. 15.

⁴⁵ *Loizidou v. Turkey*.

⁴⁶ *Loizidou v. Turkey*, 56.

⁴⁷ *Ibid.*

⁴⁸ *Loizidou v. Turkey*.

⁴⁹ *Loizidou v. Turkey*, 50

Another instance would be regarding the ECHR's application to the separatist 'Moldavian Republic of Transnistria', a regime in Moldova which proclaimed its independence, Russia was held to be guilty for violations in Moldova because the separatist regime was set up with the support of the Russian Federation and even though it had its own organs and its own administration, the separatist regime was under the effective authority or at the very least under the decisive authority of the Russian Federation.⁵⁰ Here, the fact that the separatist movement was dependent on the economic, financial, political and military support of the Russian Federation was construed as sufficient to hold Russia to have jurisdiction and to be guilty for violation of human rights in Transnistria.⁵¹

Thus, a situation where the separatist regime in control over a portion of a territory is aided by an external State in such a way that the State has an effective control over the separatist entity it can be said that the territory is under the jurisdiction of the external State. The external State in such situations can be held liable for the failure to implement any positive human right obligations in the territory.

C. Attribution to the De Jure Sovereign vis-à-vis Existent Sovereign Theory

In earlier cases, such as *Loizidou v. Turkey*, the notion of jurisdiction was considered an all or nothing concept. This meant that an event could fall either in the jurisdiction of State X or of State Y depending on which State could have effectively controlled the event and therefore may have been held internationally responsible for not having ensured compliance with human rights and fundamental freedoms.

However, later international court judgments have seemed to have challenged this view. In the case of *Ilascu v. Moldova and Russia*, even though the European Court had found that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, did not exercise authority over that part of its territory which was under the effective control of the Moldovan Republic of Transnistria, it did not conclude therefrom that it is impossible for

⁵⁰ See generally *Ilascu and Others v. Moldova and Russia* (2004) 48787/99, Council of Europe: European Court of Human Rights (emphasis on paras 392-394).

⁵¹ *Ibid.*

Moldova to exercise its jurisdiction on the said territory.⁵² Instead the European Court considered that even in the absence of the effective control, Moldova still had a positive obligation under the ECHR to take all the diplomatic, economic, judicial or other measures that it had in its power to take and in accordance with international law to secure to the applicants the rights guaranteed by ECHR. The European Court's reasoning was based on the fact that, under international law, Moldova was and continued to be the legal sovereign of the particular territory which caused it to have certain rights and duties with respect to the territory.⁵³

The 'Existent Sovereign Theory' lays down that in the hypothetical situation the legal sovereign of the particular territory is not absolved of its obligations under international conventions with respect to the territory and it is still under a duty to ensure that all positive human rights obligations are secured to all individuals. In the latter approach, courts have considered that where a State is prevented from exercising authority over a part of its territory or exercises improvised control by a constraining *de facto* situation, such as when a separatist regime is set up, it does not thereby cease to have jurisdiction over that part of its territory. As a result the State in question must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* foreign States and international organisations, to continue to guarantee the enjoyment of all the rights and freedoms protected by international law.⁵⁴ Thus even in such situations it can be said that the cause of human rights is championed and States do have to do all that they can to ensure the continued guarantee of the enjoyment of the rights and freedoms.

From the above it can be stated that international human rights law tries to make sure that in the hypothetical situation there is a State responsible for lapses in human right guarantees.

⁵² *Ilascu and Others v. Moldova and Russia*, paras 330-331.

⁵³ *Ibid.*

⁵⁴ *Ilascu and Others v. Moldova and Russia*, para 336.

IV. STRETCHING THE LIMITS – EXTRATERRITORIAL JURISDICTION AND POSITIVE HUMAN RIGHT OBLIGATIONS?

Recent years have seen a great emphasis on extraterritorial jurisdiction and human rights obligations especially with the limelight that the story of Guantanamo Bay⁵⁵ has gotten. Thus, whenever the question of ‘Who is to be blamed?’ came up, the issue of extraterritorial jurisdiction also started doing the rounds. There were academic discussions on whether the *de jure* State can be adjudged liable on the basis of extraterritorial obligations. According to the proposed hypothesis, for furthering the effective realisation of human rights in the hypothetical situation, the territory over which the state has lost *de facto* control can *ad hoc* be considered a foreign territory. It can then be evaluated whether the *de facto* State can be deemed accountable for instances when the conduct of a person or body is liable for failure to ensure effective realisation of the positive human rights can be attributed to the *de facto* State (present in the territory where the *de jure* State has lost control). However before discussions regarding such a theory could even take root, the applicability of such a theory was totally discarded. There are three reasons why academic discussion regarding this theory is a redundant exercise.

Firstly, the ICJ, in *Georgia v. Russian Federation* case, had held that under general international law unless explicitly indicated, treaty obligations apply only territorially.⁵⁶ As can be observed in Part III of the article none of the human right instruments explicitly hold the respective treaties to apply extraterritorially. In fact the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*⁵⁷

⁵⁵ *Infra* V (B).

⁵⁶ *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures*, Summary of the Order, (15 October 2008) ICJ Reports 2008, 353, available at <http://www.icj-cij.org/docket/files/140/14809.pdf> (last visited 30 September 2016).

⁵⁷ Jack Goldsmith, ‘The Debate about the Extraterritorial Scope of the Torture Convention’s Provisions on Cruelty is (Almost Certainly) Not About USG Interrogation Policy’ (24 October 2014) *Lawfare*, at <http://www.lawfareblog.com/2014/10/the-debate-about-the-extraterritorial-scope-of-the-torture-conventions-provisions-on-cruelty-is-almost-certainly-not-about-usg-interrogation-policy/> (last visited 30 September 2016).

which protects a norm of preemptory character, is said to have no extraterritorial application.⁵⁸

Secondly, in *arguendo*, the hypothesis would not require application of extraterritorial jurisdiction. Though earlier accounts of jurisdiction considered it an all or nothing concept, the decision of the European Court in *Ilascu v. Moldova and Russia* put an end to such a school of legal thought. It was stated that the State still had legal jurisdiction over the hypothetical situation at least in principle. Hence, if the State can control any particular individual or entity and it failed to get the positive human rights enforced via them, in that case the State would be liable by virtue of the Existent Sovereign Theory. There would be no need to examine extraterritorial human right obligations at all.

Thirdly, in *arguendo*, if we were to fall back upon the old view of jurisdiction being an all or nothing concept even in that case extraterritorial obligations of States cannot extend to the hypothetical situation. This can be reasoned out on a twofold basis – (1) All suggested bases of a State’s exercise of jurisdiction extraterritorially are defined and limited by the sovereign territorial rights of the other relevant States.⁵⁹ Accordingly, for example, a State’s competence to exercise jurisdiction over its own nationals abroad is subordinate to that State’s and other States’ territorial competence and as such a State may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation or acquiescence.⁶⁰ In the hypothetical scenario, this is definitely not the situation. (2) The other possible scenario in which extraterritorial obligations can be extended does not seem to apply here. International courts and tribunals have constantly made it clear that extraterritorial jurisdiction is alternatively applied only in the backdrop of the ‘effective control’ standard and is meant to extend to military occupations, conduct on a State’s flag vessels or in its consulates and embassies, situations of arrest and detention, and analogous cases.⁶¹ In the earlier discussed case of *Loizidou v. Turkey* an international

⁵⁸ *Ibid.*

⁵⁹ *Banković v. Belgium* [2001] 52207/99, Council of Europe: European Court of Human Rights, para 59.

⁶⁰ *Banković v. Belgium*, para 60.

⁶¹ Oona Hathaway, ‘Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?’ (2011) 43 *Arizona State Law Journal*, 389.

tribunal for the first time acknowledged a state's 'effective control' in extraterritoriality analysis. This view was later reaffirmed in *Banković v. Belgium*. The ICJ has also supported the aforesaid line of reasoning.⁶²

Therefore it can be deduced that there is no distant possibility of applying the theories of extraterritorial application of human right treaties to attribute liability for failure to provide positive human rights.

V. TESTING THE THEORY

In this section both the above mentioned theories will be analysed using the scenarios of Crimea and Guantanamo naval Base.

A. *Crimea*

In early 2014, Ukraine's President Viktor Yanukovich was deposed by the Ukrainian Parliament.⁶³ The Parliament had then formed an interim government under the presidentship of Oleksandr Turchynov.⁶⁴ The new government was recognised by the United States of America (USA) and the European Union.⁶⁵ Russia and a few other nations condemned the Turchynov government as illegitimate and the consequence of a *coup d'état*.⁶⁶ By the end of February, Russian forces had begun to take control of the Crimean peninsula and by March, Crimea was under the complete control of Russia's forces.⁶⁷ At about the same time the Crimean Parliament voted to dismiss the Crimean government, replace its Prime Minister, and calls a referendum on Crimea's autonomy.⁶⁸

⁶² *Georgia v. Russian Federation*.

⁶³ William Booth, 'Ukraine's Parliament Votes To Oust President; Former Prime Minister Is Freed From Prison' *The Washington Post*, (22 February 2014), available at http://www.washingtonpost.com/world/europe/ukraines-yanukovich-missing-as-protesters-take-control-of-presidential-residence-in-kiev/2014/02/22/802f7c6c-9bd2-11e3-ad71-e03637a299c0_story.html (last visited 30 September 2016).

⁶⁴ *Ibid.*

⁶⁵ Alan Yuhas, 'Ukraine Crisis: An Essential Guide To Everything That's Happened So Far', *The Guardian* (13 April 2014), at <http://www.theguardian.com/world/2014/apr/11/ukraine-russia-crimea-sanctions-us-eu-guide-explainer> (last visited 30 September 2016)

⁶⁶ *Ibid.*

⁶⁷ *Supra* n. 37.

⁶⁸ Carol Morello, Will Englund and Griff Witte, 'Crimea Parliament Votes to Join Russia', *The Washington Post* (17 March 2014), available at http://www.washingtonpost.com/world/crimeas-parliament-votes-to-join-russia/2014/03/17/5c3b96ca-adba-11e3-9627-c65021d6d572_story.html (last visited 30 September 2016).

The referendum on whether to join Russia was held shortly after and had resulted in about a 96 per cent affirmative vote.⁶⁹ This referendum was condemned by much of the western world as violating Ukraine's constitution and international law.⁷⁰ Post the referendum, the Crimean Parliament declared independence from Ukraine and asked to join the Russian Federation.⁷¹ Russia and the separatist government of Crimea signed a treaty of accession of the Republic of Crimea and Sevastopol into the Russian Federation.⁷² The UN General Assembly passed a non-binding *Resolution 68/262* that declared the Crimean referendum invalid and the incorporation of Crimea into Russia illegal.⁷³ As of 1 November, 2014 the Crimean Issue remains a frozen conflict with Ukraine Parliament holding Crimea a territory temporarily occupied by Russia.⁷⁴

From the above, there are three observations – (1) Ukraine has lost control over Crimea, (2) Ukraine still lays claim over Crimea, (3) Russia has effective control over Crimea. The Crimean case is a perfect example of the hypothetical situation. For the sake of argument let's say an individual, Mr Tamar Karpelyn, in Crimea is being denied the right to a fair trial by the local authorities. The question to answer is 'Who is to be blamed?'

69 — 'Crimea Applies to Join Russia', *The Voice of America*, (17 March 2014), at <http://www.voanews.com/content/voting-under-way-in-crimea-referendum-to-join-russia/1872380.html> (last visited 30 September 2016).

70 — 'Why the Crimean Referendum is Illegitimate' *Council on Foreign Relations*, at <http://www.cfr.org/ukraine/why-crimean-referendum-illegitimate/p32594> (last visited 30 September 2016).

71 — 'Crimean Parliament Formally Applies to Join Russia', *BBC News Europe* (17 March 2014), at <http://www.bbc.com/news/world-europe-26609667> (last visited 30 September 2016).

72 — 'Crimea Crisis: Russian President Putin's Speech Annotated', *BBC News Europe* (19 March 2014), at <http://www.bbc.com/news/world-europe-26652058> (last visited 30 September 2016).

73 Louis Charbonneau and Mirjam Donath, 'U.N. General Assembly Declares Crimea Secession Vote Invalid', *Reuters USA* (27 March 2014), at <http://www.reuters.com/article/2014/03/27/us-ukraine-crisis-un-idusbrea2q1ga20140327> (last visited 30 September 2016).

74 Jeffrey Mankoff, 'Russia's Latest Land Grab How Putin Won Crimea and Lost Ukraine' *Foreign Affairs* (May-June 2014), at <http://www.foreignaffairs.com/articles/141210/jeffrey-mankoff/russias-latest-land-grab> (last visited 30 September 2016).

In the above situation both the theories ie. the ‘Effective Control Theory’ and the ‘Existent Sovereign Theory’ will be applicable. Russia as the state with effective control will have primary responsibility to provide Mr Tamar Karpelyn the right to a fair trial. However, Ukraine as the existent sovereign is still under a duty to ensure that Mr Tamar Karpelyn gets a fair trial. Ukraine must endeavour, with all the legal and diplomatic means available to it *vis-à-vis* Russia and other States as well as international organisations, to ensure that Mr Tamar Karpelyn is not denied the right to a fair trial.

If Russia fails to provide Mr Tamar Karpelyn his right to a fair trial it will be liable for violations under article 6 of the ECHR. Additionally, Russia failing in its duty will not absolve Ukraine as the existent sovereign to endeavour with all the means available to it to ensure that Mr Tamar Karpelyn right to a fair trial is guaranteed to him. If Ukraine fails to do so, it will also be liable for violations of the article 6 of the ECHR.

However in the above example the liability between Russia and Ukraine would not be joint. Russia would be primarily responsible for the violation with some liability falling upon Ukraine as well. The fact that Ukraine was *de facto* unable to exercise its governmental powers in Crimea would limit its liability to some extent. This can be explained by the decision of the European Court in the *Ilascu v. Moldova and Russia* case where Russia, who had exercised effective control, was asked to pay 582,000 euros whereas the *de jure* sovereign was asked to pay 199,000 euros. If the case of Mr Tamar Karpelyn was being heard before the European Court, it could have decided a suitable amount of compensation based on Russia’s primarily liability and Ukraine’s efforts in ensuring the ECHR’s application in Crimea.

B. *Guantánamo Naval Base*

Popular media analysis always resonates around USA and its responsibility for human rights violation in Guantánamo Naval Base. However, the reality is far from this simple fact. The Naval Base situated on the southern coast of Republic of Cuba, was leased to USA through a set of two agreements signed in 1903 and supplemented by a further treaty in 1934. USA was to use the Naval Base exclusively for

the purposes of coaling and naval stations.⁷⁵ Further, the lease was to remain in force as long as USA did not abandon the Naval Base.⁷⁶ The agreements the Naval Base additionally provided that USA recognised the continuance of the ultimate sovereignty of the Republic of Cuba over the Naval base, but exercised complete jurisdiction and control over it.⁷⁷ Following the accession of power in Cuba by Fidel Castro, Cuba had declared US presence in Guantánamo Bay to be illegal.⁷⁸ Although not put forward in accurate legal terms, the Cuban position alludes to the lease agreement being void or voidable because of the inequality inherent in it and because of the change of circumstances with the onset of the Cold War. With the exception of one payment, Cuba has since 1959 refused to accept the rental fee from USA and have continuously maintained the US occupation to be illegal.⁷⁹ USA's occupation of the Naval Base is an unresolved matter of international law however notwithstanding that the positive human rights obligations in the Naval Base can be analysed. Consider that a positive human right obligation such as promotion of equality or guarantee of cultural rights has not been provided to an individual, as unfair as it sounds due to the application of the two discussed theories Cuba might have to share the blame for USA's action if it does not take certain safeguards. In every individual case which arises, Cuba will have to use all diplomatic channels with USA to ensure that the individual is accorded his rights. Cuba will have to take such actions on a case by case basis, rather than a collective appeal/statement for ensuring that detainees in the Naval Base are provided with all human rights available to them. The sharing of liability will be in a manner similar to the illustration above. Thus, it can be said that the Naval Base human rights case is far more complex than what even what a lot of legal experts could imagine.

⁷⁵ Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval stations (23 February 1903), *available at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp (last visited 30 September 2016).

⁷⁶ Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda (2 July 1903), *available at* http://avalon.law.yale.edu/20th_century/dip_cuba003.asp (last visited 30 September 2016).

⁷⁷ *Treaty between the United States of America and Cuba* (adopted 29 May 1934, entered into force 9 June 1934), *available at* http://avalon.law.yale.edu/20th_century/dip_cuba001.asp (last visited 30 September 2016).

⁷⁸ Yaël Ronen, 'Lease' (2008), *Max Planck Encyclopaedia of Public International Law*.

⁷⁹ *Ibid.*

VI. CONCLUDING REMARKS AND IMPLICATIONS FOR INTERNATIONAL LAW

From the foregoing paragraphs it is clear that as far as the question ‘Who is to be blamed?’ is concerned, when there is a failure to provide an individual his positive human rights guarantees in the hypothetical situation?, the State that has effective control over the situation will be held liable *via* the ‘Effective Control Theory’. Albeit, the latter, the *de jure* State is not completely absolved of its liability under any circumstance and in accordance with the ‘Existent Sovereign Theory’ has to take all steps possible in order to ensure the individual the effective realisation of his rights.

Further, international courts and tribunals have taken a liberal stance in assessing the liability of states in regions torn by secessionist movements in order to secure the effective realisation of human right treaties. Moreover, even though the above would not reflect a utopian pro human rights situation⁸⁰, in adjudicating such cases courts have really stretched their arms and ensured that not only interpretations of international law result in paradoxical situations but also that justice across borders is provided.

Looking beyond the ‘Effective Control’ and ‘Existent Sovereign’ Theories, and trying to make alternate arguments for attributing liability like invoking extraterritorial jurisdiction seems futile in the hypothetical situation.

However, in merely answering the question ‘Who is to be blamed?’ it is seen that this article throws wide implications both positive and negative, on international law. These implications are on two aspects – (1) Law of statehood and (2) Status of human right. The following shows how exactly the analysis has impacted these aspects:

⁸⁰ From a human rights advocate standstill a utopian theory would be one in which the complete liability for the *de jure* State for mere inability to not provide positive obligations without sufficient justifications in cases where there is no external State exercising effective control be recognised. Additionally, in cases where the external State exercises effective control, a system of joint and several liability between both the States seems apt.

A. *Laws of Statehood*

The analysis in this article has resulted in three positive implications for the laws of statehood. They are:

1. Reiteration of the Additional Criteria for Statehood ie Respect for Provisions of the Charter of United Nations and Jus Cogens Norms

In the discussions surrounding the ‘Effective Control Theory’ courts imposed liability on the State that had effective control over the territory. However before this could result in any mischief, the courts made it clear that despite holding the external State which exercises effective control liable, any illegal annexation or military occupation would not affect statehood. Courts stood by the rule that new States cannot be formed or territories annexed in violation of article 2(4) of the *Charter of United Nations*. In fact, modern jurists consider this one of the new additional requirements (beyond the requirements imposed by the Montevideo Convention) of Statehood.

2. Jurisdiction is not Always a Consequence of Sovereignty

During adjudication courts have alienated jurisdiction from *de jure* sovereignty in order to prevent an anomalous situation where despite violating a *jus cogens* norm, a State could get away from human right violations occurring in an area under its effective control. This highlights how jurisdiction or control is not always a consequence of sovereignty and can easily be alienated from it.

3. Reaffirming Rules for Abandonment of Territory

In the case laws dealing with the ‘Existent Sovereign Theory’, courts have indicated the resilience of the States right in its territory.⁸¹ Illegal annexation followed by a passage of significant time would not result in a State losing sovereignty over the territory. States are under no obligation to take continuous steps to exercise jurisdiction in a region where they have lost control. In fact, actions even amounting to estoppel and acquiescence would not result in the State losing

⁸¹ Thomas Grant, ‘Ukraine v. Russian Federation in Light of *Ilaşcu*: Two Short Points’ (22 May 2014) *EJIL Talk*, at <http://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two-short-points/> (last visited 30 September 2016).

sovereignty. Courts in taking such a stand have recognised the well-established proposition that it takes a great deal more than brief silence for a State to lose territory.⁸² Abandonment of territory would require both the act as well as intention on part of the State.

B. Status of Human Rights

The analysis in this article seems to have a negative implication for the status of human rights in the international treaty system. In the 'Existent Sovereign Theory', it can be seen that the *de jure* state has to take all the diplomatic, economic, judicial or other measures that it had in its power by means available to it *vis-à-vis* foreign States and international organisations, to secure to the applicants the rights and freedoms protected by international law.

As realistic and just as this sounds in the hypothetical situation, the implications for such reasoning invariably point towards a regime that diminishes the status of human rights in the international system. While we are trying to move to a regime where, except the strict definition of necessity, failure to provide human rights guarantees cannot be justified, a reasoning such as the one above, is inclined towards a regime recognising an effort to ensure realisation of rights to be sufficient.

It can be deduced that apart from norms protected by the peremptory order such as prohibition of torture, slavery etc, the other human rights guarantees are still far away from being inalienable. International courts look at such rights as being derogable very easily and provide the States restricting such rights with ample leverage.

⁸² *Ibid.*

‘TO BE OR NOT TO BE’ – THE CONUNDRUM OF ARBITRABILITY OF CORRUPTION AND SUBSEQUENT ENFORCEMENT[†]

Chinmayee Pendse and Prakruti Joshi***

I. INTRODUCTION

The advancement of global wealth and business opportunities has led to contracts between private corporations and States as well as State related entities being commonplace. In case of commercial disputes, arbitration has a reputation of providing a simple, effective, efficient and speedy disposal. Against this background, allegations of corruption in transactions are increasingly being encountered in both international and domestic commercial arbitrations. Although there is no common consensus on the definition of ‘corruption’,¹ acts of corruption include bribery of foreign public officials,² trading in influence³ and embezzlement, misappropriation of property and obstruction of justice.⁴ Corruption is normally considered to be *contra bonos mores*⁵ and most

[†] This article reflects the position of law as on 30 September 2016.

^{*} The author is an alumnus of Government Law College, Mumbai and is currently pursuing her Masters of Law (LLM) at London School of Economics and Political Science. She can be contacted at pendsecm@gmail.com.

^{**} The co-author is an alumnus of Government Law College, Mumbai and is presently an advocate enrolled at the High Court of Bombay. She can be contacted at prakrutij10@gmail.com.

¹ One of the challenges of defining corruption is distinguishing illegal trading in influence from legal lobbying. See OECD ‘Defining corruption’ (March 2007) *OECD Observer*, available at http://oecdobserver.org/news/archivestory.php/aid/2163/Defining_corruption.html#sthash.r5YY3WgG.pdf (last visited 30 September 2016).

² *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997* (adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1, article 1.

³ *Civil Law Convention on Corruption* (adopted 4 November 1999, entered into force 1 November 2003) ETS 174 Strasbourg, 4.XI.1999, article 2.

⁴ *The United Nations Convention against Corruption (2003)* (adopted on 31 October 2003, entered into force on 14 December 2005) UNGA A/58/422, the first global legally binding international anti-corruption instrument, criminalises these acts, but does not define the term ‘corruption’.

⁵ *Agent (Iran) v. Greek Company / Iran*, ICC Award No 3916, Coll ICC Arb Awards (1982), 507.

courts have refused to uphold agreements tainted with corruption. While it is inevitable that there will be a conflux of domestic law as well as judicial machinery of States in dealing with corruption, the present article seeks to establish whether the allegations of corruption in the context of international and domestic arbitration can be arbitrated upon, despite the procedural and investigative hurdles faced by arbitrators. Part II of the article discusses the initial procedural hurdles faced by the arbitrators while proceeding with arbitral proceedings where some form of corruption is involved, more particularly with regard to severability of the arbitration agreement from the main contract and the factors involved in receiving evidence by the arbitral tribunal when corruption is alleged by one of the parties to arbitration. Part III of the article goes on to expound the effect of allegations of corruption at various stages of procurement as well as performance of the contract and how the allegations are arbitrated upon. Part IV of the article addresses the key position of transnational public policy and international public policy with reference to enforcement of arbitral awards. Lastly, Part V of the article discusses the effect of parallel court proceedings on arbitration when allegations of corruption are raised.

II. INITIAL HURDLES TO ARBITRAL PROCEEDINGS

A. *Sense and Severability*⁶

Although national laws define bribery variably, the treatment of bribery is uniform—contracts aimed at bribery are illegal and are therefore null and void.⁷ Corruption, like fraud vitiates the agreement.⁸ However, under the doctrine of severability, the arbitration agreement can be considered distinct from the main contract and will not perish even if there are allegations of corruption pertaining to the main contract, thus the arbitration proceedings may continue.⁹ On the other hand,

⁶ For a more case specific and detailed analysis of severability in the context of agreements central to disputes involving allegations of corruption, *see* the proceeding Part III entitled ‘Implications of allegations of corruption on a contract on various stages and procedure thereafter’.

⁷ Vladimir Pavić, ‘Bribery and International Commercial Arbitration – The Role of Mandatory Rules and Public Policy’ (2012) Vol 43 *Victoria University of Wellington Law Review* 661, 679.

⁸ *Swiss Timing Ltd v. Organizing Committee Commonwealth Games* AIR 2014 SC 3723.

⁹ *P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation and Ors* (2009) 2 SCC 494.

where under the governing law, the nature of corruption is such that it voids the contract in its entirety *ab initio*, then the question arises whether the arbitration clause ever existed and consequently whether the arbitral tribunal has jurisdiction to adjudicate at all.¹⁰ Therefore, the arbitral tribunal is required to first ascertain whether the matters affecting the validity of the main contract also affect the validity of the arbitration clause under the contract before continuing the proceedings. Section 5¹¹ read with sub-section (1) of section 16¹² of the *Arbitration and Conciliation Act, 1996* lays down the basis for the doctrine of severability under Indian Law. A bare reading of these two sections makes it clear that the issue as to whether the main contract itself is void or voidable may be referred to arbitration. In *Swiss Timing Ltd. v. Organizing Committee, Commonwealth Games* (Swiss Timing Case),¹³ the Supreme Court held that where upon reading the contract and without the need to admit any further evidence, the Court is of the view that the contract is void *ab initio* under the *Indian Contract Act, 1872*, then the Court would be justified in declining to refer the dispute to arbitration.¹⁴

¹⁰ Karen Mills and Karim Sani 'Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto' (2006) *Transnational Dispute Management*, available at <https://www.transnational-dispute-management.com/article.asp?key=708> (last seen 30 September 2016).

¹¹ Section 5 of the *Arbitration and Conciliation Act, 1996* reads: 'Extent of judicial intervention—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part'.

¹² Sub-section (1) of section 16 of the *Arbitration and Conciliation Act, 1996* reads: 'Competence of arbitral tribunal to rule on its jurisdiction.—

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause'.

¹³ *Swiss Timing Case*.

¹⁴ *Swiss Timing Case*, 28.

The Court has, however, noted that such cases would be few and isolated. For example, contracts which are void for reasons such as incapability of the party to enter into the contract or for having their principle objective activity which is prohibited by law are void *ab initio* and hence are rendered unenforceable.

The take away from the bright line test established by the *Swiss Timing Case* is that if pursuant to reading the terms of a contract, it is clear that the contract is aimed at bribing a public official, such that the Court would not need to call for any further evidence in that regard, the contract would be held void *ab initio* and would be rendered unenforceable. In such cases the refusal to refer the contract to arbitration would naturally be justified.

B. *Evidence in Arbitration*

Erstwhile arbitral tribunals held the view that parties involved in corruption were debarred from asserting ‘any right to ask for assistance from the machinery of justice’¹⁵ and therefore, tribunals refused to entertain any dispute if allegations of corruption were made by either parties to arbitration. However, this stance was detrimental to the very essence of arbitration and party autonomy as any party who desired not to be governed by the arbitration agreement was then at liberty to make mere bald allegations of corruption in an attempt to wriggle out of it. Therefore, subsequently, in a more pro arbitration stance, arbitrators have formulated an approach to deal with this issue.

1. Standard of Proof

a. *International Arbitration*

Under criminal law, the standard of proof required by the court of law for establishing corruption is that of ‘proof beyond reasonable doubt.’ On the other hand, in international arbitration, there exists no established standard of proof for the purpose of leading evidence.¹⁶ Notwithstanding the absence of a standard of evidence, sufficient evidence will still be required to prove the allegations. Perhaps the initial reluctance displayed by arbitrators to arbitrate upon disputes involving allegations of corruption stems from the requirement of presentation of very clear and absolute evidence. Corruption is problematic to prove and the inability of arbitral tribunals to demand

¹⁵ Gunnar Lagergren, ICC Award No 1110 of 1963, *Yearbook of Commercial Arbitration* 1996 (1963), 47.

¹⁶ George M Von Mehren and Claudia Salomon, ‘Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide’, (2003) *Journal of International Arbitration* 285, 289-290.

the production of evidence further adds to this problem.¹⁷ The standard of proof required for a case involving corruption has been compared to that required where fraud is alleged,¹⁸ in relation to which, it has been observed that corruption requires a 'higher' standard of proof.¹⁹ However, it must be noted that although proving corruption requires a high standard of proof, the implications of a finding of corruption in arbitration proceedings has no penal consequences. When allegations of corruption are raised in an arbitration, the decision of whether corruption has taken place is always made in the context of deciding whether there has been a breach of the underlying contract and consequently whether the party alleging the breach is entitled to damages. Therefore, a lower standard of proof (*vis-à-vis* the standard required in a criminal trial) maybe resorted to whilst dealing with the issue.

Over the years, it appears that arbitral tribunals have followed certain theories which have evolved for addressing the issue of standard of proof. Some arbitral tribunals follow the standard of proof of the 'more likely than not' rule.²⁰ The 'more likely than not' rule requires the allegation of corruption to be proved on the balance of probabilities, which is a lower threshold to meet and is therefore usually applied in civil cases.²¹ Another frequently used theory is that of 'clear and convincing proof', which tribunals have described to be a midway approach between 'balance of probabilities' and 'beyond reasonable doubt'.²² In *EDF v. Romania*, the arbitral tribunal recognised the difficulty

¹⁷ Cecily Rose, 'Questioning the Role of International Arbitration in the Fight against Corruption', (2014) Vol 31(2) *Journal of International Arbitration* 183-264, 183.

¹⁸ ICC case no 6401, *Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*, (Award of 19 December 1991) *Mealey's International Arbitration Report*, 7(1) (1992) 31, 34.

¹⁹ The laws of the Philippines and the United States were the relevant jurisdictional laws.

²⁰ Michael Hwang SC and Kevin Lim, 'Corruption in Arbitration—Law and Reality' (2012) 14 *International Council for Commercial Arbitration (ICCA)*, available at http://www.arbitrationicca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf (last visited 30 September 2016). See also, Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law & Business, 2009), 1857-1858.

²¹ Kevin M Clermont and Emily Sherwin, 'A Comparative View of Standards of Proof' (2002) *The American Journal of Comparative Law* 243, 243.

²² Matthias Scherer, 'Circumstantial Evidence in Corruption before International Tribunals' (2002) Vol 2, Issue 2 *International Arbitration Law Review* 29, 30.

of proving corruption as it is inherently latent and therefore held that 'clear and convincing evidence' was required to prove the allegations.²³ This midway approach applied by the arbitral tribunals seeks to strike a balance between the two rules. On a scrutiny of various awards,²⁴ it is believed that if an arbitral tribunal is faced with the decision of choosing one of the two tests discussed, it is most likely to choose and apply 'clear and convincing proof' test or a higher test, as opposed to the 'more likely than not' rule.

In *Hilmarton*,²⁵ it was acknowledged by an International Chamber of Commerce (ICC) tribunal that although proof beyond reasonable doubt was required for adjudicating upon allegations of corruption, it was possible to prove something through 'indirect evidence'. Such indirect evidence was further qualified with the need to collect a 'sufficient ensemble of indirect evidence, to allow the judge to base his decision on something more than likely facts, ie, facts which have not been proven'. ICC Case No 8891²⁶ is another example where the arbitral tribunal concluded that corruption had taken place, in part by drawing upon circumstantial evidence, which it described as 'indicia'. These 'indicia' were accompanied by an examination of witnesses and included indicators like duration of the consultancy agreements under scrutiny, remuneration, etc. When the facts of an ICSID case were held 'difficult to establish with absolute certainty', it was opined by the arbitrators that they could be 'best judged under a standard of proof allowing the tribunal "discretion in inferring from a collection of concordant circumstantial evidence (*faisceaud'indices*) the facts at which the various indices are directed."²⁷ The arbitral panel in *Mohamed Bin Hammam v.*

²³ *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award (October 8, 2009), para 221.

²⁴ *Himpurna California Energy Ltd v. PT (Persero) Perusahaan Listrik Negara*, UNCITRAL Ad Hoc Award of 4 May 1999, *Yearbook of Commercial Arbitration XXV 2000* and *EDF (Services) Limited v. Romania and Westinghouse and Burns & Roe (USA) v. National Power Company and the Republic of the Philippines*.

²⁵ *Hilmarton (Agenz) v. Omnium/Algeria*, ICC Case No 5622 XIX *Yearbook of International Commercial Arbitration 1994* (1988), 105.

²⁶ ICC Case No 8891, JDI - Clunet 4/2000, 1076 (1998).

²⁷ *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009).

FIFA concluded that the standard of proof that was to be applied in arbitration before them is that of 'comfortable satisfaction'.²⁸

Interestingly, the *Metal-Tech*²⁹ award is much lauded in so far as it overcame the dichotomous practice of condemning corruption on one hand and then refraining from exercising jurisdiction in matters involving state corruption on various grounds. In the said award, the arbitrators relied, *inter alia*, on circumstantial evidence, on so-called 'red flags', and concluded that the contracts under scrutiny were marked with corruption at the stage of implementation of the contract.

b. Indian Law

Indian evidentiary law requires the guilt of the accused to be proved beyond reasonable doubt.³⁰ It is, however, a generally accepted principle that circumstantial evidence is admissible, if it conforms to certain standards as laid down by courts from time to time.³¹ Further, the Supreme Court has held that in a civil case involving allegations of charges of fraudulent character, it is not required to prove the fact that corruption has taken place 'beyond reasonable doubt' as is required in a criminal case. It was observed that the fact that the party is alleged to have accepted a bribe in a civil case does not convert it into a criminal case and ordinary rules applicable to civil cases apply.³²

Over the years, arbitrators have thus overcome the difficulty of adducing evidence and proving corruption in arbitration proceedings in various cases,³³ by accepting circumstantial evidence, formulating an approach that relaxes the conventional standard of proof for criminal offences and have proceeded to render an award. However, there are

²⁸ *Mohamed Bin Hammam v. Fifa*, Court of Arbitration for Sport Case No CAS 2011/A/2625, Arbitral Award, para 155.

²⁹ *Metal-Tech Ltd v. Uzbekistan*, ICSID Case No ARB/10/3, Award (30 September 2013), para 290.

³⁰ *Jaikrishnadas Manohardas Desai and Anr v. State of Bombay* (1960) 3 SCR 319.

³¹ *Padala Veera Reddy v. State of AP* AIR 1990 SC 79.

³² *Gulabchand v. Kudilal* AIR 1966 SC 1734.

³³ Mohamed Abdel Raouf, 'How Should International Arbitrators Tackle Corruption Issues' (2009) Vol 24 Number 1 *ICSID Review Foreign Investment Law Journal* 116. The author in the course of his article reviews various arbitral awards and concludes that even with limited means, arbitrators can tackle corruption.

cases, where it appears that the parties, which raised allegations of corruption have either never intended to expound on their claims or have altogether refused to produce evidence in support of such claims.³⁴ Thus, a few exceptions remain where, in arbitral proceedings enough evidence cannot be found to decisively uphold or dismiss allegations of corruption.

