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FAREWELL TO ADJUDICATORY LEADERSHIP?: SOME THOUGHTS ON DR. ANUJ BHUWANIA'S *COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA*

In Memoriam: Justice Prafulchandra Natwarlal Bhagwati

Upendra Baxi*

I. Obituary of PIL?

Poignantly, as this essay comes to its close, the world stands bereft of Justice Bhagwati. He would be recalled variously, most notably as a master craftsperson, founder of judicial 'activism', inaugurator of the legal aid movement and overall as a great and gifted Justice (and the seventeenth Chief Justice of India). Prominent among the handful oft-cited Justices by appellate constitutional justices and lawpersons, he worked tirelessly for people-judiciary partnership in the luminous companionship of Justices Krishan Iyer, O. Chinappa Reddy and D.A. Desai—whom I have called the Four Musketeers of the new Indian constitutionalism.[1]

It is not my intention here to focus on this legendary Justice or elite and popular perceptions about him. Chief Justice Bhagwati would have agreed with much of the criticism that Bhuwania offers in this book;[2] like most Justices, Justice Bhagwati also shared '*Après moi le*

* Emeritus Professor of Law, University of Warwick; Distinguished Professor, National Law University, Delhi. This article has been inspired from a discussion at National Law University, Delhi hosting Professor Upendra Baxi, in conversation with Dr. Anuj Bhuwania for a talk on the legacy of PILs, and Dr. Bhuwania's new book, Courting the People: Public Interest Litigation in Post-Emergency India.

1 See Upendra Baxi, 'The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Combat with the Production of Rightlessness in India' in C Raj Kumar and D Chockalingam (eds), *Human Rights, Justice and Constitutional Empowerment* (2nd edn, OUP 2010). See also P N Bhagwati, *My Tryst with Justice* (Universal Law Publishing 2015); Ram Kishore Choudhury and Tapash Gan Choudhury, *Judicial Reflections of Justice Bhagwati* (Academic Foundation & Publication Pvt Ltd 2008). Justice Michael Kirby, then a Judge of the Australian High Court, fondly described Justice Bhagwati as a 'guide, mentor, and inspiration' and said that Justice Bhagwati was a 'living symbol of the principle "equal justice under the law"'. For an earlier appreciation, see Moolchand C Sharma, *Justice P N Bhagwati: Court, Constitution, and Human Rights* (Universal Publishing House 1995).

2 Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP

deluge' ('after me, the deluge'[3]) syndrome. He stood for disciplined judicial craftspersonship that common law and constitutional law offers. He believed that a runaway judicial discretion should be chastened by judicial discipline and that judicial creativity should at every step be guided by constitutional vision. He, many a time (in personal conversations) decried what he termed the 'reckless activism' of some of his successors on the High Bench.

But he would never agree, as I do not, with Dr. Anuj Bhuwania in scripting an obituary of public interest litigation (hereafter, PIL) in the constitutional courts of India, which I have always called 'social action litigation' (hereafter, SAL). Protocols of speech disallow speaking ill of the dead: but Dr. Bhuwania's long funeral speech departs blithely from such conventions. What is more, this death does not presage any newly desired constitutional order. I maintain that this obituary is premature.

My reasons for the distinction between SAL and PIL will be detailed later but I must say this much at the outset: continued inadvertence to this distinction is analytically as well as sociologically disturbing and dangerous.

II. How Shall we Understand Justice Bhagwati – as an Enigma or Promise of New Constitutionalism?

Perhaps, a key to understanding Dr. Bhuwania lies in his approach to Justice Bhagwati. No doubt he salutes him for his post-emergency judicial activism, but he has grave reservations concerning activism itself, or at least the kind of activism the learned Justice designed. Dr. Bhuwania rightly names the learned Justice as the 'chief architect of PIL in India' but finds it helpful to analyse not so much his utterances as a Justice, but a post-retirement article as exemplifying the overall judicial position. Although there is nothing wrong in reading a Judge's retrospective reconstruction of her judicial ideology on that basis, this must be distinguished from her actual judicial discourse and performance. Besides, it must not be overlooked that justicing is a *collegiate and institutional action over time*. Since the Supreme Court does not have the system of a single Justice panel deciding the case, it is impossible to speak of a Justice enjoying '*the* hegemonic judicial position in India'.[4]

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3 One translation refers to 'flood' not 'deluge'; another refers to 'chaos', the third signifies 'I don't care what happens'. The last suggests a sort of quietism; and the first, a sense of egoistic engagement or satisfaction. One way of giving meaning to SAL is that it is a field of complexity and contradiction, marking many a constituently sincere feats of SAL creativity. See for mathematical theory aspects, John H Holland, *Emergence: From Chaos to Order* (OUP 2000); and the brief survey by Geoffroy Hodgson, 'The Concept of Mergence in Social Science: Its History and Importance' (2010) 2(4) Emergence 65; Dave Elder-Vass, *The Causal Powers of Social Structures: Emergence, Structure, and Agency* (CUP 2011).

