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FROM THE PRINCIPAL'S DESK

The achievement of success in any branch of law involves, *inter alia* effective expression both written as well as oral. In its absence, the knowledge accumulated over a period of time would be only half utilised and get stultified. The success and utility of *The Law Review* lies in the platform it provides to young student authors to showcase their latent talents. Those in charge of *The Law Review* currently, are quite conscious of their duty to scout for new talent in addition to established ones. The need to do so becomes more compelling in a society like ours wherein talent often remains “underrated” and untapped. It is a matter of great satisfaction that *The Law Review* has shown great promise to ultimately emerge successful on this anvil.

One is glad to have witnessed the manner in which the seventh edition of *The Law Review* was received all over the country. It won the acclaim of 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 organised an orientation program 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 the writing process from choosing the topic of the article and researching on it, to specifications and minute details that must be adhered to while publishing it, involving issues such as copyright infringement.

In the year 2013, the Law Review Committee received nearly twenty articles, 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 each article was also edited by experts in the area of law covered by it. The Committee identified six eminent practitioners from the legal domain, who undertook the tedious task of editing the articles.

The present edition of *The Law Review* carries a rich blend of legal topics. The articles therein present not only an analysis of existing legislation and a detailed insight into the impact of proposed legislation on the existing legal structure, but also submit detailed academic discussions on questions of law that have intrigued lawyers and academicians alike, for a long time.

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, *The Law Review* 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.



Judge Mr. R. B. Malik
Principal, Government Law College

FOREWORD

The contributors of the eighth 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.

1. Amal Sethi's article on "Vessel Protection Detachments and the Search for Immunity" explores the immunity available to military units embarked on civilian ships for the purpose of protecting them against piracy attacks, within the framework of Public International Law. This article bears particular significance in the light of contemporary events. The author opines that: "[Vessel Protection Detachments], being state actors and performing non-commercial sovereign functions, should be entitled to state immunity. Their attachment with the State and the range of functions comported by them put them at a higher pedestal when juxtaposed with privateers."
2. Anirudh Hariani's article on "IP, Open Source and the Licensing Paradigm" moots the cause for protection of open source software under the copyright law in India. The author has enunciated the relevance of open source software vis-à-vis proprietary software on the one hand and highlighted the limitations on innovation that come with patented software on the other. The author argues that "open source licenses must be given protection not only under contract, but also copyright law. After *Jacobsen v. Katzer*, this is the trend in the US, and ought, from a reading of the provisions of the *Indian Copyright Act*, to be implemented in India as well."
3. Hema Naik's and Surekha Srinivasan's article on "The Civil Liability for Nuclear Damage Act, 2010: Is Promptness without Adequacy an Effective Remedy?" identifies the lacunae in the enactment of the Civil Liability for Nuclear Damage Act, 2010 and questions the quantum of compensation that can be awarded to victims of a nuclear

disaster under the Act in comparison to international standards. The article calls for a reassessment of India's policy of increasing its nuclear capabilities, especially in light of the paradigm shift in state practice in developed nations. The authors state: "The Act has taken a big step forward in effectively covering within its ambit, compensation for many of the effects of a nuclear disaster, but has failed to realistically meet them in monetary terms."

4. Rahela Khorakiwala's article on "The Indian Electoral Process and Negative Voting" provides a succinct account of the changes in the demographics and voting patterns since India's first general election, and the expediency of the right to negative voting today. The article analyses the recommendations of the Law Commission and a recent Supreme Court decision that lend support to the right to negative voting. The author puts her views thus: "Not only does the right of negative voting make politicians conscious of their own credentials, but it also gives the voters an option to reject unworthy candidates, thereby enhancing their democratic rights."
5. Samane Hemmat's article on "Terrorism: Its Implications for Human Rights" provides an insight into both patent and subtle human rights violations by Governments in their attempt to fight terrorism. With reference to the means adopted by Governments to combat terrorism, the author says: "[T]he erosion of rights will be on going, with no end in sight, and the minimum level of rights protection will be indefinitely lowered...To strike a balance we need to start thinking outside the boxes that have failed us, without becoming like those who attacked us."
6. Sulekha Agarwal's article on "Refugee Blues – Victims of Regional Geopolitics" succinctly highlights India's loose legal framework and its obligations under international law for the protection of refugees in India. The author has elaborately traced the history of three refugee communities in India – Tibetans, Lhotshampas and Burmese and comments upon the

varying treatment of these refugees by India, on the basis of its changing foreign policies. The author says: “India’s refugee policy is not a conscious choice but a result of failed idealism and a rude awakening to pragmatism...[Its] obligations to protect refugee rights will not have much effect as long as the subject of refugees remains intrinsically related to the maintenance of geo-strategic relations.”

7. Vikrant Shetty’s article on “Computing the Tax on Cloud Computing” focuses on the tax incidence on the delivery of information technology services over the Internet, particularly applications and storage solutions. The article examines the existing legal framework for taxation of e-commerce transactions and taxation based on delivery models. The author has highlighted transfer pricing issues that can arise in the absence of specific legislation for taxing cloud computing services. The author says: “In order to overcome the hurdles of taxing cloud computing services, there is a need for a legislation which tackles the ambiguity pertaining to cloud computing services.”

This volume provides a significant contribution to legal scholarship in the country. The editorial team of *The Law Review* has created a platform for peer review. The articles have also been reviewed by eminent professionals. Professor Kishu Daswani, the faculty in charge continues to sustain this volume dedicated to legal scholarship with his commitment and vision.

Dharmajaya Y Chandrachud

Dr. Justice D.Y. Chandrachud
Chief Justice, Allahabad High Court

VESSEL PROTECTION DETACHMENTS AND THE SEARCH FOR IMMUNITY[†]

*Amal Sethi**

I. INTRODUCTION

‘Like everywhere else, the more guns there are around,
although there is a deterrent effect, you also have the
increased opportunity or potential for the wrong people to be shot.’

Dr Campbell McCafferty OBE

The violent and transnational nature of piracy makes it one of the biggest hindrances to cross border trade and commerce in today’s world.¹ The United Nations Secretary General (UNSG) Ban Ki-moon labelled the threat posed by pirates as ‘completely unacceptable’ and said that it required an ‘urgent and coordinated response’.² This was supplemented by the United Nations Security Council (UNSC) urging member nations to suppress acts of piracy, authorising the use of force

[†] This article reflects the position of the law as on 16 November 2013.

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¹ Over the period 2006-2010 there have been 54 deaths from about 1600 acts of piracy (All figures are from the International Maritime Bureau Piracy Reporting Centre Annual Reports. See <http://www.icc-ccs.org/home/piracy-reporting-centre>) (last visited 16 November 2013). See also Anna Bowden, *The Economic Costs of Maritime Piracy*, One Earth Future Foundation Working Paper 3 (One Earth Future Foundation puts losses from piracy at an estimate of about 7-12 billion dollars per year).

² ‘Piracy Situation “unacceptable” Says UN Secretary-General, Ban Ki-moon’, IMO Media Centre–Press Briefing 4 February 2011, available at <http://www.imo.org/MediaCentre/PressBriefings/Pages/04-2011-WMD-launch.aspx> (last visited 16 November 2013).

and any other appropriate means to combat them.³ Subsequently, several international and regional organisations including the North Atlantic Treaty Organization (NATO), the International Maritime Organization (IMO), the European Union (EU) and African Union (AU) have been assiduously engaged in carrying out anti-piracy operations.⁴

Initially, anti-piracy operations included deployment of war ships and accompanying of civilian vessels with escort ships. However, of late, operations to counter piracy have witnessed a new trend, whereby armed naval or military personnel called Vessel Protection Detachments (VPDs) are placed on board civilian ships.

The advent of VPDs is not devoid of any criticism and could give rise to several issues to be deliberated upon, in respect of their deployment. It has been feared that if armed men are allowed on board civilian ships, the level of violence, accidental as well as deliberate, is bound to escalate, and will put the lives of innocent people in jeopardy. Early 2012 saw this fear transform into reality with the accidental killing of Indian fishermen by Italian marines, allegedly within India's territorial waters.⁵ This incident led to a dispute involving the two nations, India and Italy, fighting over jurisdiction to try the marines and compensation to be given to the families of the deceased. In the midst of these vexed questions, the importance and need of immunity of VPDs from the jurisdiction of foreign courts was accentuated. It was observed that the issue of immunity with respect to VPDs had never been deliberated

³ The UNSC has passed some resolutions to cope with the growing alarm caused by piracy and has authorized necessary measures that are appropriate for the purpose of suppressing acts of piracy and armed robbery at sea, *Security Council Resolution 1814 (2008) [on the relocation of the UN Political Office for Somalia (UNPOS) from Nairobi to Somalia]*, 15 May 2008, S/RES/1814(2008); *Security Council Resolution 1816 (2008) [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia]*, 2 June 2008, S/RES/1816 (2008); *Security Council Resolution 1846 (2008) [on repressing acts of piracy and armed robbery at sea off the coast of Somalia]*, 2 December 2008, S/RES/1846 (2008); *Security Council Resolution 1851 (2008) [on fight against piracy and armed robbery at sea off the coast of Somalia]*, 16 December 2008, S/RES/1851(2008).

⁴ Ved P Nanda, 'Maritime Piracy: How Can International Law And Policy Address This Growing Global Menace?' (15 February 2011) 39(2), *Denver Journal of International Law & Policy* 177.

⁵ Frank Jack Danie, 'Italian Ship Crew Kills 2 Fishermen off Kerala Coast', *Reuters News Network Delhi*, at <http://in.reuters.com/article/2012/02/16/kerala-fishermen-italy-idINDEE81F0BJ20120216> (last visited 16 November 2013).

upon and there was great chaos over the applicable norms, laws and their interpretations.

This article questions the feasibility and applicability of various laws that deal with jurisdictional immunity for VPDs and in the process touches upon questions that go into the basic tenets of Public International Law. Part II of this article provides an overview of VPDs and elucidates their functions. Part III examines immunity for VPDs in light of the doctrine of state immunity, dealing with both the historical ‘absolute’ approach as well as a more modern ‘restrictive’ approach to the doctrine. Part IV scrutinises whether VPDs are entitled to immunity under any *lex specialis* regime by virtue of being classified as peacekeepers. Lastly, Part V discusses whether VPDs can claim immunity under the body of International Humanitarian Law.

II. VESSEL PROTECTION DETACHMENTS – THE NEW ORDER

A. *Defining VPDs*

There is general consensus as to who or what qualifies as a VPD. The NATO, which has taken lead in the deployment of VPDs through its various anti-piracy missions,⁶ construes them as ‘military or law enforcement units embarked on a civilian ship in order to protect it against potential attacks’⁷. The Dutch Defence Department, another frontrunner in the deployment of VPDs, has also echoed this definition.⁸ Albeit not specifically defining VPDs, the British Parliament has referred to them as small teams of naval or military personnel, placed on board commercial vessels.⁹ This definition has also been adopted by the Italian and French Governments.¹⁰ Therefore, in the absence of any divergent definitions, VPDs can be defined as small teams of armed forces of the

⁶ See NATO Operation Shield, available at <http://www.shipping.nato.int/operations/OS/Pages/default.aspx> (last visited 16 November 2013).

⁷ NATO Parliamentary Assembly, The Growing Threat of Piracy to Regional and Global Security, Annual Committee Reports, 2009 Annual Session, 80.

⁸ See Dutch Ministry of Defence-Tasks Somalia, available at <http://www.defensie.nl/english/tasks/missions/somalia> (last visited 16 November 2013).

⁹ House of Commons - Foreign Affairs Committee, ‘Piracy off the Coast of Somalia HC 1318, Tenth Report of Session 2010-12 - Report, Together with Formal Minutes, Oral and Written Evidence’ (2012) 20.

¹⁰ *Ibid.*

State or law enforcement units embarked on a civilian ship in order to protect it against potential pirate attacks.

B. Emergence of VPDs

In the recent past, the World Food Programme (WFP) had to halt its missions of delivering humanitarian food transports by sea due to severe pirate attacks. On the request of the UNSG, organisations like NATO, EU, and AU, along with member states provided escorts to the WFP. Thereafter, these warships were replaced with VPDs since they provided a simpler and less resource-intensive means of protection.¹¹ These VPDs sailed under the flag of NATO's counter piracy mission Operation Shield, EU's anti-piracy mission Atlanta and AU Mission in Somalia respectively. Increasingly it has been seen that countries like Netherlands have started deploying VPDs in significant numbers on commercial ships to protect extremely large and vulnerable transports.¹² France, Spain, Belgium, and Italy have also joined the practice and provided VPDs to commercial ships.¹³ Further, European naval forces have been known to provide assistance to Cruise Liners in that region.¹⁴ Countries like India¹⁵, United Kingdom (UK)¹⁶, Germany¹⁷, Malta¹⁸, Cyprus¹⁹ and United States of America (USA)²⁰ are also exploring the

¹¹ *supra* n. 7, 80.

¹² See Dutch Ministry of Defence-Tasks Somalia available at <http://www.defensie.nl/english/tasks/missions/somalia> (last visited 16 November 2013).

¹³ *supra* n. 9, 20.

¹⁴ James Brown, *Pirates and Privateers: Managing Indian-Oceans-Private-Security-Boom* (Lowy Institute Publications 2012) 9.

¹⁵ Armed Guards for Merchant Ships, Press Information Bureau, Government of India Ministry of Shipping, 13 August 2012, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=86269> (last visited 16 November 2013) (The Ministry of Shipping has issued guidelines for armed guards on ships).

¹⁶ 'Somali Piracy: Armed guards to protect UK ships', *BBC News UK*, (30 October 2011), at <http://www.bbc.co.uk/news/uk-15510467> (last visited 16 November 2013).

¹⁷ William Marmon, 'Merchant Ships Starting to Carry Armed Guards against Somali Pirates' (11 November 2011) *European Institute Blog*, at <http://www.europeaninstitute.org/November-2011/merchant-ships-start-to-carry-armed-guards-against-somali-pirates-1122.html> (last visited 16 November 2013).

¹⁸ *Ibid.*

¹⁹ Marmon, *supra* n.17.

²⁰ Robert Young Pelton, 'US to Promote Use of Armed Guards on Vessels, Policy Watch', (11 April 2011) *Somalia Report*, available at <http://www.somaliareport.com/index.php/post/1956> (last visited 16 November 2013).

possibility of using VPDs on board commercial or civilian ships. Of late the shipping industry has shown a strong preference for VPDs and has even expressed its willingness to pay for their use.²¹ Thus it can be seen that there is a strong increase in the deployment of VPDs as they seem to be one of the most viable solutions to combat piracy.

C. Roles Performed by VPDs

As the practice of deploying VPDs is still in its nascent stage, the exact scope of their duties cannot be determined in detail and it is not certain whether VPDs are performing policing functions, military functions or a mixture of both. NATO has included anti-piracy operations and law enforcement within the scope of a VPD's duties.²² A report of the Lowy Institute has considered self-defence and protection of the vessels as a VPD's primary role.²³ Besides these functions, they have also previously been empowered to detain suspects.²⁴ Thus, VPDs are armed personnel with law enforcement powers who play an important protective role on civilian and commercial vessels and help with anti-piracy operations.

III. STATE IMMUNITY AND VESSEL PROTECTION DETACHMENTS

A. VPDs and State Immunity under the Traditional Absolute Approach

State immunity, which reflects the sovereign equality of States as the main pillar of the contemporary international legal order, protects a State and its property from the jurisdiction of the courts of another State.²⁵ It covers administrative, civil and criminal proceedings (jurisdictional immunity) as well as enforcement measures (enforcement immunity).²⁶ The historic approach to State immunity, also known as the doctrine of absolute immunity, is based on the principle that no State should subject a juridically equal sovereign to the adjudicative

²¹ *supra* n. 9, 20.

²² *supra* n. 7, 80.

²³ Brown *supra* n. 14, 9.

²⁴ EU NAVFOR Trains AMISOM Vessel Protection Detachment Troops, EU NAVFOR Public Affairs Office, 12 December 2011.

²⁵ Peter-Tobias Stoll, 'State Immunity', *Max Planck of Encyclopaedia of Public International Law* (2011).

²⁶ *Ibid.*

and enforcement jurisdiction of its courts.²⁷ The origin of this approach can be traced back to the doctrine of *par in parem non habet imperium*²⁸ which stipulates that a sovereign should not have jurisdiction over another sovereign²⁹. The principle of absolute state immunity, as we know it to be today, was formulated in the early nineteenth century and was widely accepted in common law as well as civil law countries.³⁰ This principle later developed into a norm of customary international law on an uncontested basis in the general practice of States.³¹ State immunity protects the State as an international legal personality as well as its organs, components, constituents, entities, and representatives irrespective of the nature of their acts or the manner of their conduct.³² Amongst others, armed forces of the State are also one of the constituent organs of the state protected by the state immunity rule.³³ The pertinent point here is that VPDs are a part of the armed forces of the State, and since armed forces are a constituent organ of the State, they would be entitled to state immunity in accordance with this rule of customary international law. Thus, under the traditional rule of absolute state immunity there is not much deliberation whether VPDs would be entitled to immunity or not. Therefore, as long as the basic principles of international law are adhered to, VPDs would be entitled to immunity, irrespective of any external elements that might come into play.

B. VPDs and State Immunity under a Restrictive System

When States became increasingly engaged in commerce, it was felt that there was a need to secure their accountability in business transactions and thus to limit their immunity.³⁴ There began a shift from the traditional approach³⁵ of allowing foreign states to be subjected to the

²⁷ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (1st edn Cambridge University Press 2009) 299-304.

²⁸ Tobias *supra* n. 25.

²⁹ See *Phosphates in Morocco (Preliminary Objections)* [1938] PCIJ (ser A/B) No. 74 and See also Theodor Meron, 'The Incidence of the Rule of Exhaustion of Local Remedies' (1959) 35 *British Year Book of International Law*, 83.

³⁰ International Law Commission, 'Yearbook of the International Law Commission', Vol 2, 1980 Part 1208.

³¹ *Ibid.*

³² *supra* n. 30, 208 (internal citations omitted).

³³ *Ibid.*

³⁴ Guilfoyle *supra* n. 27, 299-304.

³⁵ A 1942 Irish case, *Zarine v. Owners of SS Ramava* [1942] IR 148, may have been among the first to apply such a doctrine.

processes of local courts, at least in respect of commercial transactions and acts ‘which a private person may perform.’³⁶ Even though this doctrine of restrictive immunity does not have its roots in customary law,³⁷ the modalities of it are directly or indirectly reflected in the recent policies of countries such as USA, UK, Canada, Australia, Pakistan, Singapore, South Africa and India³⁸. Though not in force, the *United Nations Convention on Jurisdictional Immunities of States and Their Property* reiterates this doctrine.³⁹ Accordingly, two fundamental questions need to be examined if VPDs are to be granted immunity: 1. Are VPDs doing something a private individual can? and 2. Are VPDs performing a commercial function?

1. Are VPDs Doing Something a Private Individual Can?

There is an inherent assumption that VPDs perform the same function as that of private armed security guards. However, in most cases, deployment of private guards on ships violates the laws and policies of the flag state, as states consider the use of force to be their exclusive domain⁴⁰ and hence, VPDs are not to be considered as alternatives to private guards.⁴¹ Even in instances where the use of private guards

³⁶ *Canada v. Employment Appeals Tribunal* (High Court, Ireland, 1991) 95 ILR 467 at 477–81, O’Flaherty J, refers to case law and practice preceding the statutes and treaties which emerged in the period 1972–86 *European Convention on State Immunity* 1972, (1972) 11 ILM 470; *United Nations Convention on Jurisdictional Immunities of States and their Property*, *State Immunity Act (United Kingdom) 1978*, 1978 Chapter 33, (1978) 17 ILM 1123; *Foreign Sovereign Immunities Act 1976* (US), 28 USCA §1602, (1976) 15 ILM 1388, and see Congressional Committee Report (1976) 15 ILM 1398, 1407; *Foreign States Immunities Act 1985* (Australia) (No. 196 of 1985), (1986) 25 ILM 715 and *State Immunity Act 1982* (Canada), 1980–83, c. 95; (1982) 21 ILM 798.).

³⁷ D. Gaukrodger, *Foreign State Immunity and Government Controlled Investors*, OECD Working Papers on International Investment, (2010), OECD Publishing.

³⁸ India which earlier recognised the rule of absolute immunity (except with the leave of the central government as provided under section 86 of the Code for Civil Procedures) has also moved on towards a regime allowing sovereigns to be sued when they are engaging in commercial acts (See *Ethiopian Airlines v. Ganesh Narain Saboo* (2011) 8 SCC 539).

³⁹ Part III (Article 10-Article 17), *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38, available at <http://www.unhcr.org/refworld/docid/4280737b4.html> (last visited 16 November 2013).

⁴⁰ Brown, *supra* n. 14, 10.

⁴¹ *supra* n. 9, 21.

is legal, such privateers are not able to replicate VPDs.⁴² VPDs are entrusted with a far larger range of functions, some of which are quintessential functions exclusively identified with the state. Functions of VPDs which include law enforcement, policing, capacity to detain suspects and use of force are solely sovereign functions which private guards cannot perform.⁴³ Therefore, VPDs are not comparable to private guards nor are their functions those which a private individual or a private guard may perform.

2. Are VPDs Performing a Commercial Function?

There are certain reports which have brought forth the fact that states charge a fee for providing VPD services. This raises a few questions:

- a. Is the state profiteering by protecting ships sailing under its flag and
- b. Is there a commercial motive underlying the VPD protection offered by states?

To answer the above questions a parallel can be drawn with a rather prevalent common law and order practice called Paid Policing. Paid Policing is a practice by which the police provide extra service to individuals at a charge. The police charging for their services when rendered for protection of private rather than public interest is a notion that is supported by both law and policy.⁴⁴ By engaging in commercial activities and levying charges for the same, the police does not alter the scope of its work and engage in commercial activities. Further, such a practice is not considered a departure from the police's daily job of maintaining law and order.⁴⁵ This makes us question the rationale behind charging for such services. The answer to this lies in a simple

⁴² See Sam Bateman, *Riding Shotgun: Armed Security Guards on Board Merchant Ships*, (2010) RSIS Commentaries, 28.

⁴³ Brown, *supra* n. 14, 10.

⁴⁴ *Glasbrook v. Glamorgan County Council* [1925] AC 270; See also O'Malley, *et al Converging Corporatisation? Police Management, Police Unionism, and the Transfer of Business Principles*, (2006) Department of Sociology and Anthropology, Carleton University; See also Jennifer Wood, *Reinventing Governance: A Study of Transformations in the Ontario Provincial Police* (2000) Ph.D. Dissertation, Centre of Criminology, University of Toronto, Toronto and See also Julie Ayling and Clifford Shearing, *Taking Care of Business Public Police as Commercial Security Vendors*, (2008) 8 (27) *Criminology and Criminal Justice* 27-50.

⁴⁵ *Glamorgan Coal Company Ltd. v. Glamorganshire Standing Joint Committee* [1916] 2 KB 206.

word called ‘regulation’. A fee is charged to regulate the service and prevent additional burden on the State. Profiteering is not the sole or even the principal motive for installing a fee.⁴⁶ The absence of a fee might in fact make such services susceptible to abuse.⁴⁷ After all, everything free is accepted with open hands by even those having no use for it. Applying the same rationale of regulation here, the case of VPDs thus relates to one in which a government puts a nominal price tag to prevent misuse. Every sea or oceanic route is not infiltrated with a modern day Captain Hook; yet it is unlikely that any shipping company would refuse additional protection on their vessels, if provided for free. It is this practice which would generally seek to be regulated by affixing a cost for the deployment of VPDs. Such regulation will not change the nature of the act and convert a sovereign function into a commercial service. These are sovereign functions and will remain so no matter what.

Therefore, since VPDs are neither doing something which a private individual can nor performing a commercial function, the dual test is satisfied under the rule of restrictive immunity, and a VPD would not be subjected to the jurisdiction of local foreign courts.

IV. TRYING TO DOUBLE THE IMMUNITY, VESSEL PROTECTION DETACHMENTS AS PEACEKEEPERS

In 2012, post the accidental shootout in the Indian Ocean and the subsequent arrest of the Italian Marines, Italy tried obtaining immunity for the marines based on the proposition that VPDs are peacekeepers.⁴⁸ This eclectic claim by the Italian government gave rise to a few questions – A. Who can be considered as a peacekeeper? B. Are

⁴⁶ Dr. Jeremy Gans, ‘Privately Paid Public Policing: Law and Practice’, (2000) 10 (2), *Policing and Society: International Journal of Research and Policy*, 183-206.

⁴⁷ *Glasbrook v. Glamorgan County Council* [1925] AC 270.

⁴⁸ See — ‘Fishermen killing: Italian PM calls Manmohan’ (8 March 2012) *Indian News at* http://www.thaindian.com/newsportal/uncategorized/fishermen-killing-italian-pm-calls-manmohan_100603154.html (last visited 16 Nov 2013); See also General Debate of the 67th Session, Statement By The Prime Minister Of Italy His Excellency Mario Monti To The 67th General Assembly Of The United Nations (New York, 26 September 2012), *General Assembly of the United Nations*, available at http://Gadebate.Un.Org/Sites/Default/Files/Gastatements/67/It_En_1.Pdf (last visited 16 November 2013).

VPDs peacekeepers? C. If VPDs are peacekeepers, are they entitled to immunity under an existing *lex specialis regime*? This part considers these questions and examines the merit of Italy's claims.

A. *Peacekeeping, Peacekeepers and Defining an Extended Class of Peacekeepers*

Peacekeeping refers to the activities that tend to create conditions favourable for lasting peace.⁴⁹ The term 'peacekeeping' was coined to describe a type of military action, which is used as a tool in the United Nation's (UN) system of collective security, and is consent-based. Although not explicitly provided for in the UN Charter, peacekeeping has evolved into one of the main tools used by the UN for maintaining peace, preserving sanctity and saving the world from the scourges of war.⁵⁰

Traditionally, the process of peacekeeping was carried out by a coalition called UN Peacekeepers, who comprised of forces provided by member nations, working under the command of the UN. The year 1990 saw the beginning of the development of a new military instrument of crisis management, namely armed forces of States operating with UNSC authorisation to achieve certain ends. These forces were called mandated forces. Neither were these forces organs of the UN nor were they under its control.⁵¹ They remained organs of their respective states contributing to various operations authorised by the UN, acting as a coalition and working under their command.⁵²

Even though such mandated forces are involved in peacekeeping measures, peace building and crisis management, their classification as peacekeepers remains contentious. In the absence of a robust and restrictive definition of peacekeeper there may be many arguments in favour of such classification, the first of them being that these forces

⁴⁹ — 'Who's Peacekeeping in Africa', *World Disaster Report* at http://www.wdrep.com/_wp/war/whos-peacekeeping-in-africa (last visited 16 November 2013).

⁵⁰ 'Principles of Peacekeeping', *United Nations* at <http://www.un.org/en/peacekeeping/operations/principles.shtml> (last visited 16 November 2013).

⁵¹ See R. Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*, (2003) Vol 14 *Criminal Law Forum*, 153–194.

⁵² Michael Bothe, 'Peacekeeping Forces', *Max Planck of Encyclopaedia of Public International Law* (2011).

work under a system of collective security rather than individual security. Another fact that strengthens this argument is that such missions work under the authorisation of the UN. Also, these forces other than being under the command of their respective states are no different from traditional UN Peacekeepers and carry out similar functions. Lastly, these mandated forces assist the UN in carrying out its principal goal of maintenance and preservation of peace. Therefore, considering the fact that such forces work under UN authorisation and contribute to the ultimate goal of maintaining a safe and peaceful world order under the system of collective security, these forces might just be classified as an extended category of peacekeepers.

B. Fitting VPDs in This Extended Class of Peacekeepers

As of now,⁵³ the UNSC has mandated States to take measures including the use of force to combat piracy off the coast of Somalia.⁵⁴ Thus, it can be inferred that if there is any anti-piracy peacekeeping activity, it can only be done in waters around the Somalian region that are under threat by Somalian pirates since that is the territorial extent of the UN mandate to suppress piracy. This effectively rules out any peacekeeping activity with respect to combating piracy elsewhere at least for the time being.

The question arises as to whether VPDs deployed on ships passing through the UN authorised areas can be construed as peacekeepers. VPDs deployed by States on WFP vessels would fall within the required UN mandate as the UN had urged member nations to protect the supplies carried by WFP vessels and hence, they can be classified as peacekeepers.⁵⁵ Reinforcing the argument, the UNSC has acknowledged

⁵³ The consequences of piracy at other places have not been as severe as it has been in Somalia. The issue of Somalian pirates posed a serious threat to international peace and security and hence, the UNSC was prompt in taking action. It is predicted that in case piracy starts being a major threat elsewhere the UNSC will take appropriate action.

⁵⁴ Paragraph 6 of *Security Council Resolution 1851 [on fight against piracy and armed robbery at sea off the coast of Somalia]* urges states to use all necessary means to suppress piracy. This is generally the magic formula used by the Security Council to mandate the use of force in order to restore normalcy and fight threats to international peace and security (See *Bothe supra* n. 52).

⁵⁵ *Security Council Resolution 1838 [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia]* has urged members states assist and help protect the WFP supplies from attack by pirates.

that the measures taken by states to protect WFP supplies and suppress piracy, fall within its mandate.⁵⁶

The argument that VPDs deployed on commercial vessels are peacekeepers has given rise to an arduous debate. Nonetheless, this classification can be reasoned out on a threefold basis. Firstly, the UNSC has authorised States who are interested in using the commercial maritime routes of the coast of Somalia to take steps to deter piracy⁵⁷ and placing VPDs on ships can definitely be considered as an appropriate step. Secondly, as stated earlier, the deployment of VPDs on a commercial ship does not change the character of their work. They continue to work under the command and supervision of the State, carrying out anti-piracy operations, whose object and purpose are in no way different from those of any other means. Lastly, all counter piracy operations carried out by VPDs fall within the ambit of the UNSC mandate. Thus, it can be stated that VPDs can be classified as peacekeepers as long as they are deployed in regions where the UN has mandated states to take steps to combat piracy or other marine insurgencies.

C. Immunity for VPDs Acting as Peacekeepers

The previous sections carved out a case for VPDs to be categorised as peacekeepers. Assuming that the categorisation of VPDs as peacekeepers is valid, it is to be then tested whether they are eligible for immunity under special instruments of international law by virtue of them being involved in UN authorized missions.

The purpose of immunities for personnel connected to international organisations is to protect the organisation from interference from governments and to allow them to operate independently.⁵⁸ The

⁵⁶ *Security Council Resolution 1846 [on repressing acts of piracy and armed robbery at sea off the coast of Somalia]* states that the measures taken by states to protect the WFP supplies are all within the mandate and towards implementing Security Council Resolutions 1814 and 1816.

⁵⁷ Paragraph 2, UNSC, *Security Council Resolution 1816 (2008) [on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia]*, 2 June 2008, S/RES/1816 (2008), available at <http://www.refworld.org/docid/48464c622.html> (last visited 16 November 2013).

⁵⁸ See F Rawski, 'To Waive or not to Waive: Immunity and Accountability in UN Peacekeeping Operations', (2002) 18 (1) *Connecticut Journal of International Law* 103.

UN Charter grants immunities to the representatives of member nations of the UN and the officials of the organisation, necessary for the independent exercise of their functions in connection with the organisation. VPDs cannot be considered as UN officials as they are not under the command and control of the UN. Further, as stated earlier, VPDs acting as peacekeepers also act as the organs of their respective States and not of the UN. Even if it was possible to classify VPDs as officials for the purpose of the UN Charter, granting them immunity would be a Herculean task. Immunity for blue helmet peacekeeping operations under the UN Charter in itself is not an established norm; moreover the Charter is considered insufficient to provide immunity to peacekeeping forces.⁵⁹ Also, the General Assembly has defined officials as ‘only the employees of the UN Secretariat appointment⁶⁰ i.e. personnel whose letters of appointment subject them to the UN Staff Regulations’⁶¹, thereby weakening their case for immunity. In these circumstances, it would be rather impossible to try and provide immunity to VPDs under the UN Charter.

Another instrument whose provisions are widely invoked to provide immunity to missions associated with the UN is the *Convention on the Privileges and Immunities of the United Nations (Immunity Convention)*,⁶² whose terms are widely accepted as representing customary international law.⁶³ The *Immunity Convention* is a specialised instrument that governs immunity of the UN and persons associated with it. At the outset,

⁵⁹ William Worster, ‘Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement’ (2008) 47 (3-4) *Military Law and The Law of War Review* 317.

⁶⁰ P C Szasz & T Ingadottir, ‘The UN and the ICC: The Immunity of the UN and Its Officials’ (2001) 14 *Leiden JIL* 867–885.

⁶¹ See UN Secretariat, *Secretary-General’s Bulletin – Staff Rules: Staff Regulations of the United Nations and Staff Rules*, UN Doc. ST/SGB/2002/1, 1 January 2002, amended by UN Doc. ST/SGB/2003/1, 1 January 2003, UN Doc. ST/SGB/2004/1, 1 January 2004, and UN Doc. ST/SGB/2005/1, 1 January 2005. See also K. Annan, UN Secretary-General, *Letter to Harri Holkeri, President of the UN General Assembly*, UN Doc. A/59/710, 24 March 2005, 77-78 (annexing Prince Zeid, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, UN Doc A/59/710, 24 March 2005).

⁶² See *Convention on the Privileges and Immunities of the United Nations*, (New York, 13 February 1946), 1 UNTS 15 (corrigendum: 90 UNTS 327).

⁶³ B Simma (ed), *The Charter of the United Nations: A Commentary* (New York, Oxford University Press, 1994) 589.

peacekeeping activities are not specifically covered by the *Immunity Convention* and there is no mention of the term peacekeeping or peacekeepers in this instrument. The *Immunity Convention* addresses several classes of immunities: those of the UN as an organisation⁶⁴, representatives of UN members⁶⁵, officials of the UN⁶⁶, and Experts on Mission⁶⁷. As discussed earlier, mandated forces such as VPDs cannot be classified as officials of the UN. Proposing that the definition of officials in this convention is wider than that of the UN Charter would be impractical because the *Immunity Convention* is seen as an instrument to clarify the immunities already provided for by the UN Charter. The only category under which there seems to be a minuscule possibility to fit VPDs would be that of Experts on Missions. Even though some authors have gone to the extent of stating that any person through whom the UN acts is an expert⁶⁸ the possibility to do so seems very unlikely. In the past, Special Rapporteurs⁶⁹, members of the International Law Commission⁷⁰, the International Civil Service Commission⁷¹, and the Human Rights Committee (and other similar committees)⁷², technical logistics experts serving under the UN Protective Force in Yugoslavia (“UNPROFOR”) have been classified as experts⁷³. Further, the UN Model Status of Force Agreement designates military observers, UN civilian police, and other civilian peacekeeping personnel as experts, but not military peacekeeping personnel. Thus, these examples do not give any direction or clarity as to whether peacekeepers can be experts.

⁶⁴ Articles II-III, §§ 2-10 *Immunities Convention*.

⁶⁵ Article IV, §§ 11-16 *Immunities Convention*.

⁶⁶ Article V, §§ 17-21 *Immunities Convention*.

⁶⁷ Article VI, §§ 22-23 *Immunities Convention*.

⁶⁸ Articles II, §§ 2-8 *Immunities Convention*.

⁶⁹ See, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (1999), *ICJ Rep 1999*, 62 and *I.C.J., Application of Article VI, § 22, Convention on the Privileges and Immunities of the United Nations*, (1989), *ICJ Rep 1989*, 177.

⁷⁰ *UN Juridical Yearbook* (1992), 479-480 (on the status of UN Guards as Experts on Mission), 481-483 (on the status of members of UN Volunteers); and *UN Juridical Yearbook* (1991), 305-307. See also *UN Juridical Yearbook* (1992), 480-481 (on the distinction between officials and Experts on Mission).

⁷¹ *Ibid.*

⁷² *supra* n. 70.

⁷³ R. Zacklin, Director and Deputy to the Under-Secretary-General for Legal Affairs of the UN, *Letter to C. Wilson, Counsellor, US Mission to the UN*, (12 July 1995).

Furthermore, the World Court decisions in the cases of *Cumaraswamy* and *Mazilu* (also known as the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Advisory Opinion* and the *Application of Article VI, § 22, of the Convention on the Privileges and Immunities of the United Nations Advisory Opinion*, respectively) could be read to imply that the designation as an expert is in the exclusive competence of the UNSG and may not be exercised by another organ such as the UNSC.⁷⁴ This draws a curtain on the topic as mandated forces such as VPDs get their authorisation from and owe their existence to UNSC Resolutions and are not appointed, authorised or classified by the UNSG. Therefore, arguing for the immunity of VPDs under this convention also appears to be a vain case.

Even under the *Convention on the Safety of United Nations and Associated Personnel* (Safety Convention) it is difficult to provide immunity to VPDs acting as peacekeepers. The *Safety Convention* does not specifically address immunities, but akin to International Humanitarian Law suggests protection from local court jurisdiction. In order to fall under the *Safety Convention*, the operations in question must have been ‘established by the competent organ of the UN in accordance with the UN Charter and conducted under the UN authority and control’.⁷⁵ The precise language, ‘specifically excludes’ protection for personnel participating in UN authorised operations, ie, not under UN authority and control, that are conducted by member states independent of directed operations⁷⁶, hence explicitly omitting forces like VPDs from the ambit of the *Safety Convention*.

As a last resort one can examine if there is any customary international law that provides for immunity for mandated forces such as VPDs. But this approach also does not seem to fit the bill since immunity for traditional peacekeepers in itself lacks the required state practice.⁷⁷

⁷⁴ Worster *supra* n. 59, 332.

⁷⁵ Article I (c) *Safety Convention*.

⁷⁶ WG Sharp, ‘Protecting the Avatars of International Peace and Security’ (1996) 7 *Duke Journal of Comparative and International Law* 93.

⁷⁷ Worster *supra* 59, 360.

Further, when it comes to domestic courts they themselves do not seem to agree on the applicability of such a norm.⁷⁸ The late Sir Ian Brownlie has also refuted the existence of a customary law dealing with such immunities.⁷⁹ It therefore follows that searching for a customary law to provide immunity for VPDs acting as peacekeepers would not be something less dramatic than pulling an elephant out of a magic hat. Thus, trying to classify VPDs as peacekeepers and arguing for their immunity is a failed exercise and it is befuddling as to how attempts have been made to establish immunity for VPDs on this basis.

V. STRETCHING THE LIMITS, VESSEL PROTECTION DETACHMENTS AND INTERNATIONAL HUMANITARIAN LAW

The very instance the talk of jurisdictional immunity for VPDs came up, a thing that began doing the rounds was International Humanitarian Law (IHL). There were academic discussions on whether VPDs were lawful combatants entitled to combatant privilege in accordance with the laws of war. This part describes the immediate rejection of the application of the laws of armed conflict as well as shows how academic discussion regarding futuristic possibilities of the application of IHL to third state actors such as VPDs may be a redundant exercise.

A. *Prima Facie* Rejection of IHL's Applicability to VPDs

Before discussions regarding combatant privilege being granted to VPDs could take root, the applicability of IHL was totally discarded. This was because the prime requirement for the applicability of the laws of war is the existence of an armed conflict and it is not a widely disputed fact that the fight against piracy is not an armed conflict.⁸⁰ Two notions were put forward in this regard. Firstly, pirates do not reach the threshold

⁷⁸ District Court of Haifa, *Israel, Israel v. Papa Coli Ben Dista Saar*, 10 May 1979, *UN Juridical Yearbook* (1979), 205-206.

⁷⁹ District Court of Haifa, *Israel, Israel v. Papa Coli Ben Dista Saar*, 10 May 1979, *UN Juridical Yearbook* (1979), 208.

⁸⁰ Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, 133.

required to be an armed group for the purpose of an armed conflict.⁸¹ In fact, most academics call for pirates to be treated as ordinary civilians involved in criminal activities⁸² and this is the reason that anti-piracy operations are treated as law enforcement operations even when carried about by military officials.⁸³ Secondly, in the fight against piracy the use of force is limited only to situations of self-defence which does not suggest a situation of an armed conflict.⁸⁴ Thus, due to the absence of any armed conflict, IHL cannot be applied to VPDs anti-piracy operations.

B. *Can IHL be Applicable in Certain Circumstances?*

Paragraph 6 of the recently passed *UNSC Resolution 1851* that provided the mandate for anti-piracy operations, made reference to ‘applicable International Humanitarian laws’⁸⁵. The usage of the word

⁸¹ Several criterions required to be considered an armed group are not met. Firstly, pirates are not organised on military lines (*see* Douglas Guilfoyle, ‘The Laws Of War And The Fight Against Somali piracy: Combatants Or Criminals?’, *Melbourne Journal Of International Law*). Secondly, Somali pirates are at best several different groups acting without state sanction who have mounted a series of individual attacks against vessels of varying nationalities. Thirdly, pirates are not involved in any protracted armed violence. Pirate–naval encounters are sporadic, brief and usually involve only small-scale fire (*see* Douglas Guilfoyle, ‘The Laws Of War And The Fight Against Somali piracy: Combatants Or Criminals?’, *Melbourne Journal Of International Law*). Fourthly pirates control no territory as is required by IHL to be classified as an armed group. (IHL refers to control of territory as part of the definition of ‘armed groups’ required for a non-international conflict to exist.) *See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609, Article 1(1) (entered into force 7 December 1978).

⁸² Tullio Treves, ‘Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia’, (2009) 20 *European Journal of International Law* 399–414.

⁸³ Geiss and Petrig, *supra* n. 80, 133.

⁸⁴ The use of force against pirates has been largely used in situations of self-defence and this does not suggest the presence of an armed conflict as in an armed conflict lawful combatants have a licence to kill or wound enemy combatants and destroy other enemy military objectives (*See* IA Com HR, *Report on Terrorism and Human Rights*, OAS Doc. OEA/Ser.L/ - V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 68). Further if pirates are to be considered as civilians against whom force may be used only in situations of self-defence in that case the whole argument is rendered absolutely moot because there would be no armed group which would be required if there is to be an armed conflict.

⁸⁵ Para 6 of *Security Council Resolution 1851 (2008)* [*on fight against piracy and armed robbery at sea off the coast of Somalia*] provides that any action taken under its aegis ‘shall be undertaken consistent with applicable international humanitarian and human rights law’.

‘applicable’ raised questions whether the UNSC considered the potential applicability of IHL. In light of the origins of piracy in the Somalian region and the close connection of piracy with the existing internal armed conflict in Somalia, it is suggested by Robin Geiss and Anna Petrig that the UNSC might have envisaged a situation wherein armed personnel and law enforcement officials get involved with the hostilities within Somalia by collaborating with an entity that is already a party to an on-going non-international armed conflict.⁸⁶ Such a situation would see VPDs becoming an armed group in an armed conflict. There appears to be a very high probability of this, as many pirates are members of armed groups present within Somalia and in order to tackle these pirates on land there might be some form of tie-ups between VPDs and other lawful armed groups. Since VPDs would easily classify as lawful combatants⁸⁷ in the above scenario, they could actually find themselves being entitled to additional protection in carrying out their duties. Therefore, it appears as if there could be a remote possibility in the future that VPDs might be provided with additional protection under the laws of war regime. Much of an anti-climax, this argument is not as plausible as it sounds since technicalities render it impractical. The reason being that since VPDs by definition are members of armed forces of the state or law enforcement units ‘*embarked on a civilian ship*’, (emphasis supplied) the moment they leave the ships and venture out

⁸⁶ See Geiss and Petrig, *supra* n. 80, 133.

⁸⁷ A lawful combatant is an individual authorized by governmental authority or to engage in hostilities (See Article 4 of the *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> (last visited 16 November 2013) and Article 43 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html> (last visited 16 November 2013) (Henceforth called additional protocol). A lawful combatant may be a member of a regular armed force or an irregular force. In either case, the lawful combatant must be commanded by a person responsible for subordinates; have fixed distinctive emblems recognizable at a distance, such as uniforms; carry arms openly; and conduct his or her combat operations according to the Law of Armed Conflict (See Article 4 of the additional protocol and *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at <http://www.unhcr.org/refworld/docid/4374cae64.html> (last visited 16 November 2013). Therefore, VPDs belonging to armed forces of a state would satisfy all these criteria as they are authorized by their states, wear distinctive uniforms, carry arms openly etc.

onto the land to become a party to the existing armed conflict they would cease to be VPDs and would be just members of the State military. Hence, such protection even if accorded would not be to 'VPDs' but rather to individuals who are only part of the States' armed forces.

VI. CONCLUSION

From the foregoing paragraphs it is clear that VPDs, being state actors and performing non-commercial sovereign functions, should be entitled to state immunity. Their attachment with the State and the range of functions comported by them put them at a higher pedestal when juxtaposed with privateers. Further, the fees charged for their deployment in certain instances does not diminish their position in International Law as agents of States. Moreover, even if we try and turn the tables, as far as respect for international law is maintained and justice across borders is available, VPDs would be entitled to some protection under the classical offshoot of comity even in the absence of any explicit covenants providing the same. But this is where the line is drawn.

Looking beyond this and trying to make alternate arguments to strengthen the case for their immunity, like canvassing for protection of VPDs as peacekeepers or lawful combatants in the war against piracy seems futile at this stage. Even though we might achieve some success in classifying VPDs as peacekeepers, in the absence of any Status of Force Agreements or other bilateral instruments, there would be no law that would be applicable to their esteemed status as preservers of peace. As far as the issue of combatant protection is concerned, notwithstanding enormous ongoing discussions and debate emanating in legal academia, the argument regarding their applicability is not one with any merit.

In summation, it is perhaps most apt to say that not many regimes would help protect VPDs. Definitely, the need of the hour is that the international community culls out specific provisions of International Law for the regulation and protection of VPDs. However, in the meantime, it is expedient that countries be prepared to relinquish their sovereignty so that the battle against the heinous menace of piracy is not sacrificed on the anvil of issues of immunity and jurisdiction.

