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# The Law Review

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Volume 10



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# *The Law Review*

Volume 10

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# The Law Review

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## CONTENTS

1. From the Principal's Desk i
2. Foreword iii

## ARTICLES

3. Whistle Blowing: A Hobson's Choice? 1  
Cherry-Picking Between State Authorities and  
Third-Party Internet Platforms  
*Prakriti Bhatt*
4. Unveiling Privacy for Women in India 37  
*Priyanshi Vakharia*
5. Insolvency Procedures –  
Investigating the Pre-Pack Paradigm in India 69  
*Sanjana Rao*
6. Deconstructing the Dichotomy in 106  
Cultural Property Law  
*Vedika Shah*
7. Determining Disgorgement in Securities Law 138  
*Vidhi Shah*

## FROM THE PRINCIPAL'S DESK

That there is nothing static about the law, is one of this profession's greatest charms. One practises the law by learning its history and then reinventing it. Innovation finds expression through academic writing, often adopted by lawmakers and written into statutes. Within this symbiotic relationship between theory and practice, lies academic writing. One must appreciate how, today, law review articles and blogs are increasingly being cited by courts and tribunals, and are starting to hold significant jurisprudential value. Recent landmark judgments of the Supreme Court of India show the increasing reliance placed by the apex court on literary works of students in academia. These articles are not merely token academic contributions, but play an important role in redefining the contours of law and society. *The Law Review* strives to be one such forum where undergraduate law students can build inroads to important legal conversations.

It is heartening to have witnessed the reception of the ninth edition of *The Law Review*. Appreciation and acclaim came in from law schools across the country and overseas, and from academicians, jurists and judges alike. The ninth edition also paved the way for the electronic distribution of *The Law Review* for the first time. All volumes of the publication have been indexed on SCC Online, a prominent Indian legal search index. Importantly, having each volume of *The Law Review* archived at the Government Law College website ensures open access, in line with a worldwide movement to democratise academic resources. All these steps have been undertaken to provide wider access to students and young practitioners in India and overseas.

An inadvertent but noteworthy feature of Volume 10 is that all the articles in *The Law Review* have been authored by women. This is a watershed moment for the college, which while admiring this fact of predominance, is proud to be a medium for young women authors to convey their ideas and foster discussion.

The publication process for this year began with the customary orientation programme for prospective student-authors and the new members of The Law Review Committee. The induction was soon followed by a call for abstracts from potential authors. From over thirty submissions received, five articles have been selected for their content and clarity. Volume 10 of *The Law Review* represents a spectrum of ideas and distinct styles of writing. Apart from the student-editors, every article has been reviewed by an expert. The Editorial Board is, therefore, an amalgam of senior counsel and partners at law firms. The culmination of combined efforts of the authors, committee members and the editors is what the reader holds in their hands: pages of useful, novel ideas.

Within these pages, one traverses separate fields of law, diving into the details of current legislation, exploring future possibilities, critiquing loopholes within the existing framework. This edition carries a common thread through its articles – each one addresses the law through its stakeholders. The articles aim to bridge the gap between the theory of law and its functionality within a complex, human society. That law and society are inextricably bound to each other, is a reality well thought of, by each author.

Volume 10 of *The Law Review* comprises an interesting melange of articles covering several diverse heads such as feminist jurisprudence and social justice, constitutional law, public international law, as well as finance. These articles advocate pressing research contentions and address questions of contemporary relevance including those of addressing the lacunae in the State mechanism set up for the protection of whistle blowers under The Whistle Blowers Protection Act, 2014 and its Amendment Bill of 2015; viewing the concept of privacy through a feminist lens and reviewing the impact of the privacy judgment of the Supreme Court on the rights of women in India today; giving a primer on the concept of cultural property and pitting theories of cultural nationalism and cultural internationalism against each other in varying contexts of periods of colonialism, internal unrest, international armed conflict

and peacetime; extrapolating the western corporate rescue mechanism of pre-packs and assessing its viability in the Indian insolvency regime; and exploring the utility of disgorgement as a remedial measure in instances of stock market frauds.

The Government Law College thrives from the unwavering support it receives from a strong, benevolent matrix of judges and lawyers, amongst others. I thank the Editor-in-Chief, the Hon'ble Dr Justice DY Chandrachud, and each member of the Editorial Board for their time and contribution to the growth of *The Law Review*.

The tenth edition reaches the high standards of erudition and excellence in line with the academic ideals and scholarly values of the Government Law College. With contemporary issues pertaining to law and society being tackled head-on, the literature of *The Law Review* will establish a strong hold in academic and legal jurisprudence and soon become a ready reference for legal practitioners and law students worldwide.



**Mrs. Suvarna K. Keole**

*District and Additional Sessions Judge  
Principal, Government Law College*

## FOREWORD

‘Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities...[T]he outstanding fact here is that academic scholarship is charting the line of development and progress in the untrodden regions of the law.’

- Benjamin N. Cardozo, 1931

The law is constantly developing and being redefined through scholarship and research on various issues. The contributors of the tenth volume of *The Law Review* of the Government Law College, Mumbai have addressed several contemporary issues with remarkable depth and understanding of the law. This edition of *The Law Review* serves as an important platform for budding legal minds to hone their writing and research skills while contributing to a growing repository of legal scholarship in India.

1. In the article ‘Whistle Blowing: A Hobson’s Choice? Cherry-Picking Between State Authorities and Third-Party Internet Platforms’, Prakriti Bhatt draws attention to the lacunae in the State mechanism set up for the protection of whistle blowers under The Whistle Blowers Protection Act, 2014 and its Amendment Bill of 2015. The author investigates the drawbacks of the Act and examines reasons as to why a whistle blower would be more inclined to choose a third-party internet platform over an existing, legitimate State mechanism, particularly in the context of making national security related revelations. The author further provides recommendations on how confidence and trust in the State mechanisms can be enhanced through an examination of international best practices which have sought to establish a fine balance between the conflicting interests of Government transparency and national security.
2. Priyanshi Vakharia’s article ‘Unveiling Privacy for Women in India’ explores the concept of privacy through a feminist lens. The author reviews the impact of the *Puttaswamy* judgment of the Supreme Court, which gave to the Indian people privacy as a facet of the right to life under Article 21 of the Constitution,

on the rights of women in India today. The article presents the opinion of a certain class of today's feminists: that privacy, in its traditional sense, does more harm than good for women. It then refutes this opinion by articulating the concept of privacy as an individual right, as construed in the *Puttaswamy* judgment. Through three pressing issues faced by Indian women: marital rape, temple entry, and the stark absence of women in public spaces, the article explains that privacy is no longer an abstract idea as was regarded in the past. Privacy is, today, what enables access to equality and liberty. The author argues that the right to privacy is therefore a pathway, rather than a barrier, to a more equal society for women.

3. Sanjana Rao's article on 'Insolvency Procedures – Investigating the Pre-pack Paradigm in India' introduces a well-established method of corporate rescue prevailing in the West into the Indian insolvency regime. Given the high stakes involved in insolvency proceedings and re-organisation of corporates, pre-packs may play a significant role in bringing in expediency and certainty in enabling effective insolvency resolution. The author expounds on the viability of the pre pack regime in India and opines: 'Pre-packs could thus prove helpful in a scenario where despite availability of umpteen corporate rescue modes, creditors continue to face a situation where they are expected to make high provision against the non-performing loan accounts and also reconcile to facing huge haircuts ... even though not a means to rectify the non-performing assets problem, pre-packs may provide a solution to maintain status-quo in the economy while lenders seek recovery from big borrowers.'
4. Vedika Shah's article on 'Deconstructing the Dichotomy in Cultural Property Law' provides a primer on the concept of cultural property and pits theories of cultural nationalism and cultural internationalism against each other in varying contexts including periods of colonialism, internal unrest, international armed conflict and peacetime. The author vehemently advocates the cause of cultural nationalism except in certain exceptional cases. The author poignantly opines: 'The debate surrounding cultural property is often biased with each side inclined to favour a predisposed ideological view. After analysing the two theories—nationalism and internationalism—thoroughly, the question which

arises is: are cultural internationalists justified in demanding retention of cultural property? ... Cultural property is integral to the identity of mankind and every effort must be expended to protect it... It is only when one country respects the right of sovereignty and integrity of another, such respect extending to the ownership of its cultural property, and does not unjustly enrich its self at the expense of the other, can parity between the states be achieved in the truest sense.'

5. Vidhi Shah's article titled 'Determining Disgorgement in Securities Law' explores the utility of disgorgement as a remedial measure. The article delves into understanding the nature and context of its evolution, its various constituents and calculation strategies by regulatory commissions in USA and India, thereby aiming to lay down certain standards for the calculation of disgorgement. The author explains, 'The method of computation or quantification of disgorgement differs not only among different jurisdictions but also within the approaches developed by a particular securities commission. There is no one method, which can be described as 'perfect' or 'apt'... the method is likely to vary in view of the peculiar facts and circumstances of every case and the distinct strategies adopted by the wrongdoers to contravene securities law.'

This volume makes a significant contribution to legal scholarship in the country which is made possible because of the conscientious efforts of the editorial team of *The Law Review*. The articles have additionally been reviewed by a pool of eminent professionals from the legal fraternity. Professor Kishu Daswani, the faculty advisor, continues to make sustained efforts to ensure that each edition of *The Law Review* reaches scaling heights of erudition.

*Dharmajaya J Chandrachud*

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

# WHISTLE BLOWING: A HOBSON'S CHOICE?

## CHERRY-PICKING BETWEEN STATE AUTHORITIES AND THIRD-PARTY INTERNET PLATFORMS<sup>†</sup>

*Prakriti Bhatt* \*

‘A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.’

James Madison<sup>1</sup>

### I. INTRODUCTION

The Hon’ble Supreme Court of India has consistently held that disclosure of information in the functioning of the Government must be the rule, and secrecy, an exception.<sup>2</sup> A good whistle blowers’ protection mechanism encourages transparency, accountability and responsibility. However, it appears that the State has given scant regard to the milieu of whistle blowers in India and the steps taken for their protection too, have been subpar.

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<sup>†</sup> This article reflects the position of law as on 24 February 2019.

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<sup>1</sup> James Madison, ‘To WT Barry’ in Gaillard Hunt (ed), *The Writings of James Madison* (1st edn GP Putnam’s Sons New York 1900) vol. 9, 1910, para 2, available at <http://oll.libertyfund.org/titles/1940> (last visited 24 February 2019).

<sup>2</sup> *SP Gupta v. Union of India* AIR 1982 SC 149, para 66. See *State of Uttar Pradesh v. Raj Narain* AIR 1975 SC 865, para 74; *Dinesh Trivedi v. Union of India* (1997) 4 SCC 306; and *Vineet Narain v. Union of India* AIR 1998 SC 889.

Despite three reports by National Commissions,<sup>3</sup> the passing of a resolution by the Government of India<sup>4</sup> as well as recurrent directions from the Supreme Court,<sup>5</sup> the law establishing a mechanism to receive whistle blower disclosures, to inquire into such disclosures and to safeguard against the victimisation of whistle blowers<sup>6</sup> is yet to be implemented. *The Whistle Blowers Protection Act, 2014* (WBP Act) received the presidential assent on 9 May 2014, but has not yet come into force.

Before the legislation could test the waters, The Whistle Blowers Protection (Amendment) Bill, 2015 (Amendment Bill) was passed by the Lok Sabha and it is currently pending consideration before the Rajya Sabha. The Amendment Bill portends darker times for whistle blowers as it results in not only diluting the provisions of the WBP Act, but also undermines the overriding power of *The Right to Information Act, 2005* (RTI Act) as regards public interest. It would not be a happy development if the message that this Amendment Bill gives is that the WBP Act—enacted to promote public interest, transparency and accountability, and to provide protection to whistle blowers—is quite ironically also susceptible to being used for watering down the campaign against corruption.

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<sup>3</sup> See National Commission to Review the Working of the Constitution, 'Probity in Governance' (21 August 2001), clause 3.D, available at <http://legalaffairs.gov.in/volume-2-book-1> (last visited 24 February 2019); Law Commission of India, 'The Public Interest Disclosure and Protection of Informers' (One Hundred and Seventy Ninth Report December 2001), available at <http://lawcommissionofindia.nic.in/reports.htm> (last visited 24 February 2019); and Second Administrative Reforms Commission, 'Ethics in Governance' (Fourth Report January 2007), clause 3.6, available at <https://darpg.gov.in/arc-reports> (last visited 24 February 2019).

<sup>4</sup> The Government of India had issued Resolution No. 89 dated 21 April 2004 authorising the Central Vigilance Commission as the designated agency to receive written complaints from whistle blowers. The Resolution also, *inter alia*, provides for the protection of whistle blowers from harassment and keeping the identity of whistle blowers concealed.

<sup>5</sup> *Parivartan & Ors. v. Union of India & Ors.* Writ Petition (Civil) No. 93 of 2004 (Unreported 29 September 2006, 30 August 2013, 12 February 2015, 08 April 2015, 05 November 2015 and 13 January 2016), available at <https://www.sci.gov.in/> (last visited 24 February 2019).

<sup>6</sup> See *The Whistle Blowers Protection Act, 2014*, Statement of Objects and Reasons.

Meanwhile, the Internet today provides a plethora of transnational third-party whistle blowing platforms such as WikiLeaks, that not only ease the process of whistle blowing but are also gag-proof and provide better anonymity protections than our national legislation.<sup>7</sup> While a cursory glance may make this an attractive alternative to the State mechanism, the devil lies in the details while considering the consequences of such global disclosures on a State's security, public interest and individual privacy.

This article investigates the drawbacks of the WBP Act and examines why a whistle blower would be inclined to choose a third-party internet platform over an existing, legitimate State mechanism. Since the online whistle blowing route also comes with a critical catch for national security, the article contends that domestic legislation ought to inevitably be strengthened to raise the levels of legitimacy and trust in the State. The provisions of the WBP Act must provide for a healthy and safe atmosphere for whistle blowers to fearlessly report wrongdoing.

To this effect, Part II delves into the highly critiqued sections of the WBP Act and the amendments proposed to these sections in the Amendment Bill and explores why there is a permeating lack of confidence in State authorities today. Part III then weighs the incentives against the risks of whistle blowing to a third-party internet platform and ascertains how this alternative can potentially do more harm than good. Lastly, Part IV makes recommendations based on international best practices to strengthen our whistle blower protection legislation and to establish a fine balance between the conflicting interests of Government transparency and national security.

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<sup>7</sup> Case in point: In 2009, when Barclay's Bank obtained a gag-order from the Court mandating *The Guardian* to remove leaked memos exposing a tax-avoidance scam, WikiLeaks broadcasted the leaked information instantly thereafter, thus rendering the order futile.

See David Leigh and Luke Harding, *WikiLeaks: Inside Julian Assange's War on Secrecy* (1st edn Guardian Books London 2011) 63.

## II. WHISTLE BLOWERS PROTECTION IN INDIA: A SAFE ALTERNATIVE TO SILENCE?

For want of a strong whistle blower protection law, whistle blowers in India continue to face major persecution for exposing corruption. For instance, *Ramon Magsaysay* awardee Sanjiv Chaturvedi has faced severe harassment for uncovering the Haryana Forestry and the All India Institute of Medical Sciences (AIIMS) scams.<sup>8</sup> Others, such as Satyendra Dubey, Shanmugam Manjunath, Amit Jethwa and Shehla Masood were allegedly murdered for exposing corruption, once their identity became public. Reprehensibly, the ‘Hall of Shame’ statistics maintained by the Commonwealth Human Rights Initiative record a total of 431 attacks on RTI applicants from April 2006 till February 2019.<sup>9</sup>

The Supreme Court of India had been the only bastion of whistle blowers’ rights till 2017. In 2004, in response to the petition filed after Satyendra Dubey’s murder (*Parivartan & Ors. v. Union of India & Ors.*), the Apex Court directed that suitable machinery be put in place for acting on whistle blowers’ complaints till specific laws on the matter were enacted. In 2016, with the WBP Act still pending in Parliament and in the absence of any executive set-up, the then Bench said that an ‘absolute vacuum’ could not be allowed to go on and directed the Centre to put in place an administrative mechanism for whistle blower protection. However, post the enactment of the WBP Act, in January 2017, the new Bench disposed of the 12-year old petition, dubbing the issue ‘premature’, and granted liberty to the petitioner to come back to Court after the Centre submitted that when the WBP Act was

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<sup>8</sup> See Gaurav Bhatnagar, ‘RTI Reveals Modi Called Health Minister to Discuss Removal of AIIMS Whistleblower Sanjiv Chaturvedi’ (2018) *The Wire*, at <https://thewire.in/government/rti-reveals-modi-called-health-minister-discuss-removal-aiims-whistleblower-sanjiv-chaturvedi> (last visited 24 February 2019).

<sup>9</sup> Commonwealth Human Rights Initiative, ‘Hall of Shame: Mapping Attacks on RTI users’ (2019) *Commonwealth Human Rights Initiative*, at <http://attacksnrtiusers.org/> (last visited 24 February 2019).

examined by the Government it found certain deficiencies and conflict between the provisions of the WBP Act and those of the RTI Act.<sup>10</sup>

The WBP Act by itself is far from perfect. For instance, it does not explicitly clarify what constitutes a valid 'public interest disclosure' nor does it make allowance for anonymous disclosures. No provision has been made for appeals to challenge an impugned order from a designated Competent Authority. The safeguards provided against victimisation are also feeble.

The Amendment Bill of 2015 was passed by the Lok Sabha *sans* public consultation and is currently pending in the Rajya Sabha. The Amendment Bill does nothing to remedy the shortcomings of the WBP Act. Instead, it further impairs the fight for transparency by requiring a finer sieve for public interest disclosures to pass through. In 2015, an RTI application revealed a Cabinet Note on the proposed amendments to the WBP Act stating that the present law gives an 'absolute right to whistleblower to make a complaint' and that 'people cannot have the absolute right to blow a whistle if they see wrongdoing', as reported by *The Times of India*.<sup>11</sup>

The proposed amendments have been modelled on sub-section (1) of section 8 of the RTI Act which enumerates ten exemptions from disclosure of information. The justification given for this move was to strengthen the safeguards against disclosures which may prejudicially affect the sovereignty and integrity of the country, security of the State, friendly relations with foreign States, or lead to incitement of an offence.<sup>12</sup> In this respect, the Amendment Bill amends sections 4, 5 and 8 of the WBP Act by importing the ten exemptions from the RTI Act.

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<sup>10</sup> *Parivartan & Ors. v. Union of India & Ors.* Writ Petition (Civil) No. 93 of 2004 (Unreported 29 September 2006, 30 August 2013, 12 February 2015, 08 April 2015, 05 November 2015, 13 January 2016 and 12 January 2017) available at <https://www.sci.gov.in/> (last visited 24 February 2019).

<sup>11</sup> Himanshi Dhawan, 'Centre Tries to Dilute Bill on Whistleblowers' (2015) *The Times of India*, at <http://timesofindia.indiatimes.com/india/Centre-tries-to-dilute-bill-on-whistleblowers/articleshow/48353499.cms> (last visited 24 February 2019).

<sup>12</sup> The Whistle Blowers Protection (Amendment) Bill, 2015, Statement of Objects and Reasons, paras 1, 2(a) and 2(b).

In light of these developments that do little to inspire confidence in a potential whistle blower, it is interesting to see the intention of the the WBP Act and its proposed Amendment Bill in sections 4, 5 and 8.

#### A. Section 4: Public Interest Disclosure

##### 1. The Parent Act

Section 4 lays down the requirements of public interest disclosure. The non-obstante clause under sub-section (1)<sup>13</sup> overrides the provisions of the *Official Secrets Act, 1923* (OS Act) and declares that any public servant or any person including any non-governmental organisation may make a public interest disclosure before the Competent Authority.<sup>14</sup>

The WBP Act does not define ‘public interest’, but merely affirms that ‘any disclosure made under the Act shall be treated as public interest disclosure’. The complaint must be made before the Competent Authority. Such disclosure of information must be made in good faith, and the whistle blower shall make a personal declaration of his reasonable belief that the information disclosed and allegation contained therein are substantially true.<sup>15</sup>

<sup>13</sup> Section 4(1) of *The Whistle Blowers Protection Act, 2014*, provides:

‘Notwithstanding anything contained in the provisions of the *Official Secrets Act, 1923* (19 of 1923), any public servant or any other person including any non-governmental organisation, may make a public interest disclosure before the Competent Authority.’

<sup>14</sup> Section 3(b) of *The Whistle Blowers Protection Act, 2014*, designates the following Competent Authorities with regards to their respective jurisdictions: the Prime Minister, the Chairman of the Council of States or the Speaker of the House of the People, the Chief Minister, the Chairman of the Legislative Council or the Speaker of the Legislative Assembly, the High Court, the Central Vigilance Commission, the State Vigilance Commission, or any other authority having jurisdiction in respect thereof.

<sup>15</sup> Sub-sections (2) and (3) of section 4 of *The Whistle Blowers Protection Act, 2014*, provide:

‘(2) Any disclosure made under this Act shall be treated as public interest disclosure for the purposes of this Act and shall be made before the Competent Authority and the complaint making the disclosure shall, on behalf of the Competent Authority, be received by such authority as may be specified by regulations made by the Competent Authority.

(3) Every disclosure shall be made in good faith and the person making disclosure shall make a personal declaration stating that he reasonably believes that the information disclosed by him and allegation contained therein is substantially true.’

The WBP Act mandates that on failure to disclose the identity of the whistle blower, or if such identity is found to be false, no action will be taken by the Competent Authority on the public interest disclosure so made.<sup>16</sup> Thus, anonymous disclosures are not entertained even if they are meritorious and in public interest. This comes after the Supreme Court legitimised anonymous whistle blowing in 2014 in *Centre for PIL & Ors. v. Union of India & Ors.*, also known as the ‘CBI 2G Scam Diarygate’ scandal.<sup>17</sup>

## 2. The Proposed Amendment

The Amendment Bill substitutes the existing section 4(1)<sup>18</sup> with a truncated version wherein the original non-obstante clause stands deleted. It reverses the overriding authority and supremacy of the WBP Act over the OS Act and renders the whistle blower at the risk of being prosecuted under the latter.<sup>19</sup>

Further, it also proposes to insert section 4(1A) curtailing the freedom of the whistle blower to report anything of public interest, by importing the ten exemptions to public interest disclosures from

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<sup>16</sup> Section 4(6) of *The Whistle Blowers Protection Act, 2014*, provides:

‘No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure or the identity of the complainant or public servant is found incorrect or false.’

<sup>17</sup> *Centre for PIL & Ors. v. Union of India & Ors.* Interim Applications Nos. 73 and 76 in Civil Appeal No. 10660 of 2010 (Decided on 20 November 2014) *available at* <https://www.sci.gov.in/> (last visited 24 February 2019).

<sup>18</sup> *Supra* n. 13.

<sup>19</sup> The Whistle Blowers Protection (Amendment) Bill, 2015, proposes that in the parent Act, in section 4, for sub-section (1), the following sub-section shall be substituted— ‘Any public servant or any other person including a non-Governmental organisation may make public interest disclosure before the Competent Authority.’

section 8(1) of the RTI Act as is.<sup>20</sup> These exemptions are under the broad categories of matters relating to the economic, scientific interests and the security of India and its relation with foreign States; information which would constitute contempt of court, or a breach of the privilege of the legislature or Cabinet proceedings; confidential commercial information such as trade secret or intellectual property; information available to a person in his fiduciary relationship, or that which would endanger the life or personal safety of any person, or impede the process of investigation or apprehension or prosecution of offenders; and personal information which has no relationship to any public activity or interest or which would cause invasion of the privacy of an individual.

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<sup>20</sup> Section 4(1A) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: 'Notwithstanding anything contained in sub-section (1), no public interest disclosure shall be made by any public servant or any other person including a non-Governmental organisation under this Act, if such disclosure contains—

- (a) information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, the security of the State, the strategic, scientific or economic interests of the State, friendly relations with foreign States or lead to incitement to an offence;
- (b) information, which has been expressly forbidden to be published by any court of law or tribunal, or the disclosure of which may constitute contempt of court;
- (c) information, the disclosure of which would cause a breach of privilege of Parliament or State Legislature;
- (d) information relating to commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
- (e) information which is available to a person in his fiduciary capacity or relationship, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005;
- (f) information received in confidence from a foreign Government;
- (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;
- (h) information, which would impede the process of investigation or apprehension or prosecution of offenders;
- (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers, except as otherwise provided under the Right to Information Act, 2005;
- (j) personal information, the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless such information has been disclosed to the complainant under the provisions of the Right to Information Act, 2005.'

Of these, six categories that are described in clauses (a), (b), (c), (f), (g) and (h) of the section possess absolute immunity from being disclosed. The WBP Act magnanimously allows disclosures of only those documents that the whistle blower may have already obtained through the RTI Act, such as cabinet papers and matters relating to personal or private information, found in clauses (d), (e), (i) and (j). This renders the premise of whistle blowing redundant since information disclosed under the RTI Act is by its very nature deemed to be in the public domain. It can be surmised that information leaked by a whistle blower is much more than what is available to an RTI applicant.

While both the RTI Act and the WBP Act seek to promote transparency and accountability through public interest disclosures, the ambit of both differ—in that, the former covers ‘public’ disclosures which provide information to the people at large, whereas the latter covers ‘protected’ disclosures made in confidence to a Competent Authority. A blanket import of the exemptions that apply in the first scenario into the second is an anomaly because it does not further the purpose of making provisions for ‘protected’ disclosures. Thus, while in a consistent legislative move it may appear rational to have the same exemptions in both, the RTI Act and the WBP Act, in the context of the latter such a broad sphere of exemptions amounts to cherry-picking of what information the Government is comfortable with being disclosed in ‘public interest’.

Moreover, while importing the ten exemptions under section 8(1) of the RTI Act, the Amendment Bill completely discounts the non-obstante clauses in the RTI Act which uphold public interest. Sub-section (2) of section 8<sup>21</sup> read with section 22<sup>22</sup> of the RTI Act provides that a public authority may allow the disclosure of the

<sup>21</sup> Section 8(2) of *The Right to Information Act, 2005*, provides:

‘Notwithstanding anything in the *Official Secrets Act, 1923* (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1) of this Act, a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.’

<sup>22</sup> Section 22 of *The Right to Information Act, 2005*, provides:

‘The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the *Official Secrets Act, 1923* (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.’

information if the public interest in such disclosure outweighs the harm to the protected interests—withstanding anything inconsistent therewith contained in any of the ten exemptions of section 8(1) of the RTI Act, or in the OS Act or in any other law for the time being in force. This grants discretionary power to the public authority to direct, in pursuance of public interest, disclosure of files classified as ‘confidential’ under the OS Act, or of such information which possesses immunity under any of the ten exemptions under section 8(1) of the RTI Act.<sup>23</sup> Thus, the legal effect of not including this overriding safeguard provided under sections 8(2)<sup>24</sup> and 22<sup>25</sup> of the RTI Act is that the Amendment Bill virtually makes the WBP Act subservient to the OS Act. Far from encouraging whistle blowers to expose corruption, it muzzles them under the garb of ‘protecting public interest’.

## *B. Section 5: Powers and Functions of Competent Authority*

### 1. The Parent Act

Section 5 requires the Competent Authority to ascertain and conceal the identity of the whistle blower, unless the whistle blower himself has revealed it to any other authority while making the disclosure.<sup>26</sup> The Competent Authority is not to reveal the whistle blower’s identity while seeking any comments, explanations or report from the authority in question. If the Competent Authority deems it necessary to reveal the identity in confidence to the Head of the Department (HoD) under inquiry, it may do so, provided that the whistle blower consents to it in writing. The Competent Authority must also direct the HoD to not reveal the whistle blower’s identity.

<sup>23</sup> See Dr JN Barowalia, *Commentary on the Right to Information Act* (4th edn Universal Law Publishing Delhi 2017) 436.

<sup>24</sup> *Supra* n. 21.

<sup>25</sup> *Supra* n. 22.

<sup>26</sup> Section 5(1) of *The Whistle Blowers Protection Act, 2014*, provides:

‘Subject to the provisions of this Act, the Competent Authority shall, on receipt of a public interest disclosure under section 4,—

- (a) ascertain from the complainant or the public servant whether he was the person or the public servant who made the disclosure or not;
- (b) conceal the identity of the complainant unless the complainant himself has revealed his identity to any other office or authority while making public interest disclosure or in his complaint or otherwise.’

If the whistle blower does not agree to his name being revealed to the HoD, he is required to make available all documentary evidence in support of his complaint to the Competent Authority.<sup>27</sup> This provision negates the very purpose of the law. The central philosophy of any whistle blower protection legislation is to keep the identity of the person making the public interest disclosure confidential in order to protect him from any consequent reprisals. Asking for every possible evidence there is, places excessive onus on and is discouraging for a whistle blower who has ample at stake with his initial disclosure of confidential information itself. A fresh pursuit of more information could also lead to inadvertently disclosing his identity.

In consonance with section 5 is section 13 of the WBP Act, which also mandates the Competent Authority to conceal the identity of the whistle blower and his disclosure, unless decided otherwise by the Competent Authority, or if it has become necessary to reveal it by virtue of the order of the court.<sup>28</sup>

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<sup>27</sup> Section 5(4) of *The Whistle Blowers Protection Act, 2014*, provides: 'While seeking comments or explanations or report referred to in sub-section (3), the Competent Authority shall not reveal the identity of the complainant or the public servant and direct the Head of the Department of the organisation concerned or office concerned not to reveal the identity of the complainant or public servant: Provided that if the Competent Authority is of the opinion that it has, for the purpose of seeking comments or explanation or report from them under sub-section (3) on the public disclosure, become necessary to reveal the identity of the complainant or public servant to the Head of the Department of the organisation or authority, board or corporation concerned or office concerned, the Competent Authority may, with the prior written consent of the complainant or public servant, reveal the identity of the complainant or public servant to such Head of the Department of the organisation or authority, board or corporation concerned or office concerned for the said purpose: Provided further that in case the complainant or public servant does not agree to his name being revealed to the Head of the Department, in that case, the complainant or public servant, as the case may be, shall provide all documentary evidence in support of his complaint to the Competent Authority.'

<sup>28</sup> Section 13 of *The Whistle Blowers Protection Act, 2014*, provides: 'The Competent Authority shall, notwithstanding any law for the time being in force, conceal, as required under this Act, the identity of the complainant and the documents or information furnished by him, for the purposes of enquiry under this Act, unless so decided otherwise by the Competent Authority itself or it became necessary to reveal or produce the same by virtue of the order of the court.'

## 2. The Proposed Amendment

While the Amendment Bill does not reduce the burden of the Competent Authority upon receipt of a disclosure, it inserts section 5(1A)<sup>29</sup> constraining the powers of the Competent Authority. This sub-section puts an absolute bar on inquiry into disclosures falling under the previously mentioned ten exemptions of section 4(1A).<sup>30</sup> As a result, the Competent Authority's discretion to determine what constitutes a valid public interest disclosure under the WBP Act is severely curtailed.

This new provision also comes with a rider that once a disclosure is received, the Competent Authority must first refer the disclosure to an authority sanctioned by the Central or State Government under section 8(1)<sup>31</sup> of the WBP Act. Such authority must ascertain whether the disclosure contains any information of the nature specified under the previously mentioned ten exemptions, and the certificate given in this regard by such authority is binding on the Competent Authority.

Thus, in the event of a disclosure against the Government, a body authorised by the Government itself will certify whether the disclosure warrants any investigation. Such certification being conclusive and binding on the Competent Authority, any prospective investigation into the same is thence effectively scuttled. This bridles the administrative powers of the Central and State Vigilance Commissions and derogates them to being token bodies set up for whistle blower protection in the country.

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<sup>29</sup> Section 5(1A) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: 'The Competent Authority shall not inquire into any public interest disclosure which involves information of the nature specified in sub-section (1A) of section 4: Provided that the Competent Authority shall, on receipt of any such public interest disclosure, refer such disclosure to an authority authorised under sub-section (1) of section 8 to ascertain whether the disclosure contains any information of the nature specified in sub-section (1A) of section 4, and the certificate given in this regard by such authority shall be binding on the Competent Authority.'

<sup>30</sup> *Supra* n. 20.

<sup>31</sup> *Infra* n. 35.

### C. Section 8: Matters Exempt from Disclosure

#### 1. The Parent Act

Section 8 deals with certain matters that are exempt from disclosure and protects the authorities under inquiry. Sub-section (1) exempts such authorities from furnishing any information or document, or rendering any assistance involving any disclosure of the proceedings of the Cabinet of the Union or State Government, if such inquiry is likely to fall under the reasonable restrictions of article 19(2) of the *Constitution of India*.<sup>32</sup> Sub-section (2) puts a bar on any person on giving of any evidence or producing of any document which he could not be compelled to give or produce in proceedings before a court.<sup>33</sup> These constitute the only exemptions to disclosure provided under the WBP Act.

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<sup>32</sup> Section 8(1) of *The Whistle Blowers Protection Act, 2014*, provides:

‘No person shall be required or be authorised by virtue of provisions contained in this Act to furnish any such information or answer any such question or produce any document or information or render any other assistance in the inquiry under this Act if such question or document or information is likely to prejudicially affect the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence,—

- (a) as might involve the disclosure of proceedings of the Cabinet of the Union Government or any Committee of the Cabinet;
- (b) as might involve the disclosure of proceedings of the Cabinet of the State Government or any Committee of that Cabinet,

and for the purpose of this sub-section, a certificate issued by the Secretary to the Government of India or the Secretary to the State Government, as the case may be, or, any authority so authorised by the Central or State Government certifying that any information, answer or portion of a document is of the nature specified in clause (a) or clause (b), shall be binding and conclusive.’

<sup>33</sup> Section 8(2) of *The Whistle Blowers Protection Act, 2014*, provides:

‘Subject to the provisions of sub-section (1), no person shall be compelled for the purposes of inquiry under this Act to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before a court.’

## 2. The Proposed Amendment

The Amendment Bill seeks to substitute the original section 8(1)<sup>34</sup> and diminishes the scope of successfully making public interest disclosures to a pinhole. The amended section 8(1)<sup>35</sup> reinvigorates the blanket ban under the ten exemptions,<sup>36</sup> and further fortifies their grip over public interest disclosures made under the WBP Act by granting it overriding power.

It provides that no person is required under the WBP Act or under any other law in force, to furnish any information or document, or render any other assistance in any inquiry, if such information is in the nature of any of the ten exemptions specified in section 4(1A).<sup>37</sup> It is clarified that this is pursuant to the certificate issued by an authority authorised by the State or Central Government under the previously mentioned section 5(1A).<sup>38</sup>

This amended sub-section, thus, undermines all other laws in force, including the RTI Act and its protection of public interest. It is in direct conflict with the contradictory overriding sections 8(2)<sup>39</sup> and 22<sup>40</sup> of the RTI Act which mandate disclosure of information if the

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<sup>34</sup> *Supra* n. 32.

<sup>35</sup> Section 8(1) of The Whistle Blowers Protection (Amendment) Bill, 2015, provides: ‘No person shall be required or authorised under this Act, or under any other law for the time being in force, to furnish any information or answer any question or produce any document or render any other assistance in an inquiry under this Act, if furnishing of such information, or answering of question or the production of the document or the rendering of assistance is likely to result in the disclosure of any information of the nature specified in sub-section (1A) of section 4, and for this purpose, a certificate issued by an authority, authorised in this behalf by the Central Government or the State Government, as the case may be, certifying that such information, answer, document or assistance is of the nature specified in sub-section (1A) of section 4, shall be binding.’

<sup>36</sup> *Supra* n. 20.

<sup>37</sup> *Supra* n. 20.

<sup>38</sup> *Supra* n. 29.

<sup>39</sup> *Supra* n. 21.

<sup>40</sup> *Supra* n. 22.

public interest in its disclosure outweighs the potential harm to the protected interests. It also grants the authority under inquiry complete exemption from providing the information that is sought, upon the issuance of a binding and conclusive certificate to this effect by another authority sanctioned by the Government.

Thus, in a nutshell, the proposed Amendment Bill does away with the much needed safeguard against the provisions of the OS Act,<sup>41</sup> and heavily shields the ten exemptions under section 4(1A).<sup>42</sup> It upholds 'protected interests' but makes no allowance for a balancing 'public interest' to be considered in the equation. As a result, it leaves very little room for blowing the whistle, let alone being a safe alternative to silence for a whistle blower acting in public interest.

As the above analysis reveals, currently, deficient procedural justice characterises this key legislation that governs the public's right to disclose Government information in public interest, as well as the protection of such individuals who choose to blow the whistle.

### III. INTERNET WHISTLE BLOWING PLATFORMS: SAVIOURS OR THREATS?

The procedural shortcomings of the WBP Act and its Amendment Bill illustrated in Part II could persuade a potential whistle blower to resort to gag-proof third-party internet whistle blowing platforms, as demonstrated by the current worldwide trend of online national security leaks such as those of Julian Assange, Chelsea Manning and Edward Snowden. According to Professor Margaret Kwoka of Denver Sturm College of Law, these leaks differ in significant ways from traditional whistle blower leaks, and represent a new type of leak that she terms 'deluge leaks'.<sup>43</sup> Kwoka reasons that unlike whistle

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<sup>41</sup> *Supra* n. 19.

<sup>42</sup> *Supra* n. 20.

<sup>43</sup> Margaret Kwoka, 'Leaking and Legitimacy' (2010) 48(4) *UC Davis Law Review* 1387, 1391, available at <https://lawreview.law.ucdavis.edu/issues/48/4/> (last visited 24 February 2019).

blower leaks which expose targeted Government policies about which a knowledgeable leaker is concerned, ‘deluge leaks’ are characterised by lower-level Government officials<sup>44</sup> without policy-making authority, leaking massive quantities of information on a wide range of subject matter,<sup>45</sup> largely out of a belief that the Government keeps too many secrets.<sup>46</sup>

The worldwide reaction to such ‘deluge leaks’ has been extreme—the leakers have been hailed as ‘transparency advocates’ by one segment while being written off as ‘traitors’ by the other. Thus, this Part examines the viability of the online route over the State mechanism set up by the WBP Act.

#### A. *The Internet: A Whistle Blower’s First Choice?*

Advancements in technology have cleared considerable obstacles in leaking confidential information. Whistle blowers no longer need to spend time photocopying confidential records. Hard copies have been digitised to easily saved, copied and shared soft copies stored

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<sup>44</sup> Chelsea Manning was a US Army Soldier ranking Private First Class. Edward Snowden worked as a systems administrator for a National Security Agency (NSA) contractor. Therefore, both occupied comparatively junior or lower-level ranks. See —, ‘Chelsea Manning: Wikileaks Source and Her Turbulent Life’ (2017) *British Broadcasting Corporation*, at <http://www.bbc.com/news/world-us-canada-11874276> (last visited 24 February 2019) and John Broder and Scott Shane, ‘For Snowden, a Life of Ambition, Despite the Drifting’ (2013) *The New York Times*, at <http://www.nytimes.com/2013/06/16/us/for-snowden-a-life-of-ambition-despite-the-drifting.html> (last visited 24 February 2019).

<sup>45</sup> Over a very short period of time, Chelsea Manning, through Julian Assange and WikiLeaks, released the Collateral Murder video, over 77,000 documents about the war in Afghanistan, over 390,000 documents about the Iraq war, over 250,000 diplomatic cables between the U.S. State Department and U.S. embassies around the world, and over 700 documents about individuals held at Guantanamo Bay. Meanwhile, the full extent of Edward Snowden’s disclosures remains unclear, but the NSA chief at one point estimated that he leaked up to 200,000 secret records. In a subsequent hearing before Congress, intelligence officials reported that Snowden accessed roughly 1.7 million files: Margaret Kwoka *supra* n. 43, 1400.

<sup>46</sup> *Ibid.*, 1394.

on the cloud. With rising digitisation and integration of Government databanks, more low-level Government personnel and contractors can log on to broad swaths of Government information,<sup>47</sup> including national security-related records. These digital records are also simple to hack into and steal, even by individuals unrelated to the organisation, if the website where they are stored uses substandard security measures and is not encrypted, as was revealed in the *Aadhaar* data theft case of August 2017.<sup>48</sup>

Keeping this in mind, the following aspects are where the Internet easily topples the State mechanism as a more enticing prospect:

### 1. Cryptographic Anonymity

Tracing whistle blower leaks to their source has become near impossible with stronger and easily accessible anonymity tools for submission of information. This has made whistle blowing without reprisals a reality. For anonymous submissions, WikiLeaks currently offers sophisticated anonymity tools such as Tor, an encrypted anonymising network that is touted to be vastly more secure than any banking network;<sup>49</sup> and Tails, an operating system launched from

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<sup>47</sup> For example, the grid Chelsea Manning accessed is reportedly accessible to approximately 2.5 million military and civilian employees. As for Edward Snowden, while there are no precise estimates as to the number of employees who could access the network database, 'details about virtually all of the NSA's surveillance programs were accessible to anyone, employee or contractor, private or general, who had top-secret NSA clearance and access to an NSA computer'.

See — 'Siprnet: Where the Leaked Cables Came From' (2010) *British Broadcasting Corporation*, at <http://www.bbc.com/news/world-us-canada-11863618> (last visited 24 February 2019) and James Bamford, 'Edward Snowden: The Untold Story' (2014) *Wired*, at <https://www.wired.com/2014/08/edward-snowden/> (last visited 24 February 2019).