2. Reversing the Burden of Proof

a. *International Arbitration*

In addition to admitting indirect evidence in various cases,³⁵ tribunals have also suggested reversing the burden of proof to facilitate speedy and effective adjudication of disputes.³⁶ It has been proposed that subject to certain conditions, a tribunal ought to make it easier for parties to establish the existence of corruption, by requiring a party to disprove its involvement in corrupt activities, where *prima facie* evidence of corruption exists, thus lowering the default ‘balance of probability’ standard of proof, instead of letting the burden of proof rest on the party alleging corruption.³⁷

Fortier³⁸ makes an interesting suggestion for assessing evidence after impartial investigation in an arbitral proceeding. He proposes that international arbitration can have an investigating and fact finding body like the Integrity Vice Presidency (INT), which is a part of the Sanctions Board³⁹ of the World Bank. The arbitral proceeding should be

³⁴ *FW-Oil Interests Inc v. Trinidad & Tobago*, ICSID Case No ARB/01/14, Award (3 March 2006); *International Thunderbird Gaming Corp v. United Mexican States* (Award) (26 January 2006) and *UNCITRAL and Agent(FL/Arab) v. Company (S-Korea)*, ICC Award No 4145 (Second Interim Award), *Yearbook of Commercial Arbitration*, 1987 (1984).

³⁵ ICC Award No 3916 and *Consultant (FL) v. Contractor (Germany) / Middle Eastern country*, ICC Case No 6497 (Final Award), *Yearbook of Commercial Arbitration* 1999 (1994) 71, 74.

³⁶ ICC Case No 6497, 74.

³⁷ ICC Case No 6497, 74.

³⁸ Yves Fortier, ‘Arbitrators, Corruption and the Poetic Experience (“When power corrupts, poetry cleanses”)’ (2014) *Kaplan Lecture*, available at <http://neil-kaplan.com/wp-content/uploads/2014/11/Kaplan-Lecture-Yves-Fortier.pdf> (last visited 30 September 2016).

³⁹ The Sanctions Board is an independent body that imposes sanctions on parties that have been corrupt, after such party has been given reasonable opportunity to present its case, witnesses and arguments.

preceded by an investigation by the INT, which examines documents, interviews witnesses and reviews contracts. After INT has discharged its initial burden of proving that it is 'more likely than not' that a practice warranting sanction by the Sanctions Board has been committed by the Respondent, the burden of proof is transferred to the Respondent who must show, that it did not engage in such practices. This procedure thus combines two principles of evidence—the 'more likely than not' rule and that of the reversal of burden of proof, both of which have found approval in various arbitral awards as discussed above. This may be an effective method to gather evidence in institutional arbitrations but setting up an impartial panel in private international commercial arbitrations may be impractical.

b. Indian Law

Reversal of burden of proof from the prosecution to the accused also falls within the contours of the Indian Constitution and evidentiary law and although the presumption of innocence cannot be thrown aside, the principal of reversal of burden of proof may be applied subject to exceptions.⁴⁰ One must, however, be mindful that reversal of burden of proof is permitted only in a few statutory exceptions and the thumb rule of evidence remains that the burden of proof lies on the party who asserts the issue affirmatively and not on the party who denies it, although the onus of proof keeps shifting in the course of the proceedings. One of the statutory exceptions mentioned above can be found in the *Prevention of Corruption Act, 1988* (PC Act), the penal law governing prevention of corrupt practices in India. The PC Act raises a presumption against the accused, wherein the burden of proof is on the accused to establish his innocence. This rule of presumption is embodied in sub-section (1) of section 20 of the PC Act.⁴¹ To raise

⁴⁰ *Noor Aga v. State of Punjab and Ors* (2008) 16 SCC 417.

⁴¹ Section 20 of the PC Act reads:

'Presumption where public servant accepts gratification other than legal remuneration

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted

the presumption under sub-section (1) of section 20 of the PC Act, the prosecution has to prove that the accused has received 'gratification other than legal remuneration'. When it is shown that the accused has received a certain sum of money, which was not his legal remuneration, the condition prescribed by the section is satisfied and the presumption must be raised. It has been held that mere receipt of 'money' is sufficient to raise the presumption.⁴² The presumption continues to hold the field unless the contrary is proved, that is to say, unless the court is satisfied that the statutory presumption has been rebutted by cogent evidence.⁴³

The above decisions demonstrate how the concepts of reversal of burden of proof and circumstantial evidence used by international arbitral tribunals in cases of allegations of corruption are couched in Indian statutory law. However, this does not necessarily imply that the arbitral tribunals may proceed with application of principles of reversal of burden of proof. The reason for this is two-fold. Firstly, the reverse burden clauses are statute specific and do not come into play in the case of civil proceedings where allegations of corruption have to be adjudicated upon only for the purpose of determining breach of contract. Secondly, it is established law that domestic Indian arbitration is not required to conform to the statutory provisions of evidence⁴⁴ and

or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn'.

⁴² *VD Jhingan v. State of UP* AIR 1966 SC 1762.

⁴³ *CSD Swami v. The State* AIR 1960 SC 7.

⁴⁴ *Hindustan Prefab Ltd. v. Dossanjh and Co.*, (Arb LR 91) Del (2004); *Ganges Waterproof Works Pvt. Ltd. v. Union of India* (1999) 4 SCC 33 and Dr PC Markanda, *Law Relating to Arbitration and Conciliation* (6th edn Wadhwa and Co Nagpur 2006).

procedure.⁴⁵ Hence, the arbitral tribunals with the consent of parties are at liberty to decide upon the procedure for adjudication of dispute albeit preserving the principles of natural justice.

III. IMPACT OF ALLEGATIONS OF CORRUPTION ON A CONTRACT AT VARIOUS STAGES AND PROCEDURE THEREAFTER

In this section, the article discusses the implications of allegations of corruption on a contract at various stages and how, in each case, arbitral tribunals have proceeded to adjudicate upon the same. Contracts aimed at bribery are illegal and are therefore null and void.⁴⁶ Arbitral tribunals have been known to adjudicate upon disputes by virtue of the doctrine of severability and *Kompetenz-Kompetenz*⁴⁷ and proceed with arbitration, consequently holding that claims based on such contracts cannot be sustained. Thus, in numerous cases, arbitration is conducted even where issues of corruption are raised and the agreement central to the dispute is held void.⁴⁸ This method protects the interests of the party that suffers the effects of improper influence and it seeks to ensure that 'international commerce retains a certain degree of morality'.⁴⁹ If an allegation of corruption is made in plain language in the course of the arbitral proceedings, the arbitral tribunal is clearly under a duty to consider the allegation and to decide whether or not it is proved.⁵⁰

⁴⁵ Sub-section 1 of section 19 of the *Arbitration and Conciliation Act, 1996* provides that the code of civil procedure shall not be applicable before the arbitral tribunal. *See also Unit Office, NPCC v. Madhusudhan Devbarma* AIR 1979 Gau 62 (DB); *Central Coalfields Ltd v. Ashok Transport Agency* AIR 1987 Ori 287 and *McKenzies Ltd v. State of Mysore* AIR 1987 Kant 89.

⁴⁶ *UK Company v. French Company / African country*, ICC Case No 3913 Collection of ICC Arbitral Awards 197485, 497, 562 (1981).

⁴⁷ *See Gary B Born, International Commercial Arbitration* (1st edn Kluwer Law International 2009) 311–407.

⁴⁸ ICC Case No 5622; *Consultant v. Contractor*, ICC Case No 6248 XIX Yearbook of International Commercial Arbitration 1994 (1990), 124 and ICC Case No 3913.

⁴⁹ John Savage and Emmanuel Gaillard, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999).

⁵⁰ Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* in Nigel Blackaby and Constantine Partasides (eds), *Redfern and Hunter on International Arbitration* (5th edn Oxford University Press 2009).

However, there are limits to this doctrine of severability in commercial arbitration. Where under the governing law of the dispute, the nature of the alleged corruption renders the contract in its entirety void *ab initio*, then the question becomes whether the arbitration clause ever existed and consequently whether the tribunal has jurisdiction to adjudicate at all.⁵¹

A. *Corruption at the Time of Procurement of the Contract*

A contemporary approach towards the arbitrability of disputes involving allegations of bribery is reflected in *Westacre Investments Inc. v. Jugoinport SPDR Holding Co Ltd*.⁵² In this case, despite an allegation that the agreement at issue had been procured by bribery, the tribunal decided the dispute, investigated and rejected the bribery allegations and issued an award on merits.⁵³ This reflects a pro arbitration stance, as against the erstwhile line of thought propagated by Justice Lagergren.⁵⁴ Thus, if an investment tribunal finds that the investor obtained its investment through corruption, the tribunal will conclude that the investor's claims are inadmissible. The fact of corruption is not treated as a jurisdictional issue, due to the 'well-established legal principle of separability, it noted that it was "operating on the assumption that the ... arbitration agreement remains ... valid and effective."⁵⁵

B. *Corruption as a Defence by a Party*

The defence of corruption has been raised by parties to a contract either unilaterally or mutually. Such a defence usually enables host States to invoke corruption in the formation of a contract as a reason to consider the contract void, thereby precluding any claims by the investor that may arise from the contract.⁵⁶ Multiple tribunals have allowed the

⁵¹ *Supra* n. 10.

⁵² *Westacre Investments Inc v. Jugoinport-SDRP Holding Company Ltd* [1999] APP.L.R. 05/12.

⁵³ Gary B Born, 'Bribery and an Arbitrator's Task' (2012) *Kluwer Arbitration Blog*, available at <http://kluwarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/> (last visited 30 September 2016).

⁵⁴ *Supra* n. 17.

⁵⁵ *World Duty Free Company Ltd v. Kenya*, ICSID Case No ARB/00/7, Award (31 August 2006).

⁵⁶ Michael Losco, 'Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction' (2014) Vol 63 *Duke Law Journal* 1201.

Respondent-host State to assert the corruption defence in response to unilateral corruption.⁵⁷ In such cases, the contract is tainted with illegality and is terminable by the State. If the corruption or illegality tainting the contract is of a nature that gives rise only to a right to invalidate the contract, under the doctrine of severability, the arbitral tribunal has jurisdiction, as long as the arbitration agreement is based on mutual consent and is undisputed. In other words even in cases where illegality hits the underlying contract, the 'adjudicatory authority of the arbitral tribunal remains undiminished'.⁵⁸ *World Duty Free*⁵⁹ is illustrative of a dispute where allegations of corruption were involved, and the State of Kenya took up the defence of corruption against the adverse party. After a scrutiny of domestic laws, international conventions relating to corruption, decisions taken by courts and arbitral tribunals, the tribunal held in no uncertain terms that bribery is contrary to international public policy of most, if not all, and to transnational public policy. Therefore, claims based on contracts of corruption or on contracts obtained by corruption were not upheld by the tribunal.

It has been opined that investment arbitration tribunals ought to proceed with care when allowing a corrupt host state to rely on the corruption defence, and they ought to concoct alternative solutions to the complete rejection of the investor claims where investor corruption is established.⁶⁰ Notably, it has also been suggested that where State parties raise allegations that implicate their own officials in illegal conduct subsequent to a change in the economic or political regime, the arbitral tribunal must not proceed to accept such a line of argument without adequate scrutiny.⁶¹

⁵⁷ See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No ARB/03/25, Award (16 August 2007), para 345 and *Inceysa Vallisoletana S L v. Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006), para 154.

⁵⁸ Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) Vol 29 *ICSID Review* 155–186.

⁵⁹ *World Duty Free Company Ltd v. Kenya*.

⁶⁰ Tamar Meshel, 'The Use and Misuse of the Corruption Defence in International Investment Arbitration' (2013) Vol 30 *Journal of International Arbitration* 267–281.

⁶¹ *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, UNCITRAL Ad Hoc Award of 4 May 1999, Yearbook of Commercial Arbitration XXV 2000.

Thus where allegations of corruption have been raised as a defence, the tribunal must tread cautiously in order to arrive at an enforceable decision.

However, there have been instances where tribunals have declined to delve into allegations of corruption in spite of finding that the tribunal did have jurisdiction of the matter.⁶² This may be as a result of the apprehension of arbitrators to decide matters against the state, which involve important government officials. It seems founded on the plausibility of diplomatic relations of the arbitrators being adversely affected.⁶³

C. *Corruption Deduced Suo Motu by the Tribunal*

Arbitrators may, at their discretion, examine corruption even in proceedings where the parties have not raised issues of corruption, if they suspect that corruption may be involved. This power to investigate suspected or manifest illegality *sua sponte* is well within their authority, as well as their duties, provided that the alleged or patent illegality would cast repercussions upon the final decision.⁶⁴

D. *Judicial Recognition of Arbitrability of Corruption in India*

Under Indian law, if any part of the contract has been performed illegally or in a manner that defeats the provisions of law, then, the contract is voidable as against the innocent party.⁶⁵ Further, any party claiming under such a contract cannot succeed if reliance has to be placed upon the illegal act. Therefore, if allegations of corruption in the performance of the contract are involved, the contract is voidable.

⁶² See *Bayindir v. Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005).

⁶³ Andreas Reiner, 'The Standards and Burden of Proof in International Arbitration' (1994) Vol 10 *Arbitration International* 335.

⁶⁴ Dr Richard H Kreindler, 'Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc.?' discussed in Theodore H Moran, 'The Arbitrator as Accomplice – Sham Proceedings and the Trap of the Consent Award in Combating Corrupt Payments in Foreign Investment Concessions: Closing the Loopholes, Extending the Tools' (2008) *Center for Global Development, Washington DC* 1, 26.

⁶⁵ *Bank of India Finance Ltd v. The Custodian and Ors* (1997) 10 SCC 488.

It has now been laid down in a plethora of judgments that arbitration agreements are severable from the principle contract even though they are physically embodied in the same instrument. In *Olympus Superstructures v. Meena Vijay Khetan*,⁶⁶ it has been held that disputes, which the parties to an arbitration agreement agree to refer must consist of a 'justiciable issue triable civilly'. Certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration.⁶⁷

In *Ram Kishan Mimani v. Govardhan Das Mimani*⁶⁸ and *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd*,⁶⁹ it has been clarified that the *N Radhakrishnan*⁷⁰ judgment cannot be read to imply that every time allegation of fraud or malpractice is made, there can no longer be adjudication of such matters in an arbitration reference. An exception may be made to the general rule when it appears to a court, that a matter involving serious charges with heavy documentary and oral evidence may not be referred to arbitration notwithstanding the disputes being covered thereby.

In *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd*, the Supreme Court held that an arbitration agreement does not become 'inoperative or incapable of being performed' where allegations of fraud have to be inquired into.⁷¹ The Court, *inter alia*, relied upon *Premium Nafta*⁷² and stated that the ground of challenge to the contract (that was under consideration in the said case) did not in any manner affect the arbitration agreement contained therein, which is independent of and

⁶⁶ *Olympus Superstructures Pvt Ltd v. Meena Vijay Khetan* (1999) 5 SCC 651.

⁶⁷ *Booz Allen and Hamilton Inc v. SBI Home Finance Limited and Ors* (2011) 5 SCC 532.

⁶⁸ *Ram Kishan Mimani v. Govardhan Das Mimani* (2010) 4 CHN 527.

⁶⁹ *HSBC PI Holdings (Mauritius) Ltd v. Avitel Post Studioz Ltd* (High Court of Bombay 22 January 2014).

⁷⁰ *N Radhakrishnan v. M/S. Mastero Engineers* (2010) 1 SCC 72.

The judgment of the Supreme Court of India in *N Radhakrishnan v. M/S Mastero Engineers & Ors*, considered whether allegations of corruption may be arbitrated upon. The court answered in the negative, on the ground that where complicated question of fact or law is involved or where allegation of fraud is made, a civil court may refuse reference to arbitration.

⁷¹ Decision of the Supreme Court dated 24 January 2014 in Civil Appeal No 895 of 2014.

⁷² *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. and Ors* (2007) UKHL 40.

separate from the main contract. In the event one of the parties rescinds a contract, the arbitration clause contained therein does not become ineffective.

Further, in the *Swiss Timing Case* it was held that an arbitration clause is severable from the underlying contract, under section 16 of the *Arbitration and Conciliation Act, 1996*. The exception carved out by *Swiss Timing* to the disputes that can be referred to arbitration by a court is the class of disputes wherein the contract is *prima facie* void *ab initio*.⁷³ The above decision of *Swiss Timing* was upheld by the Bombay High Court in *National Spot Exchange*, wherein the learned Single Judge upheld that the allegation of corruption could be arbitrated upon by the arbitral tribunal.⁷⁴

An arbitration clause is thus considered as a separate contract which survives even if the underlying contract is voidable. Allowing an arbitration agreement to be automatically terminated along with the main contract would be akin to destroying what the parties sought to create as a dispute resolution device. To surmise the findings of courts and tribunals discussed above, it may be stated that when a contract is tainted with corruption, either at the stage of procurement or performance, the arbitration agreement encapsulated within it survives, by virtue of the doctrine of severability.

IV. ENFORCEMENT OF THE ARBITRAL AWARD

Although various international anti-corruption treaties⁷⁵ seek to combat corruption, they suffer from a lack of enforcement mechanisms at the international level.⁷⁶ In *HUBCO*,⁷⁷ the Supreme Court of Pakistan held

⁷³ *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. and Ors*, para 27.

⁷⁴ *National Spot Exchange Ltd. v. National Spot Exchange Ltd.* (High Court of Bombay 10 September 2014).

⁷⁵ *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997* (adopted 17 December 1997, entered into force 15 February 1999) 37 ILM 1; *Europe's Civil Law Convention on Corruption* (adopted on May 1 1999) CETS 174; *African Unions' Convention on Prevention and Combating Corruption* (adopted on July 1 2003, entered into force on 5 August 2011) and *United Nations Convention against Corruption* (adopted on 31 October 2003, entered into force on 14 December 2005) UNGA A/58/422.

⁷⁶ ICC Case No 3913.

⁷⁷ *Hub Power Company Ltd v. Pakistan, WAPDA* (PLD 2000 SC 841).

that cases which, *prima facie* involve corruption cannot be arbitrated upon and that a corruption claim cannot be referred to an arbitral tribunal on grounds of public policy. If a tribunal proceeds to grant an award where allegations of corruption are raised, this itself may lead to a challenge and setting aside of such an award if it is later found that the arbitral tribunal had not performed its functions with due diligence and thereby, had failed to adequately investigate issues of corruption. Article V(2)(b) of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention) and article 36 of the *UNCITRAL Model Law* enshrine the public policy of the forum as grounds upon which arbitral awards may be refused enforcement by the courts. They provide that: 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country'.

One of the reasons for this is that the definitions of corruption, bribery and allied practices are different across nations. To one country or custom, lobbying or even making grease payments may be acceptable, while in some others, these practices may amount to corruption.⁷⁸ Vogel opines that in the 'wild west of international trade, the slogan 'anything goes' seems to have had wide application.'⁷⁹ What is meant to embody 'corruption' and 'bribery' differs greatly from one jurisdiction to another.⁸⁰ The catena of awards discussed in *World Duty Free*⁸¹, recognised and agreed that in certain jurisdictions or sectors of activities, corruption is a common practice without which the award of a contract is difficult or even impossible. The term 'international public policy', however, is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora and it has been proposed to cover that concept in referring to 'transnational public policy' or 'truly

⁷⁸ Stephen H Unger, 'Ethical Aspects Of Bribing People in Other Countries', (1998) Vol 4 *Science and Engineering Ethics* 287–290, available at www.cs.columbia.edu/~unger/articles/bribery6-98.html (last visited 30 September 2016).

⁷⁹ Vogel, 'The Supply Side of Global Bribery', (1998) *Finance & Development* 35.

⁸⁰ *Swiss Timing Case*, 663.

⁸¹ *World Duty Free v. Kenya*.

international public policy'.⁸² It is trite that tribunals must apply the law which is determined to be applicable in the dispute before them, which could be the parties' chosen law or some other foreign mandatory law or public policy, unless it is contrary to 'transnational public policy'.⁸³ Thus, parties cannot contravene principles of transnational public policy, to escape from their obligations so long as they are valid under the parties' chosen law, and any mandatory laws of the place of performance or arbitral seat which prohibit them do not override the parties' chosen law.⁸⁴ However, prior to deciding if a claim violates a transnational principle, an arbitral tribunal ought to satisfy itself if a particular issue constitutes a part of the transnational public policy. This is based on a subjective satisfaction of whether there is a 'broad consensus' amongst nations, to elevate a particular concern to a transnational level.⁸⁵ Arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognised.⁸⁶ 'Public policy' is one of the narrow group of grounds available for denying enforcement to an arbitral award, both under the *New York Convention* and under the various domestic arbitration statutes, that follow the *UNCITRAL Model Law* by which an award can be denied enforcement.⁸⁷ National courts can rightly be expected to see corruption as an issue which goes to the heart of public policy and may refuse to allow the enforcement of an award that might further corruption. However, the courts would then have to solve the difficult issue of balancing the cardinal principles of

⁸² *World Duty Free v. Kenya*, para 139 and see also P Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', (1986) Vol 3 *ICCA Congress Series* 257.

⁸³ *Westacre (UK) v. Jugoimort (Yugoslavia)* ICC Case No 7047 [1995] ASA Bull 301 (1994); *Wena Hotels Ltd v. The Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (December 8, 2000) and ICC Case No 3916.

⁸⁴ ICC Case No 8891.

⁸⁵ 'International Law Association Recommendations on the Application of Public Policy as a Ground for refusing Recognition or Enforcement of International Arbitral Awards' *International Law Association*, Resolution 2/2002 – International Commercial Arbitration (2002).

⁸⁶ Abdulhay Sayed, 'Corruption in International Trade and Commercial Arbitration', (2004) *Kluwer Law International* 89–92.

⁸⁷ *Honeywell v. Meydan Group* [2014] EWHC 1344 (TCC).

finality of arbitral awards with the imperative of safeguarding public policy.⁸⁸

V. PARALLEL COURT PROCEEDINGS – THE CATCH 22 OF ARBITRATION?

Allegations of corruption lead to initiation of proceedings in domestic forums, in accordance with national law. The jeopardy of conflicting findings on facts by the arbitral tribunal and courts may result in rendering the arbitral proceedings futile at the stage of enforcement. Although the subject matter and nature of dispute under the consideration of an arbitral tribunal differs greatly from the questions of law involved in domestic proceedings, the factum remains the same. Arbitral tribunals may benefit from the findings on fact by domestic courts, as the later inarguably have more authority to investigate and probe into allegations of corruption.⁸⁹ For instance, in *Niko Resources v. People's Republic of Bangladesh et al*, the arbitral tribunal had based its findings of corruption on facts that were arrived at in the course of parallel court proceedings.⁹⁰ However, domestic court proceedings are often prolonged and arbitral tribunals may be averse to waiting for proceedings to end, so that they can draw from the proceedings. Therefore, one of the prime issues that a tribunal must consider before assuming jurisdiction is the effect, which parallel court proceedings may have on the award and its enforcement.

As regards the Indian position, it has been observed that there is no inherent risk of prejudice to any of the parties in allowing both criminal proceeding in court and arbitration proceedings simultaneously. If there is an outcome where an award is rendered by an arbitral tribunal and the criminal proceedings result in conviction rendering the underlying contract void, an appropriate plea can be taken to resist the enforcement of the award.⁹¹ The court, in holding so, has indicated an inclination

⁸⁸ *Swiss Timing Case*.

⁸⁹ Inan Uluc, 'Corruption in International Arbitration' (2016) *SJD Dissertations* 1.

⁹⁰ *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos ARB/10/11, ARB/10/18, Decision on Jurisdiction (19 August 2013).

⁹¹ *P Manohar Reddy and Bros v. Maharashtra Krishna Valley Development Corporation and Ors*.

towards arbitration. This reasoning would not be tenable in the case of international arbitration seated in India. It is settled that for an award to be enforceable, it must not contravene anti-corruption rules and public policy and there is an obligation on the arbitrator to ensure that the parties do not arbitrate in vain.⁹² In *Maharashtra Film Stage and Cultural Development Corporation Ltd v. Multi-Screen Media Pvt Ltd*,⁹³ it was observed that if mere allegations of fraud were to oust the jurisdiction of the arbitral tribunal, the efficacy of arbitration as an alternate dispute resolution mechanism would be eroded and undermined. It can be inferred that in a domestic arbitration, mere existence of allegations of either moral dishonesty or moral misconduct would not be sufficient for the court to exercise jurisdiction over a claim subject to an arbitration agreement. Thus, it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum, which the parties themselves have chosen. However the measure to determine what falls under the purview of ‘serious allegations’ has been left to the discretion of courts, which is to be decided based on the circumstances surrounding each and every case.

Further, parallel criminal court proceedings are not a ground for stay or refusal for execution of an arbitral award rendered in the course of international commercial arbitration. The grounds for refusal to enforce a foreign award under sub-section(2)(b) of section 48 are restricted and it has been held that enforcement would be refused only if such enforcement would be contrary to – (i) fundamental policy of Indian law; (ii) the interests of India and (iii) justice or morality.⁹⁴

VI. CONCLUSION

In the recent years with an advent of commercial transactions, arbitration has greatly evolved as an effective global dispute resolution mechanism. Conscious efforts are being made all over the world to

⁹² Article 35 of the *ICC Rules* stipulates that: ‘In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure the Award is enforceable at law’.

⁹³ *Maharashtra Film Stage and Cultural Development Corporation Ltd v. Multi-Screen Media Pvt Ltd* (High Court of Bombay 3 July 2013).

⁹⁴ *Shri Lal Mahal Ltd v. Progetto Grano Spa* (2013) 8 SCALE 489.

develop the law of arbitration to fulfil the objective for which it was introduced. There are various issues involved when allegations of corruption are made by either party to arbitration at any stage of the transaction. Many countries including India however, are inclined towards arbitrability of allegations of corruption, overcoming the many procedural issues which are involved. Contrary to the highest standard of proof, which is required for proving allegations of corruption otherwise, arbitral tribunals have lowered the standard of proof required and have found a midway approach so as to exercise its substantive jurisdiction to make determination upon the allegations of corruption. Tribunals have also recognised the well cemented principles of 'doctrine of severability' and have held that the tribunals will have jurisdiction to determine the dispute. However, exception being when the allegations of corruption are inextricably related to the main contract and would affect the arbitration clause equally. In any event, a high standard of proof would be required to show the same and hold that the agreement to arbitrate is also invalid. Recent judicial pronouncements also encourage arbitral tribunals to proceed with arbitration, inspite of on going parallel court proceedings and the same are no longer held to be a sufficient ground for a stay or refusal of proceeding with the arbitration proceedings. However, even if a tribunal overcomes all these procedural hurdles and proceeds to pass an award in an arbitration where allegations of corruption are raised, this itself could be a ground for resisting enforcement of the award. Courts would then have to carve a balance to safeguard the finality of an arbitral award and public policy. Although judicial intervention cannot be avoided where serious issues of public interest are at stake, it would not be *ultra vires* for arbitral tribunals to handle allegations of corruption. Utmost precaution and every reasonable effort must be made by arbitrators to ensure the enforceability of an award. It is therefore advisable that they delve into the allegations of corruption and pass a reasoned award, taking into considerations all the ancillary issues of evidence, parallel court proceedings and enforcement of award when such allegations of corruption are made by either party.

WHOSE AIRSPACE IS IT ANYWAY: DECODING THE ADIZ ENIGMA[†]

*Joshua Abhay Patnigere**

I. INTRODUCTION

As the sun rose over a part of the East China Sea on the morning of 23 November 2013, it was hard to tell what was different. The clock in Beijing's Ministry of Defense read '10 am'. There was nothing on the horizon that tangibly would suggest that the *status quo* of these waters, which touch the shores of the People's Republic of China, Taiwan, Vietnam, South Korea, and extend as far as Japan, had undergone a drastic change in the past 24 hours. As the day progressed, the world finally awoke to China's establishment of an Air Defence Identification Zone (ADIZ)¹ connected by six co-ordinates: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.² Neutral observers may not find a major cause for alarm,

[†] This article reflects the position of law as on 30 September 2016.

^{*} The author is an alumnus of Government Law College, Mumbai and is presently working as an Associate at Indian Law Partners. He may be contacted at joshuapatnigere@gmail.com. The article is written by the author in his own capacity and does not in any way reflect the position of the firm.

¹ In this paper, a reference to an ADIZ would, if the context so mandates, include the plural thereof.

² The Ministry of National Defense of the People's Republic of China notified the co-ordinates of the ADIZ on its official website. The official announcement stated that the ADIZ would come into force as soon as the clocks in Beijing read the time as 10 am. The text was carried by the Xinhua news agency, the official press agency of the State. The full text reads thus: 'Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone Issued by the Ministry of National Defense on November 23: The government of the People's Republic of China announces the establishment of the East China Sea Air Defense Identification Zone in accordance with the Law of the People's Republic of China on National Defense (March 14, 1997), the Law of the People's Republic of China on Civil Aviation (October 30, 1995) and the Basic Rules on Flight of the People's Republic of China (July 27, 2001). The zone includes the airspace within the area enclosed by China's outer limit of the territorial sea and the following six points: 33°11'N (North Latitude) and 121°47'E (East Longitude), 33°11'N and 125°00'E, 31°00'N and 128°20'E, 25°38'N and 125°00'E, 24°45'N and 123°00'E, 26°44'N and 120°58'E.' The statement is available at http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm# (last visited 30 September 2016).

and might suggest the proclamation did not merit a second glance. The declaration of this ADIZ could be seen as muscle-flexing by an emerging world power.

The Western world and China's immediate neighbours, however, viewed this ADIZ declaration as unwelcome. The announcement ruffled feathers³ across the echelons of power in Washington DC, Seoul, Tokyo, Canberra and London. These States were concerned that China had unilaterally established an ADIZ without consulting its neighbours that this ADIZ overlapped pre-existing Korean and Japanese ADIZ, and that this overlap included the airspace within Japan's ADIZ over the Senkaku/Diaoyu Islands and Korea's ADIZ above Socotra Rock. Unlike

³ In a statement released to the media on 23 November 2013, then US Secretary of Defense, John Kerry made the following statement: 'The United States is deeply concerned about China's announcement that they've established an "East China Sea Air Defense Identification Zone." This unilateral action constitutes an attempt to change the status quo in the East China Sea. Escalatory action will only increase tensions in the region and create risks of an incident. Freedom of overflight and other internationally lawful uses of sea and airspace are essential to prosperity, stability, and security in the Pacific. We don't support efforts by any State to apply its ADIZ procedures to foreign aircraft not intending to enter its national airspace. The United States does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. national airspace. We urge China not to implement its threat to take action against aircraft that do not identify themselves or obey orders from Beijing. We have urged China to exercise caution and restraint, and we are consulting with Japan and other affected parties, throughout the region. We remain steadfastly committed to our allies and partners, and hope to see a more collaborative and less confrontational future in the Pacific.' John Kerry, 'Statement on the East China Sea Air Defense Identification Zone' (2013) *US Department of State*, available at <http://www.state.gov/secretary/remarks/2013/11/218013.htm> (last visited 30 September 2016). Likewise, Australian Foreign Minister Julie Bishop summoned Ambassador Ma Zhaouxu of the People's Republic of China to seek an explanation from the top diplomat about the intention of the Chinese establishment for setting up the ADIZ. Calling it a 'coercive and unilateral action to change the status quo in the East China Sea', Bishop said that China would have to explain its actions. Karen Barlow, 'Australia Expresses Concern over China Air Defence Zone' (2013) *ABC News Australia*, at <http://www.abc.net.au/news/2013-11-26/an-aust-calls-in-china-ambassadorover-air-defence-zone-announc/5117974> (last visited 30 September 2016). Japan, calling the ADIZ a moot contention that would 'escalate' tensions, said that it would 'never accept the zone.' 'China's New Air Defense Zone Above Senkakus 'Very Dangerous' Escalation, Japan says' *Japan Times*, available at <http://www.japantimes.co.jp/news/2013/11/23/national/china-sets-up-air-defense-id-zone-abovesenkakus/#.VKwX4pSSwqM> (last visited 30 September 2016).

other ADIZ declarations, China purported to require compliance by commercial aircraft, even when they were not entering into China's national airspace, as well as military aircraft, which are protected from the application of foreign laws by the legal doctrine of sovereign immunity.

This article explores the concept of an ADIZ and addresses the key issues pertaining to it. Part I of this article is introductory in nature. Part II deals with the concept of an ADIZ and explains what it entails. It also looks at the history behind this concept and current locations of ADIZ demarcations. The ingredients needed to constitute an ADIZ also find mention in this part, and the difference between ADIZ, and national and international airspace is further explored. Part III addresses the issue of whether an ADIZ is justified under international law, and delves into the concept of state sovereignty. Part IV explains the method of declaration of an ADIZ. This part also includes how States deal with current ADIZ. Part V examines what transpires when ADIZ overlap, and implications of non-compliance with ADIZ. Part VI focuses on the ADIZ within the context of national security. Finally, Part VII of this article proposes discrete guidelines to govern the establishment and management of ADIZ to better ensure conflict avoidance in international relations.

II. THE CONCEPT OF AN ADIZ

A. *Definition*

An ADIZ, in the most facile terms, is an area of demarcated airspace that is adjacent to, but not within the jurisdiction of a State. The ADIZ contains regulations that require certain foreign aircraft within the ADIZ to self-identify and respond to national air traffic authorities of the State that has declared the ADIZ. A more technically complete definition of an ADIZ may be obtained from the United States (US) Federal Aviation Administration's (FAA) *Federal Aviation Rules* (FAR). The FAR state that an ADIZ means an area of airspace over land or water in which the ready identification, location, and control of civil aircraft are required in the interest of national security.⁴ Further scrutiny of this definition helps

⁴ *Federal Aviation Administration Regulations* 14 CFR § 99.3, available at <https://www.law.cornell.edu/cfr/text/14/99.3> (last visited 30 September 2016). However, the term 'national security' is not defined in the US regulation.

the reader formulate the following points with regard to an ADIZ under the American approach:

- An area of airspace is required;
- An ADIZ may be declared over either land or water;
- Identification of only civil aircraft may be asked for by the host State; and
- Such identification is for national security.

However, while this definition does seem to include every aspect of identification, it may be seen that identification by a military aircraft does not find mention in this definition. In contrast, the ADIZ formed by China over parts of the East China Sea, seeks identification by every aircraft—including State and military aircraft, failing which unspecified ‘emergency measures may be adopted’ by the Chinese government.⁵ While ADIZ declarations are generally made for security purposes, the requirement by the Chinese government mandating that a military aircraft itself should also identify to the authorities on the Chinese mainland infringes not only the legal doctrine of sovereign immunity, but also the security of the State whose flag such a military aircraft bears, since secrecy of operations is sacrosanct for military forces of any State.

The concept of civilian aircraft and their roles in an ADIZ procedure reveal that most national ADIZ requirements only require identification by civilian aircraft. The FAR, in contrast from China’s requirements, do not mention military aircraft when referring to ‘State aircraft’⁶.

ADIZ have also been defined as ‘zones which are established above the exclusive economic zone or high seas adjacent to the coast, and over the territorial sea, internal waters, and land territory.’⁷ Currently,

⁵ *Supra* n. 2.

⁶ State aircraft are military, police or law enforcement aircraft operated by a State on government, non-commercial service. This definition is analogous to sovereign immune vessels contained in article 95 of the *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 30 September 2016).

⁷ J Ashley Roach, ‘Air Defence Identification Zones’, *Max Planck Encyclopaedia of Public International Law* (2013).

however, there is no definition that captures the essence of an ADIZ, no definition being all inclusive in this context. The author, therefore, has formulated the following definition of an ADIZ:

An ADIZ is a definite demarcated area over international airspace by a declaratory State requiring all aircraft intending to enter into the national airspace of such a declaratory State to identify itself and follow such procedures of navigation as may be mandated by the State issuing such declaration. Violation of such requirements by an unidentified aircraft wanting to enter the national airspace beyond the ADIZ would result in precautionary measures being activated by the declaratory State owing to the security concept of an ADIZ.⁸

B. Evolution of ADIZ

The concept of an ADIZ was first formulated in the post-World War II era. On 25 June 1950, the armies of North Korea marched south into the People's Republic of Korea, the predecessor state to the Republic of Korea. US and its allies under the aegis of the United Nations sided with the Republic of Korea, whereas the Soviet Union and China aided and fought alongside those from the north.

US, in its bid not to be caught off-guard as it was on 7 December 1941 at Pearl Harbour in Hawaii, decided to do something concrete to ensure that any air attack by the Soviet Union following the Korean War did not reach the American mainland. The US Air Force (USAF) undertook a study of the possible air approaches to US where enemy bomber aircraft might penetrate into the US airspace, and if left unchecked would wreak havoc before being neutralised by the American air squadrons.⁹

The USAF report recommended that areas be demarcated near the frontiers, and these areas would serve as buffer zones wherein foreign aircraft on the path of the coordinates leading to the US airspace could be identified and, if needed, intercepted by the US fighter jet aircraft.