IP, OPEN SOURCE AND THE LICENSING PARADIGM[†]

*Anirudh Hariani**

I. INTRODUCTION

‘In India open-source-code software will have to come and stay in a big way for the benefit of our billion people.’

Dr APJ Abdul Kalam¹

In March 2009, the Bharatiya Janata Party (BJP), as part of their election campaign, introduced an IT Vision document² on the BJP’s candidate for Prime Minister, Shri LK Advani’s website that endorses open source and open standards. Although the BJP lost the elections, open source has turned into a national humanitarian issue.³ All government organisations are also currently being encouraged to use open source software (OSS).⁴ With the future of our billion plus people depending on information technology (IT) development, OSS can play a pivotal role.

[†] This article reflects the position of law as on 16 October 2013.

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¹ The former President of the Union of India, in New Delhi, on the occasion of a visit by Bill Gates of Microsoft in November 2002. Gates, at the time, did *not* agree. See Keya Acharya, ‘India: What the President told Bill Gates’ (June 2003), at <http://egovindia.wordpress.com/2006/06/21/india-what-the-president-told-bill-gates-long/> (last visited 16 October 2013).

² Available at <http://www.lkadvani.in/eng/images/stories/it-vision.pdf> (last visited 16 October 2013).

³ Other major political parties also support open source. For example, the Congress-led Central Government has initiated the Data Portal India, ‘a platform for supporting Open Data initiative of Government of India’, available at <http://data.gov.in/> (last visited 16 October 2013).

⁴ In fact, even the Bombay High Court is now exclusively operating the OSS Linux. Further the Unique Identification Number ‘Aadhar’ project, one of the largest e-governance initiatives in India to date, is built using open source components such as MySQL, Hadoop, RabbitMQ, Mule, etc and takes heavy advantage of international open technological standards.

The practical applications of OSS are thus manifold yet, OSS also has several interesting legal facets, keeping in mind fundamental issues such as the conflict between the democracy of ideas and the incentive for invention, and a deeper question of the validity and enforceability of OSS licences. Further, the recognition of open source as a legitimate and legally viable means of software development is a far cry from its anti-establishment origins, and being considered an obscure sideshow.⁵ OSS is software distributed freely to all consumers and further developers.⁶ This means that the original developers of the software do not retain monopoly rights to the use of the software, but give later users much more freedom: the freedom to run the software program for any purpose, the freedom to study how the program works and adapt it to their needs, the freedom to redistribute copies to others, and the freedom to improve the program and release improvements to the public.

The promoters of OSS assert that it is beneficial to the community as a whole not only because it is on morally higher ground than proprietary software,⁷ but also because it leads to greater innovation, which is beneficial for society. OSS evangelists such as Eric Raymond⁸, Eben Moglen⁹ and Venkatesh Hariharan¹⁰ argue that empirical evidence over the last couple of decades has proved that the monetary rewards offered by proprietary software are not the only motivators of creativity. The success of OSS programmes such as Linux and Apache has borne out the theory that the lack of monopoly to monetary benefit in an OSS system is easily compensated for by other benefits reaped by developers

⁵ See 'Born Free', 30 May 2009, *The Economist*, 65.

⁶ Catherine Stromdale, 'How Open is Open Source', 2006 12(7) *CTLR*, 223-227. See also 'The Open Source Definition', Open Source Initiative, at <http://www.opensource.org/docs/osd> (last visited on 16 October 2013); and 'The Free Software Definition', The Free Software Foundation, at www.gnu.org/philosophy/free-sw.html (last visited 16 October 2013).

⁷ Richard Stallman, 'The GNU Project', at <http://www.gnu.org/gnu/thegnuproject.html> (last visited 16 October 2013).

⁸ See Eric Raymond, 'Homesteading the Noosphere', at <http://www.dvara.net/hk/homesteading.pdf> (last visited 16 October 2013).

⁹ See Eben Moglen, 'Anarchism Triumphant: Free Software and the Death of Copyright', available at http://emoglen.law.columbia.edu/my_pubs/anarchism.html (last visited 16 October 2013).

¹⁰ See the Open Source India blog, at <http://osindia.blogspot.com> (last visited 16 October 2013).

of OSS software, such as reputational gains and the personal satisfaction of contributing to community projects.¹¹

This article attempts to analyse the efficacy of the open source model in India. The article first scrutinises the kinds of intellectual property (IP) protection, viz copyrights and patents available for software and tries to draw a conclusion as to what form of protection is suitable to OSS, in Parts II and III respectively, particularly with respect to India. The article then evaluates the concept of open source licensing, and whether OSS licences are valid and legally enforceable, in Part IV, again with a focus on enforceability in India.

II. WHAT IS OPEN SOURCE? BASIS IN COPYRIGHT LAW

OSS may seem opposed to the suggestion of both the patent and copyright methods of property right protection, but in fact, this is *not* the case; OSS is based on copyright. OSS is not public domain software, released as *res nullius* into society to be claimed by any who finds it.¹² In fact, the success of OSS rests on the copyright system.

A. Source Code and Object Code

Computer programs are written in source code that is easily readable by humans, but not directly executable by computers. It is a set of programming instructions that is typically written in a ‘high-level’ computer language such as C++, Java or PHP which resembles the English language. A computer program known as a ‘compiler’ converts source code to object code before the program described in the source code can be executed. Object code on the other hand, cannot be easily read by people;¹³ it is a progression of bytes that encode specific

¹¹ There are 68 million Linux users as approximated by ‘LiCo - The New LinuxCounter Project’ website, at <http://linuxcounter.net/main.html> (last visited 16 October 2013).

¹² Rakesh Jain, ‘Open Source Licensing: Legal Issues’, 05(03) *ICFAI Journal of Cyber Law* 11 (2006).

¹³ This is subjective, as even object code (binary machine code) is entirely readable by humans. It was, after all, designed by humans. However it is tedious to read, but this can be helped by using a program called a ‘disassembler’ to translate the raw alphanumeric instructions back into symbolic form. Source code and object code are hence, relative terms. See David Touretzky, ‘Source vs. Object Code: A False Dichotomy’, 12 July 2000, Computer Science Department, Carnegie Mellon University, available at <http://www.cs.cmu.edu/~dst/DeCSS/object-code.txt> (last visited 16 October 2013).

machine instructions to be executed by the microprocessor when it runs the program. OSS is called ‘open source’ because not only the object code but also the source code is passed on to future users, so that they may further develop it.

It is well-settled that source code is copyrightable. However, the question of whether object code is on equal footing with source code regarding copyright protection was previously disputed.¹⁴ The issue was resolved in the UK in *Sega Enterprises v. Richards*¹⁵, where the court proceeded on the basis that there was a copyright vested in a game called ‘Frogger’, even though the game was in machine-readable assembly code. Similarly, in the US in *Apple Computer v. Franklin*¹⁶ it was held that either source code or object code may be copyrighted, provided that it meets the criteria for copyrightability, including for example, containing a certain level of originality. The above was substantiated thereafter by amendments to the laws of both countries.¹⁷ Further, international treaties also substantiated these laws.¹⁸ In India too, it is now clear that object code is also copyrightable.¹⁹

¹⁴ Previously, courts did not accept that all forms of computer programs can be protected by copyright. See *Computer Edge Pty Ltd v. Apple Computer* (1986) 65 ALR 33.

¹⁵ [1983] FSR 73. See Stanley Lai, *The Copyright Protection of Computer Software In The United Kingdom*, Hart Publishing, 2000. It was generally held that a computer program was eligible for copyright protection as a literary work, but there were difficulties in determining the infringement of copyright.

¹⁶ 714 F.2d 1240 (3d Cir. 1983). Moreover it was held that computer programs are protected in any form, fixed in any medium, regardless of their purpose and function.

¹⁷ In the US – by the 1980s Amendments to the *US Copyright Act*, Title 17 USC § 102 (2000), and the work of the CONTU (National Commission on New Technological Uses of Copyright Works, set up by the US Congress in 1974) and in the UK – section 1 of the *Copyright (Computer Software) Amendment Act, 1985* and section 3(1) of the *Copyright, Design and Patents Act, 1988*.

¹⁸ The TRIPS agreement (*Agreement on Trade Related Aspects of Intellectual Property Rights*) includes a specific provision in article 10 that expressly requires member states to protect software, whether in source or object code, as ‘literary works’ under the Berne Convention.

¹⁹ The 1994 Amendment to the *Indian Copyright Act, 1957* (Act 38 of 1994) enlarged the meaning of a computer program in section 2(ffc) to include ‘[a] set of instructions expressed in words, codes, schemes or in any other form, including a *machine readable medium...*’ (emphasis supplied).

*B. Copyleft: 'Like the sword of Damocles, the point is not that it falls but that it hangs'*²⁰

Copyrights for software are generally given for particular source code written. The software code is considered a 'literary work' and given protection in this capacity.²¹ The protection given is not to the idea behind the code, but to the expression of the actual code. Nobody may duplicate copyrighted code or further distribute it, unless licensed,²² but developing other software containing the same innovation or inventive step is not prohibited by copyright law.

The authors of OSS retain their copyright in the software they create, and allow free use of their software only through the general licence the software carries with it. 'Open source licensing' (OSL), means to permit anyone to use and develop the copyrighted software subject to certain conditions as provided in the licence. These conditions, as provided under the GNU General Public Licence (GPL) and others, contain the central obligation not to exploit commercially any version that was created under a valid OSL licence and, additionally, to only transfer use rights if the acquirer is made aware of the obligations arising under the GPL and adheres thereto. The derivative works of course belong to the person who has developed them, as per the ordinary rule of copyright law, but as soon as the person creating such derivatives restricts access

²⁰ David McGowan, 'Legal Implications of Open-Source Software', 2001 *U Ill L Rev* 241, 303, available at <http://www.cogsci.ucsd.edu/~rik/courses/cogs200-w05/readings/McGowanD-OpenSource.pdf> (last visited 16 October 2013).

²¹ In 1994 the *Indian Copyright Act* was amended to include computer programmes, tables, compilations and databases within the meaning of literary works under section 2(o) of the Act, though software source code was accepted as copyrightable even prior to this. Similarly, in the US, the *Copyright Act* was amended to incorporate software expressly in 1976, but the Copyright Office accepted computer programs as literary works well before this. The EU chose to protect software patents through the Council Directive on the Legal Protection of Computer Programs, in addition to the protection given to computer programs as literary works within the meaning of the Berne Convention. See Grant C Yang, 'The Continuing Debate of Software Patents and the Open Source Movement', 13 *Tex Intell Prop LJ* 171.

²² Section 30 of the *Indian Copyright Act* provides that '[t]he owner of a copyright has the right to grant a licence to another with respect to the copyright of his or her work. ...' Any unlicensed copying is punishable as infringement. In *Microsoft Corporation v. Yogesh Papat* (2005) 118 DLT 580, the defendants were held liable for unlicensed loading of the plaintiff's software onto the hard discs of computers being sold by them.

to them, he becomes an infringer on the copyright of the original work. In cases of such infringement, the rights granted are terminated and fall back to the previous licensors. The terms and conditions under the GPL are thus based on copyright protection. This form of licensing is popularly called ‘copyleft’.²³ It has been said, that copyleft flips the copyright over to serve the opposite of its usual purpose: ‘instead of a means of privatising software, it becomes a means of keeping software free’.²⁴ Therefore, the licence is not meant to prevent the use of the software. Instead, the licence acts as a right in *rem*, with an underlying impetus to prevent the proprietism of the software produced, in open source.

The retaining of ‘moral rights’²⁵ to software is important too for the endurance of the open source initiative, as it prevents subsequent users of software from free-riding on the reputation of the original programmer. One of the primary motivators of the creation of OSS is its capacity to build the reputation of programmers. Therefore, open source licences also ensure that OSS programmers receive recognition for their efforts. Similarly, section 57 of the *Indian Copyright Act, 1957* provides for the protection of the author’s special rights.

Open source licences therefore contain express provisions that the copyright in the original software still vests with the original author of the code. Only through the exception created by the open source licence can the application of the copyright law be escaped, and this licence must be accepted along with all its component terms. The continued openness of software is thus enforced only by using the threat of copyright law.²⁶

²³ ‘Copyleft’ software licences are sometimes referred to as ‘viral copyright licences’ because any works derived from a copyleft work must themselves be subject to copyleft when distributed. Craig Mundie, Senior Advisor to the CEO and former Chief Research and Strategy Officer of Microsoft too has used this term in a speech. According to Free Software Foundation’s former compliance engineer David Turner, the term creates a misunderstanding and a fear of using copylefted open-source software because of the word ‘viral’ being used as an analogy to computer viruses.

²⁴ Stallman, *supra* n. 7.

²⁵ Many open source licences stipulate that the original copyright must be acknowledged every time the software is passed on, and some even stipulate that every change to the software by any other developer be acknowledged, protecting the integrity of the author’s source code. Certain licences therefore require that the derived work should carry a different name or version number from the original software.

²⁶ Mathew Satchwell, ‘The Tao of Open Source: Minimum Action for Maximum Gain’, 20 *Berkeley Tech LJ* 1757.

C. 'Open source' or Free? A Disambiguation

There is a minor ongoing debate on the point of whether OSS can be termed 'free', as this term leads to confusion. The term 'free software', as patronised by the Free Software Foundation (FSF) and others, has nothing to do with price. In fact, it relates to liberty.²⁷ 'Free software', an evolving concept, is loosely defined by the FSF as 'software that respects users' freedom and community. Roughly, the users have the freedom to run, copy, distribute, study, change and improve the software. With these freedoms, the users (both individually and collectively) control the program and what it does for them...'²⁸

FSF prescribes four 'essential freedoms' for the users of a software program in order to classify the program as free software:

- The freedom to run the program, for any purpose (freedom 0).
- The freedom to study how the program works, and adapt it to your needs (freedom 1). Access to the source code is a precondition for this.
- The freedom to redistribute copies so you can help your neighbour (freedom 2).
- The freedom to distribute copies of your modified versions to others (freedom 3). By doing this you can give the whole community a chance to benefit from your changes. Access to the source code is a precondition for this.' Since 'free' refers to freedom, and not to price, there is no contradiction between selling copies and free software. In fact, the freedom to sell copies is crucial for the community, as selling OSS is an important way to raise funds for OSS development.²⁹ The success of Linux too

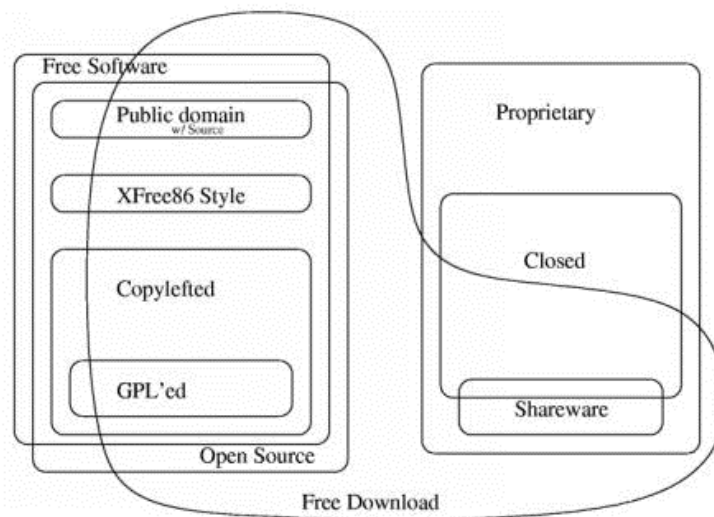
²⁷ FSF puts it in more relatable terms: 'To understand the concept, you should think of free as in free speech, not as in free beer'.

²⁸ 'The Free Software Definition', The Free Software Foundation, *available at* www.gnu.org/philosophy/free-sw.html (last visited 16 October 2013).

²⁹ Stallman *supra* n. 7.

is largely due to distribution by companies such as IBM and Red Hat. Therefore, a computer programme which people are not free to distribute gratis or for a fee, is not free software.

‘Free software’ and OSS are overlapping concepts, which mean more or less the same thing. However they are not exactly the same category of software: OSS accepts some licences that free software proponents consider too restrictive, and there are free software licences that OSS does not accept.³⁰ Nonetheless, the differences are small, as nearly all free software is open source, and nearly all OSS is free. The following diagram³¹ illustrates the different categories of software:



Therefore, it may be seen that the terms OSS and free software can be used in place of each other in most instances. However, several OSS supporters still do not encourage the use of the term ‘free software’, as the term is often confused with ‘freeware’, ie software merely available for free. When the average user sees or hears that term, they

³⁰ ‘Categories of Free and Non-Free Software’, GNU Project, The Free Software Foundation, *available at* <http://www.gnu.org/philosophy/categories.html> (last visited 16 October 2013).

³¹ This diagram originally by Chao-Kuei is free, and has been licensed out under the terms of the GNU GPL version 2.0 and other licences.

associate it with 'no cost'. Thus, a number of OSS supporters encourage maintaining a certain moral distinction between free software and OSS.

III. SOFTWARE PATENTS

The strict classification of software as only 'literary work' is sometimes not enough. Software has other elements that may not be subject to copyright protection. The source code of a computer program, while completely different from that of another program, may yet have the same function and produce a similar set of instructions that achieve a similar result.³² The idea-expression dichotomy, which is often debated, is based on the same argument. Thus, the issue of software patents arises.

A software patent gives the patent holder exclusive rights in the substance of the software created. Therefore, no other person is able to even use the same software idea, rather than just the same source code. In simple terms, while in copyright, it is the journey that matters and not the destination, the same is not the case for patents.³³ Generally patents are conferred on any 'new', 'useful' and non-obvious art, process, method or manner of manufacture, including machines, appliances or other articles or substances produced by manufacture.³⁴ Patents are consequently granted on the applicability of the software or the process the software performs. Therefore, patent laws contain exclusionary provisions within them excluding mathematical and natural facts or laws from the ambit of patent protection.

Software, being mathematical code, falls squarely within such a category

³² Andrés Guadamuz González, 'The Software Patent Debate', 10 January 2006, *Journal of Intellectual Property Law and Practice Advance Access*, available at http://www.wipo.int/edocs/mdocs/sme/en/wipo_unido_smes_msk_07/wipo_unido_smes_msk_07_www_73624.pdf (last visited 16 October 2013).

³³ Lawrence Liang *et al*, 'Briefing Note on the Impact of Software Patents on the Software Industry in India'.

³⁴ 'Invention' generally implies a new product or process involving inventive step and capable of industrial application. section 2(j) of the *Indian Patent Act, 1970* states: '(j) "invention" means any new and useful—
(i) art, process, method or manner of manufacture;
(ii) machine, apparatus or other article;
(iii) substance produced by manufacture,
and includes any new and useful improvement of any of them, and an alleged invention.'

for exclusion. Most patent laws enacted or amended recently actually expressly exclude software from the category of patentable subject matter.

A. *The Indian Approach*

Under Indian law, section 3(k) under Chapter II of the *Patent Act, 1970* states explicitly that ‘a mathematical or business method or a computer program *per se* or *algorithms* is not an invention, and hence, not patentable.

This exclusion met with conflicting interpretations at the Patent Office, with some examiners granting patents to software combined with hardware or software with a demonstrable technical application of some sort.³⁵ The *Patent (Amendment) Ordinance* in 2004 therefore qualified this exclusion by stating that software with a ‘technical application’ to industry or when ‘combined with hardware’ would be patentable.³⁶ Owing to vigorous opposition from the open source movement,³⁷ this provision was removed from the 2005 Amendment to the *Patent Act*. However, the 2005 Amendment opted for the more ambiguous statement that software is not patentable ‘*per se*’.³⁸ Yet, this statement did not entirely preclude the possibility of software patenting in India.

Subsequently, much confusion ensued due to the introduction of the *Draft Patent Manual 2008*³⁹ by the Indian Patent Office in 2008. The

³⁵ See ‘Software Patents Under Ordinance Face Reversal’, *Financial Express*, (New Delhi India 29 March 2005), available at <http://www.financialexpress.com/news/Software-patents-under-Ordinance-face-reversal/82155/> (last visited 16 October 2013). ‘[O]ver 150 patents on “technical effects of software” had been granted in the country even prior to the December Ordinance. These patents were granted despite the legal ambiguity that had prevailed prior to issuance of the Ordinance.’ However, several patents granted after the Ordinance were thereafter revoked.

³⁶ Section 3(k) of the Ordinance excluded ‘a computer programme *per se* other than its technical application to industry or a combination with hardware’.

³⁷ Including representations made by the Free Software Foundation of India (FSF India) and others.

³⁸ See *infra* n. 55. ‘*Per se*’ is similar to the term ‘as such’ used in Article 52(3) of the *European Patents Convention*.

³⁹ ‘Draft Manual of Patent Practice and Procedure’, Third Edition – 2008, The Patent Office, Controller General of Patents, Designs and Trade Marks (CGPDTM), Government of India, available at http://ipindia.nic.in/ipr/patent/DraftPatent_Manual_2008.pdf (last visited on 16 October 2013).

Draft Manual attempted to reintroduce software patents, by explicitly stating that software in combination with hardware is patentable.⁴⁰ The Indian open source community reacted strongly⁴¹ to such an attempt to bring in software patents ‘through the back door’⁴². The dissent was based on the ground that software patenting was attempted to be legalised in 2005 through the Presidential Ordinance, but was rejected by Parliament, and hence should not be permitted once already rejected.

Eventually, the Draft Manual did not come to pass. Under the *Manual of Patent Office Practice and Procedure 2011*⁴³, the Office of the Controller General of Patents, Designs and Trademarks states that a computer program, even when stored in a computer readable medium is not patentable. Clause 08.03.05.10 (f) of the Manual is reproduced below:

‘f. If the claimed subject matter in a patent application is only a computer programme, it is considered as a computer programme per se and hence not patentable. Claims directed at computer programme products’ are computer programmes per se stored in a computer readable medium and as such are not allowable. Even if the claims, inter alia, contain a subject matter which is not a computer programme, it is examined whether such subject matter is sufficiently disclosed in the specification and forms an essential part of the invention.’

The Manual does not deal with whether a software program combined with a machine or mechanical device is patentable or not. Further, the

⁴⁰ Clause 4.11.9 of the Draft Patent Manual, which reads: ‘[A]n invention consisting of hardware along with software or computer program in order to perform the function of the hardware may be considered patentable. e.g., embedded systems.’ Clause 4.11 acts as a general guide to section 3(k) of the *Indian Patent Act, 1970*.

⁴¹ See ‘Say No To Software Patents’, available at http://fci.wikia.com/wiki/Say_No_To_Software_Patents (last visited 16 October 2013). Candle light vigils and protest marches were held around the country in August 2008.

⁴² See Nagarjuna G, ‘FSF India’s response to the Draft Patents Manual’, 19 August 2008, Free Software Foundation of India, available at www.gnu.org.in/fsf-indias-response-to-the-draft-patents-manual, para 14 (last visited 16 October 2013).

⁴³ ‘Manual of Patent Office Practice and Procedure’, Version 01.11, as modified on March 22, 2011, The Patent Office, Controller General of Patents, Designs and Trade Marks (CGPDTM), Government of India, available at <http://www.ipindia.nic.in/ipr/patent/manual/HTML%20AND%20PDF/Manual%20of%20Patent%20Office%20Practice%20and%20Procedure%20%20pdf/Manual%20of%20Patent%20Office%20Practice%20and%20Procedure.pdf> (last visited 16 October 2013).

Manual is not mandatory law as is explicitly stated in its preface: '[t]his manual may be considered as a practical guide for effective prosecution of patent applications in India. However, it does not constitute rule making and hence, does not have the force and effect of law.' As a matter of practice, it appears that the Indian

Patent Office has been granting patents where the subject matter of what is being patented is not merely a software program per se, but something more, for example, if it is combined with a mechanical device or system so that the software can produce a functional or technical result and thereby assist the device or system.

B. *The TRIPS Obligations*

As a result of the Uruguay Round in 1995, the World Trade Organization (WTO) arrived at the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS)⁴⁴ to reconcile the international IP laws. The agreement imposes uniform minimal standards modelled after the laws of industrialised nations and is part of the *General Agreements of Tariffs and Trade* (GATT), the purpose of which was to eliminate trade barriers. TRIPS sets forth three different forms of protection for software: (1) copyright, (2) patent and (3) trade secrets.

Article 27.1 of the TRIPS recognises patent protection for software related invention for the member states so long as the invention satisfies the other requirements for patentability which are country specific.⁴⁵ Therefore, software may be granted patent protection in a particular country if it fulfils the specific conditions set forth under the laws of that country.

⁴⁴ *Agreement on Trade Related Aspects of Intellectual Property Rights* (adopted 15 April 1994, entered into force 1 January 1995) Annex 1C of the *Marrakesh Agreement Establishing the World Trade Organization*.

⁴⁵ Article 27.1 states: 'Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.'

Under the TRIPS agreement, the patent term is twenty years from the filing date,⁴⁶ and this term is also stipulated in the US⁴⁷, Europe⁴⁸ as well as in India⁴⁹.

India, being a signatory to the TRIPS, has passed the 2005 Amendment to the *Patent Act* in order to be TRIPS compliant, however the controversial issue of allowing software patents, as discussed above, has been specifically excluded from the *Patent Act*.

C. *The US and Europe*

Software patenting has emerged as a conspicuous method of IP protection for software in the US and Europe though its efficacy is still doubted. The US has liberalised its patenting regime to include software to a large extent, though the EU remains more conservative.⁵⁰ While Article 52(1) of the *European Patent Convention* (EPC)⁵¹ states that European patents will be granted for any invention which is susceptible of industrial application, which is new and involves an inventive step, Article(2) specifically excepts mathematical methods, schemes, rules and methods for performing mental acts and programs for computers inter alia from the application of patent law. Again, section 101 of the *US Patents Act*⁵² is worded liberally enough to allow software to be patented, stating that '[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the requirements of this title', but an exception is carved out for mathematical algorithms, under which software can be classified.

⁴⁶ Article 33 of the TRIPS. The explanation to this article says 'It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.'

⁴⁷ *Patents Act*, Title 35 USC § 154(a)(2). The United States adjusted the term in compliance with the TRIPS agreement from seventeen to twenty years from the date of grant.

⁴⁸ Article 63(1) of the *European Patent Convention*.

⁴⁹ Section 53 of the *Indian Patents Act, 1970*.

⁵⁰ See Grant C Yang, 'The Continuing Debate of Software Patents and the Open Source Movement', (13) *Tex. Intell. Prop. L.J.* 171.

⁵¹ *Convention on the Grant of European Patents* of 5 October 1973, which also formed the European Patents Office (EPO), available at www.epo.org/law-practice/legal-texts/html/epc/1973/e/ar52.html (last visited 16 October 2013).

⁵² Title 35 USC § 101 (1952).

This strict application of the concept that software is not patentable has, however, been done away with in the US and the EU. In the US, the cases of *Re Bradley*⁵³ in 1979 and *Diamond v. Diehr*⁵⁴ in 1981 led the way for a narrower exclusion of software from patent protection, changing the position from a complete denial of patents for software to allowing an application of software to be patented.⁵⁵ In the EU too, while software programs are not patentable, the technical effects of a program, which go beyond the normal physical interactions between a program and a computer, are patentable.⁵⁶

In Europe much controversy had resulted over the proposed *European Union Directive on the Patentability of Computer-Implemented Inventions* (the Directive).⁵⁷ In September 2003, the European Parliament passed the Directive, in its heavily amended form, which placed significant limits on the patentability of software. The Directive was originally drafted to ensure that software patents would be allowed in the EU, but its meaning was almost completely inverted by the European Parliament, in order to prevent the patenting of algorithms.⁵⁸ Subsequently, the Council of Ministers of the EU agreed to resubmit to the European Parliament a ‘compromise’ version of the proposed Directive. However, due to dissent from several member-states, and controversial changes of votes,⁵⁹ the final version of the Directive was eventually struck down by the Parliament.⁶⁰

⁵³ 600 F2d 807, 202 USPQ 480.

⁵⁴ 450 US 175, 209 USPQ 97 (1981).

⁵⁵ The USPTO has now laid down guidelines for patenting software and describing the situations in which it is patentable in its Manual of Patent Examining Procedure (MPEP), available at <http://www.uspto.gov/web/offices/pac/mpep/> (last visited 16 October 2013). However, the patenting of mathematical algorithm per se is of course still not allowed.

⁵⁶ *Computer related inventions v. VICOM*, at 284. Article 52(3) of the EPC limits the exceptions in article 52(2) to the extent that the application or patent relates to such subject matter or activities ‘as such’. It is this phrase that has been interpreted in cases to mean that while software itself is not patentable, applications of software are.

⁵⁷ ‘Patents Directive killed by European Parliament’, (6 July 2005), *OUT-LAW News*, available at <http://www.out-law.com/page-5884> (last visited 16 October 2013).

⁵⁸ The most significant changes included: (a) the definition of the ‘technicity’ requirement for patentability which distinguishes between abstract information-processing processes and specific kinds of physical processes; and (b) a blanket rule that patents cannot be used to prevent interoperability between computer systems.

⁵⁹ See ‘Software patents law up in the air after Poland pull out’, (19 November 2004), *EurActiv*, available at <http://www.euractiv.com/en/infosociety/software-patents-law-air-poland-pull/article-132419> (last visited 16 October 2013).

⁶⁰ *Supra* n. 56.

D. *Patents and OSS: 'The arrival of that period when human improvement must end'*⁶¹

Unlike copyright protection, patent protection for software does not find favour with OSS proponents. Stallman of the GNU Project sees software patents as a 'dangerous obstacle to all software development',⁶² and the preamble to the GPL states that 'any patent must be licensed for everyone's free use or not licensed at all'. The various arguments against software patents are discussed below:

1. Purpose

Patents are intended to encourage innovation by protecting the investment made by the inventor; this does not apply to software. Not all areas of technology can be treated equally. Open source supporters argue that software, even in its application, is based entirely on mathematical ideas and calculations. To protect such basic ideas as patented material is to prevent further human understanding of and skill in harnessing mathematical code and to stifle any progress in science. Also, with software, innovation is much quicker and the inventive steps are smaller and more incremental than in any other industry; each new innovation builds on hundreds of previous software innovations. It is argued, therefore, that the effect of software patents is to encourage monopolies and to discourage innovation.⁶³ Thus, software patents, by their very nature, hold back innovation instead of promoting it.

2. Trivial or 'Bad' Patents

Several 'bad' patents exist on trivial, well-known, techniques.⁶⁴ There are patents which cover overlapping windows, the

⁶¹ 'The advancement of the arts, from year to year, taxes our credulity and seems to presage the arrival of that period when human improvement must end', Henry L Ellsworth, Commissioner of Patents for the US, 1843 report to Congress, speaking of the increasing workload at the US Patents Office.

⁶² Stallman *supra* n. 7.

⁶³ Paul Klint, 'Against Software Patents', (15 September 2003), available at <http://homepages.cwi.nl/~paulk/patents/Patents-17-9-2003.pdf> (last visited 16 October 2013).

⁶⁴ *Ibid.*

generation of programs by other programs, and several other day-to-day applications.⁶⁵ These techniques are used daily in academic as well as commercial research.

Granting such trivial patents will bring any innovation to a grinding halt since the more 'obvious' solutions are replaced by non-patented indirect solutions.

3. Software Technology Evolves Rapidly

It is said that the software industry evolves much faster than most other technology-based industries.⁶⁶ The Indian software industry's 2007-2008 performance reflected sustained growth of 28 per cent at about US\$ 52 billion as per a report by NASSCOM.⁶⁷ With software constantly adapting to the needs of businesses and individuals worldwide, it appears that patents are very disadvantageous to innovation. Computer microprocessors allegedly double in speed every two years⁶⁸ Take the example of Apple's iPod media player, which when launched in 2001 came with only five GB of storage space, but today is available with 160 plus GB of storage space. Thus in order to match the needs of even the hardware industry, software patents which last for 20 years are extraneous.

Besides, software developers are perfectly protected without patents. Everyone who writes a computer program automatically owns the copyright in it. While a copyright grants the owner exclusive right to reproduce the original material which is tempered by the provision of 'fair use' to the public; a patent confers on the owner an absolute monopoly which is the right to prevent others from making, using, and offering for sale without consent.

⁶⁵ For example, Apple Computer was sued because its 'HyperCard' program allegedly violated a patent which covers a specific technique that entails scrolling through a database displaying selected parts of each line of text. *See supra* n. 33.

⁶⁶ Total worldwide revenues for 2013 for companies in the 'Software 500' list were \$672.9 billion, up from 2012, when total revenue was \$643.6 billion. *See* John P. Desmond, 'The Software 500 feature', *Software Magazine*, available at <http://www.softwremag.com/content/ContentCT.asp?P=3539> (last visited 16 October 2013).

⁶⁷ 'NASSCOM releases FY08 Revenue Performance and FY09 Forecast for the Indian IT Software and Services Sectors', NASSCOM Press Release, available at http://assetsdev1.csc.com/in/downloads/7547_1.pdf (last visited 16 October 2013).

⁶⁸ Liang *et al supra* n. 33.

Granting software patents is therefore very harmful to the open source initiative. Since OSS operates in a chain, with new licensees making new additions to the original source code, the finding of a patent violation by a licensee at any point in this chain has the potential to affect the use of the software by all subsequent licensees, multiplying the effect patent protection could potentially have on the OSS system. For OSS subscribers, therefore, the argument against software patenting is not only that such patenting is not warranted considering what patent law sets out to protect, but also, more simply, that it will kill innovation by putting a major hurdle in the way of the OSS initiative.

In the *Bilski* decision⁶⁹, the US Court of Appeals for the Federal Circuit has instituted a new test for business method software patents. To be patentable, a process must be either ‘tied to a particular machine or apparatus’ or must ‘transform a particular article into a different state or thing.’ This has been seen as a great impetus to OSS, as it will probably limit the patentability of software.

Red Hat, Inc, a global distributor of Linux, offers an undertaking which it calls a ‘patent promise’.⁷⁰ This is as follows:

‘Subject to any qualifications or limitations stated herein, to the extent any party exercises a Patent Right with respect to Open Source/Free Software which reads on any claim of any patent held by Red Hat, Red Hat agrees to refrain from enforcing the infringed patent against such party for such exercise....’

This patent promise, in effect indemnifies any user for infringing on any patent held by Red Hat with respect to software which is open source. Red Hat has consistently taken the position that software patents generally impede innovation in software development and are inconsistent with OSS.

Therefore, it can be seen that not only do OSS supporters disagree with the concept of software patents, but also OSS by definition is opposed to the patenting process, as it infringes on the freedom of collaborative innovation that OSS developers enjoy.

⁶⁹ In *Re Bernard Bilski* 545 F.3d 943, 88 U.S.P.Q.2d 1385, decided 30 October 2008.

⁷⁰ Available at http://www.redhat.com/legal/patent_policy.html (last visited 16 October 2013).

India, on account of it being a developing country and having the world's second largest software industry, is already pegged to be the next prime location for OSS development. The open source model suits India, largely due to the emerging pool of talented programmers which our country has today. According to Scott McNealy, chairman and co-founder of Sun Microsystems Inc., 'more than three-quarters of a million Indian developers are members of the Sun Developer Network, actively contributing to communities built around MySQL, OpenSolaris, OpenOffice.org and Java.'⁷¹ However, as per the above analysis, software patents have the potential to permanently harm the OSS movement in India. Therefore, it is of paramount importance to ensure that software patents are not recognised in India, even if this means rejecting certain obligations under the TRIPS.

IV. ENFORCING OPEN SOURCE LICENSING

A. Degrees of 'Openness'

There are different types of licences given for copyright protection of software, which have varying degrees of openness. The most common is the GNU GPL, or a version thereof.⁷² The efficacy of open source is said to depend on the licences and, indirectly, the underlying availability of IP protection.⁷³

The Open Source Initiative is a public benefit corporation based out of California in the US. It is the community-recognised body for reviewing and approving licences which are Open Source Definition (OSD) conformant.⁷⁴

⁷¹ Scott McNealy, 'India's Open Source Future', *Mint* (Mumbai India 17 February 2009), available at <http://www.livemint.com/Opinion/0no6itLZnpttMUIJ9kXDkK/India8217s-open-source-future.html> (last seen 16 October 2013).

⁷² Other popular licences include: Apache Licence 2.0, New and simplified Berkeley Software Distribution (BSD) licences, GNU Library or 'Lesser' General Public Licence (LGPL), MIT Licence, Mozilla Public Licence 1.1 (MPL), Common Development and Distribution Licence, Common Public Licence 1.0, and Eclipse Public Licence.

⁷³ Stephen M Maurer and Suzanne Scotchmer, 'Open Source Software: The New Intellectual Property Paradigm', (March 2006), NBER Working Paper Series, National Bureau of Economic Research, available at <http://www.nber.org/papers/w12148> (last visited 16 October 2013).

⁷⁴ The OSD is available at <http://www.opensource.org/docs/osd> (last visited 16 October 2013).

The OSD, which is promoted by the Open Source Initiative, lists several points which need to be complied with for software to be termed ‘open source’, including basic concepts such as:

1. Free Redistribution of the Software, which stipulates that the license shall not restrict any party from selling or giving away the software as a component of an aggregate software distribution containing programs from several different sources. The license shall also not require a royalty or other fee for such sale;
2. Access to Source Code, whereby the program must include source code, and must allow distribution in source code as well as compiled form;
3. Derived Works, which states that the licence must allow modifications and derived works, and must allow them to be distributed under the same terms as the licence of the original software; and
4. Distribution of Licence, which affords the rights attached to the program applicable to all to whom the program is redistributed without the need for execution of an additional licence by those parties.

Some open source licences, such as the ‘GPL, effectively prevent individuals from asserting new IP rights in OSS’.⁷⁵ While the GPL is the most commonly used licence, other licences vary in providing IP protection. Differences occur on a number of grounds relating to the terms of the licence. For example, while the GPL does not allow proprietary software linking, or linking of closed sourced applications with applications licensed under one of the other open source licences, the Apache Public Licence does allow it.⁷⁶ Several licences such as the Berkeley Software Distribution (BSD) licence allow redistribution of the source code with changes, whereas others, like the Apple Public Licence do so only if the ‘derivative work’ is covered by the same licence.⁷⁷

⁷⁵ John R Thomas, ‘Intellectual Property, Computer Software and the Open Source Movement’, (11 March 2004), CRS Report for Congress, Congressional Research Service, The Library of Congress.

⁷⁶ Zack Rustin, ‘Open Source licenses’, at http://mymonkeydo.com/example/open_source_licenses.html (last visited 16 October 2013).

⁷⁷ *Ibid.*

Therefore, it can be seen that different licences contain different terms, which affect the openness of the software, and thereby, its use. However, doubts have arisen in the past on the validity of OSS licences.

B. *SCO v. IBM*

The unresolved case of *SCO v. IBM* offered the US District Court of Utah the opportunity to decide whether the GPL was pre-empted by the federal copyright law of the US. In March 2003, the SCO Group (formerly Caldera Systems) filed a suit against IBM,⁷⁸ for allegedly ‘devaluing’ their version of the Unix software. IBM had purportedly contributed SCO’s copyrighted code of Unix to the open source Linux software, without authorisation. SCO also sent letters to several companies threatening lawsuits if they used IBM’s version of Linux.

Thereafter, several claims and counter-claims were filed by different parties, including a suit by Red Hat, a global distributor of Linux, against SCO.⁷⁹

SCO also filed suits against Novell, DaimlerChrysler, and others. These suits by SCO, however, failed.⁸⁰ In the suit against Novell, it was held that Novell, not the SCO Group, was the rightful owner of the copyrights covering the Unix operating system.⁸¹ After the ruling, Novell also announced that they had no intention of suing any party for the infringement of copyrights of Unix, as they did not believe any such infringement had occurred.

Further, as was averred by experts,⁸² the SCO Group had no legal basis for filing suits or enforcing liability against any other parties, as this was material it had widely and commercially published itself under the

⁷⁸ See ‘Caldera’s Complaint - Caldera v. IBM - as text’, at <http://www.groklaw.net/article.php?story=20040704170212250> (last visited 16 October 2013).

⁷⁹ The suit by Red Hat has been stayed pending the result in *SCO v. IBM*.

⁸⁰ See Order of dismissal without prejudice, *SCO v. Daimler Chrysler*, 21 December 2004, in the Circuit Court for the county of Oakland, available at <http://scofacts.org/DC-2004-12-21-B.pdf> (last visited 16 October 2013).

⁸¹ ‘Judge Says Unix Copyrights Rightfully Belong to Novell’, (11 August 2007), *New York Times*.

⁸² See Steven J Vaughan-Nichols, ‘Legal Analysts Examine SCO Claims Against GPL’ *Linux Today*, available at <http://www.linuxtoday.com/infrastructure/2003082201426NWCDLL> (last visited 16 October 2013).

GPL which specifically permitted unrestricted copying and distribution, and denied exclusivity. SCO claimed that the GPL was not valid as it was not in conformity with US Antitrust laws. Therefore, if the court had ruled on the matter, in all probability it would have dealt with the validity of open source licences such as the GPL.

However it could not do so, as SCO filed for bankruptcy in September 2007.

As per order of the court dated 20 September 2007 the case between SCO and IBM is considered administratively closed, until SCO emerges from bankruptcy proceedings, if at all.⁸³

C. *Jacobsen v. Katzer: The Artistic Licence*

The judiciary, however, did test the validity of the Artistic Licence⁸⁴ recently in *Jacobsen v. Katzer*⁸⁵, wherein the US Court of Appeals for the Federal Circuit (CAFC) considered the question of the ‘ability of a copyright holder to dedicate certain work to free public use and yet enforce an open source copyright licence to control the future distribution and modification of that work’.

The case involved the infringement of the copyright for relatively uncommon model railroad software. Robert Jacobsen, the Appellant, managed an OSS group which created software for model railroads and trains, called Java Model Railroad Interface (JMRI). Through the collective work of many participants, JMRI created a computer programme called DecoderPro, which allowed model railroad enthusiasts to use their computers to program the decoder chips that control model trains. DecoderPro was available off the internet for free; however it was downloadable only explicitly under the terms of the Artistic Licence.

⁸³ ‘IBM Case Administratively Closed; Will be Reopened When Stay Lifted’ (21 September 2007) *GrokLaw*, available at <http://groklaw.net/article.php?story=2007092110013091> (last visited 16 October 2013).

⁸⁴ The Artistic Licence refers to the original Artistic Licence (version 1.0), an open source licence used most notably for the standard Perl implementation and many CPAN modules. The original Artistic Licence was written by Larry Wall. A copy of the licence is available at <http://opensource.org/licenses/artistic-license-1.0> (last visited 16 October 2013).

⁸⁵ 535 F.3d 1373 (Fed Cir 2008) 1377, available at <http://www.cafc.uscourts.gov/images/stories/opinions-orders/08-1001.pdf> (last visited 16 October 2013).

Mathew Katzer operating under the aegis of Kamind Associates, Inc. offered a competing software product, Decoder Commander. Jacobsen alleged that Katzer/Kamind, while developing the Decoder Commander software, infringed upon the copyright of DecoderPro by using portions of it in Decoder Commander, while not complying with the terms of the Artistic Licence.

Specifically, the Decoder Commander software did not include (1) the original authors' names, (2) JMRI copyright notices, (3) any identification of JMRI as the original source of the definition files, (4) a description of how the files or computer code had been changed from the original source code, among other violations.⁸⁶

Jacobsen moved for a preliminary injunction, arguing that the violation of the terms of the Artistic Licence constituted copyright infringement and that, under Ninth Circuit law, 'irreparable harm' could be presumed in a copyright infringement case. However the District Court denied the motion,⁸⁷ stating that the violations were 'contractual promises' and not violations of copyright.

Thus, Jacobsen was limited to the traditional remedy for breach of contract, ie monetary damages, rather than the remedy of injunctive relief.

Had this judgement been upheld in the appeal to the CAFC, it could have proven to be disastrous for the open source community. Fortunately, the CAFC reversed the District Court's order, and the rationale given in judgement established the enforceability of open source licenses under US copyright law.

The CAFC noted that the Artistic License imposed its obligations through the use of the term 'provided that', which under California law (where the claim was filed) and under general rules of interpretation, typically denotes a condition. The CAFC further went on to say that copyright licences are designed to support the right to exclude, and

⁸⁶ The Decoder Commander software also changed various computer file names of DecoderPro files without providing a reference to the original JMRI files or information on where to get the Standard Version.

⁸⁷ See *Jacobsen v. Katzer*, No. 06-CV-01905 JSW, 2007 WL 2358628 (N.D. Cal. Aug. 17, 2007).

merely because a licence contains open source provisions and disclosure requirements instead of a fee, does not mean it is not binding or legally valid.

The following is an extract from the judgement delivered by Hochberg, J:

‘Copyright holders who engage in open source licensing have the right to control the modification and distribution of copyrighted material... [C]opyright licences are designed to support the right to exclude; money damages alone do not support or enforce that right. *The choice to exact consideration in the form of compliance with the open source requirements of disclosure and explanation of changes, rather than as a dollar-denominated fee, is entitled to no less legal recognition.* Indeed, because a calculation of damages is inherently speculative, these types of licence restrictions might well be rendered meaningless absent the ability to enforce through injunctive relief.’ (emphasis supplied)

Although the rationale adopted in the judgement was specific to the Artistic Licence as each licence has to be scrutinised according to the construction of its terms; this decision of the CAFC represented a windfall for the open source community, laying down a legal foundation for the protection of open source developers. The case was remanded back to the District Court to determine if the other criteria for injunctive relief had been met, although the CAFC’s decision strongly suggested that they had been met.

However, upon remand, the lower court again held on preliminary motions that Jacobsen had not shown sufficient harm to qualify for an injunction against the defendant.⁸⁸ Showing strong dissent, the open source community now claims that the decision overlooks the multitude of harms to developers, development communities, and project productivity. An *amicus* brief has also been filed in appeal to the CAFC by the Software Freedom Law Center, Inc. raising these concerns.

Interestingly, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center too has previously held in favour of

⁸⁸ *Jacobsen v. Katzer*, 89 USPQ2D (BNA) 1441.