<sup>48</sup> See Rajiv Kalkodi, 'Absence of HTTPS from URL Helped Aadhaar Hacker' (2017) *The Times of India*, at <http://timesofindia.indiatimes.com/city/bengaluru/absence-of-https-from-url-helped-hacker/articleshow/59935428.cms> (last visited 24 February 2019).

<sup>49</sup> Rita Zajacz, 'WikiLeaks and the Problem of Anonymity: A Network Control Perspective' (2013) 35(4) *Media, Culture and Society* 487, 497, available at <https://doi.org/10.1177/0163443713483793> (last visited 24 February 2019).

a USB stick or a DVD, that leaves no traces when the computer is shut down and automatically routes the internet traffic through Tor.<sup>50</sup> ‘We keep no records as to where you uploaded from, your time zone, browser or even as to when your submission was made,’ claims WikiLeaks on their Submissions webpage.<sup>51</sup>

## 2. Absence of Formalities

As seen in Part II, the WBP Act does not entertain anonymous disclosures<sup>52</sup> but operates through legally mandated confidentiality between the whistle blower and the Competent Authority with the former’s identity being kept secret at the discretion of the latter.<sup>53</sup> In stark contrast, third-party internet whistle blowing platforms that make possible untraceable anonymity, operate on the principle: ‘The best way to keep a secret is not to have it’.<sup>54</sup> Again, while the WBP Act requires extensive formalities to be followed by the whistle blower while making the disclosure<sup>55</sup> and by the Competent Authority upon receipt of such disclosure,<sup>56</sup> these online platforms have no such requirement—a mere submission of questionable confidential documents is sufficient to blow the whistle.

These factors make the online platforms a more attractive and practicable option for a potential whistle blower.

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<sup>50</sup> See WikiLeaks, ‘Submit Documents to Wikileaks’, *WikiLeaks*, at <https://wikileaks.org/#submit> (last visited 24 February 2019) and WikiLeaks, ‘What is Tor?’, *WikiLeaks*, at [https://wikileaks.org/#submit\\_help\\_tor](https://wikileaks.org/#submit_help_tor) (last visited 24 February 2019).

<sup>51</sup> WikiLeaks, ‘WikiLeaks: Submissions’, *WikiLeaks*, at <https://wikileaks.org/wiki/WikiLeaks:Submissions> (last visited 24 February 2019).

<sup>52</sup> *Supra* n. 16.

<sup>53</sup> *Supra* nn. 26–28.

<sup>54</sup> Marcela Gaviria and Martin Smith, ‘Julian Assange Interview Transcript’, *PBS Frontline*, at <http://www.pbs.org/wgbh/pages/frontline/wikileaks/etc/transcript.html> (last visited 24 February 2019).

<sup>55</sup> *Supra* nn. 13, 15–16.

<sup>56</sup> *Supra* nn. 26–28.

## B. *The Internet: A Responsible Citizen's Choice?*

While the incentives offered to whistle blowers by these platforms outweigh those offered by the WBP Act, the question now is whether the precariousness of these platforms also favour the viability of this alternative. From all the disclosures that have been made online till date, the following three areas are brightest blips on the risk radar of publishing on these platforms, subject to the nature of the contents of the information that is leaked. These risks inherently make it harder for whistle blowers to minimise the harms and maximise the benefits of their disclosures considering larger public interest. While most of the observations below pertain mainly to WikiLeaks, they apply to all third-party internet whistle blowing platforms *mutatis mutandis*. For the purpose of this article, it is assumed that whistle blowers do not intend extortion but are blowing the whistle only in public interest.

### 1. Threat to National Security

Protection of national security interests is a legitimate justification for secrecy. For example, the reasonable restrictions to our fundamental rights enumerated under article 19(2) of the *Constitution of India* are vindicated because they are deemed to be in the larger public interest. Publication of leaks containing information under those heads on internet platforms that are accessible globally would have serious repercussions on national security and diminish any benefit to the public in its pursuit to increase Government accountability and transparency.

This is not to eclipse the benefits of these online platforms that have been accrued so far. For example, in the case of WikiLeaks, the revelation of the Iraq and Afghanistan war logs pertaining to the mistreatment of prisoners<sup>57</sup> and thousands of unreported civilian

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<sup>57</sup> See Nick Davies, 'Iraq War Logs: Secret Order That Let US Ignore Abuse' (2010) *The Guardian*, at <https://www.theguardian.com/world/2010/oct/22/iraq-detainee-abuse-torture-saddam> (last visited 24 February 2019).

deaths,<sup>58</sup> and its contribution to the Arab Spring<sup>59</sup> have been of great public importance. On the other hand, regarding individual privacy and the role of the National Security Agency in the USA,<sup>60</sup> Edward Snowden's revelations led to the State surveillance being put under the scanner by then President Obama.<sup>61</sup>

However, since these platforms leak documents in bulk, there have also been gaffes wherein the data leaked has included sensitive and private information of ordinary citizens—the leaks of which do not have an iota of 'public interest', but are a danger to individual privacy and national security.<sup>62</sup> Take for example, the 30,000 'Erdogan emails' leak and the 19,252 emails in the 'Hillary Leaks'. WikiLeaks, along with these copious amounts of data also released databases that contained private information of millions of ordinary people, including a database of almost all adult women in Turkey in the case of the former leak.<sup>63</sup> In the case of the latter, apart from leaking personal information of donors of the Democratic Party of the USA, such as

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58 See David Leigh, 'Iraq War Logs Reveal 15,000 Previously Unlisted Civilian Deaths' (2010) *The Guardian*, at <https://www.theguardian.com/world/2010/oct/22/true-civilian-body-count-iraq> (last visited 24 February 2019).

59 See Sami Ben Hassine, 'Tunisia's Youth Finally Has Revolution on Its Mind', *The Guardian* (13 January 2011), at <https://www.theguardian.com/commentisfree/2011/jan/13/tunisia-youth-revolution> (last visited 24 February 2019).

60 See The Editorial Board, 'Edward Snowden, Whistle-Blower' (2014) *The New York Times*, at <https://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html> (last visited 24 February 2019).

61 See David Sanger and Charlie Savage, 'Obama Is Urged to Sharply Curb N.S.A. Data Mining' (2013) *The New York Times*, at <http://www.nytimes.com/2013/12/19/us/politics/report-on-nsa-surveillance-tactics.html> (last visited 24 February 2019).

62 See Karl Vick, 'WikiLeaks Is Getting Scarier Than the NSA' (2016) *Time*, at <http://time.com/4450282/wikileaks-julian-assange-dnc-hack-criticism/> (last visited 24 February 2019).

63 See Zeynep Tufekci, 'WikiLeaks Put Women in Turkey in Danger, for No Reason (Update)' (2016) *The Huffington Post*, at [http://www.huffingtonpost.com/zeynep-tufekci/wikileaks-erdogan-emails\\_b\\_11158792.html](http://www.huffingtonpost.com/zeynep-tufekci/wikileaks-erdogan-emails_b_11158792.html) (last visited 24 February 2019).

credit card, passport and social security numbers,<sup>64</sup> the ill-timed leak also had ramifications for the 2016 presidential elections.<sup>65</sup>

## 2. Questionable Public Interest

Such reckless leaks have cast a doubt on whether WikiLeaks is crossing the line between Government transparency and violation of privacy of ordinary citizens. According to sociologist Zeynep Tufekci, the problem lies in the fact that instead of curated whistle blower leaks that take public interest into account, the leaks of 2016 have demonstrated that mass-hacked emails are being dumped without any consideration for the privacy of the people.<sup>66</sup> As ideal as it would be for these platforms to have a vetting process and publish only those disclosures or parts thereof that are in public interest, it becomes difficult, if not impossible, to do so when they involve such liberal amounts of data. Moreover, WikiLeaks does not seem to be too keen to redact in the future either, as they declared in a tweet dated 27 July 2016: 'Our accuracy policy. We do not tamper with the evidentiary value of important historical archives.'<sup>67</sup>

## 3. Unscrambling the Egg

Such rash leaking of confidential data that is against public interest must definitely not go unpunished, but punishment after a leak has occurred does not undo the damage caused by the leak—one cannot unscramble an egg.

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<sup>64</sup> Andrea Peterson, 'Wikileaks posts nearly 20,000 hacked DNC emails online' (2016) *The Washington Post*, at <http://wapo.st/29U8y4Y> (last visited 24 February 2019).

<sup>65</sup> Mark Hosenball, 'WikiLeaks Faces U.S. Probes into its 2016 Election Role and CIA Leaks: Sources' (2017) *Reuters*, at <https://www.reuters.com/article/us-usa-trump-russia-wikileaks/wikileaks-faces-u-s-probes-into-its-2016-election-role-and-cia-leaks-sources-idUSKBN1E12J2> (last visited 24 February 2019).

<sup>66</sup> Scott Simon, 'WikiLeaks Dump Method: Sociologist Says Not All Leaked Passes Public Interest Test' (2016) *NPR*, at <http://www.npr.org/2016/10/22/498954190/wikileaks-dump-method-destroys-privacy-sociologist-says-not-all-leaked-pass-publ> (last visited 24 February 2019).

<sup>67</sup> @wikileaks, 'Our accuracy policy. We do not tamper with the evidentiary value of important historical archives.', 28 July 2016, at <https://twitter.com/wikileaks/status/758463256113676289> (last visited 24 February 2019).

While it has certainly become impossible to trace the source of a leak and nab the negligent whistle blower, the whistle blower is not the only participant in the perpetuation of a reckless leak. Unlike the mechanism set up by the WBP Act, wherein only the whistle blower, the Competent Authority, and in certain cases the authority under inquiry have access to the disclosed information,<sup>68</sup> online platforms involve three players in any disclosure and its subsequent distribution: the leaker, the platform, and the media. When a whistle blower leaks confidential files to an online platform, the online platform publishes the information globally. This information is then reported nationally or internationally by the media. Without such a wide range of publication, such information, whose revelation would be against public interest and national security, would pose little threat because the chances of unwanted readers encountering the information would be slim. Therefore, the media ends up playing an even greater role than the leaker in the dissemination of the reckless leak. It was a similar situation and a threat to our national security, when the broadsheet, *The Australian*, published the story of 22,400 pages of leaked secret documents marked 'Restricted Scorpène India' revealing threadbare details of the Scorpène-class submarine project consisting of technical literature, manuals and other operational details.<sup>69</sup> As a result, the existing batch of the French-designed submarines became vulnerable even before they came into service, and India had to shelve its plans to enlarge the order with the naval contractor.<sup>70</sup>

The common thread between the abovementioned risks is that they are all associated with making the disclosure public on an easily accessible global platform, in contrast to whistle blowing confidentially

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<sup>68</sup> *Supra* nn. 13, 15–16, 26–27.

<sup>69</sup> Express News Service, 'Scorpene Submarine Leak: Huge Setback for India as 22,000 Pages of Secret Data Leaked' (2016) *The Indian Express*, at <http://indianexpress.com/article/india/india-news-india/scorpene-submarine-leak-huge-setback-india-as-22000-pages-of-secret-data-leaked/> (last visited 24 February 2019).

<sup>70</sup> Reuters, 'Scorpene Leak: India Shelves Plan to Expand French Submarine Order after Data Breach' (2016) *The Indian Express*, at <https://indianexpress.com/article/india/india-news-india/india-shelves-plan-to-expand-french-submarine-order-after-data-breach-3010839/> (last visited 24 February 2019).

to a State authority<sup>71</sup> and preventing unwanted eyes from scrutinising the exposé. The negative impact of online whistle blowing can be mitigated only if the domestic mechanism is strengthened to overcome its lacunae, become more whistle blower friendly, and regain faith in its legitimacy.

#### IV. SAVING THE CANARY IN THE COALMINE: RECOMMENDATIONS AND CONCLUDING REMARKS

Whistle blowing is an essential facet of a healthy democracy. But where there are serious repercussions on national security, secrecy can legitimately be claimed as it would then be in the larger public interest that such matters are not disclosed or disseminated.<sup>72</sup> A fine balance must be struck between the two conflicting interests of Government transparency and national security. The purpose of whistle blower protection legislation is to provide whistle blowers with a safe alternative to silence, a security against reprisals, and to ensure that the larger public interest prevails under all circumstances.

Not all is critiqued in the WBP Act and its Amendment Bill. For one, what is remarkable is that while the term ‘whistle blower’, conventionally and in most legislations,<sup>73</sup> refers to an employee operating within the Government or a corporation who exposes

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<sup>71</sup> *Supra* nn. 26–28.

<sup>72</sup> It has been held in *SP Gupta v. Union of India* (AIR 1982 SC 149) by a seven-judge Bench of the Supreme Court that the Court would allow an objection to disclosure of document if it finds that the document relates to affairs of State and its disclosure would be injurious to public interest, but on the other hand, if it reaches the conclusion that the document does not relate to the affairs of the State or the public interest does not compel its non-disclosure or that the public interest in the administration of justice in a particular case overrides all other aspects of public interest, it will overrule the objection and order the disclosure of the document. In balancing the competing interests, it is the duty of the Court to see that there is public interest that harm shall not be done to the nation or public service by disclosure of the document and there is a public interest that the administration of justice shall not be frustrated by withholding the document which must be produced if justice is to be done.

<sup>73</sup> See for example, *Kōeki Tsūhōsha Hogohō* [Whistleblower Protection Act] (Law No. 122 of 2004) article 2, para 1 (Japan) and *Public Interest Disclosure Act, 1998* c 23, section 43A (UK).

corruption or wrongdoings therein, the WBP Act broadens the scope of this term to incorporate any public servant or any other person including any non-governmental organisation to blow the whistle or file a complaint against any public servant.<sup>74</sup> Furthermore, whistle blowers Satyendra Dubey's and Sanjiv Chaturvedi's prayers for secrecy and protection after having made their respective disclosures<sup>75</sup> would have had legal sanction<sup>76</sup> had the WBP Act been in force as was recommended by the National Commission to Review the Working of the Constitution in 2001.<sup>77</sup> The whistle blowers or their families would then have had the option of enforcing their legally mandated protections through courts, instead of being solitary crusaders in their lonely fights against corruption.

Nonetheless, the WBP Act has several chinks in its armour which make it less reinforcing and a more dispiriting legislation. Several provisions including, *inter alia*, those pertaining to public interest disclosures, victimisation, and appeals are not at par with international standards. The Amendment Bill worsens the situation and offsets whatever little progress is sought to be attained by the WBP Act with greater setbacks.

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<sup>74</sup> *Supra* nn. 13, 19.

<sup>75</sup> See Amitav Ranjan, 'Whistleblower Said Don't Name Me. Govt Did. He Was Shot Dead' (2003) *The Indian Express*, at <http://archive.indianexpress.com/oldStory/36329> (last visited 24 February 2019) and Gaurav Bhatnagar *supra* n. 8.

<sup>76</sup> *Supra* nn. 26–28.

Section 12 of *The Whistle Blowers Protection Act, 2014*, provides:

'If the Competent Authority either on the application of the complainant, or witnesses, or on the basis of information gathered, is of the opinion that either the complainant or public servant or the witnesses or any person rendering assistance for inquiry under this Act need protection, the Competent Authority shall issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps, through its agencies, to protect such complainant or public servant or persons concerned.'

Section 16 of *The Whistle Blowers Protection Act, 2014*, provides:

'Any person, who negligently or *mala fide*ly reveals the identity of a complainant shall, without prejudice to the other provisions of this Act, be punishable with imprisonment for a term which may extend up to three years and also to fine which may extend up to fifty thousand rupees.'

<sup>77</sup> National Commission to Review the Working of the Constitution *supra* n. 3.

If the Amendment Bill were to be passed as is, the WBP Act would stand emasculated further before it can even come into force. Provisions of the WBP Act affording secrecy and protection to the whistle blower would remain a far-fetched dream given that the Amendment Bill is riddled with preconditions to be met for a public interest disclosure to be considered valid under the WBP Act, acted upon, and investigated into.<sup>78</sup> Thus, while some provisions of the WBP Act might appease a potential whistle blower, disclosing to a State authority is still not an encouraging alternative.

It is therefore necessary for the State to accelerate the transition of the WBP Act to a more effective and less symbolic legislation. To this effect, the author has the following recommendations for the WBP Act based on international best practices.

#### A. *Recommendations*

1. To insert the same non-obstante clause as is in the RTI Act.

As explained under Part II, the proposed Amendment Bill not only makes the WBP Act subservient to the OS Act,<sup>79</sup> but also undermines the overriding authority of the RTI Act that advocates public interest.<sup>80</sup>

It is thus recommended that the non-obstante clause under the original section 4(1) of the WBP Act that overrode the provisions of the OS Act be retained.<sup>81</sup> The *Protected Disclosures Act 2000* (New Zealand) similarly provides immunity from civil and criminal proceedings where a person has made a protected disclosure. This protection applies despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath or practice.<sup>82</sup> It thus overrides any other law in the country that deals with official secrets.

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<sup>78</sup> *Supra* nn. 13, 15–16, 26–28.

<sup>79</sup> *Supra* n. 20.

<sup>80</sup> *Supra* n. 35.

<sup>81</sup> *Supra* n. 13.

<sup>82</sup> *Protected Disclosures Act 2000*, section 18 (New Zealand).

It is also recommended that sections 8(2)<sup>83</sup> and 22<sup>84</sup> of the RTI Act be held supreme, as they uphold public interest and override all exemptions to disclosures in force. Therefore, along with importing the ten exemptions of section 8(1)<sup>85</sup> from the RTI Act, the provisions of section 8(2)<sup>86</sup> of the RTI Act must also be imported. Additionally, the proposed revision of section 8(1)<sup>87</sup> in the Amendment Bill must be disregarded, since it conflicts with the overriding power of section 22<sup>88</sup> of the RTI Act.

2. To outline a ‘public interest test’.

As observed by the Supreme Court in May 2015, a whistle blower cannot be penalised for disclosing confidential documents if he has acted in ‘public interest’.<sup>89</sup> Currently, the WBP Act only defines ‘disclosure’<sup>90</sup> and declares that any disclosure made thereunder shall be treated as ‘public interest disclosure’.<sup>91</sup>

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<sup>83</sup> *Supra* n. 21.

<sup>84</sup> *Supra* n. 22.

<sup>85</sup> *Supra* n. 20.

<sup>86</sup> *Supra* n. 21.

<sup>87</sup> *Supra* n. 35.

<sup>88</sup> *Supra* n. 22.

<sup>89</sup> *Common Cause and Ors. v. Union of India and Ors.* Interim Application No. 13 of 2014 and Criminal Miscellaneous Petition No. 387 of 2015 in Writ Petition (Civil) No. 463 of 2012 (Decided on 14 May 2015), para 42, available at <https://www.sci.gov.in/> (last visited 24 February 2019).

<sup>90</sup> Section 3(d) of *The Whistle Blowers Protection Act, 2014*, provides:

“disclosure’ means a complaint relating to—

- (i) an attempt to commit or commission of an offence under the *Prevention of Corruption Act, 1988* (49 of 1988);
- (ii) wilful misuse of power or wilful misuse of discretion by virtue of which demonstrable loss is caused to the Government or demonstrable wrongful gain accrues to the public servant or to any third party;
- (iii) attempt to commit or commission of a criminal offence by a public servant, made in writing or by electronic mail or electronic mail message, against the public servant and includes public interest disclosure referred to in sub-section (2) of section 4.’

<sup>91</sup> *Supra* n. 15.

Legislation in India is silent on the definition of 'public interest'.<sup>92</sup> A public interest test is necessary to ensure consistency in its implementation and to avoid conflicting, subjective interpretations thereof. The closest we have come to evolving a public interest test are the factors and considerations laid down by the Supreme Court in 1993<sup>93</sup> and the Gujarat High Court in 2007–2008.<sup>94</sup> In contrast, the

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<sup>92</sup> The Supreme Court in *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi & Another* [(2012) 13 SCC 61, para 23] held: 'In its common parlance, the expression 'public interest', like 'public purpose', is not capable of any precise definition. It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [*State of Bihar v. Kameshwar Singh* (AIR 1952 SC 252)]. It also means the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake [Black's Law Dictionary (Eighth Edition)].'

<sup>93</sup> The Supreme Court in *RK Jain v. Union of India and Ors.* (AIR 1993 SC 1769, para 55) held: 'The factors to decide the public interest immunity would include: (a) where the contents of the documents are relied upon, the interests affected by their disclosure; (b) where the class of documents is invoked, whether the public interest immunity for the class is said to protect; (c) the extent to which the interests referred to have become attenuated by the passage of time or the occurrence of intervening events since the matters contained in the documents themselves came into existence; (d) the seriousness of the issues in relation to which production is sought; (e) the likelihood that production of the documents will affect the outcome of the case; (f) the likelihood of injustice if the documents are not produced.'

<sup>94</sup> The Gujarat High Court has answered the question of what is 'larger public interest' in the light of the RTI Act. According to the bench, in considering whether the public interest in disclosure outweighs in importance any possible harm or injury to the interest of such third party, the Public Information Officer will have to consider the following: (i) the objections raised by the third party by claiming confidentiality in respect of the information sought for; (ii) whether the information is being sought by the applicant in larger public interest or to wreak vendetta against the third party and in deciding that, the profile of the person seeking the information and his credentials will have to be looked into and if the profile of the person seeking information, in the light of other attending circumstances, leads to the construction that under the pretext of serving public interest, such person is aiming to settle personal score against the third party, it cannot be said that public interest warrants disclosure of the information solicited; and (iii) the Public Information Officer, while dealing with the information relating to or supplied by the third party, has to constantly bear in mind that the Act does not become a tool in the hands of a busy body to settle a personal score. See *Reliance Industries Limited v. Gujarat State Information Commission* AIR 2007 Guj 203 and *High Court of Gujarat v. State Chief Information Commission* AIR 2008 Guj 37.

*Government Information (Public Access) Act, 2009* (GIPA Act) (Australia)<sup>95</sup> and the Ministry of Local Government and Community Development, Jamaica<sup>96</sup> have formulated comprehensive tests.

Keeping in mind the tests evolved by our courts and finding a common ground between both the detailed tests of Australia and Jamaica, a corresponding comprehensive test could be evolved for India. Such a test could take into account the following considerations in favour of, or against the disclosure, to aid in deciding whether public interest in the disclosure outweighs the harm to the protected interests:

- whether the disclosure informs the public about the operations of agencies;
- whether the disclosure promotes and contributes to an open discussion and an informed debate on public affairs and issues of public importance;
- whether the disclosure enhances the scrutiny of the decision-making process and contributes to greater Government accountability and transparency;
- whether the disclosure contributes to the administration of justice and enforcement of law or would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders;
- whether the disclosure affects the economic interests of India and ensures effective oversight of the expenditure of public funds;
- whether the disclosure reveals any danger to public health, safety or to the environment, or substantiates that an agency or a member of an agency has engaged in misconduct or negligent, improper or unlawful conduct;

<sup>95</sup> *Government Information (Public Access) Act 2009* (New South Wales), sections 12 and 14 (Australia).

<sup>96</sup> Ministry of Local Government and Community Development, 'Public Interest', *Government of Jamaica*, at <http://www.localgovjamaica.gov.jm/ati.aspx?c=pi> (last visited 24 February 2019).

- whether the disclosure would prejudice the protection of an individual's right to privacy;
- whether the disclosure might cause substantial risk to public interest and national security;
- whether the disclosure might cause embarrassment to, or loss of confidence in, the Government or the agency;
- whether the disclosure carries the risk of misinterpretation by any person.

Furthermore, the UK public interest test also upholds that a disclosure concerned with an essentially personal complaint—whether individual or collective—may also be believed to be in the public interest because of some wider implications, or because addressing or exposing wrongdoing may be believed to further the public interest.<sup>97</sup>

The considerations provided above, though not exhaustive, must be utilised to weigh the competing interests and determine whether the scale swings in favour of or against the disclosure. The Competent Authority can then proceed with investigations into the disclosure if that is where the larger public interest lies. Conversely, the Competent Authority must also provide its reasons in writing if it declines to go ahead with any investigation or inquiry.

### 3. To make allowance and provisions for nameless complaints.

The WBP Act excludes anonymous whistle blower disclosures and provides that they will not be acted upon.<sup>98</sup> Anonymity is not ideally desired because it could make the whistle blower unaccountable and attract querulents and vexatious complaints. But for a whistle blower to reveal his identity while making the disclosure, the Competent

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<sup>97</sup> See *Chesterton Global Ltd. v. Nurmohamed* [2015] ICR 920 (EAT) and Jeremy Lewis *et al*, *Whistleblowing Law and Practice* (4th edn Reprint Oxford University Press New York USA), 4.93.

<sup>98</sup> *Supra* n. 16.

Authority must possess integrity and dependability in the eyes of the people. Recommending a different Competent Authority is not the panacea, since even blowing the whistle to the highest authority in the country has proved that there could be many a slip between the cup and the lip.

Thus, an absolute bar on anonymous disclosures would veer a whistle blower to make the disclosure to an internet platform because of the surety of the anonymity protection offered. The catch, however, is that this would go against public interest if such disclosure contains sensitive information potentially threatening to national security. While it is very rare that legislation allows for and protects anonymous disclosures, the *Sarbanes-Oxley Act of 2002* (USA)<sup>99</sup> and certain state statutes of Australia do make provisions for the same.<sup>100</sup>

An ideal channel of communication for such anonymous disclosures could be either taking a leaf out of WikiLeaks' book and utilising a network like Tor; or establishing hotlines, a practice that has been followed in a number of G20 nations. Indonesia's Corruption Eradication Commission, for example, has established a designated whistle blowing website.<sup>101</sup> South Korea's Anti-Corruption and Civil Rights Commission has established a telephone hotline to receive whistle blower reports.<sup>102</sup> In certain states, Germany has implemented an anonymous hotline which allows interactions with the whistle blower while keeping the exchange anonymous.<sup>103</sup>

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<sup>99</sup> *Sarbanes-Oxley Act of 2002*, Pub. L. No. 107–204, § 301, 2002 USCCAN (116 Stat) 745 (USA).

<sup>100</sup> *Whistleblowers Protection Act 1994* (Queensland) section 27(1) (Australia); *Public Interest Disclosures Act 2002* (Tasmania), section 8 (Australia); and *Whistleblowers Protection Act 2001* (Victoria) section 7 (Australia).

<sup>101</sup> Corruption Eradication Commission of Indonesia, Whistleblower System, at <http://www.kpk.go.id/> (last visited 24 February 2019).

<sup>102</sup> The Organisation for Economic Cooperation and Development, 'G20 Anti-Corruption Action Plan: Protection of Whistleblowers' (2011), 12, at <https://www.oecd.org/g20/topics/anti-corruption/> (last visited 24 February 2019).

<sup>103</sup> *Ibid*, 21.

4. To make provision for appeals.

Currently, the WBP Act makes provision for appeals in relation to the imposition of penalties under sections 14, 15, or 16 to the High Court within a period of 60 days from the order appealed against.<sup>104</sup> But in the event that the Competent Authority declines to cause inquiry and the whistle blower is not satisfied with the reasons cited by the said Authority, the WBP Act does not provide for an independent, quasi-judicial appellate body for such review. It is recommended that a body for such purpose be constituted or designated. The GIPA Act (Australia) offers the right to review such decision through either an internal or an external review by the Information Commissioner or the New South Wales Civil and Administrative Tribunal.<sup>105</sup>

5. To extend protection to the whistle blower acting in good faith.

The WBP Act offers protection for actions taken in good faith only to the Competent Authority and not to the whistle blower.<sup>106</sup> It is recommended that such protection be extended to the whistle blower, and his *bona fide* intentions should be established by the application of a 'reasonable belief test'. This test, as evolved in the UK, is a corollary to the public interest test. It considers whether the whistle blower held the view of 'good faith' and 'public interest', and whether it was a view which could be reasonably held.<sup>107</sup> However, motive may be irrelevant when the information sought to be disclosed is

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<sup>104</sup> Section 20 of *The Whistle Blowers Protection Act, 2014*, provides: 'Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under section 14 or section 15 or section 16 may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against: Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.'

<sup>105</sup> *Government Information (Public Access) Act 2009* (New South Wales), part 5 (Australia).

<sup>106</sup> Section 24 of *The Whistle Blowers Protection Act, 2014*, provides: 'No suit, prosecution or other legal proceedings shall lie against the Competent Authority or against any officer, employees, agency or person acting on its behalf, in respect of anything which is in good faith done or intended to be done under this Act.'

<sup>107</sup> See Jeremy Lewis *et al supra* n. 97.

self-evidently in public interest by reason of its subject matter. Thus, a reasonable belief test must be subservient to the public interest test.

6. To provide better safeguards against victimisation of the whistle blower.

As regards ‘victimisation’, the WBP Act provides a next-to-nothing definition covering only ‘initiation of any proceedings or otherwise’ on the ground that a disclosure was made, or assistance was rendered under the WBP Act.<sup>108</sup> It also offers a generalised and vague protection of directing ‘the concerned public servant or the public authority to protect’ the victimised whistle blower<sup>109</sup> and restoring the whistle blower ‘to the status *quo ante*’.<sup>110</sup>

In contrast, the *Protected Disclosures Act 2000* (South Africa) extensively enlists the possible circumstances that may be recognised as occupational detriment:

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<sup>108</sup> Section 11(1) of *The Whistle Blowers Protection Act, 2014*, provides: ‘The Central Government shall ensure that no person or a public servant who has made a disclosure under this Act is victimised by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.’

<sup>109</sup> Section 11(2) of *The Whistle Blowers Protection Act, 2014*, provides: ‘If any person is being victimised or likely to be victimised on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimised or avoid his victimisation: Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be: Provided further that in any such hearing, the burden of proof that the alleged action on the part of the public authority is not victimisation, shall lie on the public authority.’

<sup>110</sup> Section 11(4) of *The Whistle Blowers Protection Act, 2014*, provides: ‘Notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (2), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status *quo ante*.’

- (a) being subjected to any disciplinary action;
- (b) being dismissed, suspended, demoted, harassed or intimidated;
- (c) being transferred against his or her will;
- (d) being refused transfer or promotion;
- (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
- (f) being refused a reference or being provided with an adverse reference from his or her employer;
- (g) being denied appointment to any employment, profession or office;
- (h) being threatened with any of the actions referred to paragraphs (a) to (g) above;
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.<sup>111</sup>

It is recommended that a similar comprehensive definition be included in the WBP Act and clarify the kind of victimisation that it offers protection against.

Additionally, various other international legislations include the following protections against victimisation, which could be provided for under the WBP Act as well:

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<sup>111</sup> *Protected Disclosures Act 26 of 2000* § 1 (South Africa).

- Entitlement to transfer or relocate or reversal of transfer, with terms and conditions not being less favourable than the previous post or position that was held;<sup>112</sup>
- Immunity from prosecution;<sup>113</sup>
- Legal assistance;<sup>114</sup>
- Police protection for the whistle blower and his family;<sup>115</sup>
- Compensation.<sup>116</sup>

These protections must be offered to the whistle blower only if he approaches the Competent Authority with the disclosure, and once his *bona fide* intention and reasonable belief in the veracity of the disclosure have been affirmed.

#### 7. To make provision for incentives to whistle blowers.

Under section 17, the WBP Act provides for punishment in the case of false and frivolous disclosures.<sup>117</sup> Similarly, when the contents of a disclosure are proven and requisite action is taken, the whistle blower could be rewarded in the form of financial incentives.<sup>118</sup> Such rewards

<sup>112</sup> *Public Interest Disclosure Act 1994* (Australian Capital Territory), sections 27 and 28 (Australia); *Whistleblowers Protection Act 1994* (Queensland), section 46 (Australia); *Protected Disclosures Act 26 of 2000* § 4(2)–(3) (South Africa); and *Whistleblower Act, 2006* (No. 720 of 2006), section 14(3) (Ghana). A proposal for this safeguard can also be found in the Law Commission of India's One Hundredth and Seventy Ninth Report of December 2001 on 'The Public Interest Disclosure and Protection of Informers' *supra* n. 3.

<sup>113</sup> The Australian Competition and Consumer Commission adopts a policy of 'full amnesty' (immunity from prosecution) for the first person who blows the whistle on cartel activity such as price fixing and market sharing.

<sup>114</sup> *Whistleblower Act 2006* (No. 720 of 2006), section 16 (Ghana).

<sup>115</sup> *Whistleblower Act 2006* (No. 720 of 2006), section 17 (Ghana).

<sup>116</sup> *Public Interest Disclosure Act, 1998* c 23, section 8 (UK).

<sup>117</sup> Section 17 of *The Whistle Blower Protection Act, 2014*, provides:

'Any person who makes any disclosure mala fide and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.'

<sup>118</sup> This was also proposed in the National Commission to Review the Working of the Constitution's consultation paper on 'Probity in Governance', *supra* n. 3.

could be similar to the *False Claims Act of 1863* in the USA which contains a *qui tam* provision providing the whistle blower between 25 to 30 per cent of the total recovery, the percentage depending on the extent to which the whistle blower took the action that enabled the recovery.<sup>119</sup> On similar lines, *The Whistleblower Act, 2006* (Ghana) establishes a full-fledged 'Whistleblower Reward Fund' and provides for a reward to the whistle blower if the disclosure leads to the arrest and conviction of the guilty.<sup>120</sup>

What should not be lost sight of is the possibility that these financial incentives may be liable to be abused by persons out of vindictiveness, or for claiming rewards. It must, however, be left to the Competent Authority to determine firstly, whether the disclosure is in the public interest, and secondly, if the informant is acting *bona fide* or is actuated by malice.

### *B. Concluding Remarks*

As Lord Acton once said, 'Everything secret degenerates, even the administration of justice, nothing is safe that does not show how it can bear discussion and publicity.'<sup>121</sup>

For a democracy such as ours to continue functioning optimally, transparency and accountability are of utmost importance. In that, the whistle blower is much like a canary in a coalmine serving as a harbinger for toxic gases. He is not as much a threat to national security as he is a key resource to uncovering systemic risks and deficiencies. Turning a deaf ear and a blind eye to his disclosures or failing to protect him from reprisals would be counterproductive in a government of responsibility such as ours.

Academic research has highlighted that the plight of the whistle blower is often intense and there may be a psychological cost to

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<sup>119</sup> *False Claims Act* 31 USC § 3730(d) (1863) (USA).

<sup>120</sup> *Whistleblower Act 2006* (No. 720 of 2006), sections 20-27 (Ghana).

<sup>121</sup> Dr JN Barowalia *supra* n. 23, 409.

putting one's head above the parapet and blowing the whistle. Even the strongest-willed individuals may find the burden of standing out from the crowd unbearable over time.<sup>122</sup> Therefore, it is only when the whistle blower is reasonably satisfied that his fundamental right to life and liberty will be strenuously protected by the State, will he disclose to the State such information that would otherwise either never see the light of day or be clandestinely exposed globally on a third-party internet platform.

When it comes to disclosures on such online platforms, it is quite clear that a responsible whistle blower would not want to pick the ostensible incentives that they offer over the domestic State authority. Even if the whistle blower does make this choice, it would not be without compulsion or as a first preference.

Thus, a strong domestic legislation that inspires confidence in a whistle blower is essential. It must conform to and be ensconced by the stringent protection of article 21 of the *Constitution of India*. While there are certainly some gambles inherent in the legislative measures recommended in Part IV of this article, it is better to run these risks than to leave the whistle blower to approach a third-party internet platform that opens up a Pandora's box for national security.

A precondition for effective whistle blower and national security protection, therefore, is the rule of law. Whistle blowing should never be a Hobson's Choice—an in-house legislation ought to always prevail over the dark areas of the Internet.

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<sup>122</sup> C Fred Alford, Professor of Government at the University of Maryland, discusses the issue in his seminal work *Whistleblowers: Broken Lives and Organizational Power* (Cornell University Press Ithaca 2001), concluding that seniority offers little protection, and that there is no difference whether concerns are raised within or outside an organisation. Kate Kenny of Queens University Belfast in her article 'Whistleblowing in the Finance Industry' (2013) says that she was surprised by 'the amount of work that goes into being a whistleblower, meaning the constant reading of documents, rebutting of arguments, exposing of lies and learning about the law, all while struggling to hold your personality together; in short by the fact that it's a full time job which, usually without warning, takes over your life': quoted and cited in Jeremy Lewis *et al supra* n. 97, 1.10.

# UNVEILING PRIVACY FOR WOMEN IN INDIA<sup>†</sup>

*Priyanshi Vakharia* \*

## I. INTRODUCTION

On 24 August 2017, the Supreme Court of India, in the historic judgment of *Justice KS Puttaswamy v. Union of India (Puttaswamy)*, affirmed the fundamental right to privacy as a right solely belonging to the individual.<sup>1</sup> This exposition of privacy rested on the two components of consent and choice. A little over a year later, on 6 September 2018, the Supreme Court upheld the same principles of choice and consent in *Navej Singh Johar v. Union of India*.<sup>2</sup> In doing so, the Supreme Court held that individual autonomy which occupied a significant space under privacy, encompassed self-determination, which in turn included sexual orientation and the declaration of sexual identity.<sup>3</sup> The Court established the necessary, if somewhat obvious, connection between the individualistic notion of privacy, and the right to decide, by oneself, one's sexual identity.

This connection is reflective of the leap of expansion privacy has taken in India. Privacy exists as an umbrella protection for various rights. At its center is the individual's independence, based on the twin tenets of consent and choice. Such independence extends to self-determination and the power to independently make choices pertaining to oneself. This connection can be applied to a variety of contemporaneous issues which strike at the very core of the constitutional morality of the country.

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<sup>†</sup> This article reflects the position of law as on 24 February 2019.

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<sup>1</sup> *Justice KS Puttaswamy v. Union of India* AIR (2017) 10 SCC 1.

<sup>2</sup> *Navej Singh Johar v. Union of India* (2018) 1 SCC 791.

<sup>3</sup> *Navej Singh Johar v. Union of India* (2018) 1 SCC 791, para 149.

Women's liberty, their enfranchisement or, indeed, any credible empowerment, is meaningless without the shield of privacy. In this regard, the marital rape exception found in Indian penal law, the restriction on women's entry into places of religious worship mandated by personal or customary law, and the precarious position of women in public spaces against the current societal backdrop, all lend themselves as relevant contexts in which the privacy principle can be tested.

The purpose of this article is to use the privacy lens, as laid down in *Puttaswamy*, to read women's rights not only in terms of movements based on equality and liberty, but also as movements which can be defended on the basis of privacy. This article defends the validity of privacy against the counter arguments put forth by feminist legal scholars, Catharine MacKinnon<sup>4</sup> and Martha Nussbaum,<sup>5</sup> in warning against privacy rights for women. Both scholars argue that privacy as a concept does more harm than good for women, although they differ in their approaches to the same. MacKinnon uses equality as the basis to determine gender-sensitive issues while Nussbaum proposes that liberty is the constitutional mechanism of choice to address social and legal concerns.<sup>6</sup> Fundamentally, both believe that not only is privacy unnecessary in bolstering women's rights, but also it actively hampers the progress of women's rights. This article refutes arguments which challenge the relevance of privacy to women's rights. The author proposes that if equality and liberty are rights that an individual must

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4 Catherine MacKinnon is the Elizabeth A Long Professor of Law at the University of Michigan Law School since 1990, and the James Barr Ames Visiting Scholar of Law at Harvard Law School since 2009. She addresses issues of sex equality, women's rights, and gender crime, specifically sexual abuse and exploitation, and has authored several books in this regard.

5 Martha Nussbaum is the current Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago. Her work is heavily influenced by the writings of Catharine MacKinnon and shows a cross-section between law, legal philosophy and psychology.

6 Martha Nussbaum, 'Is Privacy Bad For Women?', (2000) *Boston Review*, available at <http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women> (last visited 24 February 2019).

have access to, then privacy is the enabler through which she can access those rights.

The article suggests that privacy is essential to women's interests when understood from an individualistic perspective and applied accordingly. Part II addresses the primary assertion that privacy protects perpetrators harming women in the context of marital rape. Part III illustrates how privacy breaks down traditional power structures, using the example of women's restricted access to places of religious worship. Part IV deviates from strict legal theory and analyses social contexts to reiterate that the individual notion of privacy is best realised in public spaces. Part V concludes the article by promoting the idea that privacy is the necessary qualifier for the realisation of women's rights.

## II. PRIVACY PROTECTS PERPETRATORS AND DISILLUSIONS INTIMACY IN THE CONTEXT OF MARITAL RAPE

### A. *Protecting Perpetrators and Disillusioning Intimacy*

Catharine MacKinnon pits the idea of privacy against women's emancipation. The notion of marital privacy has long been a source of oppression for women and has resulted in the subordination of women within the family sphere.<sup>7</sup> In the Indian context, MacKinnon's reflection seems apt, '... it is not the women's privacy that is being protected here, it is the man's.'<sup>8</sup> Given the rise of domestic violence rates in the country, MacKinnon's justification that '... privacy provides a veneer for male domination'<sup>9</sup> is a valid concern as domestic violence and sexual inequality in marriages persist.

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<sup>7</sup> See Elizabeth Schneider, 'The Violence of Privacy' (Summer 1991) 23 *Connecticut Law Review*, 973-999.

<sup>8</sup> Catharine MacKinnon, 'Toward a Feminist Theory of the State' (1991) *Harvard University Press* as quoted by Nussbaum, 'Is Privacy Bad For Women?', (2000) *Boston Review*, available at <http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women> (last visited 24 February 2019).

<sup>9</sup> *Ibid.*

MacKinnon's concern arises from the more common conception of privacy. Privacy is seen as spatial control which asserts the creation of private spheres into which intrusion by State and statute is deemed inappropriate.