⁸ This definition has been formulated by the author in his quest to define an ADIZ. It captures the essential elements of an ADIZ, and is offered to promote further discussion on the concept.

⁹ David F Winkler, *Searching the Skies: The Legacy of the United States Cold War Defense Radar Program*, for the United States Air Force Air Combat Comm and Langley Field, USA (1997), available at http://fas.org/nuke/guide/usa/airdef/searching_the_skies.html (last visited 30 September 2016).

This was the first time that a designated and defined area was to be set up near the US mainland. The first ADIZ had thus been formed across the air corridors leading to North America. Any unidentified aircraft would be asked by radio for identification, and if that did not work, the USAF was, and still is, authorised to launch an interceptor aircraft to investigate.¹⁰ The ADIZ over North America was monitored by the US and Canadian authorities, and subsequently has been folded into the North American Defense Command, which is part of the US Northern Command.¹¹

C. States which have an ADIZ

In the lead-up to the current global order, and following the footsteps of US, several States¹² declared their intention to demarcate regions and issue instructions for all aircraft—civilian or otherwise—in a bid to ensure that the security of the State was not compromised.

US has, since its first declaration of an ADIZ, declared four more ADIZ. Some of these ADIZ extend up to 400 nautical miles (nm) off the coast of California. Interestingly, US has also demarcated an ADIZ off the Alaskan coast, which extends up to 350 nm from its shores.¹³

Asian neighbours and on-and-off rivals India and Pakistan too maintain ADIZ. India has demarcated six ADIZ near its territory. These zones have been declared over the international border with Pakistan, the international border with Nepal, over the Line of Actual Control with China, along the eastern borders with Bangladesh, Bhutan and Myanmar and two in the southern region of India.¹⁴

¹⁰ *Ibid*, 8.

¹¹ *Supra* n. 9.

¹² There are 20 States that have demarcated ADIZ. Some of these include Canada, India, Japan, Iceland, Norway, South Korea, Taiwan, United Kingdom, Pakistan and others.

¹³ The list of ADIZ demarcated by US may be accessed by referring to the FAA Flight Manual, note 4. A geographic description of each ADIZ is provided in the manual.

¹⁴ The Indian ADIZ have been mentioned in the form of co-ordinates on the website of the Airports Authority of India. They have been converted into geographical regions for convenience sake. ENR -1.12 Interception of Civil Aircraft – Identification and Interception Procedures, *Airports Authority of India*, at http://www.aai.aero/public_notices/aaiste_test/eAIP/PUB/2012-04-01/html/eAIP/EC-ENR-1.12-en-GB.html (last visited 30 September 2016).

D. Rights of States that declare an ADIZ

Any State may declare an ADIZ.

The declaratory State has the right to request identification from foreign commercial aircraft in the ADIZ that seek to enter its national airspace, and the source of this requirement is notification as a condition of port entry.

If a foreign aircraft is not bound to enter national airspace, it is not legally required to comply with any ADIZ rules. The FAR state that two-way communication is important.¹⁵

This requirement is designed to learn if the aircraft is friendly or is flying towards the territory of a State with questionable intentions.

The rules set forth in almost all ADIZ declarations mandate that two-way communication be maintained at all possible times, and that the aircraft pilot must identify himself and comply with the instructions meted out by the respective Air Traffic Controller (ATC) on the ground.

¹⁵ Rules of the FAA explicitly mention that two-way communication is a must and the pilot has to answer the ground controller with regards to the origin of the aircraft and/or its destination.

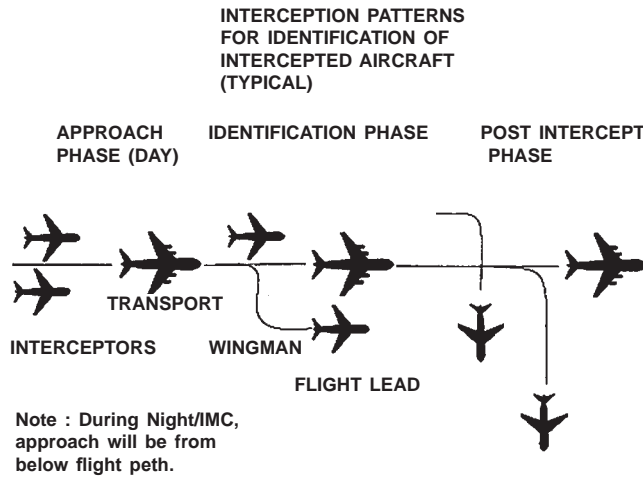


Figure 1: US ADIZ Interception Procedures

Image courtesy: FAA

Figure 1 demonstrates how an aircraft that has strayed into the US ADIZ is treated by the USAF. Failing identification procedures, two aircraft, one a leader and the other a wingman, will be launched from the nearest air station to investigate. If the foreign aircraft is just passing through the ADIZ without an intention to enter the US national airspace, the fighter jets will closely monitor it and escort it until it departs the ADIZ. These procedures may be found on various US Government websites, more particularly, those dealing with civil aviation. A similar pattern is followed by other States that have declared an ADIZ.

While such procedures may be followed, it is interesting to note that this right does not give the host State the legal right to fire upon an aircraft that has strayed into its ADIZ, or even into the airspace above its territory, except as permitted by the law of national self-defence under article 51 of the *Charter of the United Nations*, and the rules of international humanitarian law. It is now a settled principle of customary international law that when an aircraft that has not obtained the required Air Defense Certificate flies into an ADIZ without identifying itself, the host State may launch interceptor fighter jets to investigate. These fighter jets may then require that the unidentified foreign commercial aircraft with an evident intention to enter into national airspace either leave the area and change its flying coordinates or be 'requested' to land at the nearest airfield of the State, where it may be investigated. However, such 'requests' have been rare.

These fighter jet interceptors may carry air-to-air missiles. However, they may not engage foreign aircraft without some other *indicia* of hostile intent or a hostile act. Engagement may occur only in response to a refusal to comply with instructions accompanied by suspicious movement into national airspace without complying with orders meted out by the ATC on the ground or the squadron leader of the intercepting fighter jet.

E. Differentiating between an ADIZ and the national airspace of a State

International law stipulates that national airspace of a State extends to the territory above it and throughout the airspace above the territorial sea, which may extend up to 12 nm off its coast. This defined rule puts to rest all confusions relating to how far the airspace of a country can extend from its coast.¹⁶ While national airspace may extend no more than 12 nm from the coast, ADIZ are not subject to any such limit. States therefore may declare an ADIZ even farther than the 12 nm of airspace permitted as national airspace. States have only been happy to demarcate ADIZ in areas that are in some cases more than a few hundred miles off their coasts, since no legal rule prevents them from doing so. An example of such declarations is the US ADIZ off the coasts of Hawaii and California.¹⁷

An ADIZ is also different from warning zones during peacetime and no-fly zones during armed conflict. Warning zones are sometimes put in place to ensure that aircraft do not interfere or endanger special activities in a discrete section of national or international airspace. A State may declare a no-fly zone within its national airspace for any

¹⁶ Article 2 of the *United Nations Convention on the Law of the Sea* reads: Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil
2.1 The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2.2 This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
2.3 The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 3 of the *United Nations Convention on the Law of the Sea* explicitly states that the territorial seas of a State extend to 12 nautical miles off its coast.

¹⁷ *Supra* n. 13.

reason. For instance, when a Head of State visits a foreign State, the host State may demarcate a no-fly zone over the area where the visiting Head of State is residing.

Warning zones are announced for military or security purposes and are in most cases temporary. The zones are also put in place when military establishments are testing new ballistic missiles, or running war exercises. Generally, if warning zones are established in international airspace, they may not be considered ‘no-fly zones’ in which foreign military aircraft are altogether prohibited. A Congressional research committee report stated that the ‘legality of a no-fly zone operation may depend, at a minimum, on both authorisation for the operation and the extent to which the manner of execution of the operation comports with relevant international law.’¹⁸ Warning zones, no-fly zones and ADIZ derive their legal rationale from customary international law.

F. How high can an ADIZ be?

An ADIZ may not extend beyond the atmosphere of the earth. In other words, an ADIZ cannot be enforced in outer space. It is an accepted practice that anything above the Karman line¹⁹ may be said to fall in space. US, however, chooses to bring a twist of sorts to this particular rule. The USAF defines an astronaut as someone who has flown over the 80 kilometre mark.²⁰ The National Aeronautics and Space Administration, interestingly, follows the Karman Line Principle.

It is a settled rule of international law that outer space is the common heritage of mankind and that no State may exploit it for its own

¹⁸ Congressional Research Service, ‘No Fly Zones: Strategic, Operational and Legal Considerations for Congress’ (2013), *available at* <https://www.fas.org/sgp/crs/natsec/R41701.pdf> (last visited 30 September 2016).

¹⁹ The Karman Line is about 100 kilometres above sea level and is said to be the boundary between outer space and the Earth’s atmosphere. Any object flying above this line is accepted to be a space vehicle.

²⁰ *See* Jay Levine, ‘A Long Overdue Tribute, National Aeronautics Space Administration’ (2005) NASA, *at* http://www.nasa.gov/centers/dryden/news/X-Press/stories/2005/102105_Wings.html (last visited on 30 September 2016).

personal gain.²¹ Therefore, an ADIZ declaration may not be declared in outer space. Such a declaration would not mandate the following of any protocol as wished for by the declaratory State, since this declaration would infringe on the rights of other States.

III. IS AN ADIZ JUSTIFIED UNDER INTERNATIONAL LAW?

It is now accepted and settled that international law does not prohibit a State from declaring an ADIZ in an area adjacent to its national airspace.²² The concept of an ADIZ may better be understood by using settled principles of international law.

A. *Sovereignty*

1. What is sovereignty?

Sovereignty has been defined as ‘unlimited power by a country; a country’s independent authority and the right to govern itself.’²³

In his book, ‘Neutrality of Great Britain during the American Civil War’, Montague Bernard stated, ‘By sovereignty, we mean a Community or number of persons permanently organised under a Sovereign Government of their own, and by a Sovereign Government, we mean a Government, however constituted, which exercises the power of making and enforcing law within a Community, and is itself not subject to any superior Government. These two factors, the one positive, the other negative, the exercise of power and the absence of superior control, compose the notion of Sovereignty and are essential to it.’

A glance at this definition further illustrates the fact that sovereignty *ipso facto* grants ultimate power to a State to act within its territory as it pleases.

²¹ See *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205, available at http://www.unoosa.org/pdf/publications/ST_SPACE_061Rev01E.pdf (last visited on 30 September 2016).

²² James Kraska and Raul Pedrozo, *International Maritime Security Law* (2013) § 6.4.2.1, US Department Of The Navy and Department Of Homeland Security, ‘Commander’s Handbook On The Law Of Naval Operations’ (2007) § 2.7.2.3, 2-13.

²³ ‘Sovereignty’, *Merriam-Webster*, at <http://www.merriam-webster.com/dictionary/sovereignty> (last visited 30 September 2016).

2. An ADIZ does not constitute Sovereign Space

Besides the four tests mentioned in Part II above, the *United Nations Convention on the Law of the Sea* (UNCLOS) also states that the jurisdiction of a State extends to only 12 nm off its coast, and areas beyond that fall under international waters, and may fall under the Exclusive Economic Zone (EEZ) of a State, where that particular State will have exclusive rights over all living and non-living resources (fisheries, oil and gas, and seabed minerals) found within that region, including as settled by customary international law, the production of energy by either wind or water.²⁴

Thus, it may be seen that the mere declaration of an ADIZ does not constitute a claim for sovereignty. As much as some proponents of this phenomenon would want such a declaration to ensure that the demarcated territory falls within their territorial jurisdiction, conventions and the laws simply do not support that position.

The ruling of the Permanent Court of Arbitration (Tribunal) on 12 July 2016 in favour of the Republic of Philippines, that seemed to counter China's claim to the man-made islands in the South China Sea, on basis of their being present within China's 'historic exclusive waters'²⁵ saw the Chinese establishment trash the award as 'illegal'.²⁶ The Chinese establishment has now further threatened to establish an ADIZ over

²⁴ *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 30 September 2016).

²⁵ See *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (Press Release) (12 July 2016) Permanent Court of Arbitration, Press Release No. 11, 2.

²⁶ The Chinese ambassador to the Netherlands, Wu Ken, referred to the award of the Permanent Court of Arbitration as a 'black Tuesday for international law.' Mr. Ken said, 'China is deeply dissatisfied and firmly rejects this ruling which dishonors international law and damages regional stability'.

He further added, 'China has both the legal basis and the ability to recover islands and reefs illegally occupied by the occupier. Nevertheless, in a bid to safeguard peace and stability in the region, we have always sought for a peaceful settlement of disputes and upheld maritime cooperation with maximum restraint'.

The full text of Mr. Ken's statement is available at http://news.xinhuanet.com/english/2016-07/13/c_135508353.htm (last visited on 30 September 2016).

the South China Sea.²⁷ While the Chinese establishment may, in the aftermath of the award of the Tribunal, consider this newly proposed ADIZ to grant it some rights within the South China Sea, albeit in the air, if not as part of its EEZ, China does not have the backing of law to claim any rights in the air over the region. As much as China would want its proposed declaration of an ADIZ to give it some rights within the South China Sea, international law is not on China's side this time since even the UNCLOS, which has been ratified by China, gives a country the right of sovereignty only up to 12 nm from its territory.

3. The Restricted State Rights Phenomenon²⁸

While the mere declaration of an ADIZ does not guarantee States sovereign rights in that demarcated region, it does raise interesting questions of law and policy:

- a. Does the State have sovereignty in the ADIZ?
- b. If yes, what type of sovereignty does the State enjoy?

The answer to both these questions, interestingly, is the same. The State does not have any sovereignty in an ADIZ zone, and may not lawfully attempt to enforce such a claim. While the first question has already been dealt with in these enunciated points, the second merits a further scrutiny. International law states that there are two types of accepted sovereignty—absolute sovereignty and limited sovereignty.²⁹ Samantha Besson writes that, 'Even if, by definition, a sovereign State cannot be limited by the laws of another State, it may be limited when these laws result from the collective wills of all States.'³⁰

A State may not create any additional rights other than those afforded in international law, and it does not acquire any greater rights by the mere demarcation of an ADIZ. In other words, demarcating an ADIZ over international airspace does not give the declaratory State

²⁷ See Katie Hunt and Steven Jiang 'South China Sea: China May Establish Air Defense Zone after Losing Court Ruling', *CNN*, available at <http://edition.cnn.com/2016/07/13/asia/south-china-sea-ruling-reaction-adiz/> (last visited on 30 September 2016).

²⁸ This is the author's proposed theory of State rights which seeks to understand the rights of the declaratory State with regard an ADIZ.

²⁹ Samantha Besson, 'Sovereignty' *Max Planck Encyclopaedia of Public International Law* (2011).

³⁰ *Ibid*, para 31.

any additional rights that it did not enjoy before such a declaration. UNCLOS recognises that foreign ships enjoy the right of innocent passage through the territorial waters of a State, but it expressly omits any mention of a similar right for foreign aircraft.³¹

While article 19 of UNCLOS bestows power on a State, although indirectly, to refuse the right of innocent passage to an aircraft, it must be mentioned that UNCLOS fixes the outer limit of the territorial waters of a State at 12 nm. This means that a State does not have the power to restrict any aircraft flying outside its territorial waters, as the aircraft will be flying within international airspace. Any such attempt to curb the flight of an aircraft will not be valid, and may cause an uproar from the international community. The declaratory State does not have any greater right in such a region.

Hence, the concept of restricted rights comes into play, where the State may in an ADIZ ask for identification, but may not do anything contrary to international law.

B. The Lotus Principle

In a bid to determine the legality behind the concept of an ADIZ, an analysis of the Lotus Principle is of paramount importance to help justify this phenomenon. The Lotus Principle was formulated in the year 1927 in a case involving Turkey and France, when two ships collided with each other.³² The Bench hearing the case formulated a principle, which in the years to follow have come to be known as the Lotus Principle.

The first element of the principle formulated in this case laid down that jurisdiction is territorial, and owing to this, a State may not exercise its jurisdiction outside its territory. The only exception to this rule is that a State may do so only if an international treaty or a law permits it to do so. In the case of an ADIZ, it has already been settled from the above points that a demarcation of such a territory cannot be said to be

³¹ Article 19 of the *United Nations Convention on the Law of the Sea* mentions only innocent passage of ships and does not extend the right of innocent passage to an aircraft.

³² *SS Lotus (The Government of the French Republic v. The Government of the Turkish Republic)* [1927], PCIJ Series A No 10, available at http://www.icjciij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (last visited 30 September 2016).

within the territorial jurisdiction of a State nor can it satisfy the criterion needed for sovereignty.

The second element of this principle is that a State may, within its territory, be permitted to exercise jurisdiction on any issue if there is no specific rule of international law that prohibits it from doing so. To analyse this principle with regards to an ADIZ, the State has the right to do anything in its territory as long as that action is not in contravention of international law. The concept of an ADIZ is not mentioned in any international treaty or convention. Instead, the concept has emerged from State practice and customary international law. However, as brought to light from the aforementioned points, an ADIZ is not said to be the territory of a State, thereby giving the State, sovereignty and rights, but may be said to be a check of sorts to control unidentified aircraft in the likelihood of them entering into the territory of a State and being a threat to the State's national security.

C. Customary International Law

The theories behind ADIZ emerged from customary international law. In the context of international treaties, the International Civil Aviation Organization (ICAO), the civil aviation arm of the United Nations, has served as the international organisation for States to implement their obligations under the *1944 Chicago Convention*.³³ The convention highlights certain important points regarding the management of air traffic in international law. State rights, including the right to prescribed safe routes, right to refusal of inter-state traffic and others were mentioned in the convention. However, the convention did not bring to the fore anything that would serve as a legal basis for the governance of an ADIZ, with regards to demarcation of an area for military purposes. It was about five years after this convention that US demarcated the first ADIZ at the height of the Korean War.

Customary international law has been defined as law that is not treaty based, but exists because of state practice and international custom,

³³ *Convention on International Civil Aviation* (adopted 7 December 1944, entered into force 4 April 1947) ICAO, available at <http://www.icao.int/publications/pages/doc7300.aspx> (last visited 30 September 2016).

combined with a sense of legal obligation or *opinio juris*.³⁴ In the context of an ADIZ, this has to be looked at from the point of view of the following issues:

1. The Legality

Customary international law has come to include two elements—repeated conduct of States (*diuturnitas*) and an inherent belief that the behaviour of a State depends upon a legal obligation (*opinio juris sive necessitatis*).³⁵

When US and Canada demarcated the first ADIZ in North America, they introduced the world to a new concept of aviation security. This concept was then followed by other States, who demarcated their own regions with aviation guidelines in the form of ADIZ. These events stemmed from state practice and developed into custom, which then became prevalent as aircraft that entered into the North American ADIZ were required to provide their coordinates, place of origin and destination and to maintain two-way radio contact with the ATC on the ground.³⁶ Over the course of time, this practice then became custom and is now followed by almost every country which has declared an ADIZ.

³⁴ *R v. NY*, 2008 CanLII 24543 (ON SC).

³⁵ Tullio Treves, 'Customary International Law', *Max Planck Encyclopaedia of Public International Law* (2006). Tullio Treves writes that, 'While the *opinio juris* is by definition an opinion, a conviction, a belief, and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that in willing to behave in a certain manner States may or may not be wilfully pursuing the objective of contributing to the creation, to the modifications or to the termination of a customary rule. This applies also to the expressions of views as to whether certain behaviours are legally obligatory or as to whether a certain rule of customary law exists: these may be real expressions of belief—manifestations of *opinio juris*—or acts, corresponding or not to true belief, voluntarily made with the purpose of influencing the formation, the modification or the termination of a customary rule. These latter expressions of views are objective facts rather than subjective beliefs. The difficulty of distinguishing behaviours and expressions of views that are, or are not, made with the will of influencing the customary process, explain why in modern international law, together with the prevailing theory of the two elements of customary law, theories are often held supporting the view that only the objective, or only the subjective element, is decisive for the existence of a rule of customary international law and views that consider decisive only material facts and others that consider manifestations of opinion are relevant.'

³⁶ *Supra* n. 15.

An interesting case highlights this point: A proposal was formulated by the Republic of Indonesia, which approached the ICAO requesting certain amendments to the *Chicago Convention*. The Indonesian delegation wanted to ensure that the airspace over its archipelagic waters and superjacent airspace would come under its sovereignty. The Legal Committee of the ICAO considered the proposal and submitted a report to the ICAO. On the basis of the report, the ICAO ruled that since no rights of any aircraft were being infringed, no amendment was necessary to the *Chicago Convention*.³⁷

The legality of an ADIZ lies in the fact that a State is free to do what it wants as long as the action of that State does not violate any international law or convention, or the rights of other states in the international system. Perhaps guidelines are yet to be framed because an ADIZ has not caused a full-blown confrontation between States.

The point of contention from the international community, however, against the Chinese ADIZ declaration lies in the fact that the Chinese establishment requires identification even from transiting aircraft having no intention of entering into Chinese airspace, in direct contravention of articles 58(1) and 87(1)(b) of UNCLOS.³⁸

2. The Custom

An ADIZ is internationally accepted as customary international law. This law, while not codified, finds its authoritative power in how States react to customs that have been followed and are accepted as lawful practice all over the world.

Thus, an ADIZ is justified under international law, not by a written code holding together its rules, but by an unwritten code which arises out of customary international law. All states have a right to ask for identification from an aircraft approaching it, and an ADIZ provides a formal structure for doing so. The State also has the right, if anything

³⁷ See ICAO Legal Committee, 'Working Paper LC/33-WP/4-7' (17 April 2008), available at http://icao.int/Meetings/AMC/MA/2008/LC33/lc33_wp4_7e.pdf (last visited 6 September 2016) and Recommendations of the ICAO Legal Committee at its 33rd Session (1 May 2008), available at http://www.icao.int/Meetings/AMC/MA/2008/LC33/lc33_wp8_2e.pdf (last visited 30 September 2016).

³⁸ Raul Pedrozo, 'The Bull in the China Shop' (Vol 90 *International Law Studies Department of the US Naval War College* 2014), 12.

goes awry, to take emergency measures to defend itself from any attack under the law of self defence. While UNCLOS specifically mentions that the territorial jurisdiction of a State extends only to 12 nm, which is 22.2 kilometres off its coast, a modern fighter jet aircraft can cover that distance in less than one minute.

The Indian Government has entered into a 7.8 billion euro agreement to purchase 36 French-made Dassault Aviation Rafale fighter jets that come equipped with long-range missiles to boost the combat capabilities of the Indian Air Force³⁹. These fighter jets can fly at a top-speed of 2,130 kilometres per hour. Arithmetic calculations suggest that the Rafale fighters could traverse the 12 nm distance in under a minute at top speed⁴⁰. The Pakistani Air Force operates several squadrons of JF-17 Thunderbird aircraft jointly built with China. The top speed of this aircraft is 1,960 kilometres per hour. This means that the distance of 12 nm will be covered by this aircraft in less than a minute when flying at top speed.⁴¹ This further means that in the event of a war with India, the Indian Air Force will have that time limit to neutralise an intruder if early warning systems fail. While the JF-17 Thunderbird is not among the fastest fighter aircraft, US does boast of some of the finest aircraft. The F-22 Raptor with a top speed of 2,140 kilometres per hour is likely to traverse the 12 nm distance in even lesser time thereby being faster than the Rafale fighter jets and the JF-17 Thunderbird aircraft.

IV. METHOD OF DECLARATION OF AN ADIZ

Under the current framework as found within international law, there is no definitive set of guidelines to formulate a one-size-fits-all kind of declaration of an ADIZ. There have been various ways of declaring an ADIZ. However, what has remained constant is that every State that has demarcated an ADIZ has gone on to announce it. This declaration is

³⁹ See 'Rafale Deal: India Sign Agreement with France to Acquire 36 Jets' *Indian Express*, available at <http://indianexpress.com/article/india/india-news-india/rafale-deal-france-india-sign-agreement-36-fighter-jets-3045870/> (last visited 30 September 2016).

⁴⁰ Speed = Distance/Time, a variation of this equation helps us formulate how long a modern fighter jet will take to traverse the 22.2 kilometre distance when flying at its top speed.

⁴¹ The time taken by an aircraft to traverse the 22.2 kilometre distance (12 nautical miles which constitutes the territory of a State off its coast) may be arrived at by dividing 22.2 kilometres with the top speed at which the aircraft may fly when in full throttle.

mandatory in order to enable foreign aircraft to know what the protocol that needs to be followed entails.

Thus, historically, an ADIZ has been declared as follows:

- A State decides to demarcate a region as an ADIZ.
- This demarcation is publicly announced along with the protocol to be followed by the aircraft flying through such territory to enable such aircraft to comply with the regulations of the ADIZ.
- The aircraft that fly through such an area, in most cases, follow the protocol laid out, failing which the declaratory State may intercept the foreign aircraft, and if necessary for self-defence, pursue emergency measures.

V. OVERLAPPING ADIZ: THE INTERNATIONAL RELATIONS SAGA

There are times when an ADIZ overlaps with one declared by another State. In such scenarios, neither State will in all likelihood follow the requirements of the other's ADIZ. In such a case, the State that has declared an ADIZ has to rely heavily on bilateral relations with other States and try to build international pressure to ensure that its strategic interests are maintained. A question then arises—what should a State do when another State declares an ADIZ that overlaps one which has already been declared by the former?

To seek an answer to this question, one has to again remember that there are no sets of codified laws that govern an ADIZ. The Lotus Principle and customary international law prove that a State is at liberty to do anything as long as *jus cogens* are not flouted. A State does have the liberty, according to international law, to declare an ADIZ and there is no clarity on what happens if this ADIZ overlaps another. The fact that no rules exist in such a context means that a State may then declare an overlapping ADIZ without any repercussions with regards to concerns of violation of international law. However, such a declaration may be met with vociferous protest at the international stage, and may cause other countries to take sides in the dispute. If an overlapping ADIZ is formed, what should a pilot of an aircraft do? In such

scenarios, the pilot should inform the ATC of the State whose airspace the aircraft intends to enter. The language used by the States in their respective ADIZ declarations may in all likelihood contain a defence mechanism clause, and in order to ensure that this is not flouted, the pilot would do well to maintain two-way communication on both sides.⁴²

A. International Relations

In order to further delve into the concept of an ADIZ and find out from where this phenomenon finds its backing, it is imperative that a study of international relations concepts is looked into, to try and find answers which may justify this phenomenon.

The relationship a State shares with another is of paramount importance to understand this concept. Among the requirements of an ADIZ is the fact that the territory which has been demarcated must be defined. But what happens when even after such a definition, another State refuses to accept it and comply? A case in point is the Japanese ADIZ over the Daiyu/Senkaku Islands, which is now overlapped by the Chinese ADIZ. When Japan had declared the ADIZ, both Russia and China had refused to recognise it. The same was followed when China's declaration of an ADIZ was met with resistance by US and Japan, who said that they would not recognise it.⁴³ So how does the declaration by the State of an ADIZ result in its recognition by another State? The answer to this question may only be found in this one fact—the diplomatic relations that the State demarcating the ADIZ shares with another. This

⁴² The pilot would do well to inform both sides to ensure that interceptor aircraft are not launched and his entry into an ADIZ region is not viewed as hostile. In situations like these, it is now an accepted norm that the pilot must maintain two-way communication with the declaratory State into whose national airspace he intends to fly his aircraft. However, with regard the Chinese overlapping ADIZ, the pilot would have to inform the Chinese ATC and maintain two-way communication with them even though he may not intend to enter into Chinese national airspace since China's ADIZ declaration mandates that pilots do so.

⁴³ 'US Refuses to Recognize New Chinese Air Defense Zone' (2013) *Russia Today*, at <http://rt.com/usa/biden-seoul-air-dispute-849/> (last visited 30 September 2016), and 'Japan Scrambling Jets puts Aviation, Maritime at Risk: China' (31 October 2014) *Japan Times*, available at <http://www.japantimes.co.jp/news/2014/10/31/national/politics-diplomacy/japans-scramblingputting-aviation-maritime-safety-risk-china/#.VFZhtjSUeh8> (last visited 30 September 2016).

is one of the most important reasons why a State would recognise the ADIZ of another.

This point may be highlighted by using a territorial example. The Diaoyu/Senkaku Islands are an uninhabited mass of seven square kilometres in the middle of the East China Sea. Historically, the islands belonged to the Japanese, who relinquished control of them after World War II to US. Later, the islands were returned by the Okinawa Reversion Deal⁴⁴ signed between the two States. China also stakes claim to the islands. While the Chinese are adamant that the land masses are theirs, the Japanese are firm in stating that the islands belong to Japan. While these two States argue over which one the land belongs to, it is interesting to note that other States take sides based on whether the claimant is an ally. US has over time hinted that Japan has rights over the islands, but has stopped short of actually acknowledging it, by calling on both sides to ensure that things do not spiral out of control. It is the same with an ADIZ. A State may only recognise another ADIZ if it shares good bilateral relations with the State declaring such a zone.

A prime example of this is the US Vice-President Joe Biden stating that US would not recognise the Chinese ADIZ.⁴⁵ Subsequently, the USAF flew over the region two B-52 bombers stationed in Guam. Japan too joined in and held naval exercises within the region.⁴⁶ However, later statements by the US Administration said that US would recommend that the US-flagged aircraft and carriers should comply with the Chinese ADIZ.

There have been occasions when an ADIZ has been declared over a disputed territory. In such instances, the bilateral relations between States play a major role.

⁴⁴ See *Agreement between Japan and the United States of America Concerning the Ryukyu Islands and the Daito Island* (adopted 17 June 1971, entered into force 15 May 1972) 841 UNTS 249, at <https://treaties.un.org/doc/publication/unts/volume%20841/volume-841-i-12037-english.pdf> (last visited 30 September 2016).

⁴⁵ *Supra* n. 43.

⁴⁶ 'Japan, South Korea Hold Naval Exercise in Disputed China Air Zone' (2013) *Today Online*, at <http://m.todayonline.com/world/asia/japan-south-korea-hold-naval-exercise-disputed-china-airzone> (last visited 30 September 2016).

If a State recognises the right of another State in a particular region, it may not raise any objections to such a declaration. If the area where an ADIZ has been declared is one in which a dispute persists, such a declaration would be met with protests.

Our current world order is increasingly becoming Asia-centric. The world has moved from a uni-polar to bi-polar to a multi-polar world with the majority of what Americans would call ‘action’ seen in Asia.⁴⁷ A China which is staking its claim as one of the world’s superpowers, an economic, military and diplomatic powerhouse in the form of India, a once again nationalistic Japan under its Prime Minister Shinzō Abe and south-east Asian States which, if permitted, may play kingmakers, have all brought the world’s gaze back to Asia. There is greater power being wielded by Asia today, and this may be seen even from the current scenario in the Middle East.

VI. THE SECURITY CONCEPT

Security has played a very crucial role in the formation of ADIZ all over the world. It is this issue that has led States to demarcate zones that require identification by aircraft which may be flying towards their territories. The attacks on the World Trade Center in New York City showed the world how terrorists could use aircraft to create havoc and harm civilians. This attack has further led to proponents of the concept of an ADIZ voicing out in favour of such zones. The fact that an ADIZ acts as a security barrier and allows a State to gather foreign aircraft flight plans before it enters the State territory, and if need be launch interceptor fighter jets, has further helped propagate this concept.

In terms of security, the concept of national security is one that has taken over the world. No State wants to be the victim of an attack. This national security issue has ensured that States have a justification for the declaration of ADIZ. While these justifications may not make perfect sense, the fact that a State may choose to add the phrase ‘national security’ in its declaration may give it the mandate to do so, without raising too much suspicion.

⁴⁷ The rise of the Islamic State in the Middle East, the near skirmish between China, Japan, South Korea and US over China’s declaration of an ADIZ, the tension in the Korean Peninsula, besides others, are just a few of the examples of the rise of problems at the international stage within Asia.

VII. RESOLVING THE ADIZ PARADIGM – GUIDELINES FOR OPERATING AN ADIZ

In order to ensure that there is some clarity with regard to an ADIZ, the author proposes to formulate a few guidelines that may help States further regulate this concept:

- Every State declaring an ADIZ should be required to declare it publicly at relevant forums. These forums would include, apart from official communiqués by the Ministry of Defence of that State, a statement by its representative to the United Nations.
- In the case of overlapping ADIZ, an aircraft should be required to only inform the ATC of the State into whose airspace such aircraft intends to enter.
- All ADIZ declared will have to be submitted in writing by each declaratory State to the United Nations and the ICAO, along with the prescribed list of protocols to be followed. No change in such protocols may be made without updating the United Nations and the ICAO. In case a State changes the protocol without first adhering to such notice, the State may be dragged to the International Court of Justice. Damages may be sought if any emergency action taken by the State during such time of changing protocol without notice results in any loss of life or otherwise.
- The declaratory State should have to provide a list of all interceptions of civilian aircraft to the ICAO along with details of any neutralising action, if any.
- All disputes would be subject to the jurisdiction of the International Court of Justice and the award would be final and binding upon all States.
- States should be required to show substantial need to declare an ADIZ over a particular region. The necessity of such a declaration must be submitted to the ICAO and to the United Nations General Assembly to better regulate ADIZ and to avoid conflicts.
- States that want to declare an ADIZ over that of another State will have to substantiate such a declaration at the ICAO if such a declaration mandates identification from commercial aircraft and both the ICAO and the United Nations General Assembly if such

a declaration mandates identification from both civil and State and/or military aircraft.

- Already existing ADIZ that overlap each other are governed by such treaties as are mutually acceptable to both States.

VIII. CONCLUSION

An ADIZ may be one of two things—an offensive declaration or a defensive one. In its role as an offensive declaration, a State may declare it over a territory which is disputed or even in its bid to ensure that it gains an upper hand in a particular region. On the flip side, an ADIZ as a defensive declaration is one where a State has declared it purely for security reasons.

However, one thing is for certain. This concept is purely a security concept. When a State declares the formation of an ADIZ, it is done with the intention of ensuring that an aircraft that may be headed to its territory may be identified to ascertain whether that aircraft is friendly or is a potential threat. In this highly globalised world, power struggles happen on a daily basis. Each State tries to get one-up over another. An ADIZ, while a security tool, is also a potential arrow in the quiver of players on the global stage. While this concept has seen developments over the past five decades, it is interesting to note that near skirmishes have been caused by this concept in the decades precedent. It now remains to be seen whether such incidents will become a common occurrence in a world which is inching towards confrontation as each State arms itself to the hilt, or if this concept which serves best as a defence mechanism to deter loss of human life ensures that skirmishes do not take place.

The fact that there is no legal treaty or convention which governs an ADIZ, while helping States declare such zones, also leaves a lot wanting. The United Nations could, perhaps, frame international policy to deal with this concept, and not leave it in the ambit of customary international law, thereby giving States the power to do what they want, so long as they do not flout international conventions or practiced customs of international law. A codified set of laws to govern ADIZ, while Utopian in its thought, would decades from now in all possibility prevent a skirmish and save the world and the United Nations from a headache, as there would be a written set of rules to govern this

concept. Sovereign States have rights. However, the rights of a State in an ADIZ are something that needs to be tackled at the earliest.

While proponents of customary international law would disagree with this rationale, it must be remembered that while rules of war developed as customary law, much of it was codified in The *Hague Convention of 1899* and later the *Geneva Convention* after World War II. Perhaps a similar approach is needed for ADIZ to ensure that while States may have the right to declare such zones, issues pertaining to overlapping ADIZ, the refusal of States to accept such zones, and strict guidelines to be followed within them, may be framed and these may be uniform throughout the world.

RAPE AS AN ATROCITY: ANALYSIS OF JUDGMENTS DELIVERED BY THE DISTRICT COURT OF BILASPUR, CHHATTISGARH[†]

*Nikita Sonavane**

I. INTRODUCTION

The word ‘Dalit’ comes from the Sanskrit root ‘dal-’ and means ‘broken, ground-down, downtrodden, or oppressed’; in common parlance, it is often used to identify those who have been perceived and treated as the lowest of the low castes in India.¹ The term was initially popularised by Dr B R Ambedkar: he used it as a descriptor for the members of these so-called lower castes who were seeking political assertion and emancipation from historically inflicted violence, oppression and prejudice. Independent India, with the intention of atoning for its past of caste-based violence and discrimination, also defined the term in the Constitution² and laid down a path for the group’s protection.