Jacobsen in a dispute over the domain name <decodpro.com>, finding that Katzer registered the domain name in bad faith, and that the same was to be returned to Jacobsen.⁸⁹

D. German Decisions: The GPL Prevails

Similarly, prior to *Jacobsen v. Katzer*, there were certain similar decisions in German courts upholding the open source license, GNU GPL version 2.0 (GPLv2). First, on 19 May 2004 a Munich District Court dealt with the validity and enforceability of the GPLv2, in *Welte v. Fortinet UK Ltd.*⁹⁰ Thereafter, several other cases arose which contained almost identical factual scenarios.⁹¹ These were dealt with by the courts along similar lines as the first case. In all these cases it was alleged that the defendants had attempted to commercially redistribute software that was previously acquired through the internet by websites offering OSS under the GPLv2 without adhering to the terms of the license.

The courts found that the software developers had waived the necessity to become aware of the individual end users' acceptance of the offer in order for the terms of the GPLv2 to become a binding contractual agreement. Section 151 of the *German Civil Code (Bürgerliches Gesetzbuch)* allows for a legal contract by such means.⁹² However, the GPLv2

⁸⁹ See Administrative Panel Decision, WIPO Arbitration and Mediation Center, *Robert G. Jacobsen v. Jerry R. Britton*, Case No. D2007-0763, available at <http://jmri.sourceforge.net/k/docket/156-1.pdf> (last visited 16 October 2013).

⁹⁰ *Welte v. Fortinet UK Ltd*, District Court of Munich I, 21 O 6123/04, (19 May 2004), text in English available at http://www.oii.ox.ac.uk/resources/feedback/OIIFB_GPL2_20040903.pdf (last visited 16 October 2013).

⁹¹ *Welte v. Sitecom Deutschland GmbH*, District Court of Munich I (4 December 2005), 21 O 7240/05; *Welte v. D-Link Deutschland GmbH*, District Court of Frankfurt am Main, (22 September 2006), 2-6 O 224/06; In re *Wireless LAN Software*, District Court of Berlin, (21 February 2006), 16 O 134/06; In re *Voice over IP Telephone*, District Court of Munich I, (24 July 2007), 7O5245/07. See also Guido Westkamp, 'The Limits of Open Source: Lawful User Rights, Exhaustion and Coexistence with Copyright Law', (2008) 1 *Intellectual Property Quarterly* 14-57.

⁹² Section 151 of the *German Civil Code (Bürgerliches Gesetzbuch)* reads:

‘Acceptance without declaration to the offeror:

A contract comes into existence through the acceptance of the offer without the offeror needing to be notified of acceptance, if such a declaration is not to be expected according to customary practice, or if the offeror has waived it. The point of time when the offer expires is determined in accordance with the intention of the offeror, which is to be inferred from the offer or the circumstances.’

imposed obligations on the licensee as well, which had to be accepted by the licensee.⁹³ The decisions were therefore decided on the basis of contract rather than copyright law. The defendants, who in each case had attempted to exploit OSS commercially in other products, were prohibited from any further use.

The courts first observed that the offer for free download did not constitute a waiver of copyright. Thereafter, they assessed the nature of the underlying transaction and concluded that the intention in offering the free software was to transfer certain non-exclusive rights, in particular the right to reproduce, modify and distribute any such version that originally existed. Only once this was established did the courts then consider the legal nature of such agreement under contract law.⁹⁴ However, they did not specify the legal category of the agreement under general contract law.

The courts held that the obligations to disclose the source code, make it openly available and to license onward to any third party contained in sections 2 and 3 of the GPLv2 are valid and effective contractual obligations. The courts also recognised that these provisions contained the very basis upon which open source was founded.⁹⁵

Further, the German courts also confirmed the validity of section 4 of the GPLv2, which says that the license given for the use of the software

⁹³ Section 5 of the GPLv2 states:

‘You are not required to accept this License, since you have not signed it. However, nothing else grants you permission to modify or distribute the Program or its derivative works. These actions are prohibited by law if you do not accept this License. Therefore, by modifying or distributing the Program (or any work based on the Program), you indicate your acceptance of this License to do so, and all its terms and conditions for copying, distributing or modifying the Program or works based on it.’

⁹⁴ German law does not distinguish between a contract and a license. German law does not even require consideration for a valid contract; offer and acceptance are sufficient. See Jason Wacha, ‘Taking the Case: Is the GPL Enforceable?’, (18 December 2004), available at <http://www.open-bar.org/docs/GPL-enforceability.pdf> (last visited 16 October 2013).

⁹⁵ Dr Henriette Picot and Dr Alexander Duisberg, ‘A Review of German Case Law on the GNU General Public License’, *Bird and Bird*, (17 December 2007), available at <http://www.twobirds.com/en/news/articles/2007/review-german-gnu-general-public-license> (last visited 16 October 2013).

automatically terminates when the licensee breaches the terms of the GPLv2.

This fall-back provision was seen as a valid licence restriction.⁹⁶

The German courts in this context held that making software available under the GPLv2 could not be deemed as a general waiver of rights under German contract law.

E. Arguments Against the Enforceability of Open Source Licensing

Despite the ruling in *Jacobsen v. Katzer*, there are several challenges to the enforceability of open source licences. These included issues ranging from violation of US Antitrust Laws⁹⁷ to ambiguity of the terms of certain licences.⁹⁸ For example, some consider the use of the term ‘derivative work’ in the GPLv2 to be too vague, and hence consider the GPLv2 to be unenforceable in court.⁹⁹

Another commonly cited challenge is that most open source licences fail as click-wrap or shrink-wrap agreements. The licences are not signed by the licensee. ‘Click-wrap’ agreements are typically electronic agreements that appear on a computer screen where a user can read licence terms and press a button to ‘agree’ or ‘disagree’. Similarly, ‘shrink-wrap’ agreements are usually wrapped around a box or product by heat shrinking or by using a sticker. A user has to physically break through the barrier to get to the software.¹⁰⁰ It is uncertain whether click-wrap and shrink-wrap agreements are valid in all jurisdictions. Indian IT laws ostensibly recognise click-wrap agreements, but are silent regards mode

⁹⁶ *Ibid.*

⁹⁷ See *SCO v. IBM*, *supra* Part IV(B).

⁹⁸ Jason Wacha, ‘Taking the Case: Is the GPL Enforceable?’, 18 December 2004, available at <http://www.open-bar.org/docs/GPL-enforceability.pdf> (last visited 16 October 2013).

⁹⁹ The term ‘derivative work’ is used in the following manner in Section O of the GPLv2: ‘The “Program”, below, refers to any such program or work, and a “work based on the Program” means either the Program or *any derivative work* under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language.’ However the latest version of the GPL, the GNU GPL Version 3 (GPLv3), does not contain this term.

¹⁰⁰ Wacha *supra* n. 97.

of assent or acceptance.¹⁰¹ It is also relatively certain in the US that click-wrap and shrink-wrap are valid forms of contracts, and US courts have gone so far as to recommend the use of click-wrap agreements for software.¹⁰² However, since most open source licences are not ‘use’ licences, the issue arises.

The licences’ terms only apply when the user copies, modifies, or distributes the licensed code. For example, section 5 of the GPLv2 states that the mere fact of the commission of any of these acts indicates that the licence has been accepted.¹⁰³ Therefore, the user is not required to read the licence before using the software; which is contained in a separate file if downloaded, or on a separate sheet of paper if physically delivered. Failure to read the open source licence for mere use of OSS is a non-issue. However, the major hurdle for open source licences to be accepted as click-wrap or shrink-wrap agreements is that there is no notice given to the user that if they copy, modify or distribute the software *then* they have to adhere to the terms of the licence, apart from in the licence itself.

Therefore, in order to copy, modify or distribute the software, the user may intentionally or unintentionally not read the licence. However, it would be difficult for a software engineer to stand in court and say with a straight face that he does not know that the software which he has modified or distributed is open source, and is available under an open source licence. Therefore, a court assessing this question could still easily conclude that most licensees are aware that the open source licence covers the software.

Further, claims that an open source licence is perhaps not enforceable because (a) it is not a valid click-wrap agreement, (b) of a lack of privity

¹⁰¹ As per the provisions of Chapter IV of the *Information Technology Act, 2000*, on ‘Attribution, Acknowledgement and Despatch of Electronic Records’.

¹⁰² *Am Eyewear v. Peeper’s Sunglasses and Accessories, Inc.*, 106 F. Supp. 2d 895 (N.D. Tex. 2000). See also *Hotmail Corp v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d (BNA) 1020 (N.D. Cal. 1998) and *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999). Click-wrap agreements would also be valid in the US under the *Uniform Computer Information Transactions Act* (UCITA) and the *Electronic Signatures in Global and National Commerce Act* (E-Sign).

¹⁰³ *Supra* n. 92.

of contract, or (c) there is a lack of consideration, are arguments based in contract law.¹⁰⁴

However, open source licences are licences, not merely contracts; and hence do not require any promises in return from licensees to be enforceable. If the terms of the licence are infringed, the owner of the copyright will move court on the basis that the copyrighted content has been used exceeding the permission granted. In such a scenario, the defendant can either agree that he has no permission in which case he loses, or assert that his permission is the licence itself, in which case he must show that he is obeying its terms. An assertion that the licence is valid permission for use of the copyrighted material cannot be made simultaneously with a claim that the licence itself is not a valid copyright licence.

Moreover, as seen above in the German cases, even though the GPLv2 is not a valid click-wrap agreement, it was deemed to be valid due to section 151 of the *German Civil Code (Bürgerliches Gesetzbuch)*. Therefore, the validity of each open source licence would depend on the laws of jurisdiction in which it is tested.

F. Are Open Source Licences Valid in India?

The GPL and other licences were designed to be valid in all jurisdictions.

Therefore, generally in the licences themselves there is no reference to any US State or Federal laws, or to laws of any other jurisdiction. However, naturally this is not entirely possible, as copyright laws vary from country to country.

Open source licences have been widely prevalent in India, following normal practice. Indian E-governance projects using OSS and the 'Open Standards' Draft Policy¹⁰⁵ are effects of the widespread use of OSL and

¹⁰⁴ See Pamela Jones, 'The GPL is a License, not a Contract', (3 December 2003), at <http://lwn.net/Articles/61292/> (last visited 16 October 2013).

¹⁰⁵ See Leslie D'Monte, 'Battle for Multi-Billion Dollar E-Governance Projects Hots Up', *Business Standard* (New Delhi India 9 July 2009), available at http://www.business-standard.com/article/technology/battle-for-multi-billion-dollar-e-governance-projects-hots-up-109070900069_1.html (last visited 16 October 2013).

the Indian government has even collaborated with the United States to set up the Open Government Platform (OGPL), which is an initiative to promote transparency, accountability and greater citizen engagement by making more government data, documents, tools and processes publicly available.¹⁰⁶ However, open source licences have thus far not been challenged in Indian courts.

Section 51 of the *Indian Copyright Act, 1957* states:

‘Copyright in a work shall be deemed to be infringed–

- (a) when any person... in contravention of a licence so granted...
 - (i) does anything the exclusive right to do which is by this Act conferred upon the owner of the copyright...’

One of the requirements in an open source licence is that future software derived from the OSS, or any additions to the OSS must also be maintained as open source. This requirement thus forms one of the conditions of the copyright licence for the use of the original OSS. If this condition (to maintain derivative software as open source) is then contravened, this would amount to a contravention of the terms of the original software copyright licence, and hence also an infringement of copyright as per section 51 of the *Indian Copyright Act*.

Under Indian contract law, any breach of a copyright licence would also be a breach of contract. However since breach of copyright licence is a specific infringement of copyright under the *Indian Copyright Act*, the special reliefs (such as injunction) available for such infringement should also be available breach of the terms of an open source licence.

However, certain challenges exist in relation to enforceability of open source licences in India. These are as follows:

1. Purpose of Copyright

The *Indian Contract Act, 1872* in section 23 establishes that an agreement is void, in which the object or consideration defeats the provisions of

¹⁰⁶ Press Information Bureau, Ministry of Communications & Information Technology, Government of India, ‘*Shri Kapil Sibal Launches “Open Government Platform” Developed by India and US Initiative will Spur Citizen Engagement and Interface with Government*’ dated 30 March 2012.

any law.¹⁰⁷ While a licence by its very nature is a contract under Indian law, it can be argued that an open source licence defeats the provisions of the *Indian Copyright Act* by denying the author of the derivative work the right to maintain the derivative work as proprietary software. Admittedly, the function of copyright is to grant certain exclusive rights to the owner of the copyrighted work, including the right to prevent copying of the copyrighted material.

However, the granting of these exclusive rights in section 14 of the *Indian Copyright Act*, is merely a contrivance; a means to an end.¹⁰⁸ It is common knowledge that the underlying purpose of copyright law is *not* to protect the interests of the owners of copyrights, but rather to promote the progress of science and the useful arts – that is – knowledge.¹⁰⁹ In the US, the Supreme Court endorsed this view in *Fox Films v. Doyal*¹¹⁰, by stating that ‘The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors.’ Similarly in Canada, it was held in *Théberge v. Galerie d’Art du Petit Champlain Inc*¹¹¹ that the purpose of copyright law is ‘usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)’. Providing a temporary monopoly to the owner of the copyright incentivises creation of more original works and hence

¹⁰⁷ Section 23 of the *Indian Contract Act* states:

‘The consideration or object of an agreement is lawful, unless— it is forbidden by law; or is of such a nature that, if permitted, it would defeat the Provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.’

¹⁰⁸ On a lighter note, the moral basis for protection under copyright law rests *not merely* in the Eighth Commandment: ‘Thou shalt not steal’.

¹⁰⁹ For example, Article 1, section 8 of the US Constitution reads: ‘[Congress shall have the power] *To promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...’ (emphasis supplied). This forms the legal basis of copyright law in the US.

¹¹⁰ 286 US 123 (1932).

¹¹¹ [2002] 2 SCR 336.

hastens the progress of science and other arts. Further, as argued by Richard Stallman, if copyright were a natural right, something that authors have because they deserve it, nothing could justify terminating this right after a certain period of time, any more than everyone's house should become public property after a certain lapse of time from its construction.¹¹²

The *Indian Copyright Act* in section 52 specifies certain acts which do not constitute infringement of copyright. In relation to computer programmes, the section inter alia states that 'the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied' is not an infringement of copyright.¹¹³ Further, making of copies or adaptations of the computer programme from a personally legally obtained copy for non-commercial personal use is also not an infringement of copyright.¹¹⁴ Hence, it is apparent that the *Copyright Act* is not directly opposed to the idea of open source. In fact, the *Copyright Act* by means of section 52 recognises the need for information dissemination in order to support the progress of scientific research, and thereby, innovation.

The purpose of copyright law in India is to allow copyright-holders a temporary monopoly for their efforts and so encourage future creativity and the development of new material which benefits the public at large. Open source licences hence clearly do not constitute unlawful agreements under section 23 of the *Indian Contract Act*.

2. Derivative Works

While talking of enforceability of open source licences, the issue of derivative works of OSS is often discussed. Access to the source code of derivative works forms the very basis of open source. It is argued that the obligation to maintain derivative software as open source impinges on the right of the author of the derivative software to copyright in

¹¹² See Richard Stallman, 'Misinterpreting Copyright', at <http://www.gnu.org/philosophy/misinterpreting-copyright.html> (last visited 16 October 2013).

¹¹³ Section 52(1)(ac) of the *Indian Copyright Act*.

¹¹⁴ Section 52(1)(ad) of the *Indian Copyright Act*.

such derivative software. The normal rule in copyright law is that the copyright to a derivative work belongs to the person who creates it. It is thus relevant to analyse the law relating to derivative works in which copyright subsists.

Various tests have been applied in different jurisdictions to gauge what constitutes a ‘derivative work’. In the US, section 101 of the *Copyright Act* loosely defines ‘derivative work’ as:

‘[A] work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.’¹¹⁵

While the definition in the statute does not deal specifically with computer programs, the US courts have held in a number of cases that when sufficient new programming is added to an existing source code, the resultant new source code is a derivative work which can be afforded copyright protection.¹¹⁶ However, the courts have carved out exceptions in certain cases, including (i) if the original source code is not open, nor in the public domain, creating derivative works upon such source code without the owner’s licence or consent is an infringement of copyright¹¹⁷, (ii) if the owner of the original source code has retained exclusive right to derivative works created by the licensee pursuant to a contract, then the right to the derivative works remains with the owner of the original¹¹⁸, and (iii) a computer program cannot be the derivative of another when the programs are so dissimilar that one cannot be based on the other¹¹⁹.

¹¹⁵ 17 U.S.C. § 101.

¹¹⁶ *In re C TekSoftware, Inc* 127 B.R. 501, 15 U.C.C. Rep. Serv. 2d (CBC) 271 (Bankr. D.N.H. 1991) and *Aymes v. Bonelli* 47 F.3d 23, 33 U.S.P.Q.2d (BNA) 1768 (2d Cir. 1995).

¹¹⁷ *SAS Institute, Inc v. Sand H Computer Systems, Inc* 605 F. Supp. 816, 225 USPQ (BNA) 916 (M.D. Tenn. 1985).

¹¹⁸ *Liu v. Price Waterhouse LLP*, 302 F.3d 749 (7th Cir. 2002).

¹¹⁹ *Integral Systems, Inc v. Peoplesoft, Inc* 1991 WL 498874 (N.D. Cal. 1991).

Significantly, section 103(b) of the US *Copyright Act* states:

‘The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of and does not affect or enlarge the scope, duration, ownership or subsistence of, any copyright protection in the pre-existing material.’ (emphasis supplied)¹²⁰

Thus, the rule in the US is that publication of the derivative work does not affect the force or validity of any subsisting copyright upon the matter employed. The separate copyright in the pre-existing work is preserved despite its employment or incorporation into a derivative work. In *Stewart v. Abend*¹²¹ the US Supreme Court observed that copyright in pre-existing work is not abrogated by publication of the new work. Similarly, previously in *Russell v. Price*¹²², the court held that ‘[E]stablished doctrine prevents unauthorized copying or other infringing use of the underlying work or any part of that work contained in the derivative product so long as the underlying work itself remains copyrighted.’ Applying this test, it is apparent that the person making use of a derivative work must fulfil the terms of the licence granted for the original work, even if the original work is inextricably intertwined in the derivative work.

Therefore, if a copyrighted source code ‘A’ exists, and someone uses A under licence to make derivative code ‘A + B’, he is still liable to the terms of use under A’s licence. For example, this doctrine was upheld in *Grove Press, Inc v. Greenleaf Publishing Co*¹²³ in which the defendant copied a public domain authorised English translation of a book, which was held to be infringing the underlying French language work which was protected by US copyright. The court *inter alia* noted:

‘The translation does not insulate the original story from the copyright infringement even though the translation itself may be

¹²⁰ 17 U.S.C. § 103(b).

¹²¹ 110 S. Ct. 1750 (1990).

¹²² 612 F.2d 1123 (9th Cir.1979).

¹²³ 247 F. Supp. 518 (E.D.N.Y. 1965).

uncopyrighted. Like any other derivative work, the translation is separate and apart from the underlying work and a dedication to the public of the derivative work did without more, emancipate the pattern of the underlying work from its copyright.’¹²⁴

The court further held that that the failure of the derivative author to copyright his derivative work would not automatically dedicate the pattern of the copyrighted underlying work to the ‘public domain’.

The question that naturally arises is: does this doctrine apply in the case of OSS? OSS, it can be argued, may lead to precisely the converse of the above scenario; the original code is available openly, but the author of the derivative work may want the derivative work to be treated as proprietary software.

However, derivative works of OSS are just as much subject to the copyright of the original work as derivative works of proprietary software. To argue otherwise is to ignore the fact that in OSS, although the source code is openly available, it is not in the public domain but protected by copyright. Hence, a derivative work even created from OSS that infringes on the copyright of the original work cannot be entitled to copyright. The derivative work is entitled to its own copyright only subject to the copyright of the original software or the license under which the use of the original software is permitted.

Hence, this author argues that imposing this condition on the copyright of derivative works of OSS is no more restrictive than the imposition of this condition on derivative works of proprietary software. Only software that is actually derived from the original work is subject to the conditions of the original work’s copyright.

The GPL is consistent with this limited condition on the copyright of derivative works. Section 5(c) of the GNU GPL Version 3 (GPLv3) in relation to ‘Conveying Modified Source Versions’, or derivative works, states: ‘You must license the entire [derivative] work, as a whole, under this License to anyone who comes into possession of a copy. This License will therefore apply, along with any applicable section 7

¹²⁴ *Ibid.*

additional terms, to the whole of the [derivative] work and all its parts, regardless of how they are packaged. ...'

This essentially provides that the copyright of the derivative work is subject to the terms of the licence of the original source code. However, this is limited by a subsequent clarification within the section, which says that where the derivative work is part of a compilation with other separate and independent work, then copyright protection will only be given for the specific derivative work, and not the entire compilation.¹²⁵ According to the GPL, even new elements within an individual derivative work are necessarily subject to the open source licence and have to be distributed as OSS. Yet this is consistent with the provision of the *Indian Copyright Act* as discussed below.

The *Indian Copyright Act* does not define 'derivative work' but instead defines 'adaptation'.¹²⁶ It has been held in Indian law, that to invoke copyright protection in a derivative work, variation must be substantive in nature rather than merely trivial.¹²⁷ It has also been observed that for copyright to exist in any work, merely the originality test is no longer a valid assessment, while vide a number of decisions in Indian courts it has been established that it is necessary for the author to have gone through the pains of extensive labour and use of skill, or 'sweat of the brow', in order to claim copyright in a work.¹²⁸ Also, what is required is not to determine whether the work is as a whole novel or 'original', nor that the expression is in an original or novel form; but that the work must not be copied from another work; it should originate from the author.

¹²⁵ The clarification to section 5 of the GPLv3 reads: 'A compilation of a covered work with other separate and independent works, which are not by their nature extensions of the covered work, and which are not combined with it such as to form a larger program, in or on a volume of a storage medium, is called an "aggregate" if the compilation and its resulting copyright are not used to limit the access or legal rights of the compilation's users beyond what the individual works permit. Inclusion of a covered work in an aggregate does not cause this License to apply to the other parts of the aggregate.'

¹²⁶ Section 2(a) of the *Indian Copyright Act, 1957* defines 'adaptation' to include '... (v) in relation to any work, any use of such work involving its rearrangement or alteration'.

¹²⁷ See *Eastern Book Company v. D B Modak*, AIR 2008 SC 809.

¹²⁸ *Gopal Das v. Jagannath Prasad* AIR 1938 All 266; *C Cunniah S Co v. Balraj S Co* AIR 1961 Mad 111; *Macmillan v. Suresh Chandra Deb* ILR 17 Cal 952; *Rai Toys Industries v. Munir Printing Press* 1982 PTC 85, among others.

Accordingly, original or innovative thought is necessary for an author to establish copyright in his work. However, because a derivative work by definition is 'derived' from the original work, section 14 of the *Indian Copyright Act* grants the exclusive right to the holder of the copyright to make any adaption of the original work.¹²⁹ Therefore, a derivative work can only be created if the person creating it is licensed to use the original work in such manner. That is, the derivative work is subject to the copyright of the original work. The terms of the *Copyright Act* are wide enough to include derivative works of both OSS and proprietary software, and unambiguously establish that the original copyright remains intact.

Although there are no cases on the enforceability of open source licences in India, it is apparent that derivative work of original software can be created only under licence given by the owner of the original copyright. Thus, it is likely that Indian courts would also follow the trend set in the US of enforcing open source licences, both under copyright as well as contract law.

V. CONCLUSION

The open source initiative has been criticised by many as being too idealistic and not economically viable. Yet, today, it has proved to be neither idealistic nor unviable. Economic theory itself suggests that monetary rewards are not the rewards people seek in creative invention. Granting of monopoly rights to these monetary rewards may not stimulate innovation but may in fact hold it back. Proprietary software is based on the fallacious presumption that software commands a premium on its price in a free market.¹³⁰ The greater the competition and access

¹²⁹ Section 14 of the *Indian Copyright Act inter alia* states: 'Meaning of copyright.- (1) For the purposes of this Act, "copyright" means the exclusive right, subject to the provisions of this Act... (a)(vi) to make any adaptation of the work...'

¹³⁰ The marginal cost of any product is the cost of making the next copy. The cost of making the next copy of any piece of software is nothing, apart from the negligible cost of electricity and in some cases a blank CD-ROM. See Mark Taylor, 'Bursting the proprietary-software bubble', (5 November 2008), available at <http://www.zdnet.com/bursting-the-proprietary-software-bubble-3039541519/> (last visited 16 October 2013).

to pre-existing materials in any field, the greater the scope for further inventiveness.¹³¹

The existence of patents for software restricts competition and therefore limits innovation. Patent protection for software has the potential to cause stagnation in software development by putting an awkward obstacle in the path of the open source initiative. Therefore, what is essential is to ensure that there is no such patent protection.

At the same time, this author argues that open source licences must be given protection not only under contract but also under copyright law. After *Jacobsen v. Katzer*, this is the trend in the US, and ought, from a reading of the provisions of the *Indian Copyright Act*, to be implemented in India as well.

Providing copyright protection to software as well as to copyleft conditions in licences will be beneficial to OSS and so to innovation.

The former President of India, Dr APJ Abdul Kalam (also a scientist and icon for the Indian youth) envisaged OSS as the future of the Indian IT sector. The future, foretold in 2002, has come to pass several years down the line.

¹³¹ To this end, Jo Walsh and Rufus Pollock devised the most appropriate aphorism in the Many Minds Principle: ‘the coolest thing to do with your data will be thought of by someone else’. The Principle of Many Minds, slide show on ‘Open Data and Componentization’, slide 14, XTech 2007, available at http://assets.okfn.org/files/talks/xtech_2007/#slide14 (last visited 16 October 2013).

THE CIVIL LIABILITY FOR NUCLEAR DAMAGE ACT, 2010: IS PROMPTNESS WITHOUT ADEQUACY AN EFFECTIVE REMEDY?†

*Hema Naik** and *Surekha Srinivasan***

I. INTRODUCTION

The *Civil Liability for Nuclear Damage Act, 2010* (the Act) was passed by both the Houses of Parliament and thereafter, received Presidential assent on 21 September 2010. The Act was passed, *inter alia*, in order to provide for civil liability in case of a nuclear incident, channelling the liability upon the operator, and setting up a Claims Commission for providing prompt compensation to the victims.¹ The Act facilitates the realisation of India's ambitions of increasing its present nuclear capacity of a modest 4,780 MW to 63,000 MW by 2032, at an investment of US\$ 40 billion.²

As stated by the then Union Minister of State for Science and Technology, Prithviraj Chavan,³ the Act encompasses a mechanism for prompt compensation to ensure that future victims of a nuclear incident

† This article reflects the position of law as on 14 July 2013.

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¹ See *The Civil Liability for Nuclear Damage Act, 2010*, Preamble.

² Sanjay Jog, 'Fuelling the Nuclear Ambition', *Business Standard* (Mumbai India 14 December 2010), available at http://www.npcil.nic.in/pdf/news_15dec2010.pdf (last visited 14 July 2013).

³ Department of Atomic Energy, Government of India, discussed in the Lok Sabha, Unstarred Question No 2911, dated 22 April 2010, available at <http://dae.nic.in/writereaddata/rsus220410.pdf> (last visited 14 July 2013).

do not face the same difficulties faced by the victims of the Bhopal Gas Tragedy.⁴

The Act is comprehensive in its technical, economic and legal detail. The Act not only limits the liability on the operator of a nuclear power plant but also the liability on the government to a certain extent.⁵ Interestingly, the Preamble of the Act, while describing the compensation to be awarded to the victims of a nuclear disaster, only uses the word 'prompt' and not the word 'adequate'.

The article questions whether the current amount of compensation awarded under the Act, is sufficient to address the problems and difficulties faced by the victims of a nuclear disaster, especially when compared to international standards of compensation.

Part II of the article analyses specific aspects of the Act. The Chernobyl and Fukushima Dai-Ichi nuclear disasters changed nuclear safety regulations globally and are the reason for the amendment or formation of international conventions.

Part III examines how these disasters prompted the world to look at nuclear energy in a different, more cautious way. In Part IV, the Act is compared with international conventions, particularly the *Convention on Supplementary Compensation* (CSC), which, having been ratified by India, was taken into consideration while formulating the Act.⁶

⁴ On 3 December 1984 India witnessed its worst industrial catastrophe when lethal Methyl Iso-Cyanide gas from the pesticide plant of Union Carbide India Limited (UCIL) engulfed Bhopal resulting in the death of 3,000 people and affecting thousands. It was only in February 1989, that the Supreme Court ordered the payment of US\$ 470 million by UCIL and Union Carbide Corporation (UCC).

⁵ Section 2(m) of *The Civil Liability for Nuclear Damage Act, 2010*, states that 'operator', in relation to a nuclear installation, means the Central Government or any authority or corporation established by it or a Government company which has been granted a licence pursuant to the *Atomic Energy Act, 1962* for the operation of that installation.

⁶ Department of Atomic Energy, Government of India, discussed in the Lok Sabha, Unstarred Question No 2932, dated 29 August 2012, available at <http://dae.nic.in/writereaddata/Isus2932.pdf> (last visited 14 July 2013).

II. THE CIVIL LIABILITY FOR NUCLEAR DAMAGE ACT, 2010

A good nuclear liability legislation should cover within its ambit, all possible consequences of a nuclear incident, conform to the law of the land, have a reasonable liability limit, be time bound and take into consideration the standards followed internationally. Doing so will make the legislation wholesome as well as provide it with realistic means to achieve the objectives of the legislation. While the Act conforms to certain international practices, it leaves a lot to be desired in terms of international liability amounts. The liability cap provided in the Act is inadequate to compensate the people and the environment in the event of a nuclear disaster. The Act provides for prompt compensation. However, this may be of little use to the victims of a nuclear disaster. The Supreme Court has laid down that adequate compensation is the duty of a welfare State. This principle has not been incorporated in the Act.⁷

A. Nuclear Damage and Compensation

Traditionally, any injury or loss occurring due to the act of another person or entity is dealt with under the Law of Torts.⁸ Nuclear damage is wider in scope than damage under torts, as it includes the long term impacts of a nuclear disaster.

It covers a wide range of consequences under its ambit, and also includes preventive measures, which are taken in order to reduce the impact of a nuclear incident once it has occurred. The Act does not consider an act of God or acts of a third party as causes of nuclear damage and thus, an enterprise would not be held liable under the Act, for nuclear incidents caused by an act of God or of a third party.⁹

The definition of nuclear damage was coined after the Chernobyl Nuclear Disaster by the countries around the world who possessed nuclear power. The disaster at Chernobyl prompted the countries to include the definition of the term ‘nuclear damage’ in the *Protocol*

⁷ *The Civil Liability for Nuclear Damage Act, 2010*, section 5(1).

⁸ Julia A Schwartz, ‘International Nuclear Third Party Liability Law: The Response to Chernobyl’, available at <http://www.oecd-nea.org/law/chernobyl/SCHWARTZ.pdf> (last visited 14 July 2013).

⁹ *The Civil Liability for Nuclear Damage Act, 2010*, section 5(1).

to amend the *Paris Convention on Third Party Liability in the Field of Nuclear Energy* and the *Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage*.¹⁰ It was realised that increasing the ambit of the definition of a ‘nuclear damage’ without providing adequate compensation would defeat the entire objective of amending the Conventions. Therefore, lawmakers around the world have rightfully and logically increased the existing liability caps. Many countries also became parties to supplementary conventions, such as the *Brussels Supplementary Convention*, which ensured augmenting the existing National Compensation Fund with supplementary compensation, thus increasing the compensation which will be available to the victims of a nuclear incident.¹¹

In order to understand this difference between ‘nuclear damage’ and damage under the Law of Torts, it is imperative to analyse the definition of the term ‘nuclear damage’ stated in the Act.¹²

¹⁰ Schwartz *supra* n. 8.

¹¹ The total compensation of the revised *Paris Convention* and the revised *Brussels Convention* amounts upto 1.5 billion euros.

¹² Section 2(g) of *The Civil Liability for Nuclear Damage Act, 2010* defines ‘nuclear damage’ as: ‘nuclear damage’ means-

- (i) loss of life or personal injury (including immediate and long term health impact) to a person; or
- (ii) loss of, or damage to, property, caused by or arising out of a nuclear incident, and includes each of the following to the extent notified by the Central Government;
- (iii) any economic loss, arising from the loss or damage referred to in sub-clauses (i) or (ii) and not included in the claims made under those sub-clauses, if incurred by a person entitled to claim such loss or damage;
- (iv) costs of measures of reinstatement of impaired environment caused by a nuclear incident, unless such impairment is insignificant, if such measures are actually taken or to be taken and not included in the claims made under sub-clause (ii);
- (v) loss of income derived from an economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment caused by a nuclear incident, and not included in the claims under sub-clause (ii);
- (vi) the costs of preventive measures, and further loss or damage caused by such measures;
- (vii) any other economic loss, other than the one caused by impairment of the environment referred to in sub-clauses (iv) and (v), in so far as it is permitted by the general law on civil liability in force in India and not claimed under any such law, in the case of sub-clauses (i) to (v) and (vii) above, to the extent the loss and damage arises out of, or results from, ionising radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter.

The definition of nuclear damage covers within its ambit:

Economic loss, including the damage which follows from loss of life, or damage to or loss of property, or personal injury or any economic costs incurred consequent to it. For example, medical costs, loss of earning due to injury or death, loss of income due to the destruction of contaminated crops or a halt in the production of goods. After the Chernobyl Nuclear Disaster, when the sheep in Scotland were contaminated, they were deemed to be unfit for consumption. It was only after two decades that the radiation levels in these contaminated sheep dropped to safe limits, enabling the Food Standards Agency (FSA) to lift the restrictions on the consumption of the sheep.¹³

The definition of ‘nuclear damage’ also includes any economic loss which does not arise from the impairment of the environment or the loss of property, but is consequential to the nuclear damage suffered. For example, a factory in the vicinity of the area where a nuclear disaster has occurred needs to be shut down. It sustains economic loss due to a halt in production, and also due to loss of jobs by the employees.

Preventive measures are measures to prevent or minimise the impact of the nuclear damage after the nuclear incident has occurred.¹⁴ Further, the definition of a nuclear incident makes it clear that even in the absence of the actual release of radiation, preventive measures may be taken. However, these preventive measures may only be taken in response to a grave and imminent threat of release of radiation that could cause other types of nuclear damage. Further, these measures are subject to the approval of the Central Government and could be taken before or after the nuclear incident in order to minimise the impact of the nuclear

¹³ The Food Protection (Emergency Prohibitions) (Radioactivity in Sheep) and the Export of Sheep (Prohibition) Revocation (Scotland) Order, 2012 (Scot), *available at* <http://www.legislation.gov.uk/ssi/2012/263/made/data.pdf> and ‘Chernobyl And Its Effect On Scottish Agriculture’, *available at* <http://www.scotland.gov.uk/Topics/farmingrural/Agriculture/Livestock/Meat/Sheep/chernobyl> (last visited 14 July 2013).

¹⁴ Section 2(i) of *The Civil Liability for Nuclear Damage Act, 2010*, defines ‘nuclear incident’ as, any occurrences or series of occurrences having the same origin which causes nuclear damage or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage.

damage.¹⁵ It is interesting to note that preventive measures wherein no actual release has occurred will also be compensated for, as they have been taken in the interest of the people.¹⁶

The Act states that any compensation for a loss arising out of such nuclear damage shall be granted only if there is significant environmental damage.¹⁷

However, it is difficult to gauge the damage caused by a nuclear disaster to the environment in monetary terms. This kind of compensation also includes measures of reinstatement, which are measures taken by the installing state of the nuclear reactor, to restore or reinstate the environment after a nuclear incident. To claim damages under this head, it must be established before the Claims Commission that the damage is a consequence of the contamination, the claimant has an established economic interest and the damage is significant. The question of significant impairment to the environment is subjective, linking scientific criteria to social preferences and relating them to the environment and the affected community. Thus, what might be significant environmental impairment in one place might be insignificant in another place.

The above examples of damages may be claimed under any of the sub-clauses provided in the definition. Hence, to avoid a multiplicity of claims, the definition explicitly states that the claims shall not be admitted if they are already made under any other sub-clause.¹⁸

Thus, the definition covers a wide range of damage caused by a nuclear disaster.

However, the question which arises as a natural progression to this definition is whether the liability cap provided by the Act is sufficient

¹⁵ Section 2(o) of *The Civil Liability for Nuclear Damage Act, 2010*, defines 'preventive measures' as, any measures taken by a person after a nuclear incident has occurred to prevent or minimise damage referred to in sub-clauses (i) to (v) and (vii) of clause (g), subject to the approval of the Central Government.

¹⁶ Ben McRae, 'The Convention on Supplementary Compensation for Nuclear Damage: Catalyst for a Global Nuclear Liability Regime', 20 available at <https://www.oecd-nea.org/law/nlb/nlb-79/017-035%20-%20Article%20Ben%20McRae.pdf> (last visited 14 July 2013).

¹⁷ *The Civil Liability for Nuclear Damage Act, 2010*, section 2(g)(iv).

¹⁸ *supra* n. 12.

in order to adequately compensate the victims of a nuclear disaster. In India, given the population density, even a nuclear disaster of a small magnitude may result in astronomical losses.

The Act has provided for a maximum liability cap of approximately 40 billion rupees (4000 crore rupees) in all.¹⁹ However, taking all the above factors into consideration, it is submitted that the liability cap should be raised significantly if the Act aims to adequately compensate all the claims which might fall under the definition of 'nuclear damage'.

B. Consonance with the Law of the Land

The Act attempts to remedy the environmental damage which occurs as a consequence of a nuclear incident by way of reinstatement or in monetary terms.²⁰

Thus, it is essential to study the provisions of the Act in the light of judicial precedents and environmental jurisprudence in India. Landmark judgments and principles have been laid down by the Supreme Court in the case of *M C Mehta and Another v. Union of India* and *Indian Council for Enviro-Legal Action v. Union of India and Others*.²¹

As per the doctrine of absolute liability laid down in the *MC Mehta Case*, the operator of the plant alone would be held liable for all the damages occurring in the event of a nuclear damage.²² In India, the operator of all existing nuclear plants is the Nuclear Power Corporation of India Ltd (NPCIL), a public sector enterprise which will bear the liability upto 15 billion rupees.^{23, 24} If the compensation required exceeds 15 billion rupees, then the Central Government would bear the liability to the extent of 300 million SDR (24.79 billion rupees).²⁵

¹⁹ *The Civil Liability for Nuclear Damage Act, 2010*, section 6(1).

²⁰ *The Civil Liability for Nuclear Damage Act, 2010*, section 2(g)(iv-v).

²¹ *M C Mehta and Another v. Union of India* 1987 AIR 1086 (*MC Mehta Case*) and *Indian Council For Enviro- Legal Action v. Union Of India and Others* 1996 AIR 1446.

²² *M C Mehta and Another v. Union of India* 1987 AIR 1086.

²³ *The Civil Liability for Nuclear Damage Act, 2010*, section (6)(2)(a).

²⁴ Nuclear Power Corporation of India Ltd is a Public Sector Enterprise under the administrative control of the Department of Atomic Energy, Government of India, at <http://npcil.nic.in/main/AboutUs.aspx> (last visited 14 July 2013).

²⁵ *The Civil Liability for Nuclear Damage Act, 2010*, section 6, 1 SDR= 82.62 rupees on 24 January 2013.

This effectively limits the liability at around 40 billion rupees, which is grossly insufficient, bearing in mind the loss resulting from previous nuclear disasters.

In the *MC Mehta Case*, it was held that defences for torts like act of God, mischief of a third person, etc; cannot be considered as exceptions to the principles of absolute and strict liability.²⁶ This precedent has been disregarded in the Act as it excludes the operator from providing any compensation when a nuclear incident is a result of a grave natural disaster, an armed conflict, or terrorism.²⁷ The Supreme Court has further stated that the enterprise involved in a hazardous activity owes an absolute non-delegable duty to compensate for any harm arising out of the enterprise without any regard to the exceptions stated in *Rylands v. Fletcher*.²⁸ The Fukushima Dai-Ichi Nuclear Disaster in Japan was caused by the Tohoku earthquake and the consequent tsunami. If such a nuclear incident occurred in India as a result of a natural disaster or any civil hostility or terrorism, the operator would not be held liable to pay any compensation.

The Act stipulates that only an authority established by the Central Government or a government company possessing the license to operate, can function as the ‘operator’ of a nuclear plant in India.²⁹

The Act has ignored the ‘Polluter Pays Principle’, according to which the burden of liability in the event of a nuclear disaster rests on the operator and not on the government. The Act holds the operator liable upto 15 billion rupees. The government will be liable to pay compensation upto 300 million SDR only if the compensation amount exceeds 15 billion rupees. It is not for the government to meet the costs involved in either prevention of such damage, or in carrying out

²⁶ *M C Mehta and Another v. Union of India* 1987 AIR 1086.

²⁷ *The Civil Liability for Nuclear Damage Act, 2010*, section 5(i).

²⁸ [1868] UKHL 1 (17 July 1868). The rule provided in this case law does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority.

²⁹ Section 2(m) of *The Civil Liability for Nuclear Damage Act, 2010*, states that ‘operator’, in relation to a nuclear installation, means the Central Government or any authority or corporation established by it or a Government company who has been granted a licence pursuant to the *Atomic Energy Act, 1962* for the operation of that installation.

remedial action, as the effect of this would be to shift the financial burden of the pollution onto the taxpayer. The responsibility for repairing the damage and compensating the people should be of the offending industry.³⁰ Moreover, in India, as the operator comes under the purview of the public sector, the entire burden of liability is consequently shifted to the tax payer. Thus, the division of liability between the operator and government, in present times is of little use.

These principles form a part of the law of the land and it is essential for the Act to be in conformity with them. The above provisions are blatant violations of the previously mentioned judgments of the Supreme Court, which fact is attested to by former Attorney General of India, Mr Soli Sorabjee.³¹

C. *Claims of Future Generations*

Another important issue which the Act has not addressed is the claims of future generations for compensation. Studies have shown that the effects of radiation contamination or exposure could last for years and even manifest years after exposure. The effects of the Chernobyl Nuclear Disaster can still be observed while those of the Fukushima Nuclear Disaster are expected to continually manifest over many years. The Act has not made any provision for the impact of radiation on future generations and the long term effects of radiation exposure, as it has limited the time period for filing claims for compensation to 10 years from the date of the nuclear incident in case of damage to property and 20 years in case of personal injuries.³² This time period of limitation is relatively short, as compared to the recent amendments made in the *Paris Convention* which extends the right to compensation for thirty years in case of loss of life or personal injuries.³³

³⁰ *Indian Council For Enviro - Legal Action v. Union Of India and Others* 1996 AIR 1446.

³¹ Soli Sorabjee, 'Capping Nuclear Liability is a Non-Starter', *The Hindu* (Online edition India 13 December 2009), available at <http://www.thehindu.com/opinion/lead/article64688.ece> (last visited 14 July 2013).

³² *The Civil Liability for Nuclear Damages Act, 2010*, section 18.

³³ *Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*, Paragraph (I)(c) (adopted 24 February 2004).

D. Capping the Liability Limit

The liability limit of 300 million SDR as provided by the Act, aims to conform to the provisions of CSC, which has been ratified by India. The practice of limiting the liability cap is followed by most of the countries around the world to protect the operator from bankruptcy. In the case of the government's liability, unlimited liability would result in the payment of compensation for a long period of time and increased taxes on the people. Thus, unlimited liability on either the government or the operator is an untenable proposition. Notwithstanding this, there seems to be no rationale for limiting the liability amount to 300 million SDR as both in the past and the present, such a low limit has proven to be inadequate and thus, insufficient.

India's only experience in the field of a large scale accident was in 1984 with the Bhopal Gas Tragedy, which was classified as an industrial accident and the compensation awarded in the 1990s was US\$ 470 million.³⁴ The current amount of maximum liability which is to be paid by the operator in the event of a nuclear disaster has been limited to 300 million SDR by the Act, which is equivalent to around 25 billion rupees or around US\$ 460 million. This amount is less than the compensation which was awarded to the victims of the Bhopal Gas Tragedy, an event which occurred almost 30 years ago. A curative petition was filed in the year 2010 by the Government of India seeking an enhancement of around 77 billion rupees in the compensation amount to be given to the victims.³⁵ This clearly establishes that limiting the total compensation available to the victims of a nuclear incident to around 40 billion rupees will not aid the government in helping or rehabilitating the victims of a nuclear incident adequately.

³⁴ *Union Carbide Corporation etc v. Union of India* 1992 AIR 248.

³⁵ *Union of India v. M/s Union Carbon Corporation Curative Petition* (Civil) nos 345-347 of 2010 and Ravleen Kaur, 'SC Notices on Bhopal Gas Disaster Compensation' (2011), *Down to Earth*, at <http://www.downtoearth.org.in/content/sc-notices-bhopal-gas-disaster-compensation> (last visited 14 July 2013).

III. PAST INTERNATIONAL EXPERIENCES

A. Chernobyl

A nuclear incident occurred at Chernobyl on 26 April 1986. It is one of the two nuclear disasters in the world to be ever declared as level 7 on the Nuclear Event Scale, the other being the Fukushima Dai-Ichi Nuclear Disaster.³⁶ Within a few weeks of the incident, two employees of the nuclear power plant died due to the explosion and 28 men died due to Acute Radiation Syndrome. The incident also led to the evacuation of about 116,000 people from areas surrounding the reactor during 1986, and the relocation of about 220,000 people in the subsequent years from what were at that time, the three constituent republics of the Soviet Union, namely Belorussia, the Russian Soviet Federated Socialist Republic and Ukraine.³⁷

Even years after the incident, the population in Russia, Belarus and Ukraine are in a state of ‘chronic dependency’ and continue to experience a general decline in health, environmental and economic conditions. Until 2002, more than 4000 cases of thyroid cancer have been observed among those adolescents and children, who were exposed to radiation. It has been estimated that seven million people are receiving special allowances, pensions and health care privileges.³⁸ Over the years, the costs in the aftermath of Chernobyl amounted to billions of dollars.