The essence of MacKinnon's argument is that privacy insulates patriarchal domination. Marriage, in the purely traditional, heterosexual sense of the word, enjoys spatial privacy. It is the privacy granted to the marital home and the institution of marriage which MacKinnon opposes. In 2016, the National Crime Records Bureau found that cruelty by the husband and his family accounted for 32.6 per cent of all crimes committed against women and that such cruelty formed the most sizeable bracket for crimes against women.<sup>10</sup> Consider this statistic before the application of privacy to a marriage, rather than to the persons married. The blanket refusal to interfere in marital relationships under the garb of privacy is problematic because when the institution of a marriage is held above the choice and consent of the partners in that marriage, unpleasant things start to happen.

### B. *Understanding Marital Rape*

Section 375 of the *Indian Penal Code, 1860* (IPC) does not recognise rape as a crime within the confines of a marriage. This arises from a colonial sense of subservience in which spousal consent in a marriage is presumed. In many parts of the country, sexual privilege is won from a marriage association by men who do not care for the consent of the women they marry. This stems from the traditional, patriarchal notion that sexual intercourse is a right that men receive in a marriage. This characterisation, in itself, demeans a married woman's right to choose her sexual partner, and has been interpreted as a violation of the right to equality and equal protection of the law under article 14 of the *Constitution of India*, as well as the right to life and personal liberty under article 21.<sup>11</sup>

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<sup>10</sup> National Crime Records Bureau, 'Crime in India' (2016) *National Crime Records Bureau*, available at <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf> (last visited 24 February 2019).

<sup>11</sup> *T Sareetha v. T Venkata Subbaiah* AIR 1983 AP 356 (*T Sareetha*).

The definition of rape as presented in section 375 requires that sexual intercourse committed must either be against a woman's will or without her consent.<sup>12</sup> The Supreme Court of India explained that the phrase 'against her will' indicated that such intercourse was done by a man to a woman despite her resistance and opposition, while the phrase 'without her consent' implied an act of reason following deliberation.<sup>13</sup> Consent must be complete, active, and voluntary in a relationship between a man and a woman. Section 90 of the IPC states that consent given under the fear of injury or misconception of fact is no consent at all.<sup>14</sup> Consent for the purpose of section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent.<sup>15</sup> This requirement of proactive consent is in tandem with the recommendation found in the Verma Committee Report, that the definition of rape should require the existence of a lack of 'unequivocal and voluntary agreement', an approach sanctioned by the *United Nations Convention for the Elimination of all Forms of Discrimination Against Women*.<sup>16</sup> The association of a marriage cannot render void the very consent on which sexual relations are based. The importance of consent has been long recognised by the IPC. On a purely fundamental basis, then, the marital rape exception clashes with the exposition of consent as described by the IPC. Thus, even before the *Puttaswamy* judgment crystallised the individualistic notion of privacy, courts have recognised the necessity of sexual privacy.<sup>17</sup>

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<sup>12</sup> Justice Verma Committee, 'Report of the Committee on Amendments to Criminal Law' (2013), available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (last visited 24 February 2019) (Verma Committee Report).

<sup>13</sup> *State of UP v. Chotey Lal* (2011) 2 SCC 550, para 13.

<sup>14</sup> *The Indian Penal Code, 1860*, section 90.

<sup>15</sup> *State of HP v. Mango Ram* (2000) 7 SCC 224, para 12.

<sup>16</sup> Verma Committee Report *supra* n. 12, 73, para 10.

<sup>17</sup> *See T Sareetha*.

Any challenge to the marital rape exception can be scrutinised in two ways—as a violation of equality under articles 14 and 15, and as a threat to life and personal liberty under article 21.

The marital rape exception is an infringement of the right to equality and equal protection, and of the right to life and personal liberty where the bizarre distinction between married and unmarried women is used as a pre-qualifier for addressing rape. As a result the challenge to marital rape can be put to test against the standards of arbitrariness<sup>18</sup> and unreasonableness.<sup>19</sup> The classification of women based on their marital status, acting as a prerequisite to qualify for rape, is an unreasonable standard to hold. Rape does not depend on a woman's marital status. Consider the stringent standards to which domestic violence is held,<sup>20</sup> consent plays no part there, for it is irrational to believe that any woman would willingly concede to abuse and violence. In the same vein, it is irrational to conclude that a married woman would willingly consent to forced sexual intercourse. Therefore, it is necessary that the marital rape exception be abolished.

A marital rape exception cowers behind the argument that a marriage union is formed on the underlying principle of presumed consent. However, there is no waiver of sexual rights that a woman is conscripted to sign at the time of her wedding. The argument that

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<sup>18</sup> The doctrine of arbitrariness put forth in *EP Royappa v. State of Tamil Nadu* 1974 AIR SC 555, suggests that from a positivistic point of view, arbitrariness is antithetical to equality. When an act is arbitrary it is implicitly unequal according to both political logic and constitutional law and so violates article 14. The marital rape exception is shown to be inherently arbitrary, and therefore is unequal.

<sup>19</sup> Unreasonableness can be tested *via* the doctrine of reasonable classification postulated in *State of West Bengal v. Anwar Ali Sarkar* AIR 1952 SC 75. The doctrine of reasonable classification finds that a legislative classification may be reasonable when it is found on some intelligible differentia and when such differentia has a rational relation to the object of the legislation. The marital rape exception differentiates between rape survivors on the basis of their marital or non-marital status which bears no rational relation to the aim of the State in progressive modern-day India.

<sup>20</sup> *The Protection of Women from Domestic Violence Act, 2005* contains significantly deep provisions which offer protection to victims of violence within the family. The Act outlines a detailed procedure in terms of judicial recourse and constitutional remedies available to such victims in breaking the chain of violence.

the withholding of sexual consent by the wife would effectively lead to the breakdown of a marriage union<sup>21</sup> is an exaggerated extreme. Consent is not and cannot be interpreted as a one-time waiving of choice. If it is assumed to be so, as the marital rape exception does, it is unerringly arbitrary and unreasonable. The marital rape exception fails to provide a rational nexus between the horror married women endure in terms of non-consensual sex, and the larger State concern of corrupting the institution of marriage.

The second way of addressing a challenge to the marital rape exception is solely viewing it as a challenge to the right to personal life and liberty under article 21 of the *Constitution*. According to the majority opinion in *Puttaswamy*, violations of privacy under article 21 must satisfy the proportionality standard.<sup>22</sup> The Supreme Court opined: ‘An invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.’<sup>23</sup> The Court further held:

‘The concerns expressed on behalf of the Petitioners arising from the possibility of the State infringing the right to privacy can be met by the test suggested for limiting the discretion of the State: (i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference.’<sup>24</sup>

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21 PTI, ‘Criminalising Marital Rape Will Threaten the Institution of Marriage, Centre Tells Delhi HC’ (2017) *The Wire*, at <https://thewire.in/gender/criminalising-marital-rape-will-threaten-institution-marriage-centre-tells-delhi-hc> (last visited 24 February 2019).

22 The proportionality standard arose from the *Wednesbury* principle of reasonableness in English law. The proportionality standard is a common test of review to keep State infringement of individual rights under check. It requires that the measure to be enacted *via* legislation or executive action is likely to achieve its ends and cause as little harm as possible.

23 *Puttaswamy* (Dr DY Chandrachud, J), para 3(H), in section T. Conclusions.

24 *Puttaswamy* (Sanjay Kishan Kaul, J), para 71.

Of the three requirements of the proportionality standard, it may be construed that the State has its evidence for legality—there certainly is the existence of a law, ie exception 2 of section 375 of the IPC which sanctions the idea that marital rape is not punishable. The question that arises is with regard to the other two prongs: necessity and proportionality. The legitimate State aim, so to speak, is to safeguard the sanctity of the marital institution.<sup>25</sup> In democratic 21<sup>st</sup> century India, there is little, if nothing, to justify such an absurdly outdated State aim. Further, the preservation of the institution of marriage cannot come at the cost of the safety and autonomy of the individuals in a marriage. The proportionality standard applied in this context does not draw a rational nexus between the object of protecting marital relationships and the method adopted of dismissing marital rape as a private affair which is above constitutional questioning.

In order to substantiate a privacy claim under article 21, it is important to consider the origins of the marital rape exception. Exception 2 of section 375 arose as a product of the coverture rules that originated in 18<sup>th</sup> century English law, which followed the legal doctrine of yesteryears, marking husband and wife as one entity. The legal, political, sexual and economic rights of the wife were subsumed by those of her husband to the extent that the wife was considered a ‘dependent’, incapable of independent existence.<sup>26</sup> In this respect, the presumption of consent was effectively invalid for women. In that pre-suffragette political climate where men and women fell into two very distinct categories with unimpeachable boundaries, the State felt itself justified in withholding from the domestic, house-bound and family-oriented women of the time, political, social and economic rights

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<sup>25</sup> Maanvi, ‘Here’s Why Our Govt Thinks Marital Rape Shouldn’t Be a Crime’, (2017) *The Quint*, at <https://www.thequint.com/voices/women/marital-rape-delhi-high-court-government-submission> (last visited 24 February 2019).

<sup>26</sup> Sir William Blackstone, *Commentaries on the Laws of England* (Oxford, England Clarendon Press 1765–1769) Book 1, Chapter 15: Of Husband and Wife, available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-115/> (last visited 24 February 2019).

that concerned daily functioning in the outside world. In 18<sup>th</sup> century England, because women were confined to the domestic sphere, it was the legitimate aim of the State to ensure their dependency on their male counterparts. This umbrella protection of the coverture rules may have rendered the State aim of 18<sup>th</sup> century England legitimate, however, it is strange to presume that this can possibly be applicable to modern day India. Having adopted the constitutional ideals of equality and liberty, women have become independent and capable of giving consent. In 21<sup>st</sup> century India, any extension of the coverture rules is hard to justify. Women are no longer 'dependants'. They are independent (if not always equal) citizens under law.

To effectively address MacKinnon's concern that privacy is not in the best interests of women, duly imported to the instance of the marital rape exception, it is important to reassert the individualistic notion of privacy that the *Puttaswamy* judgment propounds. Spatial control is defined in the judgment as, '... the creation of private spaces.'<sup>27</sup> The Court held that in creating a private sphere for oneself, one chose the space surrounding oneself and actively controlled it enough to warrant safeguard from unwanted intrusion. This effectively earmarks privacy as attributable to the individual; it is at the individual's discretion to create a space of solitude for herself in a way that she sees fit. Such an individualistic notion of privacy cannot be used to the detriment of women in a marriage.

Even before the *Puttaswamy* judgment crystallised the individualistic notion of privacy, courts have recognised the necessity of sexual privacy. The High Court of Andhra Pradesh first broke open this shell of spatial privacy in its powerful judgment in *T Sareetha* where the Court held that section 9 (restitution of conjugal rights) of *The Hindu Marriage Act, 1955*<sup>28</sup> unfairly and grossly vitiated the privacy

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<sup>27</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 141.

<sup>28</sup> *The Hindu Marriage Act, 1955*, section 9.

of a woman by compelling her to reciprocate marital obligations against her express consent. Holding that sexual intercourse, like marital cohabitation, was a choice that was to be actively and deliberately exercised by a woman throughout her marriage, the Court acknowledged that any compulsion to the same was an infringement of a woman's right to privacy.<sup>29</sup>

An extension of the arguments that confront the restitution of conjugal rights finds footing in a more expansive movement concerning the marital rape exception.<sup>30</sup> When section 375 refuses to recognise non-consensual sex between a married pair (where the wife is not a minor and above the age of 18) as rape, the reasoning ultimately stems from the presumption that it is the marital home that merits non-intrusion. This is evidenced by the written submissions of the Union of India in the marital rape exception proceedings underway before the High Court of Delhi.<sup>31</sup> The State argued that the introduction of a marital rape exception throws into question the institution of marriage as a whole.<sup>32</sup>

This preservation of the marital sphere is echoed from the verdict of the High Court of Delhi in *Harvinder Kaur v. Harmandar Singh Choudhry* (*Harvinder Kaur*), which protected the spatial construct of marital privacy when it likened the introduction of constitutional law in the home to letting loose a bull in a china shop, to the detriment of the institution of marriage and all that it stood for.<sup>33</sup> The apex court eventually confirmed the judgment of the Delhi High Court, effectively overruling the decision in *T Sareetha*.<sup>34</sup>

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<sup>29</sup> *T Sareetha*, para 31.

<sup>30</sup> *RIT Foundation v. Union of India* Writ Petition (Civil) 284 of 2015 is a petition filed in the High Court of Delhi which challenges the validity of the marital rape exception in the IPC.

<sup>31</sup> *Maanvi supra* n. 25.

<sup>32</sup> *Maanvi supra* n. 25.

<sup>33</sup> *Harvinder Kaur v. Harmandar Singh Choudhry* AIR 1984 Delhi 66, para 34.

<sup>34</sup> *Smt Saroj Rani v. Sudarshan Kumar Chadha* AIR 1984 SC 1562.

This *prima facie* categorisation of marriage as a sphere that must be so preciously protected, is untenable when the *Puttaswamy* judgment determines that privacy is a right that must be afforded to the individual, not to her marital association.

### C. *Privacy, Marital Rape and Beyond*

The primary argument of the State in defending the marital rape exception is the destabilisation of the institution of marriage that is likely to ensue if marital privacy were to be acknowledged.<sup>35</sup> The State asserts that women's rights are protected well enough by existing legislation. The argument that existing legislation does not necessitate the removal of the marital rape exception simply because it risks upsetting the institution of marriage carries down from the same rationale used in *Harvinder Kaur*. The definition of privacy is no longer the preservation of a physical sphere. Privacy exclusively belongs to the individual. Ultimately, because individuals stand independent of the associations they may form, the privacy they exert must also be independent.

The petition against the marital rape exception, currently *sub judice* before the High Court of Delhi, effectively objects to the lack of individual privacy in a marital association.<sup>36</sup> The petition raised objections to the 'legal rape' that the exception to section 375 permits, while pointing out the unconstitutionality of the categorisation of rape victims. Rape victims who share no marital relationships with their assailants are afforded full protection under sections 375 and 376 of the IPC. The privacy of their bodies and identity is upheld to the

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<sup>35</sup> Maanvi *supra* n. 25.

<sup>36</sup> The written submissions of the Petitioner in *RIT Foundation v. Union of India* Writ Petition (Civil) 284 of 2015 can be found at: Akanksha Jain, 'Marital Rape: Married, Married But Separated, & Unmarried-Classifying Rape Victims Is Unconstitutional: Petitioners Submit Before Delhi HC [Read Written Submissions]', (2018) *LiveLaw*, at <http://www.livelaw.in/marital-rape-married-married-separated-unmarried-classifying-rape-victims-unconstitutional-petitioners-submit-delhi-hc-read-written-submissions/> (last visited 24 February 2019).

fullest. Rape victims who may be the judicially separated wives of their assailant husbands can hold their rapists accountable, with a prison sentence ranging from two to seven years if the conviction is upheld.<sup>37</sup> The criminalisation of rape cannot come with the categorisation of classes of rape victims because this reiterates the non-individualistic idea of privacy. The rationale is that unmarried or married but separated women are not part of a functional marital relationship so they do not attract the privacy that is traditionally afforded to the institution of marriage.

The petitioners before the High Court of Delhi take MacKinnon's primary concern and repackage it in a slightly different, but significantly more alarming way: the provision of a marital rape exception protects men against misuse of the law by their wives.<sup>38</sup> The petitioners contend that such an object effectively disentitles the vast majority of women, who face marital rape at the hands of their husbands, from proper legal recourse.<sup>39</sup> The bodily integrity of one partner in a marriage cannot suffer at the potential cost of misuse to the other partner. This anomaly in the law exists to the disadvantage of women in marriages. The High Court of Gujarat has observed that it is time to jettison the idea of 'implied consent' in a marriage as all women, irrespective of marital status, must have bodily autonomy. However, the Court simultaneously held that since a wife cannot initiate proceedings against her lawfully wedded husband under section 376 of the IPC, marital rape cannot be punishable.<sup>40</sup>

Given that the *Puttaswamy* judgment outlines the contours of privacy in terms of consent and choice, from this particular lens alone, the continuation of a marital rape exception in Indian jurisprudence is alarming. A marital rape exception absurdly denies a married woman agency over her own body precisely because she has entered into a

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<sup>37</sup> *The Indian Penal Code, 1860*, section 376A.

<sup>38</sup> Jain *supra* n. 36.

<sup>39</sup> Jain *supra* n. 36.

<sup>40</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat* 2018 SCC OnLine Guj 732.

marital association. Unlike MacKinnon's and Nussbaum's concerns, privacy will not be a bar to women's welfare, when the right to privacy is accorded to each individual woman.

### III. PRIVACY RESTORES TRADITIONAL POWER STRUCTURES IN THE CONTEXT OF WOMEN'S RESTRICTED ENTRY IN PLACES OF RELIGIOUS WORSHIP

#### A. *Privacy Restores Traditional Power Structures*

MacKinnon's concern with privacy is '... the problem with anything private is getting it perceived as coercive'.<sup>41</sup> She expands her objection to male domination of women to a more generalised inference of a direct clash between the personal and the political.<sup>42</sup> She argues that because of the distinction in the public and private spheres of privacy, the personal or private sphere is given a sort of sanctity or protection which others are unwilling to invade.<sup>43</sup> Nussbaum illustrates MacKinnon's claim with parallels to early contraceptive use and homosexual sodomy.<sup>44</sup> Contraceptive use in the privacy of the home was protected but distributing contraceptives on the street among students and young people was not, until an American court ruled otherwise.<sup>45</sup> Similarly, homosexual sodomy was protected between gay couples in the privacy of their homes, but didn't enjoy the same protection in clubs, or bars, or places of public interaction where gay people might meet and engage with one another.<sup>46</sup>

The point is simple—privacy strengthens traditional hierarchies by protecting higher ups from accountability with regard to their

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<sup>41</sup> Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Massachusetts, and London, England Harvard University Press 1987, 100, available at <https://www.feministes-radicales.org/wp-content/uploads/2010/11/Catharine-MacKinnon-Feminism-Unmodified.-Discourses-on-life-and-law.pdf> (last visited 24 February 2019).

<sup>42</sup> *Infra* n. 47.

<sup>43</sup> MacKinnon *supra* n. 41.

<sup>44</sup> Nussbaum *supra* n. 6.

<sup>45</sup> *Eisenstadt v. Baird* 405 US 438 (1972) (United States).

<sup>46</sup> Nussbaum *supra* n. 6.

treatment of the individuals lower down the chain of power. MacKinnon's argument is that the personal is political and ultimately cannot hide behind a privacy shield.<sup>47</sup>

Consider MacKinnon's argument in the context of the controversy surrounding the entry of women into the precincts of religious places of worship. For centuries, custom has dictated that it is 'unholy' for women to enter the *sanctum sanctorum* of temples, *havelis*, mosques or *dargahs* because of the perceived notion of impurity that a menstruating woman brings with her.<sup>48</sup> Limiting women and their choice to worship is not only a direct infringement of their right to practise their respective religions, but also disregards any decisional autonomy they may have. Religion, like contraceptive use or homosexual sodomy, is a self-regarding act despite the collectivistic culture it has in India. Religion is often as personal as a self-regarding act can be, and yet it is corrupted into a treacherous, hierarchical order that demeans women.

MacKinnon's argument, when applied to the present facts, is that the privacy apparently afforded to religion and its practice shores up a hierarchy that is disadvantageous to women. This hierarchy serves to exclude women from entering religious spaces while they are menstruating. However, in light of the *Puttaswamy* judgment, privacy weakens such a power structure. The idea of bodily privacy assails the very presumption on which religious fanatics base their case: menstruation makes women impure. Upholding menstruation as an unquestionable aspect of a woman's bodily privacy puts it beyond the purview of the hierarchical culture of a religious organisation.

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<sup>47</sup> MacKinnon shapes this argument around the popular slogan which was used as a rallying feminist cry in the 1970s. The concept 'the personal is political' seems to have its origins in Carol Hanisch's 1970 essay, *The Personal is Political*.

<sup>48</sup> See the written submissions of the Petitioners in *Indian Young Lawyers Association & Anr. v. State of Kerala & Ors.* Writ Petition (Civil) No. 373 of 2006 in Mehal Jain, 'Sabarimala Women's Entry [Day-1] Restrictions On Entry Of Women Nowhere Connected With Religious Practices In The Temple, Submits Petitioner [Read Written Submissions]', (2018) *LiveLaw*, at <http://www.livelaw.in/sabarimala-womens-entry-day-1-restrictions-on-entry-of-women-nowhere-connected-with-religious-practices-in-the-temple-submits-petitioner-read-written-submissions/> (last visited on 24 February 2019).

## B. *The Courts on Temple Entry*

The issue of restricting women's right to access the inner sanctums of religious places of worship is intersectional. It encompasses the personal laws of the respective religions it stems from and also involves constitutional law. Finally, it includes the question of how these laws affect women and the exercise of the right to religion. The privacy standard is a nuanced argument in the entire spectrum of issues related to temple entry. The privacy standard focuses on whether, and if so, where, religious obligations impinge upon the individual rights of women. Indian jurisprudence with regard to the temple entry ban rests largely on the decisions of courts in *Dr Noorjehan Safia Niaz & Anr. v. State of Maharashtra & Ors. (Haji Ali Dargah)*,<sup>49</sup> *Smt Vidya Bal & Anr. v. State of Maharashtra & Ors. (Shani Shingnapur Temple)*<sup>50</sup> and *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors. (Sabarimala Temple)*.<sup>51</sup> The issue of denial of women's access to places of religious worship necessitates the fulfilment of the privacy requirement as postulated by the *Puttaswamy* judgment. However, there are two more criteria to be considered. First, is the public character of religious institutions. Second, is the enforcement of fundamental rights against the State.<sup>52</sup> The horizontal protection that the State offers to women is crucial in opposing hierarchical structures that have stood for centuries. Religion is one such all too common hierarchical structure. Bodily integrity is an unimpeachable right belonging to the individual woman. It outweighs the power

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<sup>49</sup> *Dr Noorjehan Safia Niaz & Anr. v. State of Maharashtra & Ors.* (2016) 5 AIR Bom R 660.

<sup>50</sup> *Smt Vidya Bal & Anr. v. State of Maharashtra & Ors.* Public Interest Litigation No. 55 of 2016 (High Court of Bombay).

<sup>51</sup> *Indian Young Lawyers Association & Ors. v. State of Kerala & Ors.* 2018 (13) SCALE 75.

<sup>52</sup> Gautam Bhatia, 'Haji Ali Dargah: Bombay High Court Upholds Women's Right to Access the Inner Sanctum', (2016) *Indian Constitutional Law and Philosophy*, at <https://indconlawphil.wordpress.com/2016/08/26/haji-ali-dargah-bombay-high-court-upholds-womens-right-to-access-the-inner-sanctum/> (last visited 24 February 2019).

structure that religion may defend. In this regard, the horizontal effect of fundamental rights ensures that hierarchical structures do not impinge upon the bodily integrity of women by determining their days of worship based on their menstrual cycles.

The High Court of Bombay held:

‘Once a public character is attached to a place of worship, all the rigors of articles 14, 15 and 25 would come into play and [the Trust] has no right to discriminate entry of women into a public place of worship under the guise of ‘managing the affairs of religion’ under article 26...’<sup>53</sup>

The public character of the *dargah* does not merit the protection of article 26(b) of the *Constitution*. To the contrary, it requires that the fundamental rights enshrined in articles 14, 15 and 25 are actively upheld.<sup>54</sup> Moreover, the Court found that these rights cannot be enforced against religious institutions (in this case, the Dargah Trust), unless the State is also impleaded in the infringement of fundamental rights.<sup>55</sup>

‘... It [is] the Constitutional responsibility of the State to ensure that the principles enshrined in the articles 14 and 15 of the Constitution are upheld. The State would then be under a constitutional obligation to extend equal protection of law to the petitioners to the extent that it will have to ensure that there is no gender discrimination.’<sup>56</sup>

Consider the issue of restriction of women’s right of entry to places of public religious worship from a claim that it infringes the right to privacy under article 21.<sup>57</sup> This merits the compelling State interest–

<sup>53</sup> *Haji Ali Dargah*, para 50.

<sup>54</sup> *Haji Ali Dargah*, para 51.

<sup>55</sup> *Haji Ali Dargah*, para 51.

<sup>56</sup> *Haji Ali Dargah*, para 20.

<sup>57</sup> The standard of strict scrutiny comprises two parts: one, the compelling State interest which is required for any legislation or executive action curtailing the exercise of a fundamental right and two, the narrow tailoring of the law, which ensures that the legislation in question is construed in the strictest terms.

narrow tailoring standard, put forth for assessing claims under article 21. In an attempt to prove the existence of a law under article 13 of the *Constitution*, the Dargah Trust failed to provide substantial examples to support their claim that the proximity of women to the grave of a male saint was considered a sin in Sharia law.<sup>58</sup>

Similarly, the High Court of Bombay in the *Shani Shingnapur Temple* case held that the fundamental right of women to enter places of worship could not be encroached upon by any authority or individual. The Court affirmed that the *Maharashtra Hindu Places of Public Worship (Entry Authorization) Act, 1956*, which prescribes a six month prison term for those restricting the entry of women into a temple, must be upheld.<sup>59</sup> The State of Maharashtra assured the Court that the government was duty bound to prevent any discrimination against women in this respect and to take proactive steps to ensure the fundamental rights of women were protected.<sup>60</sup> Two years after the delivery of the verdict, the State of Maharashtra approved a proposal to take control of the management of the Shani Shingnapur temple and to take it upon themselves to frame an Act for the same.<sup>61</sup>

Given the delicate socio-cultural climate in India, religious denominations are treated with special care under article 25 of the *Constitution*. However, this care cannot outweigh the individual integrity of women who are a part of these denominations. Article 25(1) of the *Constitution* provides: all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.<sup>62</sup> In the *Sabarimala Temple* case,<sup>63</sup> menstruating women were prohibited from entering the Sabarimala Temple

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<sup>58</sup> *Haji Ali Dargah*, para 30.

<sup>59</sup> *See Shani Shingnapur Temple*.

<sup>60</sup> *See Shani Shingnapur Temple*.

<sup>61</sup> TNN, 'Maharashtra govt to take control of Shani Shingnapur temple', (2018) *The Times of India*, available at <https://timesofindia.indiatimes.com/city/mumbai/maharashtra-govt-to-take-control-of-shani-shingnapur-temple/articleshow/64673350.cms> (last visited 24 February 2019).

<sup>62</sup> *The Constitution of India*, article 25(1).

<sup>63</sup> *See Sabarimala Temple*.

under the sanction of section 3 of the *Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965*, which allows the restriction of entry in accordance with prior usage or custom. Rule 3(b) of the *Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965* allowed the exclusion of women ‘at such time during which they are not by custom and usage allowed to enter a place of public worship.’ The Travancore Devaswom Board, which manages the affairs of the temple, therefore prohibited women from entering the temple on the basis of over eight centuries of custom which allegedly prohibited menstruating women from polluting the sanctum in which Lord Ayappa, a ‘bachelor’, is worshipped.<sup>64</sup> Instances from the Garuda Purana (ch. 231), ‘A Brahmana having touched a dog, a Sudra, or any other beast, or a woman in her menses, before washing his face after a meal, shall regain his purity by fasting for a day, and by taking Panchgavyam.’ and the Markandeya Purana 35.26-28, ‘...After touching a menstruous woman, a horse, a jackal, and other animals, or a woman recently delivered of a child, or people of low caste, one should bathe for the sake of purification...’ indicate the origins of this stigma associated with menstruation.<sup>65</sup> This very characterisation presents two problems. The first is, of course, the unfairness of placing the word of a religious text over the letter and spirit of the *Constitution*. The second is the lack of understanding that religion and religious worship are choices an individual makes, by extension of which women, as individuals, cannot be excluded from the access to those choices. The Supreme Court, in defending the fundamental nature of a right to privacy, has previously declared, ‘the purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of the majorities, whether legislative or popular.’<sup>66</sup>

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<sup>64</sup> As cited in Jain *supra* n. 48.

<sup>65</sup> As cited in Jain *supra* n. 48.

<sup>66</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 126.

In *Sabarimala Temple*, one of the primary issues which arose for the consideration was whether the restriction of menstruating women constituted an essential religious practice under article 25 of the *Constitution* and whether a religious institution could impose any restrictions under its right to manage its own religious affairs under article 26(b).<sup>67</sup> On 3 October 2018, the Supreme Court held, by a 4-1 majority, that the practice of prohibiting the entry of menstruating women into the Sabarimala temple was unconstitutional. Justice Malhotra, in her dissenting opinion, noted that the question of whether women's entry was an essential religious practice or not, was a determination which only the religious denomination under consideration could make.<sup>68</sup> It is to be noted that neither Justice Malhotra in her dissent nor her fellow judges in their exposition of the majority, analysed the privacy aspect associated with the female devotees of the temple.

The decision in *Sabarimala Temple* received backlash and resulted in a state wide protest by devotees who believed the Court was interfering in their religious affairs. The Court heard 65 petitions—56 review petitions and four fresh writ petitions—against its decision. The case is closed for orders.<sup>69</sup>

From a purely privacy related perspective, women are entitled to their worship without being scrutinised for a perceived notion of impurity associated with their menstrual cycles. In this regard, the Supreme Court observed that the menstrual status of a woman was deeply personal and an intrinsic part of her privacy.<sup>70</sup> A woman's menstrual status 'must be treated by the *Constitution* as a feature on

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<sup>67</sup> The Constitution Bench hearing the *Sabarimala Temple* case framed five issues vide their order dated 13 October 2017 available at [https://www.supremecourt.gov.in/supremecourt/2006/18956/18956\\_2006\\_Judgement\\_13-Oct-2017.pdf](https://www.supremecourt.gov.in/supremecourt/2006/18956/18956_2006_Judgement_13-Oct-2017.pdf) (last visited 24 February 2019).

<sup>68</sup> *Sabarimala Temple* (Malhotra, J), para 10.

<sup>69</sup> All India, 'Sabarimala Temple Highlights: Supreme Court Reserves Verdict', (2019) *NDTV*, available at <https://www.ndtv.com/india-news/supreme-court-to-hear-sabarimala-review-petitions-today-live-updates-1989011> (last visited 24 February 2019).

<sup>70</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.

the basis of which no exclusion can be practised and no denial can be perpetrated.<sup>71</sup> The Court also recognised the arguments put forth by the *amicus curiae* that such an exclusionary practice violated women's right to privacy under article 21 as it compelled them to disclose both their age and menstrual status.<sup>72</sup>

Although there was no deeper analysis from the privacy perspective, the Court placed 'those who were denuded of their human rights before the advent of the *Constitution* – whether in the veneer of caste, patriarchy or otherwise – ... in control of their own destinies by the assurance of the equal protection of law.'<sup>73</sup> The Court observed that discrimination as a social institution is not merely perpetrated by the State, but can also be individualistic and societal. The Court further noted that article 17 of the *Constitution* must have an overarching reach: '... as an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions of purity and pollution.'<sup>74</sup>

In *Sabarimala Temple*, the Supreme Court upheld the individual to be the basic unit of the *Constitution*, as a result of which all customary practices and traditions which reduce human dignity must pass constitutional scrutiny.<sup>75</sup> The missing aspect of privacy becomes stark, because of the Supreme Court's observation of human dignity taking centre stage, as the individual is the basic unit of the *Constitution*. This observation is analogous to the reasoning used in *Puttaswamy* for privacy. There is a further extension of how notions of impurity affect women's right to worship, in that 'these beliefs have been used to shackle women, to deny them equal entitlements and subject them to the dictates of a patriarchal order.'<sup>76</sup> The Court observed that the stigma of menstruation has been used to relegate women to the

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<sup>71</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.

<sup>72</sup> *Sabarimala Temple* (Misra, J and Khanwilkar, J), para 72.

<sup>73</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 2.

<sup>74</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 75.

<sup>75</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 100.

<sup>76</sup> *Sabarimala Temple* (Dr DY Chandrachud, J), para 57.

confines of a social order that does not respect aspects of individual autonomy. Privacy, though not deeply analysed in the *Sabarimala Temple* judgment, forms one of these aspects.

The exclusivity of temple entry has long been a tool in the hands of the upper echelons of societal hierarchies. It was originally used to restrict Dalits entering places of religious worship on the grounds of their perceived untouchability. There is little to support a legitimate State aim in banning women from entering the inner sanctums of religious places of worship. The idea of impurity associated with menstruation discriminates against women who are therefore restricted from entry by virtue of the biological differences of their sex. Under the guise of the ‘impiety of menstruation’ argument, male-dominated trusts demonise menstruating women from the rest of the worshippers by creating a precariously poised ‘us versus them’ phenomenon. Here, ‘us’ refers to the non-menstruating worshippers who are better off and more deserving than menstruating women of the right to access such institutions.

### *C. Privacy and Piety*

The idea of privacy discernibly influences contemporary jurisprudence in determining women’s rights in entering religious places of worship. The Supreme Court referred to a fundamental exposition of nine primary types of privacy which fall broadly under two aspects of freedom: the freedom to be left alone and the freedom for self-development.<sup>77</sup>

The very first type of privacy, which is relevant to the entry of women in religious places of worship, is bodily privacy. Bodily privacy reflects the privacy of the physical body and emphasises the negative freedom of preventing others from violating one’s body or from restraining the freedom of bodily movement.<sup>78</sup> From the privacy lens alone, any bar to women’s entry in religious places based on

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<sup>77</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 142.

<sup>78</sup> Bert-Jaap Koops *et al*, ‘A Typology of Privacy’, (2016) 38(2) *University of Pennsylvania Journal of International Law* 483, 567, available at <https://ssrn.com/abstract=2754043> (last visited 24 February 2019).

their menstrual cycles is a violation of bodily privacy as it constitutes unwarranted restraint on the freedom of bodily movement. The Court declared that the concern for bodily integrity implied freedom from any unwarranted stimuli.<sup>79</sup> The exclusion of women from religious places on the basis of a perception of impurity works like an unwarranted stimulus. This stimulus ensures that they behave in a manner in which they would have ordinarily not behaved in, had it not been for the social and moral compunctions, compelling them to conform. Admittedly, the Court extrapolated its declaration with instances of corporeal punishment and forced feeding, and applied the idea of a violation of bodily privacy in the primary instance to State surveillance,<sup>80</sup> but the principles can also be applied to the present facts.

The second type of privacy relevant to the entry of women in religious places of worship is behavioural privacy which is typified by the privacy interests a person has while conducting publicly visible activities.<sup>81</sup> The Court opined that behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion.<sup>82</sup> Although religious worship is primarily a self-regarding act, it is almost always conducted in the public eye with members of a community and often with a certifiably public spirit. Thus, it provides the perfect instance of where privacy interests are necessary while conducting publicly visible acts. The access to places of religious worship should be granted to women in two respects. First, their right to entry inheres in their being devotees of a particular faith or members of a certain denomination. Women merit the right to entry under the universality of article 25(1). Secondly, any restriction to such entry is a violation of behavioural privacy under article 21 of the *Constitution*. The individual woman is

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<sup>79</sup> *Puttaswamy* (Chelameswar, J), para 36.

<sup>80</sup> *Puttaswamy* (Chelameswar, J), para 38.

<sup>81</sup> Bert-Jaap Koops *et al supra* n. 77, 568.

<sup>82</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 142.

not considered fit to determine the extent of her access to religious places; it is handed down to her on the basis of purely biological distinctions. There is a clear and deliberate intrusion into aspects of her behavioural privacy.

Here too, the three-pronged requirement of legality, necessity and proportionality put forth in *Puttaswamy* comes into play in assessing violations of the right to privacy under article 21.<sup>83</sup> In *Sabarimala Temple*, the Travancore Devaswom Board contended the existence of a law, that is section 3 the *Kerala Hindu Places of Worship (Authorization of Entry Act) of 1965*, which allows the restriction of entry in accordance with prior usage or custom. This law allowed the Travancore Devaswom Board to bar women from entering the temple.<sup>84</sup> The dubiety is with respect to the need for a legitimate State interest and proportionality in restricting women's access to temples. In fact, in *Haji Ali Dargah* and *Sabarimala Temple*, the State had a positive obligation to prevent the infringement of fundamental rights of one private party (the women) by another (the Dargah Trust and the Travancore Devaswom Board, respectively). Assuming instead of action which lead to infringement of such rights, that it was the State that enacted discriminatory legislation to the same effect, it would have undoubtedly been struck down. In cases where the State must prevent infringement at the hands of another, especially when that religious institution has acquired public character, the same standards of unconstitutionality apply.

Considering the proportionality standard specifically, religious institutions, and by extension the State, must prove that there exists a rationale in excluding menstruating women from entering inner sanctums of public places of worship. The arguments of impurity and sexuality that are associated with women, especially menstruating women, are sweeping stereotypical generalisations that should not be treated as valid defences if individual autonomy and the principle

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<sup>83</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 180.

<sup>84</sup> Suhrith Parthasarthy, 'The Sabarimala Singularity', (2018) *The Hindu*, available at <https://www.thehindu.com/opinion/lead/the-sabarimala-singularity/article24514458.ece> (last visited on 24 February 2019).

of choice are to be treated as tenets of privacy. Moreover, there is a considerable infringement of women's rights in such restrictions: of equality in article 14, of discrimination in article 15, of untouchability in article 17, of religious rights in article 25, and of course of personal life and liberty in article 21 of the *Constitution of India*.

Chronologically, the Supreme Court's exposition of privacy succeeded the tumult following women's movements pressing for entry into religious places. The High Court of Bombay in *Haji Ali Dargah* took the view that women must be permitted entry on a purely libertarian and egalitarian basis. Privacy did not play a role in these judgments. Understandably, privacy is one aspect of the right of women to enter places of religious worship. It does not encompass the whole right, it merely affords a lens with which it is necessary to view a woman's individuality in the context of religion and worship.

#### IV. PRIVACY CREATES CONFUSION WITH RESPECT TO PUBLIC SPACE

##### A. *Privacy is an Irrelevant Defence to Claims for Individual Liberty*

'A right to privacy looks like an injury got up as a gift.'<sup>85</sup>

MacKinnon and Nussbaum argue that privacy is often plastered on as an unnecessary defense in order to fill in constitutional gaps.<sup>86</sup> The difference in the approaches followed by MacKinnon and Nussbaum, is seen in the former's reliance on equality and the latter's faith in liberty to restore individualistic rights. However, what both scholars fundamentally oppose is the relevance of a privacy claim with respect to concerns such as access to public spaces.

MacKinnon argues that equality offers all the protection individuals need, delving into a privacy defense is improbable in helping end

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<sup>85</sup> MacKinnon *supra* n. 41.

<sup>86</sup> Nussbaum *supra* n. 6.

hierarchies and domination.<sup>87</sup> Nussbaum ventures farther by suggesting that liberty interests need express protection and that equality alone does not suffice.<sup>88</sup> In that respect, Nussbaum argues that many liberty interests for women have sparked the privacy defense and need to be extricated from the same. This narrative claims that there is a far more direct, constitutional, and libertarian way of addressing such concerns without bringing privacy into the picture.<sup>89</sup>

Women's rights issues in India, many of which are poised to be resolved by the judiciary, cannot be disassociated from a privacy interest simply on the ground that they are concerns of individual liberty. Given that the Supreme Court's dissemination of privacy includes the principles of decisional autonomy, informational self-determination and spatial control,<sup>90</sup> every individual liberty concern corresponds to the same access to choice and consent that a privacy right grants. One is not equated to another. Neither can one exclude the other. Equality and liberty in the access to public spaces are irrelevant without a sphere in which these principles can be realised with independence and impunity. Ultimately, even issues like access to public spaces, which do not arise from strict legal theory, are products of the individualistic liberty assigned to women, after any equality issues have been ironed out. Privacy is essential for the women to have uninhibited and free access to public spaces.

### *B. The Relevance of Public Space to Privacy*

The liberty and independence that a woman enjoys in moving around in public is not the same as a man's. When a woman's independence is so curtailed, it tends to limit the choice and control she has in terms of her public surroundings. A woman walking down a dark alley at night will always be on her way somewhere: she might be

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<sup>87</sup> Nussbaum *supra* n. 6.

<sup>88</sup> Nussbaum *supra* n. 6.

<sup>89</sup> Nussbaum *supra* n. 6.

<sup>90</sup> *Puttaswamy* (Dr DY Chandrachud, J), para 141(iii), citing Bhairav Acharya, 'The Four Parts of Privacy in India' (2015), *Economic & Political Weekly* 50 (22), 32.

homeward bound from work or on her way to eat dinner but rarely will women step out in entirely public spaces for a leisurely night-time stroll. In fact, in most cases where women are out with companions, especially during the later hours of the evening, they will be dropped to their very doorstep. The same courtesy doesn't extend to a man. When a lone female guest is leaving, it is only polite to hail a cab for her or at the very least, accompany her to her car. Male guests are bid goodbye at the door. In several ways, social conditioning makes it polite, or often even necessary to oversee that women are not alone in public spaces. Shilpa Phadke, a sociologist and gender studies scholar, argues that women do not claim public space the way men do.<sup>91</sup> She suggests that women go out of their way to use markers to prove their purpose of being out in public.<sup>92</sup> Women's access to public space involves a series of strategies (appropriate clothing, symbolic markings often indicating being married, and reserved body language) in order to maintain the idea that despite their presence in public space, they remain respectable women out for the legitimate purposes of work or education or the like.<sup>93</sup> More significantly, however, Phadke clarifies that the right to public space, rather than just conditional access, can be achieved only when women are free to be out in public spaces without having to demonstrate either purpose or respectability and without being categorised into public or private women.<sup>94</sup> This corresponds with the individualistic notion of privacy that women as individuals are entitled to.