Though the post-independence era was meant to herald this uplifting, Dalits remain victims of orchestrated violence. Writer and scholar D R Nagaraj, in his analysis of this violence against Dalits, identifies two patterns in the attack against them.³ The first is related to the notion of justice in a village and the second relates to obstructions faced by Dalits in asserting their rights. He observes:

‘[W]hen the behaviour of a single individual or a group of Dalits differs from and challenges traditionally accepted notions of

[†] This article reflects the position of law as on 3 June 2016.

^{*} The author is a student of Government Law College Mumbai, and is presently studying in the final year of the Three Year Law Course. She can be contacted at sonavane.nikita03@gmail.com.

¹ — ‘Who are Dalits?’, *National Campaign on Dalit Human Rights*, available at <http://www.ncdhr.org.in/dalits-untouchability/> (last visited 3 June 2016).

² Dalit is often used to refer to the category of Scheduled Castes defined under Article 366(24) of the *Constitution of India* as castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed to be Scheduled Castes for the purposes of the *Constitution of India* under article 341.

³ Dōḍḍaballāpura Rāmāyya Nāgarāj, *The Flaming Feet and Other Essays: The Dalit Movement in India* (2nd edn University of Chicago Press 2010).

morality, norms of social behaviour and rules related to love and sex, the caste-Hindu society takes it as a grave violation of its ethics and punishes the alleged offenders severely. The notions and practices of justice of the rural Hindu society are organically linked to the ethos of the caste system. Equally important is the fact that the structure of justice rests on the consensus of the entire village, which could also mean the unchallenged rule of upper castes.⁴

These notions and practices operate at an intrinsic level of the Hindu society leading to instances of violence that impact the lives of Dalits even in present times. In 2012, among the over 260 million people worldwide who faced extreme forms of discrimination, exploitation, and violence based on caste, there were nearly 167 million Indians, 16 per cent of whom were Dalits.⁵ In 2013, there were 39,327 crimes recorded against members of various Scheduled Castes across all Indian States, with a conviction rate of 23.8 per cent.⁶ The number of these crimes shot up to 47,064 in the year 2014 with a marginal drop in the conviction rate to 23.4 per cent.⁷

The first independent Indian government in its bid to move beyond lip service attempted to use legislation to address this issue. This process began with the enactment of the *Protection of Civil Rights Act, 1955*, which was passed to give effect to article 17⁸ of the *Constitution of India*. It proved to be ineffective and subsequently, led to the passage of the

⁴ *Ibid.*

⁵ —, 'India: UN Members Should Act to End Caste Discrimination' (2012) *Human Rights Watch*, available at <https://www.hrw.org/news/2012/05/14/india-un-members-should-act-end-caste-discrimination> (last visited 3 June 2016). See generally World Report 2015: India (2015) *Human Rights Watch*, available at <https://www.hrw.org/world-report/2015/country-chapters/india> (last visited 3 June 2016).

⁶ National Crime Records Bureau, 'Crime in India 2013: Statistics' (2014) *National Crime Records Bureau*, available at <http://ncrb.nic.in/StatPublications/CII/CII2013/Statistics-2013.pdf> (last visited 3 June 2016).

⁷ National Crime Records Bureau, 'Crime in India 2014: Statistics' (2015) *National Crime Records Bureau*, available at <http://www.ncrb.gov.in/cii-2014/Table%207.1.pdf> (last visited 3 June 2016).

⁸ Article 17 states: 'Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.'

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (PoA Act).⁹ The PoA Act, for the first time, classified crimes committed against members of Scheduled Castes and Scheduled Tribes as ‘atrocities’. The PoA Act and such protectionist laws aim to infuse criminal law with constitutional ideals of substantive equality by re-signifying previously stigmatised bodies as bearers of rights.¹⁰

Despite the effective mechanism envisaged under the PoA Act, the conviction rate continues to remain low.¹¹ I seek to understand the causes of this low conviction rate through my research in the Bilaspur district located in the State of Chhattisgarh. As per the 2011 census, the district of Bilaspur is the second most populous district in the State of Chhattisgarh.¹² The total population of the district is 19,61,922, of which 13.8 per cent are members of Scheduled Castes.¹³ The High Court of Chhattisgarh is located at Bilaspur. Until June 2009, there was a Special Court set up in Bilaspur to deal with cases of atrocities. This Special Court was subsequently done away with owing to paucity of cases,¹⁴ and all matters were transferred to the District Court. A separate police station has been set up and the District Court has appointed a Special Public Prosecutor to deal with all the matters under the PoA Act. The Bilaspur district meets all of the procedural requirements laid down by the PoA Act, thus making it the ideal case study.

In the context of this discourse, the violence against Dalit women deserves particular consideration as it takes a unique form at this intersection of gender and caste categories. The gender and caste discrimination that Dalit women face is the outcome of severely

⁹ Girish Agrawal and Colin Gonsalves (eds), *Dalits and The Law* (Human Rights Law Network New Delhi 2005).

¹⁰ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press New Delhi 2014).

¹¹ *Supra* n. 6 and 7.

¹² District Administration, Bilaspur (CG), ‘Statistics: General Information’ (2011) *Bilaspur: The Pride of Chhattisgarh*, available at <http://www.bilaspur.gov.in/Statistics.html> (last visited 3 June 2016).

¹³ *Ibid.*

¹⁴ The author, as part of the research, conducted interviews with the District Judge and Special Public Prosecutor of the Bilaspur District Court. Both officials stated this fact in the course of their interviews.

imbalanced social, economic and political power equations.¹⁵ According to anthropologist Leela Dube, in her 1996 work *Caste and Women*, ‘sexual asymmetry (between men and women) is bound up with the maintenance of the hierarchies of caste’. She writes that the principles of caste in fact inform the nature of sexual asymmetry in Hindu society, and simultaneously, the hierarchies of caste are articulated by gender roles. She notes that in contemporary Indian society, ‘[C]aste is not dead. Gender is a live issue ... the boundaries and hierarchies of caste are articulated by gender.’¹⁶

These observations stem from several statistical studies. A three-year study of 500 Dalit women’s experiences of violence across four Indian states shows that the majority of Dalit women report having faced one or more incidents of verbal abuse¹⁷ (62.4 per cent), physical assault (54.8 per cent), sexual harassment and assault (46.8 per cent), domestic violence (43.0 per cent) and rape (23.2 per cent).¹⁸ Another study placed the conviction rate for rapes against Dalit women at under two per cent as compared to a conviction rate of 25 per cent in rape cases against all women in India.¹⁹ The severity escalates in peculiar cases, such as those

¹⁵ All India Dalit Mahila Adhikar Manch *et al*, ‘Violence Against Dalit Women: Input to the UN Special Rapporteur on Violence against Women in connection with her visit to India between 22 April – 1 May 2013’ (2013) *International Dalit Solidarity Network*, available at http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/2013/India_submission_on_Violence_against_Dalit_Women_-_SR_on_VAW_India_2013.pdf (last visited 3 June 2016).

¹⁶ Dip Kapoor, ‘Gendered-Caste Discrimination, Human Rights Education, and the Enforcement of the Prevention of Atrocities Act in India’, (2007) 53 (3) *AJER Online* 273-286, available at <http://ajer.journalhosting.ucalgary.ca/index.php/ajer/article/view/700/678> (last visited 3 June 2016).

¹⁷ Verbal abuse included regular derogatory use of caste names and caste epithets possibly amounting to ‘hate speech’, as well as sexually explicit insults, gendered epithets and threats.

¹⁸ Aloysius Irudayam S J *et al*, ‘Dalit Women Speak Out: Violence Against Dalit Women in India’ (2006) *International Dalit Solidarity Network*, available at http://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf (last visited 3 June 2016).

¹⁹ —, ‘Dalit Women’ *International Dalit Solidarity Network*, available at <http://idsn.org/key-issues/dalit-women/> (last visited 3 June 2016).

of Devadasis,²⁰ who have been victims of societal ostracism and ritualistic exploitation,²¹ as 93 per cent of them belong to Scheduled Castes and seven per cent to Scheduled Tribes.²²

The inefficacy of the justice delivery system incapacitates it from dealing with the matters of Dalit women. Issues of Dalit women have in any case remained largely unexplored by academia, feminist organisations and other human rights groups in India. The intersection at which Dalit women are placed often creates further challenges to making the issues of violence, especially those of a sexual nature, conspicuous within the mainstream framework of analysis and action.²³ Historically, too, Dalit women have been perceived as inherently incapable of embodying honour; hence, the social meaning of rape loses its power to describe the humiliation that Dalit women face. This stems from the fact that colonial law²⁴ invested upper-caste women with greater modesty or honour as compared to Dalit women in the sphere of judicial interpretation and sentencing.²⁵ Therefore, the PoA Act, by naming the outraging of the modesty of or the dishonouring of a Dalit woman as an atrocity marks a discursive shift and imbues honour or modesty with a newer meaning with regard to Dalit women.²⁶ Given

²⁰ Devadasis are members of a community of women who dedicate themselves to the service of the patron god of the temples in eastern and southern India. Members of the order attended the god by fanning the central image, honouring it with lights, and singing and dancing for the god, as well as for the king and his close circle, who often commanded the devadasis' sexual favours. Because many devadasis engaged in temple prostitution, both the British and the upper-caste Hindus during the period of colonial rule came to hold the devadasis in low social regard. The system was outlawed in 1988. Although the number of devadasis subsequently began to decline, the institution has remained strong—although less open—in the 21st century, particularly in parts of the south. — 'Devadasi' (2015) *Encyclopaedia Britannica*, available at <http://www.britannica.com/topic/devadasi> (last visited 3 June 2016).

²¹ Maggie Black, 'Women in Ritual Slavery', (2007) Anti Slavery International, available at http://www.antislavery.org/includes/documents/cm_docs/2009/w/women_in_ritual_slavery2007.pdf (last visited 3 June 2016).

²² *Ibid.*, 3.

²³ *Supra* n. 15, 4.

²⁴ Anupama Rao, 'Caste, Gender and Indian Feminism' (2003) *Gender and Caste* 1–47, available at <http://cscs.res.in/dataarchive/textfiles/textfile.2010-03-11.8248362078/file> (last visited 3 June 2016)

²⁵ *Supra* n. 10.

²⁶ See Dr. Anand Teltumbde, 'Khairlanji Verdict Whither the Atrocity Act?' (2009) *Combat Law*, available at <http://www.combatlaw.org/khairlanji-verdict-whither-the-atrocity-act/> (last visited 3 June 2016).

this context, I decided to further focus my research on cases of sexual violence, specifically rape of Dalit women and the application of the PoA Act in Bilaspur.

At the outset, in Part II of the article, I have analysed relevant sections of the PoA Act to determine its application in cases of rape of Dalit women.

Then, in Part III, I have analysed the 23 judgments delivered by the District Court of Bilaspur between May 2009 and December 2014. These judgments were recorded in Hindi and for the purposes of research and analysis, I translated them into English.²⁷

This article is based on primary and secondary legal research. The qualitative research methodology has been employed to analyse the causes of the low conviction rate in Bilaspur. During the process of collecting judgments the method of quota sampling²⁸ has been used; I have selected only those judgments that involved a charge of rape of Scheduled Caste women. The qualitative method of in depth interview²⁹ has also been relied upon by conducting interviews of prosecutrices in cases pending at the District Court of Bilaspur.

The subject matter is intended for an audience of victim-survivors, scholars, researchers, practitioners, local community members, and policy makers.

Part IV deals with the role of investigating agencies in implementing the PoA Act to understand the process by which the prosecution's case is marred and injustice is consequently aggravated when the investigating agencies fail to perform their duty upon the registration

²⁷ The author has accurately translated and transliterated the original judgments into English, to the best of her knowledge and having made every possible and reasonable effort. Discrepancies, if they arise, may be attributed to the limitations of translation and language.

²⁸ Natasha Mack *et al*, 'Qualitative Research Methods: A Data Collector's Field Guide' (2005) *Family Health International* 360, available at <http://www.fhi360.org/sites/default/files/media/documents/Qualitative%20Research%20Methods%20-%20A%20Data%20Collector's%20Field%20Guide.pdf> (last visited 3 June 2016).

²⁹ *Ibid*.

of a First Information Report (FIR).³⁰ As part of my research, I sought information, under the *Right to Information Act, 2005* (RTI Act) from the Scheduled Caste and Scheduled Tribes Police Station located at Sarkanda in the Bilaspur district regarding the number of complaints registered.

In Part V of the article, I have analysed the *Khairlanji* massacre, which is a recent and archetypal instance of shoddy investigation in caste crimes.

Finally, in Part VI of the article, I conclude by analysing the amendments to the PoA Act that came into force in January 2016 and the changes, if any, that these amendments would bring about.

II. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989

A. *Object and Definitions*

Coming nearly four decades after the Indian Constitution, the PoA Act has been the most important measure to address the commission of atrocities against Dalits.³¹ Unlike its predecessor, the *Civil Rights Act 1955*, which only concerned itself with superficial humiliations such as verbal abuse, the PoA Act is a tacit acknowledgement by the State that caste relations are defined by violence, both incidental and systemic.³² However, 25 years later, the PoA Act remains one of the most underutilised provisions of law especially in the face of rampant violence against Dalits.

The object of the PoA Act is as follows:

‘An Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts for the trial of such offences and for

³⁰ Teesta Setalvad, ‘Caste Crimes’ (2005) *Communalism Combat*, available at <http://www.sabrang.com/cc/archive/2005/mar05/cover.html> (last visited 3 June 2016).

³¹ Anand Teltumbde, *The Persistence of Caste: The Khairlanji Murders and India’s Hidden Apartheid* (Zed Books London 2010).

³² *Ibid.*

the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.’³³

The PoA Act aspires to address and curb everyday and extraordinary caste-based violence against the Dalits and the Adivasis. However, when listing the offences punishable therein, the PoA Act uses the phrase ‘whoever not being a member of a Scheduled Caste or Scheduled Tribe’ to indicate that its provisions come into play when the offender is not a Dalit or Adivasi. In other words, a Dalit man cannot be prosecuted for raping tribal women under the PoA Act and such a charge must be prosecuted under the *Indian Penal Code, 1860* (IPC) alone.

Further, the term ‘atrocities’ has not been defined under the PoA Act. Section 2(1)(a) of the PoA Act merely states that the term ‘atrocities’ means an offence punishable under section 3 of the PoA Act.

B. Atrocities against Dalit Women

Two sections of the PoA Act apply to the offences of assault, rape or sexual humiliation of Dalit women.

Section 3(1)(xi) of the Act states:

‘Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, assaults or uses force to any woman belonging to a Scheduled Caste or Scheduled Tribe with the intent to dishonour or outrage her modesty; shall be punishable with imprisonment for a term which shall not be less than six months or which may extend to five years with fine.’³⁴

Further, Section 3(1)(xii) of the Act states:

‘Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed; shall be punishable with imprisonment for

³³ *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*, preamble.

³⁴ *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*, sub-section (1)(xi) of section 3.

a term which shall not be less than six months but which may extend to five years with fine.’³⁵

In order to attract section 3(1)(xii), the sexual exploitation must have taken place because of the offender’s position of dominance. The term ‘sexual exploitation’ has not been defined in the PoA Act, nor has it been used in the IPC. These words can, therefore, be interpreted to have the same meaning as normally accorded to them in the English language. The word ‘otherwise’ is significant, and clearly indicates that the exploitation must be with the agreement of the woman, where she would not have agreed but for the offender’s position of dominance. This section has been included in the PoA Act to deal specifically with sexual violence committed in the dynamic of a master-servant relationship.

Relatedly, for certain offences against Dalits, section 3(2)(v) of the PoA Act provides for the enhancement of the punishment that is available under the IPC. This becomes applicable when an offender commits a crime against a Dalit, but there is no specific section of the PoA Act addressing that particular crime. The accused is then charged with the appropriate section under the IPC with enhanced punishment as per section 3(2)(v) of the PoA Act. This section reads as under:

‘Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life with fine.’³⁶

The rape of a woman is punishable under section 376 of the IPC with imprisonment of either description that may extend to a term of ten years or for life. If, however, the woman in question is a member of a Scheduled Caste or a Scheduled Tribe, section 3(2)(v) of the PoA Act is

³⁵ *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*, sub-section (1)(xii) of section 3.

³⁶ *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*, sub-section (2)(v) section 3.

attracted and may provide for greater punishment. However, crucially, in order to attract the enhanced punishment prescribed by section 3(2)(v) of the PoA Act, it is necessary to prove that the woman in question was raped on the ground that she was a Dalit or a tribal.

This requirement that the rape must have been committed 'on the ground' that the woman was a member of a Scheduled Caste or Scheduled Tribe gives the judges a wide room to exercise their discretion. The threshold that must be met for proving the commission of the atrocity is, therefore, quite high. The burden rests on the prosecution to prove that the accused not only had prior knowledge of the victim's caste, but also that he acted on the basis of such knowledge in the commission of the crime.

III. ANALYSIS OF JUDGMENTS DELIVERED BY THE DISTRICT COURT OF BILASPUR

In this part, I have analysed the 23 judgments delivered by the District Court of Bilaspur in cases where the accused was charged both with the commission of rape under the IPC³⁷ and of an atrocity under the PoA Act between June 2009 and December 2014. Until May 2009, a Special Court, as mandated by the PoA Act, dealt with cases under the Act. However, after the Special Court was removed, all cases were transferred to the District Court, which now performs the functions of the Special Court. I have, first, analysed judgments delivered in 18 cases wherein the accused have been acquitted under section 376 of the Indian Penal Code (IPC) thereby leading to an acquittal under the PoA Act by default. Then, I have analysed six judgments wherein the accused have been convicted under section 376 of the IPC, but have been acquitted under section 3(2)(v) of the PoA Act; ie, they were found guilty of rape under the IPC, but not found guilty of having committed an atrocity against a Dalit woman under the PoA Act. Lastly, in this part, I have examined the sole case in which the accused is convicted under the PoA Act for the atrocity of raping a Dalit woman.

³⁷ *The Indian Penal Code, 1860* as it existed before the *Criminal Law (Amendment) Act of 2013* came into force, applies to all of the judgments in this article.

A. Cases of Acquittal under the IPC and the PoA Act

This sub-part deals with 18 cases wherein the accused were acquitted under the IPC and therefore, by default, also acquitted under the PoA Act, as the accused cannot be found guilty of the atrocity of raping a Dalit woman if he is not found guilty of the rape in the first place.

These cases have been divided into three sub-categories on the basis of the patterns emerging in them.

1. Promises of Marriage

The following eight cases have been analysed hereunder:

- (i) *State of Chhattisgarh v. Raghu alias Raghvendra Vaishnav*³⁸
- (ii) *State of Chhattisgarh v. Rakesh Yadav and Others*³⁹
- (iii) *State of Chhattisgarh v. Kamal Yadav*⁴⁰
- (iv) *State of Chhattisgarh v. Rakesh Soni alias Mintu*⁴¹
- (v) *State of Chhattisgarh v. Prabhu Panika*⁴²
- (vi) *State of Chhattisgarh v. Rajkumar Dubey*⁴³
- (vii) *State of Chhattisgarh v. Vinod Katela Jain*⁴⁴
- (viii) *State of Chhattisgarh v. Satish Gupta*⁴⁵

Most of these cases have nearly identical facts wherein the accused established sexual intercourse with the prosecutrix by promising to marry her, but subsequently refused to do so. In these cases, the prosecutrices sought to take recourse to section 376 of the IPC, which lays down the offence of rape, and section 90, which negates consent obtained under a misconception of fact or fraud. As the prosecutrices

³⁸ District Court of Bilaspur Special Case (Atrocities Act) No. 35/2010.

³⁹ District Court of Bilaspur Special Case (Atrocities Act) No. 25/2010.

⁴⁰ District Court of Bilaspur Special Case (Atrocities Act) No. 15/2010.

⁴¹ District Court of Bilaspur Special Case (Atrocities Act) No. 23/2010.

⁴² District Court of Bilaspur Special Case (Atrocities Act) No. 35/2009.

⁴³ District Court of Bilaspur Special Case (Atrocities Act) No. 18/2013.

⁴⁴ District Court of Bilaspur Special Case (Atrocities Act) No. 32/2007.

⁴⁵ District Court of Bilaspur Special Case (Atrocities Act) No. 25/2012.

all belonged to a Scheduled Caste, the accused in all cases were also charged under section 3(2)(v) of the PoA Act, which provides for enhanced punishment for certain offences committed under the IPC against a member of a Scheduled Caste or Tribe, along with sections 3(i)(xi), 3(i)(xii), or both of the PoA Act, which deal with the assault, rape or sexual humiliation of Dalit women.

In the case of *State of Chhattisgarh v. Vinod Katela Jain*, for instance, both the prosecutrix and the accused were public servants. The prosecutrix was the subordinate of the accused. The accused invited the prosecutrix to his house for his daughter's birthday party. On reaching his house, the prosecutrix discovered that the accused was alone and that the birthday party was a ruse to engage in sexual intercourse with her. She resisted but the accused had sex with her against her will. Following this incident the accused and prosecutrix began a romantic relationship. The accused promised to marry the prosecutrix despite already being married and continued to engage with her sexually on the basis of this promise.

Since the prosecutrix belonged to the Ganda caste, which is a Scheduled Caste, the accused was charged under section 3(2)(v) of the PoA Act, which provides for enhanced punishment for rape. The relationship between the accused and the prosecutrix was that of a master and a servant, ie, the accused was in a position to dominate the will of the prosecutrix. This dynamic should therefore have led to the framing of a charge under section 3(1)(xii) of the PoA Act, as well. However, surprisingly, the accused was not so charged by the investigating authority, nor did the Court frame a charge under this section. The prosecution, which has the authority to *suo motu* frame a charge by an application to the Court, also failed in its duty to do so in this case. Thus, the accused was never tried under section 3(i)(xii) of the PoA Act.

The accused was acquitted under section 376(2)(b) of the IPC as well as section 3(2)(v) of the PoA Act. The Court held that section 90, which negates consent obtained under a misconception of fact or fraud, did not render non-consensual the sexual intercourse that was initiated on the basis of the accused's promise of marriage; thus, there was no rape. This was held because the prosecutrix was (or should have been) aware that she and the accused belonged to different castes and that their families would object to such a marriage. The Court also held

that the prosecutrix was a consenting party since she was an educated woman who was aware that the accused was a married man who could not have legally married her and yet, continued to engage with him sexually.

The Court also relied on this rationale in the case of *State of Chhattisgarh v. Satish Gupta*⁴⁶ where it was held that the prosecutrix, who was 25 years old at the time of the commission of the offence, was well aware that she and the accused belonged to different castes and that, consequently, it was not possible for them to marry. It was further stated that the prosecutrix continued to engage in sexual intercourse with the accused despite knowing this, and thus, could not be accorded the benefit of a 'misconception of fact' under section 90 of the IPC. The Court also held that the medical examination proved that the prosecutrix was habituated to sexual intercourse, and found that she had engaged in it consensually with the accused. Therefore, the accused was acquitted under sections 376 and 506 of the IPC as well as section 3(2)(v) of the PoA Act. The remaining judgments are on similar lines.

In these cases, not only were the accused not found guilty of a caste atrocity against the prosecutrices, but the impossibility of an inter-caste marriage was also used as a ground to acquit the accused of rape. The Court is in fact upholding the archaic practice of marrying within one's own caste. This is a conscionable blunder on the part of the Court and runs counter to the ethos of the Indian Constitution, and the aspirations of one of its primary makers, Dr B R Ambedkar, who deemed inter-caste marriage to be the real remedy to defeat castiest dogma.⁴⁷

2. Cases of Prosecutrices Turning Hostile

The accused were acquitted in the following cases as a result of the prosecutrices turning hostile and denying the prosecution's versions of the incidents:

- (i) *State of Chhattisgarh v. Purshottam Kumar Soni and Others*⁴⁸

⁴⁶ *Ibid.*

⁴⁷ Dr B R Ambedkar, *Annihilation of Caste* (3rd edn Pradbuddha Bhart Pustkalya Nagpur 2011).

⁴⁸ District Court of Bilaspur Special Case (Atrocities Act) No. 26/2012.

- (ii) *State of Chhattisgarh v. Jaykumar Sahu*⁴⁹
- (iii) *State of Chhattisgarh v. Samarth Lal alias Chotu*⁵⁰
- (iv) *State of Chhattisgarh v. Jogeshwar Rathore and Others*⁵¹
- (v) *State of Chhattisgarh v. Jawahar Soni*⁵²
- (vi) *State of Chhattisgarh v. Ashutosh Singhal*⁵³
- (vii) *State of Chhattisgarh v. Deepu alias Deepchand*⁵⁴

A study conducted on the performance of the former Special Courts set up under the PoA Act found that the prosecutrices were compelled to turn hostile due to their economic dependence on the upper and dominant castes and their state of insecurity.⁵⁵ It also concluded that a hostile witness was the main reason for the high rate of acquittals in such cases.⁵⁶ During the course of the interviews I conducted with the prosecutrices in pending cases in the District Court, I discovered that they were subjected to immense societal pressure to withdraw their cases. In one of the cases, the prosecutrix was raped by a man who lived in the same locality as her. The majority of the people living in the locality belonged to the same (upper) caste as the accused, and the prosecutrix was hounded by taunts and snide remarks on a regular basis. This harassment, coupled with the financial burden that the litigation imposed on her family, was making it difficult for her to prosecute the case.

⁴⁹ District Court of Bilaspur Special Case (Atrocities Act) No. 1/2012.

⁵⁰ District Court of Bilaspur Special Case (Atrocities Act) No. 11/2013.

⁵¹ District Court of Bilaspur Special Case (Atrocities Act) No. 36/2009.

⁵² District Court of Bilaspur Special Case (Atrocities Act) No. 12/2009.

⁵³ District Court of Bilaspur Special Case (Atrocities Act) No. 27/2013.

⁵⁴ District Court of Bilaspur Special Case (Atrocities Act) No. 32/2010.

⁵⁵ Centre for Study of Casteism, Communalism and Law (CSCCL), National Law School, Bangalore, India, 'Study on the Performance of Special Courts Set up under the SC ST Prevention of Atrocity Act' *International Dalit Solidarity Network*, available at http://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/Performan_of_courts_SCST_act_Study.pdf (last visited 3 June 2016).

⁵⁶ *Ibid.*

3. Other Cases of Acquittal

The remaining three cases of acquittal did not fall into either of the preceding categories. In *State of Chhattisgarh v. Jaleshwar Kashyap*,⁵⁷ the Court, while acquitting the accused, noted that the prosecutrix had earlier filed a rape complaint against one Neil Prakash, and that that matter had been resolved when the villagers convinced both parties to enter into a compromise. This history was one of the grounds relied upon to acquit the accused under section 376 of the IPC and under section 3(2)(v) of the PoA Act.

Similarly, in *State of Chhattisgarh v. Gaurishankar Tiwari and another*,⁵⁸ the Court noted that the prosecutrix had admitted to having previously had an affair with a man named Ram Singh, and that she had filed false complaints in the past against different people. It used this as a ground to doubt the veracity of the prosecutrix's statement. This, coupled with other facts, led to the acquittal of the accused under the IPC.

Finally, in *State of Chhattisgarh v. Narendra Kumar Dubey*,⁵⁹ the accused was acquitted on the ground that the prosecutrix's testimony was in some way 'marred with suspicion' and that the medical evidence was unreliable because she was married and thus, habituated to sexual intercourse. Strangely, the judgment does not reveal a charge framed under section 3(2)(v) of the PoA Act, which is a necessary corollary in a case alleging the rape of a woman belonging to a Scheduled Caste. The accused was acquitted under section 3(1)(xii) of the PoA Act along with sections 376 and 506 of the IPC.

B. Cases of Conviction under the IPC and Acquittal under the PoA Act

In the following sub-part, I analyse the six cases in which the accused were convicted of rape under section 376 of the IPC but were acquitted under the PoA Act. In each case, the Court held that there was no evidence on record to prove that the prosecutrix was raped by the accused specifically on the ground that she was from a Scheduled Caste. This was the basis for the acquittal of the accused in *State of Chhattisgarh*

⁵⁷ District Court of Bilaspur Special Case (Atrocities Act) No. 31/2010.

⁵⁸ District Court of Bilaspur Special Case (Atrocities Act) No. 5/2008.

⁵⁹ District Court of Bilaspur Special Case (Atrocities Act) No. 27/2009.

v. *Mukku alias Mukesh Yadav*,⁶⁰ *State of Chhattisgarh v. Nepal Singh*,⁶¹ *State of Chhattisgarh v. Rajkumar Patel*,⁶² *State of Chhattisgarh v. Chaitu alias Chaitram*,⁶³ and *State of Chhattisgarh v. Keshav Lal*.⁶⁴

In *State of Chhattisgarh v. Chaitu alias Chaitram*,⁶⁵ an FIR was lodged under sections 376 of the IPC and 3(2)(v) of the PoA Act. The Court held that the prosecution did not present any evidence to prove that the rape took place because of the prosecutrix's caste. Therefore, the accused was acquitted under section 3(2)(v) of the PoA Act. The phrase '*abhiyukt ne prarthiya ko choddh diya*', a vulgar pejorative to describe sexual intercourse in Hindi, was repeatedly used in the judgment to describe the act of rape committed. While the official Devanagari translation of the IPC provides that the term '*laingik sambhog*' can be used to describe sexual intercourse, the deliberate use of crude language by the judge in describing the heinous act of rape begs the question of whether a judge who displays such coarseness should be considered capable of dealing with sensitive issues such as rape and caste. It also raises doubts about the fairness of the trial being conducted in this case. The absence of the term '*laingik sambhog*' in describing the act of rape is conspicuous in all judgments analysed for the purpose of this article.

In *State of Chhattisgarh v. Krishna Kumar Sahu*,⁶⁶ the accused was convicted under section 354⁶⁷ of the IPC for outraging the modesty of a woman but acquitted under the corresponding section 3(1)(ix) of the PoA Act. Despite the prosecution being exempt from fulfilling the threshold laid down under Section 3(2)(v), which applies only to cases punishable with ten years or more under the IPC, the accused has been acquitted under Section 3(1)(ix). The accused ought to have been

⁶⁰ District Court of Bilaspur Special Case (Atrocities Act) No. 33/12.

⁶¹ District Court of Bilaspur Special Case (Atrocities Act) No. 43/09.

⁶² District Court of Bilaspur Special Case (Atrocities Act) No. 18/2013.

⁶³ District Court of Bilaspur Special Case (Atrocities Act) No. 23/2009.

⁶⁴ District Court of Bilaspur Special Case (Atrocities Act) No. 12/13.

⁶⁵ District Court of Bilaspur Special Case (Atrocities Act) No. 23/2009.

⁶⁶ District Court of Bilaspur Special Case (Atrocities Act) No. 14/13.

⁶⁷ Assault or criminal force to woman with intent to outrage her modesty—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

convicted by default under the PoA Act owing to his conviction under section 354 of the IPC. In failing to do so, the Court has committed a gross error in the application of law.

C. *Sole Case of Conviction under the PoA Act*

The case of *State of Chhattisgarh v. Manik Lal Tandiya*⁶⁸ is the only case in which the District Court convicted the accused under the PoA Act. The prosecutrix was a 30-year-old married woman who, on 16 June 2012, went to the fields for her ablutions. Suddenly, the accused came to the field, pushed her to the ground and began raping her. When she screamed, he threatened to kill her. The prosecutrix's house is located approximately three–four metres from the area of the crime scene. When she reached home, she narrated the incident to her in-laws and her husband. Her husband called the *sarpanch* following which they filed a report at the police station.

The Court held the accused guilty under section 376 of the IPC. As the accused had threatened to kill the prosecutrix when she protested against the rape, the Court held that the prosecutrix's consent was obtained in consequence of such fear, and was covered by section 90 of the IPC.

The prosecutrix was examined, and the medical report stated that the prosecutrix was habituated to sexual intercourse and had been sexually active around 24–48 hours prior to the examination. However, the medical examiner also opined that there were no external signs of injury on the victim's body and that the white vaginal discharge could also be due to a reason other than that related to rape. Therefore, it could not be concluded beyond all reasonable doubt that the prosecutrix was raped.

The Court held that since the prosecutrix was a married woman in her 30s, the medical examiner's opinion was unimportant as no married woman would put her honour at stake by falsely accusing a man of raping her. In this case, the Court seems to have adopted a liberal view by not placing any reliance on the medical examiner's opinion, unlike previous cases wherein reports of the medical examiner have impacted the outcome of the cases.

⁶⁸ District Court of Bilaspur Special Case (Atrocities Act) No. 19/2013.

The caste certificate presented to the Court stated that the prosecutrix belonged to the Gond caste, which falls under the Scheduled Caste category. In his statement made to the Court under section 313 of the *Code of Criminal Procedure, 1973* (CrPC), the accused admitted to knowing that the prosecutrix belongs to the Gond caste, which is a Scheduled Caste, and admitted to being a member of the Panika caste, which does not fall under the Scheduled Caste category. The accused and the prosecutrix were also neighbours. The Court held on this basis that the accused was aware that the prosecutrix belonged to the Scheduled Caste and that the crime was committed because the prosecutrix belonged to the Scheduled Caste. Thereby, the accused was convicted under section 3(2)(v) of the PoA Act.

As per section 3(2)(v) of the PoA Act, the knowledge of a woman's caste must be the ground for the commission of the crime. It is for this reason that many of the acquittals in the previous sections were obtained, owing to the difficulty inherent in proving that the rape was specifically committed because the woman belonged to a Scheduled Caste. However, there is nothing to distinguish this case from the previous ones. There is nothing that proves that the accused committed the crime because the woman was a member of the Gond caste. The absence of any distinguishing feature unique to this case fails to explain the rare conviction, when so many other cases with similar factual matrices resulted in an acquittal. It suggests a certain degree of arbitrariness in the judgments. It is interesting to note that, during my interaction with him, I was made aware of the fact that the judge presiding over this case also belonged to a Scheduled Caste. Some may opine that this judgment is tainted with personal bias, but one cannot simply assume the legal soundness of the previous cases to debunk the irregularity in *Manik Lal Tandiya*, as the entire lot of them are highly susceptible to well-conceived criticism. I firmly believe that the arbitrary and unfettered discretion conferred on the Court in such matters has led to a failure in the deliverance of justice.

During my interaction with the court staff, lawyers and police, I was explicitly told several times that the Bilaspur District was devoid of caste prejudice. It was morbidly ironic to see the same authorities being entrusted with the responsibility of bringing to justice those responsible for committing caste atrocities in Bilaspur.

IV. ROLE OF INVESTIGATING AGENCIES

Investigating agencies form the backbone of the criminal justice system. A sound and objective investigating agency is crucial to the process of securing the ends of justice. Objectivity in the process of investigation is beleaguered when room is provided for individual prejudices to trickle in, the possibility of which is amplified in matters of rape and caste.

A. *Filing of FIRs*

An FIR is the necessary initial step to commence the legal process when an atrocity takes place or untouchability is practiced, and is also the primary vehicle that the police use to block Dalits from taking recourse to the law.⁶⁹ In 2014, a total of 34,163 charge sheets were filed for various offences committed against the Scheduled Caste community across all States, out of which 1929 were in rape cases.⁷⁰

Amnesty International notes that non-registration of crimes in India is a general problem. Besides the existent constraints, filing an FIR is in and of itself a challenge. Political influence over the police and the caste, class, religious, and gender biases of the police make it particularly difficult for Dalits to file FIRs, especially against influential upper-caste individuals.⁷¹

The Ahmedabad-based Centre for Social Justice (CSJ) conducted a detailed study of 400 judgements delivered by the Special Courts set up in Gujarat in sixteen districts since 1 April 1995. It revealed a shocking pattern behind the main reasons for the collapse of cases filed under the PoA Act within Gujarat: utterly negligent police investigation at both the higher and lower levels coupled with a distinctly hostile role played by the public prosecutors. In over 95 per cent of the cases, acquittals had resulted due to technical lapses in investigation and prosecution, and in the remaining five per cent, court directives were flouted by the government.⁷²

⁶⁹ *Supra* n. 9.

⁷⁰ National Crime Records Bureau, 'Crime in India 2014: Statistics' (2015) *National Crime Records Bureau*, available at <http://ncrb.gov.in/StatPublications/CII/CII2014/chapters/Chapter%207.pdf> (last visited 3 June 2016).