Thus, this nuclear incident has had a profound impact on various international legislations, treaties and conventions due to the staggering realisation it brought across the world with regard to nuclear damage and the importance of proper care and maintenance of a nuclear plant.

³⁶ Fukushima Nuclear Accident Update Log (12 April 2011) *International Atomic Energy Agency- News Centre*, available at <http://www.iaea.org/newscenter/news/2011/fukushima120411.html> (last visited 14 July 2013).

³⁷ The Chernobyl Forum, ‘Chernobyl’s Legacy: Health, Environmental and Socio-Economical Impacts and Recommendations to the Governments of Belarus, The Russian Federation and Ukraine’ (2003- 2005) 10, available at <http://www.iaea.org/Publications/Booklets/Chernobyl/chernobyl.pdf> (last visited 14 July 2013).

³⁸ *Ibid*, 39.

B. Fukushima Dai-Ichi

On 11 March 2011, Japan was hit by the Tohoku earthquake which registered a massive 9.0 on the Richter scale. 150 kilometres north-east of the epicentre of the earthquake, was the Fukushima Dai-Ichi Nuclear Plant, where three of the six nuclear reactors were functioning. Once the earthquake hit, the reactors safely shut down and the emergency diesel generators began acting. These generators are essential in such a situation as they help to cool down the fuel in the reactor cores. There was another safety measure in place, known as the ‘ultimate heat sink’, which is a complex cooling system used by nuclear power plants located near a river or sea, or as in this case, the Pacific Ocean.³⁹ About an hour after the earthquake, a tsunami hit the area surrounding the nuclear plant, flooding the plant and resulting in a failure of the power grid in the area. As all the safety functions in the nuclear reactor required electricity to function, the generators as well as the ultimate heat sink stopped working. In addition to this, hydrogen collected in the buildings due to the damage and caused explosions, releasing the radioactive material into the environment. No reported deaths can be attributed to the radioactive substances released into the environment due to the incident.

The first reaction of many countries to the Fukushima Nuclear Disaster, including India’s, was to conduct stress tests on their own nuclear reactors. Stress tests evaluate the responses of a nuclear power plant to severe external events (single and multiple) and take into account the initiating events, the consequential loss of safety functions and the management in the event of a severe nuclear incident.

According to Srikumar Banerjee, Chairman of the Atomic Energy Commission, Indian reactors have passed all the stress tests they were subjected to, under the order of the Prime Minister, after the Fukushima Nuclear Disaster.⁴⁰ Following this nuclear accident, the people of countries generating nuclear power raised their concerns, while the governments amended or changed their policies on nuclear power.

³⁹ ‘Fukushima Press Kit’ *Nuclear Energy Agency*, available at <http://www.oecd-nea.org/press/press-kits/fukushima.html> (last visited 14 July 2013).

⁴⁰ ‘All N- Plants in India Pass Stress Test’, *The Times of India* (Mumbai India 18 October 2011), available at http://articles.timesofindia.indiatimes.com/2011-10-18/india/30296520_1_stress-tests-fukushima-nuclear-plant (last visited 14 July 2013).

Kazumasa Iwata, President of the Japan Centre for Economic Research, estimated that the costs of the incident could range from nearly US\$71 to 250 billion. The figure includes US\$ 54 billion to buy up all land within 20 kilometres of the plant, US\$ eight billion for compensation payments to local residents, and US\$ nine to 188 billion to scrap the plant's reactors.⁴¹ Further, the operator for the Fukushima Dai-Ichi Nuclear Plant was the Tokyo Electric Power Company (TEPCO), which was strictly liable to pay the compensation. As there was no liability cap, the operator's liability was unlimited. It was feared that TEPCO would go insolvent if it was not bailed out by the Japanese Government which had lent two trillion yen to keep it solvent.⁴² The Japanese Government also injected five trillion yen into TEPCO's compensation fund.⁴³ The initial estimated damages of the Fukushima Dai-Ichi Nuclear Disaster by its operator TEPCO was around one trillion yen (US\$13 billion).

IV. INTERNATIONAL CONVENTIONS ON NUCLEAR THIRD PARTY LIABILITY

Various international conventions on nuclear third party liability have come into force since the 1960s. The Act has conformed to various principles of these conventions like channelling of operator's liability, time bound claims, limited liability, etc. However, there have also been some significant amendments to these conventions with the change in the circumstances. Hence it becomes imperative to study some of these conventions.

⁴¹ – 'Fukushima Cleanup Could Cost Up To \$250 Billion' *News on Japan*, at <http://newsonjapan.com/html/newsdesk/article/89987.php> (last visited 14 July 2013).

⁴² Taiga Uranaka, 'Japan Bank Lobby: Tepco Would Face Insolvency Without Bailout Scheme' (14 July 2011) *Reuters*, at <http://www.reuters.com/article/2011/07/14/japan-banking-idUSL3E7IE04N20110714> (last visited 14 July 2013).

⁴³ – 'Japan to Inject Five Trillion Yen into Tepco Nuclear Compensation Fund', *The Telegraph* (Online Edition United Kingdom 11 May 2011), available at <http://www.telegraph.co.uk/finance/globalbusiness/8507771/Japan-to-inject-five-trillion-yen-into-Tepco-nuclear-compensation-fund.html> (last visited 14 July 2013).

A. *The Convention on Supplementary Compensation for Nuclear Damage (CSC)*

The CSC has been developed under the aegis of International Atomic Energy Agency (IAEA).⁴⁴ It was adopted on 12 September 1997 and has been signed by 16 countries, out of which only four countries have ratified it till date.⁴⁵ However, for the CSC to come into force, it has to be ratified by at least five countries, each with a minimum of 400,000 units of ‘nuclear capacity.’⁴⁶

The compensation structure of CSC will be executed in a two step system. According to this system, the first tier involves the installation state providing a minimum compensation of 300 million SDR, followed by the second tier of compensation, consisting of an ‘international fund’.⁴⁷ Every contracting party will contribute to the international fund when it appears that the damage to be compensated for exceeds the first tier amount, and the amount to be paid by each contracting party will be determined by the number and type of states adhering to the CSC.⁴⁸ India’s nuclear liability law conforms to the CSC with reference to the two tier system of compensation.

The CSC states that the compensation provided from the international fund must be divided equally between the victims of the installation state as well as the trans-border victims, unlike the Protocol to the Vienna Convention on Nuclear Damage. If the installation state does want to provide the international fund to the trans-border victims, it

⁴⁴ Department of Atomic Energy, Government of India, discussed in Rajya Sabha Unstarred Question No.1706, dated 25 November 2010, See <http://dae.nic.in/writereaddata/rs251110.pdf> (last visited 14 July 2013).

⁴⁵ ‘Convention on Supplementary Compensation for Nuclear Damage (Current Status)’ (updated 24 June 2013) *International Atomic Energy Agency* at http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf (last visited 14 July 2013).

⁴⁶ *The Convention on Supplementary Compensation*, Article XX (12 September 1997) IAEA DOC INFCIRC/567 See <http://www.iaea.org/Publications/Documents/Infircs/1998/infirc567.pdf> (last visited 14 July 2013).

⁴⁷ *The Convention on Supplementary Compensation*, Article III(1)(a)(i) (12 September 1997) IAEA DOC INFCIRC/567 See <http://www.iaea.org/Publications/Documents/Infircs/1998/infirc567.pdf> (last visited 14 July 2013).

⁴⁸ *The Convention on Supplementary Compensation*, Article IV (12 September 1997) IAEA DOC INFCIRC/567 See <http://www.iaea.org/Publications/Documents/Infircs/1998/infirc567.pdf> (last visited 14 July 2013).

must provide for 600 million SDR instead of 300 million SDR, in the first tier itself.⁴⁹ The CSC also states that half of the compensation provided in the second tier should be distributed to the trans-border victims, of only those nations who are parties to the CSC.⁵⁰ This provision ensures that only the contracting parties benefit monetarily when in need and not the noncontracting parties. As none of India's neighbouring countries are a party to the CSC,⁵¹ India will not be able to avail any benefit under the second tier of compensation, unless it provides for a compensation amount of 600 million SDR.

However, India cannot provide a compensation amount of 600 million SDR as the Act clearly states that the liability of the government is limited to 300 million SDR.⁵² Thus, due to this anomaly existing between the provisions for the international funds in CSC and those in the Act, India may not benefit from the international fund provided by the CSC.

For the CSC to come into force, five or more ratifying member countries must have a total capacity of 400,000 MW or more. Currently the only ratifying member country to fit this description is the United States of America and therefore, it is highly unlikely that the CSC will ever come into force in the near future.⁵³

B. Other International Conventions

1. The Paris Convention on Nuclear Third Party Liability

The *Paris Convention* first came into force in 1968, its signatories being mostly Western European countries including France, Germany, United Kingdom, Greece, Spain, and Portugal to name a few. After the Chernobyl Nuclear Disaster, contracting parties to both the *Paris*

⁴⁹ *The Convention on Supplementary Compensation*, Article XI(2) (12 September 1997) IAEA DOC INFCIRC/567.

⁵⁰ *The Convention on Supplementary Compensation*, Article V (12 September 1997) IAEA DOC INFCIRC/567.

⁵¹ *supra* n. 45; 'Mauritius Signs Convention on Supplementary Compensation for Nuclear Damage' (26 June 2013) *International Atomic Energy Agency- News Centre*, available at <http://www.iaea.org/newscenter/news/2013/mauritius.html> (last visited 14 July 2013).

⁵² *The Civil Liability for Nuclear Damage Act, 2010*, section (6)(1).

⁵³ Schwartz *supra* n. 8.

Convention and the *Brussels Supplementary Convention* proposed the *Protocol to Amend the Paris Convention*. However, the Protocol has not yet come into force. The most important amendment in the Protocol was that the minimum amount of liability was increased from five million SDR to 700 million euros.⁵⁴ The establishment of minimum liability amounts has allowed participation of countries, which have imposed both limited and unlimited liability on the operator. It has for the first time defined ‘nuclear damage’ to include a wider ambit of situations. These situations, which will be included in the Protocol are personal injury, property damage, certain types of economic loss, the cost to reinstate a significantly impaired environment, loss of income resulting from the impaired environment and the cost of preventive measures, including loss or damage caused by such measures.⁵⁵ It has increased the time limit for claiming compensation to 30 years in case of loss of life and personal injury.⁵⁶ One of the most significant amendments of the Protocol was the change in the unit of account from SDR to euros as it was noted that being a regional convention the compensation received to the parties should not be in any way influenced by currencies alien to it.

2. The Vienna Convention on Civil Liability for Nuclear Damage

The Vienna Convention on Civil Liability for Nuclear Damage was adopted in the year 1963⁵⁷ The operator’s liability was set up at a minimum of US\$ five million.⁵⁸ Over 80 states have adopted the *Protocol to amend*

⁵⁴ *Protocol to Amend the Paris Convention on Third Party Liability in the Field of Nuclear Energy* Para H(a) (adopted 24 February 2004). See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:097:0055:0062:EN:PDF> (last visited 14 July 2013).

⁵⁵ *Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*, Para (B)(a)(vii) (adopted 24 February 2004) See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:097:0055:0062:EN:PDF>. (last visited 14 July 2013).

⁵⁶ *Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy*, Para (I)(c) (adopted 24 February 2004). See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:097:0055:0062:EN:PDF> (last visited 14 July 2013).

⁵⁷ *Vienna Convention on Civil Liability for Nuclear Damage*, Article II (adopted 21 May 1963, entered into force 12 November 1977) INFCIRC/500 See <http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml> (last visited 14 July 2013).

⁵⁸ *Vienna Convention on Civil Liability for Nuclear Damage*, Article V (adopted 21 May 1963, entered into force 12 November 1977) INFCIRC/500 See <http://www.iaea.org/Publications/Documents/Infcircs/1996/inf500.shtml> (last visited 14 July 2013).

the Vienna Convention on Civil Liability for Nuclear Damage.⁵⁹ Significant amendments have been made post the Chernobyl Nuclear Disaster, including a broader definition of the term ‘nuclear damage’, higher compensation and updated jurisdiction rules. The new minimum liability of the operator under this Protocol was fixed at 300 million SDR and it also mandates that compensation may be given to a non-contracting party to the Convention as well.⁶⁰

3. Brussels Supplementary Convention

The *Brussels Supplementary Convention* was adopted supplementary to the *Paris Convention* of 1960 to provide further compensation, if the compensation provided by the *Paris Convention* is insufficient. Subsequent to the Amendment of the *Paris Convention*, the 2004 Protocol amended the *Brussels Supplementary Convention*.⁶¹ The total compensation provided by both the revised conventions is not less than 1.5 billion euros.⁶² The Revised protocol has not come into force till date.

V. CONCLUSION

In today’s day and age, nuclear power has emerged as the best option for producing the lifeline of our generation – energy or power. Nuclear energy involves less pollution in its generation, is environment friendly, requires a small amount of nuclear material to produce a huge magnitude of energy and is easy to store. Nuclear energy has its faults as well – it is very volatile and if an accident occurs, the radiation pollution has an effect on everything from human health to environment, which can last for decades.

⁵⁹ *Protocol to amend Vienna Convention on Civil Liability for Nuclear Damage* (adopted 29 September 1997, 4 October 2003) INFCIRC/566 See <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc566.pdf> (last visited 14 July 2013).

⁶⁰ *Protocol to amend Vienna Convention on Civil Liability for Nuclear Damage*, Article 1A (adopted 29 September 1997, 4 October 2003) INFCIRC/566 See <http://www.iaea.org/Publications/Documents/Infcircs/1998/infcirc566.pdf> (last visited 14 July 2013).

⁶¹ *Brussels Supplementary Convention* (31 January 1963) See <http://www.oecd-nea.org/law/nlbrussels.html> (last visited 14 July 2013).

⁶² *2004 Protocol to Amend the Brussels Supplementary Convention on Nuclear Third Party Liability* (adopted 12 February 2004) See <http://www.oecd-nea.org/law/brussels-supplementary-convention-protocol.html> (last visited 14 July 2013).

The *Civil Liability for Nuclear Damages Act, 2010* was hailed as a much needed and long overdue addition to the laws of a nuclear power producing country like India. However this Act is riddled with flaws, such as the limitation of the liability of the government to only 300 million SDR, the limitation of the period for a victim to file a future claim and its inconsonance with the measures followed in other countries around the world. While India adopted some favourable aspects from international conventions, such as the new definition of nuclear damage and the inclusion of more victims under its scope, it did not make any realistic monetary provisions for the conditions stipulated in the Act.

The Chernobyl Nuclear Disaster and the Fukushima Dai-Ichi Nuclear Disaster served as eye openers to the world about the danger of nuclear power and hence, led to the formation or amendment of many nuclear legislations and international conventions. For the CSC to come into force, at least five signatories must individually have a nuclear capacity more than 400,000 units. With such a requirement, it is unlikely that we shall see the CSC in force in the near future.

Due to the enormous costs involved in reinstating the impaired environment and compensating the victims of the Fukushima Nuclear Disaster in 2011, many countries changed their policy regarding nuclear power. Japan has completely abandoned its plans for the expansion of its nuclear industry and is now looking at options for renewable sources of energy, Germany has decided to shut down 17 of its nuclear reactors by 2022.⁶³ Switzerland and Spain have banned the construction of any new reactors.⁶⁴ In Italy a proposal to generate 25% of the country's power from nuclear energy was firmly opposed by 90% of the population, which put an end to all its plans of generating nuclear power.⁶⁵ Countries like Mexico have side-lined 10 of its nuclear

⁶³ Rachel Gessat, 'Germany needs plan to close down nuclear plants' (21 June 2012) *DW*, available at <http://www.dw.de/germany-needs-plan-to-close-down-nuclear-plants/a-16040237> (last visited 14 July 2013).

⁶⁴ Henry Sokolski, 'Nuclear Power Goes Rouge', *Newsweek Magazine*, (Online Edition Canada, 28 November 2011), available at <http://mag.newsweek.com/2011/11/27/post-fukushima-nuclear-power-changes-latitudes.html> (last visited 14 July 2013).

⁶⁵ Department of Internal Affairs and Territorial, Ministry of Interior, Government of Italy, Historical Archive Of Elections, Referendum dated 12 June 2011, available at <http://elezionistorico.interno.it/index.php?tpel=F&dtel=12/06/2011&tpa=Y&tpe=A&lev0=0&levsut0=0&es0=S&ms=S> (last visited 14 July 2013).

reactor projects in favour of natural gas-fired electricity plants.⁶⁶ China has stalled its various on-going projects and is conducting thorough examinations of the proposed projects.⁶⁷ France, a country very dependent on nuclear energy has decided to reduce its dependency on nuclear energy by 2025.⁶⁸ Considering the Fukushima incident and the *Paris Protocol*, France's intention to unilaterally increase the operator's liability to 700 million euros has been approved by the *Courdes Comptes*.⁶⁹ United Kingdom being a signatory to the *Paris Protocol* has announced its intention to increase the operator's liability by seven folds to 1.2 billion euros which, is 500 million euros more than 700 million euros as prescribed by the *Paris Protocol*. This increase will result in its operator's liability being approximately twice of India's National Liability.⁷⁰

After observing these shifts in the outlook of countries on nuclear power generation, it is imperative to reassess India's decision of increasing her nuclear power in the near future, when the rest of the world is reducing or even shutting down nuclear power generation. However, if India is keen to increase nuclear power generation, there must be substantial liability caps in place and hence, there is an urgent need to increase the compensation amount for victims of a nuclear incident.

The Chernobyl disaster led to the amendment of the Paris and Vienna Conventions to include a higher liability amount. Various countries

⁶⁶ Gessat *supra* n. 63.

⁶⁷ —China freezes nuclear plant approvals (16 March 2011) *CNN International*, available at <http://edition.cnn.com/2011/WORLD/asiapcf/03/16/china.nuclear/?hpt=T2> (last visited 14 July 2013).

⁶⁸ Karolin Schaps and Henning Gloystein, 'Nuclear Power Champions Japan And France Turn Away' (14 September 2012) *Reuters*, available at <http://www.reuters.com/article/2012/09/14/us-energy-nuclear-idUSBRE88D1DR20120914> (last visited 14 July 2013).

⁶⁹ *Cours des Comptes*, 'The Costs of the Nuclear Power Sector' (2012) 426, available at http://www.environmental-auditing.org/Portals/0/AuditFiles/France_f_eng_Costs-of-the-Nuclear-Sector.pdf (last visited 14 July 2013).

⁷⁰ Department of Energy & Climate Change, Government of United Kingdom, Announcement: Nuclear Third Party Liabilities To Be Increased Sevenfold (2012), available at <https://www.gov.uk/government/news/nuclear-third-party-liabilities-to-be-increased-sevenfold> (last visited 14 July 2013).

like the United Kingdom,⁷¹ Canada,⁷² and United Arab Emirates are in the process of amending their domestic legislations to meet the liability limits as provided by these amendments.⁷³ Thus, it can be observed from the study of the international treaties that there has been significant increase in the terms of compensation given to the victims of a nuclear incident. Nuclear installation countries have not only increased their liability limits but have also entered into various supplementary conventions in order to provide enhanced compensation to the victims.

The Act has taken a big step forward in effectively covering within its ambit, compensation for many of the effects of a nuclear disaster, but has failed to realistically meet them in monetary terms. It is imperative to view this aspect of the Act and reassess India's stand on its liability limit, thereby ensuring that the provisions of the Act are attuned to realistic standards followed around the world.

⁷¹ — 'UK Boosts Nuclear Liability' (2 April 2012) *World Nuclear News*, available at http://www.world-nuclear-news.org/NP-UK_boosts_nuclear_liabilities-0204124.html (last visited 14 July 2013).

⁷² 'Liability for Nuclear Damage' (updated August 2013) *World Nuclear Association*, available at http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Liability-for-Nuclear-Damage/#.Ud_5kEH-HCt (last visited 14 July 2013).

⁷³ — 'UAE's Nuclear Liability Law' (16 October 2012) *World Nuclear News*, available at http://www.world-nuclear-news.org/RS-UAE_issues_nuclear_liability_law-1610127.html (last visited 14 July 2013).

THE INDIAN ELECTORAL PROCESS AND NEGATIVE VOTING[†]

*Rahela Khorakiwala**

I. INTRODUCTION

‘At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.’

Sir Winston Churchill thus described the significance of a vote in a democratic election.

The Indian electoral system has generally been observed as a case study for several reasons. The vast population, the large number of candidates, the territorial expanse of the country and the Electronic Voting Machines, *inter alia*, make for a model of democracy that is keenly followed by critics locally and internationally.

Since the first general election of 1952, there have been numerous changes in the demographics and voting patterns in India. Over the years, a number of election reforms have been proposed, Bills in this regard have been passed in Parliament and the Constitution has been repeatedly amended.

The process of electioneering is thus an ever-evolving democratic process that political analysts contemplate every five years. As yet another general election is scheduled within the next year, a variety of electoral debates and discussions have resurfaced. One such debate is whether the Electronic Voting Machines and/or ballot papers should have the option of ‘None of the Above’ enlisted on them. With the Supreme Court’s judgment affirming the above question in the case of

[†] This article reflects the position of law as on 13 October 2013.

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*People's Union for Civil Liberties and Another v. Union of India and Another*¹, the provision of negative voting has found a remedy.

The 'None of the Above' option is synonymous with 'negative voting' and is the option given to the electorate to elect no candidate as suitable for the position in question. Till this judgment, the right to negative voting in India existed in the form of Rule 49-O of the Conduct of Election Rules.

Part II of this Article seeks to discuss the current Indian democratic scenario and highlights the need for the implementation of the right of 'negative voting' in the Lok Sabha Elections.

Part III elucidates the Rule in its present form and proposes arguments in favour of and against the option of 'None of the Above'. It further examines the recommendations from the Law Commission Report in that regard.

Part IV discusses this right in the cloak of a Fundamental Right as against a statutory right and analyses the importance of the jurisprudence behind elections in a democracy.

Part V concludes with the amendments required in order to implement Rule 49-O and the drawbacks attached to the implementation of the right of 'negative voting'.

II. ELECTIONS IN THE GREAT INDIAN DEMOCRACY

India, today, is the largest democracy in the world that conducts free and fair elections.² It has been said that holding general elections in India is equal to holding them for Europe, United States, Canada and Australia all put together.³

¹ Writ Petition (Civil) No 161 of 2004 (*2013 PUCL case*).

² Largest in terms of an electorate of 714 million, *see* 'The World's Largest Democracy Gets Ready to Vote' *Embassy of India*, available at <http://www.indembassy.org.pe/news2009/features1abril09.pdf> (last visited 13 October 2013).

³ The National Commission to Review the Working of the Constitution, 'FINAL REPORT', Ch - 4, 'Electoral Processes and Political Parties' (Ministry of Law, Justice and Company Affairs), dated 31 March 2002, available at <http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm> (last visited 13 October 2013).

The magnitude of elections in India can be seen in its numbers. It has an electorate of 714 million of which 428 million cast their votes,⁴ in 8,28,804 polling stations,⁵ 7.2 million of which were added in 2009 itself and 8–9 million people,⁶ including the security forces were in-charge of conducting these elections.

In 2009, as India entered its 59th year since becoming a Republic and the electorate voted in five phases to form the 15th Lok Sabha, there were 17 million voters within the age group of 18 to 35 years, an astounding figure scaling higher than the individual population of 161 countries in the world.⁷

The first few Lok Sabha elections in India recorded some of the highest voter turn-outs; 61.2 per cent⁸ in the first general election of 1952, 61.33 per cent⁹ in 1967, and finally peaking in the eighth general election of 1984 with a turn-out of 63.56 per cent.¹⁰

Since then, there has been a steady decline in the percentage of voter turnouts, the lowest being 48.74 per cent¹¹ in the fourteenth Lok Sabha elections and ending with almost 59 per cent¹² in the fifteenth general elections of 2009.

⁴ India Digest, General Elections 2009, *available at* <http://www.hcilondon.in/indiadigest/Issue288/pdf/5.pdf> (last visited on 13 October 2013).

⁵ 'Indian Election Statistics', *available at* <http://www.indian-elections.com/india-statistics.html> (last visited 13 October 2013).

⁶ The Election Commissioner S. Y. Quarishi, 'Election 2009', *available at* <http://election.rediff.com/column/2009/may/18/loksabhapoll-election-commissioner-s-y-quarishi-on-election-2009.htm> (last visited 13 October 2013).

⁷ Jug Suraiya, 'Negative Democracy', *The Times of India*, (Online edition India 16 March 2009), *available at* <http://timesofindia.indiatimes.com/Opinion/Columnists/Swapan-Dasgupta/Right--Wrong/Negative-democracy/articleshow/4268648.cms> (last visited 13 October 2013).

⁸ 'Election Statistics – Voting percentage in Lok Sabha Elections', *available at* www.indian-elections.com/india-statistics.html (last visited 13 October 2013).

⁹ *Ibid.*

¹⁰ *supra* n. 8.

¹¹ *Ibid.*

¹² *supra* n. 8.

Thus, the change in the voting pattern by the Indian electorate is apparent. The 2009 general election witnessed much increased awareness and consciousness for the elections. Despite this, the participation in the urban areas which comprise a higher percentage of literate people was dismal, with Mumbai recording as low a voter turnout as 44.21 per cent¹³ while Bangalore and Chennai recorded 51 per cent¹⁴ and 59 per cent¹⁵ respectively.

Several reasons have been cited to explain the descending trend in voter participation. Political apathy, lack of choice and increasing corruption have kept many voters away from the ballot.

The Report of the Election Commission of India (established under Part XV of the Constitution) on the first general election of 1951–1952 mentioned that 88.6 million voters cast their vote in a perfectly peaceful atmosphere. There were only minor breaches of law and order in a few polling stations in some of the states. By the time the fourth general elections were held in 1967, the Report lamented, ‘Regrettably the record of peaceful polling was broken at the last general elections...’¹⁶

It is an oft quoted opinion amongst voters that, ‘We don’t support any of the contesting candidates and/or political parties it is like choosing between the lesser of two evils.’ The reason for the abstinence from voting was cited as the ‘lack of choice’.¹⁷

¹³ ‘Decrease in voter turnout’ (11 May 2009) *Politics Online*, available at http://www.politicsonline.com/blog/archives/2009/05/indian_parliame.php (last visited 13 October 2013).

¹⁴ See ‘Peaceful polling during first phase of elections in 17 constituencies’, *The Hindu*, (Online edition India 24 April 2009), available at <http://www.hindu.com/2009/04/24/stories/2009042455970100.htm> (last visited 13 October 2013).

¹⁵ ‘Lowest turnout in Chennai Central’, *The Hindu* (Chennai India 14 May 2009), available at <http://www.hindu.com/2009/05/14/stories/2009051458560300.htm> (last visited 13 October 2013).

¹⁶ Election Commission of India, ‘Report on the Fourth General Elections in India’ (1967), available at http://eci.nic.in/eci_main/eci_publications/books/genr/FourthGenElection-Vol-I-67.pdf (last visited 13 October 2013).

¹⁷ Working on the 2009 election campaign of the Member of Parliament from the Mumbai South constituency, the author had the opportunity to have political debates and discussions with several voters. Through the course of the campaign, she was able to analyse opinions of the electorate – an electorate which was not politically inclined but was politically aware and believed that its contribution was the vote that it cast once every five years. It was evident from her interactions that the citizens were reluctant to contribute in any other way.

Analysts often discuss this apathy, which is believed to be deep-rooted in the middle class, and political parties have done little to change it.¹⁸ A frequent complaint is that in many constituencies, the candidates are not promising and that the voters do not see any one political party as convincingly different.

This is coupled with the long standing misconception that ‘my one vote will make no difference.’¹⁹

The democratic election system, provided for by the architects of the Indian Constitution was not intended to deteriorate to the extent where the electorate was only making a choice between the ‘lesser of two evils’.

India is a country with a unique voting pattern. In India, the percentage of urban-rich and/or upper middle class voters is lower than that of the rural and/or urban poor. Here, the majority of voters come from the lower strata of society. In comparison, in the United States of America, it is primarily the urban voter that elects the President.²⁰ Therefore, an analysis of Indian elections requires an understanding of a varied kind.

The election system is based on the pattern in place since 1952. The occurrence of political socio-economic changes over time, have necessitated electoral reforms in several areas. These issues have been recognised and acknowledged both by the executive and the judiciary.

Today, India is a nation with a huge population of young voters forming almost 36 per cent of the electorate.²¹ With the *Sixty-first Constitution (Amendment) Act, 1988*, Rajiv Gandhi, the then Prime Minister of India, reduced the voting age from 21 years to 18 years. At that time, it

¹⁸ Rajesh Jain, ‘Elections 2009: Low Voting from Middle India’ (5 May 2009) *Emergic*, available at <http://emergic.org/2009/05/05/elections-2009-low-voting-from-middle-india/> (last visited 13 October 2013).

¹⁹ *Ibid.*

²⁰ Shashi Tharoor, *India, From Midnight To The Millennium And Beyond*, (3rd edn., Penguin Books, New Delhi, India, First published in 1997, Reprint 2007) 269 – 270.

²¹ See Mandakini Gahlot, ‘EC woos young voters’ *The Indian Express* (New Delhi India, 8 November 2008), available at <http://www.indianexpress.com/news/ec-woos-young-voters/383243/> (last visited 13 October 2013).

added 50 million people to the category that was eligible to vote.²² The scope of youth participating in political activities, voting and generating political debates was thus widened.

The Law Commission of India has prepared a Report on Electoral Reforms which is pending implementation and the Supreme Court of India addressed this issue in a judgment delivered in 2009 in a writ petition which had sought certain electoral reforms for the citizens of India.

On 26 May 1999, the Law Commission published its 170th Report which focused on electoral reforms. The need for these reforms were felt as, ‘...there has been a steady deterioration in the standards, practices and pronouncements of the political class, which fights the elections. Money power, muscle-power, corrupt practices and unfair means are being freely employed to win the elections. Over the years, several measures have been taken by Parliament to amend the laws relating to elections with a view to check the aforementioned forces.’²³

Of the several reforms suggested by the Law Commission, this Article seeks to analyse the effect of the implementation of Part VIII of the 170th Report, namely ‘An alternative method of Election’.

The Supreme Court of India, in the case of *People’s Union for Civil Liberties and Another v. Union of India and Another*²⁴ sent the matter of the proposed ‘alternative method of election’ to a Constitution Bench for its analysis and judgment as the judges believed that this question, ‘...needed a clear exposition of law by a Larger Bench.’²⁵ The 2013 *PUCCL* case is an outcome of the decision on this issue by a Full Bench of the Supreme Court of India.

²² Sanjoy Hazarika ‘India’s Lower House Passes a Bill Giving the Vote to 18-Year-Olds’, *The New York Times*, (New York USA, 16 December 1998), available at <http://www.nytimes.com/1988/12/16/world/india-s-lower-house-passes-a-bill-giving-the-vote-to-18-year-olds.html> (last visited 13 October 2013).

²³ Law Commission of India, ‘Report On The Reform Of Electoral Laws’, (Ch I), available at <http://www.lawcommissionofindia.nic.in/lc170.htm> (last visited 13 October 2013).

²⁴ (2009) 3 SCC 200.

²⁵ *Ibid.*

III. THE NOTION OF NEGATIVE VOTING

A. *The Concept*

In *Lily Thomas v. Speaker, Lok Sabha and Ors*²⁶, the Court elucidated the meaning of the term voting in the following words:

‘Voting is the formal action of will or opinion by the person entitled to exercise his right on the subject and issue in question. Right to Vote means right to exercise the right in favour or against the motion. Such a right implies the right to *remain neutral as well*’ (emphasis supplied).

‘Negative Voting’ is when a voter wants to cast a negative vote, that is, when the voter makes a choice to vote for none of the candidates contesting elections in his constituency. The voter, in this instance, registers a ‘negative vote’ which implies that he does not support any of the candidates listed on the ballot but still registers his vote. Along with recording his choice, the voter also protects his ballot from being misused by someone else. This has to be distinguished from a voter’s ‘right not to vote’ which means a voter refusing to exercise his franchise. This is also different from not voting at all where the voter does not come out and cast his vote, and thereby his vote gets added to the percentage of people who did not vote.

The concept of ‘negative voting’ is not novel. It is prevalent in several democracies across the world. Although it appears in different facets, it has not been implemented rigorously²⁷.

Countries across the world have adopted a system of ‘negative voting’. The United States of America, France, Spain, Colombia and Ukraine have ballots with the words ‘None of the Above’, ‘Against All’ and ‘Blank Vote’ provided as options. Russia followed the system of ‘Against All’ up until the year 2006.

²⁶ (1993) 4 SCC 234.

²⁷ See ‘Narendra Modi’s Law On Compulsory Voting Fails to Enthuse Election Commission’, *Daily News and Analysis* (Online edition India 22 December 2009), available at http://www.dnaindia.com/india/report_narendra-modi-s-law-on-compulsory-voting-fails-to-enthuse-election-commission_1326277 (last visited 13 October 2013).

In the United States of America, the State of Nevada²⁸ has implemented the 'None of the Above' (NOTA) option. However, this option can only be exercised in State elections and not for Presidential elections due to the subsequent consequences of the exercise of this option.

In several countries, voting is compulsory and the failure to vote is accompanied with different sanctions in different jurisdictions.²⁹ Australian citizens are fined monetarily for their failure to vote and the penalty can even include upto two days in jail.³⁰ In Cyprus, citizens failing to vote are fined 200 pounds; in Belgium, a citizen who fails to vote in atleast four elections within 15 years is likely to be disenfranchised and a citizen of Peru is unable to receive certain services in public offices upon the failure to vote³¹. Earlier in Greece, the sanctions could go to the extent that a non-voter may have difficulty in obtaining a new passport or a driver's licence, however, in practice today, the compulsory voting rules are of a mainly symbolic character and sanctions are not often applied against non-voters.³²

In 2009, as an epochal move, the Gujarat Assembly passed the Gujarat Local Authorities Laws (Amendment) Bill, 2009, which makes voting mandatory in local body polls in Gujarat and provides freedom to voters to cast their vote in favour of 'none of the candidates contesting elections'. The rules regarding negative voting were slated to be framed at a later stage.³³ This was the first such legislation to be initiated in the country.

²⁸ At <http://www.nota.org/lasvegasun.html> (last visited 13 October 2013).

²⁹ Scott Bennett, *Compulsory Voting In Australian National Elections*, Research Brief, Department of Parliamentary Services, Parliament of Australia, (31 October 2005), available at [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/06SH6/upload_binary/06sh63.pdf;fileType=application%2Fpdf#search=%22library/prspub/06sh6\)%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/06SH6/upload_binary/06sh63.pdf;fileType=application%2Fpdf#search=%22library/prspub/06sh6)%22) (last visited 13 October 2013).

³⁰ *Ibid*, 7.

³¹ See 'Compulsory Voting', at http://www.idea.int/vt/compulsory_voting.cfm (last visited 13 October 2013).

³² See 'Voter Turnout in Western Europe', Chapter 3, available at http://www.idea.int/publications/voter_turnout_weurope/upload/chapter%203.pdf (last visited 13 October 2013).

³³ 'Gujarat Assembly Passes Mandatory Voting Bill', *The Indian Express* (Online edition India 20 December 2009), available at <http://www.indianexpress.com/news/gujarat-assembly-passes-mandatory-voting-bill/556603/> (last visited 13 October 2013).

‘It is observed that due to low turnout of voters to discharge their duty by exercising their right to vote, the true spirit of the will of the people is not reflected in the electoral mandate,’ said the statement of objects and reasons of the Bill. The Chief Minister of Gujarat, Mr Narendra Modi, noted that 32 countries had made voting compulsory, leading to the voting percentages shooting up from 45 to over 90 percent.³⁴

Under this Bill, if a voter fails to exercise his franchise, the election officer will issue a notice to him seeking reasons. If a voter fails to reply within a month, or if the election officer is not satisfied with the reply, the voter will be declared a ‘defaulter voter’.³⁵

However, this Bill also faced certain hurdles. The Governor of the State of Gujarat returned the Bill unsigned citing three main objections to the Bill. First, that compulsory voting was a violation of Article 19 of the Constitution. Second, the punishment as a consequence of failing to vote was a violation of the fundamental freedoms of a citizen and third, the failure to implement compulsory voting across the world.³⁶ However, in September 2010, the Gujarat Government tabled this Bill in the Assembly again.³⁷

B. ‘Rule 49-O’

As of now, no central legislation contains binding provisions recognising the right of ‘negative voting’. A diluted form of this right has been recognised under the Conduct of Elections Rules, 1961. Rule 49-O reads as follows:

³⁴ Gopal Ethiraj, ‘Gujarat Bill Makes Voting Mandatory In Local Body Elections’, *Asian Tribune* (Chennai India 20 December 2009), available at <http://www.asiantribune.com/news/2009/12/20/gujarat-bill-makes-voting-mandatory-local-body-elections> (last visited 13 October 2013).

³⁵ *Ibid.*

³⁶ See ‘Gujarat Govt Sends Back Voting Bill’, *The Times of India* (Online edition India 18 April 2010), available at http://articles.timesofindia.indiatimes.com/2010-04-18/india/28130062_1_compulsory-voting-gujarat-local-authorities-laws-voting-bill (last visited 13 October 2013).

³⁷ See ‘Gujarat Govt Tables Compulsory Voting Bill Again’, *The Indian Express* (Online edition 08 September 2010), available at <http://www.indianexpress.com/news/gujarat-govt-tables-compulsory-voting-bill-again/678765> (last visited 13 October 2013).

‘Elector deciding not to vote – If an elector, after his electoral roll number has been duly entered in the register of voters in Form-17A and has put his signature or thumb impression thereon as required under sub-rule (1) of Rule 49L, decided not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.’

In a given case, it may happen that a voter at the polling station decides that he does not wish to cast his vote for any candidate and still his name may be entered on the register of voters. The provision enables a voter to record the fact that he has decided not to vote. Further, this record ensures that his vote is not misused. Hence, although the substantive right of negative voting exists as Rule 49-O³⁸, it needs to be implemented.

However, more importantly, Rule 49-O has a strong persuasive value which will play the role of making the political class aware and conscious of the required credentials that make a person eligible to be the representative of the people.

Democratic rules have weakened and the forms of checks and balances built into the existing system are not sufficient.³⁹ Candidates with criminal backgrounds contest elections freely, and some even contest elections while lodged in jail.⁴⁰ In the fourteenth Lok Sabha, startling statistics reveal that as many as 93 of the 545 members of the Lok

³⁸ See ‘The Power Of Negative Voting’, *The Indian Express* (Online edition India 28 September 2013), available at <http://www.indianexpress.com/news/the-power-of-negative-voting/1175466/1> (last visited on 13 October 2013).

³⁹ Different checks and balances exist in the provisions of the *Representation of People’s Act*, 1951. Some of the checks and balances are:

- i. S. 8 – Disqualification on conviction of certain offences
- ii. S. 8A – Disqualification on ground of corrupt practices
- iii. S. 9 – Disqualification for dismissal for corruption or disloyalty
- iv. S. 33 – Presentation of nomination paper and requirements for a valid nomination
- v. S. 75A – Declaration of assets and liabilities
- vi. S. 77 – Account of election expenses and maximum thereof
- vii. S. 121 – Payment of costs out of security deposits and return of such deposits
- viii. S. 125 – Promoting enmity between classes in connection with election

⁴⁰ This paper does not explore the recent judgment laid down by the Supreme Court of India on 10 July 2013, disqualifying Members of Parliament and Members of Legislative Assemblies, convicted for crimes punishable with a jail term of two years or more, from contesting elections.

Sabha were facing criminal charges. Of these only about 18 were facing innocuous charges, but the rest were quite serious including murder, attempt to murder, extortion, rape, and dacoity.

Just as muscle power through recruiting criminals facing serious charges of murder, chips away at the roots of democracy, money power can also stultify the growth of a vibrant democracy.⁴¹

The courts in our country have pointed out the grave consequences of permitting wealth and affluence to dominate the electoral process. In 1975, Justice Bhagwati had said that:

‘Democratic process can function efficiently and effectively for the benefit of the common good and reach out the benefits of self-government to the common man only if it brings about a participatory democracy in which every man, howsoever lowly or humble he may be, should be able to participate on a footing of equality with others’.⁴²

The exercise of Rule 49-O would be a step in remedying this effect to the extent that it may bring about an improvement in the quality of the candidates put up for elections by political parties. Rule 49-O is thus, a tool to ensure that better quality candidates contest elections.

Indian election campaigns are fought with election symbols, flags, party manifestos and offers of several incentives to the voters. We very often find candidates and political parties vying with each other, at the cost of blatantly breaching the Model Code of Conduct⁴³, to win votes. If Rule 49-O has to serve its purpose, the electorate needs to be made equally aware of its existence – albeit without posters, campaigns and incentives. In the light of the current demographics the implementation of this rule may be made legal but its effectiveness cannot be guaranteed.

⁴¹ ‘Redemocratising the Electoral system’ - The Fourth Rajaji Memorial Lecture in Chennai delivered by Shri.K. K. Venugopal, Senior Advocate, Supreme Court of India on April 4, 2009, *The Hindu* (Online edition India), available at <http://www.hindu.com/nic/electsyst.htm> (last visited 13 October 2013).

⁴² *Ibid.*

⁴³ ‘Model Code of Conduct for the Guidance of Political Parties and Candidates’ issued by the Election Commission of India, available at http://eci.nic.in/eci_main/Model_Code_Conduct.pdf (last visited 13 October 2013). The Commission has the power to disqualify a candidate if he/she denies to follow the Model Code of Conduct.

Within the Indian voting system, there is a conflict while exercising one's right not to vote. The *Representation Of The People Act, 1951* (RP Act) under section 128 provides for a secret ballot. As per the electoral provisions today, if a voter chooses not to vote, he must inform the Electoral Officer of his voting booth that he chooses not to cast a vote. By doing so, the voter loses his right to a secret ballot which strikes at the very foundation of our democratic electoral system. The *2013 PUCL case* remedies this issue wherein the judges conclude that this provision of Rule 49-O is *ultra vires* section 128 of the RP Act and violates Article 19(1)(a) of the Constitution of India. Apart from the issue of secrecy, Rule 49-O only allows the voter to record the exercise of his franchise as a decision not to vote. This vote does not get added to the percentage of votes polled or added to any calculations. Therefore, it is a lost vote, from which the protest that the voter actually wants to register is not visibly apparent. The exercise of such a right needed to be made clear to candidates and political parties – to show them that this is what the electorate thinks of them. The *2013 PUCL* judgment thus provides the electorate the option to vote for 'None of the Above' as an additional candidate on the Electoral Voting Machine itself, thereby making it possible to reflect the choice of the electorate.⁴⁴

Its persuasive value is also based upon the utopian assumption that political parties will not only take notice of the number of voters deciding not to vote for any of the candidates but also actually put up better candidates.

C. *The Law Commission's Recommendation*

A stronger and more potent variation of this right is provided for in the 170th Law Commission Report submitted to the Government in the year 1999. This Report was the Law Commission Report on electoral reforms and it suggested an 'alternative method of election' under Part VIII of the said Report.

Part VIII reads as follows:

'8.1 (a) no candidate should be declared elected unless he obtains at least 50% of the votes cast; (b) the ballot paper shall contain a column at the end which can be marked by a voter who is not

⁴⁴ *supra* n. 1, para 59.

inclined to vote for any of the candidates on the ballot paper, which is called hereinafter as 'negative vote'. (A voter can cast a negative vote only when he is not inclined to vote for any of the candidates on the ballot paper);

(c) for the purposes of calculating the fifty per cent votes of the votes cast, even the negative votes will be treated as 'votes cast';

(d) if no person gets 50% or more votes, then there should be a 'runoff' election between the two candidates receiving the highest number of votes;

(e) in the run-off election too, there should be a provision for a negative vote and even here there should be a requirement that only that candidate will be declared elected who receives 50% or more of the 'votes cast' as explained hereinabove;

(f) if no candidate gets 50% or more of the votes cast in the run-off, there should be a fresh election from that constituency.'

The Law Commission Report thus gives recognition to the 'negative vote' cast by the electorate. This is essential as only then will there be a value attached to such a protest vote.

In the said Report, the Law Commission has stated the objectives for implementing such a method as:

'This method is designed to achieve two important objectives viz.,

(i) to cut down or at any rate, to curtail the significance and role played by caste factor in the electoral process. There is hardly any constituency in the country where any one particular caste can command more than 50% of the votes. This means that a candidate has to carry with him several castes and communities, to succeed;

(ii) the negative vote is intended to put moral pressure on political parties not to put forward candidates with undesirable records i.e., criminals, corrupt elements and persons with unsavory backgrounds.'

The said recommendation though laudable, will result in run-off elections in a large number of constituencies as it sets a steep threshold of carrying 50 per cent of the voters of the constituency.

D. None of the Above: I Vote for 'Mr Nobody'

A more effective device in the hands of the electorate would be the 'None of the Above' option on the ballot⁴⁵, as adjudged by the Supreme Court in the 2013 *PUCL* case. Every ballot will now contain a 'None of the Above' option signifying that the voter chooses to reject every candidate contesting the election from his/her constituency. The judgment extends only to this modification with respect to the way in which the electorate will vote in the forthcoming elections to be held in 2014. It does not elaborate or identify the consequences of the 'None of the Above' option gaining the maximum number of votes and its subsequent impact on a constituency that votes thus.

Therefore, taking this alternate method of voting further is to consider the votes cast for the 'None of the Above' option as potentially being able to bring about immediate changes in the constituencies where this right has been exercised in the majority. The 2013 *PUCL* judgment explains that the outcome of the 'None of the Above' option will be to provide an opportunity to the elector to express his dissent/disapproval against the contesting candidates and will have the benefit of reducing bogus voting, which could thereafter, compel the political parties to nominate a sound candidate.

To give the 'None of the Above' option more weight to eventually bring about change in the quality of candidates that contest elections, it has been suggested that in the event that in any constituency, the 'None of the Above' option gets the maximum number of votes polled (not necessarily being 50 per cent plus one or more), there should be a fresh election in that constituency with new candidates. A necessary corollary to the rule is that if a contestant loses to the 'None of the Above' option then they become ineligible to contest in the *re-elections* held in the same constituency. This latter consequence is most important as it will form the strongest incentive for political parties and candidates to field more responsible candidates.