The counternarratives to a privacy right for women stem from the very trenchant belief that privacy rights are inherently incompatible with women's equality in terms of civil, sexual, political and other liberties. According to MacKinnon, the right to privacy assumes that State action is the primary threat to the freedom and equality of

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<sup>91</sup> See Shilpa Phadke *et al*, 'Why loiter? Radical possibilities for gendered dissent' in Melissa Butcher and Selvaraj Velayutham (eds) *Dissent and Cultural Resistance in Asia's Cities* (1st edn Routledge Oxon 2009).

<sup>92</sup> *Ibid.*

<sup>93</sup> Phadke *supra* n. 91, 189.

<sup>94</sup> Phadke *supra* n. 91, 192.

individuals, when oftentimes it is State action that makes these rights available to its citizens.<sup>95</sup> MacKinnon finds privacy untenable because it justifies inequality on the incorrect presumption that all individuals are equal, when they, in fact are not.<sup>96</sup> In this context, a man has unquestioned access to public space. However, giving a woman the same access will not erase the concerns of safety and harassment that prevail. Here, the man and the woman are inherently unequal, because despite giving them both unrestricted access to public space, one is still more disadvantaged than the other. Tracing this principle of inherent inequality, especially with respect to public space, is easy, based on the introductory illustrations. Insofar as MacKinnon states that the perception of State action being the primary threat to individual liberties is incorrect, the Indian example suggests that even when states may not proactively stall individual liberties, their inaction leads to the creation of an environment where it is easy for these liberties to be denied or ignored. Women in India have the constitutional freedom of movement and independence. In reality, this is not a viable possibility for most women.

Importing MacKinnon's argument to this context would suggest that by creating laws which allow female independence in public space, the State has done everything it possibly could to make the right to space available to women. There is no room for a privacy claim in MacKinnon's argument. However, this is not entirely true. Although loitering in itself is considered a frivolous activity, regarded as a suspicious performance of non-productivity,<sup>97</sup> men who choose to loiter are not reproached. Most women cannot even think of being present in public spaces without cause. Unlike Indian men, women rarely, if ever, laze in public parks unless they were to meet a friend there. In this context, a privacy claim is relevant because a man lounging in a public park will retain his right to privacy. He will not be questioned as to his presence. A woman, on the other hand, is

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<sup>95</sup> MacKinnon *supra* n. 41.

<sup>96</sup> MacKinnon *supra* n. 41.

<sup>97</sup> Phadke *supra* n. 91, 192.

always required to justify her presence in a public domain in addition to remaining a private person even in a public setting.<sup>98</sup>

Nussbaum presents an interesting viewpoint when considering the confusion privacy claims create.<sup>99</sup> She suggests that where privacy can be clearly demarcated through legal tradition to indicate expressly what citizens have a right to and freedom from, it is useful and appropriate.<sup>100</sup> However, to assert a nebulous right to privacy, according to her, does little to indicate how privacy rights shape the diverse fields of pre-existing law. The confusion of a privacy claim lies in its unelaborated form. The loose assertion of a mere 'right to privacy' does not indicate where and how privacy impacts law as it already exists and that complicates the source, strength and legitimacy of a privacy defence for individuals.

Creating an all-encompassing law for privacy is virtually impossible given the wide range of applicability privacy claims hold. The evolution of privacy rights can come through the fashioning of legal principles and the determination of how these legal principles can be tested in real world situations by following judicial precedent, as the *Puttaswamy* judgment itself reiterates. However, the idea of privacy rights goes a little beyond just applicability. Privacy exists as the concepts of equality and liberty do, in the spirit of the laws and not in their precise wordings. Just as actual legislation for equality and rights of freedoms would be improbable, in the same way, privacy as a concept must be suffused in the spirit of our laws and in their understanding and interpretation. Access to public space does point to an inherent inequality between men and women. Women's right to claim public space is certainly a liberty concern, given that the surrounding environment is not conducive for the realisation of the constitutional guarantee of access and movement. However, privacy plays an incremental role in reassuring women of their independence, safety and autonomy in public spheres.

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<sup>98</sup> *Ibid.*

<sup>99</sup> Nussbaum *supra* n. 6.

<sup>100</sup> Nussbaum *supra* n. 6.

### C. *Public Privacy*

For a woman to retain her privacy in a space that is freely and uninhibitedly public is the ultimate test of the autonomy, independence and inclusion of consent and choice. The right to public space is controversial even in sophisticated democracies—yet it shouldn't be.

The right to a collective and common space for individuals of a particular community dates back to the start of the earliest forms of civilisation. The conception of a common town hall, or town square, often in Indian villages, a particular area where the village panchayat gathered for local governance, finds ground in almost all communities, across cultures and countries. The concern when it comes to women is that they are rarely a part of public space in mere exercise of a right. Women access public space with a purpose. Using public spaces purposefully—taking a train or bus to get to work, going grocery shopping at street markets, taking their children to the park, or their parents for a walk—lends some legitimacy to their being out in the open. Such legitimacy insulates their safety in case anything untoward happens outside the confines of the home.<sup>101</sup> The right to access public space is not a fundamental right—it hasn't even been acknowledged as such. At best, it can be interpreted as an implied right, manifested in the freedoms articulated in article 19 of the *Constitution of India*. Surely, a right to access public space seems far removed from the convoluted knots of women's reproductive, marital and political rights.

The right to public space rests on access. In India, this access is clouded. This access is contingent on legitimacy—the stronger the purpose women have for being out in the public eye, the safer they feel. This can never be the true interpretation of access. It cannot be conditional. It is absurd to expect a reason for explaining the simple exercise of a right, implied or otherwise. Access which is contingent upon an apparent legitimacy of use of space is not true access.

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<sup>101</sup> Phadke *supra* n. 91.

True access implies security. Women do not have the benefit of this security, therefore the access is merely theoretical. This distinction is complicated in terms of equality, when men are not held to the same requirements of reasoning. As Phadke points out, lower middle class men access public space freely (and in due course earning the labels of ‘vagrants’ or ‘loiterers’) and it is their access that is seen as a threat to the safety of women in public spaces. Phadke argues that inhibiting women’s right to public space, even circumstantially if not through active legislation, is no way of securing some respite from cat-calling and hooting and the general air of sexualising the female form that carries on, unchecked, in the public space.<sup>102</sup> Eve-teasing is a common deterrent that prevents women from claiming public space. At its best, it is a permanent predilection that women out in public are compelled to endure. At its worst, it threatens the very safety of women out alone. In this vein, the Supreme Court opined that eve-teasing is a ‘pernicious, horrid and disgusting practice.’<sup>103</sup> It found that eve-teasing is a gross violation of fundamental rights.<sup>104</sup> The Supreme Court relied upon the categorisation of eve-teasing put forth by *The Indian Journal of Criminology and Criminalistics*, which recognised five different types of eve-teasing: verbal eve-teasing, physical eve-teasing, psychological harassment, sexual harassment, and harassment through objects.<sup>105</sup> Every single one of these aspects of eve-teasing curtails a woman’s access to public space by invading her individual right to privacy.

The right to access public space then is not dissociated from the inherent right to privacy, as it might seem. True, the essence of a right to access public space is essentially implicit (and not defined).<sup>106</sup> However, consider the implications of this right in the context of

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<sup>102</sup> Phadke *supra* n. 91.

<sup>103</sup> *Inspector General of Police v. S Samuthiram* (2013) 1 SCC 598, 32.

<sup>104</sup> *Inspector General of Police v. S Samuthiram* (2013) 1 SCC 598, 29.

<sup>105</sup> *Inspector General of Police v. S Samuthiram* (2013) 1 SCC 598, 32.

<sup>106</sup> In countries like the United States of America, which limits its Bill of Rights to negative rights that mainly restrict government actions, the right to public space is an implied right just like the right to privacy. Such implied rights, although unarticulated, are essential in the exercise of other more well-defined rights.

the fundamental right to privacy, as held in India. The Court gave a three-pronged definition of the tenets of privacy which included, ‘repose, sanctuary and intimate choices’.<sup>107</sup> It is apparent that the individual is entitled to make her choices in relative peace—if that choice is to access public space without a specific aim, it is important to create an environment where it is safe and feasible for women to do so.

Public space is not restricted to roads, gardens and other open and obvious spaces, where safety and feasibility are instinctive concerns for women. Even in religious places of worship, which are public spaces, women’s right to access is in partial dubiety. In parks and gardens, on the streets and in other public places, women’s safety is a wide concern that advises minimal female participation, outdoors. In temples and mosques, however, it is absurd to apply the safety concern.<sup>108</sup> The High Court of Bombay, in the *Haji Ali Dargah* case found that it was the responsibility of the Dargah Trust to ensure that the *dargah* was a safe space for its female devotees, rather than to enact a blanket restriction on them altogether.

## V. CONCLUSION

The idea of privacy is all encompassing. It finds application in virtually any claim simply because of its fundamental basic nature. Privacy is the enabler through which women can effectively assert their claims to equality and liberty.

For women to be able to speak up in their marriages, their relationships, religious rights and their public presence, there must be the creation of a space where they can exercise their ability to do so.

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<sup>107</sup> *Puttaswamy* (Chelameswar, J), para 36 citing Gary Bostwick, ‘A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision’, (1976) 64 *California Law Review* 1447.

<sup>108</sup> Interestingly, in the *Haji Ali Dargah* case which granted women access to the inner sanctum of the *dargah*, the Dargah Trust did pursue the women’s safety argument.

Privacy enables the creation of such a space. Women must be able to wilfully and deliberately exercise the active principles of choice and consent. This interpretation of privacy is essential in terms of creating a jurisprudence that is acutely fair to all categories of Indian women.

It is to be noted that every single one of the contexts used can be defended, and moreover, has been defended on the basis of other fundamental rights before various courts of justice ie, the marital rape exception violates equality under article 14, temple entry broaches the idea of untouchability under article 17, and eve-teasing in public spaces is an infringement of articles 14 and 19. It is incorrect to assume that privacy replaces these claims of fundamental rights, when in fact it inheres in these very claims. It is impossible to dissociate these claims from privacy rights.

In this light, the inferences drawn from the *Puttaswamy* judgment are important in characterising the concept of privacy as an enabler as opposed to an opaque, unformulated principle. Ultimately, it is the affording of this particular power of unencumbered decision-making to every single woman in the country that creates the true translation of privacy and in turn, marks an equality of choice.

# INSOLVENCY PROCEDURES – INVESTIGATING THE PRE-PACK PARADIGM IN INDIA<sup>†</sup>

*Sanjana Rao* \*

## I. INTRODUCTION

Corporate rescue, as a precursor to insolvency resolution, enforcement against or liquidation of a company,<sup>1</sup> is a prominent feature of insolvency laws in many jurisdictions. Corporate rescue provides creditors<sup>2</sup> of a stressed debtor company<sup>3</sup> with the tools to formulate a plan to salvage the status of such debtor company and to make it a viable business again. This, in turn, benefits the creditors and allows them to recover their dues with minimum losses as the debtor services the debt timely.<sup>4</sup>

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<sup>†</sup> This article reflects the position of law as on 24 February 2019.

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<sup>1</sup> The author will be restricting the scope of the article to debtors which are corporates.

<sup>2</sup> The term ‘creditors’ has been used to refer to financial creditors such as banks and financial institutions and the term ‘stakeholders’ has been used to refer to all classes of stakeholders which have financial interests in the affairs of the company *vis-à-vis* employees of the debtor, crown debt creditors etc.

<sup>3</sup> The term ‘debtor company’ has been used in this article to refer to a company which *inter alia* has been incorporated under the laws of its jurisdiction as a distinct legal entity, having perpetual succession and the power to enter into contracts under its own name, which has borrowed through various means and owes a debt to its creditors or has availed of credit or goods or services on deferred payment terms from other entities.

<sup>4</sup> Following the global financial crisis, certain special regulatory concessions and asset classification benefits were allowed to banks and financial institutions to salvage genuine projects. These concessions were given by the Reserve Bank of India as incentives for timely and effective resolution / restructuring under the Reserve Bank of India’s debt restructuring schemes. These guidelines and schemes were recently withdrawn by the Reserve Bank of India and a consolidated circular dated 12 February 2018 termed as ‘Revised Framework for Resolution of Stressed Assets’ was issued by the Reserve Bank of India for *inter alia* streamlining and consolidating the extant debt restructuring procedures and bringing them under the purview of *The Insolvency and Bankruptcy Code, 2016*.

Corporate rescue is critical where a company is facing inherent stress which could be the consequence of operational failure or business or financial failure, resulting in the debtor company's inability to service debts timely. Inherent stress may also arise when a company is unable to ensure that its assets are adequate to match its liabilities, which must however, be distinguished from isolated instances of asset-liability mismatch or default in repayment of debts that does not arise from the inadequacy of funds of the debtor company.

Pre-packaged administration of bankruptcy, or 'pre-packs' as commonly referred to, is a mode of corporate rescue which has not yet formally percolated into the Indian market.<sup>5</sup> A pre-packaged administration has been defined as 'an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment'.<sup>6</sup> Black's Law Dictionary defines a 'pre-pack bankruptcy' as, 'Bankruptcy where the debtor agrees to terms reducing the time it takes to handle the business at hand.'<sup>7</sup>

In India, pre-packs could change the manner in which insolvency resolution is undertaken. The Indian economy is grappling with non-performing assets (NPA)<sup>8</sup> that banks and financial institutions are stranded with after having lent to large corporates who, due to

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<sup>5</sup> There exist views in the Indian insolvency sphere that introduction of pre-packs in India would prove beneficial for the stakeholders of a corporate debtor under distress. *See infra* n. 95.

<sup>6</sup> Lorraine Conway, 'Pre-pack Administrations, House of Commons Library, Briefing Paper Number CBP5035' (2017) *House of Commons Library*, at <http://researchbriefings.files.parliament.uk/documents/SN05035/SN05035.pdf> (last visited 24 February 2019).

<sup>7</sup> Black's Law Dictionary, Free Online Legal Dictionary 2nd Ed., *The Law Dictionary*, at <https://thelawdictionary.org/prepackaged-bankruptcy/> (last visited 24 February 2019).

<sup>8</sup> *See* Alekh Archana, 'Bankers meet to take stock of progress in NPA resolution' (2017) *Livemint*, at <http://www.livemint.com/Industry/8eaqgJ0CO4Gpyuh5yyhrwJ/Bankers-meet-to-take-stock-of-progress-in-NPA-resolution.html>. (last visited 24 February 2019).

various reasons,<sup>9</sup> have not been able to service these loans. It takes an average of 4.3 years for a creditor to recover its debt in India as per the World Bank's Doing Business Report 2019 and India has been ranked 108 amongst 190 countries in terms of resolution of insolvency.<sup>10</sup> In a bid to clean up the balance sheet of the banks, the Reserve Bank of India (RBI) also identified certain large corporates which have contributed to the majority NPAs in a list sent to all banks having exposure to the named corporates. The banks were also mandated by the RBI to commence Corporate Insolvency Resolution Process (CIRP) under *The Insolvency and Bankruptcy Code, 2016* (IBC) and the rules and regulations thereunder against the named corporates, on their failure to meet certain set targets.<sup>11</sup>

In the above backdrop, the objective of this article is to explain the nature of a pre-pack and specifically analyse how a pre-pack regime would fare in the Indian insolvency market. This article also explores whether the implementation of pre-packs in India would necessitate an amendment in the existing insolvency regulatory framework and if yes, the extent of such amendment.

Part II of this article seeks to analyse the nature of pre-packs with an additional focus on their features, as a mode of corporate rescue in the United Kingdom (UK) and the United States of

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<sup>9</sup> Pallavi Chavan and Leonardo Gambacorta, 'Bank Lending and Loan Quality: The Case of India WPS (DEPR): 09 / 2016 RBI Working Paper Series' (2016) *Reserve Bank of India*, at <https://m.rbi.org.in/Scripts/PublicationsView.aspx?id=17400> (last visited 24 February 2019). The authors have set out the rationale of the procyclical nature of non-performing loans and analysed certain factors as to the reasons behind growth of non-performing loans in India.

<sup>10</sup> World Bank Group, 'Doing Business Economy Profile 2017: India' (2019) *World Bank*, at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Profiles/Regional/DB2019/SA.pdf> (last visited 24 February 2019).

<sup>11</sup> See Reserve Bank of India, 'RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)' (2017) *Reserve Bank of India*, at [https://www.rbi.org.in/scripts/BS\\_PressReleaseDisplay.aspx?prid=40743](https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=40743) (last visited 24 February 2019).

America (US). Part III of this article sets out the present regulatory framework of insolvency resolution in India, pre-packs in the Indian insolvency regime and how pre-packs would fare in India. Part IV analyses essential aspects when considering pre-packs in India and contemplates certain key legislative considerations for pre-packs to be undertaken in India. Part V sets out a holistic overview of the benefits and disadvantages of a pre-pack. Part VI concludes the article.

## II. THE NATURE OF PRE-PACKS

### A. *Pre-packs vis-à-vis Restructuring*

The term ‘restructuring’ is used frequently in the context of insolvency resolution. The terms ‘corporate restructuring’ and ‘debt restructuring’ have different connotations. As per Black’s Law Dictionary, ‘corporate restructuring’ generally signifies: ‘A fundamental and sometimes drastic change that will alter the relationships within a company or with other companies’,<sup>12</sup> while ‘debt restructuring’ refers to, ‘An agreement between creditors and the firms to reorganize liabilities to make it more feasible. It is done to avoid foreclosure or liquidations. It can involve forgiveness, rescheduling, and conversion into equity’.<sup>13</sup> There are various considerations while analysing the far-reaching impact of undertaking ‘restructuring’ of a troubled company.

In the above context, a pre-pack is a mode of restructuring which may involve any element or combination of the restructuring methods set out above, to be undertaken in respect of the debtor company. A pre-pack, however, is distinguished from the other modes of corporate rescue by the manner in which the debtor company is sought to be turned around and the timelines which are followed in relation to the

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<sup>12</sup> Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed., *The Law Dictionary*, at <https://thelawdictionary.org/restructuring/> (last visited 24 February 2019).

<sup>13</sup> Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed., *The Law Dictionary*, at <https://thelawdictionary.org/debt-restructuring/> (last visited 24 February 2019).

process. In a pre-pack, a substantial portion of the restructuring of the affairs of the company takes place prior to the debtor company filing for insolvency.

*B. What are Pre-packs?*

Corporate rescue, as the term suggests, focuses on restoring the status of a flailing company. Pre-packs, largely perceived as a subset of corporate rescue, are typically employed to preserve the business of the debtor company, ie, its tradeable or enterprise value.<sup>14</sup> The purpose of a pre-pack is to strike a balance between safeguarding the interests of the creditors and maintaining the business and assets of the debtor company by facilitating a swift transition of such assets and business.

Certain key aspects of a pre-pack have been analysed with reference to US or UK laws, as applicable, in view of the maturity and evolved regime of pre-packs in the concerned jurisdictions. Set out below are the key aspects of a pre-pack.

1. Initiation of a Pre-pack

The essence of a pre-pack is that the terms of restructuring are formulated prior to the commencement of insolvency. When a pre-pack is undertaken prior to the occurrence of an event of default with a creditor, it is the debtor company which would be in a position to propose the commencement of a pre-pack. However, in a situation where the company has defaulted or has triggered a 'potential event of default' clause in its credit documents or even when a creditor becomes aware of the distress in the debtor company, he may seek to have the debt of the debtor company restructured as a pre-pack.

Whether the process is debtor driven or creditor driven is an important factor while analysing a pre-pack. In the event the debtor

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<sup>14</sup> See *infra* Paragraph B 6 of Part II below for analysis of enterprise value and Paragraph A of Part IV of this article for the concept of fair value in India.

company seeks to initiate the pre-pack, it would have to ensure that the necessary shareholders' resolutions and board resolutions have been passed. For a creditor to initiate a pre-pack, the crucial factor is the *inter se* understanding of all the creditors of the debtor company.<sup>15</sup>

The UK<sup>16</sup> and US<sup>17</sup> insolvency laws contemplate any stakeholder of a corporate debtor initiating a pre-pack in relation to the debtor company.

## 2. How Does a Pre-pack Work?

A pre-pack essentially involves restructuring of the debt of the company. The mode of restructuring that is undertaken pursuant to a pre-pack *vis-à-vis* the debtor company, would depend *inter alia* on the nature of activity or business that is primarily undertaken by such debtor company, the quantum and nature of debt that is incurred and subsisting, and the stage of distress that the debtor company is facing, thereby necessitating restructuring. This could also include corporate restructuring being considered as a part of such restructuring exercise. Once the mode of restructuring and the terms of the same have been finalised between the parties, the pre-pack is executed promptly as the company files for insolvency. Interestingly, under certain European laws, a pre-pack is effectuated on the same day as the appointment of the Insolvency Professional (IP) itself, ie, an immediate handover of the business to the incoming purchaser.<sup>18</sup>

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<sup>15</sup> See *infra* paragraph B of Part IV of this article for an analysis on creditor control over the debtor company.

<sup>16</sup> PricewaterhouseCoopers, 'Insolvency in brief: A guide to insolvency terminology and procedure' (2009) *PricewaterhouseCoopers*, at <https://www.pwc.co.uk/assets/pdf/insolvency-in-brief.pdf> (last visited on 24 February 2019).

<sup>17</sup> Law 360, 'The Pros And Cons Of Prepackaged Bankruptcy' (2013) *Simpson Thacher & Bartlett LLP*, at <https://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1647.pdf?sfvrsn=2> (last visited on 24 February 2019).

<sup>18</sup> Adrian Cohen, 'A Guide to European Restructuring and Insolvency Procedures' (2015) *Clifford Chance*, at [https://www.cliffordchance.com/briefings/2015/09/a\\_guide\\_to\\_europeanrestructuringandinsolvenc.html](https://www.cliffordchance.com/briefings/2015/09/a_guide_to_europeanrestructuringandinsolvenc.html) (last visited on 24 February 2019).

While ‘pre-pack’ as a concept under UK laws has been used more frequently in the context of sale of substantial business or assets of the debtor company to a new entity prior to the debtor company formally filing for insolvency,<sup>19</sup> the usage of a pre-pack bankruptcy under the US laws has a much wider connotation and entails formulation of the terms of bankruptcy of the company prior to the company filing for bankruptcy.<sup>20</sup>

In both scenarios, ie, in the UK and in the US, once a debtor company files for insolvency, the administrator or the court-appointed resolution professional effectuates the pre-pack immediately. In the UK, once the terms of a pre-pack are formulated, the debtor company is typically put under administration by approaching the court and an administrator is appointed in relation to the management of the business of the debtor company,<sup>21</sup> although the permission of a court is not required to initiate a pre-pack.<sup>22</sup>

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<sup>19</sup> *Supra* n. 6.

<sup>20</sup> Investopedia, ‘Prepackaged Bankruptcy’ (2017) *Investopedia*, at <https://www.investopedia.com/terms/p/prepackagedbankruptcy.asp>. (last visited on 24 February 2019). It stipulates while defining prepackaged bankruptcy, ‘A prepackaged bankruptcy is a plan for financial reorganization that a company prepares in cooperation with its creditors that will take effect once the company enters Chapter 11 (*of the US Bankruptcy Code*). This plan must be voted on by shareholders before the company files its petition for bankruptcy, and can result in shorter turnaround times. The idea behind a prepackaged bankruptcy plan is to shorten and simplify the bankruptcy process in order to save the company money in legal and accounting fees, as well as the amount of time spent in bankruptcy protection. A proactive company in distress will notify its creditors that wishes to negotiate terms of bankruptcy before it files for protection in court. These creditors — lenders, inventory suppliers, service providers, etc. — naturally do not like the distressed situation of the company, but will work with it to minimize time and expenses associated with bankruptcy reorganizations. The creditors are more apt to be amenable during the negotiations to rework terms since they will have a voice before the bankruptcy filing; the alternative would be a surprise and then a scramble to deal with the delinquent debtor with more uncertainty about how long the process will take.’

<sup>21</sup> The procedure for administration of a company which is put under administration in the UK is regulated by Schedule B1 of *The Insolvency Act, 1986*. India follows a similar approach under the IBC which vests the control of the debtor company with an Insolvency Resolution Professional once an application for commencement of CIRP is accepted by the National Company Law Tribunal.

<sup>22</sup> *Supra* n. 6.

Thus, what sets a pre-pack apart from other modes of restructuring is the promptness with which a restructuring plan is executed despite the company being subject to insolvency proceedings at the end of the restructuring.

### 3. Who Retains Control of the Debtor Company During Insolvency Outside of a Pre-pack?

Pre-packs under US laws are typically undertaken under Chapter 11 of *The US Bankruptcy Code, 2011 (US Bankruptcy Code)*.<sup>23</sup> The US Bankruptcy Code, which provides for a Debtor-In-Possession (DIP) concept,<sup>24</sup> permits the debtor company to arrive at the terms of restructuring while remaining in possession of its assets. Chapter 11 of the US Bankruptcy Code vests with the (concerned) courts, the power to permit the debtor company to retain management of the company.<sup>25</sup>

The debtor company, however, remains subject to the oversight of the creditors' committee and the court. An automatic moratorium, not unlike section 14 of the IBC, is provided for under the US Bankruptcy laws, as well. Under the DIP status granted to the corporate debtor, the debtor is in charge of its day-to-day activities and the existing management of the debtor is not replaced by the control of a court-appointed administrator.

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<sup>23</sup> *US Bankruptcy Code*, (United States).

<sup>24</sup> See 'Bankruptcy Basics', *United States Courts*, at <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> (last visited 24 February 2019). One of the novel features of Chapter 11 under the US Bankruptcy Code is that, 'Upon filing a voluntary petition for relief under chapter 11 or, in an involuntary case, the entry of an order for relief, the debtor automatically assumes an additional identity as the "debtor in possession." 11 USC § 1101. The term refers to a debtor that keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a case trustee. A debtor will remain a debtor in possession until the debtor's plan of reorganization is confirmed, the debtor's case is dismissed or converted to chapter 7, or a chapter 11 trustee is appointed. The appointment or election of a trustee occurs only in a small number of cases. Generally, the debtor, as "debtor in possession" operates the business and performs many of the functions that a trustee performs in cases under other chapters. 11 USC § 1107(a).'

<sup>25</sup> 11 USC § 1107.

This is in contrast to the UK laws which require the management of the debtor company to vest in the administrator so appointed on filing for administration of the debtor company.<sup>26</sup> Some have even compared a pre-pack to a scheme of arrangement, which is contemplated under *The Insolvency Act, 1986 (Insolvency Act)* in the UK and a Chapter 11 filing under the US Bankruptcy Code.<sup>27</sup>

#### 4. Appointment of an Insolvency Professional<sup>28</sup>

A pre-pack requires high level of skill and expertise in *inter alia* managing the affairs of the company and commercial aspects of insolvency resolution. Therefore, a qualified professional may be required to assist the debtor company in formulating and executing a pre-pack.

Under the UK laws, when a debtor company opts to go the pre-pack route, it typically appoints an IP who undertakes the operational aspects of finalising the pre-pack transaction. In the UK, apart from the Insolvency Act and the rules thereunder, the administrator is also required to adhere to guidance notes in the form of Statements of Insolvency Practice (SIP) issued by the Joint Insolvency Committee comprising representatives from recognised professional bodies and the Insolvency Service, which is the executive arm of the Department of Business Innovation and Skills.<sup>29</sup>

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<sup>26</sup> *Supra* n. 21.

<sup>27</sup> See Alastair Goldrein, ‘Unwrapping English pre-packaged administrations: a guide to “pre-packs” in England’ (2011) *Chadbourne & Parke LLP*, at <https://www.lexology.com/library/detail.aspx?g=da1945a8-be91-4557-9028-48c5e8993a39> (last visited 24 February 2019).

<sup>28</sup> See *infra* Paragraph B 3 of Part III for an analysis of the role of an IRP or IP in India, and also from a pre-pack perspective.

<sup>29</sup> See Association of Business Recovery Professionals, ‘Statements of Insolvency Practice - England & Wales’ at <https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice/e-and-w> (last visited 24 February 2019).

The SIP 16 mandates an IP to act professionally and with objectivity, with a view to maximise the interests of the creditors of a debtor company as a whole, given the high level of interest the public and the business community have in pre-packs and administrations.<sup>30</sup> As per SIP 16, IPs are required to bear in mind the responsibility that they have towards the company and the creditors prior to their appointment, in which case it would be mostly advisory in nature versus their duty in the eventuality they are appointed as administrators.<sup>31</sup>

The role that the administrator of the company (when appointed) plays in giving effect to a pre-pack arrangement is therefore crucial and the IP who later acts as the administrator has a dual role, prior to and post his engagement as an administrator. An IP has the responsibility of ensuring that the arrangement that the company is proposing is fair to each creditor and stakeholder, and is not carried out in a manner which is opaque or prejudicial to the interests of any stakeholder or class of stakeholders.<sup>32</sup>

An IP once appointed as the administrator, is required to act in the best interests of all the creditors and stakeholders. If an IP is found by the court to have acted improperly at any point during the course of the entire process, he may be made liable for misfeasance. If he is judged to have acted improperly by a professional body, he will be subject to that body's disciplinary proceedings.<sup>33</sup>

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<sup>30</sup> See Association of Business Recovery Professionals, 'Statement of Insolvency Practice - England & Wales' at <https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice/e-and-w/sip-16-list> (last visited 24 February 2019).

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* n. 30.

<sup>33</sup> *Supra* n. 30.

## 5. Court Approval

Court involvement is a necessary prerequisite in a pre-pack, since the terms of restructuring are necessarily formulated by parties prior to there being a formal filing of insolvency. In this situation, while it is the creditors whose interests are primarily considered,<sup>34</sup> there exist interests of stakeholders of the debtor company which may not be taken into consideration while formulating such terms. Employees, vendors (in the Indian context, operational creditors), and statutory authorities are certain stakeholders which would be interested in ascertaining whether the terms of the pre-pack are beneficial to them as well. In such situations, having an adjudicating authority as a mode of grievance redressal is important to ensure that the stakeholders of the debtor company are not prejudiced due to the terms of the pre-pack.

Approval of the entire process by a neutral adjudicating body, which has to be satisfied that the terms of a pre-pack sale are indeed beneficial to the interests of all stakeholders concerned, would be important in building confidence in the functioning of pre-packs and would carry with them the seal of approval of the insolvency court as being above board, and confer legal sanctity on the arrangement.

## 6. Determination of the Enterprise Value of the Debtor Company

The enterprise value<sup>35</sup> of the debtor company serves as the benchmark, which the terms of a pre-pack are required to match at bare minimum, where a sale of business or management or assets is contemplated as a part of such pre-pack.

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<sup>34</sup> See *infra* Paragraph B. of Part IV of this article for analysis of creditor control and how it is an important consideration while undertaking pre-packs, and also from an Indian perspective.

<sup>35</sup> Black's Law Dictionary, Free Online Legal Dictionary 2<sup>nd</sup> Ed. *The Law Dictionary* at <https://thelawdictionary.org/enterprise-value/>. The Law Dictionary defines 'enterprise value' as, 'A firm's total capitalization defined as market value. Calculated as: Equity, added to debt, minus the non-critical asset value. To the firm's core business, these assets must be casual, non-essentials'. This term finds similarities under the IBC in the concept of fair value.

It is interesting to note that a like process of valuation of assets of a company under UK laws has not been prescribed.<sup>36</sup> Certain objections have been raised that the terms of a pre-pack may give a company an unfair market advantage by allowing the new company to leave behind its unwanted debts.<sup>37</sup> For the existence of a fair playing ground for competition, it is necessary while considering a pre-pack to ascertain the tangible value or the enterprise value of a debtor company to ensure that a balance is struck between corporate rescue of such company and to preclude a pre-pack from being used as a means to escape inconvenient debts in the books of a company.

## 7. Marketing the Assets of the Debtor Company

Wide marketing of the assets or business of the corporate debtor, calling for expressions of interest from parties interested in taking over the business or assets of the debtor company by inviting the bidders to quote their price for such assets would be crucial for a successful pre-pack. On arriving at a satisfactory price, the definitive documents are negotiated, consent from creditors is obtained and the terms of the pre-pack are effectuated.<sup>38</sup> The proceeds of the pre-pack are then used for repayment to the creditors while the actual company undergoes subsequent administration (or other insolvency processes prescribed under the insolvency laws).

In the event the sale of the business or assets of a debtor company is envisaged in a pre-pack, the SIP 16 in the UK requires that the assets of the debtor company, which are proposed to be sold, must be marketed widely to ensure that the debtor company obtains the best deal possible and to minimise the chances of a circuitous transfer of assets. Once a potential buyer is finalised, the debtor company files for administration and in majority of the cases, proposes the IP to act as the administrator.

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<sup>36</sup> *Supra* n. 27.

<sup>37</sup> *Supra* n. 6.

<sup>38</sup> *See infra* Paragraph B. of Part IV of this article for an analysis on creditor control.

### *C. The Parties Involved*

In a pre-pack, the debtor company is at the centre of the entire process, and may undergo a change in shareholding or its assets. The management of the debtor company, comprising the board of directors and other key managerial personnel, play a critical role in the pre-pack sale along with the shareholders, without whose approval it is unlikely that the debtor company will be able to undertake a pre-pack. This change in procedure is undertaken by the IP who is appointed by the company to formulate the terms of the pre-pack and oversee its execution.

The creditors of the debtor company are parties who are affected to a great extent given that the very nature of the entity, to whom they have lent substantial amounts of money, may undergo a change. Within the broad class of creditors, there may exist various subsets, *viz.* financial creditors such as banks and financial institutions funding the debtor company, operational creditors which are typically suppliers or vendors to the debtor company that are owed moneys on invoices and under trade contracts, secured creditors which have various forms of charge on the immovable or movable assets of the company or its shares, and unsecured creditors which have a right of recovery against the debtor company.

There are other crucial stakeholders in the debtor company, such as its employees and vendors without whom operations cannot continue, and the regulatory authorities of the jurisdiction, which, depending on the nature of activities or business of the debtor company, regulate and provide various licenses or approvals for the debtor company to undertake its business. Lastly, the government to which tax, cess and other charges are due also has an interest in the functioning of the debtor company.

## III. PRE-PACKS IN INDIA

### *A. Insolvency in India Presently*

The concept of insolvency rescue by creditors has been a part of Indian insolvency laws for more than a century. It has only attained formal recognition and importance from contemporary stakeholders

by the mandate of the fairly recent IBC. The IBC requires formation of a Committee of Creditors (CoC) for arriving at a resolution plan within the stipulated time period.<sup>39</sup> The Indian insolvency laws, prior to enforcement of the IBC, were formulated during the British regime and were not updated to align with contemporary insolvency resolution practices. The IBC consolidates the insolvency laws in relation to corporates and individuals both, and operates as the unified legislation to address insolvency of corporates and individuals.<sup>40</sup>

CIRP is the corporate rescue element of the IBC. The IBC provides for initiation of CIRP on admission, by the National Company Law Tribunal (NCLT), of an application either by or on behalf of a creditor or the corporate debtor. The resolution professional under the IBC is the equivalent of an administrator appointed under the UK model and all the affairs of the company vest in such resolution professional. The board of directors or the partners of the corporate debtor are stripped of all powers in relation to the management of the corporate debtor.<sup>41</sup> All creditors of the corporate debtor (including offshore lenders) are required to form a CoC under the IBC, and participate in collective decision-making for resolution of the financial stress of the corporate debtor.

Introduction of pre-packs as a formal mode of corporate rescue in India may be analysed now in the above backdrop.

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<sup>39</sup> Section 12 of the IBC stipulates that a corporate insolvency resolution process must be completed within a period of 180 days from the date of admission of the insolvency application by the NCLT, which may extend the period by 90 days more at its discretion on an application by the insolvency resolution professional. The IBC also contemplates an additional year to be granted to a successful resolution applicant for obtaining the requisite regulatory approvals for implementation of the resolution plan proposed by it.

<sup>40</sup> The IBC was notified by the Government of India on 28 May 2016. Certain sections of the IBC have been notified and are effective, specifically, the corporate insolvency resolution process. The bankruptcy provisions dealing with individuals are yet to be notified.

<sup>41</sup> The IBC therefore responds to the question, 'Who retains control of the debtor company during insolvency?' by following the UK approach, ie, a creditor-favouring stance.

## B. *The Pre-pack Proposition*

### 1. Are Pre-packs Required in India?

While the IBC has had a positive effect on promoters of defaulting companies in terms of repayment discipline,<sup>42</sup> liquidation is a grave threat perceived on failure of CIRP, and frequent instances of liquidation may not be a viable or desirable solution in the long run in terms of promoting the business community. This problem is aggravated further when it is the micro, small and medium enterprises which are mostly at the receiving end, due to a lack of investor interest in their assets during CIRP.<sup>43</sup> Time and costs, even for big companies undergoing CIRP, are huge factors which create an aversion towards CIRP.

While analysing the necessity of a pre-pack, one may also argue that prior to the pre-pack stage, the debtor company may enter into a leveraged buyout or management buyout for the purpose of transferring its assets or business to another entity. It may, however, be noted that such a buyout would not carry the seal of approval of a court<sup>44</sup> and would therefore, to that extent, be open to challenge by creditors if they were to object to such a transaction and require clawback,<sup>45</sup> which is a safeguard provided to creditors under the IBC.

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<sup>42</sup> Anup Roy, 'Fearing insolvency proceedings, promoters line up to pay their dues' (2018) *Business Standard*, at [https://www.business-standard.com/article/companies/fearing-insolvency-proceedings-promoters-line-up-to-pay-their-dues-118070301213\\_1.html](https://www.business-standard.com/article/companies/fearing-insolvency-proceedings-promoters-line-up-to-pay-their-dues-118070301213_1.html) (last visited 24 February 2019).

<sup>43</sup> See Namrata Acharya, 'IBC proceedings: 78 liquidation orders, a handful of resolutions' (2018) *Business Standard*, at [https://www.business-standard.com/article/economy-policy/ibc-proceedings-78-liquidation-orders-a-handful-of-resolutions-118042200726\\_1.html](https://www.business-standard.com/article/economy-policy/ibc-proceedings-78-liquidation-orders-a-handful-of-resolutions-118042200726_1.html) (last visited 24 February 2019).

<sup>44</sup> Unless the same is undertaken as a court approved scheme such as a Scheme of Arrangement under *The Companies Act, 2013*.

<sup>45</sup> Under section 44 of the IBC, the NCLT possesses the power to pass an order if approached by the resolution professional, declaring any transaction entered into by the debtor company prior to the insolvency commencement date as a preferential transaction, undervalued transaction or an avoidance transaction.

A risk of a clawback may not arise, however, if such a pre-pack is approved by the NCLT itself. By proposing mandatory NCLT approval for execution of a pre-pack, another advantage is that fears which investors, creditors and other stakeholders would have, about safeguarding their rights against the debtor company in recovery, would be allayed to a great extent and confirm the finality and binding nature of such transaction.

## 2. How Would a Pre-pack Work in India?

While the conventional definition of a pre-pack suggests that the sale of assets is concluded prior to the company officially filing for insolvency, a pre-pack in the Indian context may be broader in its usage to comprise various tools utilised in relation to the debtor company to revive it and rectify the financial stress that it is undergoing (similar to the term used in the US context).<sup>46</sup>

In the Indian context, change in management, sale of assets of the debtor company to another company, interim financing and refinancing, assignment of debt of the debtor company to asset reconstruction companies and turnaround funds are a few tools that a debtor company and creditors possess while undertaking the corporate rescue of such debtor company. These tools are also available to a bidder (resolution applicant) once a debtor company is subject to CIRP.

It would be interesting to blend the aspects of the IBC with such corporate rescue tools, prior to the debtor company undergoing CIRP itself.

It may be worth considering Project Sashakt, an initiative introduced by a Government panel headed by the Chairman, Punjab National

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<sup>46</sup> See also paragraph A. 2 of Part II which analyses the question, 'What Really is a Pre-pack?'

Bank, which was recently in the news due to its recommendations on handling stressed assets.<sup>47</sup> Project Sashakt suggests an approach of bringing together banks dealing with stressed assets by way of an inter-creditor agreement. The resolution approach to be adopted in respect of the assets is based on the size of the stressed asset.<sup>48</sup> For mid-sized assets, the lead bank is to be in charge of the resolution of the asset and the voting process in respect of resolution of the asset would be as under the IBC, being 66.66 per cent of majority vote share.<sup>49</sup> For larger stressed assets, the same are proposed to be auctioned to asset reconstruction companies and majority equity of the debtor company would then be transferred to sector-specific alternate investment funds, which would work under a unified asset management company to be set up by the banks. This would enable better price discovery and quicker turnaround of assets.<sup>50</sup> The timeline prescribed under Project Sashakt is 180 days, within which the resolution plan is expected to be formulated. Failing completion of the resolution in 180 days, the asset would be subject to CIRP under the IBC.<sup>51</sup>

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<sup>47</sup> See Gopika Gopakumar, 'Mint Primer: What is Project Sashakt and how it will work' (2018) *LiveMint*, at <https://www.livemint.com/Industry/xx5DASBD0xB9fgEPzKGwUO/Mint-Primer-What-is-Project-Sashakt-and-how-it-will-work.html> (last visited 24 February 2019).