4 Bhuwania (n 2) 114.

With this caveat in mind, one may note the three positions of 'activism' that Justice Bhagwati carefully distinguished – the 'technical', 'juristic' and 'instrumental' activism.[5] (I had described 'juristic activism' as a typically Indian contribution to the genre of 'activism', as early as 1975). In the last category, it is the 'constitutional values' which acquire salience; these values are primarily found in the Directive Principles of State Policy which should 'motivate' the Justices to 'susbtantivation of social justice'. Judicial activism was nothing but social activism, in the special sense of being 'judge-led' and 'judge-induced PIL'; it was a means to an end – the end being to realise 'social justice as the central feature of the new constitutional order'.[6]

Dr. Bhuwania has five criticisms to offer. First, it has ruptured the relationship between substance and procedure. Second, the result is that since then 'academic analysis as well as the political rhetoric… have been skewed by an unquestioning adherence to this narrow consequentialist approach'. Third, the 'questionable nature of the PIL' was thus 'glossed over'. Fourth, 'PIL' was 'judge-induced'. Fifth, it was a juridical version of the 'committed judiciary' approach.[7]

There is no evidence offered for the third proposition at all. The same holds true for the fourth proposition, of which there are some anecdotal instances (which are strictly hearsay under the Indian Evidence Act, and therefore inadmissible). Some Justices and lawyers may say this in their memoirs or conversationally; and it would have been helpful if Dr. Bhuwania had collected some such information supporting this proposition. The second proposition does little justice to the Indian constitutional scholarship. The fifth expresses a political opinion of the author, worthy of threshold respect but liable to be disregarded when it is fully recalled that many Justices before, with, and after Justice Bhagwati have expressed similar views and there is analytically a need to distinguish judicial opportunism from a sincere judicial constitutional conviction.[8] When does sincere constitutional opportunism become rank political opportunism is a question on which much study and analysis is still awaited.

The rupture between procedure and substance (the first proposition) is also the break between outcome and process; the anti-PIL critique that Dr. Bhuwania seeks to offer is that this rupture is dangerous for the entire Indian legal system and that is why 'PIL' is inherently

5 ibid 115.

6 ibid.

7 ibid.

8 It is noteworthy how the new 'PIL' (at that stage was entirely SAL) jurisdiction was welcomed by the Court as a whole: see Bhuwania (n 2) 119-122. I learnt this from Justice A.P. Sen's soon-up-on-retirement article in a national English daily where he wrote in the first-person singular of his pioneering contribution to Indian justicing. He cited many a decision that Justice Bhagwati had composed. Mr. Justice Sen had joined/signed each one the decisions. His Lordship's article indicates how ownership of advances in jurisprudence always stood acknowledged as the achievement of the entire Court.

bad. For, once they have taken leave of any semblance of procedure, one gets only judicial despotism.

Assuming this to be the case (for here I do not take account of *faute de mieux*, my entire lifework on judicial process and power), I would have expected Dr. Anuj Bhuwania to, at the very least, raise the threshold question: when does, or when may we say with justification, that judicial indeterminacy or interpretive openness threatens the legal system? Legal scholars who have considered this question have given two types of responses: one, that such indeterminacy may be 'minor' or 'wholesale'. Indeterminacy 'on a minor scale is not very problematic, whereas on a large scale it is crippling'.[9] The other view thrives on the idea that all rules have an 'open texture' and are therefore to open too ceaseless interpretation; fashioning judicial techniques from within the constitutional gaps or indeterminacies[10] entails strong and sensitive judicial action. Large and rampant indeterminacies that seem to threaten the legal order, and together with it also the moral order, are also ineluctable. In fact, there is a view that 'liberal political theory is committed to a variety of ideals that can be confused with a commitment to determinacy' but liberalism 'is not committed to determinacy in the sense of uniquely warranted outcomes'.[11] The existence of indeterminacy in adjudication, therefore, 'poses no substantial threat to the possibility of legitimate governance by law as such'.[12]

One expects that Dr. Bhuwania will take on board these matters seriously in the second edition of his work.