⁴⁵ The poll panel has recommended to the Union Government to include 'None of the Above' Option in EVMs- see P B Joychen, 'EC asks govt to include 'None of the Above' Option in EVMs', *The Times of India* (Jaipur India, 24 September 2009), available at <http://timesofindia.indiatimes.com/india/EC-asks-govt-to-include-none-of-the-above-option-in-EVMs/iplarticleshow/5048184.cms> (last visited on 13 October 2013).

In the event that a higher threshold is sought to warrant a fresh election, another option would be to provide for a fresh election only in the contingency that the 'None of the Above' option gets 50 per cent or more of the votes cast.

As India grows to become a democracy that is watched and followed globally, the importance of a knowledgeable and active electorate selecting eligible political leaders and representatives to Parliament is important. The right to negative voting is a tool for the implementation of the same. However, the main argument against the implementation of this right is that for a provision like 'None of the Above' to work, the electorate needs to be literate, aware and vigilant of the existence of such rights and the consequences of making a choice to vote for 'None of the Above'.

India has a literacy rate of only 74.4 per cent⁴⁶ and studies have shown that it is largely the rural population and the below poverty line people that vote in India.⁴⁷ In light of these known facts, the question is whether the electorate would do justice to this provision.

Another issue that is a hindrance in the implementation of this Rule is the fact that if the 'None of the Above' option gets the maximum number of votes polled then a re-election has to be held. In this re-election, none of the candidates who contested the election are eligible to re-contest from that seat. Therefore, the consequences of this provision are severe and thus the electorate needs to be cautious while making use of this right.

IV. JURISPRUDENCE OF A DEMOCRACY AND THE RIGHT TO VOTE

A Democracy is a government by the people; especially by the rule of the majority. It is a government in which the supreme power is vested in the people and exercised by them directly or indirectly

⁴⁶ See Census of India (Provisional Population Totals: India : Census 2011), available at <http://censusindia.gov.in/2011-prov-results/indiaatglance.html> (last visited 13 October 2013).

⁴⁷ *supra* n. 20.

through a system of representation usually involving periodically held free elections.⁴⁸

It is therefore imperative that people choose their representatives in Parliament. The *de jure* head of the State, the Prime Minister, is indirectly elected by the people of India. India is a sovereign democratic republic⁴⁹, and these provisions form a part of the basic structure of the Indian Constitution⁵⁰, thus making them permanent. No Act of Parliament can change this form of government in India.

India is one of the few countries that commenced the democratic process with equal voting rights for all citizens. Countries like the United Kingdom, France and the United States of America, initially discriminated by guaranteeing voting rights on the basis of property, gender, colour and creed. It was only in the year 1920, after 133 years of the existence of their Constitution, that the United States of America gave its female citizens the right to vote.

The founding fathers of our Republic conceived of representative parliamentary democracy as the polity most suited to India's ethos, sociocultural milieu and requirements. They envisaged equal participation of all the adult citizens in the democratic process without any discrimination. Selection of representatives of the people through Universal Adult Suffrage and free and fair elections was for them an act of faith. Universal Adult Franchise, granted under Article 326 of the Constitution⁵¹, was a bold and ambitious political experiment and

⁴⁸ Available at <http://www.merriam-webster.com/dictionary/democracy> (last visited 13 October 2013).

⁴⁹ The Preamble to the Constitution of India, reads, 'WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC...'

⁵⁰ *Keshavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

⁵¹ Article 326: Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage- The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this constitution or any law made by the appropriate Legislature on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

a symbol of the abiding faith that the founders reposed in the great masses of the country and in their innate wisdom.⁵²

The Right to Vote is an indispensable element of a democracy. Every citizen who has the right to vote should have a corresponding right *not* to vote for and also the right to *vote against* any of the candidates contesting the elections for reasons that he believes are justified.

Therefore, a citizen may choose the 'None of the Above' option because he does not believe in the system, the candidates, the parties contesting or the present political ideologies. In such a situation, a truly representative democracy must attempt to cater to the political viewpoints of as many citizens as possible. Only then will the results of the elections reflect the view of the majority.

A democratic form of government is created to accommodate all such conflicting view points. By providing Indian citizens with the right to vote for 'Mr Nobody' the democratic system which has survived since 1950, will only get stronger.

One of the main arguments against the implementation of this right is that the Right to Vote is not a Fundamental Right and that the Right not to Vote, therefore, cannot be a Fundamental Right either. It is argued that, this being the case, this right cannot be enforced through a writ petition in the Supreme Court of India. Those making this argument point out that the Right to Vote is a statutory (as opposed to a fundamental) right provided for under section 62 of the RP Act.⁵³

This was the main point of contention in the Supreme Court in the case of the *People's Union for Civil Liberties and Another v. Union of India and Another*.⁵⁴ In the counter-affidavit filed on behalf of the Union of India, the very maintainability of the writ petition was questioned on the ground that the petitioners have not claimed violation of any of their Fundamental Rights as enshrined in Part III of the Constitution. The stand of the Union of India was that the right of the elector to vote is

⁵² *supra* n. 3.

⁵³ Section 62- Right to vote- (1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of by any constituency shall be entitled to vote in that constituency.

⁵⁴ *supra* n. 24.

a statutory right and not a Fundamental Right and therefore, the writ petition filed under Article 32 cannot be entertained. The further case of the Union of India was that the right of an elector to vote does not include the right of negative voting and therefore, Rule 49-O cannot be dubbed as unconstitutional or *ultra vires* the provisions of section 128 of the Act.

This view was supported with reference to the case of *Kuldip Nayar v. Union of India*⁵⁵ wherein it was held that the right to elect and to vote can, at best be regarded as a statutory right available to an elector under the Act but the same cannot be treated as flowing from the right to freedom of expression as guaranteed under Article 19(1)(a) of the Constitution.

The Petitioners in this case have argued that the right of an elector to vote at an election in secrecy includes the right of negative voting *qua* all candidates and the Election Commission is duty bound to provide appropriate mechanisms in the Electronic Voting Machines for the effective exercise of this right. In this context, Rule 49-O was liable to be declared as unconstitutional as it violated the right of the electorate to vote in secrecy. Recognising this anomaly in the law, the recent judgment by the Supreme Court in 2013 *PUCL* case has concluded that along with providing the option to vote for 'None of the Above' on the Electronic Voting Machine, the election rules should be amended to follow the legal principles of section 128 of the RP Act, 1951 and Article 19(1)(a) of the Constitution of India.⁵⁶ Effectively, the Supreme Court ensured secrecy of the ballot along with the choice to vote for none of the candidates during an election.

The Supreme Court has already recognised the right of an elector to know the antecedents of the candidates and freely exercise his/her franchise as an integral part of the Fundamental Right guaranteed under Article 19(1)(a) of the Constitution.⁵⁷ Thus, there is no rationale to exclude the right of negative voting from the purview of that Article.

In *arguendo*, if we accept that the Right to Vote *per se* is not a Fundamental Right, the question is whether the right to choose

⁵⁵ (2006) 7 SCC 1.

⁵⁶ *supra* n. 1, para 61.

⁵⁷ *Union of India v. Association for Democratic Reforms* AIR 2002 SC 2112.

between two candidates is a Fundamental Right of Freedom of Speech and Expression⁵⁸. The right to make a selection of one's own choice, includes the right to choose a 'Mr Nobody' if the voter believes that no candidate is worthy of his vote. The jurisprudential question here is whether the Right to Vote includes the Right to Vote for 'Mr Nobody' which means voting for a 'None of the Above' option, and whether that is also a positive assertion of one's Fundamental Right to Freedom of Speech and Expression. Therefore, the right to choose 'Mr Nobody' is included in the right to choose itself and the right to choose would also include the right to reject.

V. CONCLUSION

Elections are the single largest exercise of democratic rights wherein citizens can actively participate. In India, the magnitude of this event arises from the fact, that there are over 700 million registered voters⁵⁹, making it the world's largest democracy. However, the essence of a true democracy lies in its representative character and not merely in its numerical strength. The deterioration in the quality of candidates, lack of choice, parties fielding candidates with questionable records has led to apathy among voters. In order to offer the electorate a positive alternative, the concept of negative voting should be introduced.

As discussed above, variants of the concept have been mooted by the 170th Law Commission Report and Rule 49-O. However, the implementation of the Law Commission Report poses a number of financial and logistical hurdles which will further burden the exchequer.

Importantly, Rule 49-O violated a voter's right to secrecy which was fundamental to the right of franchise. This issue was resolved in the *2013 PUCL* judgment. Nonetheless, there are still several issues relating to the right to negative voting that need to be addressed. The judgment does not consider the consequences of the option of 'None of the Above' being elected with the majority number of votes. The acceptance of this right is a positive step forward and the effects will be visible

⁵⁸ Article 19 of the Constitution of India.

⁵⁹ See Election Commission of India, Archive of General Elections (2009), available at http://eci.nic.in/eci_main/archiveofge2009/Stats/VOLI/05_StateWiseNumberOfElectors.pdf (last visited 13 October 2013).

during the sixteenth general elections that are likely to take place within the next year.

There are some recommendations from the Law Commission Report that can further effectively implement the right to negative voting through Rule 49-O while also simultaneously addressing their drawbacks. Therefore, the Supreme Court's approach to ensure a voter's right to secret ballot by including the 'None of the Above' option on the Electronic Voting Machines is a practical advancement.

The Law Commission Report additionally recommends that a re-election must be held if the winning candidate fails to secure 50 per cent of the votes polled. It is perceived that in the current scenario, the requirement of 50 per cent is far-fetched and impractical as it would result in a re-election in a large number of constituencies.⁶⁰ It is therefore suggested that where the 'None of the Above' option gets 50 per cent or more of the votes polled, indicating the total rejection of the candidates by the electorate, the election should be countermanded and a fresh election should be held, with new candidates contesting. If this is done, it would have a salutary effect on the political parties, who would no more rely upon history sheeters, gangsters and thugs, to wrest the seats through pressurising the voters in the constituency, so that gradually the system itself would be cleansed.⁶¹ The cost of its implementation is a small price for the exercise of a large-scale democratic right.

With every general election, the Indian electorate is becoming more mature. To keep pace with the growing awareness these reforms are required within the electoral system. Not only does the right of negative voting make politicians conscious of their own credentials, but it also gives the voters an option to reject unworthy candidates, thereby enhancing their democratic rights. The 2013 *PUCL* judgment is therefore a step in the right direction.

⁶⁰ Many of the candidates who win the elections do not get 50 per cent or more of the total votes polled. Sometimes this is due to the fact that many candidates contest from the same seat and therefore votes get divided, making it difficult for any one candidate to get more than 50 per cent of the votes polled- *see* Election Commission of India, 'General Elections, 2009 (15th Lok Sabha), Constituency Wise Detailed Result', *available at* http://eci.nic.in/eci_main/archiveofge2009/Stats/VOLI/25_ConstituencyWiseDetailedResult.pdf (last visited 13 October 2013).

⁶¹ *supra* n. 41.

The need for this right has also been endorsed by academicians across the country.⁶² Even the Election Commission, in a letter dated 10 December 2001,⁶³ has advocated in favour of the elector's right of negative voting. Therefore, let us now hope that the statement that 'the death of democracy is not likely to be from ambush but will be a slow extinction from apathy, undernourishment' does not come true.⁶⁴

Scholars have always contemplated as to how India survives with so many contradictions. It is with the fortification of these rights that India survives.

⁶² Soli J Sorabjee (Former Attorney General of India), 'The Right of Negative Voting', *The Indian Express*, (Online edition India 01 March 2009), available at <http://www.indianexpress.com/news/right-of-negative-voting/429335/1> (last visited 13 October 2013).

⁶³ In its letter to the Law Ministry, the Commission advocated in favour of the electors' right of negative voting and stated that Rules 41 and 49-O of the Rules were violative of Articles 19(1)(a) and 21 of the Constitution and Section 128 of the Act (Representation of the People Act, 1951) in as much as the provisions contained therein violate secrecy of the vote and voter.

⁶⁴ *supra* n. 41.

TERRORISM: ITS IMPLICATIONS FOR HUMAN RIGHTS[†]

*Samane Hemmat**

I. INTRODUCTION

‘If only there were evil people somewhere insidiously committing evil deeds and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being, and who is willing to destroy a piece of his own heart?’

Alexander I Solzhenitsyn

Have our God-given rights as human beings been perverted to such extremes that they are now to be determined by a sudden resurgence of ancient savagery, by irrationally dedicated antisocial elements who, based on a fundamentally wrong belief system, harbour the delusion that they are embarked on a heroic mission? Under a climate of fear, Governments around the world have been taking measures to secure the nation while infringing the basic non-derogable human rights of the population. Subtle measures introduced in the form of new legislation or amendments to existing legislation have also limited certain lesser rights such as the right to privacy, freedom of expression and information. In order to formulate better counter-terrorism policies, it is important that we understand the problem of terrorism better. This will enable the formation of policies that are not only effective, but also take into account the need for balancing human rights and civil liberties while protecting national security.

This article analyses both patent and subtle human rights violations by Governments. Part II of the article analyses definitions of terrorism

[†] This article reflects the position of law as on 14 October 2013.

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under various national legislations. Part III discusses patent and subtle derogations from and limitations to the concept of human rights in light of stringent measures taken in order to suppress terrorism. Finally, in Parts IV and V, the author explores the legality and morality of different approaches adopted by Governments to counter terrorism and focuses on those methods which permit a civilised fight against terror.

II. DEFINING TERRORISM

The stark reality of the world we live in today, however clichéd it may sound is that, ‘One man’s freedom fighter is another man’s terrorist’.¹ This captures the ambiguity, politicisation, moral judgment, and high stakes involved in defining terrorism.² The search for an accepted definition of terrorism in international law has been described as resembling ‘the Quest for the Holy Grail’.³ This lack of a clear definition hinders the international communities’ effective coordination in combating it.

The League of Nations first attempted to arrive at an internationally acceptable definition of terrorism, but its 1937 *Convention for the Prevention and Punishment of Terrorism* never came into existence.⁴ At least 109 possible definitions have been put forward between the period of 1936 and 1981.⁵ The Security Council (SC) passed several resolutions condemning acts of terrorism and imposed a wide range of obligations on States to prevent and suppress terrorist actions. In the past, thirteen international conventions that criminalised particular activities related to terrorism were extended based on an international consensus on terrorism. Examples include the *U.N. International Convention against*

¹ Michael Freeman, *Freedom or Security: The Consequences for Democracies Using Emergency Powers to Fight Terror*, (1st edn. Praeger Publications Westport CT 2003) 25.

² *Ibid*, 25.

³ G Levitt, ‘Is ‘Terrorism’ Worth Defining?’ (1986) 13 *Ohio Northern University Law Review* 97.

⁴ ‘Is God A Terrorist?, Definitional Game-Playing By The Coalition Of The Willing’ (12 January 2004), *laetus in praesens*, available at <http://www.laetusinpraesens.org/docs00s/godact.php> (last visited 14 October 2013).

⁵ ‘Progress Report on the Promotion and Protection of Human Rights,’ (Kalliopi K. Koufa, UN Special Rapporteur on Terrorism and Human Rights, 2001) (UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001) 8.

*the Taking of Hostages (1979), International Convention for the Suppression of Terrorist Bombings (1997), and the International Convention for the Suppression of Terrorist Financing (1999). Security Council Resolution 1566 of 2004 was a particularly strong step taken by member nations towards codifying international law concerning acts of terrorism. It defines terrorism to include: '[C]riminal acts, including [those] against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a Government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature...'*⁶

There have also been several generic definitions of terrorism promulgated by regional organisations. For instance, the League of Arab States in 1998 adopted the *Arab Convention on the Suppression of Terrorism*, which sets forth a definition for terrorism.⁷ Amnesty International outlined several concerns with the definition put forth by the Arab Convention, including that the term violence is not defined or qualified and that the use of the term threat may allow the labelling of those that have not committed violence but who are seen as a threat to the State—including legitimate political opponents—to be considered terrorists.⁸ A similar critique was made of the definition set out in the

⁶ Andrew Eastman, 'Policywatch' (2005) *Jihad Watch*, at <http://www.jihadwatch.org/2005/01/philippines-arrestsjihadists-over-plot-to-bomb-catholic-procession.html> (last visited 14 October 2013).

⁷ Article 1(2) *Arab Convention on the Suppression of Terrorism*, (adopted on 22 April 1998, entered into force 7 May 1999) (unofficial translation from Arabic by the UN translation service, available at https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf).

⁸ Helen Duffy, *The "War On Terror" and The Framework of International Law* (1st edn. Cambridge University Press New York 2005) 27, available at <http://books.google.co.in/books?id=gfaTNDaCp4YC&printsec=frontcover&dq=The+'War+on+Terror'+and+the+Framework+of+International+Law+&hl=en&sa=X&ei=pkdcUu7xCtGxrAeeloGwBQ&ved=0CDgQ6AEwAA#v=onep&q=The%20'War%20on%20Terror'%20and%20the%20Framework%20of%20International%20Law&f=false> (last visited 14 October 2013).

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 2001 (USA PATRIOT Act) adopted by the United States of America after the September 11 attacks. The *USA PATRIOT Act* defines terrorism as ‘...acts dangerous to human lives that are a violation of the criminal laws of the United States or of any State’. The phrase ‘acts dangerous to human life’ can be interpreted in a wide variety of ways. Acts of civil disobedience or those between demonstrators and police officers, whether violent or entirely non-violent, could be construed as acts ‘dangerous to human life’ and in ‘violation of the criminal laws’. Most activists be it environmental activists, anti-globalisation activists or anti-abortion activists who use direct action to further their political agendas are particularly vulnerable to prosecution as domestic terrorists.⁹ Predictably, human rights concerns have been raised over much of the legislation passed post September 11.

Similarly, the United Kingdom’s definition of terrorism according to the British Government’s *Prevention of Terrorism (Temporary Provisions) Act of 1989*, is vague and open to multiple interpretations. It states that ‘the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear’.¹⁰ This definition can also be applied to Greenpeace activists who could be interpreted as ‘putting the public or any section of the public in fear’.¹¹ Furthermore, section 1(b) and 1(c) of the *Britain’s Terrorism Act, 2000* defines terrorism as the ‘use or threat of action designed to influence the Government¹² or to intimidate the public or a section of the public and for the purpose of advancing a political, religious or ideological cause’. This definition too, has been criticised as being too general and too inclusive. In 2008, the *Counter-Terrorism Act* (the Act)

⁹ Nancy Chang, *Silencing Political Dissent: How Post-September 11 Antiterrorism Measures Threaten Our Civil Liberties* (1st edn. A Seven Sisters Stories Press Canada 2002) 45.

¹⁰ *Prevention of Terrorism (Temporary Provisions) Act, 1989*, section 20(1)(c), available at www.legislation.gov.uk/ukpga/1989/4/section/20/enacted (last visited 14 October 2013).

¹¹ Nozima Kamalova, ‘The War On Terror and its Implications for Human Rights in Uzbekistan’ (2007) Occasional Paper #296, available at www.wilsoncenter.org/topics/pubs/OP296.pdf. (last visited 14 October 2013).

¹² Section 34 of the *Terrorism Act, 2006* amended sections 1(1)(b) and 113(1) (c) of *Terrorism Act, 2000* to include ‘international Governmental organisations’ in addition to ‘Government’.

was passed which amended the definition of terrorism by inserting a reference to a racial cause.¹³ The Act passed contained various contentious provisions such as, removal of the prohibition on postcharge questioning, longer terrorism sentences and powers to seize the assets of convicted terrorists. ‘The most controversial provision to remain on the Bill, when it was introduced, was a proposal to amend the *Terrorism Act, 2000* to create a so-called ‘reserve power’ for the Home Secretary to extend the maximum period of pre-charge detention in custody for individuals suspected of terrorism-related offences from 28 to 42 days. The Government justified the move stating that they were facing an unprecedented threat from terrorism.’¹⁴ This provision was excluded from the final Act, rightly so, as it risked undermining the presumption of innocence, the right to silence and the privilege against self-incrimination. It also increased the risk of oppressive or coercive questioning.

Proposals to extend detention without charge in anti-terrorism legislations result in the surrender of certain essential liberties, but do not simultaneously guarantee any additional or even temporary safety, making us less and not as it would have us believe, safer.

Indian Law, as under the *Prevention of Terrorism Act of 2002* (POTA) is even less precise in defining what exactly constitutes an act of terrorism. Terrorism has been defined ‘as any violence with intent to threaten the unity, integrity, security, or sovereignty of India or to strike terror in the people or any section of the people...’¹⁵ The law also imposes a minimum five-year sentence on ‘[w]hoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act...’¹⁶ Apprehension over this definition arose because of the use

¹³ See Counter-Terrorism Bill 2007-08, available at <http://www.legislation.gov.uk/ukpga/2008/28>(last visited 14 October 2013).

¹⁴ ‘Counter Terrorism Act, 2008, To Make Further Provision About The Detention And Questioning Of Terrorist Suspects’, (2009) *The Guardian*, available at <http://www.guardian.co.uk/commentisfree/libertycentral/2009/jan/19/counterterrorism-act> (last visited 14 October 2013).

¹⁵ *Prevention of Terrorism Act, 2002*, section 3(1).

¹⁶ *Prevention of Terrorism Act, 2002*, section 3(3).

of the words ‘advocates’ and ‘incites,’ as they implicated issues of free speech and political expression. Further, the Act defined terrorist acts in such generalised terms that it encompassed ordinary cases of murder, robbery, theft, and other comparable offences. Therefore, mere criminals who fell in the purview of the definition could be subject to improperly severe penalties and overzealous law enforcement officials attempting to circumvent constitutionally mandated procedural safeguards.¹⁷ In this manner, under the rubric of terrorism POTA created broad new crimes.

It seems likely that the definition of terrorism as envisioned by the various national legislations as well as international instruments has been deliberately left vague. While one may be tempted to lean in favour of the interpretation that this has been done with a purpose to include even a possibly innocent person suspected of certain activities which may fall within such definitions, the more reasonable interpretation would be that all possible acts which may cause terror or are similar to activities linked to terrorism may be included within the scope of such definitions. Furthermore, a broad definition allows investigative and enforcement agencies to respond swiftly and with certainty to terrorist threats in the knowledge that the scenario they are faced with falls within a general category of ‘terrorist acts’.

However, concern does arise due to the internationally acclaimed practice of granting a certain leeway to States while dealing with terrorism. A State may thus substantially take advantage of the existence of a vague definition of terrorism and prosecute any person(s), which it may wish to deem ‘terrorist’. Therefore, there is an express need for an internationally accepted definition of terrorism, which must be applicable to all nations, and consequently, the scope for abuse becomes limited.

III. HUMAN RIGHTS AND THE PRICE OF SECURITY

A new age of terrorism has dawned upon us where acts of terrorism are no longer an unforeseen possibility. Among the first of the terror attacks of more recent decades were the hijackings of international airliners

¹⁷ Christopher E. Gagné ‘POTA: Lessons Learned from India’s Anti-Terror Act’ (2005) 25(1) *Boston College Third World Law Journal* 269, available at http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bctwj/25_1/09_TXT.htm (last visited 14 October 2013).

at the beginning of the 1970s, the assault on the Olympic Games in Munich in 1972, the kidnapping of OPEC (Organisation of Petroleum Exporting Countries) Ministers, the September 11 attack on the World Trade Centre in New York, the bombings of London in 2005 and the 2007 Glasgow International Airport attack. Similar acts of terrorism have also punctuated recent Asian history.¹⁸ For instance, in India, there has been a steady rise in Islamist terrorism over the course of the 1980s and 21st century. The major terrorist incidents in India include the 1993 Mumbai bombings, the 2001 Parliament attack, 2005 Ram Janmabhoomi attack in Ayodhya, 11 July 2006 Mumbai train bombings, and most recently the 26 November 2008 Mumbai attacks.

In the months that followed the September 11 attacks on the World Trade Center, the global response to terrorism has escalated, in terms of being more dramatic, and sometimes being undertaken with a sense of panic or emergency. These close to panic reactions could have serious implications for international and human rights law, as well as humanitarian law.¹⁹ It is essential to distinguish derogations from limitations to human rights, and although gross violations of human rights are seen as a necessary effect of most counter-terrorism measures, those measures invoked which only have an impact on human rights, should not be looked upon as violations but merely as limitations on human rights.

A. Patent Human Right Violations

The right of every human being not to be killed is the basis of all human right guarantees, and if this 'Right to Life' is not respected, other rights and freedoms can no longer be effectively exercised and in fact become redundant. There can be no derogation from the right to life, under any circumstances, even in cases of emergency.²⁰ The Right

¹⁸ David Fouquet, 'Defining Terrorism And Its Implications On Human Rights' (11 September 2002) *European Institute for Asian Studies*, available at <http://www.eias.org/conferences/euasia911/euasia911fouquet.pdf> (last visited 14 October 2013).

¹⁹ 'Progress Report on the Specific Human Rights Issues: New Priorities, In Particular Terrorism,' (Kalliopi K. Koufa, UN Special Rapporteur on Terrorism and Human Rights, 2001) (UN Documents E/CN.4/Sub.2/2002/35, 17 July 2002), paras 59 and 63.

²⁰ Article 3 of the *Universal Declaration of Human Rights*, Article 6 of the *International Covenant on Civil and Political Rights*, Article 2 of the *European Convention*, Article 4 of the *American Convention* and Article 4 of the *African Charter of Human and People's Rights*.

to Life prohibits arbitrary deprivation of life (summary or arbitrary executions) on the one hand and, on the other, it sets the conditions in which the death sentence can be applied in countries that have not yet abolished it. The United Nations Committee on Human Rights expressed concern about the use of weapons by combatants against persons presumed to be terrorists, which caused a large number of deaths.²¹ According to the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘Empowering Governments to identify and kill “known terrorists” places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited “exception” to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others.’²² This exception creates a smoke screen rendering ineffective, any accountability mechanisms that may have otherwise constrained or exposed such illegal action under either humanitarian or human rights law.²³

Another non-derogable right is the right of a person not to be deprived of his liberty and to be treated with humanity and respect for the inherent dignity of the human person. In this context, the Right to Habeas Corpus enables persons to protect their personal freedoms and contest the legality of their detention if arrested or detained by a State without a legitimate motive, ie arbitrarily.²⁴ The European Court of Human Rights pointed out that the special nature of the anti-terrorism activities did not release States from judicial control and that the State was not free to arrest suspects without applying judicial procedure.²⁵ The Court explained that even in cases where national security is at stake,

²¹ *International Covenant of Civil and Political Rights* (adopted 31 August 2001) CCPR/C/21/Rev.1/Add.11, 1.

²² ‘Extrajudicial, Summary or Arbitrary Executions’, (Philip Alston, Special Rapporteur, 2004) (E/CN.4/2005/7, 22 December 2004) para 41.

²³ *Ibid.*

²⁴ Article 9 and article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; *European Convention on Human Rights* (ECHR) (adopted on 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

²⁵ *Ocalan v. Turkey* 46221/99 (2003) ECHR 125, para 106, available at <http://www.unhcr.org/refworld/docid/3e71a9d84.html> (last visited 14 October 2013).

in a democracy, the concepts of lawfulness and rule of law require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake, or the executive's assessment of what poses a threat to national security. An independent authority must be able to react in cases where invoking the concept of 'national security' has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary. Failing such safeguards, the police, or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.²⁶ On the other hand, there seems to be a tendency towards a denial of the absolute need for prohibition of cruel, inhuman, and degrading treatment by States coupled with the reemergence of the utilitarian point of view, which justifies the use of torture as part of the fight against terrorism.

In the United States, the September 11 attacks gave rise to the counter-terrorism spiral, where Governments everywhere, for motives good or bad, began restricting rights or enforcing existing laws more harshly, thereby reducing the freedoms people used to enjoy. Hence, even for those not directly affected by Al Qaeda's attacks, the war in Afghanistan or the anti-terrorist measures taken almost everywhere, the future has come to be seen as an *annus miserabilis* as far as freedom is concerned.²⁷

Under the umbrella of 'war on terror' special military commissions, which have jurisdiction to impose the death penalty, are set up. They follow a secret procedure, without any right of appeal for the defendant and it is the President himself who has the discretionary power to decide the prosecution of a person by these special commissions, solely

²⁶ *Al-Nashif v. Bulgaria* (20 June 2002), ECHR, paras 94, 123-124 available at <http://www.unhcr.org/refworld/docid/468cbc9d0.html> (last visited 14 October 2013).

²⁷ 'For Whom The Liberty Bell Tolls', *The Economist* (United States, August 29, 2002) 11, available at http://www.economist.com/node/1301751?story_id=1301751 (last visited 14 October 2013).

on the basis of suspicion.²⁸ It is ironic that the US claims a right under the laws of war to detain certain people for the duration of an armed conflict, but denies them the right of hearing. Therefore, under the law of armed conflicts, there is a considerably greater risk of sentencing innocent people in secret. On the other hand, if law enforcement rules are used, a mistaken arrest can be rectified at a public trial. However, in the present scenario, the Government is never obliged to prove a suspect's guilt, and a supposed terrorist can be held potentially for life. If the supposed terrorist is killed, the consequences can be even greater, if it is later discovered that he was innocent.²⁹ Countless lives have been destroyed by American forces arresting innocent Afghans and sentencing them to the Guantanamo Bay Detention Camp. Such was the case of Mohammed Akhtiar who was in fact targeted inside and outside prison by Al Qaeda and Taliban backers for supporting an American backed Government in Afghanistan.³⁰ Such mistakes are inevitable in the case of a traditional battlefield, where quick life-and-death decisions must be made. But when there is no such urgency, prudence and humanity dictates applying law enforcement rules.³¹ United States drones massacre hundreds of innocent Afghans, Iraqis, and Pakistanis with the hope that few suspected terrorists might also be stopped. One of the most glaring examples of the United States disregard for Human Rights is the Guantanamo Bay Detention Camp. The situation in Guantánamo Bay was described by Amnesty International as a 'human rights

²⁸ 'Counter-Terrorism versus Human Rights: The Key to Compatibility' (Analysis Report October 2005) 10, *available at* www.fidh.org/IMG/pdf/counterterrorism429a.pdf (last visited on 14 October 2013).

²⁹ 'Human Rights Watch World Report 2004', Human Rights And Armed Conflict (2004) 185,186, *available at* http://books.google.co.in/books?id=z6rNVggYKjAC&printsec=frontcover&dq=World+Report+2004&hl=en&ei=hWEtTNCFHtCHkAXT5Nlb&sa=X&oi=book_result&ct=book-thumbnail&resnum=1&ved=0CDIQ6wEwAA#v=onep&q&f=false (last visited 14 October 2013).

³⁰ Tom Lasseter, 'Day 1: America's Prison For Terrorists Often Held Wrong Men', *McClatchy Newspapers*, (United States of America, 15 June 2008), *available at* <http://www.mcclatchydc.com/detainees/story/38773.html> (last visited 14 October 2013).

³¹ Kenneth Roth, 'The Law of War in the War on Terror' (2004) *Foreign Affairs Magazine*, *available at* <http://www.foreignaffairs.com/articles/59524/kenneth-roth/the-law-of-war-in-the-war-on-terror> (last visited on 14 October 2013).

scandal' and rightly so.³² It has been referred to as 'the Gulag of our times'. The UN Committee Against Torture in May 2006, condemned prisoners' treatment at Guantanamo Bay, declaring that indefinite detention constitutes per se a violation of the UN Convention Against Torture, and called on the United States to shut down the Guantanamo facility.³³ The same view was expressed by the European Parliament when it supported in 2006 a motion urging the United States to shut down the camp.³⁴ The US detention policies followed in Guantanamo were counter-productive fuelling support for extremist Islamist groups where most detainees went home far more militant than when they arrived. Since the beginning of the war in Afghanistan as on October 7, 2001, approximately 775 detainees have been brought to Guantanamo and 420 have been subsequently released without charge. As of August 2013, 164 detainees remain in Guantanamo.³⁵ A number of children have also been interned at Guantanamo Bay, in contravention of international law.³⁶ The Taguba study³⁷ noted that more than sixty per cent of the civilian inmates at the notorious Abu Ghraib prison in Iraq were deemed not to be a threat to society, which should have enabled their release.

³² 'Guantánamo Bay - A Human Rights Scandal' *Amnesty International USA Human Rights*, available at <http://www.amnesty.org/en/library/asset/AMR51/159/2006/en/4c5dfe9f-d3e6-11dd-8743-d305bea2b2c7/amr511592006en.html> (last visited 14 October 2013).

³³ UN Committee Against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention' (2006) (CAT/C/USA/CO/2PDF), available at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_05_06_torture.pdf (last visited 14 October 2013).

³⁴ See <http://news.bbc.co.uk/2/hi/americas/5074216.stm> (last visited 14 October 2013).

³⁵ Carol Rosenberg, 'U.S. Sends Two Algerians Prisoners Home From Guantánamo' *The Miami Herald*, at <http://www.miamiherald.com/2013/08/29/3593270/us-sends-two-algerians-prisoners.html> (last visited 14 October 2013).

³⁶ Jo Becker, 'The War on Teen Terror', *Human Rights Watch* (New York, United States of America June 24, 2008), available at <http://www.hrw.org/en/news/2008/06/24/war-teen-terror> (last visited 14 October 2013).

³⁷ Maj. Gen. Antonio M. Taguba, 'Article 15- 6 investigation of the 800th Military Police Brigade' (2004), available at http://www.npr.org/iraq/2004/prison_abuse_report.pdf (last visited 14 October 2013).

In the United Kingdom the shoot-to-kill policy, also known as Operation Kratos adopted by the British police has terrorised not only the Muslim community, but the Asian, Indian and all other minority communities in Britain. A Brazilian national Jean Charles de Menzes was shot in the head eight times in close range by the police at Stockwell tube station in London, England.³⁸ Metropolitan Police officers claimed that they misidentified him as a suicide bomber about to explode a device on the London Underground.

India also has its own little Gitmos across the country whose existence is not openly admitted, as it would result in pressure from human rights activists, bad publicity and international censure. Suspects who have spent time in these places had no idea where they were as they were taken blindfolded and allowed no visitors. Extreme physical and psychological torture, based loosely on the regime in Guantanamo Bay, is used to extract information from detainees.³⁹

Several instances of grave human right violations by illegal detention and arbitrary killings of innocent victims have been brought to light.⁴⁰ The nation's safety must not be compromised, but torture becomes questionable when innocent children are subjected to it, especially in the light of officials in the Intelligence Bureau defending it as the only most effective way to gather intelligence.⁴¹

B. *Subtle Human Right Violations*

A defining characteristic of human rights is its dynamism. It is a concept, which is a product of its time and is a true reflection of the process of continuity and change. Prior to the 1940s, the term 'human

³⁸ 'Police Shoot Man At Underground Station' (2005) *Reuters*, available at http://today.reuters.co.uk/news/newsArticle.aspx?type=topNews&storyID=2005-0722T102941Z_01_SCH145033_RTRUKOC_0_SECURITYBRITAIN.xml (last visited 5 October 2009); See also 'Man Shot Dead By Police On Tube' (2005) *BBC News*, available at http://news.bbc.co.uk/2/hi/uk_news/4706787.stm (last visited 14 October 2013).

³⁹ Anupam Dasgupta and Syed Nazakat 'India's Secret Torture Chambers', *The Week*, (India 14 July 2009), available at syednazakat.wordpress.com/2011/02/04/indias-secret-torture-chambers/ (last visited 14 October 2013).

⁴⁰ *Ibid.*

⁴¹ *supra* n. 39.

rights' was rarely used: there was no sustained international movement in its name nor were there any non-governmental organisations (NGOs) with the global reach to defend its principles. Now scholars and activists have categorised and compartmentalised human rights. One instance of this is French jurist Karel Vasak's notion of 'three generations of human rights' which comprises of *liberté*- first generation of civil and political rights, *égalité*- second generation economic, social and cultural rights and lastly *fraternité*- third generation of the newly called solidarity rights.⁴² In recent years, the concept of privacy has come under the ever-expanding definition of human rights, as the concept has expanded to include a whole range of assaults on the individual and has been equated with the idea of liberty. 'The right to privacy is a basic principle of all human rights instruments. The right to privacy aims at protecting the right to private and family life, a home and communications, by prohibiting arbitrary or unlawful interference or intermeddling by public authorities.'⁴³ The right to privacy is related to the right of freedom of expression, the freedom of assembly, the freedom of movement, the freedom of thought, the freedom of religion and protection of unlawful attacks on a person's honour and reputation. Hence, the absence of right to privacy inevitably leads to the absence of freedom. Nonetheless, the right to privacy is not an absolute right.⁴⁴ With respect to the fight against terrorism 'special' methods of investigation have been developed such as the processing of files with personal data. In fact, the principal treaties on human rights do not mention personal data in their articles. However, the Commission on Civil Liberties, Justice and Interior Affairs of the European Parliament has considered that this area was covered by the right to private and

⁴² Hidetoshi Hashimoto, *The Prospects for A Regional Human Rights Mechanism in East Asia* (Routledge United States of America 2004) 60, available at http://books.google.co.in/books?id=5Ii5sU2apksC&printsec=frontcover&dq=The+prospects+for+a+regional+human+rights+mechanism+in+East+Asia&hl=en&ei=2I4yTNeMOtG_rAefyaHHBA&sa=X&oi=book_result&ct=result&resnum=1&ved=0CC8Q6AEwAA#v=onep&q&f=false (last visited 14 October 2013).

⁴³ Article 17 *ICCPR*, Article 8 para. 1 ECHR and Article 11 para. 2 ECHR.

⁴⁴ Article 17 of the *ICCPR* permits interference with a person's private life by public authorities if it does not constitute 'arbitrary or unlawful' interference. Similarly, Article 8 of the ECHR allows departures from the law, if necessary 'in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

family life.⁴⁵ There are also certain Conventions and Charters which impose restrictions on the processing of personal data.⁴⁶ The ECHR in the *Rotaru case*⁴⁷ affirmed unequivocally for the first time that Article 8 of the Convention offered protection as regards the processing of personal data, irrespective of whether this data was ‘personal’ or not, ie even if the data gathered on an individual is concerning activities which he/she had voluntarily made public or of which he/she had, in any case, not intended to protect the confidentiality. However, the use of personal data for compiling ‘terrorist profiles’ on the basis of characteristics such as nationality, religion, age, education, place of birth, psycho-sociological characteristics or marital status is certainly arbitrary. Incorrect profiling results in innocent people being subjected to arbitrary interrogations, travel restrictions, surveillance, or security alerts. Hence, though terrorist profiling might be necessary there is a need for setting up rules and regulations for such activities.

Another important human right is that of freedom of expression and information which is a key element of any democratic society.⁴⁸ It is recognised as a human right under various international instruments.⁴⁹ Article 19 of the ICCPR ‘includes within the right to freedom of expression, the freedom to seek, receive and impart information and ideas of all kinds’ in contrast with the *European Convention* that does not cover the right to ‘research’ information. Nevertheless, the ECHR attributes great importance to the Right to Information in its jurisprudence. As far as Article 10 in its entirety is concerned, the Court attributes a special status to it when it says that it ‘constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man’.⁵⁰ In general

⁴⁵ European Parliament on Citizen’s Freedoms and Rights, Justice and Home Affairs, ‘Freedom, Security and Justice: An Agenda for Europe’, available at http://www.europarl.europa.eu/comparl/libe/elsj/charter/art14/default_en.htm (last visited 14 October 2013).

⁴⁶ As an example, see the *Convention on the Protection of Persons* as regards the automated processing of personal data (S.T.E., No. 108), signed in Strasbourg on 28 January 1981 and Article 8 of the *Charter of Fundamental Rights of the European Union*.

⁴⁷ *Rotaru v. Romania*, Application no. 28341/95.

⁴⁸ *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

⁴⁹ *Universal Declaration of Human Rights*, the ICCPR as well as the European, Inter-American and African regional human rights law.

⁵⁰ *Handyside v. Royaume-Uni*, European Court of Human Rights, November 1976.

terms, the freedom of expression comprises of the right to information, ie receiving and disclosing information in all cases. The freedom of information is, in fact, crucial for the enjoyment of the freedom of expression and 'Implicit in freedom of expression is the public's right to open access to information and to know what Governments are doing on their behalf, without which truth would languish and people's participation in Government would remain fragmented'.⁵¹

The Inter-American Commission on Human Rights has argued that some erosion of the right to freedom of expression may prove necessary in combating terrorism, in the interest of 'protecting public order or national security'.⁵² The scope of freedom of expression is generally limited by hostile speech across the board.⁵³ In fact, most aspects of the freedom of expression such as the right to express oneself or to research, gather or pass on information are all affected in the fight against terrorism. The fight against terrorism has always incited certain States to adopt legislation authorising Government interference with the media to check terrorism jeopardising secrecy of journalist sources, both directly by restricting witnesses from cooperating in investigations linked to terrorism and indirectly, by extending the Government's powers of surveillance and investigation. Others put pressure on journalists in order to prevent them from voicing criticism and to stop them from going to prisons, trials or to war zones or to restrict their access to them. But 'a line that is difficult to draw is the one between support of terrorism and support for the cause which has produced terrorists among its supporters who may find it difficult if not impossible to support the authorities against the terrorists on their own side'.⁵⁴

⁵¹ Joint Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression under the auspices of Article 19 (26 November 1999), available at <http://www.article19.org/data/files/pdfs/igo-documents/three-mandates-dec-1999.pdf> (last visited 14 October 2013).

⁵² International Federation for Human Rights, Analysis Reports, 'Counter-Terrorism versus Human Rights: The Key to Compatibility' (October 2005), available at <http://www.fidh.org/IMG/pdf/counterterrorism429a.pdf> (last visited 14 October 2013).

⁵³ Article 20 of the ICCPR; Article 10 (2) of the *European Convention*; See also *Sürek v. Turquie*, European Court of Human Rights, 8 July 1999.

⁵⁴ John Hedigan, 'The European Convention on Human Rights and Counter-Terrorism', 28 *Fordham Int'l L.J.* 392 (2004), available at <http://ir.lawnet.fordham.edu/ilj/vol28/iss2/5> (last visited 14 October 2013).

1. United States of America

In the wake of the September 11 attacks, the United States introduced legislative and administrative measures affecting privacy. The passage of the *USA PATRIOT Act* significantly enhanced wiretapping and other surveillance powers of the Federal Bureau of Investigation. The separation between law enforcement and intelligence functions within the Department of Justice was diluted entailing the participation of criminal prosecutors in decisions regarding the use of intelligence wiretaps.⁵⁵ New rules were introduced requiring foreign nationals of eighteen predominantly Muslim countries to register with the United States Immigration and Naturalization Service (INS). Academic institutions accepting foreign students as well as the foreign students themselves were also required to register with the INS in addition to being required to obtain a visa to study in the United States. The *USA PATRIOT Act* gave federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes.⁵⁶ Among the more controversial measures was the extension of the so-called ‘pen register’ portion of federal wiretapping law to e-mail communication.⁵⁷ The *USA PATRIOT Act* permitted the usage of wiretaps authorised by a court in one jurisdiction anywhere in the United States. It also removed some then existing restrictions on intelligence gathering within the United States, allowing courts to issue ‘roving wiretaps’, which apply to an individual rather than a particular communications device. Although some of the provisions in it were subject to ‘a sunset clause’ and were due to expire on 31 December 2005 unless renewed, the ‘pen-register’ extension does not expire,⁵⁸ a classic example of the difficulty to repeal provisions to counter terrorism.

⁵⁵ The separation between law enforcement and intelligence prior to the Act reflected concerns that the lower standard of proof needed to authorise intelligence wiretaps compared to those in criminal investigations might lead prosecutors to mischaracterise the nature of criminal wiretaps in order to bypass evidential requirements.

⁵⁶ Congressional Research Service, ‘The USA PATRIOT Act: A Sketch’ (2002) *Federation of American States*, available at <http://www.fas.org/irp/crs/RS21203.pdf> (last visited 14 October 2013).

⁵⁷ Pen registers and track and trace orders allow the source and destination calls to and from a particular telephone (ie traffic data) to be monitored without the need for a court order or probable cause.

⁵⁸ The *United States Patriot Act*, section 224; ‘Sunset Clause’ specifies that sections 203 (a) & (c), 205, 208, 211, 213, 216 (‘pen register’ extension), 219, 221 and 222 do not expire.

In July 2002, the federal authorities announced a pilot scheme for Operation Terrorism Information and Prevention System to enlist public and private sector employees, including telephone, post office, cable television and delivery workers, to act as Government informants, alerting authorities of suspicious activity. This proposal was withdrawn after widespread criticism in August 2002 and later prohibited by the *Homeland Security Act* (HSA)⁵⁹ that *inter alia*, provided for a privacy officer within the new Homeland Security Department to ensure that the department acts in accordance with the 1974 Privacy Act.⁶⁰ Although the HSA also banned the introduction of national ID cards, it has been criticised for its '[o]verly broad intelligence information sharing provisions between the Homeland Security department and other agencies, such as the FBI or the Central Intelligence Agency (CIA) and even with foreign law enforcement agencies'.⁶¹

The measures taken by the Government, contrary to widespread public perception, are not apathetic to privacy or human right concerns although when a nation is faced with the threat of terror attacks, intelligence gathering is the key. This is evidenced by the reaction of the Congress to the Total Information System and also the Computer Assisted Pre-Screening Program II (CAPPS II). 'The Total Information Awareness, a comprehensive data-mining system' developed by the Pentagon to collect and analyse vast quantities of public and privately-held personal data⁶² on US and foreign nationals in the hunt for information about terrorist suspects⁶³ was denied funds by the Senate in 2003 and its use in the US was to be prohibited until the Congress

⁵⁹ The *Homeland Security Act, 2002*, section 770, available at www.gpo.gov/fdsys/pkg/BILLS-107hr5005pcs/pdf/BILLS-107hr5005pcs.pdf (last visited 14 October 2013).