<sup>48</sup> See Vishwanath Nair, 'Government Unveils Five-Point Plan 'Sashakt' To Tackle Bad Loans' (2018) *Bloomberg Quint*, at <https://www.bloombergquint.com/business/government-unveils-five-point-plan-sashakt-to-tackle-bad-loans#gs.KQmVwtvY> (last visited 24 February 2019).

<sup>49</sup> See 'Project Sashakt: Banks give shape to inter-creditor pact for bad assets' (2018) *Economic Times*, at <https://economictimes.indiatimes.com/industry/banking/finance/banking/banks-give-shape-to-inter-creditor-pact-for-bad-assets/articleshow/64877560.cms> (last visited 24 February 2019).

<sup>50</sup> Viral Acharya, 'Some Ways to Decisively Resolve Bank Stressed Assets' (2017) *Reserve Bank of India*, at [https://rbi.org.in/Scripts/BS\\_SpeechesView.aspx?Id=1035](https://rbi.org.in/Scripts/BS_SpeechesView.aspx?Id=1035) (last visited 24 February 2019). This approach may be reminiscent of a certain 'bad bank' which was discussed by the RBI Deputy Governor in the concerned speech.

<sup>51</sup> See *supra* n. 48.

While Project Sashakt is a corporate rescue mechanism which is aimed at quicker recoveries to creditors, it is proposed to be a precursor to the IBC.<sup>52</sup> This is a large-scale initiative by the Central Government to manage stressed assets. A pre-pack in some ways would be similar to this scheme as it would contemplate corporate rescue prior to initiation of proceedings under the IBC.

Analysing the pre-pack in terms of Project Sashakt, the similarity in both is that the terms of the pre-pack would be formulated prior to the application for commencement of insolvency being filed against the debtor company. The differentiating factor is that on finalisation of the terms of the pre-pack, a CIRP application would be filed by the debtor company and the pre-pack plan promptly implemented as a resolution plan under the IBC.<sup>53</sup> Under Project Sashakt, however, a successful resolution of the debtor company precludes it from being subject to CIRP under the IBC.

The pre-pack process, therefore, would be similar to the IBC and work along the lines of a CIRP, with creditor involvement. However, being a less formal procedure, a pre-pack could be concluded on obtaining consent from creditors, without undergoing a 180-day process. This, of course, would depend greatly on the *inter se* understanding between creditors. In practice, it is not uncommon that negotiations of restructuring fail between a debtor company and its creditors due to lack of consensus between the creditors.

The majority vote concept of 66.66 per cent would aid in such situations. To give sanctity to a pre-pack, if the same is undertaken in compliance with all the procedures and processes prescribed, it could be the NCLT's sole discretion, whether or not to re-open a particular pre-pack on being approached by a dissenting creditor, and if the NCLT did seek to analyse a pre-pack, it may be restricted to a particular aspect or term.

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<sup>52</sup> See *supra* n. 48.

<sup>53</sup> See *infra* paragraph C of part IV of this article for analysis on viability of connected party pre-packs in India.

### 3. The Role of an IP

The UK insolvency laws differ from the Indian insolvency laws in the following way: while in the former, the debtor company appoints the IP prior to formally filing for insolvency, and such IP most likely is appointed as the administrator when the company files for insolvency,<sup>54</sup> in the present regulatory regime in the latter, the Insolvency Resolution Professional (IRP) is appointed only after an application for the commencement of the CIRP is admitted by the NCLT.

While the existing regulations in India governing IPs set out the code of conduct and their powers and responsibilities, these regulations apply once the IP has been appointed, ie, once the CIRP application against the corporate debtor has been filed and accepted by the NCLT.<sup>55</sup>

In the event that pre-packs as a mode of corporate rescue are formally recognised in India, the regulations may need to be amended to contemplate the scope of powers and responsibilities of an IP in a pre-pack transaction. Guidance from the SIP 16 may be sought since it contemplates the specificities of the role of an IP in a pre-pack.<sup>56</sup>

## IV. LEGISLATIVE ASPECTS OF PRE-PACKS IN INDIA

Given the above background of the nature of pre-packs, certain specific issues set out below may be analysed from a legislative perspective to ascertain whether pre-packs would succeed in the Indian market.

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<sup>54</sup> See *supra* n. 30.

<sup>55</sup> See *Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016*. Notification No. IBBI/2016-17/GN/REG003 dated 23 November 2016.

<sup>56</sup> *Supra* n. 29.

### A. *Tradeable Value of the Company*

The main responsibility of an IRP and subsequently the resolution professional is to ensure that the debtor company functions as a going concern during CIRP.<sup>57</sup> The approval of the CoC is required for the IRP or the resolution professional to undertake activities which affect the rights of the members of the CoC.<sup>58</sup> Therefore, any decision which may be arrived at by an IP for sale of either a part or whole of the assets of the debtor company under a pre-pack would be permitted to be executed only after the debtor company has filed for insolvency and with the approval of the CoC.

The disadvantage of a sale that is concluded under such circumstances, ie, where the debtor company has already entered into insolvency, is that the assets of the debtor company would depreciate given the insolvency proceedings.<sup>59</sup> For instance, a company whose assets are valued at INR 10 prior to the commencement of the insolvency proceedings may only have a tradeable value of INR 2 after the insolvency proceedings are concluded and the resolution plan for sale of the assets or business of the debtor company is approved by the CoC and the NCLT. It is the creditors who would ultimately bear the losses of a devalued sale since their dues will abate in substantial proportion. In the case of an unlisted company, while the tradeable value of the company may not fall in the case of insolvency, there would nonetheless be a general decline in the affairs of the company, since vendors would not desire to trade with a distressed company and fresh credit would not be forthcoming.

The IBC provides for calculation of the liquidation value of the debtor company. The liquidation value of a corporate debtor is defined under the IBC as the ‘estimated realizable value of the assets

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<sup>57</sup> IBC, sections 20 and 25.

<sup>58</sup> IBC, section 28.

<sup>59</sup> Moneycontrol News, ‘HCC’s shares fall 7% after creditors file insolvency proceedings against Lavasa Corporation’ (2018) *Money Control*, at <https://www.moneycontrol.com/news/business/markets/hccs-shares-fall-7-after-creditors-file-insolvency-proceedings-against-lavasa-corporation-2901501.html> (last visited 24 February 2019).

of the corporate debtor if the corporate debtor were to be liquidated on the insolvency commencement date.<sup>60</sup> There is a fair amount of discussion surrounding how reliable the liquidation value of the company may be while assessing and formulating the resolution plan *vis-à-vis* the debtor company. Given that the liquidation value is essentially calculated at the insolvency commencement date,<sup>61</sup> there is a possibility that the figure so arrived at by the valuers may not reflect the actual value of the assets of the company, ie, its enterprise value.<sup>62</sup>

The IBC has been amended in view of the above and only the CoC members are permitted to have access to the liquidation value of the debtor company undergoing CIRP. Further, instead of the liquidation value, the resolution applicants are provided with the ‘fair value’ which is, ‘the estimated realizable value of the assets of the corporate debtor, if they were to be exchanged on the insolvency commencement date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had acted knowledgeably, prudently and without compulsion’.<sup>63</sup> While this would, to a great extent, help in ensuring that the value of the company does not depreciate, the damage to the brand value may have occurred due to the commencement of CIRP itself, not to mention the costs and the time taken for completion of CIRP.<sup>64</sup>

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<sup>60</sup> *Insolvency and Bankruptcy Board of India (Insolvency Resolution of Corporate Persons) Regulations, 2016*, regulation 2(k).

<sup>61</sup> The date of admission of an application for initiating corporate insolvency resolution process by the NCLT, which application is filed under sections 7, 9 or 10 of the IBC.

<sup>62</sup> FE Bureau, ‘Stressed asset valuation: Both fair and liquidation values to be considered’ (2018) *Financial Express*, at <https://www.financialexpress.com/economy/stressed-asset-valuation-both-fair-and-liquidation-values-to-be-considered/1057179/> (last visited 24 February 2019).

<sup>63</sup> *Insolvency and Bankruptcy Board of India (Insolvency Resolution of Corporate Persons) Regulations, 2016*, regulation 2(hb).

<sup>64</sup> ‘Insolvency and Bankruptcy Code: Here’s why resolution must be strictly time-bound’ (2017) *Financial Express*, at <https://www.financialexpress.com/opinion/insolvency-and-bankruptcy-code-heres-why-resolution-must-be-strictly-time-bound/675643/> (last visited 24 February 2019): ‘A very long CIRP period is likely to push the corporate towards liquidation while reducing its liquidation value. Further, a longer CIRP period means a larger number of firms under resolution process at a given point of time, which would impinge on economic growth.’

The proposition here is that for price discovery in terms of a pre-pack, the 'fair value' prescribed under the IBC may help the IPs, creditors and potential investors or counterparties to have a uniform criterion to evaluate the debtor company's tradeable value while formulating its terms. Thus, to that extent, extant laws will not have to be re-written to think of a new formula to calculate the enterprise value of a debtor company under a pre-pack.

### B. *Creditor Control*

Creditors play a crucial role in any corporate rescue mechanism. In view of the maturity of insolvency laws in the US and the UK and the continuing reliance placed by Indian authorities thereon, it would be useful to understand the significance and extent of control which a creditor exercises in a pre-pack in the aforesaid jurisdictions and analyse the same in the Indian context *vis-à-vis* pre-packs.

#### 1. The United Kingdom

In the UK, an interesting point arose basis the interpretation of the Insolvency Act in relation to an administrator's powers to sell the assets of the company in the period between his appointment and until a meeting of the creditors is to be called.<sup>65</sup> In fact, courts in England have at instances also considered whether pre-pack sales may be effectuated by an administrator soon after his appointment without seeking creditors' consent for concluding the transaction. Courts in the UK have held that administrators have sufficient discretion to manage the affairs of the company, including the discretion to refrain from taking into consideration the views of the creditors where deemed fit, for the purpose of ensuring smooth continuance of business of the debtor company.<sup>66</sup> This view has, to a great extent, been tempered by the SIP 16.<sup>67</sup>

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<sup>65</sup> *Re Transbus International Limited*, [2004] EWHC 932 (Ch), para 12 and *Re T&D Industries Plc* [2000] 1 WLR 646.

<sup>66</sup> *See Re Transbus International Limited*, [2004] EWHC 932 (Ch) and *Re T&D Industries Plc* [2000] 1 WLR 646.

<sup>67</sup> *Supra* n. 29.

Where a proposal for sale of all or substantially all of the business of the debtor company is being contemplated, the creditors of the debtor company in most situations possess the contractual right to know of such proposal.<sup>68</sup> Such a transaction will have an impact on the capacity of the debtor company to continue functioning and therefore, also affect its ability to repay debts.

Where a transaction for divestment of the business of the debtor company is undertaken by it, and more specifically undertaken foreseeing the oncoming insolvency, the creditors should ideally have a definitive say in the transaction. The flipside, however, is that certain creditors or classes of creditors apprehend that such divestment is for avoiding the payment of their dues. Once the operational part of a company is divested to another company, then the creditors feel that they essentially have nothing to go after, in case the company undergoes liquidation. For this reason, creditors initiate independent legal recovery against the debtor company to prevent the transaction from going through. In such scenarios, actual transactions from which the debtor company could have benefited, also fall through.

In the past, anticipating creditor interference in the UK, companies would undertake pre-packs without entering into negotiations with their creditors.<sup>69</sup> Subsequently, the IP, once appointed as the administrator, would immediately conclude the transaction without taking creditor approval.<sup>70</sup> However, to ensure that no action prejudicial to the interests of the company is undertaken, the SIP 16 has been put in place, which requires the IP to comply with certain established standards of conduct and procedures.<sup>71</sup>

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<sup>68</sup> Hugh Sims, 'Pre-packs: Recent law and practice' (2007) *Guildhall Chambers*, at [http://www.guildhallchambers.co.uk/files/Pre-packs\\_RecentLaw&Practice\\_HS&PeterCranston.pdf](http://www.guildhallchambers.co.uk/files/Pre-packs_RecentLaw&Practice_HS&PeterCranston.pdf) (last visited 24 February 2019).

<sup>69</sup> See *Re Transbus International Limited*, [2004] EWHC 932 (Ch) and *Re T&D Industries Plc* [2000] 1 WLR 646.

<sup>70</sup> See *Re Transbus International Limited*, [2004] EWHC 932 (Ch) and *Re T&D Industries Plc* [2000] 1 WLR 646.

<sup>71</sup> *Supra* n. 29.

## 2. The United States of America

As has been explained above, the US has a DIP mechanism available to debtor companies.

From a practical aspect, certain views exist in the US market as to when a voluntary filing under Chapter 11 may ultimately be of benefit to the debtor company. A debtor company, which has a certain class of lenders with a homogeneous type of debt, may benefit more from a pre-pack, given that prior negotiations on a bilateral basis will yield effective results for the debtor company.

When a debtor company has to negotiate with various classes of creditors, for instance, trade creditors, landlords, crown creditors, workmen or employees, the expectation that each class of creditor will have from the debtor company will vary widely, given the nature of the dues owed to them, and in such circumstances, even a pre-pack undertaken by the debtor company (with speediness of procedure as the primary consideration) may be rendered fruitless as the time spent in negotiating with the wide variety of creditors may amount to the same time which a conventional insolvency resolution process would take.<sup>72</sup>

## 3. India

As stated above, the IBC follows a more UK-centric approach to the management of the affairs of the debtor company once the application for commencement of its insolvency is admitted by the court.<sup>73</sup> It has been reiterated by the Supreme Court of India in its landmark judgment in the case of *Innoventive Industries v. ICICI Bank Ltd.*,<sup>74</sup> that the promoters of a debtor company under CIRP have no

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<sup>72</sup> See Douglas M Folley and Jame E Van Horn, 'Pre-packs on the Rise in Chapter 11 Bankruptcies: Prenegotiated Plans Can Accelerate Re-negotiations' (2008) *Bankruptcy Alternative*, at <https://www.mcguirewoods.com/news-resources/publications/prepacks.pdf> (last visited 24 February 2019).

<sup>73</sup> IBC, section 17.

<sup>74</sup> *Innoventive Industries v. ICICI Bank Ltd.* (2018) 1 SCC 407.

powers to take any decisions on behalf of the debtor company, or for management of the debtor company.<sup>75</sup>

In India, the appointed IRP is responsible to ensure that the interests of all the stakeholders of the debtor company are protected, and not just those of certain classes of creditors. This ensures that the resolution plan formulated is not prejudicial to a section or class of creditors of the debtor company.

A foreseeable problem that may arise in India, is where *inter se* creditor rights are concerned. Where there is a dissenting creditor in terms of a pre-pack, it would result in the failure of the pre-pack (absent a formal procedure on democratic decision-making and enforcement of majority vote). It would therefore be a crucial consideration for a legislation contemplating pre-packs to clearly set out the provisions pertaining to the *inter se* treatment of creditors in terms of decision-making under a pre-pack.

A long-drawn process where parties end up negotiating terms for days on end would be counterproductive to the spirit of a pre-pack. Notwithstanding the aforesaid, in the event the principle of majority democratic vote is incorporated as a part of the pre-pack regime, whether the dissenting creditor would continue to have the right to seek initiation of CIRP under the IBC, *de hors* the pre-pack terms, would be a key consideration for legislators.

### C. Connected Party Pre-packs

#### 1. The United Kingdom

It is a fact that in the UK, it is usually the existing management which takes over the business or assets of the debtor company and commences business afresh. These arrangements are referred to as

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<sup>75</sup> In the above judgment, the apex court further clarified that the existing management of the debtor company does not possess the power to file an appeal against orders of the court pertaining to the debtor or to appear on behalf of the company in its proceedings as representatives of the debtor company.

connected party<sup>76</sup> pre-packs, giving the term ‘phoenix’ company to the resultant new entity with the ‘fresh’ management. It was estimated in the UK that in the period between 1 November 2015 to 1 November 2016, of the 1,689 cases that were referred for administration, 22 per cent of the cases were sought to be resolved under the pre-pack route and more than half of these, ie, 51 per cent of the cases were arrangements entered into with connected parties.<sup>77</sup>

It may be inferred from the above statistics that one of the strongest motives for a company’s directors to undertake a pre-pack is to regain control of its business and/or assets, however, under a different identity. It is arguable that this roundabout manner of regaining control of the debtor company can result in circumvention of the insolvency laws. This particularly becomes an issue where a company is facing huge losses primarily due to promoter or managerial inefficiency.<sup>78</sup>

To regulate the sphere of connected party pre-packs, one of the recommendations of the Graham Committee set up to review the existing set of pre-pack laws in the UK, was to create a pool of independent business people to assess and give their opinion on whether the proposed arrangement of the debtor company would be viable and beneficial both to the rights of the creditors and the debtors.<sup>79</sup> The recommendation of the Graham Committee was carried

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<sup>76</sup> The Insolvency Act, section 249 defines a connected party as:  
‘For the purposes of any provision in this Group of Parts, a person is connected with a company if—

(a) he is a director or shadow director of the company or an associate of such a director or shadow director, or

(b) he is an associate of the company,

and “associate” has the meaning given by section 435 in Part XVIII of this Act.’

<sup>77</sup> ‘Pre-pack Pool: Annual Review’, (2017) *Pre-pack Pool*, at <https://www.prepackpool.co.uk/uploads/files/documents/Pre-pack-Pool-Annual-Review-2017.pdf>, page 7 (last visited 24 February 2019).

<sup>78</sup> Amar Bhatti, ‘Insolvency - Pre-packs’ (2016) *LinkedIn*, at <https://www.linkedin.com/pulse/insolvency-pre-packs-amar-m-bhatti> (last visited 24 February 2019).

<sup>79</sup> House of Commons, Business, Innovation and Skills Committee, ‘The Insolvency Service’ (2013) Sixth Report of Session 2012-13; Evidence 67, [HC 675], 6 February 2013.

out and subsequently a pre-pack pool, which is an independent body consisting of ‘experienced business people who will offer an opinion on the purchase of a business and/or its assets by connected parties to a company where pre-packaged sale is proposed’, was set up.<sup>80</sup>

## 2. India

The extent of involvement of connected parties in pre-packs may be worth analysing in the event legislative framework is introduced for regulating pre-packs in India.

Where CIRP is initiated against a debtor company which is party to an inter-company loan transaction, the lender company (which is the related party) will not have the right of representation, participation or voting in the CoC.<sup>81</sup>

From a resolution applicant’s perspective, the IBC was specifically amended by *The Insolvency and Bankruptcy Code (Amendment) Act, 2018* (Amendment Act)<sup>82</sup> to *inter alia* address the issue of connected party involvement in CIRP of a debtor company. The Amendment Act under section 29A has effectively barred the existing management of the debtor company from taking any steps which would permit them to regain control over the assets of the debtor company.<sup>83</sup> The Amendment Act culminated due to cases of CIRP being undermined by the existing promoter group.<sup>84</sup>

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<sup>80</sup> See *supra* n. 78. In such scenarios, it would be counterproductive for a company to enter into a pre-pack given that there is no or very less assurance that the existing set of promoters will succeed in keeping the company afloat. This in turn might discourage suppliers of the debtor company from engaging in business with the phoenix company.

<sup>81</sup> IBC, section 21(2).

<sup>82</sup> The *Amendment Act* was passed by both houses of Parliament on 19 January 2018.

<sup>83</sup> IBC, section 29A.

<sup>84</sup> In *Edelweiss Asset Reconstruction Co. Ltd. v. Synergies Dooray Automotive Ltd. & Ors.* CA (AT) Nos. 169 to 173-2017, by divesting assets of the debtor company to an associate company, the associate company of the debtor company was able to participate in the CoC as a majority creditor. The resolution plan which was ultimately formulated envisaged a 98 per cent haircut for the lenders of the debtor company.

Under the Amendment Act, as per section 29A, a connected person<sup>85</sup> is barred from proposing a resolution plan, ie, acting as a resolution applicant, if the applicant falls foul of the various criteria set out under section 29A. The most important criterion being that the resolution applicant ‘has an account, or an account of a corporate debtor under the management or control of such person or of whom such person is a promoter, classified as non-performing asset in accordance with the guidelines of the Reserve Bank of India issued under *The Banking Regulation Act, 1949* and at least a period of one year has lapsed from the date of such classification till the date of commencement of the corporate insolvency resolution process of the corporate debtor.’ There is a window provided for a connected person to act as a resolution applicant if the connected person makes payment of all overdue amounts with interest thereon and charges relating to NPA accounts before submission of the resolution plan.

Once the resolution plan is implemented, the existing management, including the promoters, are replaced and the debtor company is managed by the IRP. Further, under the Amendment Act, the terms of the resolution plan must not contemplate scenarios pursuant to which, during the tenure of the resolution period, the existing management of the debtor company may return to manage the debtor company. The management of the company during the implementation of the resolution plan should be vested with entities which are required to be completely unconnected from the existing management of the debtor company.<sup>86</sup>

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<sup>85</sup> A “connected person” is –

- ‘(i) any person who is the promoter or in the management or control of the resolution applicant; or
- (ii) any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
- (iii) the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)’. By subsequent amendments, certain entities have been carved out and been permitted to participate as a resolution applicant during CIRP, to further the aim of the IBC.’

<sup>86</sup> See *supra* n. 84.

### 3. Can Connected Party Pre-packs Be Considered in India?

Whether permitting existing management to retain control of a flailing company, specifically as permitted in the US, is desirable or not, is debatable. If the insolvency of the company was caused essentially due to mismanagement by the existing board, then permitting the existing management to continue controlling the debtor company would seem counterproductive. However, if the inability of the company to repay its debts can be attributed to external factors, such as sluggish growth in a particular sector of the economy and temporary cash flow mismatch, then allowing the existing management to continue overseeing the functioning of the company would be economical as the company would be in a better position to revive under its existing management.

There may be differing views on this subject while considering a connected party pre-pack, with arguments being made for both sides –on one hand, support for ensuring that all links which the existing management of the debtor company had with the debtor company are severed from it, and on the other hand, views that where the distress in the company is not caused by promoter or managerial causes but by financial risks or business risks, actually replacing the management of the company may be counterproductive.<sup>87</sup>

There exist certain arguments in support of the creditor-centric approach where the management of the affairs of the debtor company vests in the court-appointed administrators, citing that the ‘historical link between the insolvency to the displacement of management is very strong’.<sup>88</sup> However, the argument for the existing management retaining control over the debtor company is also strong, primarily

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<sup>87</sup> Andy Mukherjee, ‘View: India turns a bad-loan tragedy into a bankruptcy farce’ (2018) *Economic Times*, at [s://economictimes.indiatimes.com/industry/banking/finance/banking/india-turns-a-bad-loan-tragedy-into-a-bankruptcy-farce/articleshow/63839265.cms](https://economictimes.indiatimes.com/industry/banking/finance/banking/india-turns-a-bad-loan-tragedy-into-a-bankruptcy-farce/articleshow/63839265.cms) (last visited 24 February 2019).

<sup>88</sup> ‘Comparison of Chapter 11 of the United States Bankruptcy Code’, *Jonesday* at [https://www.jonesday.com/files/Publication/1ec093d4-66fb-42a6-8115-be0694c59443/Presentation/PublicationAttachment/e5b46572-7aeb-4c34-ab2e-bee2f8f3d3c2/Comparison%20of%20Chapter%2011%20\(A4\).pdf](https://www.jonesday.com/files/Publication/1ec093d4-66fb-42a6-8115-be0694c59443/Presentation/PublicationAttachment/e5b46572-7aeb-4c34-ab2e-bee2f8f3d3c2/Comparison%20of%20Chapter%2011%20(A4).pdf), page 13 (last visited 24 February 2019).

when a debtor company files for voluntary bankruptcy, as there is an added incentive for the debtor company to reorganise its business efficiently. This is because there is an extra layer of court protection to the creditors on the failure of the debtor company to repay its dues. There are, therefore, benefits to both approaches regarding in whom the control of a debtor company ultimately vests.

The present section 29A of the IBC, as amended from time to time, has tempered the erstwhile position of law which may have seemed harsh. However, given the strong stance that the Indian legislature has taken against connected party involvement in resolution of the corporate debtor, one may assume that connected party pre-packs may not be favoured in the event that pre-packs are formalised in India by the regulators, if not altogether prohibited along the lines of the present section 29A of the IBC.

*D. Would the Law Require Reform for Pre-packs?*

The introduction of pre-packs in India would require amendment to the extant insolvency laws. The IBC and its ancillary rules and regulations would require amendments to incorporate provisions which would not only enable but also regulate the sphere of pre-packs, depending on how much independence is considered to be vested in the parties to undertake and formulate the terms of a pre-pack.

Presently, in India, for a person or entity to be appointed as an IRP or resolution professional, such person or entity is required to meet certain qualifications and be registered as an IP with an insolvency professional agency, which in turn is registered with the Insolvency and Bankruptcy Board of India. These IPs or IP entities could serve a dual function just as the IPs in UK.

A specific set of regulations may also be required to regulate pre-packs. Some of the features that these regulations could contemplate have been set out below:

- a) It would be the primary responsibility of the debtor company to mandatorily appoint an IP or IP entity prior to resolving to undertake a pre-pack.

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- b) The IP or IP entity would then undertake a detailed diligence of the debtor company and prepare an Information Memorandum (IM) which, just as in the case of CIRP, would be required to be kept strictly confidential. This IM would be permitted to be reviewed only by the creditors and bidders and subject to point (d).
  - c) It must be ensured that each creditor or stakeholder of the debtor company is notified of and made aware of the nature of the transaction being contemplated.
  - d) The most essential feature of a pre-pack would be for the IP or IP entity to ensure that adequate safeguards for maintaining confidentiality are in place, such as non-disclosure agreements and undertakings provided by potential bidders, and to ensure that participation of a creditor in the pre-pack does not jeopardise the process by the creditor commencing insolvency proceedings in the midst of a pre-pack.
  - e) As part of the terms of an understanding to undertake a pre-pack transaction, the parties may also be subjected to a 'stand-still period' where the creditors of the debtor company are restricted from independently initiating recovery against the debtor company during the subsistence of the pre-pack formulation process, which would undermine the entire process. The option of objecting to a pre-pack would always be available to the dissenting creditor at the time the company files for insolvency.
  - f) In continuation of point (c), it would be critical for the NCLT to satisfy itself that the interests of all stakeholders are considered prior to approving the pre-pack.
  - g) The decision to permit connected party pre-packs is open for debate. However, given the strong stance that the legislature has taken against involvement of connected persons in the insolvency resolution process of a debtor company, it seems likely that connected party pre-packs would be prohibited or strictly regulated in India.

- h) In the event a sale of the business or assets of the debtor company is envisaged as a part of the pre-pack, the next step would be to seek potential acquirers or investors. The IP or IP entity, at this stage, may benefit from the involvement of the debtor company in this regard as the debtor company would be more adept at identifying the best terms and conditions at which the transaction may be concluded.

Delineating the finer provisions in relation to pre-packs will require considerable analysis of insolvency laws of other jurisdictions. Just as the introduction of a new legislation requires time to test how it fares, so will pre-packs be analysed adequately as it is yet uncharted territory.

## V. TO PRE-PACK OR NOT TO PRE-PACK?

### A. *Benefits of a Pre-pack*

Lenders add restrictive covenants to loan agreements that prevent a debtor company from alienating its assets (which are secured) or disposing of all or a majority of its business without creditor approval.<sup>89</sup> Therefore, the debtor company along with the IP are bound to ensure that all creditors' interests are considered to effectuate a meaningful pre-pack.

A pre-pack which does not consider the interests of a particular creditor will ultimately lead to a creditor independently initiating recovery actions against the corporate debtor, thereby rendering the entire exercise of a pre-pack futile.

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<sup>89</sup> Typical restrictive clauses in a loan agreement include prohibition on:

- (i) change in the management control of the debtor company (ie the power to direct the management and policies of the company);
- (ii) effecting any change in the capital structure of the company;
- (iii) undertaking any merger, consolidation, reorganisation, reconstruction or amalgamation;
- (iv) amending or modifying the charter documents of the company;
- (v) register or give effect to any transfer in the shareholding of the promoter below a prescribed threshold;
- (vi) sale of any asset which is secured to or financed by the lender.

To therefore enable debtor companies to undertake pre-packs, the first question posed to administrators and legislators is: Will the Indian situation commercially benefit from pre-packs? There may be divergent views on this. While arguing against the advent of pre-packs, it may be said that a pre-pack is not required at the moment, given that the IBC provides for a fairly all-encompassing regime in order to identify and resolve insolvency. It may also be stated that a pre-pack may in fact not be desirable since it may permit the debtor company to divest its business and assets which, in all fairness, must be made available for creditor action and dealt with formally as per the prevalent insolvency laws of the land. It is essential, therefore, to evaluate both benefits and disadvantages of a pre-pack.

Pre-packs are undertaken typically with the following advantages in mind:

- (1) A pre-pack provides the debtor company with a way to realise its assets and repay its outstanding dues.
- (2) In the event a change in management of the debtor company is contemplated as a part of a pre-pack, the assets of the company are put to good use, albeit under a new management.
- (3) A pre-pack reduces the strenuous and cumbersome exercise, which all involved parties are put through, during conventional restructuring or even liquidation of a company.
- (4) The insolvency process is a costly procedure and the costs of the same are borne by the estate of the debtor company. It is from the assets of the debtor company that the insolvency costs are discharged. Valuation of assets and costs and fees of professionals and resolution professional costs sometimes tax an already burdened company to a great extent.<sup>90</sup> A pre-pack is a promising way of achieving a smooth transition of the assets of the company in a cost-effective manner.

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<sup>90</sup> See Insolvency and Bankruptcy Board of India Circular number IBBI/IP/013/2018 'Fee and other Expenses incurred for CIRP' (2018) *Insolvency and Bankruptcy Board of India*, at [http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20\[June%202018\]\\_2018-06-18%2014:06:58.pdf](http://ibbi.gov.in/webadmin/pdf/whatsnew/2018/Jun/Circular%20on%20Fee%20and%20other%20Expenses%20incurred%20for%20CIRP%20[June%202018]_2018-06-18%2014:06:58.pdf) (last visited 24 February 2019).

- (5) Creditors have better prospects of expecting greater returns since the debtor company's tradeable value is not eroded by virtue of the insolvency proceedings as the assets are valued and sold at a price determined prior to the initiation of insolvency.
- (6) Given the distressed status of the company, a pre-pack is characterised by the speedy procedure followed for concluding the terms of the proposed sale, which helps in addressing the stress in the company and effectuating company rescue before the value of the assets of the debtor degenerates or before creditors stake claim to it.
- (7) Job protection for employees of the debtor company is one of the primary considerations for pre-packs where the long-drawn process of administration does not hamper the ongoing business of the company and poaching of resources by competitors of the debtor company can be curtailed to a great extent.<sup>91</sup> The UK also has laws which mandatorily require employees to be protected in the event of change of control, when a business or undertaking, or part of one, is transferred to a new employer.<sup>92</sup>

### *B. The Disadvantages of a Pre-pack*

Given the inherent nature of pre-packs, it has faced strong opposition from certain quarters which have cited the manner in which pre-packs are concluded. Unsecured creditors typically contend that as opposed to the insolvency process as it currently stands, the process of entering into pre-pack arrangements is opaque,<sup>93</sup> may not consider the interests of the creditors and other stakeholders, and has an element of risk that the assets of the debtor company or its business

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<sup>91</sup> Association of Business Recovery Professionals, 'Pre-packaged Sales', *Rescue Recovery Renewal*, at [https://www.r3.org.uk/media/documents/publications/press/Pre-packs\\_briefing.pdf](https://www.r3.org.uk/media/documents/publications/press/Pre-packs_briefing.pdf) (last visited 24 February 2019).

<sup>92</sup> *The Transfer of Undertakings (Protection of Employees on Transfer of Undertakings) Regulations, 2003* mandatorily requires protection of employees in the event of a business or undertaking, or part of one, is transferred to a new employer.

<sup>93</sup> Louise Lang, 'Pre-pack administration: Pros and Cons', (2015) *The Gazette Official Public Record*, at <https://www.thegazette.co.uk/insolvency/content/100359> (last visited 24 February 2019).

may be transferred to entities without keeping in mind the interests of the creditors or other stakeholders.

In the Indian scenario, it may also be argued that the interests of the unsecured creditors are usually not considered due to their low priority in the liquidation waterfall mechanism set out under the insolvency laws, and in case of pre-packs, such class of creditors has no opportunity to object to the transaction. Adequate remedies and recourse in relation to pre-packs to check the wide and uncontrolled use of pre-packs by debtor companies, as a means of avoiding the insolvency process, would need to be contemplated thereunder.

There exist some views that pre-pack arrangements may be entered into without taking into consideration the interests of all stakeholders. It is arguable that where the insolvency of a company has been brought upon the company by its own management (due to operational mismanagement of the existing promoters or management), permitting them to control the alienation of the assets *de hors* the statutory insolvency framework is highly prejudicial to the interest of all the stakeholders. The bidding for the assets or business of the debtor company may also pose a problem. This would fall within the IP's responsibility, who would ultimately be answerable to the insolvency court established under the insolvency laws of that particular jurisdiction. The IP would also have to ensure that the assets or business of the company are widely marketed notwithstanding its impending insolvency, hampering its prospects of continued functioning. Since the management of the debtor company presently remains with the company until admission of the CIRP application, the management in case of a pre-pack would continue to vest in the debtor company.

Finally, it must be highlighted that any action which is taken by the administrator must be with a view to: (i) ensuring that the company functions as a going concern and (ii) maximise value of the assets of the debtor company to ensure that the dues of the creditors do not get affected.<sup>94</sup>

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<sup>94</sup> Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar Publishing Cheltenham 2016).

## VI. CONCLUSION

In view of the analysis undertaken in this article, corporate rescue and specifically pre-packs would prove useful since liquidation of borrowers seems far from a viable solution to cure the longstanding malaise of NPAs in India.

Corporate rescue, for this reason, is looked upon by many as the last resort before recovery proceedings are initiated. In such cases, the option may be considered by lenders of even big borrowers as a means to exit its exposure to turnaround entities (be it by divesting the debt or change of management of the debtor company) who actually possess the bandwidth to fund companies with intense capital requirements in certain sectors.

In the present situation of NPAs with which the financial sector is stranded, pre-packs may prove to be a useful tool to aid the IBC process. Such pre-pack transactions however, would have to be strictly within the four corners of a specifically formulated framework, be vetted thoroughly and approved by specialised adjudicatory bodies which may be set up under the aegis of the NCLT, which could substantially cut down the requirement of NCLT participation as well.

In fact, the Chairman, Insolvency and Bankruptcy Board of India and the NCLT President have expressed confidence that insolvency processes would soon mature and India may see the introduction of pre-packs.<sup>95</sup>

Pre-packs could thus prove helpful in a scenario where, despite availability of umpteen corporate rescue modes, creditors continue

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<sup>95</sup> See Menaka Doshi, 'Who Among The 353 Resolution Professionals Can Manage 12 Large Insolvencies?' (2017) *Bloomberg Quint*, at <https://www.bloomberquint.com/law-and-policy/2017/06/19/challenges-facing-insolvency-professionals-large-corporate-insolvencies-bankruptcies-nclt-ibbi-ms-sahoo-comments> (last visited 24 February 2019) and KR Srivats, 'Time ripe to consider 'pre-packs' under insolvency: NCLT President' (2018) *The Hindu Business Line*, at <https://www.thehindubusinessline.com/economy/time-ripe-to-consider-pre-packs-under-insolvency-nclt-president/article23650251.ece> (last visited 24 February 2019).

to face a situation where they are expected to make high provisions against NPAs and also reconcile to face huge haircuts. Security enforcement and credit enhancement may seem adequate precautions to be taken at the time of sanction of big loans but these safeguards seem to prove inadequate in the long run on a large-scale, for the purpose of remedying the existing NPA problem and resolving the deep-rooted default culture.

# DECONSTRUCTING THE DICHOTOMY IN CULTURAL PROPERTY LAW<sup>†</sup>

*Vedika Shah* \*

## I. INTRODUCTION

The world's oldest extant book 'Jikji' housed at the Bibliothèque Nationale de France has garnered much attention worldwide. Printed in 1377 during the reign of the Koryō Dynasty in Korea, Jikji is a Korean Buddhist document comprising of excerpts from the writings of erudite Buddhist monks. Since around the 1950s, Jikji has been displayed at the Bibliothèque Nationale de France.<sup>1</sup> Though the circumstances surrounding Jikji's transfer to France are unclear, it has been alleged by some that Jikji was looted from Korea by the French, while several others contend that Jikji was legally taken out of the country by a French private collector, and was thereafter donated to the Bibliothèque Nationale.<sup>2</sup>

At its heart, the Jikji controversy rests upon the rival claims of Korea and France to this cultural object of great significance. Korea, on one hand claims that Jikji, bearing historical significance to the people of Korea, must be rightfully returned to its source nation. In contrast, the Bibliothèque Nationale de France contends that Jikji forms an integral part of the cultural heritage of mankind, and does not belong to one particular country. The Bibliothèque Nationale de France further contends that given the unmatched technological and scholarly

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† This article reflects the position of law as on 24 February 2019.

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1 Hye Ok Park, 'The History of Pre-Gutenberg Woodblock and Movable Type Printing in Korea' (2014) 4 *International Journal of Humanities and Social Science*, 9, 14.

2 Lee Eun-joo, 'Jikji Buddhist Documents – A Question of Ownership' (2009), *BTN-Buddhist Channel*, at <http://www.buddhistchannel.tv/index.php?id=92,7622,0,0,1,0#.WcJx8ohx3IU> (last visited 24 February 2019).

resources that it possesses, Jikji has been better preserved and secured in France than it would be elsewhere.<sup>3</sup>

The contentious claims of the two countries reflect two competing ideologies dominating the cultural property debate today—cultural nationalism versus cultural internationalism.<sup>4</sup>

The present article explores the two fundamental theories of the cultural property conundrum and examines in great detail the rationale behind demanding return of cultural property. Part I of this article is introductory in nature. Part II delves into the concepts of cultural nationalism and cultural internationalism and explains their facets. Part III examines the application of the theories of cultural nationalism and internationalism in four varying circumstances. In each situation, the author has proposed a solution best suited to the needs of that peculiar situation. The circumstances analysed include: disputes between metropolises and their colonies over ownership of acquired cultural property; the existence of multiple claims by different nations, each having varied connections to a single piece of cultural property; determination for preservation of cultural property in conflict-ridden nations; and lastly, discerning the rivaling claims of Greece and Britain with respect to the Parthenon Marbles and consequently, the need to find a way through. The article ends with concluding statements and explores which of the two theories is more tenable.

## II. THE CONCEPT OF CULTURAL PROPERTY AND ITS THEORIES

### A. *Cultural Property*

The word ‘cultural property’ was first defined in the *Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954*

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<sup>3</sup> Kwak, ‘World Heritage Rights versus National Cultural Property Rights: The Case of the Jikji’ (2005), *Carnegie Council for Ethics in International Affairs*, available at [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_12/online\\_exclusive/5153](https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/online_exclusive/5153) (last visited 24 February 2019).

<sup>4</sup> Naomi Mezey, ‘The Paradoxes of Cultural Property’ (2007) 107 *Columbia Law Review* 2004, 2011.

(1954 Convention)<sup>5</sup> as movable and immovable property of great importance to the cultural heritage of people.<sup>6</sup> ‘Immovable property’ has been defined to include monuments of architecture, art or history, archaeological sites whereas movable property includes manuscripts, books, scientific collection among others.<sup>7</sup>

The 1954 Convention was enacted as a reaction to the massive cultural looting which took place during World War II, however, it confined itself to protecting cultural property only during times of armed conflict. It failed to address looting, illicit importing and pillaging of cultural property in peacetime.

Prior to 1970, the illegal trade of antique objects and cultural items was widespread. Consequently, several sovereign states embarked upon preservation of important historical and culturally significant objects by enacting the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970* (1970 Convention).<sup>8</sup> The 1970 Convention enabled safeguarding of cultural property in peacetime. The meaning ascribed to the term ‘cultural property’ in the 1970 Convention is very similar to that of the 1954 Convention.

The *UNESCO Recommendation Concerning the International Exchange of Cultural Property, 1976* further went on to give a definitive meaning to the term ‘cultural property’, as being ‘items which are used as means of expressions, evincing human creation and evolution of nature for *inter alia* historical, artistic, scientific or technical value and interest.’<sup>9</sup> The aforesaid recommendation gives a more inclusive definition of cultural property, thus encompassing a wider category of objects.

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<sup>5</sup> *UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict* (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

<sup>6</sup> 1954 Convention, article 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

<sup>9</sup> UNESCO, Records of the General Conference, 19th Session, *Recommendation Concerning the International Exchange of Cultural Property* (26 November 1976), para 1.

In context of cultural property, disputes pertaining to ownership arise between two parties, ie, the source nation and the market nation. The concept of what constitutes a 'source nation' has been widely contested. Several authors have propounded different interpretations of this concept. The popular leaning has been towards 'source nation' being referred to as the place where cultural property is produced and with which people of that country have a direct and genuine link.<sup>10</sup>

On the other hand, countries that purchase, or more often than not, loot and pillage cultural property from the source nations or art-rich nations are known as 'market nations'.<sup>11</sup> For instance, the Benin Bronzes, a collection of numerous metal plaques and intricately carved sculptures depicting the rulers of the ancient kingdom of Nigeria, formerly known as Benin, were looted in 1897 by Britain during an attack on Benin City, and since then have been treated as spoils of war and have been property of the British Museum. In such a scenario, Nigeria would be treated as the source nation whereas Britain would fall under the category of market nations.