⁷¹ *Supra* n. 16.

⁷² *Supra* n. 31.

By not registering complaints, or registering FIRs under incorrect sections of the law, or leaving out the provisions of the PoA Act, police fail to carry out their official law and order duties as well as abide by the law.⁷³ The case of *Vinod Katela Jain*,⁷⁴ mentioned previously, is one such instance wherein the investigating authority failed to file a charge under the relevant section, thereby resulting in an acquittal.

Botched up investigations weaken the prosecution's case further especially in cases of rape as an atrocity, where the prosecution is already reeling under the weight of proving the accused's intention while committing the crime as warranted by Section 3(2)(v) of the PoA Act. In *M C Prassanan v. the State*,⁷⁵ while dealing with the case of the rape of a minor girl by her teacher, the Calcutta High Court noted the following in its judgment:

'From such delay in framing the charge under section 3(1)(xii) of the Act of 1989 it can be easily presumed that neither I.O. nor the learned Prosecutor nor the learned Sessions Judge nor the learned Chief Judicial Magistrate who committed the case for trial to the learned Sessions Judge was aware of the existence of Act of 1989.'

B. Functioning of Special Police Stations

The PoA Act mandates the setting up of separate police stations in each district to deal with the cases of crimes against Dalits and tribals.⁷⁶ The district of Bilaspur has a separate police force to deal with these cases. On 14 December 2014, I requested information on the number of complaints received and FIRs filed between the years 2009 to 2014 for all offences under the PoA Act at the Scheduled Castes and Scheduled Tribes police station, under the RTI Act.

In the year 2013, 2.65 per cent of the total number of rape cases against Dalit women across all states in the country occurred in Chhattisgarh.⁷⁷

⁷³ *Supra* n. 9.

⁷⁴ *Supra* n. 44.

⁷⁵ 1999 Cri LJ 998, para 25.

⁷⁶ *Supra* n. 9.

⁷⁷ National Crime Records Bureau, 'Crime in India 2013: Statistics' (2014) *National Crime Records Bureau*, available at <http://ncrb.nic.in/StatPublications/CII/CII2013/Statistics-2013.pdf> (last visited 3 June 2016).

The information above reveals that a large number of cases from amongst the total number of complaints received have been settled through compromise. In the year 2011, compromise was arrived at in 71 cases of the 272 complaints received by the police station. This further corroborates the fact that the investigating agencies, besides abandoning their duties, mete out a procedure that jeopardises the interests of the victims.

C. *PoA Rules*

In 1995, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules (PoA Rules) were promulgated. The PoA Rules were intended as an essential corollary to the PoA Act to ensure its effective implementation. For instance, rule 11 provides for travelling allowance, daily maintenance expenses and transport facilities for victims of atrocities, their dependents, and witnesses.⁷⁸ In my interactions with three victims out of the six cases pending at the District Court in 2014, I discovered that none of them were paid any allowance as mandated by the PoA Rules. All the victims stated that approaching the judicial system was in itself a massive step given the stigma they faced. The financial burden acquired during the course of the trial was cited as another deterrent in approaching the Court.

V. THE KHAIRLANJI MASSACRE

When discussing the concerns and vagaries of the justice delivery system pertaining to caste based crimes, particularly rape, it is beneficial to have some understanding of the abject failure of the system, the legal safeguards and even the civic society, embodied in the case of the *Khairlanji* massacre, which remains one of the most gruesome examples of caste based violence since Indian independence.

The victims of the violence in this case were from the Bhotmange family, that consisted of Bhaiyalal Bhotmange (55, at the time of the carnage), his wife Surekha Bhotmange (40), their sons Sudhir (21) and Roshan (19), and daughter Priyanka (17), who originally belonged to Ambagad village, 25 kilometres from Khairlanji. Economic hardship

⁷⁸ *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995.*

caused the family to move to Khairlanji in 1989. Being members of a lower caste, they were subjected to the villagers' prejudicial harassment.

On 3 September 2006, one Siddharth Gajbhiye was beaten up by 15 people from Khairlanji due to some petty cause. On 16 September 2006, 12 culprits were arrested by the police based on the accounts of the eyewitnesses: Priyanka, Surekha, Sudhir and Bhaiyyalal Bhotmange. This did not go well with the criminals. After being released on bail on 29 September 2006, they incited 40 villagers of Khairlanji, all belonging to the dominant castes, and planned to attack and murder Siddharth Gajbhiye and his brother Rajan Gajbhiye. Somehow, Surekha Bhotmange and Priyanka Bhotmange got wind of this plan and informed Rajan Gajbhiye.

When the villagers could not find Sidhharth and Rajan Gajbhiye, and learned that they had been forewarned by the Bhotmange family, they became furious and turned their hoodlums to the house of the Bhotmange family with the weapons of bicycle chains, axes, daggers and sticks. Seeing the approaching mob, Bhaiyalal Bhotmange ran away. Only Surekha and her children were present at home. Both the Bhotmange women, Surekha and Priyanka, were stripped of their clothes. The dreadful photographs show that there was not an inch of these young women's bodies that was not marked by bruises.⁷⁹ Four members of the Dalit Bhotmange family were brutally murdered.

The FIR (No 56/2006) invoked the following sections of the IPC: 147 (punishment for rioting), 148 (rioting, armed with deadly weapon), 149 (common object), 302 (punishment for murder), and 201 (causing disappearance of evidence of offence, or giving false information to screen offender). None of these had any bearing on the crime committed. The PoA Act was also invoked, but only in its mildest: section 3(1) (intentional insult or clause intimidation with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view). Crucially, sections 376 (for rape) and 354 (assault or criminal force on a woman with intent to outrage her

⁷⁹ Brinda Karat, 'Khairlanji Verdict Blind to Dalit Cause' (1 August 2010) *The Times of India*, available at <http://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/Khairlanji-verdict-blind-to-dalit-cause/articleshow/6242212.cms> (last visited 3 June 2016).

modesty) of the IPC were not invoked in the FIR.⁸⁰ Eventually, the Sessions Court held eight out of the 11 accused to be guilty of the offences under the IPC and sentenced six out of the eight to death and two to life imprisonment, and acquitted the remaining three. However, none of the accused were found guilty under the PoA Act.⁸¹

In its judgement delivered on 14 July 2010, the Nagpur Bench of the Bombay High Court commuted the death sentence of all six accused to life imprisonment. While acquitting the accused under the PoA Act, the Court held that the entire object had been to take revenge against Surekha and Priyanka to settle old scores.⁸² The judgment took a parochial view of the motive of revenge, failing to appreciate that the dimensions of revenge against Dalits are quite different from other cases, given the caste-ridden nature of our society.

The *Khairlanji* case is symbolic of all the cases where failure on the part of the investigating agency and the judiciary to perform their duties has resulted in the perpetuation of sexual violence against Dalit women. It is a reminder of the apathetic system in place nationally that render the PoA Act and other legal frameworks meaningless.

VI. CURRENT SCENARIO AND ITS IMPLICATIONS

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Bill, 2014 was introduced in the Lok Sabha by the Minister of Social Justice and Empowerment on 16 July 2014. *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015* (the PoA Amendment Act) subsequently came into force on 26 January 2016.⁸³

⁸⁰ *Supra* n. 31.

⁸¹ *State of Maharashtra v. Gopal @ Jitendra 10* (2008) Special Court at Bhandara Special Criminal Case No. 01/2007 (Unreported 24 September 2008).

⁸² *Central Bureau of Investigation through DSP, CBI SCB v. Sakru Mahagu Binjewar (Original Accused No. 2) and Others* (2010) High Court of Bombay, Nagpur Bench Criminal Confirmation Case No. 4/2008 (Unreported 14 July 2010) along with four connected appeals, para 43D.

⁸³ Maneesh Chhibber and Avishek G Dastidar, 'Govt Notifies Amended SC/ST Law' (New Delhi 26 January 2016) *The Indian Express*, available at <http://indianexpress.com/article/india/india-news-india/govt-notifies-amended-scst-law/> (last visited 3 June 2016).

The PoA Amendment Act classifies new offences as atrocities committed against Dalits. In section 3(1)(w), the following offences have been included as atrocities committed against Dalit women:

‘(i) intentionally touching an SC or ST woman in a sexual manner without her consent, or (ii) using words, acts or gestures of a sexual nature, or (iii) dedicating an SC or ST women as a devadasi to a temple, or any similar practice will also be considered an offence.’⁸⁴

The PoA Amendment Act also substitutes the words of section 3(2)(v) of the principal legislation, ‘on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member’, with the words ‘knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe.’⁸⁵ This, ideally, would serve to lower the threshold that has to be met by the prosecution for the accused to be convicted of an atrocity, as it requires only that the accused know that the person is a member of a Scheduled Caste or Tribe, not that the act be committed for that reason and on that basis alone.

It also shifts the burden on the defence to prove the absence of such knowledge in the commission of the crime. But the existence of a threshold howsoever low has no place in a legislation that seeks to eliminate the pervasive evil of caste since the experience of victims-survivors of caste atrocity with the criminal justice system is greatly shaped by their (lower) caste identities. This is particularly true for Dalit women, who not only have to battle societal backlash but also tackle the callousness of the state machinery while striving to obtain justice in cases of sexual violence. A threshold such as this one can only be laid down when we have successfully insulated the criminal justice system from prejudices of caste and gender.

⁸⁴ *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015*, sub-section (i) of section 4.

⁸⁵ *The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015*, sub-section (ii) of section 4.

The crimes against Dalits are catalysed by social prejudice and their vulnerability.⁸⁶ Sexual violence against Dalit women has always been used as a potent tool to further marginalise the lower castes. Under the PoA Act, attempts to seek redress were often obstructed by a complex psychosocial blend of external impositions such as threats of retaliation and violence by the caste perpetrators (such as threat of loss of livelihood) and internal patriarchal and cultural understandings.⁸⁷

Chapter IVA has been introduced in the PoA Amendment Act to protect the rights of victims and witnesses. In the absence of any provision for the sensitisation of judges and investigating agencies, this provision lacks teeth. Judges and investigating agencies are assumed to be immune from social prejudice. This is clearly fallacious.

A sensitised judiciary and investigating agency are crucial to the successful implementation of all legislations, especially social legislations such as the PoA Act that are formulated with the intention of remedying deep-rooted social biases. Their absence, coupled with the wide discretion available to judges under the PoA Act, defeats the aim of protecting Dalits against atrocities. Hopefully, the PoA Amendment Act will restrict and reduce this exercise of discretion. But without this sort of sensitisation, this special social legislation will continue to be a mere paper tiger.

⁸⁶ Dr Anand Teltumbde, 'Khairlanji Verdict Whither the Atrocity Act?' (2009) *Combat Law*, available at <http://www.combatlaw.org/khairlanji-verdict-whither-the-atrocity-act/> (last visited 3 June 2016).

⁸⁷ *Supra* n. 16.

REVERSE PATENT SETTLEMENTS IN INDIA[†]

Rohil Bandekar and Maithili Parikh***

I. INTRODUCTION

Intellectual property law and competition law have been in conflict ever since the advent of competition law. The inherent difference in the approach to generate public welfare itself between these two branches of law makes it the bone of contention. The more recent development in this controversy of competition law and intellectual property law is of reverse patent settlements, particularly in the pharmaceutical industry. Popularly known as ‘Pay-for-Delay’, it is a strategy through which patent holders¹ seek to extend the exclusivity period of their patented products by making payments to potential competitors, in order to prevent entry of generic suppliers on, or before the expiry of the patents.² Contrary to the common understanding of a judicial settlement, where the infringer pays the patentee to settle the lawsuit, in the case of reverse patent settlements, the patentee pays a large amount of money to the alleged infringer to settle the lawsuit and prevent entry of the generic drug in the market. A study undertaken by the American Federal Trade Commission indicates that these settlements are estimated to cost consumers in the United States of America (USA) alone, USD 3.5 billion per year.³ Similarly, the escalating magnitude of the Indian pharmaceutical industry makes discourse on this issue the need of the hour.⁴

[†] This article reflects the position of law as on 31 May 2016.

^{*} The author is a student of Government Law College, Mumbai, and is presently studying in the Fifth Year of the Five Year Law Course. He can be contacted at rohilbandekar@gmail.com.

^{**} The co-author is a student of Government Law College, Mumbai, and is presently studying in the Fifth Year of the Five Year Law Course. She can be contacted at maithili.sparikh@gmail.com.

¹ Hereinafter referred to as ‘originators’.

² Federal Trade Commission ‘Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers’ (2010) 1.

³ *Ibid.*, 2.

⁴ See ‘India Pharma 2020: Propelling Access and Acceptance, Realising True Potential’ (2010) *McKinsey & Co.*, available at <http://online.wsj.com/public/resources/documents/McKinseyPharma2020ExecutiveSummary.pdf> (last visited 31 May 2016).

This article analyses the essential constituent elements and the impact of reverse settlements, in Part II. Part III deals with the stand taken by foreign jurisdictions on reverse patent settlements. It includes a perusal of the regulatory framework and judicial development in USA, the European Union (EU), and the United Kingdom (UK) with emphasis laid on the landmark cases of the respective jurisdictions. Part IV discusses these settlements specifically in the Indian context. The discussion also includes the likelihood of emergence of such settlements in India and the ambit of the Competition Commission of India (CCI) to adjudicate upon/address such issues and the proposed approach to deal with the same.

II. ANALYSING REVERSE PATENT SETTLEMENTS

A. *Essential Elements that Constitute a Reverse Patent Settlement*

Reverse patent settlements consist of two basic elements – (1) limitation of generic entry; and (2) value transfer to the generic company.

1. Limitation Of Generic Entry

The entry of generic drug in a competitive market can be restricted either partially or wholly, according to the terms of the licence agreement, which the originator controls. The most popular form of limitation of generic entry is an explicit clause contained in the settlement agreement, which specifically lays down that the generic drug maker recognises the validity of the patent of the originator and will desist from entering the market till the validity of such patent expires. Similarly, the originator could also allow the generic drug limited entry in the market by allowing access only to certain patent rights in the licence. Due to these reverse patent settlements, the originators are devoid of competitive threats from generic manufacturers and hence, there is an absence of free competition in the market for that particular drug.⁵

2. Value Transfer To The Generic Manufacturers

Value transfers involved in patent settlements agreements take several forms, the most prominent being, payment of a lump sum amount from

⁵ See Competition DG: European Commission ‘55th Report on the Monitoring of Patent Settlements’ (2014) 3.

the pioneer drug company to the generic manufacturer. Other forms of value transfer include compensation for the generic manufacturers' legal cost in a patent dispute, purchase of assets, distribution for agreement by which the generic drug manufacturer obtains commercial benefits by distribution of the pioneer pharmaceutical drug. A newly evolved form also includes 'side-deals' carried out by the originators, in which the generic is allowed to enter the market before the expiry of the patent in a – (i) different geographical boundary; or (ii) with another product altogether. A value transfer could also be in the form of a patent licence to the generic manufacturer that would permit the company to enter the market, though restricting its access. The conditions and requisites of a value transfer agreement are vital in determining the level of such a value transfer.⁶

B. Impact Of Reverse Patent Settlements

The global pharmaceutical industry is a USD 300 billion industry, with figures estimated to rise to USD 400 billion by the end of 2016.⁷ Legal mechanisms of intellectual property rights and competition law, across the world have scrambled to regulate this sector by protecting rights of patent holders but also ensuring absence of market collusion and promoting growth of the industry. *Prima facie*, it can be observed that reverse patent settlements have a dual negative impact, mainly being – (1) consumer welfare; and (2) *ex ante* effect on innovation.

1. Consumer Welfare

Imbalance in market economic power in any industry could result in creation of monopolies or monopsonies, which tend to decrease consumer welfare. However, unlike other privately traded goods, the pharmaceutical industry bears an ethical burden since healthcare is an established fundamental right. Hence, it is vital for the web of laws to find a policy that protects consumers. The impact on consumer welfare can be explained in two broad categories – (a) *ex post* consumer welfare; and (b) overall consumer welfare.

⁶ *Ibid.*

⁷ Annemarie M, 'The Gray Intersection of Pharma Patent and Reverse Payment Settlement Regulation' (2014) *Pharmaceutical Compliance Monitor*, available at <http://www.pharmacompliancemonitor.com/gray-intersection-pharma-patent-reverse-payment-settlement-regulation/7703/> (last visited 31 May 2016).

a. *Ex-Post Consumer Welfare*

It is a direct reflection of the level of consumer welfare that would be lost due to the entering into of a reverse patent settlement by parties rather than the patent being challenged and subsequently being adjudged upon by a court of law.⁸ The term *ex post* is utilised in the context since the consumer welfare is calculated assuming that the innovation has already taken place. Reverse patent settlements create an environment in which the originator can exploit the consumer by hiking the prices of the drug significantly while the potential market entrant is barred, leaving the consumer with little choice in case of essential drugs. If the settlement exclusion period exceeds the expected litigation exclusion period, the *ex post* consumer welfare would be mammoth and would lead to heavy loss of consumer welfare.

b. *Overall Consumer Welfare*

Reverse patent settlements often also cause overall depletion of consumer welfare. The fact that the originators actually pay a lump sum amount to the generic challenger mitigates the chance that the patent will be subject to review in a court of law. This will deprive the legal machinery of the opportunity to ‘weed out’ the weak patents, thereby preserving unwarranted rights, detrimental to the interest of consumers. While drug companies often argue that reverse patent settlements are in fact pro-competitive, and a viable tool for commercial settlement, sensibly protecting the originator’s research and development investment, it does not appear to be so. In practice, it is often seen that generic manufacturers have prevailed in 73 per cent of challenges against the brand name drug owner, in matters computed over a decade.⁹ Consumers pay extravagant prices for innovative-patented drugs but very often prices fall rapidly as soon as a generic equivalent enters the market. Therein lies the short-term interest for generic drug makers; the long-term interest being drug discovery encouraged by patent protection regulations.

⁸ Einer Elhauge and Alex Kruger, ‘Solving the Patent Settlement Puzzle’ (2012) 91 *Texas Law Review*, 293.

⁹ Federal Trade Commission, ‘Generic Drug Entry Prior to Patent Expiration: An FTC Study’ (2002) 13.

2. *Ex-Ante* Effect on Innovation

An important drawback of reverse patent settlements is that it discourages innovation. If a patent legislation system were designed optimally, fostering an environment that encourages efficient amount of innovation, it would in turn benefit the consumers. Reverse patent settlements exceed the exclusivity of a patent beyond the period that it deserves. Economic assessments prove that patent profits that exceed the desired level result lead to excessive investment in innovation, resulting in loss of social welfare, as opposed to an optimal investment.¹⁰ Pay-for-delay settlements encourage generic manufacturers to challenge the branded drug as the computed reward for less deserving patents or unscrupulous inventions are greater than more deserving or genuine innovations. The conditions generated by these settlements, hence, provide greater profits for weaker patents without having to spend large sums on innovation or clinical trials. Hence, if a company is faced with a choice between investing in an arduous genuine innovation that would involve large investments, and an unscrupulous innovation, the artificial and unjust reward obtained *via* reverse patent settlements may distort its choice, causing loss of innovation which would eventually cause grave repercussions to consumer welfare.¹¹

III. FOREIGN JURISDICTION

In order to fully appreciate the discourse of reverse patent settlements in the Indian scenario, it is expedient to understand certain nuances in development of reverse patent settlements in foreign jurisdictions.

A. *United States Of America*

1. Regulatory framework

The most prominent legislation in the United States of America is the *Drug Price Competition and the Patent Term Restoration Act of 1984* (Hatch-Waxman Act).¹² In fact the very emergence of reverse patent settlements is a direct consequence of the Hatch-Waxman Act. The Hatch-Waxman

¹⁰ *Supra* n. 8, 294.

¹¹ *Supra* n. 8, 284, 294.

¹² *The Drug Price Competition and Patent Term Restoration Act, 1984* Pub L 98-417, 98 Stat 1585.

Act primarily serves to bring lower cost generic equivalents of branded drugs in the market, in turn making essential generic drugs widely available to consumers at low costs.¹³ The Hatch-Waxman Act fosters litigation challenging the validity or enforceability of the patents by providing a reward in the form of a 180-day exclusivity period to generic manufacturers that challenge the patent.¹⁴

Prior to the passing of the Hatch-Waxman Act, generic drug manufacturers were required to undertake a lengthy procedure for approval by the Food and Drug Administration (FDA). However, the passage of this historic legislation metamorphosed the legal mandate imposed on generic manufacturers by shortening the process. The Hatch-Waxman Act now provides that generic drug manufacturers can acquire FDA approval by merely proving that the generic drug is as safe and effective as its brand name drug, *inter alia* by relying on existing data. On obtaining this certification from the FDA, the generic brand will obtain a 180 day exclusivity period during which it will be the only generic manufacturer of the product. However, this is a perk offered only to the first generic manufacturer. Even though the spirit of the Hatch-Waxman Act suggests that it encourages generic manufacturers to file applications and enter the market without exorbitant research cost, in practice it virtually creates a mechanism *via* which the originators delay the release of generic drugs through settlements entered into with the generic drug manufacturers, and extend the exclusivity of their drugs even beyond the patent validity period. These settlements have increasingly gained popularity amongst the pioneer drug patent owners as litigation is onerous for a company, since if the generic manufacturer is successful, the originator risks losing a significant portion of its market. While for the generic manufacturer, regardless the outcome of litigation, the generic will not be subject to any form of substantial damages, as the relief is merely injunctive.¹⁵ Hence, it is quite often contended that reverse payment settlements stemmed from the Hatch-Waxman Act itself.

¹³ Olga Gurgula, 'Restrictive Practices in Pharmaceutical Industry: Seeking for a Balance between Intellectual Reverse Payment Agreements Property and Competition Law' (2012) *Global Antitrust Review* 66.

¹⁴ *Ibid*, 67.

¹⁵ This is so because the Hatch-Waxman Act makes the filing of the Abbreviated New Drug Application (ANDA) a constructive act of infringement.

2. Judicial Approach

a. *The Circuit Split*

Prior to the *Actavis* case,¹⁶ the federal circuit courts were in disagreement as to the suitable approach to analyse reverse patent settlement agreements. The varying approaches of the different circuit courts have been briefly elucidated below:

(i) *Per Se* Illegality

The Sixth Circuit Court categorically held reverse patent settlements to be illegal by their very object.¹⁷ The court regarded such a settlement to be, at its core, a horizontal agreement to eliminate competition in the market.¹⁸

(ii) Scope of Patent

Rejecting the *per se* illegality approach developed by the Sixth Circuit Court, the Eleventh Circuit Court developed the ‘scope of patent test’ wherein it was held that reverse patent settlements would violate competition law only if the settlement exceeded the exclusionary powers granted by the patent.¹⁹ The court laid down the factors to be considered for an effective antitrust analysis of reverse patent settlements, namely– (i) the scope of the exclusionary potential of the patent; (ii) the extent to which the provisions of these settlements exceed that scope; and (iii) whether any provisions that exceed the scope were illegal according to traditional antitrust analysis.^{20, 21}

¹⁶ *Infra* n. 25.

¹⁷ *Wholesale Drug Co v. Hoechst Marion Roussel (In re Cardizem CD Antitrust Litig)*, 332 F.3d, 896 (6th Cir 2003).

¹⁸ *Wholesale Drug Co v. Hoechst Marion Roussel (In re Cardizem CD Antitrust Litig)*, 332 F.3d, 908 (6th Cir 2003).

¹⁹ *See Valley Drug Co v. Geneva Pharmaceuticals Inc* 344 F.3d, 1294 (11th Cir 2012); *Federal Trade Commission v. Watson Pharmaceuticals Inc* 677 F.3d, 1298 (11th Cir 2012).

²⁰ *Federal Trade Commission v. Watson Pharmaceuticals Inc* 677 F.3d 1312 (11th Cir 2012).

²¹ Traditional antitrust analysis factors include likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations.

(iii) Presumptively Unlawful

Dubbing the scope of patent test as an ‘almost irrebuttable presumption of patent validity’,²² the Third Circuit Court instead held that reverse patent settlements are ‘presumptively illegal’. This approach shifts the onus on the defendants to show that the agreement is not anti-competitive, which can be discharged on two grounds – (i) by showing payment was for a purpose other than delayed entry; or (ii) by establishing pro-competitive benefits of such payment.²³

b. *The Actavis Case*

The *Actavis* case is considered the single most significant development in the reverse patent settlement conflict in USA, and possibly the world, for it put to rest the controversy regarding such agreements by rejecting both the Eleventh Circuit Court’s scope of patent test, and the quick look approach advocated by the Federal Trade Commission. The United States Supreme Court (USSC) appears to have taken the middle path by opting for the ‘rule of reason’ approach. This approach requires a detailed analysis of the effect on competition within a defined market.²⁴ USSC, however, refrained from setting forth any guidelines for the lower courts to implement this approach, instead permitting them the flexibility to develop it.²⁵

Given the importance of this case, a brief elucidation of the facts would be appropriate. Solvay Pharmaceuticals (Solvay) was the manufacturer of Androgel, for which it obtained a patent in 2003. Subsequently, Actavis Inc (Actavis) and Paddock Laboratories (Paddock) filed an ANDA²⁶

²² *In Re: K-Dur Anti-Trust Litigation* 686 F.3d 197, 214 (3rd Cir 2012).

²³ *In Re: K-Dur Anti-Trust Litigation* 686 F.3d 197, 218 (3rd Cir 2012).

²⁴ *See National Society of Professional Engineers v. United States*, 433 US 679, 692 (1978).

²⁵ *Federal Trade Commission v. Actavis*, 570, 21 US (2013).

²⁶ Abbreviated New Drug Applications or ANDA will be certified if they fulfil any one of the following four conditions — (I) No patent related to the pioneer drug has been filed; (II) The relevant patent has expired; (III) The patent will expire on a certain date; and (IV) The patent is invalid or will not be infringed by the manufacture, use or sale of the new generic drug. Certification was to be made by declaring that the drug would not infringe any other patent already in existence. It was also mandated that all generic drug manufacturers were required to send notice to all the listed patent owners, who would be affected by the application.

along with paragraph (IV) certifications²⁷, which resulted in Solvay filing infringement proceedings against them. Another manufacturer Par Pharmaceuticals did not file an independent ANDA, but joined forces with Paddock. Solvay entered into an out of court settlement with Par Pharmaceuticals, Paddock and Actavis for the mammoth sums of USD 60 million, 12 million and approximately 270 million respectively. As consideration, Actavis agreed not to market its generic drug until 2015 and also undertook to promote Androgel²⁸.

B. *European Union*

1. Regulatory Framework

Unlike USA, EU has no legislation akin to the Hatch-Waxman Act. The member states individually control the issue and enforcement of patents. As a result, to enforce any patent, the originator/ manufacturer would have to initiate infringement proceedings in the courts of each member state,²⁹ making patent litigation an expensive ordeal. The branded manufacturer also risks losing a large market share if the patent litigation is adjudicated against it. This onerous nature of patent enforcement for the branded drug manufacturer is considered the root cause of reverse patent settlements.

2. Judicial Approach

a. *The Lundbeck Case*³⁰

The *Lundbeck* case represents a landmark development in competition law in the EU, as this was the first instance wherein the European Competition Commission (ECC) determined the legality of such agreements, holding the agreement entered into between Lundbeck and the generic manufacturers to be presumptively unlawful. Lundbeck

²⁷ *The Drug Price Competition and Patent Term Restoration Act*, 1984 Pub L 98-417, 98 Stat 1585, § 505(j).

²⁸ The brand name drug of Solvay Pharmaceuticals, Androgel is a daily testosterone replacement therapy.

²⁹ *Convention on the Grant of European Patents* (adopted 5 October 1973, entered into force 7 October 1977) 13 *International Legal Materials* 268 (1974), article 64(3), available at <http://www.epo.org/patents/law/legal-texts/epc.html> (last visited 31 May 2016).

³⁰ *Lundbeck* [2013] COMP/AT 39226 (European Commission: Competition DG) [unpublished].

was the manufacturer of a ‘blockbuster’³¹ antidepressant –Citalopram, and held patents for both, the Citalopram molecule and the process of manufacturing the molecule. Since the term of Lundbeck’s patent was expiring in 2002, it provided an opportunity for generic manufacturers to enter the market; instead of competing, however, Lundbeck entered into agreements with the four groups of generic manufacturers, including the Indian company, Ranbaxy, to defer entry into market, in consideration of a substantial sum of money, amounting to approximately 70 million euros.³² ECC opined that the agreements entered into between Lundbeck and the generics were presumptively unlawful and hence did not warrant a detailed investigation into the actual anti-competitiveness of the agreements. It further fined Lundbeck 93.8 million euros.³³ An appeal is pending before the General Court (EU).³⁴

*b. The Servier Case*³⁵

French pharmaceutical company, Servier, held significant market power of the ‘blockbuster’ blood pressure control medicine Perindopril, as no antihypertensive medicine other than the generic versions of Perindopril were able to meaningfully constrain its sales. In 2003, when its patent for the molecule expired in most part, except the secondary patents relating to process, the generic manufacturers were determined to enter the market with their versions. Since there were a few sources of technology that were unprotected, Servier acquired the most advanced one to eliminate the use of technology and thereby bar the generics. Cut off from all other directions, the generics chose to challenge Servier’s

³¹ European Commission: Press release IP/13/563 19/06/2013, ‘Antitrust: Commission Fines Lundbeck and Other Pharma Companies for Delaying Market Entry of Generic Medicines’ (19 June 2013), available at http://europa.eu/rapid/press-release_IP-13-563_en.htm (last visited 31 May 2016).

³² James Killick *et al*, The Commission’s Lundbeck Decision: A Critical Review of the Commission’s Test for Patent Settlement Agreement (2015) *Competition Policy International*, available at <https://www.competitionpolicyinternational.com/the-commissions-lundbeck-decision-a-critical-review-of-the-commissions-test-for-patent-settlement-agreements> (last visited 31 May 2016).

³³ *Ibid*.

³⁴ As of 31 May 2016.

³⁵ *Perindopril (Servier)* [2014] COMP/AT 39612 (European Commission: Competition DG) [unpublished].

patents before the court, but virtually every time a generic came close to entering the market, Servier and the concerned company would adopt an out-of-court settlement procedure with the generic manufacturers. Taking into account the long duration of limiting the market entry of generics, several anti-competitive practices that were adopted, and the gravity of the offence, ECC fined Servier and five generic manufacturers, a whopping 427.7 million euros.³⁶ This clearly suggests that a multitude of generic manufacturers do not necessarily serve as an effective bar to eliminate the possibility of a reverse patent settlement.

C. *United Kingdom*

1. Legislative Approach

Similar to EU, UK has no specialised legislation akin to the Hatch-Waxman Act.

2. Judicial Approach: The *Glaxo Smith Kline* Case

Currently pending final order by the Competition and Markets Authority (CMA) of UK, Glaxo Smith Kline could be fined a massive 2.6 billion pounds if it is found guilty of the alleged offence of delaying entry of generic anti-depressant Seroxat through a reverse patent settlement.³⁷ The body responsible for enforcing competition law in UK, the Office of Fair Trade (OFT), began investigations in 2011, being of the opinion that Glaxo Smith Kline had violated the Competition Act of UK as well as the treaty between the EU member states.³⁸ However after the disbandment of the OFT, the responsibility has been passed onto CMA to further investigate whether the generics—AlphaPharma, Generics UK and Norton Healthcare, were transferred value by Glaxo Smith Kline to exit the market of the concerned anti-depressant, which is also its best-selling drug.

³⁶ See European Commission, 'Antitrust: Commission Fines Servier and Five Generic Companies for Curbing Entry of Cheaper Versions of Cardiovascular Medicine', EU Press Release IP/14/799 (2014), available at http://europa.eu/rapid/press-release_IP-14-799_en.htm (last visited 31 May 2016).

³⁷ See Adam Hill, 'GSK Faces £ 2.6 Billion Fine' (2013) *Pharmafile*, available at <http://www.pharmafile.com/news/178972/gsk-faces-26-billion-fine> (last visited 31 May 2016).

³⁸ *Ibid.*

IV. REVERSE PATENT SETTLEMENTS IN INDIA

A. *Emergence Of Reverse Patent Settlements In India*

Close analysis of reverse patent settlements in USA might lead to the erroneous conclusion that such settlements have originated as a direct consequence of the Hatch-Waxman Act, would not have arisen but for the enactment of such legislation, and hence would be confined to USA alone. The European and the UK experience prove otherwise. It appears that reverse patent settlements occur when—generic challenges to patents are incentivised, and/or the patent litigation is more onerous for the patentee, ie the patentee risks losing more in the patent litigation as compared to the generic company.

Although the overall Indian pharmaceutical industry data suggests that there are a large number of active generics in the market, thereby resulting in intense competition, the actual scenario in a specific market appears to be otherwise due to several factors as follows:

1. Market Concentration

As of 2010, the organised sector (which is primarily responsible for the formulation production in the country) was comprised of 250–300 players and accounted for 70 per cent of the industry in terms of value.³⁹ Amongst them, Cipla continued to have the largest market share of 5.2 per cent, followed by Ranbaxy (now a subsidiary of Sun Pharma) with a 4.7 per cent share.⁴⁰ These numbers at a cursory glance might suggest intense competition; however the actual scenario is quite contrary because pharmaceutical products are not single homogenous goods, and there are several ‘relevant markets’ within the industry known as therapeutic segments.⁴¹ It is within these therapeutic segments that competition takes place. In the case of many drugs, there are only a few large suppliers in a particular therapeutic category, even

³⁹ See ‘India Pharma Inc.: Capitalising on India’s Growth Potential’ (2010) PWC, 15, available at https://www.pwc.in/assets/pdfs/publications-2011/pwc_cii_pharma_summit_report_22nov.pdf (last visited 31 May 2016).

⁴⁰ *Ibid.*

⁴¹ ‘Competition Issues in The Pharmaceutical Industry’ (2007) CUTS International, available at http://www.cuts-international.org/pdf/ICRR07_%20Pharma.pdf (last visited 31 May 2016).

in the case of non-patented drugs. However, in the case of patented drugs, with the patent-holder companies exercising monopoly rights over those drugs, substitutability is often close to zero, especially after the implementation of *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*^{42, 43} The table below illustrates the oligopolistic structure of different therapeutic segments despite generic competition:⁴⁴

Name of the Drug	Therapeutic Category	No. of Brands	Share of Top 4 rands (Per Cent)
Ciprofloxacin	Quinolones	200	60
Levofloxacin	Quinolones	45	48
Chlorogquine	Anti-Malaria	43	93
Quinine	Anti-Malaria	24	85
Rh Adults	Anti-Tuberculosis	63	79
RHEX FD (Rifampicin + Isoniazid+ Pyrazinamide)	Anti-Tuberculosis	40	70
RHE (Rifampicin + Isoniazid + Ethambutol)	Anti-Tuberculosis	42	65
Atorvastatin	Stantins	75	47
Simvastatin	Statins	25	84
Lovastatin	Statins	15	98
Note: The drugs' categories include all dosages and forms of individual brands.			

⁴² *Agreement on Trade-Related Aspects of Intellectual Property Rights* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299.

⁴³ See 'Competition Law and Indian Pharmaceutical Industry' (2010) *CENTAD*, available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf (last visited 31 May 2016), paras 2.10.23 and 3.4.21.

⁴⁴ *Ibid*, table 2.34, 65.

Therefore, it can be seen that the mere presence of a large number of generic manufacturers in the pharmaceutical industry as a whole does not always result in a competitive industry.

2. Asymmetric nature of Industry: The consumer is not the chooser

The Indian pharmaceutical market is unique and differs largely in consumer pattern from the pharmaceutical markets across the world. The Indian consumers are not involved in the decision making process of their purchase of goods because these are usually dictated by the doctors, pharmacists and hospitals. This dependence of patients is due to the complicated nature of healthcare and the trust instilled in healthcare professionals. The significant role assumed by doctors, pharmacists and hospital staff leads to manipulation of the market, as drug companies tend to exploit this influence by providing lucrative incentives and consumers are induced into buying drugs that are more expensive.⁴⁵ Below is an analysis of the distorted market pattern:

a. *Doctors*

Driven by the desire to capture larger market share and maximise profits, drug companies engage in intense promotional strategies aimed at doctors. Doctors are routinely wooed with electronic gadgets, sponsored weddings, sponsored holidays, conferences at five star hotels, and even establishment of nursing homes. Therefore in the prescription-drug industry, companies tend to exert commercial influence on the prescribing habits of doctors and indirectly violate the spirit of competitive principles.⁴⁶ Since only large drug companies have the financial resources to resort to such practices, competition is effectively limited. This makes the prospect of reverse patent settlements more lucrative.

b. *Pharmacists*

In India, where thousands of drug companies compete for market shelf in pharmacies, a few companies that offer spectacular discounts to pharmacists wield great clout as more often than not, pharmacists

⁴⁵ *Supra* n. 43, para 2.10.7.