⁶⁰ The *Homeland Security Act*, section 222.

⁶¹ 'ACLU Hails Victories in New Homeland Security Bill: Operation TIPS, National ID Rejected By Congress' (2002) *American Civil Liberties Union*, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11295&c=206&Type=s> (last visited 14 October 2013).

⁶² See Jay Stanley, 'Is the Threat From 'Total Information Awareness' Overblown?' (2002) *American Civil Liberties Union*, at <http://www.aclu.org/Privacy/Privacy.cfm?ID=11501&c=130&Type=s> (last visited 14 October 2013).

⁶³ John Markoff, 'Pentagon Plans a Computer System That Would Peek at Personal Data of Americans', *New York Times* (New York, United States of America, 9 November 2002), available at <http://www.nytimes.com/2002/11/09/politics/09COMP.html> (last visited 14 October 2013).

passed a new law authorising it. Under CAPPs II, on the other hand, the collection and submission of personal details of all passengers and crewmembers entering and leaving the US by airlines and shipping lines was made mandatory.⁶⁴ CAPPs II was also cancelled by the Transportation Security Administration (TSA) in the summer of 2004. Shortly thereafter, the TSA announced a successor program, called Secure Flight that would work much on the same lines as CAPPs II which was stalled by the Congress on privacy concerns.

Free expression, another basic right, faced multiple threats in the United States following September 11. The ability of the media to report news was undermined by access restrictions to prisoners held by the US Government and by limited access to frontlines and troops during the Afghanistan war. Even foreign news organisations came under pressure from the US authorities not to broadcast anything, which would reflect poorly on the Government. After the Chief Immigration Judge decided to close all immigration proceedings, media organisations found it nearly impossible to determine how many foreign nationals were detained on immigration charges, let alone to discover their names or report on proceedings against them.⁶⁵ The Government's arguments that the disclosure of the detainees' names would breach their privacy rights was hollow considering the absence of due process rights accorded to many of the suspects. Limitations of such a nature do not serve the interests of greater security and are hence discreditable as noted by the US Federal Court of Appeals (Sixth Circuit) criticising the blanket restriction on public access to proceedings, while noting that 'democracies die behind closed doors'.

The US authorities' commitment to free expression was also called into question during the war in Afghanistan. Several press-freedom organisations complained that the US Government's purchase of the

⁶⁴ David Johnston, 'U.S. to make airlines give data on Americans going overseas', *New York Times* (New York, United States of America, 4 January 2003).

⁶⁵ International Helsinki Federation for Human Rights (IHF), 'Anti-terrorism Measures, Security and Human Rights, Developments in Europe, Central Asia and North America in the Aftermath of September 11' (April 2003), available at http://www.cestim.it/argomenti/09razzismo/europa/2003Apr18en_report_anti-terrorism_pdf%5B1%5D.pdf (last visited 14 October 2013).

entire stock of wartime satellite images of Afghanistan taken by the Ikonos civilian satellite amounted to censorship, since it prevented news organisations from showing images of the bomb damage and fighting. Media organisations also faced serious restrictions on access to US front lines for most of the war in Afghanistan, although these restrictions eased towards the end of the conflict.⁶⁶ They also experienced great difficulty obtaining access to prisoners held at the US military base in Guantanamo Bay, Cuba.⁶⁷ In addition to access problems, media organisations also faced pressure⁶⁸ from US authorities over content, particularly in the months immediately following the attacks. In 2001, a statement released by the Justice Department provided that it would defend any federal agency that refused to grant a request under the *Freedom of Information Act* (FOIA) provided that the refusal rested on a ‘sound legal basis’⁶⁹ superseding the earlier ‘foreseeable harm’ benchmark. The policy has had a significant effect on FOIA requests. In March 2002, the White House Chief of Staff issued a memorandum to federal agencies, which instructed them to withhold information that is sensitive for national security reasons even when the FOIA national security exemption does not apply.⁷⁰

The continuing growth of technology in the United States has not only increased the amount of data that is collected about individual persons by Governmental agencies and commercial entities but has also led to controversies surrounding the use of such information. A new framework is required to regulate the move from accessing single sets of records in single databases to a framework that recognises the privacy implications enabling the Government to review extensive records about each and

⁶⁶ Reporters Committee for Freedom of the Press, ‘Homefront Confidential’, 6-8.

⁶⁷ *Ibid.*, 8.

⁶⁸ See ‘Anti-terrorism Measures, Security and Human Rights, Developments in Europe, Central Asia and North America in the Aftermath of September 11.’

⁶⁹ Lawyers Committee for Human Rights, ‘A Year of Loss’ (September 2002), 10-12.

⁷⁰ Reporters Committee for Freedom of the Press, Homefront Confidential, 46. Access to information via Government websites was also restricted. The Nuclear Regulatory Commission removed its entire website shortly after September 11, 2009 although some of the material was later restored. At least sixteen other federal agencies followed suit by removing at least some of the content from their websites. Although in each case, the removal was justified on the grounds that the information might be useful to terrorists; only the Nuclear Regulatory Commission has developed clear public guidelines for the removal of information previously available to the public. In the absence of such guidelines, there is a danger of unwarranted secrecy.

every person in search of ‘suspicious’ activity. Though a great mass of such data would have no relevance to terrorism and may well involve private matters, access to such records may still be useful to detect terrorists. Using this information, the Government would be able to develop patterns of activities that are necessary to accomplish terror attacks, or identify those patterns, which warrant further scrutiny, and are unlikely to accompany innocent activity. If Governments all over the globe were to develop programs that could check for such revealing patterns by access to a variety of record systems, plans that would have previously been impossible to discover, can be curbed before they are put into action. The importance of making data available for counter terrorism investigations should not be undervalued, as it is one of the most important forms of preventing terrorism.

2. United Kingdom

The *Anti-Terrorism Crime and Security Act, 2001* (ATCSA) rushed through the Parliament in the aftermath of September 11, contains measures that significantly impact privacy rights in the United Kingdom. The three main areas of concern relating to privacy are the additional obligations to disclose personal data to security agencies, the increase in police powers to verify the identity of suspects by fingerprinting and conducting body searches without consent and the establishment of additional requirements related to the retention of traffic data. Part III of the Act extends the obligation of public bodies to disclose personal data in their possession to law enforcement and security agencies. Section 17 requires that public authorities disclose to police and security services any personal information held by them ‘for the purposes of any criminal investigation whatever which is or may be carried out whether in the United Kingdom or elsewhere.’⁷¹ Disclosure is also permitted for ‘the purposes of any criminal proceedings whatever which have been or may be initiated’⁷² or ‘to determine whether any such investigation or proceedings should be initiated or brought to an end’.⁷³ The wide-range

⁷¹ *Anti-Terrorism Crime and Security Act, 2001*, section 17(2) (a).

⁷² *Anti-Terrorism Crime and Security Act, 2001*, section 17(2) (b).

⁷³ *Anti-Terrorism Crime and Security Act, 2001*, section 17(2) (d).

of circumstances⁷⁴ in which disclosure can legitimately be requested, including investigations unrelated to national security, and the placing of the onus on public bodies to say no to such requests is likely to result in disclosure constituting a disproportionate interference with privacy rights. ATCSA also permits the police to take photographs of any person detained at a police station, without consent if necessary.⁷⁵ Furthermore, any head covering that obstructs the photograph may be removed by force if necessary and the photographs may be retained indefinitely even if the persons are never charged with any crime. ATCSA also includes traffic data retention provisions, based on a voluntary code of conduct for network operators.⁷⁶ Under the law, the home secretary will consult with telecommunications operators, internet service providers, and the UK data commissioner.⁷⁷

The UK Government's interest in increased data retention is linked to its enhanced powers to obtain and review data given to law enforcement, security, customs and tax agencies by the *Regulation of Investigatory Powers Act, 2000* (RIPA).⁷⁸ The RIPA spells out that a code of conduct could eventually be developed to prescribe data retention for the purposes of prevention or detection of crime, as well as for national security purposes. This created a large potential for accessing information, which could be used for much wider purposes while on the face of it, it would appear that it was retained only for safeguarding national security. In October 2002, the UK internet service providers association expressed its opposition to a code of conduct.⁷⁹ Under section 104 of the RIPA, the home secretary has the right to order the mandatory retention of data if he deems it 'necessary to do so' after having reviewed the operation of a voluntary code of practice and

⁷⁴ The extent of disclosure is illustrated by schedule 4 of the Act, which lists the 53 pieces of primary legislations affected by section 17. *Anti-Terrorism Crime and Security Act, 2001*, schedule 4 includes the *National Savings Bank Act, 1971*; *Consumer Credit Act, 1974*; *National Health Service Act, 1977*; *Civil Aviation Act, 1982*; *Telecommunications Act, 1984*; *Companies Act, 1989*; *Pensions Act, 1995*; *Data Protection Act, 1998*; *Local Government Act, 2000*. Further thirteen other laws applicable in Northern Ireland are also affected.

⁷⁵ *Anti-Terrorism Crime and Security Act, 2001*, section 92.

⁷⁶ *Anti-Terrorism Crime and Security Act, 2001*, part 11, section 102(4).

⁷⁷ *Anti-Terrorism Crime and Security Act, 2001*, section 103.

⁷⁸ *supra* n. 65, 204.

⁷⁹ *Ibid.*

agreements under it. Ordering the mandatory retention of data would be compatible with EC Directive 58/2002,⁸⁰ but would arguably violate Article 8 of the ECHR.⁸¹ It was also indicated that serious consideration was given to the introduction of a national ID card, but plans were abandoned after widespread criticism.⁸²

Freedom of speech is also curtailed, akin to the reaction of the US under *inter alia*, the *Terrorism Act, 2006* and *Terrorism Act, 2000*.⁸³ Though civil liberties campaigners say the law is a return to the ‘sus’ laws of the 1970s and could be used to harass legitimate demonstrators, what they have not considered is that it could also be used to stop actual terrorists. The benefit of such a law therefore clearly outweighs the cost and is essential to disrupt terrorist activity. In the case of surveillance of religious and political meetings, if sufficient reason exists to believe that a political or religious group poses a threat to national security, the State has the power to deploy a full battery of resources in its armory to monitor and further investigate that group’s activities.

Part 5 of the ATCSA has specifically extended ‘racially aggravated offenses’ to include ‘religiously aggravated offences’. However, surveillance in the United Kingdom does not effectively adopt information technology systems, and a number of key areas, most notably the paper-based civil registration system, simply lack any capacity for data mining. As a result, certain requests for information can be extremely time consuming and labour intensive. In 2001, the Government announced allocation of 1 billion pounds over the next ten years to address this shortcoming. Subsequently, in 2002 the

⁸⁰ The processing of personal data and the protection of privacy in the electronic communications sector- Directive on privacy and electronic communications, Directive 2002/58/EC, European Parliament and of the Council, 12 July, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:EN:HTML> (last visited 14 October 2013).

⁸¹ UK Government efforts to introduce an ‘entitlement card’ were widely seen by privacy advocates as a fresh attempt to introduce a national ID card.

⁸² The nature of the information to be stored on the cards and central collection of that information are among the many privacy questions raised by the proposals. In July 2002, the Home Office introduced a consultation paper on a proposed national ‘entitlement card’ that would be used in order to access public services, although it would not be compulsory to carry the card at all times. The proposal met similar opposition.

⁸³ *Terrorism Act, 2000*, section 44 allows police to stop individuals in areas seen as being at high risk from terrorism, even if they are not suspected of a crime.

Performance and Innovation Unit published a report entitled 'Privacy and Data-Sharing' that broadly outlines a coherent data sharing strategy to support the online provision of Government services. The fact that the Government is thinking along these lines suggests that investigators working on cases with national security implications could reasonably expect access to most forms of data held by Government departments.

Furthermore, by the introduction of the ATCSA, Government agencies such as Her Majesty's Customs and Excise and the Inland Revenue are now formally able to pass information to police forces and the Security Service where national security is an issue.

After the 1993 and 1994 terror-attacks in London by the Irish Republican Army (IRA) the Government decided to install 'a ring of steel' (a network of close circuit television cameras mounted on eight official entry gates that control access in the city). Nevertheless, the anxiety about terrorism in Britain continues to grow and with it, the cameras continue to multiply. So many cameras are attached to so many systems of surveillance in the UK that people have stopped counting. According to one estimate, there are 2.5 billion surveillance cameras in Britain.⁸⁴ Though privacy advocates in Britain have spoken out against the same, the cameras can be useful in investigating terror attacks like they have been used in the investigation of crimes such as the 1999 Brixton nail bomber case. Majority of the British populace believe in the promise of cameras as a magic bullet against terrorism and echo the slogan 'if you've got nothing to hide, you've got nothing to fear'.

3. India

After the 2008 terror attacks in Mumbai, there was widespread criticism of the political leadership of the nation as well as the callousness and irresponsibility of the media. Transcripts of conversations between the terrorists released to the press subsequently, show that their operations were guided and orchestrated based on the live reportage and information volunteered on local news channels. The coverage of the Mumbai attacks displayed how national interest and security can be betrayed and human lives jeopardised by indiscreet and unguided

⁸⁴ Pamala L. Griset and Sue Mahan, *Terrorism In Perspective* (Sage Publication Florida 2008) 304.

reporting. A few weeks after the Mumbai attacks, the Ministry of Information and Broadcasting mooted an amendment to the existing Programme Code under the *Cable Television Networks Rules of 1994* to introduce restrictions, among other things, on live coverage of war or violent law and order situations, disclosures about security operations, live interviews with victims, security personnel or perpetrators of the crime. The editors of television channels strongly opposed this move that would completely subjugate the media to Government control, as it was a serious assault on the principles of free media and right to speech and expression.⁸⁵ There are two facets to the legal rights involved; one is the media's own rights under Article 19(1)(a) of the Constitution of India which it enjoys like any other citizen. The Supreme Court has held in successive judgments on press freedom that the media has no special rights, higher than that of any citizen. If it enjoys any special position, it is in the nature of a public trustee, entrusted with the duty of facilitating the Right to Information guaranteed to the citizens. The second facet of media rights is the right to collect and transmit to the citizen information of public importance. Long before it became a statutory right in India, the Right to Information was declared by the Supreme Court to have derived from the Fundamental Right to Free Speech and Expression under Article 19(1)(a).⁸⁶ The Right to Information, like the Right to Free Speech is not absolute. It is amenable to the very restrictions that apply to free speech. It is permissible to restrict free speech on grounds more specifically set out in Article 19(2) of the Constitution. These include restrictions on grounds of security of State, public order, the sovereignty and integrity of India, and incitement to an offence. Therefore, a law, which is within the parameters of these restrictions spelt out in Article 19(2), would not fall foul of the test of constitutionality. At the time of a crisis, particularly

⁸⁵ In *Attorney General v. Guardian Newspapers Ltd.* 3 All ER 595 (1988), Justice Lord Donaldson explained why the press enjoys certain special privileges: 'It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less than that of the general public. Indeed it is that of the general public for whom they are trustees.'

⁸⁶ *Indian Express Newspapers v. Union of India* 1 SCC 641; *State of UP v. Raj Narain* 4 SCC 428; *S.P. Gupta v. Union of India* Supp SCC 87; *Union of India v. Assn for Democratic Reforms* 5 SCC 294; *PUCL v. Union of India* 4 SCC 399.

one as grave as the Mumbai attacks, there can be no right to immediate or instantaneous information on the part of the citizen. Barring of course those immediately impacted by the events, that is the families of the victims, there would be no public prejudice if the same information were to be made public after the situation was under control. There are already in existence wide powers under the existing law, authorising the censorship of television⁸⁷ and none of these provisions appear to have been challenged so far, even though they are far wider than the fetters sought to be imposed by the recent draft amendment to the Programme Code. There is a whole myriad of laws that the media could possibly be subject to, such as the *Consumer Protection Act, 1986* and the *Monopolies and Restrictive Trade Practices Act, 1969* dealing *inter alia*, with a rather widely defined 'unfair trade practices' are amongst them. This really means that if an emergency were to occur again, the Government could order blackouts or direct some censorship under the existing law, even though the draft amendment dealing specifically with emergency situations has been shelved. Hence, though the amendments proposed by the Government seem excessive at the time of emergencies like the 26/11 attacks, they may be necessary. The media when faced with the threat of terrorism needs to act not only with extreme care and acute precision, but also with immense sensitivity, all of which the current media severely lack.

The Information Technology (IT Act) Amendment Act, 2008, was passed by the Parliament in the Winter Session of 2009. The rules under the IT Act empower a designated Central Government officer to block public access to any information on the internet for wide-ranging reasons of security and national interest.⁸⁸ One glaring infirmity in the rules drafted by the Department of Information Technology is that they make no stipulation for a prior hearing to the affected website. This is despite the fact that the web host who does not comply with the direction to remove the offending information is liable to be punished with imprisonment of up to seven years along with fine. Under the rules framed under section 69A of the IT Act, every State or Central

⁸⁷ Section 19 and 20 of the *Cable Television Networks (Regulation) Act, 1995* give the power to the Central Government to prohibit operation of cable television network in public interest.

⁸⁸ Rule 3 of the *Information Technology Rules (Procedure and safeguards for blocking for access of information by public) Rules, 2009*.

Government department has been empowered to decide whether a certain news item, article, blog or advertisement relating to its jurisdiction is safe to remain on the internet. If a 'complaint' against any information displayed on the internet is made, the department concerned will determine whether the matter in question affects any of the six concerns mentioned in sub-section (1) of section 69A, ie interest of sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States, public order or for preventing incitement to commit any cognisable offence relating to the other five reasons. The only recourse provided for by the rules to the media organisations is the formation of a review committee which will examine whether or not the directions to block information have been issued in accordance with the IT Act. Though the review committee is empowered to order the 'unblocking' of the information concerned, the rules are strangely silent on whether the affected website would be allowed to appeal before it and give its defence.⁸⁹

Furthermore, cyber terrorism as defined under section 66F is too wide and can cover several activities, which are not actually of a 'terrorist' character. Section 66F(1)(B) is particularly harsh and goes much beyond acts of 'terrorism' to include various other activities within its purview. The restrictions on access and use of information must be confined to injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order. The ambit of those provisions extends to 'any restricted information, data, or computer database', thus, including any Government file, which is marked as confidential or saved in a computer used exclusively by the Government. It also covers any file saved in a computer exclusively used by a private corporation or enterprise. To give an illustration, if a journalist managed to break into a restricted database, even one owned by a private corporation, and stumbled upon information that is defamatory in character, he would have committed an act of 'cyber-terrorism'. Various kinds of information pertaining to corruption in the judiciary may also be precluded from

⁸⁹ Rule 14 of the *Information Technology Rules (Procedure and safeguards for blocking for access of information by public) Rules, 2009* and Manoj Mitta, 'Govt Gearing up to Gag News Websites' *The Times of India* (New Delhi India 22 May 2009), available at http://articles.timesofindia.indiatimes.com/2009-05-22/india/28160643_1_draft-rules-websites-tvchannels (last visited 14 October 2013).

being unauthorisedly accessed on the ground that such information may be put to use for committing contempt of court. Any person who gains such access would again qualify as a cyber-terrorist. This provision can be grossly misused with the ulterior motive of muzzling dissent or freezing access to information that may be restricted in nature nonetheless, have a bearing on probity in public life etc.⁹⁰

The Government of India also introduced the idea of national ID cards to check terrorism. The project aims at providing a unique national identity number to each person in the national population register. However, contrary to popular perception, this simple card will not turn a democracy into a tyranny and exaggerated concerns over national identification should be discounted. It is accepted that the national ID will not offer complete protection from terror threats but it does provide us with added protection. Civil libertarians need not fear every technological change or innovation, as these are technologies that have potential to maximise both safety and civil liberties. A number of measures have been put into place by nations to counter terrorism. We can deal with Terrorism and we can discourage it but we cannot end it completely any more than we can end violence for any other purpose. The goal should therefore, be to limit the harm done to persons whilst maintaining the integrity of society and Governmental processes.

IV. STRIKING THE RIGHT BALANCE

‘Revenge is a kind of wild justice; which the more man’s nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office.’

Francis Bacon, *Essays of Revenge* (1597)

The manner in which States respond to terrorism determine whether terrorists will destroy more than lives and towering structures or also the very foundations of our freedom. The concepts of human rights and rule of law have evolved after centuries and centuries of violence,

⁹⁰ Pranesh Prakash, ‘Comments on the Draft Rules under the Information Technology Act’ (2009) *The Centre for Internet & Society*, available at <http://cis-india.org/internet-governance/front-p/blog/comments-draft-rules> (last visited 14 October 2013).

wars, barbarity, dictatorships and authoritarian rule. These standards must not be set aside and destroyed in the name of nationalism. Though most 'civilised' nations have outlawed torture, it has not been totally eliminated in any country and continues behind closed doors. The fact that in the fight against terrorism most detainees are later proved innocent, makes this ban more exigent.

However, the tragic reality is that torture sometimes works, though many people wish it did not. Torture has produced self-proving, truthful information that was necessary to prevent harm to civilians in numerous instances. In 1995, the Philippine authorities tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately 4,000 people into the Pacific Ocean, as well as to plan to fly a private Cessna filled with explosives into the CIA headquarters. This information saved thousands of unsuspecting innocent civilians. Hence, the dilemma before states is that if they do not torture they may compromise on the safety and security of their citizens. If torture is tolerated, but not legitimised, (as the institutionalisation of torture would lead to too great a risk of its abuse) it would be a compromise on principles of democratic accountability. Dershowitz⁹¹ who recognised this problem proposed the issuance of 'torture warrants' only in the most compelling of cases, which would permit the application of 'non-lethal' torture. Non-lethal torture can in fact be viewed as a technique for saving lives. Furthermore, a judicial warrant as a pre requisite to non-lethal torture would in fact decrease the amount of violence used against terror suspects. In every instance in which a warrant is requested, and a field officer has already decided that torture is justified, in the absence of a warrant requirement he would simply proceed with torture. Therefore requiring this decision to be approved by a judicial officer will most definitely result in fewer instances of torture. As Abraham Maslow once observed, to a man with a hammer, everything looks like a nail. If the man with the hammer must get judicial approval before he can use it, he will probably use it less often and more carefully. Thus, the underlying principle is that in extraordinary times extraordinary measures must be adopted under the premise that the innocent

⁹¹ Alan M. Dershowitz, *Why Terrorism Works* (Yale University Press New Haven and London 2002), 203.

have more rights than the guilty. To instead succumb to humane considerations would only lead to hopeless chaos.⁹² Akin to this is the concept of guaranteeing a fair trial to a terrorist. A fair trial for any person accused of terrorism ensures that the criminal justice system and the courts are not prejudiced. On the other hand, the denial of justice to men accused of terrorist acts further communalises society and instead of isolating those involved in crimes, an entire community feels under siege which in turn leads to their large-scale alienation.

It is important to note however that there are certain derogations by states that are inexcusable, such as violations of the principle of prohibition of arbitrary arrest and detention by the creation of military courts to try civilians flouting the substratum of due process rights. States should ensure that any measure they adopt to counter terrorism fully respects the principle of equality before the law and does not amount to discrimination on grounds of religion, nationality or ethnicity. Any laws or practices that have the effect of creating or perpetuating discrimination should be instantly amended, rescinded, or nullified. All prisoners should have the right to challenge the legal basis of their detention before an independent tribunal (habeas corpus) in addition to having prompt access to counsel and a trial within reasonable time. Decisions to hold hearings and trials in secret should be made on a case-by-case basis by the judge in charge of the proceedings, and should be subject to review. There is no denial of the fact that at times and in certain circumstances, states are entitled and obliged to take steps that derogate from human rights. Nevertheless, taking recourse to only those actions that preserve fundamental civil rights while at the same time enabling security measures demanded by and appropriate in the need to respond to terrorist threats, is important. The Government has the dual responsibility of protecting the state and its people while ensuring the sacrosanctity of human rights and therefore, in response to the mandatory nature of the fight against terrorism, mechanisms for protecting human rights should include the possibility of a temporary limitation of certain non-absolute rights in special situations that warrant such derogations. The precedents developed by various human rights tribunals and commissions leave no doubt as to the conditions under

⁹² Russell D.Howard and Reid L.Sawyer, *Terrorism and Counterterrorism* (McGraw-Hill Companies United States 2002).

which such derogations apply. The instruments for the protection of human rights take into account the fact that human rights have to be adaptable and refusing to accept a weakening of human rights is in fact a legitimate act of intransigence that highlights the safeguards provided for by human rights. While there is no evidence that states need more power in order to combat terrorism effectively, it is clear that states seek greater power in times of crisis and that there is invariably a corresponding narrowing of individual rights and freedoms. Though this may not be desirable, certain restrictions on our derogable rights must be permitted to enable the state to effectively carry out its function.

In the case of media organisations and the Freedom of Expression and Information, though amending existing legislation does not appear to be necessary, certain limitations by the News Broadcasters Associations in the form of self regulation is necessary as past experience is proof enough of the fact that restricting rights to free speech, expression and information in the interests of the greater good is at times crucial. In cases concerning rights to privacy and surveillance and searches of private property, authorisation on a case-to-case basis should be given. Internet Service Providers should only be compelled to retain traffic data in relation to specific investigations and not on a wholesale basis. Personal data collected as a result of anti-terrorist operations through surveillance, data collection and traffic data retention should not be used for general law enforcement or any other purpose. Lastly, computerised data collection and screening initiatives should be carefully assessed against international privacy standards and domestic data protection laws should ensure full compliance both before introduction and during use.

National security seems to have become a broad justification for any number of actions taken by the Government on the basis of information not available to the public. The Government is obliged to respond aggressively to attacks, which threaten the life of a country. The risk however is that in taking such action, the Government should not play into the hands of terrorists by creating reason for large-scale domestic dissent. As Roosevelt eloquently stated, the only thing we have to fear is fear itself. People are afraid, and, driven by fear that the Government has introduced shortcuts. But these are expensive shortcuts with long-term effects.⁹³

⁹³ *Ibid.*

V. CONCLUSION

‘Information does not kill people; People kill people.’

Dennis Bailey

The Devil’s Dichotomy lies in the fact that people are faced with the choice between security and freedom in a zero-sum game. We typically think of an open society as the crowning achievement of man. Free markets, human rights, the free exchange of ideas and information and so forth, are the most important factors in a democracy. Nevertheless, open democracies are also most susceptible to violence and can be exploited for malevolent purposes.

The Faustian argument of trading security for the alluring promise of freedom may have seemed reasonable when the only downside was tolerating the occasional robbery or mugging in a mostly civil society. However, we now live in a different age, an age where a fanatic might obtain weapons, which confer upon him the God like power of destruction once only reserved for super powers. In such an age, men cannot be free unless they are first secure. We must fight terrorists, who put their goals ahead of the lives of innocent people, with utmost determination and rigour and where necessary, with military means as well. The goal of all nations should be to reduce terrorism to a level at which it can be combated as a mere crime. The aim should be not to deal with terrorist attacks as and when they occur, but rather to prevent terrorists from being able to organise them in the first place. Such preventive strategies would require at their core an effective system of intelligence gathering. Specialists have long recognised the centrality of intelligence in the fight against terrorism. Hence, the most useful enhancements of policy to combat terrorism, at the international level, need to be made in intelligence gathering, by every means available, intelligence sharing, intelligence analysis and threat assessment. Technology is creating a world where an increase in transparency correlates to an increase in freedom and mobility. When authorities have limited information, they are forced to treat everyone like a suspect or to focus on factors like ethnicity or religion that have poor validity as predictors of terrorism. Technologies of openness like secure IDs, surveillance, facial recognition, and information analysis can counter this problem not by restricting people’s freedom but by

making everyone's public actions more transparent. The fundamental flaw in the view that equates privacy to liberty is that in most cases where there is a trade-off in privacy, freedom is not lost, however this is not so. For instance, surveillance cameras may remove the anonymity of tourists or persons taking part in a march but it does not preclude those activities. Prioritising either liberty or public-safety is a mistake; they are both important, but their relative importance changes from time to time and from situation to situation. The conflict between liberty and security only arises on the mischaracterisation of freedom as a state of anarchy and security as life under the protective fist of Government oppression. However, freedom and security are not conflicting goals. The safer a nation feels, the more weight can be given to liberty and the greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress the activity even at the cost of curtailing liberty. When nations are under a constant threat from international terrorism, it stands to reason that our civil liberties will be curtailed. In fact, they should be curtailed, to the extent that the benefits in greater security outweigh the costs in reduced liberty. The costs must however be weighed as carefully as the benefits. This is the only common sense approach, as it is sometimes necessary to put a moratorium in place for the good of all concerned. As Chief Justice William Rehnquist rightly wrote, 'The laws will... not be silent in time of war, but they will speak with a somewhat different voice'.

Insofar as domestic measures like wiretapping are needed in addition to war, civil libertarians are wrong to oppose them solely out of antipathy for Government power. Rather, we should expand as much as possible the ability of the Government to secure our freedom. Used properly, Governmental powers like eavesdropping, airport security, profiling, and interrogation are not threats to freedom, but means to secure it. Such powers can and must be implemented in a way consistent with freedom, ie guided by unambiguous, objective laws and subject to constitutional checks and balances. Therefore, a trade-off among the goals of protecting national security and assuring democratic liberties must occur but not without periodic assessments of the effectiveness of the particular measures adopted to deal with the dangers of catastrophic terrorism.

The fight against terrorism is a long-term, perhaps permanent effort and can never be definitively won. There is no event or time at which a Government will confidently be able to claim that terrorism no longer poses a threat. Therefore, the erosion of rights will be on going, with no end in sight, and the minimum level of rights protection will be indefinitely lowered. All antiterrorism campaigns must therefore include human rights protection as a core component of its overall security strategy. Furthermore, we must accept that the balance we ultimately strike will contain trade-offs between our liberties and our safety. This will neither satisfy absolutists in either the law enforcement or the civil libertarian groups. However, in the opinion of the author the civil libertarians should be brought into the loop rather than having to criticise from the outside afterwards, as the beneficiaries of this will be the people who will finally be in a position to demand and receive both safety and freedom. To strike this balance we need to start thinking outside the boxes that have failed us, without becoming like those who attacked us.

REFUGEE BLUES - VICTIMS OF REGIONAL GEOPOLITICS[†]

*Sulekha Agarwal**

I. INTRODUCTION

The word refugee is derived from the Latin word ‘refugium’ which means shelter, security, or haven. The two world wars generated refugees in millions, a number too large for any nation to accommodate. A need to devise an internationally acceptable solution to the problem was felt, which resulted in the framing of the 1951 *Convention Relating to the Status of Refugees* (the Convention) which dealt exclusively with refugee protection. The Convention defined refugee as a person who,

‘[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’¹

The Convention along with the *Protocol Relating to the Status of Refugees*² adopted in 1967 has played a pivotal role in the development of international refugee protection. As of August 2008, 144 States had ratified either one or both of these instruments.³

[†] This article reflects the position of the law as on 30 September 2013.

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¹ Article 1(A) of the *Convention Relating to the Status of Refugees*, (adopted 28 July 1951, entered in to force 22 April 1954) 189 UNTS 150.

² The Protocol is an independent instrument. A State can become party to the Protocol through accession or ratification without becoming a party to the Convention.

³ Goodwin-Gill, ‘Convention Relating To The Status Of Refugees Protocol Relating To The Status Of Refugees’ United Nations Audiovisual Library of International Law, *United Nations*, available at <http://legal.un.org/avl/ha/prsr/prsr.html><http://legal.un.org/avl/ha/prsr/prsr.html> (last visited 30 September 2013).

Despite popular international participation, the Convention is seen as inadequate by the developing nations that host around 80 per cent of the world's refugee population⁴ as it fails to embody new refugees resulting from ethnic violence and gender-based persecution and is insensitive to security concerns, particularly terrorism and organized crime. The Convention also does not provide for the sharing of responsibilities and its scope does not include better management of international migration.⁵

Notwithstanding the Convention and the Protocol, refugee movements have necessitated more focused responses by regional organizations. The Organization of African Unity (OAU) devised the *OAU Convention on the Specific Aspects of Refugee Problems in Africa, 1969* wherein the definition of refugee was broadened to include the victims of generalized conflict and violence not acknowledged by the Convention.⁶ Similarly, ten Latin American countries adopted the *Caratagena Declaration*⁷ in 1984 in order to incorporate the involuntary migrants created due to generalized oppression and violence in Central America.

Countries in other regions, however, have chosen to deal with the situation individually. This is true of the South Asian and the South-East Asian region where only a few countries have signed the Convention.⁸

⁴ Susan Akram, 'Millennium Development Goals and the Protection of Displaced and Refugee Women and Girls', *MDPI Journals*, 283-313.

⁵ *Ibid.*

⁶ The *OAU Convention* also made a significant development ahead of the Convention in its recognition of the security implications of refugee flows, its more specific focus on solutions, particularly on voluntary repatriation, its promotion of a burden-sharing approach to refugee assistance and protection.

⁷ *Caratagena Declaration of Regugees, Colloquium on the International Protection of Refugee in Central America, Mexico and Panama* (adopted on 22 November 1984), available at <http://www.refworld.org/docid/3ae6b36ec.html> (last visited 30 September 2013).

⁸ Some of the non-signatory nations to the Convention include Bangladesh, India, Indonesia, Lao People's Democratic Republic, Malaysia, Nepal, Singapore, Thailand and Vietnam. Even Pakistan, host to the world's largest refugee population, is not a signatory. The only signatories in this region are Philippines and the Kingdom Of Cambodia.

One among such countries is India, the world's largest democracy and a host to a varied refugee population.⁹ India is neither a signatory to the Convention nor does it have internal laws specifically dealing with refugees. India chooses to deal with the refugees on an *ad-hoc* basis and its treatment of the different refugee groups has been far from equitable. While the Tibetan refugees were treated with utmost hospitality, the Bhutanese refugees were hardly allowed to step on Indian soil.¹⁰ The treatment of refugees within the same refugee community has also not been even. The Burmese refugees were initially given much support but in recent times they have been subjected to strict control.

The cause behind India's discriminatory refugee policy is the influence exercised by India's bilateral relations with nations of geo-strategic importance to India. India's relations with the national governments of the refugee generating countries inversely affects its treatment of refugees.

This article seeks to analyse how the presence of the three main refugee groups ie Tibetan, Bhutanese and Burmese refugees in its territory is being used by India as a tool to secure its own borders to prevent its encirclement by China.

Part II of the article describes the existing laws pertaining to refugee protection in India and its obligations to protect refugees under international law.

In Part III, the article states the cause of flight of the three aforementioned refugee groups of India, the existing bilateral relations between India and the refugee generating countries and its policy towards these groups. Finally, Indian policies towards these refugee groups are analysed in its entirety with reference to Sino-Indian relations.

⁹ India is host to a diverse population of roughly 200,000 refugees. The major refugee communities currently residing in India are the Tibetan, Sri Lankan, Bhutanese, Burmese, Palestinian and Afghan refugees.

¹⁰ Shiva K Dhungana, 'Third Country Resettlement and the Bhutanese Refugee Crisis: A Critical Reflection', June 2010, 35, Refugee Watch.

II. REFUGEE LAWS AND INDIA

A. *Why is India Not a Signatory to the Convention?*

There are several reasons behind India's reluctance towards signing the Convention and the Protocol. Firstly, India shares the dissatisfaction of developing countries that the Convention fails to address adequately the situation of mixed flows, ie, it does not distinguish between political refugees and economic migrants.¹¹

Secondly, the Convention does not call for burden-sharing. No provision has been made in order to ensure that the countries providing asylum are not left alone in dealing with the displaced population. Being a country with 29.8 per cent of the population below the poverty line¹² and an average unemployment rate of nine per cent,¹³ India cannot financially afford to be responsible for the wellbeing of a substantial addition to its population.

Thirdly, concerns about national security have further hindered India from signing the Convention. Finally, the Convention was founded during the Cold War which allegedly resulted in the intertwining of refugee policies with Cold War Politics.¹⁴ This has further made signing of the Convention unfavourable for India which was the pioneer of the Non-Aligned Movement.

B. *Indian Laws*

India as a matter of public policy does not formally recognise refugees through any specific laws which confer refugee status on such persons. Neither does it have any specific legislation dealing particularly with refugees. The principal legislation that can be said to relate to refugees

¹¹ A political refugee is any person who is unwilling or unable to stay in the country of their nationality due to fear of political persecution. An economic migrant is a person who leaves his house and country voluntarily to seek a better life elsewhere.

¹² World Development Indicators, 2010, *The World Bank*, available at <http://data.worldbank.org/country/india> (last visited 30 September 2013).

¹³ Unemployment Rate Country List, *Trading Economist*, available at <http://www.tradingeconomics.com/country-list/unemployment-rate> (last visited 30 September 2013).

¹⁴ B S Chimni, 'Outside the Bounds of Citizenship: The Status of Aliens, Illegal Migrants and Refugees in India' in R Bhargava and H Reifeld, *Civil Society, Public Sphere and Citizenship: Dialogues and Perceptions* (SAGE New Delhi 2005) 277–313.

in India is the *Foreigners Act, 1946*, which deals with the entry, exit and presence of foreigners in India.^{15,16}

This Act is applicable to all persons who are ‘aliens’ ie non-citizens. Under this Act, the Central Government is endowed with the power to prohibit, regulate and restrict the entry of foreigners into India, their departure and their presence.¹⁷ This Act also gives the Central Government the power to restrict the movement of foreigners within India,¹⁸ limit their employment opportunities,¹⁹ confine them to refugee camps, limit their possessions²⁰ and prohibit selected activities.

Apart from the *Foreigners Act*, the *Registration of Foreigners Act, 1939*,²¹ the *Passport (Entry into India) Act, 1920*, the *Passport Act, 1967*, the *Extradition Act, 1962*, and the *Citizenship Act, 1955*²² are the other legislative

¹⁵ *Foreigners Act, 1946*, Preamble.

¹⁶ Section 2(a) of the *Foreigners Act, 1946* defines a ‘foreigner’ as ‘a person who is not a citizen of India’, which can refer to aliens of any kind including immigrants, refugees and tourists.

¹⁷ The types of possible restrictions are (i) no entry or departure (ii) entry only at such time only by such route only at such port/place, and (iii) observance of such conditions on arrival.

¹⁸ Section 3(2) of the *Foreigner’s Act, 1946*, states that ‘without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner- (d) shall remove himself to, and remain in, such area in India as may be prescribed; (e) shall comply with such conditions as may be prescribed or specified- (i) requiring him to reside in a particular place; (ii) imposing any restrictions on his movements.’ Under this section the Indian government is permitted to locate refugees in special designated areas. Thus, this section constitutes a restriction on movement.

¹⁹ Section 3(2) of the *Foreigner’s Act, 1946*, states that ‘without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner... (e) shall comply with such conditions as may be prescribed or specified- (vii) prohibiting him from engaging in activities of a prescribed or specified description.’

²⁰ Section 3(2) of the *Foreigner’s Act, 1946*, states that ‘without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner (e) shall comply with such conditions as may be prescribed or specified- (viii) prohibiting him from using or possessing prescribed or specified articles’.

²¹ The *Registration of Foreigners Act, 1939* was formulated by the colonial government as a response to the needs created by the Second World War and primarily deals with the stay and exit of foreigners in India.

²² Section 3 of the *Citizenship Act, 1955* outlines the conditions necessary to gain citizenship. Citizenship by birth is granted to every person born in India, or persons who otherwise have Indian citizenship. A person born outside India can be granted citizenship if his father was Indian at the time of the applicant’s birth.

measures that deal with regulation, status and treatment of aliens, including refugees.

Despite there not being any specific legislation which deals with refugees, refugees have the protection available under the Constitution of India inasmuch as it grants certain fundamental rights to all persons in the Indian Territory—citizens and non-citizens alike. These rights include the right to equality under Article 14,²³ right to protection of life and personal liberty under Article 21²⁴ and right to freedom of religion under Article 25.²⁵ The violation of these rights can be remedied through recourse to the judiciary and have time and again been upheld by the Supreme Court of India.²⁶

One of the landmark judgements on this aspect is the first *Chakma case*,²⁷ wherein the Supreme Court held that every state government had the constitutional obligation to protect refugees. In another progressive pronouncement, the Supreme Court upheld the decision of the Calcutta High Court directing the Railway Board to pay Rs 1,000,000 to a Bangladeshi national who was raped by the railway employees. The Supreme Court stated that ‘rape is a crime against society and remedies are independent of the citizenship status of the victim’.²⁸

²³ ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’

²⁴ ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’ *See also, National Human Rights Commission v. State of Arunachal Pradesh* 1996 SCC 742, where the Chief Justice of India, Justice Ahmadi held that the State is bound to protect the life and liberty of every human being under Article 21 which includes the right to non-refoulement.

²⁵ ‘Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.’

²⁶ When the National Human Rights Commission of India (NHRC) approached the Supreme Court under Article 32 of the Constitution for protection for the Chakma refugees hailing from the tribal areas of Chittagong Hills in Bangladesh whose life and security was threatened by local politicians and youth leaders in the state of Arunachal Pradesh, relief was granted by the Supreme Court on the basis of the rights of aliens under Articles 14 and 21.

²⁷ *Arunachal Pradesh v. Khudiram Chakma* AIR 1994 SC 1461 (*Chakma Case*).

²⁸ *Chairman Railway Board v. Chandrimadas and Others* AIR 2000 SC 988.

C. *India and International Law*

The primary component of the Convention is the principle of non-refoulement. The near universal application of non-refoulement has rendered it as a customary international practice.²⁹ Under this principle, a state is prohibited from returning a refugee to his country where he has a well-founded fear of persecution.³⁰ The *International Covenant on Civil and Political Rights, 1966* (ICCPR), to which India is a signatory, further incorporates non-refoulement under the principle of complementary protection.³¹

The Indian courts have expanded the scope of Article 21 of the Constitution of India³² to encompass the principle of non-refoulement.³³ In the case of *U Myat Kayew and Nayzan v. State of Manipur*³⁴ the Guwahati High Court, under Article 21, ruled that asylum seekers who enter India, even if illegally, should be permitted to approach the office of the UN High Commissioner to seek refugee status.

The lack of specific laws for dealing with refugees gives an impression that India is not under a formal duty to follow this principle. However, this is not essentially true as India is a signatory to various UN Treaties and Covenants which contain provisions that are directly related to

²⁹ 'Non-Refoulement Under Threat'-Proceedings of a Seminar Held Jointly By The Redress Trust (REDRESS) And The Immigration Law Practitioners' Association (ILPA) (2006), 5.

³⁰ Tapan K Bose, 'Protection of Refugees in South Asia: The Need For A Legal Framework' (1st edn South Asia Forum for Human Rights, 2000) 13-30.

³¹ There is no universally accepted definition of the term 'complementary protection'. However, in general terms, it describes States' obligations to non-refugees (that is those that do not satisfy the Convention definition) who are nonetheless in need of protection on the basis that they face serious violations of their human rights if returned to their country of origin.

³² *Louis De Raedt v. Union of India and Others* 1991(3) SCC 554.

³³ Since the forcible expulsion or deportation of a refugee to a country, where his life or freedom is threatened on account of his race, religion, nationality, political opinion or affiliation, would be in violation of the constitutional scheme, provided for in Article 21.

³⁴ Civil Rule No 516 of 1991. The case involved eight Burmese people, aged 12 to 58, who were detained in the Manipur central jail in Imphal for illegal entry. These people had participated in the democracy movement, had voluntarily surrendered to the Indian authorities and were taken into custody. The cases were registered under section 14 of the *Foreigners Act, 1946* for illegal entry into India. They petitioned for their release, however, to enable them to seek refugee status with UNHCR in New Delhi.

the rights of refugees. Primary among these international covenants is the *Universal Declaration for Human Rights, 1948* (UDHR) Article 14³⁵ of which allows asylum from persecution.

Other international treaties influencing the treatment of refugees and to which India is a party are the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* (CAT), the *Genocide Convention, 1948* and the *International Covenant on Economic Social and Cultural Rights, 1966* (ICESCR). India also voted to adopt the UN Declaration of Territorial Asylum in 1967.

The Government of India is under a constitutional obligation to honour these treaties and covenants under the declaration contained in Article 51 of the Constitution.³⁶

The Supreme Court has been active in emphasising the importance of the obligation created under this article. In the case of *Vishaka and Others v. State of Rajasthan and Others*³⁷ it held that:

‘Any international convention not inconsistent with fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This is implicit from the Article 51(c).’

³⁵ Article 14(1) of the *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA Res 217 A(III) states that, ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’.

³⁶ Article 51(c) of the Constitution of India enjoins that ‘the State shall endeavour to foster respect for international law and treaty obligations in the dealing of organized peoples with one another’.

³⁷ 1997 (6) SCC 241. *See also* ‘Article 253 provides power to Parliament to make legislation to give effect to international agreements, while Entry 14 in the Union List relates to the legislative competence of Parliament to implement treaties, agreement and conventions with foreign countries. Under the Constitution of India, powers and functions are divided into the Union List, the State List and the Concurrent List’ as cited in Prabodh Saxena, ‘Creating Legal Space for Refugees in India: The Milestones Crossed and the Roadmap for the Future’ (2007) 19 *International Journal of Refugee Law* 246.

III. REFUGEE POPULATIONS IN INDIA

A. *Refugees from Tibet*

1. Background

In 1950, the People's Liberation Army (PLA) invaded the Tibetan area of Chamdo³⁸ where the outnumbered Tibetan troops surrendered. Consequently in 1951, representatives of the Tibetan authority participated in negotiations with the Chinese Government in Beijing, which resulted in the Seventeen Point Agreement.³⁹ It established Chinese sovereignty over Tibet and the Dalai Lama ruled Tibetan area was held to be an autonomous area of China.

On 1 March 1959, an unusual invitation to attend a theatrical performance at the Chinese military headquarters outside Lhasa was extended to the Dalai Lama. The Chinese officers insisted that the Dalai Lama should not be accompanied by his traditional armed escort to the performance. Tibetan Government officials feared that plans were being laid for a Chinese abduction of the Dalai Lama. On 10 March 1959, several thousand Tibetans surrounded the Dalai Lama's palace to prevent him from leaving or being removed.⁴⁰ This marked the beginning of the uprising in Lhasa.