The burgeoning scuffle between source nations and market nations has sparked a growing interest in cultural property, and has brought the cultural property debate, particularly the aspect concerning the restitution of cultural property to source nations, to the forefront. The perception as to what constitutes cultural property largely differs from region to region. An object which may be considered significant in one culture may not be so considered in another. A strict approach in designating what constitutes cultural property would be antithetical to a country's autonomy in determining its cultural identity.

### *B. Cultural Nationalism*

The proponents of the theory of cultural nationalism believe that states have a right to retain their cultural treasures within their territorial boundaries.<sup>12</sup> They believe they are entitled to complete

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<sup>10</sup> Lyndel Prott, *Commentaire Relatif à La Convention Unidroit* (1st edn UNESCO 2000) 46.

<sup>11</sup> John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77 *California Law Review* 339, 340.

<sup>12</sup> *Ibid.*, 350, 351.

control over cultural property that originated in their territory and forms part of their country's national patrimony. Cultural nationalists place emphasis on national interests and values. According to them, cultural property is an element of national culture and can be understood only in relation to its origin, history and traditional setting and must be kept in its original archaeological context.<sup>13</sup> They believe that many market nations in the past have done much damage to the cultural heritage of source nations and to protect the national interests and values of these nations, return of the plundered property to the source nation is essential.

The two chief conventions dealing with illegal import, export, theft and transfer of ownership of cultural property are the 1970 Convention and the *UNIDROIT Convention on Stolen and or Illegally Exported Cultural Objects, 1995* (1995 Convention).<sup>14</sup> Both these conventions condemn illicit import, export and transfer of ownership of cultural property and recognise the absolute right of source nations to retain their cultural property.<sup>15</sup> While the 1970 Convention reflects a milder undertone in encouraging parties to return cultural property to source nations, the 1995 Convention emphatically advocates for the right of the source nations to have their cultural property restituted. Furthermore, the United Nations General Assembly has recognised the right of the source nation to have its cultural property returned to it.<sup>16</sup> Cultural property has been repatriated to the source nation

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<sup>13</sup> James Cuno, *Whose Culture? The Promise of Museums and the Debate over Antiquities* (1st edn Princeton University Press Princeton 2009) 9.

<sup>14</sup> *UNIDROIT Convention on Stolen and or Illegally Exported Cultural Objects* (adopted on 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457.

<sup>15</sup> 1970 Convention, articles 3 and 6, and 1995 Convention, articles 3 and 5.

<sup>16</sup> General Assembly, 'Resolution 3026 (1972): Human Rights and Scientific and Technological Developments' (A/RES/3026(XXVII)A, December 1972); General Assembly, 'Resolution 3148 (1973): Preservation and Future Developments of Cultural Values' (A/RES/3148(XXVIII), December 1973); General Assembly, 'Resolution 58 (2003): Return or Restitution of Cultural Property to Countries of Origin' (A/RES/58/17, December 2003); General Assembly, 'Resolution 61 (2007) : Return or Restitution of Cultural Property to Countries of Origin', (A/RES/61/52, February 2007); General Assembly, 'Resolution 67: Return or Restitution of Cultural Property to Countries of Origin' (A/RES/67/80 (2012) and General Assembly, 'Resolution 67 (2015): Return or Restitution of Cultural Property to Countries of Origin' (A/RES/70/76, December 2015).

on a few occasions. The most recent example of this is the return of the Maori's skull of New Zealand by Germany. The Maori, an indigenous community in New Zealand, traditionally preserved the skulls of revered male relatives, famous chiefs and enemies killed in war. From the 1840s to 1910, thousands of heads and skulls of indigenous Maori were taken from New Zealand by European and American anthropologists with many ending up in museums or private collections. One such museum, the Rautenstrauch Joest Museum of World Cultures in Cologne, Germany, returned such a preserved Maori skull to New Zealand. Henriette Reker, the mayor of Cologne, told the delegation from New Zealand in a statement made at the ceremony, 'I cannot reverse the wounds of the past. But I have done what I could to take your descendant out of an anonymous collection and return his human dignity.'<sup>17</sup> Reaching such a compromise today not only conveys a rightful regard for the cultural sentiments of source nations which they ought to be granted, but is also the epitome of utmost international cooperation. Other such repatriations include the Makonde Mask to the United Republic of Tanzania,<sup>18</sup> the Mask of Gorgon to Algeria<sup>19</sup> and Maori heads to New Zealand.<sup>20</sup>

The theory of cultural nationalism propagates that in order to lead a fulfilling life and ensure a secure identity, people often feel the need to be exposed to their history, most of which is represented by historical objects. These objects provide people with the means to

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<sup>17</sup> Kurt Bayer, '60 Maori and Moriori heads and skulls repatriated from UK and US', *The New Zealand Herald*, at [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11638270](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11638270) (last visited 24 February 2019).

<sup>18</sup> Return or Restitution Cases, *UNESCO website*, at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/return-or-restitution-cases/> (last visited 24 February 2019).

<sup>19</sup> 'Recent Restitution cases of cultural objects using the 1970 Convention,' *UNESCO website*, at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/recent-restitution-cases-of-cultural-objects-using-the-1970-convention/> (last visited 24 February 2019).

<sup>20</sup> Press Association, 'Maori Chief's Mummified Head to Return to New Zealand After 150 Years in UK' (2013), *The Guardian*, at <http://www.theguardian.com/culture/2013/aug/06/maori-chief-head-returned-new-zealand> (last visited 24 February 2019).

connect to their heritage and roots. On this basis, it is perceived as a moral imperative for market nations to return to source nations their cultural property.

### *C. Cultural Internationalism*

The cultural internationalism theory propounds that cultural property is of vital importance for the people of the world and must therefore be available all around the world, so that everyone has an opportunity to access their own as well as the cultural achievements of other people.<sup>21</sup> It is not necessary that something made in a particular place must belong there, or that the present government of a nation should have under its control artefacts historically associated with its territory. Given that we live in an increasingly globalised society where there is growing societal acceptance towards harmonisation of cultures, cultural internationalism is viewed as quintessential for the preservation of cultural property.

The principles of preservation, access and integrity are the three principal tenets of the cultural internationalism theory which must be considered while determining the appropriate allocation of cultural property.<sup>22</sup> Cultural internationalism mandates preservation.<sup>23</sup> There exists a presumption that market nations are better situated to care for and preserve the property for the enjoyment of mankind. The obligation is recognised by the 1970 Convention itself and requires the retaining state to promote ‘the development or the establishment of scientific and technical institutions, (museums, libraries, archives, laboratories, workshops) required to ensure the preservation and

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<sup>21</sup> John Henry Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (2nd edn Kluwer Law International Netherlands 2009) 61.

<sup>22</sup> *Ibid.*, 1912.

<sup>23</sup> John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’, (1986), Vol. 80, No. 4, *The American Journal Of International Law*, 831-53.

presentation of cultural property'. Even generally, the obligation to preserve is internationally recognised.<sup>24</sup>

The principle of access recognises that cultural property is a medium through which the peoples of the world gain intellectual exchange and hence they have a right to claim access to it.<sup>25</sup> The concept of 'common heritage of mankind' promotes widespread access to cultural property and its preservation for future generations; states are therefore responsible for the preservation of cultural property and have the duty to take appropriate steps to render it accessible to everyone.<sup>26</sup> Cultural internationalism opines that cultural property forms part of the common cultural heritage of mankind and its protection is an *erga omnes*<sup>27</sup> obligation.<sup>28</sup> Lastly, the principle of integrity signifies that any work of art or other cultural object should be as intact and whole as possible—the object loses value (aesthetically, scientifically or monetarily) even if some of it has been separated.<sup>29</sup>

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<sup>24</sup> UNESCO, 'Records of the General Conference: Recommendation on International Principles Applicable to Archaeological Excavations' (9th Session, 5 December 1956), Preamble; UNESCO, 'Records of the General Conference: Recommendation for the Protection of Movable Cultural Property' (20th Session, 28 November 1978), para 15; UNESCO, 'Records of the General Conference: Recommendation Concerning the Protection, at the National Level, of the Cultural and National Heritage' (17th Session, 16 November, 1972).

<sup>25</sup> Sharon Williams, *The International and National Protection of Movable Cultural Property: A Comparative Analysis* (Oceana Publications, New York, 1978)1, 52.

<sup>26</sup> Stephen Urice, *The Beautiful One Has Come - To Stay in Imperialism, Art and Restitution* (1st edn Cambridge University Press Cambridge) 152.

<sup>27</sup> In international law, the concept of *erga omnes* obligations refers to specifically determined obligations that states have towards the international community as a whole. An *erga omnes* obligation is a non-derogable legal obligation that is cast on all states, and which must be performed at all times.

<sup>28</sup> *Temple of Preah Vihear (Cambodia v. Thailand)* (1962 Interpretation separate opinion of Judge Cançado Trindade) [2011] ICJ Reports 566, 598.

<sup>29</sup> Ana Sljivic, 'Why Do You Think it's Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism' (1997) 31 *George Washington Journal of International Law and Economics*, 393, 414.

The cultural internationalism theory finds its genesis as early as 1863 in the *Lieber Code*.<sup>30</sup> The *Lieber Code* contained a number of regulations relating to protection of cultural property during armed conflict. The *Lieber Code* was followed by the 1954 Convention. The 1954 Convention is the first official international instrument which views cultural property as the heritage of mankind, and lays emphasis on its preservation. Articles 3 and 4 of the 1954 Convention enjoin upon state parties the responsibility to abstain from damaging cultural property situated either in its own territory or in any other country, and to take measures to safeguard and protect it.<sup>31</sup>

The concept of cultural property protection being an *erga omnes* obligation received a further impetus when various international tribunals recognised the desecration of cultural property as a violation of customary international law and punished the perpetrators of these crimes.

The Yugoslav Wars which ravaged the state of Yugoslavia from 1991 to 2001, led to the destruction of a number of structures of immense cultural importance, including the Vukovar City Museum, which contained artefacts dating back to the 13<sup>th</sup> century. The war destroyed the works of famous Croatian artists like Vlaho Bukovac and perpetuated the destruction of the Church of St. Demetris built in 1715, which was one of the largest cathedrals of the country. It was this cultural depredation that led the International Criminal Tribunal for Yugoslavia, a tribunal which was set up under the aegis of the United Nations to prosecute serious crimes that were committed during the Yugoslav Wars, to hold the destruction of cultural objects as an injury to mankind and a crime against humanity.<sup>32</sup>

This principle was reaffirmed by the Claims Commission, a body established to end the war between Ethiopia and Eritrea. During the war between the two countries, the Stela of Marta, a 2,500 year old

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<sup>30</sup> *Lieber Code*, Instructions for the Armies of the United States in the Field (War Department 1863).

<sup>31</sup> 1954 Convention, *supra* n.5, articles 3 and 4.

<sup>32</sup> *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, *Judgement* (International Criminal Tribunal for Former Yugoslavia 26 February 2001), 207.

obelisk bearing a rare description, was destroyed. The Commission reached a conclusion that the destruction of the Stela of Marta was a violation of customary humanitarian law and reparations should be made for the same.<sup>33</sup>

The common cultural heritage notion received a further stimulus when the International Criminal Court (ICC) recognised cultural destruction as a war crime against the backdrop of mass wreckage of cultural property in Mali at the hands of militant groups, the Ansar Die and Al-Qaeda.<sup>34</sup> Magnificent mosques and mausoleums, erected to commemorate the contribution of revered Muslim saints, which were perceived as the identifying structures of Mali, were annihilated in this rampage.

The prosecutor in her opening statement to the ICC remarked that the shrines and mausoleums were historically significant for humanity, and the whole of mankind was affected by their loss. The ICC eventually prosecuted Ahmad-al-Faqi-al-Mahdi, an Islamic militant for destroying these ancient shrines and mausoleums in Mali.<sup>35</sup>

Thus, the theory of cultural internationalism in essence does not believe in confining cultural property to the producing nation's capricious borders. Rather, it lays emphasis in recognising and celebrating works of art as manifestations of universal human genius and creativity.<sup>36</sup>

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<sup>33</sup> *Eritrea / Ethiopia Partial Award* – Central Front Eritrea's Claims 2, 4, 6, 7, 8 & 22 (Claims Commission, 28 April 2004), para 113.

<sup>34</sup> *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC -01/12-01/15, Judgement and Sentence (27 September 2016), para 52.

<sup>35</sup> 'Statement of the Prosecutor of the International Criminal Court Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi', International Criminal Court website, at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> (last visited 24 February 2019).

<sup>36</sup> Claudia Caruthers, 'International Cultural Property: Another Tragedy of the Commons', (1998) 7 *Pacific Rim Law and Policy Journal*, 143, 154.

### III. APPLICATION OF THE THEORIES

#### A. Colonial Era

##### 1. Historical Background

The era of colonisation can be traced back to 1270 BC during the reign of Ramesses II. Ramesses II was a renowned Egyptian king who ruled Egypt from 1279-1213 BC. He was a formidable leader under whose aegis the Egyptian empire expanded vastly. He was also extremely passionate about art and architecture, and built a number of monuments under his patronage. During his reign, he colonised a number of Mediterranean countries and robbed these countries of their cultural property.<sup>37</sup> Another prominent pillage was evinced during the reign of Napoleon Bonaparte, an eminent French emperor. Napoleon Bonaparte was regarded as the greatest commander in the military history in the West. His reign over France spanned from 1804 to 1814 during which he defeated mighty states including Austria and Prussia, and gained control over a major part of Europe by 1810. He extensively plundered artistic treasures from the nations he conquered. The classical oil painting by Italian artist Paolo Veronese, *Wedding Feast at Cana*, which is known to depict the moment when Jesus turned water into wine; and the *Horses of St. Mark* by a Greek sculptor Lysippus, an exquisite set of four bronze horses, formed part of Napoleon's artistic conquests.<sup>38</sup>

Looting artefacts and paintings was seen as means of raising funds to support military expeditions as well as symbolising victory. Though pillaging was not carried on with an active intent of destabilising the colony but rather to purely add to the wealth of the colonising nation, it produced some disastrous consequences for the colonies.

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<sup>37</sup> Leonard D DuBoff et al., *ARTLAW: Cases and Materials* (2nd edn. Aspen Publisher New York 2010) 533.

<sup>38</sup> Ivan Lindsay 'From Napoleon to Nazis : the 10 most notorious looted artworks', *The Guardian* at <https://www.theguardian.com/artanddesign/2014/nov/13/10-most-notorious-looted-artworks-nazis-napoleon> (last visited 24 February 2019).

Modern-state global colonialism began in the 18<sup>th</sup> century wherein global powers like Britain, France, Spain and Portugal conducted large scale colonisation in Latin America and Asia. A number of global powers colonised nations that had previously housed the most ancient and culturally rich civilisations of the world. Britain colonised India and Egypt, that cradled the Indus Valley Civilization and the Ancient Egyptian Civilisation respectively, while France captured the Assyrian region (which would include modern-day Syria, Iraq and Egypt) that was the origin of the Mesopotamian civilisation.<sup>39</sup>

Soon the phenomenon of draining colonised nations of their cultural property gained traction around the world. Colonised nations were stripped of their cultural vestiges with which they shared immense emotional value, while the westernised nations became more powerful both economically and culturally. The 19<sup>th</sup> and 20<sup>th</sup> centuries saw the beginning of the process of decolonisation wherein most colonies gained independence from their metropolises. However, the process of decolonisation failed to give the colonies the right to recover their cultural property which they had been unfairly dispossessed of. Even today in the 21<sup>st</sup> century, cultural property of most former colonies is housed in museums of their powerful European colonisers. The effort of these colonies to have their cultural property repatriated to them has been fraught with obstacles and has barely achieved the desired result. Colonisation not only subjected the colonies into servitude and economic exploitation, but also left them bereft of any power or capacity to recover what is rightfully theirs.

## 2. Who Owns the Cultural Property?

Cultural property bears an imprint of thoughts, practices and values of a particular culture and is a medium around which the ethnic, communitarian and national identities of a country revolve.<sup>40</sup> Cultural property formed an integral part of the identity of the people in the colonies. For them, their artefacts were a partial extension of their

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<sup>39</sup> Timothy Michelle, *Colonising Egypt* (1st edn. University California Press United States of America 1991) 14.

<sup>40</sup> Amartya Sen, *The Argumentative Indian*, (1st edn Farrar Straus and Giroux United States of America) 53.

identities, which were revered, and from which they drew their confidence and inspiration.<sup>41</sup> The Coroma textiles of Bolivia are an example of cultural property that has given purpose and meaning to the life of the Aymara community of Bolivia, and which has kept them tied to their ancestors and their roots.<sup>42</sup> The Coroma textiles are sacred ancient textile bundles, which represent a particular ancestral social group also known as 'Ayllu'. They believe that the spirits of their ancestors are contained within these textiles. They offer prayers and food to them, and consider them to be oracles whose blessings are sought before any important community decision is made. A festival is held every November wherein the Aymara community members wear the sacred textiles and dance as a mark of respect to their ancestors. These textiles were seldom displayed publicly. However, during the aforementioned festival where these textiles were displayed, they were surreptitiously stolen by western traders and widely traded in the international market. The world may perceive these Coroma textiles as mere fabrics as a means of trade but for the Aymara community it formed the bedrock of their identity.

The systematic plundering of cultural property carried on by the colonisers did indeed have a debilitating effect on the subjects of the colonies. The threads that wove an entire culture and nation together had suddenly vanished. The people in the colonies soon found themselves chained in the bondage of despair and experienced a loss of faith in themselves. The means that connected them to their past and inspired them for the future was lost.<sup>43</sup> Even after gaining independence, the loss of cultural property and the subsequent loss of cultural continuity, continues to wreak havoc in these indigenous communities.<sup>44</sup>

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<sup>41</sup> Shashi Tharoor, *An Era of Darkness* (1st edn Aleph Book Company India) 194.

<sup>42</sup> Susan Lobo, 'The Fabric of Life : Repatriating the sacred Coroma Textiles' (1991) 15 *Cultural Survival Quarterly Magazine*, 40, 42.

<sup>43</sup> Patty Gerstenblith, 'The Public Interest in the Restitution of Cultural Objects' (2001) 16 *Connecticut Journal of Int'l Law*, 197, 206.

<sup>44</sup> Photini Pazartzis and Maria Gavouneli, *Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade* (1st edn Hart Publishing United Kingdom 2016) 154.

Aboriginal Australians are one such indigenous community that have been left culturally enervated after their colonisation by Britain. About 6,000 objects including culturally significant items like the Gweagal shield belonging to aboriginal Australians have been in the possession of British museums.<sup>45</sup> The Gweagal shield belonged to an indigenous Australian warrior who bravely fought Captain Cook and his crew when they first set foot on Australian shores in 1770. The shield is looked upon by the aboriginal Australians as a symbol of the valour that their ancestors possessed. The aboriginal Australians believe that their culture is dying and the return of cultural objects like the Gweagal shield will help reinvigorate the lost aura and prestige of their culture.

The adherents of cultural nationalism strongly subscribe to the view that cultural property must be returned to the colonised nations, while the proponents of cultural internationalism believe that colonial powers are in a better position to protect the integrity of cultural property. The museums in nations of the colonial powers possess the facilities and expertise required for the safekeeping of cultural property which the colonised nations lack. Furthermore, the museums provide the widest possible access to the cultural property, and people from all over the world have a greater opportunity to behold these objects there *vis-à-vis* their presence in the colonised states.<sup>46</sup>

The entire construct of cultural internationalists is based on the primary foundation that the colonising nations did not do anything wrong or unethical. Loot of cultural property then was viewed as a corollary of war. It was looked upon as the norm and something that was perfectly acceptable. Metropoles believed that in return for administering and managing the affairs of the colonies and providing them with technical and scientific know-how which they did not

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<sup>45</sup> Hannah Ellis Petersons, 'Indigenous Australians demand return of shield taken by Captain Cook' (2016) *The Guardian* at <https://www.theguardian.com/culture/2016/nov/08/indigenous-australians-demand-gweagal-shield-captain-cook> (last visited 24 February 2019).

<sup>46</sup> John Henry Merryman, 'The Retention of Cultural Property' (1987) 21 *University of California, Davis*, 477, 497.

possess earlier, the colonial powers were entitled to economically and culturally enrich their own country at the expense of depriving the colony. This justification is farcical and ill-founded. The colonisers colonised the nations in order to strengthen their own might and add to their own resources. There was no benevolent intention of helping the colonised country. Therefore, the question of being able to claim a right to exploit as a reward for supposedly selfless actions of improving the colonies does not arise. Looting and plundering a disarmed and resourceless population cannot be justified by the colonisers under the garb of progress, and is an obvious wrong which requires complete redressal.

The next narrative put forth by cultural internationalists that only colonisers possess the resources and expertise to house exquisite cultural property is untrue.<sup>47</sup> This argument is nothing but a façade put forth by market nations, so as to enable them to retain cultural property over which they historically have no right. Further, even if it was believed that the former colonies did not possess the resources that their metropolises did, the same cannot be said today. Former colonies including India, Greece, Australia and Egypt are today home to some world famous museums like the Egyptian Museum in Cairo, the Australian Museum in Sydney, the Athens Museum in Greece and the Prince of Wales Museum in Mumbai, where cultural property is preserved and protected in an extremely secure environment with the necessary expertise in place. Moreover, these countries have government departments dedicated to the protection and preservation of cultural property, like the Ministry of Culture in India, the Hellenic Ministry of Culture in Greece and the Ministry of Culture in Egypt to ensure cultural property receives due attention and care. The argument of the lack of an ability for preservation of precious cultural property holds no water in light of these developments.

Lastly, the idea that cultural property can be granted full accessibility only in the country of the coloniser is at best haughty and parochial

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<sup>47</sup> Anne Erdos, *Return and Restitution of Cultural Property* (31, United Nations Educational, Scientific and Cultural Organisation France 1979) 58.

in nature. There are only a few percentages of persons who can afford to visit Britain or France to see the cultural property displayed in their museums. It is almost a dream for an average Indian with a Gross National Income of USD 1,680 or an average Egyptian with a Gross National Income of USD 340, who is barely able to make ends meet, to visit the Tower of London or the Louvre museum in France.<sup>48</sup> He is unable to view the cultural property residing there which was plundered from his country and of which he ought to be the rightful owner. If cultural property is returned to the colonies, not only would the people of that country, who ought to be the rightful heirs, be able to first-hand witness their own cultural property, but it would also provide a great boost to the tourism industry of the former colony. This move would incentivise a large number of foreign tourists to flock to these countries to experience their rich cultural heritage and stimulate economic growth in this sphere. Further, even if the argument of greater accessibility in the metropolises compared to the colonies is deemed to be a tangible benefit, it can be said that the benefits of reuniting the colonial people with their heritage which is so integral to their life, outweighs any benefit of better access and visibility in the metropolises.<sup>49</sup>

### 3. Proposed Solution

Objects like Maharaj Ranjit Singh's golden throne, the Kohinoor, Amravati sculptures and Tipu Sultan's famous mechanical tiger are examples of exemplary Indian craftsmanship that remain in the custody of the British even after more than 70 years of independence.<sup>50</sup> Such amassing of cultural property by colonial powers

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<sup>48</sup> ——— *World Bank* at <https://data.worldbank.org/country/india?view=chart> ; ——— *World Bank* at <https://data.worldbank.org/?locations=IN-EG> (last visited 24 February 2019).

<sup>49</sup> Irini A Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union Law*, 39 (2011).

<sup>50</sup> Sonali Pimputkar, 'Not just Kohinoor these Indian treasures are also in foreign custody' (2008) *The Free Press Journal* at <http://www.freepressjournal.in/featured-blog/not-just-kohinoor-even-these-indian-treasures-are-in-foreign-custody/1222577> (last visited 24 February 2019).

serves as a flagrant reminder of the injustices perpetrated against the colonies by the colonisers. It is imperative to realise that colonised states and indigenous groups have been unfairly deprived of their cultural property, which were either surreptitiously or under coercion removed from their national boundaries. The colonised states are justified in demanding a return of their cultural property belonging to these people. The restitution of cultural patrimony will provide an opportunity to the people to reconnect with their traditional culture and to rediscover a part of their identity which they lost years ago. Artefacts are symbols of achievements of a country, their return will play a great role in inspiring indigenous artists and craftsmen and will motivate them to scale greater heights. It must be remembered that unless cultural property is returned to the colonies, it will continue to remain evidence of the evils of loot, arsenal and pillaging that colonialism was all about.

Further, today in the 21<sup>st</sup> century where the concept of sovereignty of a state is regarded as sacrosanct,<sup>51</sup> and a sovereign state has complete freedom of action in all its matters without being subject to the authority of any foreign power, it is only fair that countries are entitled to equal freedom and right over the cultural property created by their ancestors without any interference from any external state or authority. A sovereign state must have an unimpeded right to retain, enjoy and recover its cultural heritage. It is only when former colonies can claim recovery of objects that bear witness to their identity and civilisation as a matter of right, without having to be at the mercy of its metropolises, that these former colonies may be considered to be on equal footing with their metropolises and do justice to the mandate of sovereignty in the true sense of the word.

### *B. Multiplicity in Ownership Claims*

The theories of cultural nationalism and cultural internationalism, based on individual parameters of ownership, access, preservation

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<sup>51</sup> *The Charter of the United Nations* (adopted on 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2.

and protection respectively, recognise only a single country which can be regarded as the owner or keeper of cultural property. Both these theories fail to address the dilemma as to which country should be given ownership and possession of a piece of cultural property where more than two nations stake a claim over it. This segment analyses three distinct situations under which it would be difficult to individually attribute ownership to one particular country, and outlines the road ahead so as to provide a framework under which such countries can jointly enjoy the cultural property.

### 1. Culture Traversing Territorial Boundaries

In *Peru v. Johnson*,<sup>52</sup> the dispute arose when cultural antiquities from the Moche culture, a Peruvian pre-Columbian culture, were looted from Sipin and illicitly imported into the United States. Peru filed a civil suit for recovery of its artefacts. In its judgment, the United States District Court of California held that Peru could not conclusively prove its ownership over the antiquities since the Moche culture spanned not only across Peru but also included areas that were part of modern day Bolivia and Ecuador.<sup>53</sup> In this case, if only one country was to be chosen as the legitimate descendant of Moche antiquities, the obvious question which arises is what makes a claim of Peru to Moche cultural property more deserving than an Ecuadorian or a Bolivian claim? Here, one cannot conclusively determine the exact nature of the ownership of Peru, Bolivia and Ecuador. However, the aforementioned countries could contemplate claiming equal and joint ownership over the Moche antiquities.

In circumstances like these where cultural property stems out of a particular culture or community that once resided in an expansive region, but have over the years disintegrated and got categorised into well-defined sovereign states, there is a discernible difficulty in ascertaining an exclusive owner of the antiquities. The followers of the culture in all states may stake a claim to cultural property. Such property belongs to their shared culture and heritage and equally

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<sup>52</sup> *Government of Peru v. Johnson* 720 F. Supp. 812 (DC Cir 1989).

<sup>53</sup> *Government of Peru v. Johnson* 720 F. Supp. 812 (DC Cir 1989), para 1.

ties them all to their ancestors. In such cases, it is neither fair nor equitable for one country to be heralded as the heir to the cultural property.

*a. Contribution of Diverse Countries*

In circumstances where cultural property has changed myriad locations, and two or more nations stake a claim to a piece of cultural property, there is a deadlock. There is ambiguity as to the right of which nation would gain precedence over the other.<sup>54</sup>

The case of the Hebrew manuscripts<sup>55</sup> is one such affair which exemplifies the tussle between countries claiming provenance to the manuscripts. The Hebrew manuscripts were taken from various sources at different points of times. Hebrew books were written in different countries like Islamic-ruled Spain, North Africa, and Christian Europe among others. The local environment of each country left a deep and unique effect on these manuscripts. If the Hebrew manuscripts which are currently housed in the Russian National Library, St. Petersburg, were to be restituted, there is no single country that could make a claim of being the exclusive possessor of the manuscripts. It has been suggested by many that the manuscripts should be restituted to Israel, which is supposedly considered as the official Jewish state. However, it is questionable whether Israel—a single state, which came into existence only in 1948, and by mere reason of it being a Jew dominant state—has a strong enough claim to represent all the different cultures that have contributed to these manuscripts.<sup>56</sup>

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<sup>54</sup> Yehuda Blum, 'On the Restitution of Jewish Cultural Property Looted in World War II' (2000) 94 *American Society of International Law* 88, 101.

<sup>55</sup> Hebrew manuscripts are a handwritten copy of a portion of the text of the Hebrew Bible (Tanakh) made on papyrus, parchment, or paper, and written in the Hebrew language. The oldest manuscripts were written in a form of scroll, the medieval manuscripts usually were written in a form of codex. The late manuscripts written after the ninth century use the Masoretic text.

<sup>56</sup> Barnavi, 'Hebrew Manuscripts in the middle ages' (2015) *Jewish Learning*, at <http://www.myjewishlearning.com/article/hebrew-manuscripts-in-the-middle-ages/> (last visited 24 February 2019).

*b. Eventual Disintegration of Conjoined Regions and Dynastic Empires*

In the case of the Kohinoor diamond,<sup>57</sup> both India and Pakistan are at loggerheads, with each claiming to be the rightful owner of the diamond, and demanding its repatriation from England. Maharaj Ranjit Singh, the then ruler of Punjab and Lahore, was the original owner of the Kohinoor diamond. After the death of Maharaj Ranjit Singh, the diamond was passed on to his twelve year old son, Duleep Singh. The treaty of Lahore signed between Maharaj Duleep Singh and the British divested him of his rights over the Kohinoor and subsequently the diamond came into the possession of the British.<sup>58</sup>

On one hand, Pakistan believes that since the diamond was surrendered in Lahore, now part of the territory of present day Pakistan, the diamond should be repatriated to Pakistan.<sup>59</sup> On the other hand, India believes that the Kohinoor is traditionally part of its own cultural property, forcibly taken out of its control by the British during the colonial era, and which must now be repatriated to India. The question of the Kohinoor is indeed perplexing. Both India and Pakistan were, at that time, a part of one nation—the erstwhile British India—and predominantly shared a common culture and heritage. Recognising any one of the countries as the source nation, and thereby entitling that country to retain the Kohinoor, will in effect deprive the other country of its cultural patrimony.

In situations like these where antiquities originally belonging to an empire or a country which no longer exists, and has split into several independent countries, the theories of cultural property are not precise

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<sup>57</sup> The Kohinoor is a 106 carat diamond which was once the largest diamond in the world. Previously, it has belonged to various rulers in India; today it lies in the hands of the British royal family and is part of the Crown Jewels.

<sup>58</sup> Utkarsh Anand, 'The Kohinoor Controversy: The 1970 UN Convention now offers some answers' (2016) *The Indian Express*, at <http://indianexpress.com/article/explained/kohinoor-controversy-1970-un-convention-offers-answers-12762766/> (last visited 24 February 2019).

<sup>59</sup> Saby Goshray, 'Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage' (2007) 31 *Fordham International Law Journal*, 741, 752.

as to which would then be the rightful place of provenance of the cultural property.

*c. Proposed Solution*

In all of the above discussed scenarios, giving one country an exclusive ownership over the cultural property will amount to denying the right of other countries to their cultural patrimony. The non-receiving countries will be at the mercy of the legally recognised owner to be able to associate with and access their past heritage, of which they ought to be equal inheritors. It is grossly unfair to let only one country possess an unfettered title over the cultural antiquities, while its counterparts possess an equally valid title over the cultural property.

The existence of such competing claims over cultural property only works to the advantage of former colonial powers, as these nations now have an opportunity to fend off claims of restitution raised by such countries on grounds of uncertainty of provenance, and can continue to retain wrongfully acquired cultural property. Britain, for instance, has been reaping the benefits of the Kohinoor, while India and Pakistan squabble over its ownership.

In light of this, the author proposes that in situations where a number of states of a region possess a valid title over a common cultural antiquity, each country should be recognised as the 'co-owner' of the cultural property. Each co-owner should have an equal claim over the cultural property. Further, instead of a particular co-owner being given the right to display the cultural property, a regional organisation to which a number of co-owners belong must be entrusted with the task of protecting and preserving the cultural property. For instance, the African Union, a regional organisation representing over fifty African countries, could be assigned the task of safekeeping common cultural property belonging to a number of African States. This would help in the decentralisation of power in the region as no single owner can wield a greater influence over the cultural property than its counterpart. It also reduces the possibility of any kind of animosity among different co-owners. The regional organisation would provide a medium for the co-owners to come together, thaw their differences

and unite in their struggle to bring back their cultural property. Further, it would also ensure a better bargaining power for the co-owners *vis-à-vis* their individual capacity to bargain with a foreign power. In this manner, regional organisations will bridge disparity and provide an equal footing to various co-owners of the cultural property.

### *C. A Tale of Regions Rife with Conflict*

Several countries harbour the notion that their cultural property is only safe within the borders of their country, in lieu of which they tighten their borders and implement stringent restrictions on any sort of transfer of cultural property. However, this perception may not always be best suited for ensuring effective protection of cultural property in certain exceptional cases.

Often, in crisis situations including armed hostilities and insurgencies, artefacts within the boundaries of the conflict-torn nation can be subject to destruction through vandalism, arson or neglect by deviant forces. The wanton destruction of cultural property by the Islamic State of Iraq and Syria (ISIS) in Syria and the unconscionable damage to cultural property caused by the Taliban in Afghanistan bears testament to the fact that mere retention of cultural property within a source country may not always be optimal. In certain compelling situations, source countries must dispel this notion in order to prevent their cultural property from being destroyed.

#### 1. When Cultural Property Fell Prey to Warring Factions

Afghanistan's unique geographical position made it a focal trade route connecting the east to the west. Trade, apart from bringing in economic prosperity, also contributed to the country by becoming a thoroughway of various cultures. Cultural segments as diverse as the Bronze Age, the Greek epoch, Buddhist and Islamic influences were attracted to the fertile region. Each culture brought with it its unique artistic convention, which enriched the country's heritage. Artefacts ranging from gold and bronze ornaments, effigies belonging to the Bronze Age to Ghandharan sculptures showcasing the earliest figural depictions of Buddha, and Islamic paintings with intricate

geometrical lacing were found in Afghanistan.<sup>60</sup> This expansive art and architecture collection earned it a distinction of being an art-rich country. However, the reign of the Taliban, a fundamentalist belligerent group in Afghanistan, from 1996-2001, changed the political and social landscape of the country. Afghanistan, once a rich cultural repository, was reduced to ravages. The Taliban annihilated Afghan cultural heritage that the country boasted of. The Kabul Museum, which housed a diverse range of artefacts, was ransacked. 140,000 cultural objects ranging from Islamic art to Roman bronze effigies were destroyed.<sup>61</sup> Ancient archaeological sites in the country were pilfered. Valuable antiques showcasing the rich Afghan civilisation were sold to bordering countries for paltry sums.<sup>62</sup> All the purloining and destruction left Afghanistan with nothing but smoke smothered museums, shattered artefacts and lost history.

The destruction by the Taliban was followed by the Arab Spring in 2010. The Arab Spring, which may have brought in a ray of hope for freedom and democracy in the Middle Eastern states, ended up giving a major blow to the cultural heritage of mankind. In the face of revolution, collective public sentiment propelled the destruction of cultural property as a means to express anger against the ruling government.<sup>63</sup> In Egypt, the Cairo Museum that was home to the most splendid works of art from around the world, fell prey to destruction.<sup>64</sup> During this time, a number of artefacts were looted and

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<sup>60</sup> Gil Stein, 'The War Ravaged Cultural Heritage of Afghanistan : An overview of Projects of Assessment, Mitigation and Preservation' (2015) 78 *Near Eastern Archaeology*, 187, 189.

<sup>61</sup> Andrea Cuning, 'U.S. Policy on the Enforcement of Foreign Export Restrictions on Cultural Property & Destructive Aspects of Retention Schemes' (2004) 26 *Houston Journal of International Law*, 450, 496.

<sup>62</sup> James Cuno, 'The Whole World's Treasures' (2001) *Boston Globe*, at [http://www.law.harvard.edu/faculty/martin/art\\_law/cuno.htm](http://www.law.harvard.edu/faculty/martin/art_law/cuno.htm) (last visited 24 February 2019).

<sup>63</sup> Yoma Sarhan, 'The Arab spring and the state of Egypt's antiquities' (2014) *Wilson Centre*, at <https://www.wilsoncenter.org/event/the-arab-spring-and-the-state-egypts-antiquities> (last visited 24 February 2019).

<sup>64</sup> Alexander Joffe, 'Egypt's Antiquities Caught in the Revolution', *The Middle East Quarterly* (2011) 73.

smuggled to foreign countries. The invaluable objects lost included a statue of King Tutankhamun and a statue of Queen Nefertiti. King Tutankhamun was the 18<sup>th</sup> dynasty Egyptian pharaoh widely remembered for the numerous building projects undertaken under his patronage. The majestic statue of the king was made of wood, and portrayed him being carried by a goddess. Queen Nefertiti, on the other hand, was one of the most powerful and beautiful women of Egypt and the wife of the great Egyptian pharaoh, Akhenaten. She was known for her worship of the sun God, Aten, and the new belief system created by her that changed the ways of religion within Egypt. The statue of the majestic Queen was made of sandstone and depicted her making offerings to God.<sup>65</sup> Thus, after all the loot and plunder, Cairo Museum was reduced from a culturally significant building to a plain, vandalised site.

Syria and Iraq witnessed the rise of a fanatic insurgent group, ISIS, who had blatant disregard for cultural property.<sup>66</sup> ISIS wrecked not only invaluable manuscripts and Islamic books housed in libraries, but also pillaged museums and destroyed artefacts, antiques and architecture.<sup>67</sup> The situation worsened in 2014, when ISIS captured eastern Syria and Mosul in Iraq. Videos were released showing artefacts displayed in the museum in Mosul being destroyed and several parts of the site of Palmyra being demolished.<sup>68</sup> To ISIS, these artefacts and statues were nothing more than stone and metal used to honour false Gods. They plundered and desecrated the

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<sup>65</sup> Farah Halime, 'Revolution Brings Hard Times for Egypt's Treasures' (2012), *New York Times*, at <http://www.nytimes.com/2012/11/01/world/middleeast/revolution-brings-hard-times-for-egypts-treasures.html> (last visited 24 February 2019).

<sup>66</sup> Amr Al-Azm, 'The Pillaging of Syria's Cultural Heritage' (2015) *Middle East Institute*, at <http://www.mei.edu/content/at/pillaging-syrias-cultural-heritage> (last visited on 24 February 2019).

<sup>67</sup> Graciela Gestoso Singer, 'ISIS's War on Cultural Heritage and Memory' (2015) 6 *UK Blue Shield*, 1, 2.

<sup>68</sup> Allison Cuneo, Susan Penacho and LeeAnn Barnes Gordon, 'Special Report: Update on the Situation in Palmyra' (2015) *ASOR Cultural Heritage Initiatives*, at <http://www.asor-syrianheritage.org/special-report-update-on-the-situation-in-palmyra/> (last visited 24 February 2019).

Assyrian capital of Khorsabad, famous for the oldest artefacts in Iraq, without even a semblance of remorse. ISIS carried on looting on archaeological and historical sites, and raised about USD 200 million every year from this to fund its terror activities.<sup>69</sup> ISIS' acts of cultural destruction have obliterated the rich and diverse foundation of Syrian art and heritage.

## 2. Proposed Solution

The pilfering and destruction carried on in the aforementioned instances has led to the loss of cultural heritage of not just the citizens of the source nations, but of humanity as a whole. More than 200 years of history represented by the Syrian and Egyptian cultural property, can no longer be witnessed by human civilization. The creativity and culture of our ancestors has been lost forever.

To avoid such a travesty, such objects should be transferred into museums of countries where they would be assured professional care and attention, and better preservation of the antiquities, than in home countries where it is likely that it will be subject to heightened exposure to proprietary destruction. In case of immovable property, it is impossible to transfer the monuments out of the nation, and hence that destruction cannot be prevented. However, in case of movable property, where there is a slight chance to safeguard and protect these assets, every effort must be expended to transfer the cultural property to a safer environment. It would be prudent for source nations to hand over their artefacts for a temporary period to neutral organisations, like the United Nations Education Scientific and Cultural Organisation or the International Council of Museums, which would be in a better position to safeguard the cultural objects. A kind of a trust relationship can be established between the two sides. The safekeeping organisation would be a trustee (a person or country who administers the trust) and the source nation would be the beneficiary (a person or country who receives the benefits of

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<sup>69</sup> Louis Charbonneau, 'ISIS is making \$200 million from stolen artefacts' (2016) *Business Insider*, at <http://www.businessinsider.com/r-islamic-state-nets-up-to-200-million-a-year-from-antiquities-russia-2016-4?IR=T> (last visited 24 February 2019).

the trust).<sup>70</sup> The trustee country or organisation would preserve and protect the cultural property, and keep it within its safe custody until the belligerent situation in the source nation comes to an end and conditions stabilise. Thereafter, the trustee organisation will transfer the cultural property to the source nation.

An interesting instance of such a forged trust relationship dates back to the late 1990s, when a few Afghan cultural assets were temporarily held by the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, during periods of rising conflict in Afghanistan.<sup>71</sup> If these cultural assets had been left behind in Afghanistan, they too would have faced the same fate as the remaining cultural property in the country. It is because these assets were transferred to the Afghanistan Museum-in-Exile in Bubendorf, Switzerland, that the people of the world still have the opportunity to marvel at them. Thus, through this trust mechanism, cultural objects can be protected from the actions of pernicious forces and can be safeguarded from being lost forever.