⁴⁶ *Supra* n. 43, para 2.10.13.

advise the consumers regarding purchase of a drug.⁴⁷ These discounts intensify the gap between wholesale price and retail price and in fact a study found that all but one of the top 25 drug companies in India offer heavy discounting deals at least once a month, which could be up to 103 per cent⁴⁸.⁴⁹ This enables large drug companies to control the market and exclude smaller manufacturers as well as generic manufacturers; making reverse patent settlements very profitable.

c. Hospitals

As an integral part of the healthcare system, hospitals also play a role in influencing consumer pattern. A case brought forth in a consumer forum in Andhra Pradesh revealed that a private hospital had entered into a contract with a drug manufacturing company, wherein the company agreed to sell the particular drug to the hospital above market price, which was detrimental to the trusting consumers who would buy the prescribed drugs from the hospital pharmacy.⁵⁰ Hospitals often have their own pharmacies, which are incorporated under different companies, which in turn lead to spatial monopolies.⁵¹ This is the role that hospitals play in limiting competition.

Tied selling is a frequently used anti-competitive measure involving the above three players of the health care delivery system. It restricts the choice of consumer by engaging in collusive activities resulting in monopolistic dominance as noted above.

3. Increased presence of MNCs due to the product patent regime

The return of the product patent regime as a result of the *Patent Amendment Act, 2005* has raised concerns regarding the future of the generic pharmaceutical industry in India.⁵² The dynamics of the

⁴⁷ 'Competition Law and Indian Pharmaceutical Industry' (2010) *CENTAD*, available at http://www.cci.gov.in/sites/default/files/PharmInd230611_0.pdf (last visited 31 May 2016), paras 2.10.13 and 3.4.21.

⁴⁸ See generally Daniel Pearl and Steve Stecklow, 'Drug Firms' Incentives Fuel Abuse by Pharmacists in India', (2001) *Wall Street Journal*, available at <http://www.wsj.com/articles/SB997910373349012375> (last visited 31 May 2016).

⁴⁹ *Supra* n. 41, 11.

⁵⁰ *Supra* n. 41, 14.

⁵¹ *Supra* n. 43, para 2.10.17.

⁵² *Supra* n. 43, para 2.1.5.

pharmaceutical industry prior to the introduction of the *Patents Act, 1970* is crucial to fully appreciate the concern raised. Prior to 1950, the indigenous sector dominated the pharmaceutical industry in India.⁵³ Post 1950, multinational companies (MNCs) began to improve their presence in the Indian markets with the introduction of new medicines. A strong product patent system then prevailing under the *British Patents and Designs Act, 1911*, led to increasing influence of MNCs in the Indian pharmaceutical market reducing the share of indigenous companies to 32 per cent in 1970 from 62 per cent in 1950 and the share of MNCs increased to 68 per cent in the 1970s from 32 per cent in 1952. The Ayyangar report⁵⁴ examining the legislation concluded that foreign patent holders dominated the industry through large number of filing and grants. Therefore, the *Patents Act, 1970* was introduced, which limited patents only to process patents in the case of pharmaceuticals and agricultural chemicals, and reduced the term to seven years. It was this effort of the Government that led, once again, to the growth of the generic industry in India. However, in order to make the Indian patent law fully compliant with the TRIPS⁵⁵, the government introduced the *Patent Amendment Act, 2005*.⁵⁶

It is not a mere coincidence that MNCs have now renewed their interest in India. The Indian pharmaceutical industry has attracted USD1707.52 million worth of foreign direct investment (FDI), exclusive of investments in shares of Indian firms in the period between April 2000 and April 2010.⁵⁷ Acquisitions of local players by large MNCs illustrate the increasing level of interest that they have shown in the Indian market.⁵⁸ History appears ready to repeat itself with the MNCs likely to succeed in capturing a larger pie of the Indian markets.⁵⁹ The implications of these mergers on competition are significant since many

⁵³ *Supra* n. 43, para 2.2.2.

⁵⁴ Shri Justice N Rajagopala Ayyangar 'Report on the Revision of the Patents Law' (1959), available at http://spicyip.com/wp-content/uploads/2013/10/ayyengar_committee_report.pdf (last visited 31 May 2016)

⁵⁵ The TRIPS agreement envisages product and process patent.

⁵⁶ *Supra* n. 43, 7.

⁵⁷ See 'India Pharma Inc.: Capitalising on India's Growth Potential' (2010) PWC, 17, available at <https://www.pwc.in/assets/pdfs/pharma/PwC-CII-pharma-Summit-Report-22Nov.pdf> (last visited 31 May 2016).

⁵⁸ *Ibid.*

⁵⁹ *Supra* n. 43, para 2.7.1.

of the merging MNCs and generic companies have pharmaceutical products used for the same therapy, and therefore are competitors. For example, both Nicholas Piramal (India) and Boehringer Mannheim were major players with competing products in various therapeutic segments, namely cardiovascular system, hormones, vitamins and nutrition, before they merged.⁶⁰ Increased MNC presence, accompanied by market entry tactics such as mergers, acquisitions and exclusive licensing deals with generics, reduce the number of competitors within the concerned therapeutic segment even in the case of non-patented drugs,⁶¹ creating fertile grounds for reverse patent settlements.

Furthermore, with the CCI taking notice of several possible reverse patent settlements and investigating them, it is clear that reverse patent settlements are now beginning to make their way to India. It is pertinent to note that in a study commissioned by the CCI on issues relating to competition in the Indian pharmaceutical industry,⁶² there were glaring observations about patent settlement deals in EU and USA. However, the study failed to provide suggestions to overcome such practices based on the experiences of EU and USA. The point of pertinence is that these settlements are extensively used in scenarios such as the above, wherein the generics in the operating market are few and the research and development costs are high.

MODEL SCENARIO

A model scenario may be where 'X', an originator operating in a market for a unique drug with a high cost of research and development, with a few major generics, files a patent infringement suit on a major threatening generic manufacturer, thereafter reaching a mutual settlement with the generic. With the product patent regime now applicable in India, the frequency of scenarios, wherein there are increased patent challenges which would eventually lead to reverse patent settlements, are likely to increase. Thus, obtaining patents on newly developed drugs and the high cost of research and development⁶³ of the drug would serve as an entry barrier for generic manufacturers, thereby limiting competition to a few big generics only.

⁶⁰ *Supra* n. 41, 9.

⁶¹ *Supra* n. 41, 5.

⁶² *Supra* n. 43.

⁶³ *Supra* n. 43, table 2.23, 55.

B. Would Reverse Patent Settlements Come under the Purview of Competition Law in India?

The analysis of reverse patent settlements involves an amalgamation of settlement law, competition law and intellectual property law. The *Competition Act, 2002* (Act) aims to promote and sustain competition in markets and protect interests of the consumers. Hence, an agreement between two competitors which results in one of them delaying entry in the market appears to fall within the provisions of the Act. However, in light of the intersection with the aforementioned branches of law, the following issues must be addressed:

1. Whether the CCI can scrutinise a compromise entered into between an originator and a generic drug manufacturer?

The CCI is empowered to scrutinise any agreement that allegedly causes or is likely to cause an appreciable adverse effect on competition.⁶⁴ Reverse patent settlements have the potential to raise competition concerns such as creation of entry barriers, hampering innovation and adversely affecting consumer welfare,⁶⁵ which are factors that the CCI shall have due regard to in order to determine an appreciable adverse effect on competition.⁶⁶ *Prima facie* there appears to be a conflict between the powers of the CCI to scrutinise such agreements and the order 23 rule 3 of the *Civil Procedure Code, 1908* which mandates that the court which has recorded the compromise must determine whether the compromise is lawful, or alternatively unlawful.⁶⁷ However, section 61 read in conjunction with the *non obstante* clause in section 60 of the Act resolves the conflict; the justification for the aforementioned lies in the fact that the term ‘unlawful’ has a broad scope of application. Since reverse patent settlements could be unlawful because they may produce an appreciable adverse effect on competition, the CCI is the appropriate forum to seek such remedy, as its very formation was aimed to correctly adjudicate complex and technical anti-competition matters.⁶⁸

⁶⁴ *The Competition Act, 2002*, section 19.

⁶⁵ Part II (B), *Impact of Reverse Patent Settlements*.

⁶⁶ *The Competition Act, 2002*, sub-section (3) of section 19.

⁶⁷ See also *Banwari Lal v. Chando Devi* AIR 1993 SC 1139.

⁶⁸ See Government of India, ‘Report of High Level Committee on Competition Policy & Law’ (2000), para 7.2.4 and *FICCI Multiplex Association v. United Producers and Distributors Forum* Case No. 01 (2009) Competition Commission of India, para 23.37.

Further, section 32 of the Act empowers the CCI to investigate into extra-territorial conduct by companies which have the potential to cause an adverse appreciable effect on competition in India. The investigation of Indian generic manufacturers such as Unichem Laboratories Ltd, Matrix Laboratories Ltd and Lupin Ltd by ECC in the Servier case⁶⁹ could serve as a reason for the CCI to institute a *suo moto* investigation into the practices of such pharmaceuticals and their effect on the Indian market.

2. Whether the presence of a patent would exempt a reverse patent settlement from anti-competition scrutiny?

The exemption provided under section 3(5) of the Act is by no means a blanket exemption,⁷⁰ since it has 'reasonable conditions' as its fulcrum.⁷¹ Although the term 'reasonable conditions' has not been defined under the Act, jurisprudence in USA suggests that acting within the monopoly powers conferred by the patent would be considered reasonable.⁷² By implication only unreasonable conditions attached to intellectual property rights would attract provisions of the anti-competition law.

C. Proposed Approach:

Jurisdictions around the world make use of different approaches to scrutinise reverse patent settlements, in tandem with their country's public policy, competition policy and patent policy. In this regard, the authors propose that the following method and steps may be adopted for examining reverse patent settlements in the Indian scenario:

1. Mandatory reporting of all patent settlements to the CCI

In USA, the Hatch-Waxman Act provides an incentive to the first generic challenger by allowing him a 180 day exclusivity period post filing an ANDA as prescribed. This in turn makes challenges by subsequent generic companies less lucrative and serves as a deterrent to

⁶⁹ *Ibid*, 32.

⁷⁰ Government of India, Report of High Level Committee on Competition Policy & Law 2000, para 5.1.7.

⁷¹ See *FICCI Multiplex Association v. United Producers and Distributors Forum* Case No. 01 (2009) Competition Commission of India, para 23.31.

⁷² *United States v. General Elec. Co.*, 272 U S 476, 485 (1926); *Simpson v. Union Oil Co. of Cal.*, 377 U.S 13, 24 (1964).

subsequent challenges. However in India, EU and UK, where no such legislation granting special incentives to the first challenger is in place, a large payoff to a single generic company might signal to others that the patentee lacks confidence in the validity of the patent, thus, resulting in an increase in the number of generic challenges. In order to avoid this, the originator may often conclude such settlements in secrecy.

In such a scenario, mandatory reporting to the CCI would serve a dual purpose, namely:

- Serve as a natural deterrent to reverse patents:

Mandatory reporting would ensure that such settlements do not go unnoticed and may result in an increased number of generic challenges to the patent. This would act as a deterrent for a patentee to enter into such agreements *ab initio*. It is, however, doubtful whether this mandatory reporting of reverse patent settlements would entirely negate its emergence; and

- Provide the CCI reasonable opportunity to comprehensively scrutinise such settlement agreements.
2. Which approach of competition analysis should be undertaken by the CCI?

The most suitable approach for reverse patent settlement analysis that can be adopted by the CCI in the Indian scenario, in the opinion of the authors, is the ‘presumptively unlawful’ approach that has been advocated by the Federal Trade Commission of USA and ECC. The presumptively unlawful approach would lead the courts to presume that these settlements are unlawful, unless otherwise demonstrated by the parties. The parties can rebut this presumption by showing pro-competitive effects of the settlement and proving that the payments constitute a reasonable assessment of the litigation success. However, if they fail to do so, the courts can safely conclude that the particular settlement violates anti-competition law and creates an appreciable adverse effect on competition in India as envisaged under the Act.⁷³ This approach rests on the logic that the mere payment from a brand name manufacturer to a generic drug manufacturer for agreement by the

⁷³ *The Competition Act, 2002*, section 3.

latter to delay its market entry for such consideration, serves as a *prima facie* evidence of unreasonable restraint of trade. Hence, even though the court would presume them to be anti-competitive, the settling parties would have the opportunity to rebut the presumption by leading clear evidence that the pro-competitive benefits of the settlement outweigh the anti-competitive benefits. The *Preserve Access to Affordable Generics Act* provides that the Trial Court would be prudent to consider the following factors⁷⁴ before making a fair conclusion in such matters— (i) comparison between the deferred entry date agreed upon by the generic drug manufacturer and remaining life of the existing relevant patent; (ii) the amount of consideration obtained by the generic drug manufacturer while settling the dispute; (iii) the potential earnings of the generic drug manufacturer had it succeeded in the litigation proceedings; (iv) potential earnings lost by the originator had the generic manufacturer succeeded in such litigation proceedings; (v) time period between date of value transfer to the generic manufacturer and date of settlement; and (vi) the value the consumers would have gained *via* competition in the market between the generic drug maker and originator. Hence, these factors would serve as a six-prong test for the court to adjudicate on the lawfulness of such settlements.

The severe anti-competitive effects of reverse patent settlements warrant the presumptively unlawful approach since the various competitors virtually divide the market, restricting all forms of competition between the market players and on all grounds; this form of market control could result in consequences more serious than price control. In price control, only one factor of the market is being controlled, while in reverse patent settlements, all the factors are controlled to benefit a few competitors. In cases where generic drug manufacturers have been paid to stay out of the market, it could be construed as market allocation of time. Furthermore, putting the burden of proof on the settling parties fits in the Indian scenario, where the lack of first challenger benefits leads to secrecy of settlements, which may make the process of proving reasonable grounds cumbersome for the CCI. This especially holds

⁷⁴ See *Preserve Access to Affordable Generics Act*, section 369, 111th Cong. § 2(b) (as reported and amended by S Comm on the Judiciary, October 15, 2009); *Protecting Consumer Access to Generic Drugs Act*, 2009, HR 1706, 111th Cong. § 2(a) (2009). It is pertinent to note that this bill has not yet been enacted.

true in an industry such as pharmaceuticals, where intellectual property licences, raw material incentives and promotional aids have replaced the typical cash payments.

More importantly, a sheer perusal of the Indian economy and health care scenario suggests that this approach is more suitable in the present context. Dubbed the ‘global pharmacy of the south’, India exports life-saving drugs to developing countries and also supplies quality drugs to the rich nations at affordable prices. Despite this seemingly commendable performance, millions of Indian households do not have access to vital drugs. Despite the availability of adequate knowledge, technology and skills to innovate and develop new drugs, India faces tremendous challenges in prioritising and delivering essential medicines to the millions vulnerable and in urgent need of these drugs. Since the initiation of market friendly economic reforms, drug prices have risen significantly. India’s drug market structure is presently vulnerable to control by multinational companies, which are beginning to take over the dynamic domestic generic drug industry.⁷⁵ With the government likely to increase financial investments substantially in the healthcare sector⁷⁶ and take various measures in order to increase availability of low cost generic medicines⁷⁷ through the Universal Health Coverage (UHC) and Jan Aushadi Scheme, reverse patent settlements which attempt to delay generic entry into the market, in order to maintain supra-competitive prices would certainly be antithetical to such schemes, greatly inhibiting their success. Therefore, in the Indian context it would be prudent to adopt a rule that is more restrictive as compared to the approach taken in USA. However, it is conceded that a rule that is excessively restrictive (*‘per se illegality’*) would subject competitors to

⁷⁵ *Supra* n. 2.

⁷⁶ High Level Expert Group (HLEG) has recommended that the Government (both Central and state governments) should increase public expenditures on health from the current level of 1.2 per cent of GDP to at least 2.5 per cent by the end of the 12th plan, and to at least 3 per cent of GDP by 2022 and specifically increase expenditure on medicines from around 0.1 per cent to 0.5 per cent of GDP. Furthermore, HLEG has recommended using general taxation as the primary source healthcare financing, *supra* n. 2.

⁷⁷ HLEG for UHC has recommended enforcement of price controls and price regulation on essential and commonly prescribed drugs, reviving public sector units (PSUs) that manufacture generic drugs and vaccines, measures to retain and ensure self-sufficiency in drug production and setting up of a national and state level Drug Supply Logistics Corporation for the bulk procurement of low-cost, generic essential drugs.

vexatious litigation, potentially discouraging innovation, therefore the presumptively unlawful approach would be best suited in India.

There is an absolute legislative vacuum with regard to identification and addressing reverse patent settlements in India. It would be prudent for the legislature to take due advantage of the clean slate, and provide for these settlements in the Act itself. Under the Act, the presumptively unlawful approach already finds its place in the provisions of sub-section (3) of section 3 which lays down the provisions dealing with cartelisation. The same provisions could also be suitably modified to apply to reverse patent settlements in India. While it has been previously mentioned that the presumptively unlawful approach will be the most apt to examine such agreements, we further aim to explain the other possible methods and reasons supporting our suggestion herein.

3. Why the scope of patent test may not be suitable in the Indian context?

The scope of patent approach was utilised by the 11th Circuit Court in the *Actavis* case⁷⁸ and lays precedence on patent over antitrust law. This approach does not seem to strike a balance between the two bodies of law as envisaged by the Act⁷⁹ and tends to disagree with the spirit and purpose of the Act. The patent is presumed to be valid, which in turn, virtually rejects the purpose of the patent infringement case. The crux of reverse patent settlements is that in such agreements, settling parties agree to uphold patent validity even when none exists as was seen in the case of *Valley Drug Company*,⁸⁰ where the district court also ruled against the patentee. Similarly, the 11th circuit court relied on the scope of patent approach based on its exclusionary power and created a new patent right, unfairly, through mutual agreement between parties which in turn would harm the consumers. This approach allows parties to create a contractual patent, which excludes that particular competitor. Subsequent contracts with various generics may be entered into by the patentee for their exclusion from the market. It may be inferred that the scope of a patent forms only a part of the required analysis to be made while setting out the criteria for identifying reverse patent settlements

⁷⁸ *Supra* n. 25.

⁷⁹ *The Competition Act, 2002*, sub-section (5) of section 3.

⁸⁰ *Valley Drug Co v. Geneva Pharmaceuticals Inc* 344 F.3d 1295 (11th Cir 2012).

since it neglects important aspects such as the relevant market and the pro- competitive effects of the settlement, if any.

4. Why the rule of reason approach should not be applied?

After exploring all alternatives, perhaps the most tempting approach to adopt may seem ‘rule of reason’, adopted in Actavis case and remains a settled law in USA. Even though USSC did record the rule of reason approach as the desirable method of analysis, in spirit it seems to have adopted the presumptively unlawful approach.⁸¹ It is commonly known that the rule of reason used in practice is quite different from the rule of reason laid down by Justice Brandeis in the old *Board of Trade* case.⁸² Instead, it revolves around a regulated structure. Here a reference may be drawn to the criteria laid down in Professor Hovenkamp’s hornbook:⁸³

- Consider first whether there is a ‘contract, combination, or conspiracy’ that restrains trade.
- Consider whether this restraint poses any kind of risk to competition.
- Consider whether this risk is likely to generate any perceivable pro-competition benefits in the market.
- Consider if the defendant has market power or whether there is a presence of proof of actual anti-competitive damage.

⁸¹ Thomas F Cotter, ‘FTC v. Actavis, Inc.: When is the Rule of Reason Not the Rule of Reason?’ (2014) 15 *Minnesota Journal of Law, Science and Technology* 41, 43.

⁸² See *Board of Trade of Chi v. United States*, 246 US 231, 238 (1918). Justice Brandeis wrote for the Court: ‘The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.’

⁸³ Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (4th edn West Academic Publishing 2011) 279–80.

- Consider whether the restraint of trade creates any actual pro-competitive benefits and not just perceivable or plausible benefits.
- Consider whether the restraint is the least restrictive means of attaining those benefits.
- Balance the pro-competitive benefits against the anti-competitive harm.

Following this step-by-step analysis, we can safely assume that typical Pay-for-Delay settlements satisfy the first four steps of this analysis, on primary glance itself. The first step is satisfied since these settlements include a value transfer from the originator to the generic manufacturer in return for the generic manufacturer to settle the case and temporarily exit the market. Here lies a contract that restrains trade, which is indisputable. A contract of such nature would pose an obvious potential risk to competition, which satisfies the condition laid down by the second step. The third step is satisfied by a perusal of these settlements since even though they are potential risks to competition in a market, they have their share of possible pro-competitive benefits as they would mobilise social resources that would otherwise be utilised in the expensive process of litigation. The fourth step would also be satisfied, if in litigation the patent could be proved invalid or not infringed by the generic drug, the loss in revenue that would be experienced by the originator would then flow to the consumers in the form of lower prices.

Hence, for reverse patent settlements, the analysis would only essentially begin at the fifth step, at which point, the burden of proof has shifted to the defendant, who has to produce exonerating evidence and discharge his burden. Therefore, it seems that the rule of reason approach in the case of reverse patent settlements functions in the same manner as the presumptively unlawful approach.⁸⁴ However, despite the in-depth analysis in the similarities, *prima facie* the rule of reason approach seems unsuited for India. This case specific approach would result in considerable delay in litigation result keeping in mind the existing judicial backlog of cases.

⁸⁴ *Supra* n. 81, 41, 45 and 46.

5. Compulsory Licensing

Compulsory licensing is a well-recognised remedy in cases of patent abuse.⁸⁵ It is defined generally as the granting of a licence by the government of a state to use a patent without the patentee's permission.⁸⁶ Competition authorities around the world have resorted to compulsory licensing to effectively combat patent related issues.⁸⁷ Furthermore, various international covenants too endorse compulsory licensing. For instance, TRIPS although does not mention the term, but it does, in spirit, support the concept under article 31.⁸⁸

In India, compulsory licensing as a remedy for competition law violations is a nascent concept, with the competition authorities yet to explore this avenue. The Act, if construed liberally does confer upon the CCI, powers to issue compulsory licences under sections 27 and 28. As per section 27 of the Act, if the CCI after inquiry finds that any agreement is in contravention of section 3 or section 4 of the Act, it can pass such other order or issue such directions as it may deem fit.⁸⁹ The CCI is further empowered to transfer the property of a firm that has abused its dominant position.⁹⁰ Keeping in mind the primary objective of the Act—to promote consumer interests and competition in the markets,⁹¹ we believe that such a liberal interpretation of the aforementioned sections should be taken. The CCI too has in its decisions laid emphasis on the interests of the common man, than on the competitors or competitive processes.⁹²

Presently, granting of compulsory licences is governed by the *Patents Act, 1970*.⁹³ The Controller of Patents (Controller) can grant a compulsory

⁸⁵ *United States v. Besser Mfg Co*, 343 US 444 (1952), 447.

⁸⁶ Sara M Ford, 'Compulsory Licensing Provisions under the TRIPS Agreement: Balancing Pills and Patents' (2000) 15 *American University International Law Review* 942, 945.

⁸⁷ *The Canadian Competition Act* RSC 1985, C-34, section 32.

⁸⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299.

⁸⁹ *The Competition Act, 2002*, sub-section (g) of section 27.

⁹⁰ *The Competition Act, 2002*, section 28.

⁹¹ *The Competition Act, 2002*, preamble.

⁹² Naval Sataravala Chopra, Dinoo Muthappa, 'The Curious Case of Compulsory Licensing in India' (2012) 8 *Competition Law International*, 37.

⁹³ *The Patents Act, 1970*, section 84.

licence after expiry of three years from the grant of patent—(i) if the reasonable requirements of the public with respect to the patented invention have not been satisfied; (ii) the patented invention is not available to public at affordable price; or (iii) the patented invention is not worked in the territory of India. Presently, the procedure for availing this remedy in cases of reverse patent settlements would be to first seek redressal from CCI and then separately file for compulsory licensing before the Controller,⁹⁴ making it a tedious and long drawn ordeal. Therefore we believe that pursuing this remedy before the CCI would be most suitable. The overriding effect of the Act over other statutes ensures that no conflict between the provision regarding compulsory licences in the *Patents Act, 1970* and the Act can arise.⁹⁵ Moreover, the CCI can make a reference to the Controller before granting a compulsory license. Certain groups of scholars opine that a policy favouring compulsory licensing would tend to hamper innovation and deter investment. However, this consequence is not inevitable as royalty payments can be granted along with such licenses, which would in fact incentivise innovation.

V. CONCLUSION

Reverse patent settlements that were earlier restricted to the West are likely to emerge in India, making it an urgent issue to be settled by Indian law. Despite the fact that this settlement strategy seems to be catching on in the Indian pharmaceutical industry, the legality remains incoherent owing to the nascent nature of competition law in India. Expected to reach a mammoth figure of USD 55 billion by 2020,⁹⁶ the legal stance to be taken on reverse patent settlements is crucial. Recognising that a rule that is too permissive, would lead to risk allowing competitors to collude and one that is excessively restrictive, would subject competitors to vexatious litigation, potentially discouraging innovation and burdening an already taxed judicial system with a new species of litigation. In this regard, we are of the opinion that the presumptively unlawful approach would be most suitable to the Indian scenario.

⁹⁴ As explained in Part III, an anti-trust approach before the commission is the most suitable to analyse reverse patent settlements

⁹⁵ *The Competition Act, 2002*, section 60.

⁹⁶ *Supra* n. 4, 2.

WHY THE NET NEEDS TO FORGET[†]

Shivangi Adani and Shivani Chimnani***

‘Regulating the Internet to correct the excesses and abuses that arise from the total absence of rules is a moral imperative.’

Nicolas Sarkozy¹

I. INTRODUCTION

In 2006, Stacy Snyder, an apprentice teacher, posted a photo on her MySpace page of herself at a party, wearing a pirate hat and drinking from a plastic cup, with the caption, ‘Drunken Pirate’.² The said online post was disseminated and reposted on various media platforms, achieving extensive prominence. Consequently, the university where Snyder was enrolled denied her a teaching degree, alleging that she was promoting drinking among her under-age students.³ Snyder sued, arguing that the university had violated her First Amendment rights by penalising her for her after-hours behaviour. However, the claim was rejected. Snyder suffered significant loss at the cost of this online post, which was further circulated and made more conspicuous after the university’s actions, thereby creating various hurdles in her personal and professional life. An innocuous online post went on to become the greatest impediment to this young woman’s career. Covering this

[†] This article reflects the position of law as on 30 September 2016.

^{*} The author is a student of Government Law College, Mumbai, and is presently studying in the Third Year of the Five Year Law Course. She can be contacted at shivangiadani@gmail.com.

^{**} The co-author is a student of Government Law College, Mumbai, and is presently studying in the Third Year of the Five Year Law Course. She can be contacted at shivanichimnani@gmail.com.

¹ Nicholas Sarkozy, then President of France, called for tighter regulation of the Internet when the world’s most powerful web figures, including Google, Microsoft and Facebook, gathered in Paris to debate governance in the G-8 Summit Conference, in May 2011.

² Jeffrey Rosen, ‘The Web Means the End of Forgetting’, *The Sunday Magazine, The New York Times* (New York United States of America 25 July 2010) MM30, available at http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?Pagewanted=all&_r=0 (last visited 30 September 2016).

³ *Ibid.*

tragedy, *The New York Times* read, ‘The problem she faced is only one example of a challenge that, in big and small ways, is confronting millions of people around the globe: how best to live our lives in a world where the Internet records everything and forgets nothing ...’⁴ Many questions arise in this situation: Was Snyder’s personal activity related to her professional capacities? Did Snyder deserve to be denied a degree over an unrelated incident of her personal life? Does Snyder deserve to be eternally haunted by this instance hindering her professional growth? More importantly, does Snyder have a *right to be forgotten*?

In the realm of the quintessential virtual age, owing to the internet’s ubiquitous nature, our privacy standards have significantly plummeted. Millions of individuals across the globe willingly divulge substantial amounts of information about their personal and professional lives *via* numerous social media platforms. The disclosed information forms a separate digital identity for every individual. Once disclosed, the information makes an obtrusive ingress in the world of cyberspace, making it globally accessible. The internet is thus capable of building as well as destroying people’s lives.

The present article discusses the essentials of the right to be forgotten as an addition to the right to privacy, along with the implementation, feasibility, global applicability and necessity of this right in today’s information age. Part II of this article discusses the meaning of the right to be forgotten, and the factors leading to its culmination. Part III analyses the right to be forgotten by examining the accountability of search engines, the extraterritorial applicability of the right, and the nature and scope of the information which can be requested for concealment under this right. Part IV analyses the functioning and facilitation of this right and the significant role of search engines in implementing the same. Part V expounds the necessity of this right and its intrinsic interconnectedness with the fundamental rights of free speech and privacy. Part VI highlights the need of having robust data protection laws to ensure an effective consent regime in this digital age.

⁴ *Supra* n. 2.

II. THE ROAD TO THE RIGHT TO BE FORGOTTEN

They say that the internet never forgets, but from time to time, the ongoing dictum needs to be challenged. Mario Costeja González, a Spanish citizen, spent five years fighting to have 18 words delisted from Google search results on his name. He challenged the indefinite nature of the internet in order to remove damaging and irrelevant information about his forlorn past, giving birth to the much contested European Court of Justice (ECJ)⁵ ruling of the *right to be forgotten*.

In 2009, when Mario Costeja González looked himself up on Google, he found notices regarding his former bankruptcy published by the Spanish newspaper *La Vanguardia*. Aggrieved by this, he complained to the newspaper and requested it to take down the notices. When the newspaper ignored his request, he asked the Spanish Data Protection Authority to order the removal of the notices and to direct Google Spain and Google Inc. to remove links to his personal data on the ground that the information was no longer relevant and that he had come out of his financial difficulties. The Spanish Data Protection Authority rejected the request to take down the notices from the newspaper, but Google Spain and Google Inc. were directed to remove the data complained of. Without further ado, Google Spain and Google Inc. appealed against this decision before the High Court of Spain. The High Court of Spain joined the actions and referred the case to the ECJ.⁶

The virtue of forgetting in the digital age seemed farfetched, but the ECJ thought rather the contrary. In May 2014, the ECJ ruled in favour of Mr González and amassed worldwide headlines by introducing a radical new right to privacy—the right to be forgotten.⁷

⁵ The European Court of Justice is the highest court in the European Union in matters concerning the interpretation of European Union Law.

⁶ Rosemary Jay, 'EU Court of Justice Advocate-General Issues Opinion in Google Search Case' (2013) *Hunton & Williams Privacy & Information Security Law Blog*, at <https://www.huntonprivacypblog.com/2013/07/16/eu-court-of-justice-advocate-general-issuesopinion- in-google-search-case/> (last visited 30 September 2016).

⁷ *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] Court of Justice of the European Union Case C-131/12.

A. *What Is the Right to be Forgotten?*

The right to be forgotten, claimed to be an extension of the right to privacy, empowers individuals residing in European Union (EU) countries to request the delisting of personal data collected by third parties, as well as to limit access to information from one's past that has been published on the web, under certain circumstances.⁸ The novel idea proposed is that one should hold the right to have personal information migrate from a public or disclosed sphere to a private or limited access area after a while.⁹ Proponents of this right describe it as 'a way to give (back) individuals control over their personal data and make the consent regime more effective.'¹⁰

B. *The Genesis of the Right to Be Forgotten*

Europe concerns itself with privacy rights and data protection rules to a great extent, as is evident in its treaties, EU directives and regulations, which served as the basis for the emergence of the right to be forgotten. The intellectual roots of the right to be forgotten can be found in '*le droit à l'oubli*' or 'the right of oblivion', a French law which allows a convicted criminal who has served his sentence and paid his debt to society to object to the publication of the facts of his conviction and incarceration.¹¹

The *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, adopted by the Council of Europe in 1981, is the first binding international instrument which sets out minimum standards to protect the individual against abuses which may accompany the collection and processing of personal data.¹²

⁸ Meg Leta Ambrose, 'It's About Time: Privacy, Information Lifecycles, and the Right to Be Forgotten' (2013) 16 (2) *Stanford Technology Law Review* 101, 117.

⁹ Daniel Gomes and Mario J. Silva, 'Modelling Information Persistence on the Web' (2006) 6th *International Conference on Web Engineering*.

¹⁰ Jef Ausloos, 'The "Right to Be Forgotten"—Worth Remembering?' (2012) 28 (2) *Computer Law & Security Review* 143, 143.

¹¹ Napoleon Xanthoulis, 'Conceptualising a Right to Oblivion in the Digital World' (2012) *Social Science Research Network*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064503 (last visited 30 September 2016).

¹² *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (adopted 28 January 1981, entered into force 1 October 1985) ETS No.108.

Additionally, the *European Convention on Human Rights*¹³ and the *Charter of Fundamental Rights of the European Union*¹⁴ establish the right to respect for one's private and family life, one's home, and one's correspondence. Moreover, the *Treaty on the Functioning of the European Union* establishes the principle that everyone has the right to protect the personal data concerning him or her.¹⁵ The *Treaty of the European Union* additionally reinforces the right to data protection.¹⁶ Most vitally, the *Data Protection Directive* (1995 Directive) of the European Union¹⁷ served as the chief legal precursor of the right to be forgotten in the *Mario Costeja González* case. The Preamble to this Directive lays down that '... data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals...'¹⁸ According to this Directive, the 'controller' of the data must ensure that information is collected for 'specific, explicit and legitimate purposes'¹⁹ and must make every effort to ensure that the data is accurate, and rectify or erase it if it is not.²⁰

Further, the case of *Da Cunha v. Yahoo de Argentina SRL*,²¹ where a model, Virginia da Cunha, claimed damages and injunctions against Yahoo and Google for displaying her photos and pornographic websites on her search results without her permission, raised issues relating to

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8.

¹⁴ *Charter of Fundamental Rights of the European Union* (adopted 18 December 2000, entered into force 1 December 2009) 2012/C 326/02, article 7.

¹⁵ *Treaty on the Functioning of the European Union* (adopted 9 May 2008, entered into force 1 December 2009) 2008/C 115/01, article 16 (1).

¹⁶ *Treaty on the European Union* (adopted 7 February 1992, entered into force 1 November 1993) 2012/C 326/01, article 39.

¹⁷ *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data* (adopted 24 October 1995, entered into force 13 December 1995) 95/46/EC. (Data Protection Directive 95/46).

¹⁹ Data Protection Directive 95/46, clause (1) (b) of article 6.

²⁰ Data Protection Directive 95/46, clause (1) (d) of article 6.

²¹ James A. Goldston, and Darin L. Palvi, 'Amicus Curiae Submission in the case of *Da Cunha v. Yahoo de Argentina SRL*' (2014) *Open Society Foundations*, at <https://www.opensocietyfoundations.org/sites/default/files/domestic-da-cunha-amicus-curiae-eng-20140310.pdf> (last visited 30 September 2016).

the free circulation of information and ideas on the internet, as well as the need to protect individuals from the harm resulting from online publications.²²

On 14 April 2016, the EU's *General Data Protection Regulation* (2016 Regulation) was passed in Strasbourg after more than four years of negotiation containing consolidated provisions of the right to be forgotten.²³

III. ANALYSING THE RIGHT

The ECJ in the *Mario Costeja González* case primarily interpreted the 1995 Directive, making it all encompassing and effective in 21st century reality by extending its applicability to search engines. 'Personal data' is defined in the 1995 Directive to include any information relating to an identifiable natural person ('data subject') who can be identified by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.²⁴ The 1995 Directive lays down that the processing of personal data must be lawful and fair to the individuals concerned. In particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed.²⁵ Further, the 1995 Directive holds that data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent.²⁶

The complaint lodged by Mr González against Google Spain and Google Inc. to adopt the necessary measures to withdraw personal data relating to him from their indices and to prevent access to such data in

22 ——— 'Da Cunha v. Yahoo de Argentina SRL and Anr' (2014) *Open Society Foundations*, at <https://www.opensocietyfoundations.org/litigation/da-cunha-v-yahoo-de-argentina-srl-and-another> (last visited 30 September 2016).