On 12 March 1959, protesters appeared on the streets of Lhasa declaring Tibet's independence.⁴¹ The Chinese military and Tibetan rebel forces began to fortify positions within and around Lhasa in preparation for conflict. In the crackdown that ensued, 10,000 to 15,000 Tibetans were killed within three days. Fearing the capture of the Dalai Lama, unarmed Tibetans surrounded his residence, at which point the

³⁸ 'The Fall of Chamdo -A Tibetan Account' English translation of 'Political and Military History of Tibet' (2003) 2 159-186, Matthew Akester (tr), *available at* <http://historicaldocs.blogspot.in/2013/03/the-fall-of-chamdo-tibetan-account.html> (last visited 30 September 2013).

³⁹ *Seventeen-Point Plan for the Peaceful Liberation of Tibet* (China-Tibet) (adopted and entered into force on 23 May 1951).

⁴⁰ Dawa Norbus, 'The 1959 Tibetan Rebellion: An Interpretation Dawa Norbu' *The Centre for Research on Tibet*, *available at* <http://www.case.edu/affil/tibet/tibetanSociety/documents/The1959Tibetanrebellion-aninterpretation.pdf> (last visited 30 September 2013).

⁴¹ *Ibid.*

Dalai Lama fled to India. On 28 March 1959, the Chinese established the Panchen Lama⁴² as a figurehead in Lhasa, claiming that he headed the legitimate Government of Tibet in the absence of the Dalai Lama, the traditional ruler of Tibet.

Thereafter began China's destruction of Tibetan monasteries, persecution of citizens and other violations of human rights which caused thousands to flee for their lives to India.⁴³

2. Sino-Indian Relations

India enjoyed relatively warm diplomatic relations with China for almost a decade after its independence and was one of the first countries to formally recognise China as a country. It also lobbied hard in the UN Security Council to secure China a seat.⁴⁴ India did not condemn the invasion of Tibet by China but it also did not legally recognise Tibet as a part of China.

On 29 April 1954, India and China entered into the Trade and Intercourse Agreement. Prime Minister Nehru believed that cultivating stronger ties with China would help to strengthen national security. The phrase '*Hindi-Chini, bhai-bhai!*' ('the Indians and the Chinese are brothers') was coined during this era.

When the PLA crushed the Lhasa Uprising, India chose not to intervene.⁴⁵ When the 14th Dalai Lama requested Prime Minister Nehru

⁴² The Panchen Lama is the second-highest lama in Tibetan Buddhism. He is considered second only to the Dalai Lama. Lobsang Trinley Lhündrub Chökyi Gyaltzen was the 10th Panchen Lama. He supported China's claim of sovereignty over Tibet, and its reform policies for Tibet. When the Dalai Lama fled to India in 1959, the Panchen Lama publicly supported the Chinese government. The Chinese made him chairman of the Preparatory Committee for the Tibet Autonomous Region.

⁴³ 'China must urgently address rights violations in Tibet—UN senior official' *UN News Centre* (2 November 2012), available at <http://www.un.org/apps/news/story.asp?NewsID=43399&Cr=China&Cr1#.UcwSdTtHLfl> (last visited 30 September 2013).

⁴⁴ Myres S McDougal and Goodman, 'Chinese Participation in the United Nations: The Legal Imperative of a Negotiated Solution' (1966) *The American Journal of International Law* 671-727.

⁴⁵ On 18 November 1950, Jawaharlal Nehru wrote to the Home Minister, Sardar Vallabhbhai Patel, saying, 'We cannot save Tibet, as we should have liked to do, and our very attempt to save it might well bring greater trouble to it. It would be unfair to Tibet for us to bring this trouble upon her without having the capacity to help her effectively. It may be possible, however, that we might be able to help Tibet to retain a large measure of her autonomy.'

to grant refuge to his people, he allowed them to stay in India but did not recognise them as refugees.

The Sino-Indian War of 1962 put an end to the 1954 Agreement and relations between the two countries remained severe for almost two decades thereafter. China accused India of supporting the rebels in Tibet while India accused China of supporting Pakistan in the 1965 war against India.⁴⁶

However, towards the end of 1979, both the countries tried to improve their relations. In 1988, Prime Minister Rajiv Gandhi visited China and the two countries agreed to work out their border dispute.⁴⁷ Nothing related to the Tibetan issue was addressed in these bilateral meetings. The 21st century brought about a major change in Sino-Indian relations. At the invitation of Premier of the State Council of China, Wen Jiabao, the Prime Minister of India, Atal Bihari Vajpayee, paid an official visit to China from 22 June to 27 June 2003.⁴⁸ As a result of this meeting, India and China signed the *Declaration on Principles for Relations and Comprehensive Cooperation*⁴⁹ and India formally recognised the area known as the 'Tibetan Autonomous Region' as a part of China.⁵⁰ On its part China agreed to allow cross-border trade in the state of Sikkim which also signified its acceptance of India's claim to Sikkim. India also agreed to prohibit Tibetans from engaging in 'anti-China' activities in India.

3. Indian Policy

When the Dalai Lama arrived in India, Prime Minister Nehru offered him and his followers a safe haven in light of the longstanding cultural and religious ties and international pressure. However, India did not refer to the Dalai Lama as a refugee but as an 'honoured guest'

⁴⁶ Nigel Harris, 'Special Asian Survey: Chinese policy' (1971) 48 *International Socialism*, 13-15, available at <http://www.marxists.org/history/etol/writers/harris/1971/06/china.htm> (last visited 30 September 2013).

⁴⁷ 'Political Relations' (2012) *Embassy of India*, available at www.indianembassy.org.cn/DynamicContent.aspx?MenuId=2&SubMenuID=0 (last visited 30 September 2013).

⁴⁸ *Ibid.*

⁴⁹ *Declaration on Principles for Relations and Comprehensive Cooperation Between the People's Republic of China and Republic of India*, (India-China) (adopted and entered in to force on 25 June 2003)

⁵⁰ *Ibid.*

and continues to do so till today. Nehru made clear that the Indian assistance towards the Dalai Lama and his followers was limited to humanitarian assistance only and that it did not recognize the Tibetan government-in-exile.⁵¹

Following the Dalai Lama's escape, thousands of Tibetan refugees flocked to India from fear of Chinese persecution. The Indian government provided them with shelter, medical care and humanitarian aid. In order to deal with the medical needs of the arrivals, the Ministry of External Affairs set up camps at Missamari and Buxa Duar, both near the Tibetan border.⁵²

Initially, the Tibetans were sent to Mussorie, but a year later they were moved to McLeod Ganj, Dharamsala where they continue to reside even today. Nehru established a society for Tibetan Education within the Ministry of Education which provides funds for schools that impart special Tibetan education to the refugee children and initiated the establishment of Tibetan Handicraft centres. The refugees were also allowed to reside and work in India.

Unlike other refugee groups Tibetan refugees are granted temporary but formal documents of identification.⁵³ However, the issue of these documents continues to vary from one wave of arrivals to another.⁵⁴

⁵¹ Indian hospitality could also be attributed to the fact that Prime Minister Nehru wanted to establish India's international image as the upholder of peace and liberty. While he was not prepared to defend the Tibetan population militarily, allowing them to enter India further purported that image, even if it came at the risk of Chinese animosity.

⁵² Sudeep Basu, 'Organizing for Exile! "Self-Help" among Tibetan Refugees in an Indian Town' (June 2010) 35, *Refugee Watch*.

⁵³ Since 1959, India has issued the Tibetans three types of documents none of which are permanent and must be renewed periodically, viz (i) Registration Certificates (RCs) which a Tibetan must possess in order to reside in India; (ii) Identity Certificates (ICs) for Tibetans RCs to travel internationally which are ordinarily valid for two years and may be renewed; and (iii) Special Entry Permits (SEPs) were issued to Tibetans in Nepal before they depart for India, to ensure their safe transit and enable them to stay in India on a temporary basis.

⁵⁴ The arrival of Tibetans in India has been divided into four phases; the First Wave (1959-1979) comprising of those who entered India soon after the Lhasa Uprising, the Second Wave (1980-1993) comprising of Tibetan monks and political activists who had been detained and tortured after the demonstrations that began in 1987, the Third Wave (1994-1999) and refugees arriving between 2000 and present.

India's policies regarding documents of identification especially RCs⁵⁵ have changed over time. India issued RCs en masse between 1959 and 1979. The only new RCs that were authorised thereafter were for the Tibetan children born in India to parents who had themselves arrived before 1979 and held valid RCs.

In the 1980s and early 1990s, India turned a blind eye to the new wave of Tibetans that came to India for refuge. They had to depend upon the issuance of unauthorised RCs with some help from the Central Tibetan Administration (CTA) which provided them with unverified birth certificates.⁵⁶ In the early 1990s the CTA and the Indian Government adopted the policy of voluntary repatriation. Thereafter, the CTA stopped providing unverified birth certificates which made it difficult for new arrivals to acquire RCs.

Since the early 1990s, the Indian government has also become increasingly intolerant of the Tibetan protests and demonstrations. The Tibetans refugees have to secure a permit before they legally demonstrate or protest. Indian intolerance of Tibetan political activity was demonstrated in the months leading up to the 2008 Beijing Olympic Games where protesters faced extreme suppression and arrest.⁵⁷

Prior to 1980s, the Tibetan refugees received adequate assistance from the Indian Government in obtaining formal documents of identification. Although India continued to admit Tibetan refugees after the 1980s, the Government denied these Tibetans both residential and identification certificates.

The Indian Government admitted 25,000 Tibetan refugees between the years of 1986 and 1996.⁵⁸ Yet it refused to grant them new allotments of land, which has led to overpopulation, unemployment and food shortages for the poor refugees.

⁵⁵ RCs are essential for Tibetans who wish to reside in India. It signifies that the bearer has been registered as a foreigner in India and grants them the privilege to reside in designated regions of India, some provide the holder of the RC with the ability to travel domestically, and, subject to further conditions, to travel abroad.

⁵⁶ The CTA is the seat of Tibetan representatives-in-exile. The Indian government has not given the CTA formal legal recognition.

⁵⁷ Tibet Justice Centre, 'Tibet's Stateless Nationals II: Refugees In India' (2011).

⁵⁸ H Knox Thames, 'India's Failure to Adequately Protect Refugees' (1999) 1 (7) *Human Rights Brief*, 20-23.

B. Refugees from Bhutan

1. Background

The Lhotshampa community is a peasant community that migrated from Nepal to Bhutan in mid 1800s. They cleared out forests in southern Bhutan and established agrarian communities. Eventually they became the major producers of food. Despite their historical presence and importance, they were formally granted citizenship and tenure of lands by the Bhutanese government only in 1958.⁵⁹

The Drukpa community is the largest community in Bhutan and constitutes the ruling monarchy and the elite population. They constantly felt threatened by the Lhotshampas who had access to quality education in India. This was possible as they shared common ethnic and cultural ties with the Nepali-speaking population of West Bengal, India. The Drukpas were educated under the system influenced by Buddhism which was mostly religious and therefore, the elites feared the possibility of Lhotshampa domination over education, economy and politics.

In the 1980s, the Gorkhaland movement gathered momentum in India where the majority Nepali-speaking population in Darjeeling demanded an independent state of Gorkhaland within India. Darjeeling is situated in the Indian state of West Bengal which shares its border with South Bhutan. The possibility of a spillover effect of the movement in southern Bhutan where the majority of the Lhotshampa population was situated aroused much fear in the Bhutanese government. The insecure monarchy started viewing the Lhotshampas as a threat to their existence and a potential cause of their downfall.

Moved by these fears, the Bhutan National Assembly, dominated by the majority Drukpa community, in 1985 passed a revision of its existing laws. It limited citizenship to those who could prove residence before 31 December 1958.⁶⁰ This move was implemented by a census in 1988

⁵⁹ — ‘Government Repression of Southern Bhutanese [Lhotshampas]’ *Association of Human Rights Activists, Bhutan*, at <http://www.ahurabht.tripod.com/index.html> (last visited 30 September 2013).

⁶⁰ Rajesh Giri, ‘Bhutanese Refugees: Middle of Nowhere’ (1999) 18 *Newsletter of the International Institute for Asian Studies*, available at <http://www.iias.nl/iiasn/18/regions/s5.html> (last visited 30 September 2013).

which was conducted only in southern Bhutan. In 1989, the King of Bhutan announced that the country would adopt the 'One Nation, One People' policy⁶¹ which comprised of one culture, one etiquette, one dress code and one language. It prohibited the practice of Nepali language, Hindu culture and religion, and any dress other than the traditional Drukpa dress.

This announcement was followed by a mass confiscation of citizenship certificates, brutal torture and imprisonment of those who protested. The security personnel rounded up citizens at night, who were then forced to sign voluntary migration certificates.⁶² This marked the beginning of the forced expulsion of the Lhotshampa population to Nepal via Indian Territory.⁶³

2. India-Bhutan Relations

India and Bhutan have shared good relations since the British era. This was mainly due to British interests in securing India's borders by maintaining Bhutan as a buffer State between India and China. After India gained independence, India and Bhutan entered into the *Treaty of Friendship* in 1949 the first article of which stated that 'there shall be perpetual peace and friendship between the Government of India and the Government of Bhutan.'⁶⁴ In pursuance thereof, India assisted Bhutan in getting admitted as a member of the UN in 1971.⁶⁵

Both India and Bhutan have vested interests in maintaining their friendship, security being their primary concern. Bhutan continues to serve as a buffer state between India and China. The annexation of Tibet by China has further increased the importance of Bhutan's

⁶¹ *Ibid.*

⁶² International Organization for Migration, 'The Bhutanese Refugees In Nepal A Tool For Settlement Workers And Sponsors' (2008).

⁶³ *supra* n. 59.

⁶⁴ *Treaty of Perpetual Peace and Friendship Between the Government of India and the Government of Bhutan* (India-Bhutan) (adopted on 8 August 1949), entered in to force on 22 September 1949) BTN-020.

⁶⁵ Article II of the *Treaty of Perpetual Peace and Friendship Between the Government of India and the Government of Bhutan* (India-Bhutan) (adopted on 8 August 1949 entered in to force on 22 September 1949) BTN-020 states that: 'The Government of India undertakes to exercise no interference in the internal administration of Bhutan. On its part, the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations.'

strategic position for India. Bhutan's support is also imperative for the containment of insurgency in India's North-Eastern region which is a threat to its internal security.⁶⁶ Due to geographical proximity, the insurgents set up their camps near the Indo-Bhutan border and even within Bhutan.⁶⁷ As long as India has Bhutan's cooperation, suppression of these insurgents will be easier and they will not be able to function properly.

Bhutan on the other hand needs Indian support as its diplomatic relations with China has been extremely turbulent with China making claims to Bhutanese territory.⁶⁸ Thus, support from India is very crucial to prevent it from becoming a second Tibet.

India and Bhutan also share mutual economic interests. India provides Bhutan 13 transit routes.⁶⁹ The 336 Mega Watt Chukha Hydel project ensures a steady supply of electricity to parts of West Bengal and Assam. The revenue from this supply comprises about 40 percent of Bhutan's national revenue.⁷⁰ The ongoing 1020 Mega Watt Tala Project once completed and commissioned will not only resolve India's power shortage problem but will also provide substantial revenue to Bhutan.⁷¹ The *Treaty of Friendship* also establishes a free trade route between the two countries.

3. Indian Policy

From the beginning India has not allowed the Bhutanese refugees to remain on its territory. Despite that, it still hosts a significant amount of its population; estimates of the numbers of ethnic Nepalis from Bhutan who reside in India range from 15,000 to 30,000.⁷²

⁶⁶ Dorji Penjore, 'Security of Bhutan: Walking Between the Giants' (2004) 10 *Journal of Bhutan Studies*, 108-131.

⁶⁷ Hussain Wasbir, 'Insurgency in India's Northeast Cross-border Links and Strategic Alliances' (2006) 17 *Faultlines*, 105-126.

⁶⁸ In 1958, China had not only staked a claim on the Indian Territory, its maps but also showed 200 sq miles of Bhutanese territory as part of Tibet.

⁶⁹ Padmaja Murthy, 'Indo-Bhutan Relations: Serving Mutual Interests' (1999) Vol 23 (1) *Strategic Analysis*.

⁷⁰ Sonam Tshering and Bharat Tamang, 'Hydropower-Key To Sustainable, Socio-economic Development Of Bhutan', available at http://www.un.org/esa/sustdev/sdissues/energy/op/hydro_tsitingbhutan.pdf (last visited 30 September 2013).

⁷¹ Asian Development Bank, 'Bhutan: Energy Sector' (2010).

⁷² 'Last Hope-The Need for Durable Solutions for Bhutanese Refugees in Nepal and India' (2007).

India has remained silent on the ethnic cleansing of the Lhotshampa community and has consistently maintained that the refugee problem is a bilateral issue between Nepal and Bhutan. However, there seemed to be a shift in this stand whenever it was in favour of the Bhutanese Government.

Nepal and Bhutan do not share an international border. In order to reach Nepal, the expelled Lhotshampas had to transit via India. Instead of preventing the refugees from entering the Indian Territory or allowing them to remain, India chose to send them to Nepal. The Indian security forces allowed the refugees easy access to the Indian Territory but once there, they were put into trucks and were immediately transported off to the Nepal border.⁷³

India has been very careful about preventing the refugee issue from overshadowing its relation with Bhutan. In 1997, India arranged for the extradition of Rongthong Kuenley Dorji, a leader of the party in opposition to the ruling Druk National Congress (DNC).⁷⁴ India maintained that this was done with regard to Article VIII(2) of the *Treaty of Friendship*.⁷⁵ Though the timely intervention of Indian human rights organisations prevented the extradition, India restricted his movements and has asked him to report regularly to the police authorities.

In May 2007, thousands of Bhutanese refugees organised a 'symbolic long march' back to Bhutan to draw the attention of international communities and to put pressure on the Bhutanese government.

⁷³ Murthy *supra* n. 69.

⁷⁴ 'BHUTAN: The Detention of Rongthong Kuenley Dorji' (1997) 7 (4) *Human Rights Solidarity*, 1.

⁷⁵ Article VIII (2) of the *Treaty of Perpetual Peace and Friendship Between the Government of India and the Government of Bhutan* (India-Bhutan) (adopted on 8 August 1949) entered in to force on 22 September 1949) BTN-020 states: 'The Government of Bhutan shall, on requisition being duly made by the Government of India, or by any officer authorised by the Government of India in this behalf, surrender any Indian subjects, or subjects of a foreign Power, whose extradition may be required in pursuance of any agreement or arrangements made by the Government of India with the said Power, accused of any of the crimes, specified in the First Schedule of Act XV of 1903, who may take refuge in the territory under the jurisdiction of the Government of Bhutan, and also any Bhutanese subjects who, after committing any of the crimes referred to in Indian territory, shall flee into Bhutan, on such evidence of eitit guilt being produced as shall satisfy the local court of the district in which the offence may have been committed.'

However, they were stopped at the Nepal-India border. When the refugees tried to force into the blockade, the Indian security forces brutally attacked the peaceful march of the refugees.⁷⁶

C. *Refugees from Burma*

1. Background

On 8 August 1988, popularly commemorated as the 8-8-88 day in the Republic of the Union of Myanmar (Burma), pro-democracy protests broke out.⁷⁷ The army units shot at unarmed protesters. On 18 September 1988, the army forcibly retook control of the cities and towns. Martial Law was declared and the State Law and Order Restoration Council (SLORC), a collective of senior military officers was created who would form a ‘transitional military government’.⁷⁸ To gain internal legitimacy and foreign support for its rule, the SLORC rapidly instituted a series of reforms, including changing the English name of the country to ‘Myanmar’.

Meanwhile, the National League for Democracy (NLD), led by Aung San Suu Kyi began gaining popularity. This posed a threat to the SLORC who sentenced Suu Kyi to house arrest in July 1989 on charges of instigating divisions in the armed forces.⁷⁹ In the May 1990 elections, the NLD achieved a landslide victory.⁸⁰ The SLORC however, nullified

⁷⁶ ‘NEPAL: “Huge tragedy” looms as Bhutanese Refugees Stage “long march home”’ *Integrated Regional Information Network* (30 May 2007), available at <http://www.irinnews.org/Report/72453/NEPAL-Huge-tragedy-looms-as-Bhutanese-refugees-stage-long-march-home> (last visited 30 September 2013).

⁷⁷ Renaud Ergeteau, ‘The Repression of the August 8-12 1988 (8-8-88) uprising in Burma/ Myanmar’ *Online Encyclopedia of Mass Violence* (Online Edition, 25 February 2009), available at http://www.massviolence.org/IMG/article_PDF/The-repression-of-the-August-8-12-1988-8-8-88-uprising-in.pdf (last visited 30 September 2013).

⁷⁸ – ‘Burma- The 18 September 1988 Military Takeover And Its Aftermath’, *Amnesty International*, available at www.ibiblio.org/obl/docs/3/18_Sept_1988-ocr.pdf (last visited 30 September 2013)

⁷⁹ Katy Stoddard, ‘Aung San Suu Kyi, Burma’s beacon of hope’ (2012), *The Guardian*, available at <http://www.guardian.co.uk/theguardian/from-the-archive-blog/2012/jun/19/archive-aung-san-suu-kyi> (last visited 30 September 2013).

⁸⁰ Asean Inter-Parliamentary Myanmar Caucus, ‘The 1990 Elections In Myanmar-15 Years Wating’ (2005), available at <http://www.aseanmp.org/docs/resources/1990%20Elections.pdf> (last visited 30 September 2013).

NLD's victory by announcing that the new Members of Parliament were elected only to form a constituent assembly to draft a new Constitution, rather than sit as the elected Parliament.

This generated more protests and arrests. The military crack-down was brutal and unfettered human rights violations were committed.⁸¹ Thousands of people fled to the nearby countries to evade the human rights abuses inflicted on them. The Chin minority group in north Burma was especially subjected to abuse as they were Christians and Burma was mostly a Buddhist state.⁸²

2. India-Burma Relations

Like most other neighbours, India shares historic ties with Burma which date before the two countries' colonial experience under the British. Relations with Burma in the contemporary era can be studied with respect to Burma's post-independence period which may be classified under four categories: the U Nu era (1948–62), the Ne Win era (1962–88), the transition era (1988–90), and the SLORC/SPDC era (1991–2010).

During the U Nu era, the two countries saw strong bonds of friendship, the basis of which was to be found in Jawaharlal Nehru's and U Nu's mutual regard for the Non Aligned Policy. In the Ne-Win era, relations were as Foreign Secretary JN Dixit once put it 'correct but not close'.⁸³

In the 1960s the promulgation of the policy of nationalisation in Burma resulted in the eviction of thousands of Indians. Despite that the two countries managed to sign the *Land Boundary Agreement, 1967* and the *Maritime Boundary Agreement, 1986*. Relations remained quite smooth at the leadership level during Prime Minister Indira Gandhi's tenure.

⁸¹ 'Crackdown - Repression of the 2007 Popular Protests in Burma' (2007), available at <http://www.hrw.org/reports/2007/burma1207/burma1207web.pdf> (last visited 30 September 2013).

⁸² United States Department of State, '2010 Report on International Religious Freedom - Burma' (2010) *Refworld*, available at <http://www.refworld.org/docid/4cf2d0ad34.html> (last visited 30 September 2013).

⁸³ Rajiv Kumar Bhatia, 'Myanmar-India Relations: The Way Forward' (2011) 6 (3) *Indian Foreign Affairs Journal*, 315-326, available at <http://www.associationdiplomats.org/Publications/ifaj/Vol6/6.3/6.3%20ARTICLE%204.pdf> (last visited 30 September 2013).

The period of 1988–90, witnessed a change of governments in both countries. India extended strong support to the pro-democracy movement in Burma thereby generating serious tensions in their relations. However, due to China's growing influence over the South East Asian nations, the Bharatiya Janata Party Government in India discarded its idealist approach and adopted 'realpolitik'.⁸⁴ To fulfil the immediate need to improve its relations with its neighbours, India adopted the 'Look East'⁸⁵ policy. This required India to prevent itself from interfering in the internal matters of Burma.

3. Indian Policy

India was the first neighbouring country to stand up for democracy when the 1988 uprising took place in Burma. The Indian Embassy in Rangoon was active in helping pro-democracy activists.⁸⁶ When the Burmese student activists fled to the Indo-Burmese border, the Indian Embassy in Rangoon provided them with financial assistance to go to India. The Government of India opened refugee camps in the Indian states of Mizoram and Manipur⁸⁷ and 'strict instructions' were given to not turn back any genuine Burmese refugee seeking shelter in India.⁸⁸

The Indian government even risked sacrificing its thin linkages with the Burmese military rulers. On 10 November 1990, two Burmese students hijacked a Thai plane from Bangkok to Calcutta.⁸⁹ After nine hours,

⁸⁴ 'India's Strategic Culture' (2006), available at <https://fas.org/irp/agency/dod/dtra/india.pdf> (last visited 30 September 2013).

⁸⁵ The 'Look-east policy' was launched in 1992 under the leadership of Prime Minister PV Narasimha Rao. In the 1990s India implemented an economic policy of engagement with the South-East Asian region and sought to create and expand regional markets for trade, investments and industrial development. It also began strategic and military cooperation with the nations in this region.

⁸⁶ 'Challenges To Democratization In Burma- Perspectives on Multilateral and Bilateral Responses' (2011).

⁸⁷ *Ibid.*

⁸⁸ Soe Myint, 'India should do more for Burma's democracy' *Mizzima News* (Online Edition 10 June 2003), available at http://www.burmatoday.net/mizzima2003/mizzima/2003/06/030610_india_mizzima.htm (last visited 30 September 2013).

⁸⁹ Chandra Banerjee, 'Trial of Myanmar Activists in 1990 Thai Airways Hijacking Case to Begin in April', *Asian Tribune* (Online Edition 14 January 2003), available at <http://www.asiantribune.com/news/2003/01/15/trial-myanmar-activists-1990-thai-airways-hijacking-case-begin-april-0> (last visited 30 September 2013).

the two students gave themselves up to the Indian authorities. They were released after three months on bail. Thirty-eight Members of Parliament (MPs) signed a petition requesting the then Prime Minister Chandra Shekhar Singh to give them political asylum in India, which was subsequently granted.⁹⁰

The All India Radio carried anti-military broadcasts in Burmese language. To complicate the situation further, in 1992, India along with the United States of America and other Western countries sponsored a United Nations resolution condemning the Burmese military junta for its violations of human rights.⁹¹

However, the Indian shift in policy towards 'realpolitik' has resulted in a change of attitude towards the refugees. India continues to allow hundreds of Burmese pro-democracy activists and refugees to stay in India but their activities are closely monitored by the authorities. On many occasions, India has forcibly returned Burmese refugees to Burma which is in complete violation of the international custom of non-refoulement.⁹² The Burmese refugees continue to live in fear and insecurity in India and are subject to continuous discrimination.⁹³

IV. INDIA'S REFUGEE 'POLICY'?

India's geographic situation is both a boon and a curse. While its location makes it conducive to the expansion of trade and transport, the same makes it vulnerable geo-strategically. From this perspective, China poses the greatest threat—India's 'Look East'⁹⁴ policy and China's 'good

⁹⁰ Bibhu Prasad Routray, 'India Myanmar Relations: Triumph of Pragmatism' (2011) 1 (1) *Jindal Journal of International Affairs*, 301-321, available at <http://www.jsia.edu.in/JJIA/PDF/Bibhu%20Prasad%20Routray.pdf> (last visited 30 September 2013).

⁹¹ *Ibid.*

⁹² In 2006, India extradited eleven Burmese army defectors some of whom were already recognised as 'person of concern' by UNHCR.

⁹³ In June 1995, tensions between the local Mizo population and Burmese Chins increased after Mizoram newspapers reported that the President of a village unit of the Young Mizo Association had been shot and killed by three members of the Chin National Front. A reign of police terror and massive arrests followed.

⁹⁴ *supra* n. 85.

neighbour⁹⁵ policy has put these two countries in a *de facto* state of competition to establish better bilateral relations with their neighbours. The growing relations between China and Pakistan also pose a great security threat to India in terms of geographical encirclement in light of the Chinese ‘String of Pearls’⁹⁶ strategy. This growing race for Asian supremacy between the two has made it imperative for India to secure its borders and the buffer states between itself and China. India’s borders have been a great source of uncertainty and concern to the Indian government. India shares a crucial distance of a total of 15,106.7 kilometres⁹⁷ with its neighbours. India also has several disputed territories and faces territorial issues with six out of its ten neighbours.⁹⁸

China has managed to resolve⁹⁹ or defuse¹⁰⁰ most of its boundary and territorial disputes.¹⁰¹ Time and again it has laid unwarranted claims to various parts of the Indian Territory,¹⁰² thereby threatening its sovereignty. The Chinese determination to end all of its territorial

⁹⁵ In the late 1990s and early 2000s, China increased regional cooperation with the Asian nations in an attempt to establish itself as a responsible power. Under the ‘good neighbour’ policy, China granted favourable treatment to neighbouring countries. The policy included solving disputes especially territorial ones by peaceful means and sharing of the developmental benefits.

⁹⁶ The ‘String of Pearls’ strategy emphasises an increase in Chinese efforts to establish geopolitical influence. It includes increased access to ports and airfields, development of special diplomatic relationships, and modernising the military forces that extend from the South China Sea through the Strait of Malacca, across the Indian Ocean, and on to the Arabian Gulf.

⁹⁷ The individual values are—Bangladesh 4096.7 km, China 3488 km, Pakistan 3323 km, Nepal 1751 km, Myanmar 1643 km, Bhutan 699 km and Afghanistan 106 km.

⁹⁸ These countries include Pakistan, China, Bangladesh, Nepal, Myanmar and Sri Lanka.

⁹⁹ Wenwen Shen, ‘China and its Neighbours: Troubled Relations’ (2012), *EU-Asia Centre*, available at http://www.eu-asiacentre.eu/pub_details.php?pub_id=46 (last visited 30 September 2013).

¹⁰⁰ A dispute is defused through a preliminary agreement on principles for delimiting the disputed area.

¹⁰¹ From 1960 to 1964, China settled disputes with Nepal, Myanmar, North Korea, Pakistan, Afghanistan and Mongolia, and also conducted substantive talks with the erstwhile Soviet Union. From 1991 to 1999 China signed agreements resolving disputes with Laos, Vietnam, Kazakhstan, Russia, Kyrgyzstan, Tajikistan, Bhutan and Vietnam.

¹⁰² China has laid claims over the Aksai Chin (which led to the war of 1962), Trans-Karakoram Tract, the state of Arunachal Pradesh and the Depsang plains.

disputes has also caused it to adopt an assertive behaviour.¹⁰³ China should use force to put an end to its territorial dispute with India is a great possibility, making it crucial for India to maintain its relations with the countries that share their borders with itself and China and develop them as strong buffer states. Tibet has played an important role in shaping Sino-Indian relations. Though its historic importance as a buffer state is lost, refugees from Tibet continue to be used as pawns in diplomatic exchanges between these two nations. With the loss of Tibet and the increasing Chinese influence upon its neighbours, India was determined to secure its relations with the countries of South Asia-Indian Ocean Region (SA-IOR) which geographically serve as a buffer between itself and China. Towards meeting this end, India has used the presence of refugees from these neighbouring countries to its advantage. In this context, India's relations with the two countries of Bhutan and Burma are of much relevance. When relations with the government of these two states improve, India becomes less hospitable to the refugees and on the other hand they receive better treatment if relations worsen.

A. *Tangled with Tibet*

The presence of nearly 150,000 Tibetans in India¹⁰⁴ has been a great cause of Chinese anxiety. Though India has recognised Tibet as a part of China,¹⁰⁵ it has not been able to allay Chinese fears about the possible use of the presence of the Dalai Lama and the large Tibetan refugee population in India to create trouble for China in Tibet. Their presence in India continues to keep the 'Tibetan question' alive.¹⁰⁶ The treatment meted out to Tibetan refugees has been evidently better than the treatment given to any other refugee community in India. However, a closer look at the Indian policy reveals that the level of treatment has

¹⁰³ M Taylor Fravel, 'China's Behavior in its Territorial Disputes and Assertiveness in the South China Sea' (2011) *Centre for Strategic and International Studies*, available at http://csis.org/files/attachments/111128_Fravel_China_Behavior_Territorial_Disputes.pdf (last visited 30 September 2013).

¹⁰⁴ Report of Refugee Populations in India (2007), available at http://www.hrln.org/admin/issue/subpdf/Refugee_populations_in_India.pdf (last visited 30 September 2013).

¹⁰⁵ Claudia Astarita, 'China-India Relations in the Twenty-First Century: Decoding Border Disputes with Critical Junctures' (2013) *Journal of International Affairs*, available at <http://jia.sipa.columbia.edu/china-india-relations-twenty-first-century-decoding-border-disputes-critical-junctures> (last visited 30 September 2013).

¹⁰⁶ The debate on Tibetan Sovereignty.

not been all that benign. The level of treatment has varied according to the prevailing Sino-Indian relations. When the relations seemed better, India imposed stricter controls on the refugees.

The Tibetan refugees came to India only a few short years after Indian independence. Nehru in his attempts to establish India as a peaceful nation and a non-aligned movement pioneer allowed the Tibetans into India and at the same time remained neutral about Tibet's violent annexation.

During the 1960s and 1970s Indian relations with China remained sour due to the war. India provided extensive logistical and financial assistance to thousands of Tibetan refugees. It continued to accommodate the influx of refugees throughout this period.

However, towards the end of the Cold War, Sino-Indian relationship developed a new dimension. The Chinese Premier Li Peng visited India in 1991 and agreements on resuming cross-border trade were signed. The Chinese Consulate General was reopened in Mumbai in 1992 and the Indian Consulate General in Shanghai in 1993.

The Indian Prime Minister Narasimha Rao visited China in 1993 and signed the Peace and Tranquility Agreement and the visit of Chinese President Ziang Zemin in 1996 led to the reaffirmation of the 'Five Principles of Peaceful Coexistence to strengthen relationship in the 21st century'.¹⁰⁷

In 1994, India adopted the policy of 'voluntary repatriation'. The new arrivals of Tibetan refugees were not absorbed into the settlements and were encouraged to voluntarily return to Tibet. They were not allowed to acquire RCs and did not receive assistance from the CTA. Those without the RCs were arrested and detained. In 2003, India accepted that the Tibetan Autonomous Region was a part of Chinese territory,¹⁰⁸ following which bilateral relations improved tremendously. In 2005, the Indian and Chinese Prime Ministers Manmohan Singh and Wen Jiabao signed agreements establishing a framework for the resolution of the

¹⁰⁷ *supra* n. 44.

¹⁰⁸ 'India Recognises Tibet as a Part of China' (2003) *The Sikh Times* (Online Edition India 24 June 2003), available at http://www.sikhtimes.com/news_062403a.html (last visited 30 September 2013).

border dispute and committing to further strategic cooperation. Prime Minister Hu Jintao visited India in 2006.

Hereafter, India began suppressing ‘anti-Chinese’ activities by the Tibetans and discouraged refugees from entering India. In 2007, twenty-two activists were arrested during a Tibetan Youth Congress demonstration at the Chinese Embassy in New Delhi.¹⁰⁹ Relations began to decline again when China refused to grant a visa to an officer from Arunachal Pradesh claiming that he did not require one as Arunachal was a part of China.¹¹⁰ After this incident, India began to favour Tibetans through its policies. In 2008, India stated that being a democratic country it believed in free expression and would not suppress Tibetan demonstrations during the relay of the Olympic torch.¹¹¹ In the face of tremendous Chinese pressure to not let the Dalai Lama visit Tawang monastery in Arunachal Pradesh, the Dalai Lama was allowed to visit Tawang in November 2009. Indian negotiations with the CTA have continued without giving it formal recognition. This can be seen as India’s message to China that should it choose to interfere with India’s international disputes and affairs, it too has a ball in its court which it will not hesitate to shoot back.

B. *Blind to Bhutan*

India has characteristically managed to maintain resolute ties with Bhutan’s government despite Chinese efforts to increase influence over it. India has managed to prevent the Lhotshampa refugee issue from surfacing in any of its talks and has continually positioned itself in a neutral stance.

There is a glaring discrimination between the Indian treatment of the Tibetan and Bhutanese refugees. While it received the Tibetans with

¹⁰⁹ ‘Tibetan activists in Tihar Jail after severe beatings by Delhi Police’ (2007), *Phayul*, available at <http://www.phayul.com/news/article.aspx?id=18204&t=1> (last visited 30 September 2013).

¹¹⁰ David M. Malone and Rohan Mukherjee, ‘India and China: Conflict and Cooperation’ (2010) Vol. 52 (1) *Survival*, 137-158, available at <http://scholar.princeton.edu/rmukherj/files/Survival%2052-1%2012%20Malone%20and%20Mukherjee.pdf> (last visited 30 September 2013).

¹¹¹ – ‘No suppression of Tibetan protests: India to China’ (2008), *Outlook India*, available at <http://news.outlookindia.com/items.aspx?artid=561780> (last visited 30 September 2013).

open arms and provided them with generous facilities and lands to settle upon, the Bhutanese remained oblivious to Indian sight.

The Bhutanese refugees were directly deposited at the Nepal border and no attention was paid to their plight. Those who managed to enter and remain in India are now forced to live in squalid conditions and have no access to any formal agency which can help them acquire the basic necessities. Further, they are discriminated against by the local communities and find it difficult to gain employment.

C. Malleable to Myanmar

Indian policy towards Burma shifted from idealism to pragmatism triggered by the increasing influence of China over Burma. While an ardent supporter of democracy like Nehru would have never reconciled himself with military excesses, the Narasimha Rao government, through its 'Look East' policy sacrificed ideology at the altar of geo-political security.

India's increasing insecurity about Burma is not ill founded. China is currently the largest supplier of weapons to Burma and also provides the Burmese Army with training in the technical use of weapons and weapon systems. If China were to acquire full sway over Burma it would control the economy and surround India's North-eastern states as well.

Burma's geo-strategic location further increases the importance to maintain good relations with its government. Burma shares a 1643 kilometre long land border with four of India's most sensitive states- Arunachal Pradesh, Nagaland, Manipur and Mizoram. India also shares the strategic waters of Bay of Bengal, including the area Andaman and Nicobar Islands where the two closest Indian and Burma's islands are barely 30 kilometres apart.

When protests for democracy first broke out, India was very supportive of the protesters. However after 1994, as a result of India's adoption of the 'Look East' policy, the support to these protesters reduced and the refugees were subjected to stricter control.

India has done much to cultivate its ties with Burma. It voted against the decision of the International Labour Organisation (ILO) to take action against the regime for failing to curb forced labour in the country.¹¹² In April 2010, both countries held joint secretary level talks in Tawang Arunachal Pradesh which was very significant due to the Chinese claims on the area.¹¹³

Today India hosts a growing population of refugees from Burma, mostly comprising of the ethnic Chin minority.¹¹⁴ Burmese refugees in India reside primarily in two places—the North-eastern states, especially Mizoram, and New Delhi. India does not officially recognise the Burmese as refugees. UNHCR is allowed to manage these refugees in Delhi in but is not allowed to operate in the North-east states where the majority of refugees live.¹¹⁵

As long as India and Burma's bilateral relationship remains on good terms, the Burmese in India will remain trapped in a condition of human rights violation and discrimination.

V. CONCLUSION

India's refugee policy is not a conscious choice but a result of failed idealism and a rude awakening to pragmatism. Its shifting stands and policies regarding international issues occurring in its neighbourhood which require its involvement have made refugees the scapegoats in its international policies, even if initially it was not intended to be so.

The Tibetan crisis arose right after Indian independence. India wanted to prove to the world that it could emerge as an ambassador of peace and as a successful nation especially in light of international scepticism. The Tibetan crisis provided the requisite opening for

¹¹² Routray, *supra* n. 90.

¹¹³ Myint, *supra* n. 88.

¹¹⁴ — 'Briefing: Myanmar's Ethnic Problem' (2012) *Integrated Regional Information Networks*, available at <http://www.irinnews.org/report/95195/briefing-myanmar-s-ethnic-problems> (last visited 30 September 2013).

¹¹⁵ — 'India: Close the Gap for Burmese Refugees' (2009) *Refugees International*, available at <http://www.refintl.org/policy/field-report/india-close-gap-burmese-refugees> (last visited 30 September 2013).

India to further its idealistic pursuits and as a consequence Tibetan refugees were allowed to seek refuge. This strain of idealism continued while initially dealing with refugees from Burma when India welcomed pro-democracy refugees with open arms. The Bhutanese though, were spared involvement in this great Indian pursuit as they came at a time when idealism was at its death bed but faced worse as they were subjected to Indian expediency instead. India's failed effort at idealism has cost the refugees on its territory dearly. Since its shift to pragmatism India has been actively exploiting these refugee communities towards gaining favour with the country of their origin.

Due to discriminatory assistance it may appear that individually one refugee community is better off than the other. But as a group they all suffer. India may maintain that it has sufficient laws for refugees and that it does not require an exclusive law for them. It may also cite one or two odd cases where it has indeed successfully protected them but in general refugees in India have no substantial rights.

India's obligations to protect refugee rights will not have much effect as long as the subject of refugees remains intrinsically related to the maintenance of geo strategic relations.

Therefore, till the refugees have the potential to be exploited for the purpose of national interest, no attempt to draw a uniform policy will be successful and no amount of pressure or reasoning will be enough to persuade India to sign the Convention. The only course left open to the refugees trapped in this Catch 22 situation is to wait for the balance of these relations to shift in their favour.

COMPUTING THE TAX ON CLOUD COMPUTING[†]

*Vikrant Shetty**

I. INTRODUCTION

In this digital age, corporations globally are able to use and have access to new inventions and technologies almost every day. This incessant evolution of technology is constantly challenging the existing tax legislations, most of which have been drafted without contemplating the radically changed dynamics of revenue generated from digital services such as cloud computing transactions.

This has proved to be a problem, not only for India, but also for the international sphere.¹ Even though e-commerce taxation in India has been continually evolving, taxation on cloud computing services has not received the requisite attention from the Indian Income Tax Department. Thus, it is necessary for the Government to formulate a way to tax cloud computing services, in order to capitalise another source of revenue.

II. WHAT IS CLOUD COMPUTING?

As early as 1994, a cloud was used to represent the internet in system diagrams.² Hence, the internet has now become synonymous with the 'cloud'. 'Cloud computing' is a generic term for the delivery of information technology services over the Internet³. Although the term 'cloud computing' may be unfamiliar, cloud computing services are being availed by all of us every day. A simple example of an outcome

[†] This article reflects the position of law as on 14 July, 2013.

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¹ 'Tax Analysts Hosts Conference on States' Taxation of Cloud Computing', (2013) *Tax Analysts*, available at <http://www.taxanalysts.com/www/pressrel.nsf/Releases/B81E9A12F9D90B9485257B5C00474438?OpenDocument> (last visited 14 July 2013).

² U.S. Patent 5,485,455, Figure 8, column 17, line 22, filed Jan 28, 1994; U.S. Patent 5,790,548, Figure 1, column 5, lines 56-57, filed April 18, 1996.

³ OECD (2012), *Dealing Effectively with the Challenges of Transfer Pricing*, OECD Publishing, <http://dx.doi.org/10.1787/9789264169463-en> (last visited 14 July 2013).

of cloud computing is a personal e-mail, which we access at absolutely no cost from a third party server.

Two decades ago, in order to use an e-mail service, one had to install a personal Mail Exchange server, which involved huge capital costs. Organisations had to invest heavily in setting up their own Information Technology (IT) infrastructure, which included purchasing of dedicated servers and equipment, in order to run their business applications. IT departments were forced to spend considerable time and energy on implementation, maintenance, and upgradation of software and data storage units.

With cloud computing, one can simply log in and start using software and servers maintained by third parties. E-mail, social networking, online storage of data and use of online software are a few examples of cloud computing services. Cloud Computing is characterised by on-demand self service, pay as per use, broad network access, resource pooling and non-transfer of ownership of main property.

The cloud can be classified into four deployment models, based on the nature of the network, and cloud computing services can be classified into three delivery models, based on the nature of the service provided.⁴

The four deployment models are:

Private cloud: The cloud infrastructure is owned or leased for exclusive use by a single organisation comprising of multiple consumers.⁵ This type of deployment model is predominantly found in office units and classrooms.

Community cloud: The cloud infrastructure is shared between several organisations from a specific community that has shared concerns⁶ such as Multinational corporations. Community clouds are generally designed specifically for specialised and highly regulated industries, such as

⁴ *Infra* 'Part III: Taxation Based on Delivery Models'.

⁵ Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing: Recommendations of the National Institute of Standards and Technology*, (U.S Department of Commerce Special Publication 800-145 September 2011), 3.

⁶ David S. Linthicum, *Cloud Computing and SOA Convergence In Your Enterprise*, (Pearson Education India 2009) 10.

healthcare or investment banking. A community cloud would be built to handle security and regulatory compliance requirements of that industry.⁷

Public cloud: A public cloud offers cloud computing solutions, applications and storage to almost anyone who has access to the internet. Public cloud services may be free or offered on a pay-per-usage model.⁸ Examples of public cloud include Salesforce.com, Google AppEngine and Amazon EC2.⁹

Hybrid cloud: The cloud infrastructure is a composition of two or more clouds (private, community or public) that remain as unique entities but are bound together, enabling data and application portability. A good example of a hybrid cloud is ‘cloud bursting’. In cloud bursting, organisations use their own private computing infrastructure for normal usage, but access the services on a public cloud using services for high/peak load requirements. This ensures the handling of a sudden increase in computing requirements and load balancing between clouds.¹⁰

This article focuses on tax incidence in relation to cloud computing services provided on the Public cloud. Part III of this article addresses the existing treatment of e-commerce taxation. Part IV deals with taxation based on delivery models. Part V addresses the transfer pricing issues that can arise in the absence of clear-cut laws on taxation on the revenue generated from cloud computing services. Finally, Part VI proposes suggestions to tackle the issues that arise in e-commerce taxation.