#### *D. The Parthenon Marbles Wrangle*

##### 1. Greece versus Britain

The scuffle between Greece and England regarding the ownership of the Parthenon Marbles has garnered much attention worldwide. The Parthenon Marbles dispute is one of the most renowned amongst the cultural property repatriation cases.

The Parthenon Temple,<sup>72</sup> built in around 447 BC was viewed as a divine work of the Hellenistic culture. The Temple was decorated

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<sup>70</sup> Nertila Sulce, 'Trust as a Relationship Treated by Common Law Legal Systems and as a Relationship Treated by Civil Law Legal Systems. Things in Common and Comparison between the Two Systems', (2015), 4 *European Journal of Sustainable Development*, 102, 103.

<sup>71</sup> —, 'Museum in Exile : Swiss foundation safeguards over 1,400 Afghan artefacts', *UNESCO*, at <http://www.unesco.org/new/en/culture/themes/museums/museum-projects/archive/museum-in-exile-swiss-foundation-safeguards-over-1400-afghan-artefacts/> (last visited 24 February 2019).

<sup>72</sup> —, 'An introduction to the Parthenon and its sculptures', *The British Museum Blog*, available at <https://blog.britishmuseum.org/an-introduction-to-the-parthenon-and-its-sculptures/> (last visited 24 February 2019).

with delicately carved marble friezes and sculptures. These sculptures depicted episodes from the battle between the Olympian Gods and the giants, the battle between the Olympians and the Amazons and the Trojan War. The friezes which were about 160 metres long with 115 panels, displayed the Greek procession on their way to the panathenaic festival, a festival celebrated in Greece to honour the goddess Athena. The friezes and sculptures were placed on the exterior of the Temple and greatly added to the aura and prestige of the edifice.

However, in the seventh century, on the basis of a permit allegedly given by the Ottoman Empire, the then ruling kingdom of Greece, Lord Elgin, a representative of the British crown, removed a plethora of friezes and marble sculptures from the Greek Temple and shipped them to Britain. In around 1816, Lord Elgin sold these marbles to the British Museum, and since then the marbles have been adorned there.<sup>73</sup>

Since gaining independence, the Greek Government has vehemently demanded return of the Parthenon Marbles. They contend that removal of the Parthenon Marbles from Greece was immoral, as Lord Elgin, in the first place, had no authority to remove the treasure outside the territorial borders of Greece. Further, the Parthenon Marbles are intricately linked to Greek cultural heritage and they must be returned to their rightful owner.<sup>74</sup>

The Parthenon Marbles, together with the Temple of Parthenon, conveyed a glimpse of life and religion in ancient Athens. The de-contextualisation of the Parthenon Marbles from Greece has greatly hampered the integrity of the Temple.<sup>75</sup> Britain and the proponents of cultural internationalism argue that for centuries the Parthenon

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<sup>73</sup> John Henry Merryman, *supra* n. 21, 150

<sup>74</sup> Leila Aminneddoleh, 'The British Museum Should Return : The Parthenon Marbles To Greece' (2014) *Forbes*, at <https://www.forbes.com/sites/realspin/2014/12/23/the-british-museum-should-return-the-parthenon-marbles-to-greece/#1d510ca129e5> (last visited 24 February 2019).

<sup>75</sup> Andromache Gazi, 'Museums and National Cultural Property II: The Parthenon Marbles' (1990) 9 *Museum Management and Curatorship* 241, 246.

Marbles have been better preserved in the British Museum. If left in Greece, they would have been subject to deterioration on account of acute pollution. Moreover, it is contended that the Parthenon Marbles are better viewed and studied by scholars in the British Museum, in the context of artefacts from other civilizations like the Egyptian, Syrian and many others.<sup>76</sup> The wide accessibility granted to the Parthenon Marbles in the British museum has brought about approbation, and renewed interest in Greek history worldwide.<sup>77</sup>

The Greeks, on the other hand, contend that the imperialistic attitude of Britain that only they can protect and preserve the Parthenon Marbles, is misplaced. The Parthenon Marbles would remain equally safe in the Acropolis Museum, specially created by the Greek Government to house the Marbles. The Marbles would be secure from environmental hazards under controlled conditions. The British now have no reason to retain the Parthenon Marbles and they must be returned to Greece.<sup>78</sup>

Britain argues that even if the Parthenon Marbles were to be returned to Greece, they would be housed in the Acropolis Museum next to the Temple, and not in their original context on the Temple. In this way, the restitution of the Parthenon Marbles to Greece may not entirely restore the context and integrity of the Parthenon Temple. In such circumstances, the return of the Parthenon Marbles has been allegedly considered meaningless.<sup>79</sup>

## 2. Need for Cooperation between the Two Countries

It is undoubtedly true that source nations are well justified in claiming the return of their lost cultural patrimony. Objects that are

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<sup>76</sup> Dorothy King, *The Elgin Marbles*, (1st edn. Random House United Kingdom 2006) 298-299.

<sup>77</sup> *Ibid*, 305.

<sup>78</sup> Melineh Ounanian, 'Of all the Things I've Lost, I miss my Marbles the Most! An Alternative Approach to the Epic Problem of the Elgin Marbles' (2007) 9 *Cardozo Journal of Conflict Resolution* 109,114.

<sup>79</sup> John H Stubbs and Emily Makas, 'Architectural Conservation in Europe and the Americas' (2005) *Flinders University at* [https://dspace2.flinders.edu.au/xmlui/bitstream/handle/2328/8156/241\\_262%20simpson.pdf?sequence=1](https://dspace2.flinders.edu.au/xmlui/bitstream/handle/2328/8156/241_262%20simpson.pdf?sequence=1) (last visited 24 February 2019).

closely linked to the history of a state or community, essential to the understanding of the heritage, must be returned to the source nation. However, the claims of world museums<sup>80</sup> that have for years preserved and protected these cultural artefacts cannot be completely disregarded. It would be unfair to expect a universal museum to return each and every effigy and statue demanded for restitution by source nations.

In the situation relating to the repatriation of the Parthenon Marbles, the claim of neither country can be discounted. It is trite that Greece has a right over the Marbles that are intricately connected to Greek culture and life. The fact that Greece has gone ahead and built a museum to specially house the Marbles shows that the country is yearning to have its priceless artefact returned and is committed to go to great length to protect and preserve it.<sup>81</sup> The claim of the British Museum is also not completely without reason. Historically, they had removed the Marbles and transferred them to Britain after obtaining the requisite permission. The fact that Greece now claims<sup>82</sup> that the consent of the Ottoman Empire was of no consequence and that the consent of the Greeks was not taken, may be perceived as unjust. Further, there exists a fear that if the Parthenon Marbles are restituted, it would be tantamount to opening a Pandora's box—with each country claiming the return of all its cultural artefacts. In situations like these, it is imperative for countries to try and reach a middle ground through the medium of diplomacy and to find a solution.

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<sup>80</sup> *Ibid.*

<sup>81</sup> Andrew Pierce, 'Greek Government unveils new home for Elgin Marbles' (2009) *The Telegraph* at <https://www.telegraph.co.uk/news/worldnews/europe/greece/5304133/Greek-government-unveils-new-home-for-Elgin-Marbles.html> (last visited 24 February 2019).

<sup>82</sup> Dominic Selwood, 'Greek knows there is no legal right to the Elgin marbles—that is why it won't sue the UK' (2015) *The Telegraph* at <https://www.telegraph.co.uk/news/worldnews/europe/greece/11604991/Greece-knows-there-is-no-legal-right-to-the-Elgin-Marbles-thats-why-it-wont-sue-the-UK.html> (last visited 24 February 2019).

International exchanges, long term loans and memorandums of understanding between the two countries can be considered for promoting understanding and harmony between the countries. The agreement entered into between Nigeria and France on the subject of the Sokoto and Nok statues is also a specimen of such mutual understanding.<sup>83</sup> The Sokoto and Nok terracotta statues are the oldest sculptures to be found in West Africa. These statues of humans and animals with distinctive features, represent a rare form of artistry found exclusively in the West African region. Being one of the most sought-after forms of art, these statues were looted from Nigeria in 1998 and entered the French art market, where they were eventually bought by the French Government from a private dealer. Nigeria claimed that the works of art had been illegally exported from the country, while France maintained that they had validly and legally bought the statues.<sup>84</sup> However, following a rigorous round of negotiation between the two countries, an agreement was concluded between them wherein France recognised Nigeria's ownership over the statues but the objects would continue to be displayed in the French museum for 25 years, subject to a joint renewable agreement.<sup>85</sup> This cooperative approach has helped the two countries end a bitter feud without jeopardising the interests of either side.

A similar kind of understanding can put an end to the Parthenon Marbles controversy. An agreement can be entered into between the countries whereby the British museum recognises Greece's ownership over the Marbles, and agrees to loan to Greece the Parthenon Marbles for a specified period. In exchange for receiving the Parthenon Marbles, Greece must provide to Britain an opportunity to temporarily exhibit and study unique Greek artefacts. This understanding will be advantageous for both the countries. Greece will get unimpeded ownership over its most prized artefact, and its

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<sup>83</sup> Ece Velioglu, 'Case Three Nok and Sokoto Sculptures – Nigeria and France' (2012) 1 *Platform ArThemis* 1, 5.

<sup>84</sup> *Ibid.*, 2.

<sup>85</sup> Marie Cornu and Marc Andre-Renold, 'New Developments in the Restitution of Cultural Property : Alternative means of Dispute Settlement' (2009) *Journal Du Droit International*, 1, 2.

citizens will also get a chance to associate with and access its treasures after years. While for Britain, not only will it retain the ultimate right to access and display the Parthenon Marbles, but it will also get an opportunity to study, access and display to its visitors, exquisite and ancient Greek artefacts. An acrimonious dispute can indeed be solved with a bit of compromise on both sides. Thus, it is advisable for all countries facing such disputes to be circumspect and not think in terms of wins and losses, but to recognise the concern on both the sides and to amicably resolve the dispute.

#### IV. CONCLUSION

The debate surrounding cultural property is often biased with each side inclined to favour a predisposed ideological view. After analysing the two theories—nationalism and internationalism—thoroughly, the question which arises is: Are cultural internationalists justified in demanding retention of cultural property? The principles of preservation, protection and access are undoubtedly important to an extent, but they are not as critical so as to trump considerations of ownership, sentiments or linkage to heritage. Cultural property is integral to the identity of mankind and every effort must be expended to protect it. However, the off-chance of the cultural property being destroyed in the source nation should not result in the citizens of that country being deprived of the opportunity of beholding their cherished cultural property. It would be fairly reasonable to facilitate transfer of cultural property to secured locations in times of unrest, but not otherwise. The elitist notion followed by cultural internationalists that cultural property is safe only in highly developed countries is an example of the stance of naked retentionism followed by these countries.

Decades have passed since former colonies and nations alike have attained independence and the *United Nations Charter* explicitly recognises<sup>86</sup> every nation's unimpeachable right of sovereignty.

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<sup>86</sup> *The Charter of the United Nations*, article 2.

A corollary of independence is the equality of states, historically expressed by the maxim *par in parem non habet imperium*.<sup>87</sup> It is only when one country respects the right of sovereignty and integrity of the other, such respect extending to the ownership of its cultural property, and does not unjustly enrich its self at the expense of the other, that parity between the states can be achieved in the truest sense.

It is high time that countries engage in diplomatic discussions and negotiations to resolve this issue. Such mediums will facilitate in striking a balance between the varying interests of different states. An amicable return of cultural property by market nations to source nations world over will serve as the greatest hallmark of civilised society as a whole.

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<sup>87</sup> James Crawford, *Brownlie's Principles of Public International Law* (8th edn Oxford University Press 2012), 448. The maxim translates to 'For it is not one city to make the law upon another, for an equal has no power over an equal'.

# DETERMINING DISGORGEMENT IN SECURITIES LAW<sup>†</sup>

*Vidhi Shah* \*

## I. INTRODUCTION

A regulatory power frequently exercised by securities commissions across various jurisdictions, disgorgement is an indispensable tool to square off unjust enrichment availed by any participant in the capital markets. The Black's Law Dictionary defines disgorgement as 'the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.'<sup>1</sup> The primary purpose of disgorgement is to deter violations of securities laws by depriving violators of their ill-gotten gains.<sup>2</sup> To disgorge means to deprive a person of the value by which he has been unjustly enriched. Unjust enrichment, in turn, refers to the retention of certain benefits, which is not legally justifiable. Therefore, disgorgement as a remedial measure in securities law involves a wrongdoer being stripped of the unlawful profits or wrongful gains made by him. The underlying idea and purpose behind this remedial measure is that no person should be permitted the opportunity to profit from his wrongdoing. Therefore, even before any punishment or penalty is levied, it is quintessential to deprive a wrongdoer of the fruits of his misconduct or wrongdoing. In this sense, disgorgement may be understood as a primary and basic remedy. Put in simple terms, the objective of disgorgement is to restore status *quo ante*, ie, the situation and conditions which existed prior to the commission of the legal contravention.

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<sup>†</sup> This article reflects the position of law as on 24 February 2019.

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<sup>1</sup> Bryan A Garner, *Black's Law Dictionary* (10th edn Thomson Reuters 2014) 568.

<sup>2</sup> *Kokesh v. SEC* 137 S. Ct. 1635 (2017); *SEC v. Fischbach Corp.*, 133 F. 3d 170, 175 (CA2 1997) and *SEC v. First Jersey Securities, Inc.*, 101 F. 3d 1450, 1474 (CA2 1996).

Today, while the legitimacy of disgorgement as a remedy has received acceptance in the securities enforcement context, regulatory commissions are left to decide what must be included in the quantification of disgorgement and how disgorgement must be quantified. Globally, securities commissions have developed and employed varied methods for the calculation of disgorgement. A perusal of these methods highlights the equitable characteristics which are inherent in disgorgement as a form of remedy for the violation of securities law. Thus, the objective of this article is to understand the nature of disgorgement in the context of its evolution, its constituents and its calculation by regulatory commissions. For the purpose of this article, the author will rely on securities law in the United States of America (USA) as a reference model in view of the sophistication and maturity of the securities market and law in USA and extensive reliance by Indian authorities thereon.<sup>3</sup>

Part II of this article traces the evolution of disgorgement in USA and India. Part III analyses disgorgement as a distinct and unique remedy. Part IV examines the jurisprudence governing the constituents of disgorgement and its quantification by the Securities Exchange Commission (SEC) in USA. Part V expounds the jurisprudence on the constituents and computation of disgorgement as adopted by the Securities and Exchange Board of India (SEBI). Part VI seeks to explore and develop certain standards for the calculation of disgorgement. Part VII concludes.

## II. EVOLUTION OF DISGORGEMENT IN INDIA AND USA

### A. *Evolution of Disgorgement in USA*

In its year of enactment, the *Securities Exchange Act, 1934*<sup>4</sup> did not include any separate statutory provision for disgorgement. The remedies, which it provided for, *inter alia* included injunctions and civil penalties. The law was rooted in the rule that equity ought

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<sup>3</sup> See *Rakesh Agarwal v. SEBI* (SAT Appeal No. 33 of 2001) Order dated 03.11.2003 and *Bharat Jayantilal Patel v. SEBI* (SAT Appeal No. 126 of 2010) Order dated 15.09.2010.

<sup>4</sup> *Securities Exchange Act, 1934* 15 U.S.C. § 78a et seq.

not to intervene where an adequate legal remedy exists.<sup>5</sup> In 1971, disgorgement or rather ‘restitution of unlawful gains’ was considered and upheld in *Securities Exchange Commission v. Texas Gulf (Texas Gulf)*.<sup>6</sup> In this case, it was argued that the SEC was not conferred with the general equitable power of ordering ‘restitution of illegal profits’. It could only order injunctive relief and such other ancillary remedy as may be necessary to enforce such injunctive relief.<sup>7</sup> Therefore, ordering restitution of unlawful profits would in essence constitute a ‘penalty’.<sup>8</sup> However, the court dismissed the argument on the ground that it would defeat the purposes of the *Securities Exchange Act, 1934* if a violator of Rule 10b-5<sup>9</sup> were allowed to retain the profits from his violation.<sup>10</sup> This marked an essential departure from the previously outlawed claim of the SEC to order disgorgement. As a consequence of *Texas Gulf*, courts came to accept as truism, the notion that disgorgement is inherently an ancillary equitable remedy.<sup>11</sup> In the year 1990, the US Congress conferred statutory sanction on the remedy of

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5 John D Ellsworth, ‘Disgorgement in Securities Fraud Actions Bought by the SEC’ (1977) 3 *Duke’s Law Journal* 641.

6 *SEC v. Texas Gulf* 446 F.2d 1301, 1303-1311 (2d Cir. 1971), cert. denied, 404 US 1005 (1971).

7 *Texas Gulf*, 1307.

8 *Texas Gulf*, 1308.

9 § 240.10b-5, Employment of manipulative and deceptive devices: ‘It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange

(a) To employ any device, scheme, or artifice to defraud

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.’

10 *See* § 240.10b-5.

11 Russel G Ryan, ‘The Equity Façade of SEC Disgorgement’, *Harvard Business Law Review Online* (2013), at <http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/> (last visited 24 February 2019).

disgorgement by the enactment of the *Security Enforcement Remedies and Penny Stock Reform Act, 1990*.<sup>12</sup>

Subsequently, disgorgement has matured as an effective and frequently employed remedy by the SEC, particularly in the context of securities fraud and insider trading.<sup>13</sup> It may be noted that in suits where the SEC seeks enforcement of securities law, the SEC acts in its capacity as a statutory regulator to protect and secure public interest. Hence, in such cases, it is the threshold of public interest and not private litigation that measures the propriety and need for equitable relief.<sup>14</sup>

### B. *Evolution of Disgorgement in India*

Six years after the enactment of the *Securities and Exchange Board of India Act, 1992* (SEBI Act), SEBI made its first unsuccessful attempt to direct disgorgement in the matter of *Hindustan Lever Limited v. SEBI*.<sup>15</sup> It endeavored to expand the ambit of its regulatory powers to direct disgorgement through another unsuccessful attempt in *Rakesh Agarwal v. SEBI*.<sup>16</sup> SEBI made yet another attempt at disgorgement in the *Roopal Ben Panchal* scam,<sup>17</sup> cautious this time, to term it as ‘a useful equitable remedy because it strips the perpetrator of the fruits of his unlawful activity and returns him to the position, he was in, before he broke the law.’<sup>18</sup> The *Roopal Ben Panchal* scam, as referred

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<sup>12</sup> *Securities Enforcement Remedies and Penny Stock Reform Act of 1990* (SERPSRA), Pub. L. No. 101-429, 104 Stat. 931. The Act expressly authorises accounting and disgorgement in the securities laws.

<sup>13</sup> *SEC v. Shapiro*, 494 F.2d 1301, 1303-1314 (2d Cir. 1974); *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390-92 (2d Cir.), cert. denied, 414 U.S. 910 (1973); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103-06 (2d Cir. 1972).

<sup>14</sup> See *SEC v. Mgmt. Dynamics, Inc.* 515 F.2d 801 (2d Cir. 1975) and James Tyler Kirk, ‘Deranged Disgorgement’, (2015) 8 *J. Bus. Entrepreneurship & L.* 131.

<sup>15</sup> *Hindustan Lever Ltd. v. SEBI* [1998] 18 SCL 311 (AA) and Sumit Agrawal and Robin Joseph Baby, *SEBI ACT: A Legal Commentary on Securities and Exchange Board of India Act, 1992* (Taxmann Publication 2011).

<sup>16</sup> See *Rakesh Agarwal v. SEBI* (SAT Appeal No. 33 of 2001) Order dated 03.11.2003.

<sup>17</sup> SEBI order in the matter of investigations into initial public offerings dated 21.11.2006.

<sup>18</sup> *Ibid.*

to in common market parlance, involved the cornering of retail category shares in certain initial public offers and was different in being characterised as a ‘useful compensatory remedy’.<sup>19</sup> Subsequently, disgorgement was directed by SEBI and upheld by the Securities Appellate Tribunal (SAT) in a multitude of cases.<sup>20</sup> SAT has further clarified that since the chief purpose of disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, the disgorgement amount should not exceed the total profits realised as a result of the unlawful activity.<sup>21</sup> The burden of proving that the amount sought to be disgorged ‘reasonably approximates’ the amount of unjust enrichment lies on SEBI.<sup>22</sup>

However, it was only in the year 2014, that section 11B<sup>23</sup> of the SEBI Act was amended to incorporate and establish disgorgement as an

<sup>19</sup> *Supra* n. 15.

<sup>20</sup> *See Karvy Stock Broking Ltd. v. SEBI* (SAT Appeal No. 6 of 2007) Order dated 2.05.2008; *NSDL v. SEBI* (SAT Appeal No. 147 of 2006) Order dated 22.11.2007; *Opee Stock Link Ltd. and Anr. v. SEBI* (SAT Appeal No. 20 of 2009), Order dated 30.12.2009; *Himani Patel v. SEBI* (SAT Appeal No. 154 of 2009) Order dated 07.09.2009; *Shadilal Chopra v. SEBI* (SAT Appeal No. 201 of 2009) Order dated 02.12.2009; *Dhaval Mehta v. SEBI* (SAT Appeal No. 155 of 2008) Order dated 08.09.2009; *Dushyant Dalal v. SEBI* (SAT Appeal No. 182 of 2009) Order dated 12.11.2010.

<sup>21</sup> *Karvy Stock Broking Ltd. v. SEBI* (SAT Appeal No. 6 of 2007) Order dated 02.05.2008.

<sup>22</sup> *Karvy Stock Broking Ltd. v. SEBI*; Sumit Agrawal and Robin Joseph Baby, *SEBI ACT: A Legal Commentary on Securities And Exchange Board of India Act, 1992* (Taxmann Publication 2011).

<sup>23</sup> *SEBI Act, 1992*, section 11B Power to issue directions: (*before the 2014 amendment*) ‘Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,—

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions,—

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.’

explicit power of SEBI. The explanation to section 11B embodies the statutory sanction to disgorgement and reads as follows:

‘For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.’<sup>24</sup>

Section 12A of the *Securities Contract Regulation Act, 1956 (SCRA)* and section 19 of the *Depositories Act, 1996* are identical to section 11B of the SEBI Act. The concerned sections 12A and 19 were also amended *vide* the *Securities Law Amendment Act*<sup>25</sup> to include the same explanation,<sup>26</sup> which defines and confers legislative sanction to disgorgement. Therefore, in Indian securities law, the power of SEBI to order disgorgement now stems from statutory provisions embedded in the SEBI Act, the SCRA, 1956 and the *Depositories Act, 1996*.

The amount of money disgorged was earlier credited to the Consolidated Fund of India. It is now credited to the Investor Protection and Education Fund and used in accordance with the *SEBI (Investor Protection and Education Fund) Regulations, 2009*<sup>27</sup> to first,

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<sup>24</sup> Inserted by the *Securities Law (Amendment) Act, 2014* w.r.e.f. 18.07.2013.

<sup>25</sup> *Securities Law (Amendment) Act* w. r. e. f. 13.07.2013.

<sup>26</sup> *Securities Contracts (Regulation) Act, 1956*, Explanation to section 12A: ‘For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.’

<sup>27</sup> *SEBI (Investor Protection and Education Fund) Regulations, 2009* dated 19.05.2009. (*SEBI (IPEF) Regs*).

provide restitution to eligible and identifiable investors,<sup>28</sup> who have suffered losses as a consequence of violation of securities law and then use such funds along with interest thereon for the purpose of investor welfare and education.<sup>29</sup> SEBI extensively uses this power to direct disgorgement in cases of violations of securities law.

### III. DISGORGEMENT: A UNIQUE REMEDY

This part of the article seeks to elucidate the nature of disgorgement as a remedy for the enforcement of securities law. The purpose of understanding the nature of disgorgement is twofold. First, to understand the nuances between disgorgement *vis-à-vis* other powers of the regulator to remedy a violation of securities law. Second, to determine the constituents of disgorgement. This would be crucial for the calculation of disgorgement.

#### A. *Disgorgement as an equitable remedy or a penal measure?*

Before commencing the discussion on whether disgorgement is an equitable remedy or a penalty, it would be essential to understand why this distinction is important. In a multitude of cases, securities commissions or regulators order injunctions or debar wrongdoers from dealing in the securities market for a statutorily stipulated number of years. In addition, they also direct disgorgement and penalties. The classification of disgorgement as a penalty would have a significant impact on its calculation. In the given context, it would now be useful to understand the distinction between penalty and disgorgement.

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<sup>28</sup> The investors affected by a securities law violation are not always identifiable. For instance, in cases of insider trading, it may not be possible to identify any particular person who has suffered loss. However, the act is prejudicial to the interests of the investors in the securities market as a whole. In such cases, it may not be possible to grant restitution to specific individuals from the amount credited to the Investor Protection and Education Fund (IPEF). However, in certain cases of Initial Public Offer (IPO) irregularities, it may be possible to identify affected investors, who may be the unsuccessful applicants in an IPO. *See also* SEBI Press Release dated 17.12.2015, 'SEBI distributes disgorgement amount to the investors affected by IPO irregularities', PR No. 295/2015 and SEBI Press Release dated 12.04.2010, 'SEBI commences disbursement process of disgorgement amount', PR No. 93/2010.

<sup>29</sup> *See SEBI (IPEF) Regs, 2009, regulations 4 and 5.*

The term 'penalty' denotes a punitive action, whether corporal or pecuniary, imposed and enforced by the State for a crime or offence against its laws.<sup>30</sup> Mere contravention of the law suffices an invocation of such provisions. Across various jurisdictions, the judicial trend has been to distinguish the concept of penalty from that of disgorgement. To ascertain whether a law is penal, it is important to understand whether the wrong sought to be redressed is a public wrong or a private wrong.<sup>31</sup> While penal laws ordinarily govern public wrongs only, a pecuniary sanction would operate as a penalty if the objective is to punish the wrongdoer and deter the public at large, ie, compensating a victim for loss caused to him.<sup>32</sup> If the liability imposed is compensatory in nature and paid entirely to a private plaintiff to redress a private injury only, then it would not constitute a penalty.<sup>33</sup>

Traditionally, in India and USA, it has been held that disgorgement is not a punishment, and nor is it concerned with the damages sustained by the victims of the unlawful conduct.<sup>34</sup> Disgorgement is merely a monetarily equitable remedy,<sup>35</sup> and not a punitive measure<sup>36, 37</sup>. The purpose of penalty is to punish and therefore, penalty by its very nature is retributive whereas the purpose of disgorgement is to strip the wrongdoer to the limited extent of unjust enrichment.<sup>38</sup>

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<sup>30</sup> *Huntington v. Attrill*, 146 U. S. 657, 667 (1892). It may be noted that in the Indian context, although penalty is perceived to be punitive in nature, there is no requirement to prove *mens rea* for the purpose of imposing penalty on account of breach of civil obligations. See *Shriram Mutual Fund v. SEBI* (2006) 5 SCC 361. Alternatively, it can be argued that mere absence of *mens rea* will not change the punitive nature of a penalty imposed.

<sup>31</sup> *Huntington v. Attrill*, 668.

<sup>32</sup> *Kokesh v. SEC* 137 S. Ct. 1635 (2017), 6.

<sup>33</sup> *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 421-422 (1915).

<sup>34</sup> *Karvy Stock Broking Ltd. v. SEBI* [2008] 84 SCL 208.

<sup>35</sup> *Karvy Stock Broking Ltd. v. SEBI*.

<sup>36</sup> *SEC v. Blatt*, 583 F.2d 1325, 1327-1336 (5th Cir. 1978).

<sup>37</sup> See *Dhaval Mehta v. SEBI* (SAT Appeal No. 155 of 2008) Order dated 08.09.2009 and *Shailesh Jhaveri v. SEBI* (SAT Appeal No. 79 of 2012) Order dated 04.10.2012.

<sup>38</sup> *Fatema Dalal and Murtuza Kachwalla, 'Disgorgement: An Introduction to a New Concept or a Precedent to a Debacle?'* (2007) 6 *Law Review GLC* 74, 79.

Interestingly, the approach of the legislature and the courts now seems to be to dilute the fine but thin distinction between penalty and disgorgement. This shift was recently witnessed in USA in its recent decision in *Kokesh v. SEC*.<sup>39</sup> In this case, the question was whether the limitation period of 5 years, which is applicable to civil penalties in USA,<sup>40</sup> would also be applicable to the disgorgement amount directed in the securities enforcement context. The Supreme Court of USA (US SC) held that ‘disgorgement’ would classify as a ‘penalty’ within the meaning of §2462 of the *United States Code*.<sup>41</sup> This is because first, disgorgement is a remedy seeking to redress a public wrong or a wrong against the state as against providing redressal to an aggrieved investor in the securities market. For the purpose of disgorgement, the regulatory commission would act in public interest rather than put itself in the shoes of particular injured parties. Second, an inherent objective of disgorgement is to achieve deterrence of securities law violations.<sup>42</sup> Lastly, disgorgement is not always compensatory in nature. This is generally in cases where aggrieved investors cannot be identified. A classic example of this would be a case of insider trading wherein it is the securities market which suffers as a whole on account of such unlawful conduct. In such cases, compensation cannot be granted to particular individuals or persons, as the investors to whom loss has occurred are not identifiable. Citing *Porter v. Warner Holding Company*,<sup>43</sup> the US SC held that payment of a non-compensatory sanction to the government as a consequence of legal violation causes disgorgement to operate as a penalty.<sup>44</sup> Further, it explained that a civil sanction may have more than one purpose. It may be compensatory in nature and deterrent or retributive at the

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<sup>39</sup> *Kokesh v. SEC*.

<sup>40</sup> Judiciary and Judicial Procedure, (25 June 1948) 28 U.S.C. § 2462 (United States) reads as: ‘an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued.’

<sup>41</sup> 28 U. S. C. §2462.

<sup>42</sup> *SEC v. Fischbach Corp.*, 133 F. 3d 170, 175 (CA2 1997) and *SEC v. First Jersey Securities, Inc.*, 101 F. 3d 1450, 1474 (CA2 1996); *SEC v. Rind*, 991 F. 2d, 1491.

<sup>43</sup> 328 U. S. 395, 402 (1946).

<sup>44</sup> *Kokesh v. SEC*; Distinguishing between restitution paid to an aggrieved party and penalties paid to the Government.

same time. Considering that in a number of cases, disgorgement goes beyond mere compensation and imposes punishment, disgorgement would constitute a penalty. In holding so, the US SC has attenuated the distinction between penalty and disgorgement to a considerable extent.

Similarly, in India, certain legislative changes have been recently introduced in the SEBI Act by way of The Finance Act, 2018<sup>45</sup>, which also appear to have watered down the distinction between disgorgement and penalty to some extent. For this purpose, it would be essential to understand section 11B of the SEBI Act.<sup>46</sup> It may be useful to break down this section on the basis of its purpose for the ease of understanding. Section 11B comprises of the following three parts:

- (i) Circumstances which necessitate SEBI's intervention (such as protection of investors, need to secure proper management, etc)
- (ii) To whom SEBI may issue directions (companies, stock brokers, persons associated with securities market, etc);<sup>47</sup>

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<sup>45</sup> *The Finance Act, 2018*.

<sup>46</sup> *SEBI Act, 1992*, section 11B: Power to issue directions and penalty: 'Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,—

- (i) in the interest of investors, or orderly development of securities market; or
- (ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or
- (iii) to secure the proper management of any such intermediary or person, it may issue such directions,— (a) to any person or class of persons referred to in section 12, or associated with the securities market; or (b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market. Explanation — For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.'

<sup>47</sup> *See Finance Act, 2018*, section 12 read with *SEBI Act, 1992*, section 11B.

- (iii) An explanation to the section, which statutorily empowers disgorgement.

Now, the table given below seeks to assist the reader in comprehending how the distinction between disgorgement and penalty may have been partially blurred *vide The Finance Act, 2018*.

Relevant Section	Prior to the Amendment <sup>48</sup>	After the Amendment	Comments
Marginal Note to section 11B of SEBI Act, 1992.	Power to issue directions.	Power to issue directions and penalty. <sup>49</sup>	SEBI's power to direct disgorgement is manifested in section 11B. Section 11B, which originally dealt with the power to issue directions only, now confers on SEBI the power to levy penalties as well.
Marginal Note to section 15J of SEBI Act, 1992.	Factors to be taken into account by the adjudicating officer.	Factors to be taken into account while adjudging the <i>quantum of penalty</i> (emphasis supplied). <sup>50</sup>	By way of this amendment, it is now clear that section 15J enumerates the factors to be considered in the determination of quantum of 'penalty'.

<sup>48</sup> Amendment in this table refers to the amendment to *SEBI Act, 1992* under *Finance Act, 2018*, Part X.

<sup>49</sup> *Finance Act, 2018*, section 180.

<sup>50</sup> *Finance Act, 2018*, section 185.

Relevant Section	Prior to the Amendment <sup>48</sup>	After the Amendment	Comments
Section 15J of SEBI Act, 1992.	<p>While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:</p> <p>(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;</p> <p>(b) the amount of loss caused to an investor or group of investors as a result of the default;</p> <p>(c) the repetitive nature of the default.</p>	<p>While adjudging quantum of penalty under section 15-I or section 11 or section 11B, the Board or the adjudicating officer shall have due regard to the following factors, namely:</p> <p>(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;</p> <p>(b) the amount of loss caused to an investor or group of investors as a result of the default;</p> <p>(c) the repetitive nature of the default.<sup>51</sup></p>	Section 15J has been further amended to provide for the determination of penalty, <i>inter alia</i> , under section 11B, which encapsulates the power to disgorge.

<sup>51</sup> Finance Act, 2018, section 185.

Let us consider a situation where a person who has been debarred from accessing and dealing in the securities market by SEBI has undertaken certain legal trades through connected companies during the period of debarment. In such a scenario, would the appropriate measure undertaken by the regulator be that of levying penalty under section 15HB<sup>52</sup> of the SEBI Act, which envisages a maximum penalty of INR 1 crore or award disgorgement of unlawful gains, in which case, there is no cap to the maximum amount which can be disgorged. While both, penalty and disgorgement, may be awarded in cases of contravention of provisions of the SEBI Act or regulations made thereunder, the difference lies in determining whether the gains made from legal trades during the period of debarment would constitute wrongful gains. The author is of the opinion that when a person is debarred from accessing the securities market, any trade undertaken by him would be unlawful by virtue of the debarment itself and notwithstanding the legality inherent in the nature of the trade. Interestingly, recently SEBI has also chosen the latter route of directing disgorgement in a similar fact situation.<sup>53</sup>

Further, unlike USA, there is no limitation period prescribed by the SEBI Act or the *Limitation Act, 1963* in India for any enforcement action by SEBI. In fact, in *Vaman Madhav Apte v. SEBI*,<sup>54</sup> SAT

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<sup>52</sup> *SEBI Act, 1992*, section 15HB, Penalty for Contravention where No Separate Penalty has been provided: 'Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.'

<sup>53</sup> See SEBI order dated 27.03.2017 in *Beejay Investment and Financial Consultants Pvt Ltd & 17 others*. See also CA Jayant Thakur, 'Disgorgement of profits – profits made in violation of SEBI directions vs. profits made in violation of law' (2016) *Indian Corporate Law*, at <https://indiacorpplaw.in/2016/06/disgorgement-of-profits-profits-made-in.html>. (last visited 24 February 2019).

<sup>54</sup> *Vaman Madhav Apte & Ors. v. SEBI* (SAT Appeal No. 449 of 2014) Order dated 04.03.2016. This order was given by SAT in an appeal against the order of SEBI dated 31.10.2014. In the facts of the case, the Appellants acted in violation of Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 on account of failure to make a public announcement for the acquisition of shares. When the appellants argued that there was inordinate delay on the part of SEBI in taking action, the Whole Time Member of SEBI observed that such violation of securities law was a continuous violation giving rise to a fresh cause of action each day during which the failure continued.

has explicitly held that neither the SEBI Act nor any regulations thereunder stipulate a maximum time period within which (i) proceedings shall be initiated by the regulator, or (ii) on the expiry of which, action by the regulator against the violator shall be barred. In the absence of any such provisions, the doctrine of delay and laches cannot be invoked in a securities enforcement action by the regulator. Although the doctrine of laches is an equitable principle commonly accepted by courts of law in India, the courts are unlikely to accept it in the securities enforcement context, considering that the objective of such action is to serve a public purpose by protecting the interests of investors and preserving the integrity of the securities market.<sup>55</sup>

### *B. Disgorgement distinguished from Impounding*

Section 11(4)(d) of the SEBI Act empowers SEBI to impound and retain proceeds or securities in respect of any transaction, which is under investigation. The term ‘impound’ means:

‘1. To place (something such as car or personal property) in the custody of the police or the court, often with the understanding that it will be returned intact at the end of the proceeding. 2. To take and retain possession of (something, such as a forged document to be produced as evidence) in preparation of a criminal prosecution.’<sup>56</sup>

From the above, it can be discerned that impounding is an interim measure in the hands of SEBI during the pendency of the process of investigation and before the final adjudication of guilt. This power enables SEBI to retain the approximate proceeds by which the wrongdoer has been unjustly enriched. Impounding can also operate as an effective instrument against diversion of funds and erosion of value of assets pending investigation.<sup>57</sup> On the contrary, disgorgement

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<sup>55</sup> This would be subject to the facts and circumstances of every case. In a given case, if the regulator, having known about the violation of securities law, acts after a considerable amount of time without reasonable cause, in such a case, the court may choose to reject such action on the ground of delay and laches.

<sup>56</sup> Bryan A Garner, *Black’s Law Dictionary* (10th edn Thomson Reuters 2014) 874.

<sup>57</sup> See SEBI order in the matter of *Beejay Investment & Financial Consultants Pvt Ltd* dated 27.03.2017. See also SEBI order in the matter of *Abhijit Rajan* dated 21.03.2016.

is a final remedy available to SEBI. Using this power, SEBI can permanently deprive the wrongdoer to the extent of the unjust enrichment availed by him. It may be noted that while impounding is generally ordered *vide* an interim order, disgorgement cannot be ordered at the interim stage. Disgorgement, being a permanent remedy, can be directed only by way of a final order.<sup>58</sup>

### C. *Disgorgement and Restitution*

Restitution means to return or restore wealth received by the defendant from the claimant as it amounts to unjust enrichment at the expense of the claimant.<sup>59</sup> Disgorgement means relinquishing gains made by the defendant as a consequence of some wrongdoing to the claimant, where such gains have been received from a third party.<sup>60</sup> While multiple attempts have been made to distinguish restitution from disgorgement, this distinction faces a multitude of practical challenges. To demonstrate a few: (i) when disgorgement is computed as loss averted, there may not be any real gain accruing to any person (if the computation is based only on a notional gain) or (ii) when wrong has not been caused to any 'particular identifiable person'. Recently, in *Kokesh v. SEC*, the US SC held that 'disgorgement is a form of restitution measured by the defendant's wrongful gain.'<sup>61</sup> Hence, the distinction between restitution and disgorgement appears to be considerably convoluted.

## IV. CONSTITUENTS OF DISGORGEMENT AND ITS COMPUTATION BY THE SEC AND COURTS IN USA

### A. *US Jurisprudence on Constituents of Disgorgement*

In view of James Tyler Kirk's article titled 'Deranged Disgorgement',<sup>62</sup> the author seeks to highlight certain elements which should either be

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<sup>58</sup> See *National Securities Depository Ltd. v. SEBI* (SAT Appeal No. 147 of 2006) Order dated 22.11.2007.

<sup>59</sup> RB Grantham and CEF Rickett, 'Disgorgement for Unjust Enrichment', (2003) 62 *The Cambridge Law Journal* 159, 159.

<sup>60</sup> *Ibid.*

<sup>61</sup> Restatement (Third) of Restitution and Unjust Enrichment §51, Comment at 204 (2010) (Restatement (Third)) as cited in *Kokesh v. SEC* at 2.

<sup>62</sup> James Tyler Kirk, 'Deranged Disgorgement' (2015) 8 *J. Bus. Entrepreneurship & L.* 131 (James Tyler Kirk).

included or excluded from the broad parameters of disgorgement. An understanding of the constituents of disgorgement would assist one in arriving at the reasonably accurate quantification of disgorgement. In his article, Kirk has formulated what he calls ‘the theory of regulatory equity’.

He emphasises the crucial distinction between unlawful ‘profits’ *vis-à-vis* unlawful ‘benefits or gains’. He advocates that the doctrine of unjust enrichment should include unlawful gains or benefits rather than profits only. The essential distinction between the two is that while unlawful profits connote a prerequisite monetary dimension, an unlawful gain or benefit may occur even in the absence of any monetary profits. Put simply, Kirk advocates that an unjust enrichment can occur in the securities context, even in the absence of a monetary gain.<sup>63</sup> Alternatively, unjust enrichment is not merely restricted to what remains in the pockets of the wrongdoer in the aftermath of a fraud, but rather includes the ‘value of the other benefits’ which accrue to the wrongdoer through a scheme.<sup>64</sup> These benefits may be in the form of interest free loans, improved reputation, cost defrayments, etc.<sup>65</sup>

Example: A tipper (also an insider) who shares unpublished price sensitive information (UPSI) may not necessarily make a monetary gain but he becomes a coveted tipper by future and potential tippers.<sup>66</sup>

Kirk has further proposed that ‘to give effect to the deterrent purposes of disgorgement, the remedial scheme must have a way to neutralise secondary and tertiary benefits flowing from the securities violation.’

However, disgorgement of benefits, other than monetary benefits, is likely to entail a plenitude of legal challenges, as disgorgement is fundamentally perceived as a monetarily equitable measure and not as a punitive measure.