23 Zlata Rodionova, 'EU Data Protection Regulation Passes in Brussels Giving Citizens Right to Be Forgotten Online' *The Independent* (London United Kingdom 14 April 2016), available at <http://www.independent.co.uk/news/business/news/european-union-s-general-data-protectionregulation-privacy-facebook-data-eu-law-online-web-a6984101.html> (last visited 30 September 2016).

24 Data Protection Directive 95/46, article 2(a).

25 Data Protection Directive 95/46, preamble, clause 28.

26 Data Protection Directive 95/46, preamble, clause 33.

the future encapsulates the crux of the right to be forgotten. The case raised three fundamental issues which comprised the accountability of search engines,²⁷ the extraterritorial applicability of the right and the nature and scope of the information which can be requested for delisting.

A. Whether Google Can Be Considered as a 'Processor' or 'Controller' of Data and Thereby Be Responsible for the Removal of Data?

The accountability of Google was a much disputed proposition in the course of the *Mario Costeja González* case. Google vehemently argued that it was not responsible for the content, as it was not a processor or controller of the concerned data as envisaged in the 1995 Directive, for the data was originally published on the webpage of the newspaper *La Vanguardia*. However, the Court held to the contrary. It stated that the activities of a search engine, namely that of finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and ultimately making it available to internet users, classifies as processing of personal data.²⁸ A pivotal question which arises is, 'Why should a search engine be held liable when it has not published the information?' The ECJ justified the said liability on the grounds that the information potentially concerns a vast number of aspects of a person's private life, which could not have been interconnected or could have been only obtained with great difficulty without the search engine.²⁹ Hence, the Court held that the very display of personal data on a search result constitutes a more significant interference with the data subject's right to privacy than its publication on a webpage.³⁰

Google lost the battle against the right to be forgotten, and now it bears the responsibility of complying with the delisting requests that

²⁷ The Right to Be Forgotten applies to all search engines which are based in Europe or which have their subsidiaries in the EU. However, since the ECJ Ruling refers to Google, and Google is the prime search engine in Europe, the present article extensively discusses the implications on Google.

²⁸ *Mario Costeja González* case, para 41.

²⁹ European Court of Justice: Press Release No. 70/14, 'Judgment in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González', Luxembourg (13 May 2014).

³⁰ *Mario Costeja González* case, para 87.

Europeans can make. There are several implications of this burden. Firstly, this is a huge liability, especially for a profit-making enterprise. Google is a search engine whose main role entails making searches easier and not mantling information, but the irony is that the ruling partially defies the very basis of a search engine's working. Once every 90 seconds, Google receives a request from someone seeking to keep a part of his personal history from showing up on an internet search.³¹ Since 29 May 2014, Google has received 448,443 requests and evaluated 1,579,894 Universal Resource Locators (URLs). It has removed 43 per cent of the URLs.³² Earlier, Google was under no obligation to cater to these requests. Now, non-compliance with removal requests could make Google liable for up to four per cent of its global income.³³ In the course of discharging this right, Google may deteriorate as an efficient public utility. Secondly, the decision-makers of such requests are the staff at Google themselves. Not only does this impose further costs on Google, but Google has also been given the work of enforcing a human right, which in an ideal situation is done by the Government or the courts. One cannot deny that a profit-driven company will have a clouded vision, and it cannot possibly deal with every request adequately. In difficult and ambiguous cases, Google will prefer deleting the URL and this in turn will produce a severe chilling effect. However, a counter presented against this is that companies ought to be responsible for human rights as well, and in order to implement effective data protection, such a measure is inevitable.

B. Whether the Data Protection Directive Extends to Search Engines like Google, Which Are Established Outside Europe?

On this issue, Google contended that the company functions entirely outside Europe, which is why they fall outside the territorial scope of

³¹ Rachel Stern, 'Google Loses Ground in Fight Against Europe's "Right to Be Forgotten"' (2014) *The Christian Science Monitor*, at <http://www.csmonitor.com/World/Europe/2014/1121/Googleloses-ground-in-fight-against-Europe-s-right-to-be-forgotten> (last visited 30 September 2016).

³² Google Transparency Report as per July 2016, at <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en> (last visited 30 September 2016).

³³ European Commission, *Regulation (EU) 2016/679 of the European Parliament and of the Council of Europe 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 94/46/EC (General Data Protection Regulation)*, article 83 (5).

the 1995 Directive. The ruling held that even if the physical server of a company processing data is located outside Europe, EU rules apply to such search engine operators if they have a branch or a subsidiary in a member state.³⁴ Thus, the ruling applies to all companies with EU corporate entities, even if the servers performing the ‘data control’ functions are themselves based outside the EU.³⁵

At first, when Google implemented this right, it was applicable only to the EU domains of search engines, which meant that if an individual looked up the delisted information on non-EU versions, such as Google.com, the information would still be openly available. However, confining the suppressing of search results solely to European domains undermined the effect of the judgment.³⁶ Google has now fixed this loophole by using its geo-location tools to restrict access on all search domains accessed from the EU.³⁷ However, it is contestable whether this right should go global or not. Should Google, upon finding that an individual’s request is justified, modify its search results globally? Or should it only modify search results shown within the EU?³⁸ It is ideally the primary function of a sovereign State to determine by law what forms of speech and conduct are acceptable within its borders.

C. Whether an Individual Has the Right to Request the Delisting of Lawfully and Consensually Published Personal Data from Search Engines?

The ECJ pondered over the question whether the 1995 Directive could be interpreted as enabling the data subject to require a search engine to remove links to web pages, on the ground that such information may

³⁴ *Supra* n. 29.

³⁵ *Mario Costeja González case*, para 60.

³⁶ Tanguy Van Overstraeten, Richard Cumbley, ‘Have Privacy Regulators Given the “Right to Be Forgotten” a Global Reach?’ (2014) *Linklaters*, at <http://www.linklaters.com/Insights/Publication1403Newsletter/TMT-News-8-December-2014/Pages/EU-right-to-be-forgotten-global-reach.aspx> (last visited 30 September 2016).

³⁷ Peter Fleischer, ‘Adapting Our Approach to the European Right to Be Forgotten’ (2016) Google Europe Blog, at <https://europe.googleblog.com/2016/03/adapting-our-approach-to-european-right.html> (last visited 30 September 2016).

³⁸ Brendan Van Alsenoy, Marieke Koekoek, ‘The Territorial Reach of the “Right to Be Forgotten”: Think Locally, but Act Globally?’ (2014) *European Law Blog*, at <http://europeanlawblog.eu/?p=2476> (last visited 30 September 2016).

be prejudicial to Mr González or that he wishes it to be ‘forgotten’ after a certain time, even if such web pages had been published lawfully and contained true information relating to him.³⁹ As indicated above, the ECJ came to the conclusion that individuals did have a right to be forgotten. It held that when an internet user feels that any information on the internet violates his right to privacy, he has the right to have these links removed under certain conditions, the conditions being that the information should be inaccurate, inadequate, irrelevant or excessive.⁴⁰ The 2016 Regulation, comprising the right to be forgotten, states that a data subject has the right to delist his personal data where: (a) the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed; (b) where data subjects have withdrawn their consent for processing or when the storage period consented to has expired, and there is no other legal ground for processing the data; (c) the data subject objects to the processing of personal data concerning him or the processing of the data does not comply with the regulation for other reasons.⁴¹

Even though the ECJ held that the right is not absolute and has to be balanced with the rights to freedom of expression and of the media,⁴² the recognition of this right has received considerable backlash and there are apprehensions that this recognition will disturb the balance between the above rights. It is rightly argued that this decision may have created an ambiguous responsibility upon search engines to censor the web, extending even to truthful information that has been lawfully published.⁴³

³⁹ *Mario Costeja González case*, para 89.

⁴⁰ *Mario Costeja González case*, para 93.

The terms ‘inaccurate, inadequate, irrelevant or excessive’ have not been precisely defined by the Court or by any legislation, thereby giving it a wide interpretation. Each request for delisting is assessed on a case-by-case basis.

⁴¹ European Commission, *The General Data Protection Regulation (GDPR)* (Regulation (EU) 2016/679 (European Union) (adopted 27 April 2016).

⁴² European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)’ (2012) *COM II final*, para 85.

⁴³ See Aylin Akturk, Jeremy Malcolm, ‘Unintended Consequences, European-Style: How the New EU Data Protection Regulation will be Misused to Censor Speech’ (2015) *Electronic Frontier Foundation*, at <https://www EFF.org/deeplinks/2015/11/unintended-consequences-european-style-how-new-eu-data-protection-regulation-will> (last visited 30 September 2016).

IV. HOW DOES THIS RIGHT WORK?

Search engines have a fundamental role to play in facilitating the right to be forgotten; they implement this right as per the directions provided by the ECJ. They have a formalised procedure for collecting requests for removal, considering the requests and ultimately executing the requests. Google is one such search engine which has spearheaded the functioning of this right and has undertaken profound steps in complying with the EU's right to be forgotten. The company has created a new form, allowing those in the EU to request the takedown of URLs they have an objection to. Thus, when a person finds embarrassing, irrelevant or damaging online information, he has the right to contact the data controllers, ie traditional search engines (such as Google, Bing, Yahoo etc) and ask them to take it down. The person can address the search engines, asking them to delist the websites having such information, elucidating the reasons for the same. The form provided by Google to entertain delisting requests has been reproduced here:^{44, 45}

⁴⁴ Google Inc, 'Right to be Forgotten Form', at https://support.google.com/legal/contact/lr_eudpa?product=websearch (last visited 30 September 2015).

⁴⁵ The form filling procedure consists of various steps. First, the person who wishes to get his name delisted must select one of the 28 EU countries provided in the form, which also include the four non-EU countries of Iceland, Liechtenstein, Norway and Switzerland. The person is then required to fill the personal information column, which contains the name used by him for the search, the links of which he wants to delist, his full name and his communication email address. After this, the person is required to enlist the URLs he wishes to get delisted, explaining his association with the URL and why the URL is objectionable to him. Thereafter, the person is required to attach a digital copy of a form of identification, to ensure authenticity, and a photograph of the individual, if the link requested to be delisted includes his picture. Finally, the person is supposed to sign virtually, confirming the submission of the information and request, and hit the 'submit' button which confirms the request submission. Once the form is submitted, a system-generated response is issued which confirms the receipt of the legal request and the ongoing assessment of the request. The Google Removal Team then processes the request. Overall, each removal is examined on a case-by-case basis. In the case of rejection, people are notified, and they have the right to appeal to the concerned jurisdictional authority.

Search removal request under data protection law in Europe


Background

In May 2014, a ruling by the Court of Justice of the European Union (C-131/12, 13 May 2014) found that certain people can ask search engines to remove specific results for queries that include their name, where the interests in those results appearing are outweighed by the person's privacy rights.

When you make such a request, we will balance the privacy rights of the individual with the public's interest to know and the right to distribute information. When evaluating your request, we will look at whether the results include outdated information about you, as well as whether there's a public interest in the information – for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials.

You will need a digital copy of a form of identification to complete this form. If you are submitting this request on behalf of someone else, you will need to supply identification for them. Fields marked with an asterisk * must be completed for your request to be submitted.

Please select the country whose law applies to your request *

Personal information

Name used to search *

This should be the name that, when used as a search query, produces the results you would like to delist. If you wish to submit multiple names (e.g. if your maiden name differs from your current last name), please put a “/” between the names. For example, “John Smith / John Doe”.

Full name of requester

Your own name, even if you are making the request on behalf of someone else who you are authorized to represent. If you are representing someone else, you must have the legal authority to act on their behalf.

If you are submitting this request on behalf of someone else, please specify your relationship to that person (for example: “parent”, “attorney”). We may ask for documentation confirming that you are authorized to represent this person.

Contact email address*

(The email address where we will contact you with updates about your complaint)

Search results you want removed from the list of results produced when searching for the name

Identify each result in the list of results that you want removed by providing the URL for the web page that the result links to. The URL can be taken from your browser bar after clicking on the search result in question. If you wish to submit more than one URL in this request, please click “Add additional” for each additional URL. Learn more about how to find the URL of a page.

URLs for results you want removed *

Add additional

For each URL you provided, please explain

- how the linked URL relates to you (or, if you are submitting this form on behalf of someone else, why the page is about that person); and
- why the inclusion of that URL in search results is irrelevant, outdated, or otherwise objectionable.

We will not be able to process your complaint without this information. *

For example:

http://example_1.com

This URL is about me because... This page should not be included as a search result because...

http://example_2.com

This URL is about me because... This page should not be included as a search result because...

To prevent fraudulent removal requests from people impersonating others, trying to harm competitors, or improperly seeking to suppress legal information, we need to verify identity. **Please attach a legible copy of a document that verifies your identity** (or the identity of the person whom you are authorized to represent). A passport or other government-issued ID is not required. You may obscure parts of the document (e.g. ID number) as long as the remaining information identifies you. You may also obscure your photograph, unless you are asking for removal of pages that include photographs of you. Google will use this information solely to help us document the authenticity of your request and will delete the copy within a month of closing your removal request except as otherwise required by law.*

Choose file

No file chosen

I represent that the information in this request is accurate and that I am the person affected by the web pages identified, or I am authorized by the person affected to submit this request. *

Please check to confirm

Please note that we will not be able to process your request if the form isn't properly filled out or if the request is incomplete.

Signature

By typing your name below and clicking "submit", you are consenting to the processing of the personal information that you submit as outlined below and you are representing that the above statements are true, that you are requesting the removal of the search results identified by the URLs you have listed above, and that, if you are acting on behalf of another persons, you have the legal authority to do so.

Google Inc. will use the personal information that you supply on this form (including your email address and any ID information) and any personal information you may submit in further correspondence for the purposes of processing your request and meeting our legal obligations. We may share details of your request with data protection authorities, but only when they require these details to investigate or review a decision that we have made. That will normally be because you have chosen to contact your national DPA about our decision. We may provide details to webmaster(s) of the URLs that have been removed from our search results.

Signature *

Please type your full name here

Signed on this date of *

MM/DD/YYYY

SUBMIT

* Required field

V. WHY WE NEED THE RIGHT TO BE FORGOTTEN

The reaction to the ECJ ruling, apart from shock, has been split. It has produced an interesting philosophical divide between two fundamental rights ie the freedom of expression and the right to privacy, and has accelerated a debate that should have happened a long time ago.⁴⁶ Despite the fact that Google and advocates of free speech have severely criticised this right, nonetheless, the significance of the right to be forgotten cannot be undermined for the following reasons:

A. *The Necessity of Regulating the Net*

Computer technology has advanced with startling rapidity over the past decade. A person may not want any information concerning him permanently available online, but with the pervasive nature of the internet, his control over his online activities has become minimal. The reason behind the *Mario Costeja González* case was connected with the power that Google wields: ‘Googling’ someone is probably the most effective way to find out information about that person.⁴⁷ We live in an era where there is a paradigm shift to virtual ways and means; reliance on the internet is far more than on any other media. Thus, new jurisdictional instruments have to be manifested to meet these new aspects of existence.

The right to be forgotten can be of critical use for persons in numerous instances. Employers frequently look up their candidates online in order to learn about them, which provides assistance in the recruitment process.⁴⁸ Recruiters conduct an online search of candidates using a variety of websites, including search engines, social networking sites,

⁴⁶ Julia Powles, ‘Why we can Salvage from “Right to Be Forgotten” Ruling’ (2014) *Wired*, available at <http://www.ict.pcm.gov.lb/ict/English/SubPage.aspx?pageid=191> (last visited 30 September 2016).

⁴⁷ Paul Bernal, ‘The Right Be Forgotten Roadshow—and the Power of Google,’ (2014) *Paul Bernal’s Blog*, at <https://paulbernal.wordpress.com/2014/09/16/the-right-be-forgotten-roadshow-and-the-power-of-google/> (last visited 30 September 2016).

⁴⁸ Chris Stokel-Walker, ‘Google: Who Would Want the Right to Be Forgotten?’ (2014) *BBC News*, at <http://www.bbc.com/news/magazine-27396981> (last visited 30 September 2016).

photo and video sharing sites; and 70 per cent of them state that they have rejected candidates because of information found online, such as photos and membership of controversial groups.⁴⁹ There is nothing inherently wrong in prospective employers sifting through online information to find out about the employability of a particular person. However, in many cases, placing reliance on online information could be unjustifiably harmful to the individual in question, for example, when the information relied on is false, misleading or no longer relevant. The anonymous nature of the internet is also misused for the purpose of maliciously spreading defamatory information for vengeance or other personal motives. A person should have the right to regulate such information, to ensure a fair chance of employment. Further, in the United Kingdom, the *Rehabilitation of Offenders Act* has a provision for ‘spent convictions’, which are short term convictions, allowing them to be effectively ignored after a specified amount of time.⁵⁰ For example, if a person is sentenced to less than six months in prison, his conviction would be spent or ignored after two years. Spent convictions typically do not need to be disclosed to employers, but owing to Google search results, such benefits accruing from the Act could not be effectively redeemed.⁵¹ These examples highlight the problems encountered by individuals due to the internet’s indelible content and the dire need to have a right to regulate such content. The right to be forgotten is conceived to be the crusader against the new found digital openness hampering people’s lives.

B. The Right to Be Forgotten as an Extension of Digital Privacy Rights

Privacy is traditionally defined as the state of freedom from intrusion. If there is physical intrusion, we have the necessary law of torts for trespass, but mankind now suffers from the evil of digital intrusion. In the international sphere, article 8 of the *European Convention on Human Rights* (ECHR)⁵² protects the right to respect for private life.

⁴⁹ *Supra* n. 2.

⁵⁰ — ‘What Does a Spent Conviction/Caution Mean?’ *Ask the Police*, at <https://www.askthepolice.uk/content/Q89.htm> (last visited 30 September 2016).

⁵¹ Stokel-Walker *supra* n. 48.

⁵² *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8(1).

Additionally, article 17 of the *International Covenant on Civil and Political Rights* (ICCPR), which protects privacy, provides that, ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’⁵³ The framework of international human rights law under the ICCPR remains equally applicable to new communication technologies such as the internet.⁵⁴ State parties are thus required by article 17(2) of the ICCPR to regulate, through clearly articulated laws, the recording, processing, use and conveyance of automated personal data, and to protect those affected by its misuse, by State organs as well as private parties.

The protection of personal data represents a special form of respect for the right to privacy.⁵⁵ Today, internet privacy matters more broadly than traditional privacy does, and it should not be considered easy for other rights to outweigh it in the balance.⁵⁶ Invasions and infringements of privacy, from surveillance and tracking to profiling and misuse of data, can have an impact on far more than our ‘individual’ privacy—they can have an impact on every aspect of our lives, from ‘traditional’ civil rights such as freedom of speech, association and assembly, to practical things like job prospects, relationships, credit ratings and the prices we pay for goods, which threatens our autonomy and our freedom to live as we would like to.⁵⁷

In addition to prohibiting data processing for purposes that are incompatible with the ICCPR, data protection laws must establish rights to information, correction and, if need be, deletion of data and

⁵³ *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, article 17.

⁵⁴ United Nations High Commissioner for Human Rights, Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) A/HRC/17/27, para 21.

⁵⁵ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn NP Engel Kehl am Rhein 2005) 401.

⁵⁶ Paul Bernal, ‘Internet Privacy Rights’ (2014) *Paul Bernal’s Blog*, at <https://paulbernal.wordpress.com/internet-privacy-rights?iframe=true&preview=true> (last visited 30 September 2016).

⁵⁷ *Ibid.*

provide effective supervisory measures.⁵⁸ As stated in the Human Rights Committee's General Comment on the Right to Privacy,

'In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files.'⁵⁹

There should also be adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.⁶⁰

C. *Balancing of the Rights of Expression and Privacy*

The right to be forgotten is often deemed to be a suppressor of the right to expression and public access to information, but one ought to consider the nascence of the provision and what it aims to guarantee. The right to be forgotten does not attempt to suppress the freedom of expression; freedom of expression cannot be absolute and other factors such as reputation and repercussions on another individual have to be taken into consideration. The right to be forgotten is about the control of data, not about censorship, and if properly understood and implemented is not in conflict with the freedom of expression. It should not be seen as a way to rewrite or conceal history or as a tool for celebrities or politicians; it is rather a fundamental and pragmatic right available to all.⁶¹ Considering the underlying international framework, article 19 of the ICCPR guarantees every individual the freedom of expression and freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice⁶² but includes an essential restriction, being 'respect of the rights or reputation

⁵⁸ La Rue *supra* n. 54.

⁵⁹ Human Rights Committee, 'General Comment 16, Article 17' (1988) HRI/GEN/1/Rev.1, para 10.

⁶⁰ La Rue *supra* n. 54, para 69.

⁶¹ Paul Bernal, 'A Right to Delete—Not a Right to Be Forgotten' (2014) *Paul Bernal's Blog*, at <https://paulbernal.wordpress.com/2014/08/07/a-right-to-delete-not-a-right-to-be-forgotten/> (last visited 30 September 2016).

⁶² ICCPR, article 19.

of others'.⁶³ Similarly, article 8 of the ECHR ensures the freedom of expression, but includes a cardinal condition, being 'for the protection of the reputation or rights of others'.⁶⁴ Most human rights instruments guaranteeing the freedom of expression include legitimate restrictions to safeguard the rights of others, and this is what the right to be forgotten essentially does. In fact, the right to privacy is essential for individuals to express themselves freely. The widespread availability of information which is potentially damaging to persons can constitute a violation of their right to privacy, and by undermining people's confidence and security on the internet, it will impede the free flow of information and ideas online.⁶⁵ The right to privacy and expression thus go hand in hand and privacy is equally necessary for ensuring expression. The right to be forgotten would constitute a violation of the freedom of expression only when there is an arbitrary use of the law to sanction legitimate expression.⁶⁶

D. Wide Scale Worldwide Adoption of the Right to Be Forgotten

More and more countries today are adopting the right to be forgotten to ensure effective data protection.

Russia has signed into law the 'Right to Be Forgotten', which allows individuals in Russia to demand the removal of a search engine's links to personal information deemed irrelevant or inadequate.⁶⁷ In recent cases, the courts in Australia⁶⁸ and Japan⁶⁹ have referred to the ECJ ruling and held Google liable for the damaging information shown in the search results of persons.

⁶³ ICCPR, article 19(3)(a).

⁶⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005, article 8(2).

⁶⁵ *Ibid.*

⁶⁶ La Rue *supra* n. 54, para 53.

⁶⁷ Vera Shaftan, 'Russia Signs Controversial "Right to Be Forgotten" Bill into Law' (2015) *Data Protection Report*, Norton Rose Fulbright, at <http://www.dataprotectionreport.com/2015/07/russia-signs-controversial-right-to-be-forgottenbill-into-law/> (last visited 30 September 2016).

⁶⁸ *Duffy v. Google Inc.*, [2015] SASC 170.

⁶⁹ Justin McCurry, 'Japan Recognises "Right to Be Forgotten" of Man Convicted of Child Sex Offences' (2016) *The Guardian*, at <http://www.theguardian.com/technology/2016/mar/01/japan-recognises-right-to-be-forgotten-of-man-convicted-of-child-sex-offences> (last visited 30 September 2016).

There are conflicting opinions in the United States of America (US) as to whether Google should adopt the right to be forgotten. In the background of the primacy given to the First Amendment rights in the US, it is a valid interpretation that American privacy legislation will possibly never reach the scope of European laws.⁷⁰ In India, the implementation of the right to be forgotten seems unachievable at this stage, since there exists no explicit right to privacy and the courts have incorporated the right to privacy into an existing fundamental right.⁷¹ Interestingly, India recently witnessed its first right to be forgotten case, wherein the Delhi High Court raised the question whether the right to life included a right to be forgotten, where a banker implored the Court to remove personal details about his former acrimonious marital dispute from online search engines, arguing them to be an invasion of his privacy.⁷² The Petitioner cited the European precedent of the *Mario Costeja Gonzalez* case as grounds for seeking the removal, stating that his marital relations were presently stable and the criminal dispute had been long resolved, but the online presence of the dispute stymied his employment prospects. No final decision was reached, but the Delhi High Court ordered Google and other authorities to file a reply to the Petitioner's claim by 2 February 2017.⁷³

VI. CONCLUSION

The internet's stronghold has made privacy a distant dream. The past is no longer the past, but an everlasting present.⁷⁴ As people realize how relentless the iron memory of the internet can be, and how suddenly data from the past can re-emerge in unexpected contexts, they will

⁷⁰ Victor Luckerson, 'Americans Will Never Have the Right to Be Forgotten' (2014) *Time*, at <http://time.com/98554/right-to-be-forgotten/> (last visited 30 September 2016).

⁷¹ *Constitution of India*, 1950, articles 19(1)(a) and 21.

⁷² Abhinav Garg, 'Delhi Banker Seeks "Right to Be Forgotten" Online' (New Delhi, India 2016), *The Times of India*, available at <http://timesofindia.indiatimes.com/india/Delhi-banker-seeks-right-to-be-forgottenonline/articleshow/52060003.cms> (last visited 30 September 2016).

⁷³ Salman SH, 'Delhi HC accepts intervention against a Right to be Forgotten case in India' (2016) *Medianama*, available at <http://www.medianama.com/2016/09/223-delhi-hc-right-to-be-forgotten/> (last visited 30 September 2016).

⁷⁴ Norberto Nuno Gomes de Andrade, 'Oblivion: The Right to Be Different ... from Oneself, Reproposing the Right to Be Forgotten', [monograph online], (2012) 13 IDP. *Revista de Internet, Derecho y Política*, 122, 134, available at http://journals.uoc.edu/index.php/idp/article/view/n13-andrade_esp/n13-andrade_esp (last visited 30 September 2016).

understand the importance of regulating the net.⁷⁵ The EU is headed to a great start by providing a milestone statute guaranteeing digital protection. The right to be forgotten is an imperative right required to defy the indefinite nature of the internet and to provide assistance in melting this ironclad memory which has often tendered several inconveniences as aforementioned and has resulted in the absolute loss of control of an individual over his/her own data.

Given the internet acutely overpowering our lives, and all our information being virtually available, our privacy rights ought to be considerably configured to include the digital protection of information. Since we live in an era where virtual data encapsulates every snippet of information, ranging from our personal actions to professional endeavours, we must have the capacity, both technically and legally, to have data removed if no longer required. The 'Right to Be Forgotten' would offer people an effective opportunity to re-evaluate the use of their data for ever-changing purposes in dynamic contexts.⁷⁶ It would strengthen the individual's control over his/her identity and constitute some 'check' on information available online.⁷⁷ The right to be forgotten forces the autonomy of every person to protect his data; it guarantees an individual the choice whether to have personal data which may be detrimental to self, to be present or absent in cyberspace.

The battle to protect privacy in the technological era seemed like a quixotic venture, but this ruling signifies a concrete step in strengthening digital privacy. The right to be forgotten is most certainly the need of the hour and the actions of the EU of providing internet users with the right and choice to regulate their individual information online are greatly laudable and are being increasingly adopted worldwide for all the right reasons. For the foregoing reasons, for the sake of privacy and human rights alike and for the need of protecting data and consolidating individual consent is why the net needs to forget.

⁷⁵ Bert-Jaap Koops, 'Forgetting Footprints, Shunning Shadows. A Critical Analysis of the "Right to Be Forgotten" in Big Data Practice' (2011) 8(3) *Tilburg Law School Legal Studies Research Paper Series* 1, 2.

⁷⁶ Ausloos *supra* n.10.

⁷⁷ *Ibid.*

INDIA: ON THE 'REIT' PATH[†]

Sweta Ananthanarayanan and Shreyas Narla***

I. INTRODUCTION

The growing scale of operations of the Indian corporate sector has increased the demand for commercial buildings, residential properties and spaces including warehouses and shopping centres. This surge in demand has consequently fuelled the need to expand investment in the real estate sector.

Traditionally, the only sources of financial support for this sector have been the banks, financial institutions, and in some cases, private players. Regulated means for investment in real estate have been continually formed and evolved to provide for this sector; though these have been circumscribed by direct engagement with physical properties. It is in this scenario that a relatively modern source of investment in real estate properties, being the real estate investment trust (REIT), has been seen as the way forward.¹

REIT serves as an alternative for investors who are averse to investing in physical properties due to the monetary quantum involved, and the risks that may arise including unsupervised and arbitrary rent generated from such properties. Investors can buy and sell units of REIT on various stock exchanges, making investment easier as well as ensuring liquidity and transactional transparency compared to acquisition of a

[†] The article reflects the position of law as on 17 January 2017.

^{*} The author is an alumna of Government Law College, Mumbai and is presently working as an Associate at Cyril Amarchand Mangaldas. She can be contacted at sweta.glc@gmail.com.

^{**} The co-author is a student of Government Law College, Mumbai and is presently studying in the Fifth Year of the Five Year Law Course. He can be contacted at narla.shreyas@gmail.com.

¹ See Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013, *see also* Hemant Goyal & Sandhya Gupta, 'REITs to Boost Growth and Transparency in Indian Real Estate Sector' *HG Legal Resources*, available at <https://www.hg.org/article.asp?id=33321> (last visited 17 January 2017).

physical property.² It pools investor money in order to invest in real estate properties,³ and provides time-bound, regulated and regular rental income to the investors. With the introduction of REITs in India, a person can reap benefits of such regulated and assured rent by investing a minimum of two lakh rupees in REIT units.⁴

The framework of the REIT was developed in the United States of America (USA). It laid the foundation for an entity that undertakes investment in commercial real estate similar to investment in stocks as provided by mutual funds, wherein the entity invests in revenue-generating properties and sells 'units' upon listing on stock exchanges. Those who own these 'units' receive distributions from the rent generated, which can be considered similar to the dividends received on stock. This structure has evolved over the years in USA, functioning in varied and complex ways, yet *the original legislative intent of making large-scale, income-producing commercial real estate investment available to all types of investors remains at the core.*⁵ (emphasis supplied) The structure of REIT was introduced in Australia in 1971 and in a number of Asian countries in the late 1990s and early 2000s. Almost 30 countries have operating REIT markets; a further 12 have REIT-type legislations in place, while other countries have such legislation under active consideration.⁶

² See Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013.

³ 'SEBI Relaxes Rules for REITs, Offshore Fund Managers' *The Economic Times* (Mumbai India 18 June 2016), available at http://economictimes.indiatimes.com/markets/stocks/policy/sebi-relaxes-rules-for-reitsoffshore-fund-managers/articleshow/52798985.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last visited 17 January 2017).

⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 14 of regulation 14.

⁵ Debbie Stabenow, Junior United States Senator from Michigan, while addressing the Congress stated the above lines on the occasion of the 50th Anniversary of REITs in USA. These lines reiterate the five decade intent that has guided the functioning of REITs in USA, ie, '*investors from all walks of life to benefit from the income generation and diversification advantages of commercial real estate investments*'. *Congressional Record* Volume 156, Number 123 (14 September 2010), available at <http://www.gpo.gov/fdsys/pkg/CREC-2010-09-14/html/CREC-2010-09-14-pt1-PgS7081.htm> (last visited 17 January 2017).

⁶ Bobby Parikh, 'The right way to tax REITs', *India Forbes* (16 February 2016), available at <http://forbesindia.com/article/special/the-right-way-to-tax-reits/39627/1?utm=slidebox> (last visited 17 January 2017).

The Securities and Exchange Board of India (SEBI) introduced the *Securities and Exchange Board of India (Real Estate Investment Trust) Regulations, 2014, as amended* (REIT Regulations) with the intent to include rent generating properties within the REIT asset profile for enabling a framework for setting up of, operating and listing of Indian REITs (I-REITs), which were notified on 26 September 2014. Besides the commercial real estate space, the REIT Regulations go further and allow investment in certain infrastructural projects limited to hotels, hospitals, convention centres and common infrastructure for composite real estate projects.⁷

Although the REIT Regulations were notified in September 2014, in a span of two years SEBI has made approximately 190 amendments to remove ambiguities and to provide certain clarifications in the REIT Regulations. These amendments were notified with effect from 30 November 2016. In light of this background, the article explains the concepts, methods and principles adopted in REIT Regulations. Part II of this article carries a detailed analysis of REIT Regulations pertaining to the structure and framework of I-REIT, while noting its various facets and peculiarities *vis-à-vis* the frameworks in various international jurisdictions. Part III puts forth the regulatory and practical concerns related to the manner and nature of investment in property. Part IV deals with the proposed tax regime and studies the best tax practices existing across jurisdictions to ascertain a suitable structure for I-REITs.

II. STRUCTURE AND FRAMEWORK OF I-REIT

The REIT Regulations set forth strict requirements for an I-REIT structure, the nature of its assets and its sources of income. They provide, *inter alia*, for an organisational and functional structure of an I-REIT, roles, rights and responsibilities of the parties involved, compliance procedures for issue and listing of I-REIT units, procedures and disclosures concerning related party transactions.

⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(zi) of regulation 2.

The REIT Regulations require every I-REIT to be mandatorily registered with SEBI.⁸ Pursuant to such norms for mandatory registration with SEBI, certain specific eligibility criteria are required to be fulfilled by the parties involved,⁹ being, the sponsor and sponsor group, manager and trustee. The primary criterion stipulates that an I-REIT should be a trust, with the trust deed registered in India under the provisions of the *Registration Act, 1908*.¹⁰ The trust deed must have its main objective as undertaking the activity of an I-REIT in accordance with the REIT Regulations. It must also include the responsibilities of the trustee as laid down under Regulation 9 of the REIT Regulations including overseeing the activities of the manager in the interest of the unitholders.¹¹ Further, the parties are separate, non-connected entities¹² and include sponsors, sponsor groups, managers and trustees, and exclude the principal valuer.¹³ The concept of a sponsor group has been recognised in the REIT Regulations unlike the *Securities and Exchange Board of India (Infrastructure Investment Trusts) Regulations, 2014*, which lays down *inter alia*, the framework for infrastructure investment trusts. These parties manage, regulate and supervise the I-REIT, its investments as well as the issuance of the units. Each of the parties has distinctive criteria and responsibilities ranging from setting up the I-REIT to managing the I-REIT. However, the manager has certain distinct responsibilities which are subject to supervision of the trustee. The role and liability of the trustee may be limited to the extent of delegation of certain responsibilities that is permitted to managers. However, this delegation of responsibilities cannot supersede the primary fiduciary responsibilities that the trustee is required to fulfil under the *Indian Trusts Act, 1882*.

⁸ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1 of regulation 3.

⁹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(zc) of regulation 2.

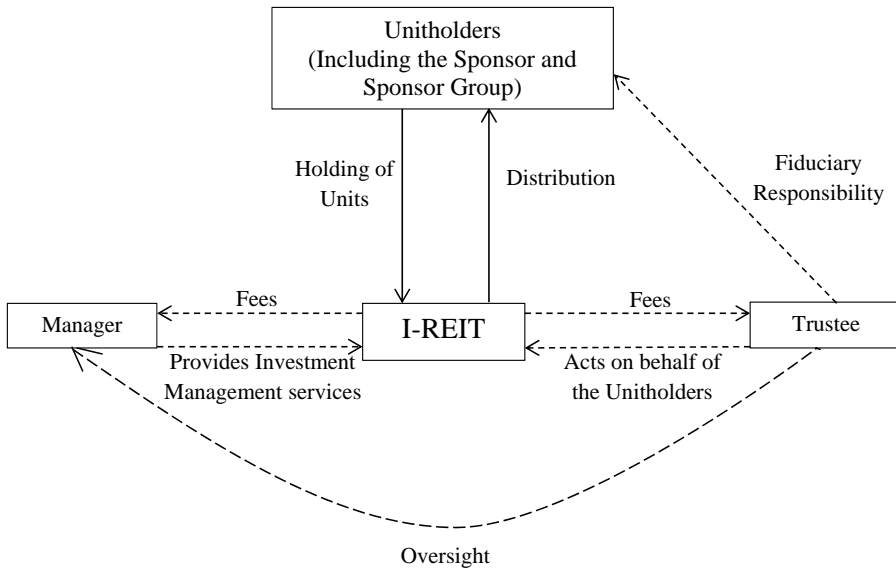
¹⁰ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(a) of regulation 4.

¹¹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(b) of regulation 4.

¹² *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(c) of regulation 4.

¹³ *Contra* draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013, sub-regulation 1(c) of regulation 2.