III. Method

This remarkably readable and eminently quotable work commands the authority of an ethnographer of the constitutional development in India.[13] The art of constitutional ethnography

9 See Mathew H Kramer, *Objectivity and the Rule of Law* (CUP 2007) 132, 210.

10 See H L A Hart, *The Concept of Law* (Clarendon Press 1964) 121ff. See further, the valuable analysis of 'formalism' and instrumentalism' in Steven M Quevedo, 'Formalist and Instrumentalist Legal Reasoning and Legal Theory' (1985) 73(1) California Law Review 119,147-150 see particularly for the 'family of meanings' attributed to the two terms. See also for a comparative instance, Francisca Pou Gimenez, 'Constitutional Change and the Supreme Court Institutional Architectural: Decisional Indeterminacy as an Obstacle' in Andrea Castagnola and Saul Lopez Noriega (eds) *Judicial Politics in Mexico: The Supreme Court and the Transition to Democracy* (Routledge Taylor and Francis Group, 2017) 117-146. Gimez clearly sees 'indeterminacy' and 'decisional fuzziness' as a problem but is careful not to condemn wholesale the inherence of judicial discretion. See also, Arianna Sanchez, Beatriz Magaloni, and Eric Magar, 'Legalist vs. Interpretativist: The Supreme Court and the Democratic Transition in Mexico' in G Helmke and J Rios-Figueroa (eds), *Courts in Latin America* (CUP 2011) 187-218.
Justice Bhagwati's grasp of the nature of this discretion specially invested in the directive principles was very complex: see Ram Kishore Choudhury and Tapash Gan Choudhury (n 1) 117.

11 See Jules L Coleman and Brian Leiter, 'Determinacy, Objectivity, and Authority' (1993) 142(2) University of Pennsylvania Law Review 549, 594.

12 ibid.

13 Among works that testify to diverse methods of 'ethnography', see Upendra Baxi, 'Outline of a

is rare in Comparative Constitutional Studies (COCOS, as I call it).[14] Dr. Bhuwania makes a valuable contribution in seeking to study how most lawyers and Justices handle constitutional contestation handling and settlement of disputes. It is persuasive in deflating the progress narrative of 'PIL' as a 'romance gone wrong…'.'I will argue', he avers, 'that PIL was a tragedy to begin with and has over time become a dangerous farce'.[15]

I am with Dr. Bhuwania when he offers many-sided criticisms of many a 'PIL' verdicts. After surveying carefully several decisions upholding sudden and expeditious 'slum clearances' (mostly at the instance of the Resident Welfare Associations), he summates the trend wherein the High Court acts as a 'slum demolition machine'.[16]

Giorgio Agamben would have put the matter differently in terms of a 'governance machine'.[17] I understand by a governance machine an interlocking co-production of social and jural meanings by dominant constitutional elites and social actors spread across many a hegemonic site. Assuming Dr. Bhuwania's descriptions of Delhi constitutional courts as 'slum-demolition machines', one is left wondering whether this is true of all regions of India? Or is Delhi to be regarded as microcosm of India? More generally, are we to regard courts and judges necessarily as governance machines? How do we, in these contexts, fully access accumulation, and even resistance action by, and on, knowledges named as 'anthropological machines'?

'Theory in Practice' of Indian Constitutionalism' in Rajeev Bhargava (ed), *Politics and Ethics of the Indian Constitution* (2009) 92-118; Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38 Law & Society Review 389; Lisa Wedeen, 'Reflections on Ethnographic Work in Political Science' (2010) 13 Annual Review of Political Science 255-272; John Comaroff and Jean Comaroff, *Ethnography and the Historical Imagination* (Westview 1992); Bernard S Cohn, *An Anthropologist Among the Historians and Other Essays* (OUP 1987); Anne L Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press 2009); Pratiksha Baxi, *The Public Secret of Law: Rape Trials in India* (OUP 2013). See, in the present context, the views of Arvind Elangovan, 'The Making of the Indian Constitution: A Case for a Non-nationalist Approach' (2014) 12(1) History Compass 1, 9-10. He urges a conceptual 'separating the history of the nation from a history of the making of its constitution' so that we could begin to 'address … justifiable lament about the poor state of historical and philosophical imagination about India's constitution'. This extraordinarily rich essay suggests some linkages between ethnographical method and historiographical approach to the making, and working, of the Constitution.

14 Upendra Baxi, 'Preliminary Notes on Transformative Constitutionalism' in Oscar Vilhena, Upendra Baxi, Frans Viljon (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, and South Africa* (University of Pretoria Press 2013) 19-47. See also, Tom Ginsberg and Roseland Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011).