⁷ Huseni Saboowala *et al*, *Designing Networks and Services for the Cloud: Delivering Business-grade Cloud Applications and Services*, (Pearson Education 2013).

⁸ *Ibid*.

⁹ Rajkumar Buyya *et al*, *Mastering Cloud Computing: Foundations and Applications Programming*, (Newnes 2013).

¹⁰ Stephen R. Smoot and Nam K Tan, *Private Cloud Computing: Consolidation, Virtualization, and Service-Oriented Infrastructure*, (Elsevier 2011) 9.

III. TAXATION OF CLOUD COMPUTING

A. *Introduction to E-Commerce Taxation*

It is difficult to determine with certainty the tax treatment of technical business models like cloud computing, as they involve several variable features or transactions. For the purpose of direct taxation, the income derived by the resident cloud service provider, ie when the office of the service provider and the recipient are both located in India, would be taxed at normal tax rates. The tax implications get complicated when either the cloud computing provider or the recipient is located outside the country, in such cases several tax treaties have to be taken into consideration. In such scenarios, understanding the supply chain of the cloud computing service which is being provided is of paramount importance, in order to determine which country has a right to tax all or parts of the transaction.

Cloud computing also raises certain indirect tax issues. If a cloud computing service is classified as a 'service' it will attract a 12.36 per cent¹¹ service tax. If it is to be classified/characterised as a 'transfer of right to use property', it will attract Value Added Tax (VAT) which varies from state to state. If appropriate legislations are not passed at the earliest, immense tax litigation may crop up in the future, in relation to local and cross-border cloud computing services.

In order to examine issues relating to taxation in the IT sector, Prime Minister Manmohan Singh appointed a high-level panel, under the Chairmanship of Mr. N Rangachary, former Chairman Central Board of Direct Taxes (CBDT) and Insurance Regulatory and Development Authority (IRDA).¹² The Committee emphasised the need for certainty in tax policies to be applied on the IT industry,¹³ export revenues of

¹¹ Department of Revenue, Ministry of Finance, Government of India, Notification No.2/2012 - Service Tax, Gazette Of India, Extraordinary, Part II, section 3, sub section (I) (17 March 2012).

¹² Press Information Bureau, Government Of India 'PM Sets Up Committee To Review Taxation Of Development Centres And The It Sector, Safe Harbour Provisions To Be Finalised Soon' (30 July 2013) *available at* <http://pib.nic.in/newsite/erelease.aspx?relid=85584> (last visited 14 July 2013).

¹³ Rangachary Committee, 'First Report of the Committee to Review Taxation of Development Centres and the IT Sector' (14 September 2012).

which are estimated at \$ 68 billion¹⁴. The goal of the committee was to have a fair tax system in line with best international practice, for promoting India's software industry. The committee interacted with various Departments of Central Government, industry stakeholders and accounting firms and prepared reports which were submitted to the Ministry of Finance.¹⁵

B. Income Characterisation

Due to the borderless nature of cloud computing transactions, it is difficult to determine the nature of the income derived and, in effect, concepts such as source and residence, with respect to income tax are rendered obsolete. Issues get further complicated due to the differences between the definitions and scope of the types of income provided in the tax legislations of various countries, the Double Taxation Avoidance Agreements (DTAAs) and other tax treaties.

As per section 90(2)¹⁶ of the Income Tax Act, 1961 (ITA), the provisions of the ITA shall apply to an assessee, despite of a DTAA, *to the extent that the provisions of the Act are more beneficial to that assessee* (emphasis supplied). In *Commissioner Of Income-Tax v. Visakhapatnam Port Trust*¹⁷, the Andhra Pradesh High Court held that while determining the liability of a non-resident company in India, if there is any DTAA entered into under section 90 of the Act, the provisions of the DTAA must prevail over the provisions of the Act.

The income derived from cloud computing services can generally be taxed either as fees for technical services, royalty or as business profit, depending on definition contained in the relevant laws. The relevant definitions for consideration would be:

¹⁴ NASSCOM Strategic Review, 2012, as cited in Rangachary Committee, 'First Report of the Committee to Review Taxation of Development Centres and the IT Sector' (14 September 2012), 52.

¹⁵ Press Information Bureau, Government Of India, 'Clarification Regarding Issues Relating To Export Of Computer Software- Direct Tax Incentives', New Delhi, Pausa 27, 1934 (17 January 2013).

¹⁶ Agreement with foreign countries or specified territories- '... (2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.'

¹⁷ [1983] 144 ITR 146 (AP).

1. Royalty:

Under ITA, royalty¹⁸ is, in simple terms, the consideration for transfer of all or any rights (including the granting of licence) in respect of copyright, patent, invention, design, secret formula or process, trade mark or similar property. A narrower definition appears in Article 12.2 of the *Organisation for Economic Co-operation and Development (OECD) Model Tax Convention*¹⁹ as well as in most DTAA entered into between the Government of India and the governments of other nations. This would cover payment for the use of computer programmes as well as use of any other related scientific equipment.

Owing to the lack of consensus within the judiciary, a loom of ambiguity is seen in the interpretation of royalty so as to include payment for the use of computer programmes or other technology of similar nature.

The Karnataka High Court in *The Commissioner of Income Tax v. M/s Samsung Electronics Co Ltd*²⁰ reversing the decision of the Income

¹⁸ Section 9 (1)(vi) Explanation 2: “royalty” means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head “Capital gains”) for –

- (i) The transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (ii) The imparting of any information concerning the working of or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iii) The use of any patent, invention, model, design, secret formula or process or trade mark or similar property;
- (iv) The imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;
- (v) The transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting, but not including consideration for the sale, distribution or exhibition of cinematographic films; or
- (vi) The rendering of any services in connection with the activities referred to in sub-clauses (i) to (v).

¹⁹ 12.2 of the *OECD Model Tax Convention*: The term “royalties” as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

²⁰ (2009) 185 Taxman 313 (Kar).

Tax tribunal,²¹ held that an imported software product would result in the transfer of a copyright and the payment made to the foreign supplier would be in the form of a royalty payment. The court held that a transfer of the right to make a copy of software for internal business purposes, store the same in the hard disk of a computer and take back up copies, would amount to transfer of copyright, and the payment for the transfer of such rights, would constitute royalty payments. Hence, it would attract a tax of 10 to 20 per cent as under Article 12(1),(2) and (3)(a)²² of the Indo-US DTAA.

²¹ *Samsung Electronics Company Ltd. v. Income Tax Officer*, 2005 94 ITD 91 Bang; or 2005 276 ITR 1 Bang.

²² Article 12- Royalties and fees for included services -

1. Royalties and fees for included services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2. However, such royalties and fees for included services may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if the beneficial owner of the royalties or fees for included services is a resident of the other Contracting State, the tax so charged shall not exceed : (a) in the case of royalties referred to in sub-paragraph (a) of paragraph 3 and fees for included services as defined in this Article [other than services described in sub-paragraph (b) of this paragraph] :
 - (i) during the first five taxable years for which this Convention has effect,
 - (a) 15 per cent of the gross amount of the royalties or fees for included services as defined in this Article, where the payer of the royalties or fees is the Government of that Contracting State, a political sub-division or a public sector company ; and
 - (b) 20 per cent of the gross amount of the royalties or fees for included services in all other cases ; and
 - (ii) during the subsequent years, 15 per cent of the gross amount of royalties or fees for included services ; and
 - (b) in the case of royalties referred to in sub-paragraph (b) of paragraph 3 and fees for included services as defined in this Article that are ancillary and subsidiary to the enjoyment of the property for which payment is received under paragraph 3(b) of this Article, 10 per cent of the gross amount of the royalties or fees for included services.
3. The term royalties as used in this Article means :
 - (a) payments of any kind received as a consideration for the use of, or the right to use, any copyright or a literary, artistic, or scientific work, including cinematograph films or work on film, tape or other means of reproduction for use in connection with radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience, including gains derived from the alienation of any such right or property which are contingent on the productivity, use, or disposition thereof ; and
 - (b) payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

In the case of *Microsoft Corporation v. ADIT*²³ the ITAT, Delhi observed that end users do not simply use the CD but the programme contained in the CD, which is protected by copyright and the right to copy the programme has to be exercised before it can be put to use. Therefore, the payments made by the end users were for the granting of license in copyright and other intellectual property rights in the product and would amount to royalty under section 9(1)(vi) of the ITA.

In *Kansai Nerolac Paints Ltd v. Assessee*²⁴ the ITAT, Mumbai was of the considered opinion that a computer software, when put into a media and sold, becomes goods like any other audio cassette or painting on canvass or book and therefore, payment for the same did not constitute royalty.

In *Motorola Inc v. DCIT*²⁵ the Delhi Special Bench of the ITAT rejected the contention that if a person owns a copyright article then he automatically has a right over the copyright.

A tabular synopsis of divergent judgments on this issue has been provided herein below: ²⁶

Q.1 Whether the expression ‘transfer of all or any rights’ includes ‘use or right to use’?

Motorola Inc ²⁷	Gracemac Corp ²⁸	Sonata Information Technology ²⁹	Frontline Soft Ltd. ³⁰
Yes	Yes	No	Yes

²³ AIT-2010-484-ITAT, para 99.

²⁴ MA No.120/Mum/2011, para 19.

²⁵ 95 ITD 269 (SB).

²⁶ Pradip Kapasi *et al*, ‘Taxability of Income from ‘sale of computer software’ as ‘royalty’ (December 2011) available at <http://www.bcasonline.org/articles/artin.asp?1027> (last seen 14 July 2013).

²⁷ *Motorola Inc v. DCIT*, (95 ITD 269) (Del.) (SB).

²⁸ *Gracemac Corporation v. ADIT* (47 DTR 65) (Del).

²⁹ *Sonata Information Technology Ltd. v. ACIT* (103 ITD 324) (Bang).

³⁰ *Frontline Soft Ltd. v. DCIT* (12 DTR 131) (Hyd).

Q.2 Whether the expression ‘transfer of all or any rights’ (including granting of licence) refers to rights in copyright referred in section 14 of the 1957 Act?

Motorola Inc	Gracemac Corp	Sonata Information Technology	Frontline Soft Ltd.
Yes	No	Yes	No

Q.3 Whether the rights referred in section 14 of the 1957 Act are transferred in sale of computer software to end-users?

Motorola Inc	Gracemac Corp	Sonata Information Technology	Frontline Soft Ltd.
No	–	No	–

Q.4 Whether ‘computer program’ is copyright and/or industrial intellectual property?

Motorola Inc	Gracemac Corp	Sonata Information Technology	Frontline Soft Ltd.
Copyright	Both	Copyright	

Thus, from the above synopsis, it is clear that there is a lack of consensus among Indian courts with regard to issues relating to transfer of copyright in case of transfer of software.

It is submitted that the payments for transfer of copyright and usage of scientific equipment from even a server platform should be taxed as royalty. This view was also taken by the Authority for Advance Rulings in *Imt Labs (India) (P) Ltd v. Unknown*³¹. In March 2005, a license agreement was entered into between the US based Conversagent Inc and IMT Labs Pvt Ltd in India, for the use of the ‘Smarter Child’ software on Conversagent Inc’s server platform for the purpose of producing, hosting and distributing ‘Interactive Agent’ applications.³²

³¹ [2006] AAR No. 676 of 2005 (6 November 2006).

³² *Ibid.*

The Authority for Advance Rulings, while referring to Article 12(3)(b)³³ of the Indo-US DTAA ruled that the payments made from time to time for the service was in the nature of royalties since it constituted payment for the usage of scientific equipment.³⁴

Even in *Re: Cargo Community Network Pte Ltd*³⁵ the AAR was of the view that use of a server platform amounted to use of scientific equipment.

2. Fees for Technical Services

Fees for technical services (FTS) has been defined in Explanation 2 to section 9(1)(vii) of the ITA and includes payments made for managerial, technical or consultancy services.³⁶ Section 44DA of the ITA provides that the income by way of royalty or FTS received from an Indian concern in pursuance of an agreement made with a non-resident (not being a company) or a foreign company which carries on business in India through a permanent establishment (PE) situated therein, or performs professional services from a fixed place of profession situated therein, and where the right, property or contract in respect of which the royalties or FTS are paid is effectively connected with such PE or fixed place of profession, as the case may be, would be computed under the head 'Profits and gains of business or profession' in accordance with the provisions of the ITA. The section also contains a proviso that no deduction shall be allowed,—

- (i) in respect of any expenditure or allowance which is not wholly and exclusively incurred for the business of such PE or fixed place of profession in India; or

³³ Article 12(3)(b) of Indo-U.S. DTAA: payments of any kind received as consideration for the use of, or the right to use, any industrial, commercial or scientific equipment, other than payments derived by an enterprise described in paragraph 1 of Article 8 (Shipping and Air Transport) from activities described in paragraph 2(c) or 3 of Article 8.

³⁴ *supra* n. 31 p. 12 reads as follows: '...it is seen that the term 'royalties' as used in Sub-clause (b) of para 3 of Article 12 means payments of any kind received as consideration for the use of, or the right to use any industrial, commercial or scientific equipment'.

³⁵ A.A.R. No. 688 of 2006, decided on 22 January 2007.

³⁶ 'Explanation 2: for the purpose of this clause, 'fees for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining, or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'Salaries'.'

- (ii) in respect of amounts, if any, paid (otherwise than towards reimbursement of actual expenses) by the PE to its head office or to any of its other offices.

The Madras High Court in *Skycell Communications Ltd v. Deputy Commissioner*³⁷ noted the fact that though internet services cannot be availed without the sophisticated equipment installed by the internet service providers, every subscriber of the internet service provider could not be regarded as having entered into a contract for availing of technical services from the provider of the internet service, and such subscriber regarded as being obliged to deduct tax at source on the payment made to the internet service provider. Mere collection of a 'fee' for use of a standard facility provided to all those willing to pay for it does not amount to the fee having been received for technical services. In view of this order, one may argue that if payments made for an internet connection cannot be considered as FTS, payments made for cloud computing services, which involve minimal human intervention, would also not fall under this head.

The ITAT, Kolkata, in *Right Florist Pvt Ltd, Kolkata v. Department Of Income Tax*³⁸, considered the question whether online advertising services, by producing the sponsored results in the search results or by web banners through adservers, could be covered by the connotation of 'technical services'. The facts of that case were that the assessee, who was engaged in the business of online florist, made payments to M/s Google Ireland Limited, which is resident of Ireland, and M/s Overture Services Inc, which is based in USA, for online advertisements. The Tribunal stated that the lowest common factor in 'managerial, technical and consultancy services' was the human intervention, and as long as there is no human intervention in a technical service, it cannot be treated as a technical service under Section 9(1)(vii). The Tribunal, while reiterating the view that a machine could not be a manager or a consultant, ruled that the income earned by Google, in respect of online advertising revenues did not fall under FTS.

³⁷ 2001 251 ITR 53 Mad.

³⁸ I.T.A. No.: 1336/ Kol. / 2011.

3. Business Profit

Business profit means income derived from any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture.³⁹ If the transaction is held to be a sale, rent or lease of a copyrighted article or if it is considered to be a service, the profits would be considered as business profits. In accordance with Article 7.1 of the *OECD Model Tax Convention*, such income would be taxed in a country only if the foreign enterprise carries on business in that country through a PE or business connection situated in that country.⁴⁰ The Committee of Fiscal Affairs (CFA) has noted that currently there is a lack of consensus, among the OECD Member countries, in regards with the correct interpretation of Article 7.⁴¹ This absence of consensus regarding the interpretation of Article 7 can lead to double or no taxation at all. It is however, clarified by the OECD that the ‘right to tax does not extend to profits that the enterprise may derive from that State otherwise than through the ‘permanent establishment.’⁴² In pursuance of its efforts to address the weaknesses of double or no taxation in the current rules, the Base Action Report provides for a number of actions that can be undertaken in an effective and efficient manner.⁴³ The Action Plan calls for important changes in the current system and the adoption of special mechanisms, including anti-abuse provisions, designed to prevent base erosion and profit shifting.

³⁹ Section 2(13) of the *Income Tax Act, 1961*.

⁴⁰ Article 7.1 of the *OECD Model Tax Convention*: The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

⁴¹ OECD, ‘Report on the Attribution of Profits to Permanent Establishments’ (2006) 10.

⁴² OECD, ‘Attribution Of Profit To A Permanent Establishment Involved In Electronic Commerce Transactions: A Discussion Paper From The Technical Advisory Group On Monitoring The Application Of Existing Treaty Norms For The Taxation Of Business Profits’, para 23.

⁴³ OECD, ‘Action Plan on Base Erosion and Profit Shifting’ (2013) 13.

The commentaries under Article 5 of the *OECD Model Tax Convention* have laid down the thresholds, which e-commerce activities need to pass in order to be recognised as a PE. Consider a hypothetical situation in which a person in the U.S. uploads his software on a website, the servers of which are in India. The level of control that the user has over the cloud server will determine whether such a server would be viewed as a PE of the user or not, and if it is viewed as a PE, then any profits earned by the user due to the services may be taxed in the country where the server is located. It is an international consensus that a server carrying out stand-alone intelligent processes can be treated as a PE.⁴⁴ In this case, the question arises whether the server in India can be considered as a PE. The OECD Committee on Fiscal Affairs has reached a consensus that a website or a website hosting arrangement typically does not result in a PE for the enterprise that carries on business through such a website, and that an ISP will not, except in very unusual circumstances, constitute a dependent agent of another enterprise so as to constitute a PE of that enterprise.⁴⁵

The draft bill of the Direct Tax Code (Bill No. 110 of 2010) defines PE under Clause 314 sub-clause (183).⁴⁶ Although no part of the definition specifically deals with cloud computing, the definition provides a simple

⁴⁴ OECD Committee on Fiscal Affairs, 'Clarification on The Application of The Permanent Establishment Definition in E-Commerce: Changes To The Commentary On The Model Tax Convention On Article 5' (22 December 2000), para 9 *available at* <http://www.oecd.org/tax/taxtreaties/1923380.pdf> and Nishith Desai Associates, 'Cloud Computing Risks/Challenges – Legal & Tax Issues: My cloud, Your Cloud, Whose Cloud?' (March 2013), 21, *available at* http://www.nishithdesai.com/0/file/pdf/research/research_papers/Cloud%20Computing.pdf (last visited 14 July 2013).

⁴⁵ *Ibid.*, para 6.

⁴⁶ Clause 314 sub-clause (183) of the draft bill of the Direct Tax Code (Bill No. 110 of 2010) provides the definition of permanent establishment:

“permanent establishment” means a fixed place of business through which the business of a non-resident assessee is wholly or partly carried on and—

- (a) includes—
 - (i) a place of management;
 - (ii) a branch;
 - (iii) an office;
 - (iv) a factory;
 - (v) a workshop;
 - (vi) a sales outlet;
 - (vii) a warehouse in relation to a person providing storage facilities for others;

approach to the issue of PE, with respect to cloud computing services. The definition states that PE, with respect to the Code, shall be deemed to include:

‘... (i) a person other than an independent agent being a broker, general commission agent or any other agent of independent status acting in the ordinary course of his business, acting in India on behalf of an assessee, if such person- (A) has and habitually exercises in India an authority to conclude contracts on behalf of the assessee, unless his activities are limited to the purchase of goods or merchandise for the assessee... (C) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident;...

(iii) a substantial equipment in India which is being used by, for or under any contract with the assessee;’

-
- (viii) a farm, plantation other place where agricultural, forestry, plantation or related activities are carried on;
 - (ix) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;
 - (x) a building site or construction, installation or assembly project or supervisory activities in connection therewith;
 - (xi) furnishing of services, including consultancy services, by the assessee through employees or other personnel engaged by him for such purpose; and
 - (xii) an installation or structure or plant or equipment, used for exploration or for exploitation of natural resources; and
 - (b) deemed to include—
 - (i) a person, other than an independent agent being a broker, general commission agent or any other agent of independent status acting in the ordinary course of his business, acting in India on behalf of an assessee, if such person—
 - (A) has and habitually exercises in India an authority to conclude contracts on behalf of the assessee, unless his activities are limited to the purchase of goods or merchandise for the assessee;
 - (B) habitually maintains in India a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the assessee; or
 - (C) habitually secures orders in India, mainly or wholly for the non-resident or for that non-resident and other non-residents controlling, controlled by, or subject to the same common control, as that non-resident;
 - (ii) the person acting in India on behalf of an assessee engaged in the business of insurance, through whom the assessee collects premia in the territory of India or insures risks situated therein;
 - (iii) a substantial equipment in India which is being used by, for or under any contract with the assessee.

This definition brings in server without using the word ‘server’.

Under this definition, servers which merely host cloud computing services of others would not amount to PE unless they pass the threshold of ‘substantial equipment’, even if no human intervention is involved. However, to decide what amounts to ‘substantial equipment’ would require a case-by-case analysis.

Websites would also not fall under this definition. This definition would, therefore, also include companies such as Google India, which habitually secures orders in India for Google Ireland.⁴⁷

In many countries, a local subsidiary traditionally being a distributor for the foreign entity could be conveniently interpreted to replace arrangements resulting in a shift of profits out of the country where the sales take place without a significant change in the functions performed in that country. Where such convenient shifting of profits is practiced by MNCs thereby qualifying for the exceptions to PE status for preparatory and ancillary activities, it is of utmost importance that the definition of PE must be updated to prevent such abuses and that India could develop model treaty provisions and recommendations regarding the design of domestic rules to prevent the granting of treaty benefits in inappropriate circumstances.⁴⁸

C. *Taxation of Income*

A Technical Advisory Group set up by the OECD has rightly stated that it is very difficult for a source country to properly take account of a taxpayer’s worldwide income and expenses for purposes of applying progressive rates to the taxpayer’s net domestic source income.⁴⁹ Therefore, taxing on net income in the case of cloud computing would prove to unnecessarily burden the local tax authorities. Furthermore, the

⁴⁷ Sugata Ghosh, ET Bureau ‘Google India Slapped With Rs 76 Crore Fine’ *The Times of India* (Online Edition India 14 November 2012), available at http://articles.timesofindia.indiatimes.com/2012-11-14/internet/35111657_1_google-india-tax-treaty-tax-office (last visited 14 July 2013).

⁴⁸ *supra* n. 43, 19.

⁴⁹ OECD, ‘Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce?’, Final report of the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for Taxing Business Profits.

Technical Advisory Group also took cognisance of the fact that taxation imposed on a gross basis may exceed the amount of income earned with respect to a particular transaction.⁵⁰

III. TAXATION BASED ON DELIVERY MODELS

There are mainly three delivery models for cloud computing

A. *Software As A Service (SaaS)*:

Also referred to as ‘on-delivery software’ or ‘software cloud’, it is a software delivery model in which software is hosted centrally and is accessible from various client devices through a client interface such as a web browser. A lot of time and energy is saved since there is no need to install or run the software application on every computer accessed by the user. Examples of SaaS include Microsoft Office 365, Google Apps, iCloud and Salesforce. Although SaaS was found mainly in B2B environment, over a period of time, SaaS has become dominant in the B2C environment.⁵¹

The best example of SaaS is GoogleDocs, a model rapidly acting as a substitute to the Microsoft Office Applications, which offers an interface used for the purpose of editing documents and spread sheets⁵², which does not require download or installation. Hence, the Microsoft Corporation is planning to put MS Office on the cloud⁵³ which also does not need to be downloaded or installed.

Under the *Finance Act, 2012*,⁵⁴ the definition of ‘royalty’ was clarified with retrospective effect from June 1, 1976. Explanation 4 of the Amendment to Section 9 under the ITA stated as under:

⁵⁰ *Ibid.*

⁵¹ ‘Tax in the Cloud: A briefing for Tax Directors’ *KPMG International* (2012), available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/tax-in-the-cloud/Documents/tax-in-the-cloud.pdf> (last visited 14 July 2013).

⁵² Mike Harwood *et al*, *Security Strategies in Web Applications and Social Networking*, (Jones & Bartlett Publishers 2010), 21.

⁵³ Redmond, ‘Microsoft Announces Office 365’ *Microsoft* (19 October 2010), at <http://www.microsoft.com/presspass/press/2010/oct10/10-19office365.msp> (last visited 14 July, 2013).

⁵⁴ Act No. 23 of 2012.

‘Explanation 4 – For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any rights for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.’

Therefore, if the rights in the software were transferred the payments made for such transfer would be in the nature of royalty, even if such rights were transferred through the cloud. However, in case of SaaS it is difficult to determine whether or not rights in the software have been transferred. Whether Courts and Tribunals will interpret the widened ambit of royalty to include cloud computing is yet to be analysed and adjudicated by the Indian judiciary.

In *Director of Income Tax v. M/s Nokia Networks*⁵⁵, the Delhi High Court took cognisance of the retrospective amendment which stated that consideration for use of software would constitute ‘royalty’. However, relying on *CIT v. Siemens Aktiengesellschaft*⁵⁶, the Court supported the view that amendments cannot be read into the treaty. As the assessee in *Director Of Income Tax v. M/S Nokia Networks*⁵⁷ had opted to be assessed by the DTAA, the consideration could not be assessed as ‘royalty’.

Payment for the use of online software, without owning the right to the use of the copyright therein, merely amounts to use of a copyrighted article. Therefore, this payment is not payment for the copyright itself and should not be treated as royalty. According to the U.S. Treasury Regulations, a transfer of a computer programme is treated as a transfer of a copyright if any of the following four rights are transferred:

- i) The right to make copies of the computer programme for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease or lending;
- ii) The right to prepare derivative computer programmes based upon the copyrighted computer programme;

⁵⁵ ITA 512 of 2007.

⁵⁶ 10 ITR 320 (Bom).

⁵⁷ ITA 512 of 2007.

- iii) The right to make a public performance of the computer program;
or
- iv) The right to publicly display the computer program.

Therefore, if any one of these four rights is transferred, the payments made for such transfer would be in the nature of royalty.⁵⁸ Perhaps it would be beneficial if Indian tax laws also list such rights in order to avoid ambiguity.

From an indirect tax perspective, the IT industry has also raised the issue of whether use of software should be treated as 'goods' or as a 'service'.⁵⁹ It is interesting to note that the Supreme Court in its decision in *Tata Consultancy Services v. State Of Andhra Pradesh*⁶⁰ had held that branded software is classified as goods but did not conclusively give their opinion on whether unbranded software are goods or not, since it would raise issues such as situs of contract of sale and/or whether the contract is a service contract. Though the Supreme Court reserved its view on unbranded software, it is the opinion of the author that the principles laid down by the Supreme Court while dealing with branded software would also be relevant in context of unbranded software. A similar interpretation seems to have been taken by tax authorities in a service tax circular, which, while citing the judgment of *Tata Consultancy Services v. State Of Andhra Pradesh*, clearly stated that sale of both, branded and unbranded, software amounted to sale of goods.⁶¹

⁵⁸ Treasury Regulations, Sub Chapter A, section 1.861-18(c)(2).

⁵⁹ Team PI, 'Indian Government To Ease Tax Rules For IT Sector: Report' (26 September 2012) *Next Big What*, at <http://www.nextbigwhat.com/indian-government-to-ease-tax-rules-for-it-sector-report-297/> (last visited 14 July 2013).

⁶⁰ AIR 2005 SC 371: 'We are in agreement with Mr Sorabjee when he contends that there is no distinction between branded and unbranded software. However, we find no error in the High Court holding that branded software is goods. In both cases, the software is capable of being abstracted, consumed and use. In both cases the software can be transmitted, transferred, delivered, stored, possessed etc. Thus even unbranded software, when it is marketed/ sold, may be goods. We, however, are not dealing with this aspect and express no opinion thereon because in case of unbranded software other questions like situs of contract of sale and/or whether the contract is a service contract may arise'.

⁶¹ Department of Revenue, Ministry of Finance (Tax Research Unit), Government of India, Circular No. 81/2/2005-ST, 7 October 2005.

In 2006, packaged software was brought under the service tax net.⁶² Hence, the distinction between branded and unbranded was no longer relevant from a tax perspective. Subsequent to the *Finance Act, 2006*, when software was downloaded, it was considered a service, and attracted service tax, but when the same software was taken as a hard copy on a disc, it was taxed as goods. The licence to legally use the software, which came along with the packaged software, was treated as a good and attracted 4 per cent value added tax, 8 per cent countervailing duty (CVD) and central sales tax. If the customer was given compact discs in addition to the downloaded software as back-up, the compact discs were also treated as goods and payment for the same would be taxed accordingly.⁶³

In the 2008 Budget,⁶⁴ customised software was also brought under the service tax net, but the *Finance Act, 2008* did not specifically use the words ‘customised software’. This gave tax officials freedom to interpret the law and led to double taxation on payment for downloaded customised software. Therefore, by early 2009 the Rs 100-million software market had seen sales fall by over 40 per cent.⁶⁵ While the distinction between customised and packaged software may be justified, downloading software onto the customer’s hard disk and then using the same cannot be called availing of a ‘service’.

⁶² Available at <http://www.servicetax.gov.in/st-profiles/it-sw-services.pdf> (last visited 14 July 2013).

⁶³ Deepshikha Sikarwar, ‘Software buyers log out as taxing error pops up’, *The Economic Times* (Online Edition India 8 June 2009), available at http://articles.economictimes.indiatimes.com/2009-06-08/news/27664983_1_service-tax-software-central-sales-tax (last visited 14 July 2013).

⁶⁴ Union Budget 2008-09, Finance Bill, Chapter V; Inserted in Chapter V of the Finance Act 1994 by s. 90 of the Finance Act, 2008 (18 of 2008).

⁶⁵ Shelley Singh & Deepshikha Sikarwar, ‘Software buyers log out as taxing error pops up’, *The Economic Times* (India 24 February 2009), available at http://articles.economictimes.indiatimes.com/2009-02-24/news/27633320_1_service-tax-software-retailers-piracy-rates (last visited 14 July 2013). ‘The new definition of software, following changes in service tax in the previous Budget, brings the acquisition of right to use packaged software under the service tax net, leading to double taxation. ISODA president Devesh Aggarwal says at the end of the day, it’s a huge drain on the retailer’s resources. “We pay 8% CVD on imported software, 4% VAT, 12.36% service tax and up to 5.5% octroi (in states like Maharashtra). Software is a low-margin (4-5 %) business. Dealers have to pay a TDS of 11.33% and with just a 5% margin, they are paying almost 7% from their pockets, leading to high debt and an unviable business”.’

Vide notification dated 27 February 2010 services for packaged/canned software were exempted from the whole of service tax.⁶⁶

The main test to decide this is whether the ‘installation’ and ‘maintenance’ of the software is done by the web server or the user. If the software needs to be installed on the user’s hard disk, it should be considered as ‘goods’, otherwise it should be taken as a ‘service’.

B. Platform as a Service (PaaS)

Also known as ‘desktop cloud’, it provides a platform to run or create program applications using programming languages and tools such as Java, Python, .NET, etc. The consumer does not manage or control the basic cloud infrastructure, network, servers, or operating systems, but has control over the application hosting environment configurations. Examples of PaaS include Twitter, Orkut, Force.com, Facebook and Heroku.⁶⁷ It also includes cloud advertising, auctioning and sale services such as Google Ads, eBay, WordPress and Craigslist. PaaS is mainly used at the B2B environment⁶⁸ as it is required for development of applications and other commercial uses.

It is submitted by the author that payments for PaaS must be treated as ‘royalty’ since the nature of use of PaaS services does not require any installation or maintenance. Also, the user cannot store the application on the hard disk, but merely uses it as it is on the cloud. Hence, it clearly amounts to availing of a service and not purchase of a good.

It is to be remembered that sites such as eBay or Flipkart.com, which sell goods online, provide cloud computing services only to the extent

⁶⁶ Department of Revenue, Ministry of Finance, Government of India, Gazette Of India, Notification No 53/2010-Service Tax, Extraordinary, Part II, section 3, sub section (i) (27 February 2010)

‘(i) the document providing the right to use such software, by whatever name called, if any, is packed along with the software;
(ii) the manufacturer, duplicator, or the person holding the copyright to software has paid the appropriate duties of excise on the entire amount received from the buyer; and
(iii) the benefit under notification No. 17/2010– Central Excise, dated the 27th February, 2010 is not availed of by the manufacturer, duplicator or the person holding the copyright to software.’

⁶⁷ Jeremy Geelan, ‘Twenty-One Experts Define Cloud Computing’ *Cloud Computing* (2009), at <http://cloudcomputing.sys-con.com/node/612375> (last visited 14 July 2013).

⁶⁸ *supra* n. 51.

of the platform which they provide. Thus, the tax applicable on the sale of goods, if any, would not be taxation on a cloud computing service.

In *Right Florist Pvt Ltd, Kolkata v. Department Of Income Tax*⁶⁹ the ITAT, while examining the nature of payments made for online advertising held that:

The service which is rendered by the Google is generation of certain text on the search engine result page. This is a wholly automated process. There is no dispute that in the services rendered by the search engines, which provide these advertising opportunities, there is no human touch at all. The results are completely automated and, as evident from the screenshots we have reproduced earlier in this order, these results are produced in a fraction of a second- 0.27 seconds in the screenshot reproduced earlier. For the reason that there is no human touch involved in the whole process of actual advertising service provided by Google, in the light of the legal position that any services rendered without human touch, even if it be a technical service, it cannot such a technical service which is covered by the limited scope of Section 9(1)(vii), the receipts for online advertisement by the search engines cannot be treated as FTS taxable as income, under the provisions of the ITA, in the hands of the Google . The wordings of Explanation 2 to Section 9(1)(vii) as also that of the definition of fees for technical services under Article 12(2)(b) being similar in material respects, the above legal proposition equally applies to the definition under article 12 (2)(b) of India Irish tax treaty. The income earned by Google, in respect of online advertising revenues discussed above and based on the facts on record, cannot be brought to tax as income deemed to accrue or arise under section 9(1)(vii), i.e. last limb of Section 9(1), as well.

Once we come to the conclusion that the online advertising payments made to Google Ltd cannot be brought to tax in India, under section 5(2) r.w.s. section 9 of the ITA, we can conclude that these amounts are not eligible to tax in India at all.’

C. *Infrastructure as a Service (IaaS)*

Also known as ‘hardware cloud’, consumers rent processing, storage, networks, and other fundamental computing resources under this model.

⁶⁹ I.T.A. No.: 1336/ Kol. / 2011.

Rather than purchasing servers, data space or network equipment, clients instead outsource them and pay on a 'pay as you use' basis.⁷⁰ Examples of IaaS include Rapidshare, Mediafire, Dropbox, Fileserve, Rapidgator and Bayfiles. Organisations accrue cost between business units and may or may not use actual currency. At present, GoogleDocs offers users a free limit of one GB web space, which suffices the needs of most users. But if one needs more space one can always buy more space for an amount that costs much less than an actual hard disk. Generally, when someone purchases physical storage in India, the tax on the income from that transaction goes to the Indian Government. However, when one buys web space it goes to wherever the service provider's head office is located.⁷¹

In the case of IaaS, the user uploads data onto the cloud service provider's infrastructure and monitors the software and data remotely. This means that user uses the infrastructure of the service provider. Therefore, the payment must be characterised as a royalty as it falls under the use of 'technical equipment'.

Reference may be made to the Delhi High Court's decision in *Asia Satellite Telecommunications Co v. DIT*⁷². In this case the assessee entered into agreements with TV channels, by which the assessee provided the facility of transponder capacity available on its satellite to enable the TV channels to relay their signals. The Court held that since the transponder was in orbit, merely because the transponder had its footprint on various continents, it did not mean that the process had taken place in India. The Court held that payments for use of the transponder in that case did not amount to 'royalty' since payments made by customers under typical transponder leasing agreements are made for the use of the transponder transmitting capacity and will not constitute royalties under the DTAA's or under the ITA; these payments are not made in consideration for the use of, or right to use, property, or for information, that is referred to in the definition ie they cannot

⁷⁰ Zaigham Mahmood and Richard Hill, *Cloud Computing for Enterprise Architectures*, (Springer 2011) 9.

⁷¹ Abhishek Singh, 'On Taxing The Internet Economy' (30 September 2011) *Medianama*, at <http://www.medianama.com/2011/09/223-taxing-the-internet-economy-abhishek-singh> (last seen on 14 July 2013).

⁷² ITA No.131 of 2003 and ITA No.134 of 2003.

be viewed, for instance, as payments for information or for the use of, or right to use, a secret process since the satellite technology is not transferred to the customer.

Many argue that data storage on the cloud is in reality a good and not a service. But one must keep in mind that online infrastructure is also used as a means of data security and protection. The servers of IaaS providers are maintained in ideal conditions and access to them is restricted. Sometimes the IaaS service provider charge not only on the basis of the amount of data used, but also on the electricity consumption and costs for cooling the servers.

V. TRANSFER PRICING

Transfer pricing rules are framed to ensure the allocation of income to the respective countries where a multinational company has incurred the business income. Very often in cases of transfer of intangibles, multinational companies are able to misappropriate the rules of transfer pricing in order to shift the income to low-tax countries.

The final product may be a combination of services provided by multiple entities, the outcome of such service will have to be assessed considering every aspect service provided individually, such as the software, hardware or platform aspect, and not based on the service as a whole. For the purpose of Transfer Pricing this assessment would be very complex since Cloud services may be a combination of aspects provided by multiple entities. This analysis is required to check whether intra-group transactions, in relation to cloud computing services, are at arm's length. It is also important from the perspective of Corporate Tax, since many jurisdictions will treat the income derived from each of these kinds of transactions differently and specific tax provisions would apply to each type.⁷³ In such circumstances, special measures either within or beyond the arm's length principle will be essential.

From a Transfer Pricing perspective the service characterisation is required to appropriately assess the pricing of the services rendered.

⁷³ 'Tax in the Cloud: A briefing for Tax Directors' (2012) *KPMG International*, available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/tax-in-the-cloud/Documents/tax-in-the-cloud.pdf> (last visited 14 July 2013).

It is necessary to ascertain whether a service has been provided or an intangible property has been transferred. It is also important to ascertain whether the transaction is to be considered as a sale, lease or license of a good.

It is also important to ensure that the outcomes of transfer pricing are in line with value creation, thus it is essential to develop rules to prevent Base Erosion and Profit Sharing (BEPS):

- ‘(i) adopting a broad and clearly delineated definition of intangibles;
- (ii) ensuring that profits associated with the transfer and use of intangibles are appropriately allocated in accordance with value creation;
- (iii) developing transfer pricing rules or special measures for transfers of hard-to-value intangibles; and
- (iv) updating the guidance on cost contribution arrangements.’

The problem lies in the application of traditional transfer pricing methods to the dynamic circumstances created by e-commerce activities. Considering the absence of a physical boundary, identifying the source of transactions and quantifying cross-border transactions becomes more difficult.

In 2011, it was alleged that the Australian division of a large multinational corporation specialising in Internet-related services and products paid only \$74,000 in corporate Income Tax for the 2011 calendar year in Australia, on claimed local revenues of \$201 million, although it was widely estimated to have made between \$1.5 to 2 billion. This discrepancy arose because the Australian division failed to include its activities under the provision of advertising and software services, in spite of charging Australian customers for the same. In defence it stated that it has agreements with its US parent and an other company for the provision of research and development services, and with its Irish and Asia-Pacific divisions for the provision of sales and marketing services. Consequently, almost all of the Australian divisions revenues were listed as revenues for services rendered to those companies.

In simple words, the Australian division of this MNC was able to furnish relatively less revenues locally than the expected revenues because it does not buy products from its overseas divisions, and thus the transfer pricing laws do not apply.

In India the tax office had alleged that the Indian division of an MNC specialising in online advertising had shown false income to avoid being subjected to transfer pricing adjustments with respect to its international transactions. The Indian division was slapped with a penalty of Rs 760 million by the income-tax authorities, by an order that relates to the assessment year 2008-09. The order stated, 'The entire activity of (the Indian division's) online advertising programme and the revenue earned thereon has happened in India with both the advertisers as well people making use of the advertisements situated in India. To this extent, the income of (the Irish division of the MNC) was held to be accrued as well as arisen in India itself.' The Indian division has gone into appeal on the said order.⁷⁴ The tax department had held that since the Indian division 'habitually concluded contracts in the name of (the Irish division) as well as habitually secured orders in India for (the Irish division)', it established itself as a dependent agency, and a 'permanent establishment of (the Irish division) in India'.⁷⁵

VI. SUGGESTIONS & RECOMMENDATIONS

In order to overcome the hurdles of taxing cloud computing services, there is a need for a legislation which tackles the ambiguity pertaining to cloud computing services. Not only is it necessary to collect tax revenues which India can capitalise on, it is also essential to foster the growth of cloud computing as it saves costs for Indian enterprises and maintains their efficiency.

The divergence between the location of value creation and the location of allocation of taxes calls for a developed means to track the evaluation of financial flows by monitored data collection. This must include

⁷⁴ *supra* n. 47.

⁷⁵ *supra* n. 47.

outcome-based techniques, which look at measures of the allocation of income across countries. Moreover it is important to define the nature of data to be provided by the taxpayers to the respective authorities, to assess the economic implications of BEPS behaviours and actions taken to address BEPS. The data collection is necessary since often, relevant information on tax planning is unavailable to the authorities. Although external audits (by tax authorities) are an important source, they are more corrective in nature than preventive. An example of a preventive measure may include co-operative compliance programmes between tax-payers and tax-authorities.⁷⁶

In order to achieve such effective and comprehensive data assessment, the OECD report suggests a greater involvement of non-OECD members thus, inviting interested G20 countries⁷⁷ to participate in the 'BEPS project' whereby the interested parties will be given an equal footing as the OECD members in the outcome of the project. It will therefore, be very fruitful for India to participate on an *ad hoc* basis.

In view of the taxation based on PE, it is submitted that in the absence of an alternative, tax laws must consider PE in e-commerce transactions. It must be noted that any restriction on the usage of the cloud computing service would take away the world-wide accessibility of cloud computing services. If the cloud computing service provider is required to pay tax it would have to do so in over a hundred countries, making it a tedious task. On the other hand, if tax is to be paid only in the country where the cloud computing service provider is located countries such as India where e-commerce has not developed to a great extent will lose out on a large amount of revenues. Also, cloud computing service providers will set up their enterprises at tax havens, in order to evade taxation. It is thus, recommended by the OECD report to update the definition of PE in order to prevent the artificial avoidance of the PE status as typically done by MNCs to fragment their operations among multiple group entities to qualify for the exceptions to PE status for preparatory and ancillary activities.

⁷⁶ *supra* n. 43, 22.

⁷⁷ The G20, also known as the Group of 20 is a bloc of developing nations established on 20 August 2003.

It is observed that tax authorities have constantly expanded the scope of the definition of royalty. There is no doubt that these steps were taken in order to gain revenue from cloud computing service providers who do not have PEs in India.⁷⁸ However, expanding the scope of what constitutes 'royalty', out of fear of erosion of India's tax base, may have an adverse effect on the growth and development of the e-commerce industry.⁷⁹

The Direct Tax Code, which is proposed to come into effect, aims at putting an end to the ambiguity in relation to taxation on many modern phenomena, including cloud computing.⁸⁰ For instance the draft Direct Tax Code seeks to tax technical services rendered to an Indian resident even if the services are not rendered in India.⁸¹ The definition of PE as given in the Bill substantially reduces the ambiguity with respect to what constitutes a PE and is indeed a step forward.

It must be determined as to what attracts royalties and what attracts business profits, keeping in mind the various international treaties and DTAA's. Instead of a general application on all delivery models, each model should be analysed individually and taxation principles must be applied to each delivery model specifically, in order to compute the net amount payable. When any cloud computing service consists of a combination of two or more delivery models, the object of the service must be taken into account and certain parameters can be set on the secondary delivery models. For example, an e-mail service also allows the user to use web space for the purpose of attaching and sending files. Although, the object of the service is not storage of data, the e-mail service can be used for that purpose as well. In such cases there

⁷⁸ International Fiscal Association, Richard L. Doernberg (ed), *Ifa: Electronic Commerce and Multijurisdictional Taxation*, (Kluwer Law International, 2001).

⁷⁹ Daksha Baxi and Bijal Shah, Special Reports, Tax Analysts Document Number: Doc 2000-27276, (13 October 2000).

⁸⁰ Nishith Desai Associates, 'Cloud Computing Risks/Challenges – Legal & Tax Issues: My cloud, Your Cloud, Whose Cloud?' (March 2013), 21, *available at* http://www.nishithdesai.com/0/file/pdf/research/research_papers/Cloud%20Computing.pdf (last visited 14 July 2013).

⁸¹ Kripa Raman, 'Tax Treatment For Cloud Computing Needs Scrutiny, Says Law Firm', *Business Line, The Hindu* (Online Edition India 17 October 2011), *available at* <http://www.thehindubusinessline.com/industry-and-economy/info-tech/tax-treatment-for-cloud-computing-needs-scrutiny-says-law-firm/article2546259.ece> (last visited 14 July 2013).

must be a limit as to the amount of web space the service provider is permitted to make available to each account, within a specified time, without his service being classified as IaaS. Reference can be made to Gmail which provides only around 10 GB of web space (with an increase of a few KBs everyday). Furthermore, Gmail detects suspicious behaviour and prevents the user from uploading data, if it suspects that data is being uploaded for storage purposes. Therefore, all other factors remaining the same, if Gmail was to start charging users for its e-mail service, the income derived would not be taxed under the head of IaaS. However, if the e-mail service provider provides further web space for consideration, the income derived from such a transaction would certainly be taxed as IaaS. Taxing based on delivery models is a complex, but necessary, task. As submitted earlier, in the cases of IaaS, PaaS and certain SaaS the payments should be in the nature of royalty. In such cases, it is not of much consequence if PaaS is taxed considered as IaaS, since the characterisation of income would be the same as they are taxed as royalty. Special care is required for certain SaaS which would be taxed under the head of 'business profit', when such SaaS is combined with other delivery models.

Any attempt to tax cloud computing services which consist of a composition of two or more delivery models is tedious and logistically difficult. From a policy perspective, it is essential for law makers to ensure that tax and other regulatory factors do not act as an impediment to the availability or advancement of technology.