The pictorial representation below provides an overview of the structure envisaged under the REIT Regulations:



A. *Sponsor and sponsor group*

The sponsor and sponsor group set up an I-REIT.¹⁴ When the I-REIT is created, the sponsor and sponsor group would inject their properties into the initial portfolio of the I-REIT. The sponsor and sponsor group, collectively, will also retain majority of the ownership when the I-REIT is created. The sponsor could be a real estate developer like a builder, or a private equity fund investing in real estate.¹⁵ All sponsors in an I-REIT must collectively have a minimum net worth of 100 crore rupees,¹⁶ with each individual sponsor having a net worth of not less

¹⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1 of regulation 11.

¹⁵ See Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013.

¹⁶ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(d)(ii) of regulation 4.

than 20 crore rupees.¹⁷ Such a moderately high bar is beneficial as it ensures the support of a strong sponsor which strengthens the financial stability of an I-REIT.

It is essential that such 'strong' sponsors back an I-REIT; especially in light of the performance of the Singaporean REITs during the global financial crisis of 2007-2008. During this period, some of the Singaporean REITs faced delinquency risks as they were unable to refinance the loans with banks, and their sponsors lacked the capacity to support them with loans or equity injection. However, Singaporean REITs which had strong sponsor-backing were able to sail through liquidity crunches by short term injection of funds by such sponsors.¹⁸

The sponsor or its associates must also have a minimum of five years' experience¹⁹ as a real estate developer, or in fund management²⁰ in the real estate industry. While there is no additional qualification for a real estate fund manager acting as a sponsor, the sponsor, if a developer, must have at least two of its projects completed.²¹ The concern with this stipulation is that the REIT Regulations do not provide any clarification or explanation regarding the nature of such projects. The nature of these projects seems relevant, especially if the sponsor has had experience and success in developing residential real estate and is foraying into commercial real estate through the REIT set-up. For instance, a developer that invests in residential real estate can also qualify as a sponsor for an I-REIT that may engage in commercial real estate. This may not be an ideal situation.

¹⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, proviso to sub-regulation 2(d)(ii) of regulation 4.

¹⁸ Seek Ngee Huat et al (eds), *Singapore's Real Estate: 50 Years of Transformation* (World Scientific), 184.

¹⁹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(d)(iii) of regulation 4.

²⁰ Funds management is the management of the cash flow of a financial institution. The funds' manager ensures that the maturity schedules of the deposits coincide with the demand for loans, 'Fund Management' *Investopedia*, at <http://www.investopedia.com/terms/f/fundsmanagement.asp> (last visited 17 January 2017). Thus a fund management in real estate industry would involve the channelising of the pooled funds in real estate assets or projects.

²¹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, proviso to sub-regulation 2(d)(iii) of regulation 4.

Regulation 11 of the REIT Regulations charts out the responsibilities of a sponsor and sponsor group. In addition to establishing an I-REIT, the sponsor and sponsor group have been conferred upon the task of appointing the trustee. It also stipulates that the sponsor and sponsor group shall transfer or undertake to transfer their entire ownership of real estate assets to an I-REIT, prior to allotment of the I-REIT units. Commercially, there would be an agreement between the I-REIT and its sponsor and/or sponsor group in relation to the right of first refusal agreement. In a situation where the sponsor and/or the sponsor group wants to sell its property asset, the I-REIT will be offered the right to purchase the asset first before it is being offered to the market. They may also transfer their interest in a Special Purpose Vehicle (SPV) that owns real estate. Since the REIT Regulations have charted out the work of an independent valuer who must carry out a detailed valuation of the assets including physical inspection, so that any risk that may lie in transferring of property by them to the I-REIT, either in terms of fair pricing or quality of buildings, is averted.²²

The REIT Regulations do not have any restriction on the number of sponsors.²³ After the initial offer of the units, the sponsor and sponsor group must have a minimum holding of 25 per cent of the I-REIT units for at least three years from the date of listing of such units. Any holding in excess of the above limit must be held for at least one year.²⁴ At all times, the sponsor must individually hold at least five per cent²⁵ of the I-REIT units and collectively,²⁶ all sponsors and sponsor groups must hold at least 15 per cent of the I-REIT units.

Upon the lapse of the compulsory holding periods, the sponsors may sell their units, subscribing to permanent holding limits, specified

²² *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, regulation 21.

²³ Prior to the *Securities and Exchange Board of India (Real Estate Investment Trusts) (Amendment) Regulations, 2016*, the number of sponsors was limited to three.

²⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 3(a) of regulation 11.

²⁵ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 3(c) of regulation 11.

²⁶ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 3(b) of regulation 11.

above.²⁷ However, if the sale is below such limits (5 per cent individually and 15 per cent collectively), it must arrange, prior to such a sale, for another person to step in as the re-designated sponsor. Such a re-designated sponsor shall comply with all the qualifications applicable to a sponsor under the REIT Regulations and is required to obtain the approval of the unitholders, thereby placing a sound check on such a process. Once the I-REIT is listed, the sponsor's role would be reduced to that of a shareholder and like all other shareholders, it would receive income in the form of dividends.

While adhering to due process, promoters of companies are in a position to not only do away with their entire shareholding. In contrast, the sponsors and sponsor groups are obliged to maintain their stake and office in the I-REIT to ensure their 'skin in the game' at all times.²⁸

B. Manager

A manager of an I-REIT will be at the helm of all operations right from appointments²⁹ to asset management, and from arranging for listing to ensuring accounting, and supervising the auditing of the I-REIT. Such a manager can be a company or limited liability partnership (LLP) or a body corporate, qualified with a condition that it should be incorporated in India.³⁰ To qualify as a manager backed with financial competence, the REIT Regulations require a company or body corporate to have a net worth of at least 10 crore rupees, or an LLP to have at least 10 crore rupees worth of net-tangible assets.³¹ In addition, the manager or its associate must have at least five years of experience in fund management or advisory services or property management in the real estate industry or in development of real estate.³² An 'associate'

²⁷ *Supra* n. 25 and 26.

²⁸ Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013.

²⁹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulations 5 and 6 of regulation 10.

³⁰ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(w) of regulation 2.

³¹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(e)(i) of regulation 4.

³² *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(e)(ii) of regulation 4.

has been defined under the REIT Regulations to mean any person who has been as defined under the *Companies Act, 2013* or under the applicable accounting standards and shall also include the following (i) any person controlled, directly or indirectly, by the said person; (ii) any person who controls, directly or indirectly, the said person; (iii) where the said person is a company or a body corporate, any person(s) who is designated as promoter(s) of the company or body corporate and any other company or body corporate with the same promoter(s); (iv) where the said person is an individual, any relative of the individual.³³ The REIT Regulations impose immense responsibilities on the manager including the responsibility to make investment decisions with regard to the I-REIT assets. Accordingly, if a manager does not have the requisite experience, it may also avail the benefit of using the experience of one of its associates to fulfil this eligibility requirement. This stipulation seeks to ensure a certain degree of proficiency and expertise in the management of an I-REIT and also provides for a range of experienced players with varied real estate experience. To further augment the competency of the manager, at least two of its key personnel must have at least five years, each, of experience in fund management or allied services or advisory services or property management in the real estate industry or in development of real estate.³⁴ However, there is no clarity whether the experience in real estate is specific to commercial real estate or residential real estate. While this distinction may not be entirely relevant for the sponsor, it does raise a concern in the case of a manager who is in complete charge of the operations of an I-REIT and its properties.

The REIT Regulations envisage the involvement of professional managers with diverse skill bases in property development, redevelopment, acquisitions, leasing and management in I-REITs.³⁵ The scope of the professional managers includes making decisions on the purchase and financing of properties for an I-REIT. The question

³³ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(b) of regulation 2.

³⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(e)(iii) of regulation 4.

³⁵ See Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013.

of appointment of an external-advisor and external management requirement arose when the USA REIT envisioned a passive investment vehicle, like the mutual funds, which were not intended to engage in the operating activities of a traditional company. Since a manager is entrusted with decision making powers, the interests of unitholders including sponsors may be subject to its vagaries.³⁶

If the manager is a company, then not less than half of its directors should be independent and should not be directors on the board of another I-REIT, and if it is an LLP, then not less than half of the members of its governing board should be independent and should not be members of the governing board of another I-REIT.³⁷ While this is deemed to dissuade any form of unscrupulous activity and ensure objectivity in the management of the I-REIT, explicit liabilities and responsibilities of independent directors or members of such entities have not been envisaged under the REIT Regulations. Despite, the trust nature of an I-REIT, inference may be drawn from the *Companies Act, 2013*³⁸ to determine the eligibility, responsibility, accountability, and remuneration³⁹ of independent directors.

³⁶ Broad experiences concerning REIT managers, both external and internal, which have existed in jurisdictions across the world, include issues of reorganisation of the assets, high management fees, etc. See generally, Barry Critchley, 'Externally Managed REITs Generate Their Own Set of Issues' *Financial Post* (10 April 2015), at <http://business.financialpost.com/news/fp-street/externally-managed-reits-generate-theirown-set-of-issues> (last visited 17 January 2017), Goh Eng Yeow, 'Check out REIT Manager's Fee, Not Just Dividend', *Straits Times* (11 July 2015), at <http://www.straitstimes.com/business/check-out-reit-managers-fee-not-just-dividend> (last visited 17 January 2017), Tien Foo, 'Challenges Ahead for Singapore Real Estate Investment Trusts' Department of Real Estate, *National University of Singapore*, at <http://www.rst.nus.edu.sg/staff/singtienfoo/Challenges%20Ahead%20for%20Singapore%20REITs.pdf> (last visited 17 January 2017), and Su Han *et al*, *Real Estate Investment Trusts - Structure, Performance, and Investment Opportunities* (Oxford University Press 2003), available at <https://goo.gl/os9Vl8> (last visited 17 January 2017).

³⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(e)(iv) of regulation 4.

³⁸ *The Companies Act, 2013*, section 149.

³⁹ *The Companies Act, 2013*, sub-section 7 of section 197.

The provisions regarding the manager are largely inspired by those under Singapore's *Code of Collective Investment Schemes*⁴⁰ which are now being proposed to be included in the Draft Guidelines⁴¹ to Singapore REIT managers. For instance, the Singapore norms require explicitly that the manager be a Singapore-incorporated body with physical office in Singapore.⁴² Similarly, the REIT Regulations define the term 'manager' with a qualification of being incorporated in India. In doing so the regulator has consciously intended to read down the definition of the term 'body corporate' which has been defined under the *Companies Act, 2013* to include 'a company incorporated outside India'. The definition requires that the manager should be an entity incorporated in India thereby stipulating an incorporation test. Further, the ownership test, with respect to foreign ownership and control for a manager that is incorporated as a body corporate, shall be determined by SEBI in terms of *Foreign Exchange Management Act, 1999* and rules and regulations prescribed thereunder.⁴³

C. Trustee

A trustee is meant to be a person who holds the I-REIT assets in trust for the *benefit* of the unitholders, as per the REIT Regulations.⁴⁴ (emphasis supplied) The trustee must be registered with SEBI under the *Securities and Exchange Board of India (Debenture Trustees) Regulations*,

⁴⁰ Monetary Authority of Singapore, *Code on Collective Investment Schemes*, paras 2.1 - 2.6, available at http://www.mas.gov.sg/~media/resource/legislation_guidelines/securities_futures/sub_legislation/revisedcode30sep2011final.pdf (last visited 17 January 2017).

⁴¹ Monetary Authority of Singapore, 'Draft Guidelines to All Holders of a Capital Markets Services Licence for Real Estate Investment Trust Management', available at <http://www.mas.gov.sg/~media/MAS/News%20and%20Publications/Consultation%20Papers/Appendix%204%20Draft%20Guidelines%20to%20all%20holders%20of%20a%20Capital%20Markets%20Services%20Licence%20for%20REIT%20Management.pdf> (last visited 17 January 2017).

⁴² Draft Guidelines to All Holders of a Capital Markets Services Licence for Real Estate Investment Trust Management, Monetary Authority of Singapore, sub-clause 1 of clause 2.

⁴³ Reserve Bank of India, FEMA. 355/2015-RB (16 November 2015), available at <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NT35545E09E76D76D41CB9C096814B9C87E6A.PDF> (last visited 17 January 2017).

⁴⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(zv) of regulation 2.

1993 (Debenture Trustees Regulations). The trustee must have such wherewithal with respect to infrastructure and personnel to the satisfaction of SEBI and in accordance with circulars or guidelines as may be issued by SEBI from time-to-time.

While the sponsor appoints the trustee, it is the trustee who enters into an investment management agreement, on behalf of the I-REIT, with the manager.⁴⁵ The trustee must not be an associate of the sponsor or the manager.⁴⁶ Further, elaborate monitoring and reviewing powers⁴⁷ have been granted to the trustees under the REIT Regulations that ensure scrupulous functioning of the I-REIT. These stipulations ensure independence of the trustee and foster unitholders' confidence in the I-REIT as the trustee is required to hold its assets in trust for the benefit of the unitholders in accordance with the trust deed and REIT Regulations.

The trustee is compliant under the Debenture Trustees Regulations,⁴⁸ and assumes certain fiduciary responsibilities under the *Indian Trusts Act, 1882*. In terms of the *Indian Trusts Act, 1882*, the trustee assumes the role of being the owner of the I-REIT assets and must manage the I-REIT assets which is beneficial and in the best interests of the I-REIT and the unitholders.⁴⁹ However, the REIT Regulations allow the trustee to delegate the primary responsibility of managing the activities of the I-REIT to the manager with supervisory roles, thereby limiting the liability of the trustee in relation to the activities of managing the I-REIT assets. However, this cannot be the means for the trustee to abstain from fulfilling its primary responsibilities under the *Indian Trusts Act, 1882*.

The REIT Regulations set out the statutory requirements for, among

⁴⁵ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2 of regulation 9.

⁴⁶ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2(f)(i) of regulation 4.

⁴⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, regulation 9.

⁴⁸ *Securities and Exchange Board of India (Debenture Trustees) Regulations, 1993*, sub-regulation 1 of regulation 3.

⁴⁹ See Justice Subhro Kamal Mukherjee and S.P. Sen Gupta, *Indian Trusts Act, 1882* (Kamal Law House 2015).

other things, the board composition of a manager. However, SEBI has not clearly stipulated requirements and obligations in respect of corporate governance mechanism for the manager to ensure that there is no conflict in the interest of sponsor and other unitholders. Given that the unitholders will benefit from strong corporate governance requirements of the manager, SEBI may consider setting out requirements for, among other things, board composition, audit committee composition and independence of directors of the manager. For instance, the *Business Trusts Regulations, 2005* under the laws of Singapore place strong emphasis on strong corporate governance of the manager by stipulating *inter alia*, the criteria for determining the independence of the board of the manager of the business trust, whether or not the director is acting on behalf the business trust, from management and business relationships with the manager and matters pertaining to other professional associations of the directors of the manager.⁵⁰ These provisions ensure that the responsibility of the director of a manager does not interfere with the exercise of the director's independent judgment with regard to the interests of all the unitholders of the business trust as a whole.

III. INVESTMENT IN PROPERTY

The REIT Regulations also lay out stipulations with regards to channelising the investments of an I-REIT. These are mostly in sync with the practices, with regards to REIT investment, prevalent in the world, particularly Far-East and South-East Asia.⁵¹ The REIT Regulations stipulate that investment can also be made in a holding company (holdco) and/or SPVs or transferrable development rights (TDRs) in India only.⁵² I-REIT is permitted to invest in a property⁵³ either

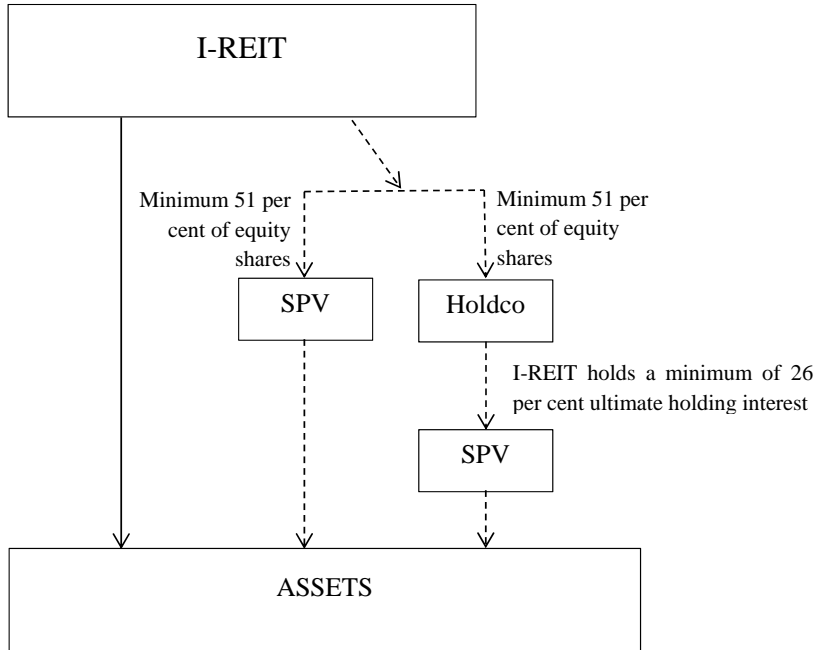
⁵⁰ See *Business Trusts Regulations 2005*, regulations 3 and 4.

⁵¹ See 'Destination India – Are we ready for REITs?' KPMG (September 2014), available at <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/09/Real-Estate-Investment-Report.pdf> (last visited 17 January 2017).

⁵² *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1 of regulation 18.

⁵³ Regulation 2(1)(zi) of *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014* states that 'a property means land and any permanently attached improvements to it, whether leasehold or freehold and includes buildings, sheds, garages, fences, fittings, fixtures, warehouses, car parks, etc. and any other assets incidental to the ownership of real estate but does not include mortgage.'

directly or through a holdco or an SPV. The following diagram may be observed to understand the means available to an I-REIT to invest.



However, the REIT Regulations are characteristically restrictive. They stipulate certain qualifications for a holdco and an SPV. Firstly, a holdco or an SPV can be a company or an LLP. If an I-REIT is investing through a holdco, then it is required to have ultimate holding interest of not less than 26 per cent⁵⁴ in the underlying SPV, besides holding a minimum of 51 per cent of the equity shares of the holdco.⁵⁵ If an I-REIT is investing through an SPV, then it must have at least 51 per cent of the equity shares of the SPV. Further, an SPV, in either set-up,

⁵⁴ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 3A of regulation 18.

⁵⁵ Regulation 2(1)(zs) of *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014* defines an SPV, to mean 'any company or LLP, (i) in which the REIT holds or proposes to hold controlling interest and not less than fifty per cent of the equity share capital or interest; (ii) which holds not less than eighty per cent. of its assets directly in properties and does not invest in other special purpose vehicles; (iii) which is not engaged in any activity other than holding and developing property and any other activity incidental to such holding or development'.

is required to hold the properties directly and not invest in other SPVs. The REIT Regulations stipulate a layered investment through a holdco that holds properties through other SPVs. Such a holdco is meant to maintain a holding in SPVs alone and engage in activities incidental to such properties and no other activity.⁵⁶ SEBI treats this set up as a 'two level investment structure through a holding company'.⁵⁷ In the Hong Kong Regulations, two-layer investment is differently arranged where it is allowed through SPVs, where a top-layer SPV is solely formed for holding interests in one or more SPVs.⁵⁸ Further, under limited circumstances and upon reasonable demonstration, the regulatory authority in Hong Kong can permit multi-layer investment.⁵⁹

The REIT Regulations do not recognise other forms of control as it specifically mandates an I-REIT to hold at least 51 per cent of equity capital or interest of the SPV. This specific exclusion of other forms of control which may include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of management rights or shareholders agreements or voting agreements,⁶⁰ is without any justification.

The manner of investment requires at least 80 per cent of the value of the I-REIT assets to be invested in completed and rent generating properties.⁶¹ Whilst the Draft Regulations had stipulated for 90 per cent of investment in real estate, the REIT Regulations has limited the investment figure to 80 per cent⁶² so that I-REITs can avail the benefit

⁵⁶ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(qa) of regulation 2.

⁵⁷ Securities and Exchange Board of India, Press Release 139/2016 (23 September 2016).

⁵⁸ *Code on Real Estate Investment Trusts*, Hong Kong, sub-regulation 5(c)(ii) of regulation 7.

⁵⁹ *Code on Real Estate Investment Trusts*, Hong Kong, note to sub-regulation 5(d) of regulation 7.

⁶⁰ Section 2(27) of the *Companies Act, 2013* defines 'control' to include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

⁶¹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 4 of regulation 18.

⁶² *Ibid.*

of a diversified portfolio. This kind of a severe norm and its subsequent amendment has been observed in the Hong Kong experience,⁶³ where the limit was reduced to 75 per cent owing to the difficulties⁶⁴ arising out of the stifling nature of the norms.

Prior to the amendment, in the remaining 20 per cent of the total I-REIT asset value, upto 10 per cent could be invested in under-construction properties or completed but not rent generating and the remaining in a range of avenues.⁶⁵

This capping overlooked the concerns of a cash-strapped market for under-construction properties.⁶⁶ With the objectives of providing greater flexibility and aligning the framework with international REIT markets which either do not cap the level of investment in under-construction assets or permit a higher level of investment in under-construction real estate assets, SEBI brought about an amendment that has removed this capping. Thus, now the 20 per cent can be invested in under-construction properties along with the original options that include listed or unlisted debt of real estate companies, mortgage backed securities,

⁶³ Section 7.1 of *Code on Real Estate Investment Trusts* until 2014, stipulated that 100 per cent (generally) of the total asset value of the REIT must be invested in real estate while upto 10 per cent of the total net asset value can be invested in uncompleted and non-income generating real estate, at http://enrules.sfc.hk/en/display/display_main.html?rbid=3527&record_id=3397 (last visited 17 January 2017) and see generally Hong Kong Financial Services Development Council, 'Developing Hong Kong as a Capital Formation Centre for Real Estate Investment Trusts', Figure 5, available at <http://www.fsd.org.hk/sites/default/files/04%28Eng%29-Developing%20HK%20as%20a%20Capital%20Formation%20Centre%20for%20REITs.pdf> (last visited 17 January 2017).

⁶⁴ Hong Kong Securities and Futures Commission, 'Consultation Conclusions on Amendments to the Code on Real Estate Investment Trusts' (July 2014), available at <https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/conclusion?refNo=14CP2> (last visited 17 January 2017), 'Consultation Paper on Amendments to the Code on Real Estate Investment Trusts' (January 2014), available at <http://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=14CP2> (last visited 17 January 2017), and Hong Kong Financial Services Development Council, 'Developing Hong Kong as a Capital Formation Centre for Real Estate Investment Trusts', Figure 5, 27, available at <http://www.fsd.org.hk/sites/default/files/04%28Eng%29-Developing%20HK%20as%20a%20Capital%20Formation%20Centre%20for%20REITs.pdf> (last visited 17 January 2017).

⁶⁵ *Infra* n. 67.

⁶⁶ Consultation paper for amendments to the Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014.

equity shares of companies listed on a recognised stock exchange in India which derive not less than 75 per cent of their operating income from real estate activity, government securities, money market instruments or cash equivalents.⁶⁷ This appears to be an exhaustive list which provides for reasonable diversification of investment.

The Draft Regulations ran the risk of allowing 100 per cent of the REIT asset to be invested in a project worth not less than 1000 crore rupees. However, in REIT Regulations, a more flexible investment opportunity has been provided wherein, the I-REIT can hold at least two projects with not more than 60 per cent of the value of its assets in one project.⁶⁸ With the Hong Kong Regulations including development projects with the 2014 amendment, the Asian REIT regime now shows sufficient leeway for development projects. Such a provision in the REIT Regulations is a welcome and sound inclusion.

It is required that on making an investment in a property, both completed and under-construction,⁶⁹ the I-REIT or SPV must hold it for a period of at least three years. Such a requirement shall ensure greater degree of financial stability of the I-REIT, without hampering liquidity and opportunities for diversification. It also prevents a situation in which an I-REIT maybe involved in constant purchase and investment in property.

Several restrictions have been imposed on the I-REIT with respect to its investment strategy. It is not allowed to invest in vacant land, agricultural land or debt securities.⁷⁰ It has been prohibited from launching schemes⁷¹ or from undertaking lending activities⁷².

⁶⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 5 of regulation 18.

⁶⁸ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 8 of regulation 18.

⁶⁹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 10 of regulation 18.

⁷⁰ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 2 of regulation 18.

⁷¹ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 17 of regulation 18.

⁷² *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 13 of regulation 18.

It is expressly barred from investing in another I-REIT as well. This express exclusion seems to be peculiar to the REIT Regulations *vis-à-vis* the UK REIT, with respect to which the *Finance Act, 2013* in UK introduced changes to make the tax regime conducive to such an investment with the aim of further investment diversification, cash management flexibility and tax simplification.⁷³

It would have been interesting if the REIT Regulations and the corresponding tax regime could have been drafted in a manner to encourage investment in sustainable and environment-friendly ventures. This would have given scope for development of Green-REITs or Eco-REITs, thereby not only establishing a transparent but also a responsible and conscionable market.

IV. TAX IMPLICATIONS OF THE I-REIT STRUCTURE

The REIT Regulations came out in light of the *Finance Act, 2014*, by way of an amendment to the *Income-Tax Act, 1961*. The provisions in the *Finance Act, 2014* came into effect to provide for a special treatment regime governing taxability of the income earned through an I-REIT structure. These provisions have been incorporated depending on the stream of income that the I-REIT is earning and distributing. A discussion on this regime becomes relevant in light of the revenue estimations being touted in the market. An infusion of as much as USD 20 billion is expected to be facilitated in the real estate sector from the effective implementation of the REIT Regulations.⁷⁴

In terms of the *Finance Act, 2015*, the sponsor can avail of concessional tax scheme when it goes for initial listing of the I-REIT units on a recognised stock exchange. This would mean that upon payment of securities transaction tax (STT), long-term capital gains tax will be exempt and short-term capital gains tax will be taxed at 15 per cent on transfer of units. Given that the applicable tax treatment to both, a

⁷³ *The Finance Act, 2013*, United Kingdom, schedule 19.

⁷⁴ 'SEBI Issues Guidelines for Investment in INVITs, REITs' *The Economic Times* (New Delhi India 11 2011), available at http://articles.economicstimes.indiatimes.com/2014-08-11/news/52687478_1_infrastructure-investment-trusts-invits-reits (last visited 17 January 2017).

sponsor of an I-REIT and a promoter of a company, is similar in terms of public listing, some additional tax benefits to a sponsor may make it lucrative for sponsors to opt for I-REIT. The high costs of setting up I-REITs could be taken into consideration in levying a concessional tax treatment on the sponsor at the time of initial listing of I-REIT units which may go a long way in making I-REITs a more attractive avenue. Pertinently, even the unitholders have been doled out a similar tax treatment. If the unitholders sell the units of the I-REIT on the stock exchange after holding it for more than 36 months, the capital gain arising on sale of such units of I-REIT will be exempt from tax. However, transfers within the 36 month period will attract short-term capital gains tax. Such sale of units on the stock exchange shall be subject to STT on transaction value.

It is significant to note that the concessional tax scheme has not been extended to direct transfer of real estate assets to an I-REIT and to transfer of interest in an LLP. By doing so, there is an avoidable additional corporate layer imposed between the I-REIT and the real estate asset, which could result in an additional tax outflow.⁷⁵ In order to avoid this tax leakage, a pass-through mechanism whereby the investors do not have to worry about any additional tax imbedded in the structure will serve as a positive step towards making the I-REIT structure lucrative for investors.⁷⁶ In Asia, Singapore has been the most generous with its tax incentives for REITs. For instance, REITs in Singapore and even those in Hong Kong are exempt from the payment of corporate tax. Further, no capital gains tax is levied on the investors investing in REITs in Singapore. Japan permits deduction of distributions, resulting in almost zero corporate tax on REITs, and imposes only capital gains tax at 10 per cent on individuals. This should further encourage the Indian authorities to reconcile with the Asian experience.

⁷⁵ Sriram Govind and Ruchir Sinha, 'REITs: Tax Issues and Beyond' (27 October 2014) *Lexology*, available at <http://www.lexology.com/library/detail.aspx?g=12d558bc-c506-4592-a2c6-dc5e90316391> (last visited 17 January 2017).

⁷⁶ Lisa Pallavi Barbora, 'No DDT for real estate investment trusts' (2 March 2016) *Live Mint*, available at <http://www.livemint.com/Money/rHPH1vB9dJtkAjtGrYbtuN/No-DDT-for-realestate-investment-trusts.html> (last visited 17 January 2017).

In case the SPV through which the I-REITs invest is in the nature of a company, it has to adhere to the provisions of the *Companies Act, 2013*. A company paying dividend would attract dividend distribution tax (DDT) at the applicable tax rate. The dividend paid by the SPV to I-REIT would have therefore, ordinarily attracted DDT. The Finance Minister of India in his speech on the budget for financial year 2016-2017 proposed that any distribution made out of income of SPVs to the I-REITs and investment trusts having specified shareholding will not be subjected to DDT at the hands of I-REIT and the unitholders of the I-REIT.⁷⁷ This proposal has found its place in the *Finance Act, 2016* to stimulate housing activity by facilitating investments in I-REITs and to augment registrations of I-REITs. This will not only spur a movement in the registrations of I-REIT, but will also bring the tax regime at par with the systems in Hong Kong, where no tax is payable on dividends paid to investors, and in Singapore, where all resident individual investors are exempt from payment of tax on dividends.

India's real estate sector is particularly hampered by wearisome and lengthy registration processes, and burdensome stamp duties varying across states which could be in the range of four per cent to 14 per cent. In this regard, India can take a cue from Singapore, which has waived the stamp duty on property transactions for five years from 2005, so as to make it cheaper for I-REITs to buy buildings.⁷⁸

It is important that the taxation rules applicable to I-REITs should be made consistent with the broader policy rationale underpinning the development of the I-REIT market. It is ideal to create and thereafter maintain the demand from real estate capital users to access public capital markets, and the demand on the part of investors, both large and small. Hence, I-REITs should be characterised by the absence of double-taxation of income. For the survival of I-REITs in changing markets, their organisational characteristics, ownership structures, and investment strategies are likely to continue evolving.⁷⁹ Since it may be argued that

⁷⁷ 'Speech of Arun Jaitley', Minister of Finance, Budget 2016-2017 (29 February 2016) available at <http://indiabudget.nic.in/ub2016-17/bs/bs.pdf> (last visited 17 January 2017).

⁷⁸ Goh Eng Yeow, 'REITS: Time to end tax breaks?', *Straits Times* (5 February 2015), available at <http://www.straitstimes.com/opinion/reits-time-to-end-tax-breaks> (last visited 17 January 2017).

⁷⁹ Su Han *et al*, *Real Estate Investment Trusts - Structure, Performance, and Investment Opportunities* (Oxford University Press 2003).

tax efficiency is critical to the success of I-REITs, the tax laws governing them must be driven by foresight and dynamism to reconcile with the changes.

V. CONCLUSION

I-REIT is a welcome move which will help bring in liquidity, transparency, better governance and more importantly an organised ecosystem which is professionally managed and protects investors. However, the I-REIT regime has not received the much anticipated enthusiasm from the market as yet. The Indian capital markets have not witnessed a single I-REIT registration or any of the properties being converted into an I-REIT status.⁸⁰ For instance, barring a few categories of investors who are expressly permitted by the RBI to invest in units,⁸¹ it is unclear whether certain categories of investors that are currently permitted to invest in equity shares⁸² offered by Indian companies, including venture capital funds and insurance companies, may also invest in the units in an offer of units by an I-REIT. This may be considered as a contributing factor to the absence of I-REIT registration in the last two years, despite the promulgation of the REIT Regulations in 2014. The quality and effectiveness of the REIT Regulations and the approach to tax and tax efficiency of I-REITs

⁸⁰ *Supra* n. 6.

⁸¹ Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013; *Infra* n. 83.

⁸² Regulation 2(1)(zd) of the *Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009* defines qualified institutional buyer(s), to mean '(i) a mutual fund, venture capital fund, alternative investment fund and foreign venture capital investor registered with the Board; (ii) a foreign portfolio investor other than Category III foreign portfolio investor, registered with the Board; (iii) a public financial institution as defined in section 4A of the Companies Act, 1956; (iv) a scheduled commercial bank; (v) a multilateral and bilateral development financial institution; (vi) a state industrial development corporation; (vii) an insurance company registered with the Insurance Regulatory and Development Authority; (viii) a provident fund with minimum corpus of twenty five crore rupees; (ix) a pension fund with minimum corpus of twenty five crore rupees; (x) National Investment Fund set up by resolution no. F. No. 2/3/2005-DDII dated November 23, 2005 of the Government of India published in the Gazette of India; (xi) insurance funds set up and managed by army, navy or air force of the Union of India; (xii) insurance funds set up and managed by the Department of Posts, India.'

are factors in investment decision making. It is important to note that the makers of these decisions are circumscribed to the category of high net-worth individuals.⁸³ However, SEBI has been forthcoming in addressing the concerns of the stakeholders to facilitate the growth of I-REIT in India. It has permitted investment by mutual funds in units of an I-REIT and an infrastructure investment trust with certain investment restrictions.⁸⁴ The Indian government has also displayed its responsiveness and willingness to address the concerns of the industry and stakeholders, when it brought out the *Finance Act, 2016* which recommended certain proposals to facilitate investments in I-REITs. This willingness was translated into real action by the Reserve Bank of India (RBI) when it allowed persons resident outside India including a Registered Foreign Portfolio Investor and or a non-resident Indian (NRI) to acquire, purchase, hold, sell or transfer units of an investment vehicle⁸⁵, subject to certain terms and conditions.⁸⁶ Pursuant to the RBI notification, SEBI through a circular dated 15 March 2016 permitted Foreign Portfolio Investors to invest in units of I-REITs, Investment trusts and Category III Alternative Investment Funds (AIFs) in terms of the *Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014*, subject to such other terms and conditions as may be prescribed by SEBI from time-to-time.

Notwithstanding the fact that this is a welcome provision as it allows greater and freer participation in the regime as well as enables fresh

⁸³ Consultation paper on the draft Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2013.

⁸⁴ Securities and Exchange Board of India, Board Meeting PR No. 5/2017 (14 January 2017), available at http://www.sebi.gov.in/cms/sebi_data/pdffiles/35602_t.pdf (last visited 17 January 2017).

⁸⁵ Regulation 2(ii)(g) of the *Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000* defines an “Investment Vehicle” to mean an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose and shall include Real Estate Investment Trusts (REITs) governed by the SEBI (REITs) Regulations, 2014, Infrastructure Investment Trusts (InvITs) governed by the SEBI (InvITs) Regulations, 2014 and Alternative Investment Funds (AIFs) governed by the SEBI (AIFs) Regulations, 2012.’

⁸⁶ Reserve Bank of India through a notification dated 16 November 2015 amended the *Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000*, available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10130&Mode=0> (last visited 17 January 2017).

equity in the market, it is also important that the changes must begin with a more internalised focus where it is required, than simply being aspirational. For instance, the REIT Regulations define 'units' to mean 'beneficial interest of the I-REIT'⁸⁷. The nature of these 'units' may be characterised from the definition provided under the Consolidated FDI Policy issued by the Department of Industrial Policy and Promotion which defines a 'unit' to mean 'beneficial interest of an investor in the Investment Vehicle and shall include shares or partnership interests'.⁸⁸ However, these units may not be classified as securities under the *Securities Contract Regulation Act, 1956*, since real estate investment trusts are not companies or bodies corporate. Accordingly, the applicability of several regulations (including regulations relating to intermediaries, underwriters, merchant bankers, takeover, insider trading and fraudulent and unfair trade practices) to the I-REIT is still unclear and untested.

While SEBI has addressed most of the concerns of the stakeholders through the amendment notification dated 30 November 2016 to the REIT Regulations, with certain appropriate regulatory measures and tweaking of the tax provisions, combined with better clarity to the stakeholders and investors, I-REITs may be seen in the global map for its performance in the Indian capital markets in the years to come.

⁸⁷ *Securities and Exchange Board of India (Real Estate Investment Trusts) Regulations, 2014*, sub-regulation 1(zx) of regulation 2.

⁸⁸ Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, 'Consolidated FDI Policy' (7 June 2016), available at http://dipp.nic.in/English/policies/FDI_Circular_2016.pdf (last visited 17 January 2017).

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