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<sup>63</sup> James Tyler Kirk at 156; See *SEC v. Yun*, 148 F. Supp. 2d 1287 (M.D. Fla. 2001); *Texas Gulf Sulphur*. Here, the tippers were made liable to disgorge without any monetary gain.

<sup>64</sup> See *SEC v. Great Lakes Equity*, 775 F. Supp. 211.

<sup>65</sup> James Tyler Kirk at 158; *SEC v. Great Lakes Equity*, 215.

<sup>66</sup> See *SEC v. Yun*, 148 F. Supp. 2d 1287 (M.D. Fla. 2001).

Kirk further analyses that while direct transactional costs, such as brokerage fees, may be offset in the calculation of disgorgement, the general and legitimate business expenses incurred in the process of acquiring the unlawful gains cannot be offset while calculating disgorgement and therefore, such general business expenses must be lawfully included in the amount to be disgorged.<sup>67</sup>

### B. *Computation of Disgorgement in USA*

The computation of disgorgement extends only to the amount with interest by which, the defendant profited from his wrongdoing.<sup>68</sup> Any further sum would constitute a penalty assessment.<sup>69</sup> Thus, it becomes essential that where benefits are derived from lawful and unlawful conduct, the party seeking disgorgement must distinguish between legally and illegally derived profits.<sup>70</sup> In cases of systematic and pervasive fraud, where it is difficult to find any lawful activity, all profits may be construed as unlawful in nature and therefore, required to be disgorged.<sup>71</sup> However, the rules for calculating disgorgement must recognise that separating legal from illegal profits, may at times, be a near impossible task.<sup>72</sup> Accordingly, disgorgement need only be a 'reasonable approximation of profits causally connected to the violation'.<sup>73</sup> The SEC bears the ultimate burden of persuasion that its disgorgement figure reasonably approximates the amount of unjust enrichment.<sup>74</sup> It is then for the defendant to show that the disgorgement figure is a not a reasonable approximation.<sup>75</sup>

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<sup>67</sup> *SEC v. McCaskey*, 2002 WL 850001 at 4 (S.D.N.Y. 2002); *See SEC v. Hughes Capital Corp.*, 917 F. Supp. 1080, 1086-87 (D.N.J. 1996) and *SEC v. Kenton Capital Ltd.*, 69 F. Supp. 2d 1 (D.D.C. 1998).

<sup>68</sup> § 240.10b-5.

<sup>69</sup> § 240.10b-5.

<sup>70</sup> *See SEC v. Willis*, 472 F. Supp. 1250, 1276 (D.D.C. 1978).

<sup>71</sup> *See Commodities Future Trade Commission v. British American Commodities Options Corporation*, 788 F.2d 92, 93-94 (2d Cir. 1986) cert. denied, 479 U.S. 853, 107 S.Ct. 186, 93 L.Ed.2d 120 (1986).

<sup>72</sup> *Elklind v. Liggett Myers Inc.*, 635 F.2d 156, 171 (2d Cir. 1980).

<sup>73</sup> *SEC v. First Financial City Corp. Ltd.* 890 F.2d 1215, 1217-1233 (D.C. Cir. 1989).

<sup>74</sup> *SEC v. First Financial City Corp. Ltd.*

<sup>75</sup> *SEC v. First Financial City Corp. Ltd.*

An analysis of multiple judgments of the courts of law in USA yields three important patterns adopted in the computation of disgorgement. Although, these judgments are in the context of shares, they may be considered under the broader ambit of securities traded in the cash segment of stock exchanges. They are as follows:

### 1. Consideration of ‘Cost Basis’

In this method of computing the amount of disgorgement, reasonable approximation of profits is calculated as the difference between the price at which shares were sold and the cost of acquiring such shares. Simply put, it works on the basic formula, which has been set out as follows:

$$\text{Profits} = \text{Selling Price} - \text{Cost Price}$$

In *SEC v. MacDonald*,<sup>76</sup> an officer purchased shares of a trust, while in possession of material, non-public information. In this case, though the determination of the disgorgement amount was remanded back to the commission, the Court ruled that the correct computation would involve a difference between the sale value of shares and the price at which, such shares were purchased.

The following table is an explanatory example, which clarifies the use of ‘cost of acquisition’, in computing the amount of disgorgement.<sup>77</sup>

Situation	Cost Basis (Purchase Price)	Selling Price	Profits (Selling Price - Purchase Price)
Insider sold it	\$4	\$5	\$1
The stock rose and the Insider sold it	\$4	\$10	\$6

### 2. Consideration of Market Value of Shares at the Relevant Date of Sale Instead of Cost Basis

In this method, the amount of disgorgement is calculated as the difference between the value of shares at the date of sale, while in

<sup>76</sup> *SEC v. MacDonald* 699 F.2d 47, 49-58 (1st Cir. 1983).

<sup>77</sup> *See SEC v. MacDonald.*

possession of material non-public information, and the value of shares, a reasonable time after such information is made known to the public.

An analysis of case law demonstrates a trend that this method is generally employed, in cases where there is a sale of shares while in possession of material non-public information, which is likely to cause a decline in the value of shares.<sup>78</sup> Alternatively, this method of computing disgorgement is largely employed in cases where losses are sought to be unlawfully averted rather than a situation where gains are unlawfully or wrongly made.

In *SEC v. Happ*, the Appeals Court held that in an insider trading case, the proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them, while in possession of material non-public information, and their market value, ‘a reasonable time after public dissemination of the inside information.’<sup>79</sup> In this case, the appellant explicitly argued that disgorgement must be calculated on the basis of cost, ie, it must be calculated as the difference between the value of sale of shares, and its cost of acquisition, which would enable the SEC to determine his unlawful gains. He unsuccessfully contended that the SEC was, in fact, proceeding on a ‘wrong footing’ by equating the amount of disgorgement to the ‘loss averted’ by him instead of proceeding on the lines of ‘unlawful gains made’ to determine unjust enrichment.<sup>80</sup> Where the securities market is manipulated to mulct the public, there is no justification to give the offender any credit for the fact that such person had not succeeded in avoiding losses.<sup>81</sup> For example, loss may be unlawfully averted in cases of negotiated deals and circular trading to stabilise the price of certain shares.

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<sup>78</sup> See *SEC v. Patel* 61 F.3d 137, 139 (2d. Cir. 1995); *SEC v. Happ* 392 F.3d 12, 14-35 (1st Cir. 2004) and *SEC v. Shapiro* 494 F.2d 1301, 1303-1314 (2d Cir. 1974).

<sup>79</sup> *SEC v. Patel* and *SEC v. Happ* 392.

<sup>80</sup> *SEC v. Happ* 392 F.3d 12, 14-35 (1st Cir. 2004)

<sup>81</sup> See *SEC v. Common Wealth Chem. Sec. Inc.* 574 F.2d 90, 102 (2nd Cir. 1978); James Tyler Kirk.

In such cases, it is for the defendant to show that the loss avoided is not a reasonable approximation as made by the SEC.<sup>82</sup> The onus is on the defendant to demonstrate ‘a clear break in or considerable attenuation for the causal link between the illegality and ultimate profits.’<sup>83</sup> It may be relevant to note that the requirement of a causal relationship between a wrongful act and the property to be disgorged does not imply that a court may order a malefactor to disgorge only the actual property obtained by means of his wrongful act.<sup>84</sup> Rather, the causal connection required is between the amount by which the defendant was unjustly enriched and the amount he can be required to disgorge.<sup>85</sup> Disgorgement of only the actual assets would lead to abnormal results.<sup>86</sup> An order to disgorge establishes a personal liability, which the defendant must satisfy regardless of whether he retains the selfsame proceeds of his wrongdoing.<sup>87</sup> In any event, the risk of uncertainty in calculating the amount of disgorgement always falls on the wrongdoer.<sup>88</sup>

Illustration: Mr. A buys 100 shares of company X in 2001 at \$10 per share. On 30 January 2004, he sells all his shares at \$15 per share, while in possession of material non-public information relating to certain fraudulent activities taking place in the company. This information becomes public on 7 February 2004 at 8.00 p.m., and on 8 February 2004, the price of shares of company X drops to \$3 per share. Hence, disgorgement here, will be the loss averted, which is the difference between the value of shares on the date of sale and its value, a reasonable time after public dissemination of the insider information.

(The reason why we will not opt for the first method (cost basis) is that there is no rational relation between the cost of acquisition of

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<sup>82</sup> *SEC v. Common Wealth.*

<sup>83</sup> *SEC v. Happ.*

<sup>84</sup> *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000).

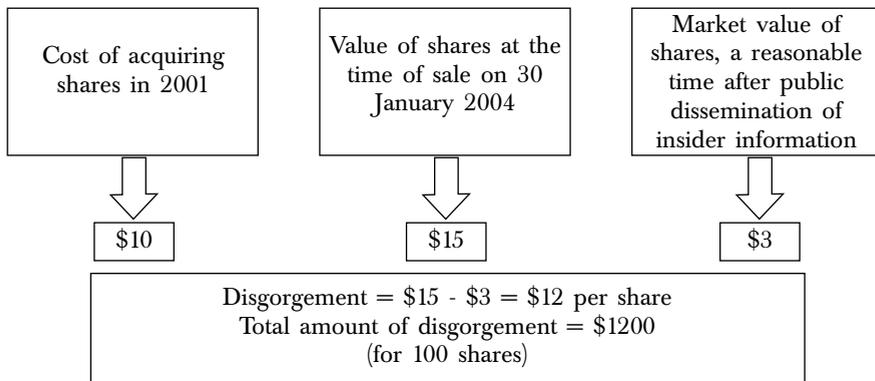
<sup>85</sup> *SEC v. Banner Fund Int'l*, 602.

<sup>86</sup> *SEC v. Banner Fund Int'l*, 617.

<sup>87</sup> *SEC v. Banner Fund Int'l.*

<sup>88</sup> *SEC v. Patel* 61 F.3d 137, 139-142 (2d. Cir. 1995).

shares in 2001 and its selling price in 2004. In three years, due to constant movements in the securities market, a plethora of changes may occur in the valuation of shares.)



In the given instance, if the share price further falls to \$2.5 on 10 Feb 2004 on account of such fraudulent act, the defendant may have to disgorge a greater sum ( $\$15 - \$2.5 = \$12.5$  per share) unless he can prove that the further decline was not on account of the fraudulent activity in the company. As explained above, in calculating disgorgement, the risk of uncertainty is to be borne by the wrongdoer.

It would be useful to note that if we use the first method (cost basis), the amount of disgorgement would be quantified at  $\$15 - \$10 = \$5$  per share. Accordingly, the total amount of disgorgement under the first method would be \$500 and under the present method, it has been valued at \$1200. Hence, the method employed in the calculation of disgorgement can significantly impact the final quantification, which is why, it becomes very important to use the most equitable method in view of the facts of each case.

### 3. Percentage basis

This method requires the application of the following two steps:

- a) Calculation of the percentage by which the value of shares increased or declined after the material non-public information became known to the public.
- b) Application of the derived percentage to the total value of sale or purchase of shares to determine disgorgement.

This method was applied in *SEC v. Patel*<sup>89</sup> and affirmed by the Appeals Court.

Illustration: A is an executive director in company X and holds 100 shares in the company at \$2000 (\$20 per share). He becomes aware of material non-public information regarding falsification of accounts in company X, and he sells his entire holding on 10 September 2016 for \$2000. On 19 September 2016, the share price of company X was at \$15 per share. This information became public on 20 September 2016. The price dropped to \$5 per share.

Solution: The following table demonstrates the method to be employed in calculating disgorgement in the given illustration using the percentage method:

Step 1: Drop in the shares of company X from 19-20 September 2016	66.67%
Step 2: Disgorgement amount = 66.67% of \$2000	\$1334.40

Thus, the aforesaid are three methods, which have been employed by the SEC in ascertaining the disgorgement amount, as is evident from various judgments.

## V. CONSTITUENTS OF DISGORGEMENT AND ITS QUANTIFICATION BY SEBI AND COURTS IN INDIA

### A. *Constituents of Disgorgement in India*

In India, SEBI does not include taxes in the computation of disgorgement. The amount disgorged is exempt from income tax

<sup>89</sup> *SEC v. Patel*.

as well. Alternatively, if income tax has already been paid on the amount, the solution would be to claim a refund of the income tax from the concerned income tax authorities.<sup>90</sup> Further, where an argument was made before both SEBI and SAT to exclude ‘other expenses’ from the ambit of disgorgement, such an argument was dismissed at the very threshold.<sup>91</sup> On these lines, one could possibly argue that in India, expenses such as brokerage or relevant business expenses incurred for the purpose of contravening the law would not be excluded while calculating the amount of disgorgement. It also appears unlikely that inclusion of non-monetary benefits (like improved reputation) will be accepted by Indian law courts for the purpose of quantifying disgorgement.

In the given context, it would help to note that interest, which is awarded on disgorgement, is not a constituent of disgorgement. While SEBI directs disgorgement under section 11B of the SEBI Act, interest is ordered in terms of section 28A(1) of the SEBI Act<sup>92</sup> read

<sup>90</sup> *Purshottam Budhwani v. SEBI* (SAT Appeal No. 91 of 2013) Order dated 15.01.2015.

<sup>91</sup> *See Purshottam Budhwani v. SEBI* and SEBI order in the matter of *IPO irregularities: Dealings of Purshottam Budhwani in IPOs* dated 23.05.2011.

<sup>92</sup> *Income Tax Act, 1961*, section 28A(1): Recovery of Amounts (Only the relevant part of the section has been carved out hereunder) ‘If a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:—

- (a) attachment and sale of the person’s movable property; (b) attachment of the person’s bank accounts; (c) attachment and sale of the person’s immovable property; (d) arrest of the person and his detention in prison;

...

- (e) appointing a receiver for the management of the person’s movable and immovable properties, and for this purpose, the provisions of sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, in so far as may be, apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of to income-tax under the Income-tax Act, 1961.’

with section 220 of the *Income Tax Act, 1961*.<sup>93</sup> Alternatively, awarding interest on disgorgement does not make the latter penal in nature

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<sup>93</sup> *Income Tax Act, 1961*, section 220: When tax payable and when assessee deemed in default (Only the relevant part of the section has been carved out hereunder)

‘(1) Any amount, otherwise than by way of advance tax, specified as payable in a notice of demand under section 156 shall be paid within thirty days of the service of the notice at the place and to the person mentioned in the notice:

Provided that, where the Assessing Officer has any reason to believe that it will be detrimental to revenue if the full period of thirty days aforesaid is allowed, he may, with the previous approval of the Joint Commissioner, direct that the sum specified in the notice of demand shall be paid within such period being a period less than the period of thirty days aforesaid, as may be specified by him in the notice of demand.

(1A) Where any notice of demand has been served upon an assessee and any appeal or other proceeding, as the case may be, is filed or initiated in respect of the amount specified in the said notice of demand, then, such demand shall be deemed to be valid till the disposal of the appeal by the last appellate authority or disposal of the proceedings, as the case may be, and any such notice of demand shall have the effect as specified in section 3 of the Taxation Laws (Continuation and Validation of Recovery Proceedings) Act, 1964 (11 of 1964).

(2) If the amount specified in any notice of demand under section 156 is not paid within the period limited under sub-section (1), the assessee shall be liable to pay simple interest at one per cent for every month or part of a month comprised in the period commencing from the day immediately following the end of the period mentioned in sub-section (1) and ending with the day on which the amount is paid:

Provided that, where as a result of an order under section 154, or section 155, or section 250, or section 254, or section 260, or section 262, or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under this section had been reduced, the interest shall be reduced accordingly and the excess interest paid, if any, shall be refunded:

Provided further that where as a result of an order under sections specified in the first proviso, the amount on which interest was payable under this section had been reduced and subsequently as a result of an order under said sections or section 263, the amount on which interest was payable under this section is increased, the assessee shall be liable to pay interest under sub-section (2) from the day immediately following the end of the period mentioned in the first notice of demand, referred to in sub-section (1) and ending with the day on which the amount is paid:

Provided also that in respect of any period commencing on or before the 31st day of March, 1989 and ending after that date, such interest shall, in respect of so much of such period as falls after that date, be calculated at the rate of one and one-half per cent for every month or part of a month.

because interest is not a constituent of disgorgement and the two remedies are directed under independent provisions of the SEBI Act.

### B. *Quantification of Disgorgement in India*

It was nearly a decade ago that SEBI's power to disgorge unlawful gains came to be recognised by SAT. Consequently, disgorgement as a directive power of SEBI is still in its nascent stage.

Interestingly, in *Dushyant Dalal v. SEBI*,<sup>94</sup> a case dealing with the abuse and misuse of the Initial Public Offer (IPO) allotment process by cornering of shares in the retail category, SAT reaffirmed SEBI's

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(2A) Notwithstanding anything contained in sub-section (2), the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may reduce or waive the amount of interest paid or payable by an assessee under the said sub-section if he is satisfied that—

- (i) payment of such amount has caused or would cause genuine hardship to the assessee ;
- (ii) default in the payment of the amount on which interest has been paid or was payable under the said sub-section was due to circumstances beyond the control of the assessee ; and
- (iii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him:

Provided that the order accepting or rejecting the application of the assessee, either in full or in part, shall be passed within a period of twelve months from the end of the month in which the application is received:

Provided further that no order rejecting the application, either in full or in part, shall be passed unless the assessee has been given an opportunity of being heard:

Provided also that where any application is pending as on the 1st day of June, 2016, the order shall be passed on or before the 31st day of May, 2017.

(2B) Notwithstanding anything contained in sub-section (2), where interest is charged under sub-section (1A) of section 201 on the amount of tax specified in the intimation issued under sub-section (1) of section 200A for any period, then, no interest shall be charged under sub-section (2) on the same amount for the same period.

(2C) Notwithstanding anything contained in sub-section (2), where interest is charged under sub-section (7) of section 206C on the amount of tax specified in the intimation issued under sub-section (1) of section 206CB for any period, then, no interest shall be charged under sub-section (2) on the same amount for the same period...

<sup>94</sup> *Dushyant Dalal v. SEBI* (SAT Appeal No. 182 of 2009) Order dated 12.11.2010.

stance that to compute disgorgement, unrealised gains on a notional basis can be included, even if there has been no real sale of the shares and therefore, no actual profits have been realised. In the case concerned, it further indicated its intention to abstain from interfering in the appropriate method to be adopted by the concerned Whole Time Member of SEBI in the quantification of disgorgement, unless the method applied was arbitrary or unfair in nature. Moreover, the SAT also upheld equal apportionment of the disgorgement amount, calculated on a fair and reasonable basis, 'in the absence of material as to how the illegal gains were distributed' between two persons.<sup>95</sup>

In India, the quantification of disgorgement by SEBI, ordinarily proceeds in the following manner:

- (i) *Amount of Disgorgement = Value of Sale – Cost of Acquisition*
- (ii) *Amount of Disgorgement = Listing Price – Cost of Acquisition* (useful to determine notional profits, where sale has not occurred)

The aforementioned method (ii) has been adopted, *inter alia*, in *Himani Patel v. SEBI*,<sup>96</sup> *Dhaval Mehta v. SEBI*,<sup>97</sup> and *Dushyant Dalal v. SEBI*.<sup>98</sup>

- (iii) *Amount of Impounding = Value of shares on the date of sale – Value of shares a reasonable time after the negative UPSI becomes public.*

The aforesaid method (iii) has been adopted by SEBI in relation to certain recent interim orders for impounding and may find acceptance in the final disgorgement order.<sup>99</sup>

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<sup>95</sup> *Dhaval Mehta v. SEBI* (SAT Appeal No. 155 of 2008) Order dated 08.09.2009.

<sup>96</sup> *Himani Patel v. SEBI* (SAT Appeal No. 154 of 2009) Order dated 7.09.2009.

<sup>97</sup> *Dhaval Mehta v. SEBI*.

<sup>98</sup> *Dushyant Dalal v. SEBI*.

<sup>99</sup> *Prakash Shah v. SEBI* (SAT Appeal No. 170 of 2017) SAT Order dated 10.08.2017 and SEBI order dated 02.08.2017 in the matter of *Joseph Massey and 7 other persons for insider trading in MCX scrips*.

### Illustrations:

- a) A owns 100 shares of company X as on 19 January 2016. On this date, he becomes privy to UPSI regarding company X's takeover of a reputed company Y. He buys 100 shares on 20 January 2016 at INR 80 per share and a further 100 shares on 23 January 2016 at INR 100 per share. The UPSI becomes public on 10 February 2016. The market responds positively to the news of such takeover and the share price of company X booms to INR 150 per share on 11 February 2016. Immediately, A sells the shares of company X to make profits.

Hence, disgorgement can be calculated in the following manner:

Date	Price/ share	Number of shares bought	Cost of acquisition
20.01.2016	INR 80	100	INR 8,000
23.01.2016	INR 100	100	INR 10,000
11.02.2016	INR 150	Value of 200 shares, which were purchased while in possession of UPSI	INR 30,000

$$\begin{aligned} \text{Hence, disgorgement} &= \text{Selling Price} - \text{Cost of Acquisition} \\ &= \text{INR } 30,000 - (\text{INR } 8,000 + \text{INR } 10,000) \end{aligned}$$

$$\text{Disgorgement} = \text{INR } 12,000$$

- b) A company X makes a series of misleading corporate announcements from 2015-2016, which artificially increases the price of its shares and traded volume in the market. M, a director of company X, holding 70,000 shares in the company offloads his shareholding in the open market during the same period. In such a case, disgorgement may be calculated as follows:

Dates	Shares acquired from market	Purchase Price/ share	Purchase consideration per transaction	No. of shares sold	Selling Price per share	Sale consideration per transaction
02.01.2015	5,000	INR 0.8	INR 4,000			
06.01.2015	3,500	INR 0.8	INR 2,800			
01.02.2015	5,200	INR 1	INR 5,200	2,000	INR 1.05	INR 2,100
13.02.2015	5,000	INR 0.95	INR 4,750			
25.04.2015	17,500	INR 1.2	INR 21,000			
03.05.2015	10,000	INR 1.25	INR 12,500			
08.08.2015	500	INR 1.3	INR 650	12,500	INR 1.32	INR 16,500
10.11.2015	1,500	INR 1.35	INR 2,025			
05.01.2016	20,000	INR 1.60	INR 32,000	38,200	INR 1.60	INR 61,120
27.05.2016	1800	INR 1.72	INR 3096	8,000	INR 1.7	INR 13,600
29.06.2016				9,200	INR 1.65	INR 15,180
TOTAL			INR 88,021			INR 1,08,500

Now using the weighted average method,<sup>100</sup> we find:

Weighted average purchase price per share =  $88,021/70,000 = \text{INR } 1.25$

Weighted average sale price per share =  $1,08,500/70,000 = \text{INR } 1.55$

Disgorgement per share = Weighted average selling price per share – weighted average price per share =  $\text{INR } 0.3$

Total disgorgement =  $70,000 \times 0.3$

Disgorgement =  $\text{INR } 21,000$

<sup>100</sup> Normally, when there are multiple transactions in the same scrip at different price points or the same scrip is traded on different stock exchanges, the weighted average method is better suited to secure accuracy.

- c) Mr. A, the promoter of Company X subscribes for 100 shares in the retail category of the IPO through a façade of benami or fictitious accounts. The issue price of shares is INR 60 per share. Pursuant thereto, he is allotted 100 shares in the retail category. Their closing price on the first day of listing, 9 July 2013, is INR 62 per share. He then sells all 100 shares at INR 63 per share on 10 July 2013.

Price	Price/share	Number of shares acquired/sold	Total value of shares
Issue Price	INR 60	100	INR 6000
Selling Price	INR 63	100	INR 6300

Issue price of shares in June 2013 = INR 6000

Sale value of shares = INR 6300

Disgorgement = Selling Price – Issue Price of shares

Disgorgement = INR 300

- d) Mr. A, the promoter of Company X subscribes for 100 shares in the retail category of the IPO through a façade of benami or fictitious accounts. The issue price of shares is INR 60 per share on 1 July 2013. Pursuant thereto, he is allotted 100 shares in the retail category. Their closing price on the first day of listing, 4 July 2013 is INR 62 per share. He then sells 50 shares at INR 63 per share on 5 July 2013.

Date	Price/share	Number of shares issued/sold/retained	Total value of shares
1 July 2013	INR 60	100	INR 6,000
4 July 2013	INR 62	100	INR 6,200 (INR 3,100 for 50 shares)
5 July 2013	INR 63	50	INR 3150

Issue price of 50 shares = INR 3,000

Sale value of 50 shares = INR 3,150

Disgorgement in respect of the 50 shares sold = Selling Price – Issue Price

= INR 3,150 – INR 3,000

Disgorgement in respect of the 50 shares sold = INR 150

Number of shares retained = 50

Notional profits in respect of the 50 shares retained = Closing price of shares on the first day of listing – Issue Price

Notional profits = INR 3,100 – INR 3,000

Disgorgement in respect of the 50 shares retained = INR 100

Total disgorgement amount = Actual wrongful gains + notional wrongful gains

= INR 100 + INR 150

Total disgorgement amount = INR 250

It may be noted that for the purpose of example (d) mentioned hereinabove, we have followed the stance taken by SAT in *Dushyant Dalal v. SEBI*.<sup>101</sup> In respect of the 50 shares retained, even though no actual profits have been realised by Mr. A and considering that there is no selling price to determine profits, the amount of disgorgement would be equal to the notional profits made by Mr. A in the given situation. Such determination of notional profits takes into account the difference between the closing price of the shares on the first day of listing and the Issue Price.

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<sup>101</sup> *Dushyant Dalal v. SEBI*.

## VI. STANDARDS FOR QUANTIFYING DISGORGEMENT

With due regard to the fact that it may not be possible to establish a straitjacket formula, which can be used to determine and quantify disgorgement in every situation, this article seeks to develop certain standards for computing disgorgement in case of a violation of securities law with particular focus on the cash segment of the stock market. Though such standards may not cover every probable situation or may be inapplicable to an ordinary violation on account of the peculiar facts and circumstances of that case, they seek to serve as general standards for easy computation of disgorgement by securities commissions. These standards are characterised by a relative mixture of the computation methods discussed in the course of this article.

They are as follows:

- (i) In case of insider trading, where the UPSI is of a positive nature, which boosts the market value of securities of a particular company, and shares are purchased before such UPSI becomes public knowledge, the clear motive seems to be making of unlawful profits.

Here,

*Disgorgement = Sale Value of Shares (in case of a sale) or value of shares, a reasonable time after the information becomes public - Cost of Acquisition*

- (ii) In case of insider trading, where the UPSI is of a negative nature, which leads to a decline in the value of securities of a particular company, and securities are sold before such UPSI becomes public knowledge, the intention is to avert losses. However, it could also be argued that the motivating factor for such sale is to make profits from the artificially high value of securities.

*Disgorgement = Market Value of Shares on the date of Sale/Trade - Value of Shares, a reasonable time after such information becomes public*

(iii) In case of cornering of shares in an IPO to derive an unfair advantage of a higher listing price, the clear intention is to make unlawful profits.

a)  $Disgorgement = Value\ of\ Sale - Cost\ of\ Acquisition$

Or

b)  $Disgorgement = Listing\ Price - Cost\ of\ Acquisition\ (to\ determine\ notional\ profits,\ where\ sale\ has\ not\ occurred)$

(iv) In case of a fraudulent advertisement, announcement or notice for buyback of securities or bonus issue of shares, the following method can be used to determine the amount of disgorgement:

$Disgorgement = Average\ traded\ price\ a\ reasonable\ time\ after\ the\ announcement - Average\ traded\ price\ a\ reasonable\ time\ before\ such\ announcement.$ <sup>102</sup>

(v) In case of an unlawful preferential allotment (for instance, when the company itself provides capital for subscription to its shares in the garb of preferential allotment)

$Disgorgement = Value\ or\ the\ amount\ contributed\ towards\ the\ legal\ contravention.$ <sup>103</sup>

For instance, in the above example, where the company itself has provided capital to the allottee for the purpose of subscribing to its shares, the company will be liable to disgorge the amount which has so been contributed towards its capital.

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<sup>102</sup> SEBI sought to adopt this method, as evinced from the order of SEBI in the *matter of Harishchandra Gupta* dated 01.04.2016. However, the matter was remanded to the Adjudicating Officer for the purpose of determining the exact figures of the ill-gotten gains.

<sup>103</sup> Order of SEBI in the *matter of Harishchandra Gupta*.

- (vi) In a recent case on front running,<sup>104</sup> B was an employee in A's company. A communicated his trade orders to B who placed them with the stock broker. B immediately purchased a certain quantity of shares for himself (lesser in quantity than A's order) in the same scrips for which the trade orders were placed with the broker on behalf of A and he sought to match the trade. Consequently, a majority of his trades matched with A's whereas some of them were offset in the market at large.<sup>105</sup>

Here, considering that front running is a fraud against the securities market as a whole, the profits accrued to B from squaring off shares in the market would be determined as the unlawful gain and not merely the profits accrued from the matched trades with A.<sup>106</sup>

Hence, in cases of front running and subject to the peculiar facts of each case, disgorgement may be quantified as:

*Disgorgement = Profits accrued by squaring off shares in the securities market, which shares were acquired by way of front running.*

- (vii) Where shares of a company are offloaded in the market by a person/entity involved in issuing false corporate announcements or disseminating any false news in respect of such company

<sup>104</sup> Bryan A Garner, *Black's Law Dictionary* (10th edn Thomson Reuters 2014) 784: 'Front running: n. Securities. A broker's or analyst's use of non-public information to acquire securities or enter into options or futures contracts for his or her own benefit, knowing that when the information becomes public, the price of the securities will change in a predictable manner. This practice is illegal. Front-running can occur in many ways. For example, a broker or analyst who works for a brokerage firm may buy shares in a company that the firm is about to recommend as a strong buy or in which the firm is planning to buy a large block of shares.'

In *SEBI v. Kanaiyalal Baldevbhai Patel* (2017) 15 SCC 1, the Supreme Court refers to the definition of 'front running' as used in the Black's Law Dictionary.

<sup>105</sup> SEBI order *in front running transactions of Kamal Jitendra Katkoria* dated 8.05.2018.

<sup>106</sup> SEBI order *in front running transactions of Kamal Jitendra Katkoria* (Since A would have bought a bigger quantity, his trade would have a positive impact on the price of the scrip. Having knowledge of this trade, B bought shares from the market at a lesser price from common investors and reserved the price advantage for himself by incidentally or deliberately setting a last traded price in the scrip. For A's order to match, the price should be equal to or more than the last traded price and hence, B succeeded in gaining profits wrongfully).

which results in an artificial increase in the price of the concerned scrip, the amount of disgorgement may be calculated as follows:

*Disgorgement = Closing price of scrip on the day before such announcements were made or information was disseminated to the public – average traded price of the shares sold by the concerned person/entity until the falsity of such information or announcement is brought to public notice.*<sup>107</sup>

It would be useful to consider an example to understand the above method.

A person 'M' holding 12 per cent shares in a company X (listed on BSE) colludes with a stock market blogger and a media agency to write and publicise that inside sources have leaked that one of the top 50 listed companies in India is in talks with Company X for a proposed acquisition. The blog was published on 6 December 2015 and the media agency featured it in the newspaper on the morning of 7 December 2015. The price of the scrip increased by almost 20 per cent. By 10:30 am, M offloaded 11 per cent of his shareholding in the market and fetched a lucrative amount for the same. At 10:40 am, the Board of Company X issued a public statement through Bombay Stock Exchange (BSE) to the effect that there were no such ongoing talks between Company X and any other company. Pursuant thereto, the price of the scrip fell.

In such a scenario, the unlawful gains could be calculated as the difference between the closing price of the scrip on 6 December 2015 and the average price at which M traded his shares till 10:40 am multiplied by the total number of shares offloaded in the market. The reason why unlawful gains have been computed on the basis of trade till 10:40 am only is that, at that point, the falsity of the proposed acquisition news was brought to the knowledge of the public at large.

- (viii) Interestingly, the percentage method adopted in *SEC v. Patel*, is one which can be applied in practically all of the above cases. However, its employment by the SEC has been rather limited.

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<sup>107</sup> See SEBI order dated 22.03.2018 in *Re: Saimira Pyramid Theatre Limited*.

- (ix) In case of pledge of shares, while in possession of negative UPSI, disgorgement would ordinarily be equal to the losses sustained by the pledgee, and the unlawful gains of the pledger. However, considering that the growing trend of pledging equity for the purpose of raising loans is subject to increased criticism by regulatory authorities in India, especially in the case of pledge of shares by promoters of companies, SEBI may want to opt for disgorgement of the entire amount of the loan.<sup>108</sup> This is because, such a loan would not have been granted in the first place, had the pledgee known the real value of the shares pledged. Hence, the grant of loan itself could be construed as an unlawful gain accrued to the pledger. The interesting question here would be whether disgorgement could be directed when there is full repayment of the loan. In my opinion, it may not be possible under the existing provisions of law and precedent, because though courts have recognised the concept of ‘notional profits’ to compute disgorgement, they may be reluctant to acknowledge ‘notional losses’ as a determinant for quantifying disgorgement.<sup>109</sup>

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<sup>108</sup> See Reserve Bank of India, Financial Stability Report (Including trend and progress of banking in India 2013-14) (December 2014) - Chapter III - Financial Structure Regulation and Infrastructure, at <https://rbi.org.in/scripts/PublicationReportDetails.aspx?UrlPage=&ID=809>. (last visited on 24 February 2019)

<sup>109</sup> See *Chintalapati Srinavasa Raju & Ors. v. SEBI, SRSR Holdings & Ors v. SEBI* (Appeal Nos. 463, 451-453, 458-462 of 2015) SAT order dated 11.08.2017 read with *Shri B. Ramalinga Raju & Ors v. SEBI* (Appeal Nos. 282, 284, 285, 286 and 287 of 2014) SAT order dated 12.05.2017. In these matters, a pledge was made by the promoters of Satyam Computers Services Limited, Ramalinga Raju and Rama Raju through an entity called SRSR Holdings for a loan borrowed of approximately INR 1,258 crores. This pledge was later invoked and a large part of the loan amount was repaid. In the concerned matter, the SAT and SC upheld SEBI’s findings that SRSR Holdings would classify as an insider and therefore, relevant provisions of the *Prohibition of Insider Trading (PIT Regulations)* and *SEBI Act* were violated. However, SAT remanded the calculation of the amount of disgorgement to SEBI which was earlier quantified by SEBI as the entire loan amount of INR 1,258 crores. SEBI had ordered this amount to be paid jointly and severally by Ramalinga Raju, Rama Raju and SRSR Holdings. Hence, while it would be reasonable to presume that some amount of disgorgement will be awarded in case of pledge of shares while in possession of UPSI, the method, which will be employed by the regulator to quantify the amount, remains a question to be answered.

## VII. CONCLUSION

The concept of disgorgement is now recognised in most jurisdictions. Securities commissions globally have been employing disgorgement as an effective and distinct enforcement tool for the dual purpose of protecting the interests of investors, and preserving the integrity of the capital markets. It cannot be denied that disgorgement is an equitable remedy, which has evolved against the background of legal lacuna that provided for injunctions and debarments but failed to deprive the wrongdoer of the primary unlawful fruits of his wrongdoing.

The method of computation or quantification of disgorgement differs not only among different jurisdictions but also within the approaches developed by a particular securities commission. There is no one method which can be described as ‘perfect’ or ‘apt’. In light of judicial pronouncements and legislation, it is pertinent to understand that a method is acceptable to the extent it performs the function of accurate estimation of unjust enrichment accrued to the wrongdoer. However, the method is likely to vary in view of the peculiar facts and circumstances of every case and the distinct strategies adopted by the wrongdoers to contravene securities law.

It is imperative that the amount of disgorgement be computed as the ‘reasonably approximate unlawful gains’ made by the party ordered to disgorge. Disgorgement, quantified as the reasonable approximation of profits wrongfully gained or losses wrongfully averted, causally connected to the violation(s), could rightfully be understood as the general standard to determine disgorgement in securities law.

# INDEX OF BACK ISSUES

*The Law Review* 2017 (Vol. 9)

1. Separatist Regimes and Human Rights Obligations
2. 'To Be or Not To Be' – The Conundrum of Arbitrability of Corruption and Subsequent Enforcement
3. Whose Airspace is it Anyway?: Decoding the ADIZ Enigma
4. Rape as an Atrocity: Analysis of Judgments Delivered by the District Court of Bilaspur, Chhattisgarh
5. Reverse Patent Settlements in India
6. Why the Net Needs to Forget
7. India: On the 'REIT' Path

Recommended form of citation:

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

# INDEX OF BACK ISSUES

*The Law Review* 2014 (Vol. 8)

1. Vessel Protection Detachments and the Search for Immunity
2. IP, Open Source and the Licensing Paradigm
3. The Civil Liability for Nuclear Damage Act, 2010: Is Promptness Without Adequacy an Effective Remedy?
4. The Indian Electoral Process and Negative Voting
5. Terrorism: Its Implication for Human Rights
6. Victims of Persecution in Regional Geopolitics
7. Computing the Tax on Cloud Computing

Recommended form of citation:

<Author> <Title> (2014) 8 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2007 (Vol. 7)

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1. Development of Environmental Law  
*Justice Dr. S. Radhakrishnan*
2. The “Business” of Court Management  
*Justice Mrs. Roshan Dalvi*
3. Judicial Activism  
*Justice Mr. V. G. Palshikar (Retd.)*
4. Is Arbitration Law Required to be Reviewed Urgently?  
Suggestions for Law Reforms  
*Justice D. R. Dhanuka (Retd.)*

Recommended form of citation:

<Author> <Title> (2007) 7 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2007 (Vol. 6)

1. Globalisation and the Indian Legal Services Sector: Opportunities and Constraints
2. Inventive Step to Innovative Leap: Advocating the Next Big Advance in the Incumbent Patent Regime
3. Global Warming and the Alien Torts Claims Act: Desperate Times, Desperate Measures?
4. Disgorgement: A Move Towards Introduction or a Precedent to Debacle
5. Jus Cogens: A Rules-standards Analysis
6. Beyond a Tudor Approach to Transfer Pricing: Evolving a Model for Effective Use of Secret Comparables
7. Time to 'Can'- spam?
8. In Defence of Bethlehem

Recommended form of citation:

<Author> <Title> (2007) 6 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2006 (Vol. 5)

1. Genomics – A Brave New World
2. 2(C) Or Not 2 (C): Redefining Minorities under the Indian Constitution
3. Convergence and Competition: Reconciling Differences
4. Corporate-University Tie-Ups – Should India Go the Bayh-Dole Way?
5. Clinical Trials in India
6. Gender Wars: An Identity Crisis
7. Liability For Copyright Infringement on the Internet
8. Tap, Tap, Who’s Listening? Prying into Privacy

Recommended form of citation:

<Author> <Title> (2006) 5 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2005 (Vol. 4)

1. Identity Cards – In Whose Interest?
2. Nanotechnology: Protecting the Next Big ‘Small’ Thing
3. Disciplinary Provisions under The Navy Act, 1957
4. Legal Paternalism: The Indian Context
5. The Idea-Expression Fallacy: Effacing the Traditional and Doctrinaire Limits

### CASE REVIEW

6. The Saw Pipes Judgment

### LEGISLATION REVIEW

7. The Armed Forces (Special Powers) Act, 1958: Disarming the Law?

Recommended form of citation:

<Author> <Title> (2005) 4 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2003–2004 (Vol. 3)

### ARTICLES

1. Hyperlinks: A Study of the Legal Controversies
2. Amendmenace: The Constitution of India Unveiled
3. Credit Derivatives as a Means of Credit Risk Management
4. Safety Norms for Unsafe Wastes! Hazardous Wastes in India
5. Pharma Patents: The New Regime and Pricing Implications
6. Decriminalisation of Homosexuality in India
7. How Legal is Illegal: Paradoxes in the Indian Drug Laws

### BOOK REVIEW

8. Free Trade Today by Professor Jagdish N. Bhagwati

Recommended form of citation:

<Author> <Title> (2004) 3 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2002–2003 (Vol. 2)

1. Universal Jurisdiction in International Law
2. The Governor's Power to Dissolve the Legislative Assembly – Judicial Review and Other Facets
3. Women and the Co- Parcenary Law – Unsolved Questions
4. Data Protection and the Indian BPO Industry
5. Governmental Secrecy and Right to Information
6. A Teetotaller's Tall Claims
7. The Sarbanes Oxley Act 2002: Implications for India
8. The Arbitration And Conciliation Act, 1996: In Search of a Complete Code
9. Basmati, Turmeric and Neem – Patenting and Related Issues – Case Studies
10. Securitisation: Bankruptcy Remoteness and Other Issues
11. The Illegal Proliferation of Small Arms – A Global Dilemma
12. Defence Mechanisms under the Takeover Code
13. The Dawn of 'Copytrust'

Recommended form of citation:

<Author> <Title> (2003) 2 Law Rev. GLC <page no.>

# INDEX OF BACK ISSUES

## *The Law Review* 2001–2002 (Vol. 1)

1. TADA to POTO: From the Frying Pan... Into the Fire!
2. Privacy on the Internet – Protected by Legislations?
3. Tax Treaty Abuse
4. Software Patents: Legal Framework and Implications
5. Parallel Importation of Trade Mark Goods
6. Database Governance: Protection of Information or the Stifling of Progressive Development?
7. Understanding Constitutional Law

Recommended form of citation:

<Author> <Title> (2002) 1 Law Rev. GLC <page no.>