15 Bhuwania (n 2) 12.

16 Bhuwania (n 2) 89-106.

17 Giorgio Agamben, *The Open Man and Animal*, (Stanford University Press 2002); Kelly Oliver, 'Stopping the anthropological machine: Agamben with Heidegger and Merleau-Ponty' (2007) 2(2) PhaenEx 1, 2; Mathew Abbott, 'The Animal for which Animality is an Issue: Nietzsche, Agamben, and the Anthropological Machine' (2011) 16(4) Angelaki: Journal of Theoretical Humanities 87, 90.

The difficulty, of course, lies in the method of studying judicial outcomes. A most general question is: whether the so-called reality exists outside consciousness and language? Are the findings to be determined by methods chosen or are the methods to determine things that we may find?

At a different level, one appropriate choice of methods rather than methodology (the science of methods), suggests that methods constitute a discipline imposed on the researcher: is the hypothesis adopted adequately operationalised, is the field of enquiry well-chosen according to criteria prescribed, is the investigation conceptual or empirical – these are the questions that initially confront the researcher. Dr. Bhuwania is aware of the problems involved in his field but his method seems to follow only those outcomes which prove the 'pathology' of judicial 'PIL' power, not any other materials supporting plausible rival hypotheses.[18]

Dr. Bhuwania does not wish so much to study high judicial discourse of legal reasoning but rather wishes to 'think through the quotidian reality of PIL process', to engage 'its protean nature that its departure from basic legal procedures make possible rather than the themes its addresses – like environment, gender or urban affairs'.[19]

He is at his poignant best on the substantive judgement on evictions (without provision of appropriate shelter and rehabilitation that the human right to a city encompasses).[20] This will be unaffected overall by more detailed policy studies that orient us to both pros and cons of unplanned urbanisation arguments being urged. Also ignored in this archive is the subaltern perspective – the emergent discourse on the right to co-production of social space, commonly now referred to as the emerging human right to a city.[21] Further lies unaproblematised the US

18 See, for example, Arun K Thiruvengadam, 'Swallowing a Bitter PIL?: Reflections on Progressive Strategiesfor Public Interest Litigation in India' in Oscar Vilhena, Upendra Baxi, Frans Viljon (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India, and South Africa* (University of Pretoria 2013) 519-531. See also, Shylashri Shankar, *Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties* (OUP 2012); Mayur Suresh and Siddharth Narrain (eds), *The Shifting Scales of Justice: The Supreme Court in Neo-liberal India* (Orient Black Swan 2014); Sandra Fredman, *Human Rights Transformed: Positive Rights and Duties* (OUP 2008) 124—149. See also, the pioneering exploration by S P Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2003).

19 Bhuwania (n 2) 13.

20 See Upendra Baxi, 'A Philosophic Reading of RTCC' in *Urban Policies and the Right to City in India: Rights, Responsibilities, and Citizenship* (UNESCO 2011) 16-20. See also, Gautam Bhan, *In the Public Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* (Orient Blackswan 2016); Stephen Legg, *Spaces of Colonialism: Delhi's Urban Governmentalities* (Wiley-Blackwell 2007).

21 I think that David Harvey advances our common understanding of this 'right' when he says that, 'The right to the city is far more than a right of individual access to the resources that the city embodies: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities and

constitutional doctrine of 'aesthetic regulation',[22] which pervaded the judicial unconscious in the Vasant Kunj Mall decision, though rightly condemned by claims to the stark spaces of slums, thus cancelling the promise for constitutional dignity and equality of all citizens of India.[23]

Judicial orders are not always reasoned opinions that usually precede judicial action. Surely, some sort of access to paper books or to counsels arguing either side is entailed in the method of judicial ethnography of constitutional interpretation. These will decidedly lend more substance to the formal accusation that the 'wrath of PIL is a selective one'.[24]

This miscellany of points about the method raises a wider aspect: In what does the art and science of constitutional ethnography consist? How may it turn out to be different from high doctrinal analysis, policy research, empirical research, conceptual studies, impact studies, and the like? How is constitutional ethnography to differently construct the analyst's desire and discourse? In what ways does an anthropology of suffering emerge from constitutional ethnography? One looks in vain for any systematic direct responses to these and allied concerns,[25] but I think that Dr. Bhuwania is, perhaps, content with 'philosophical anthropology'

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ourselves is, I want to argue, one of the most precious yet most neglected of our human rights.' See, David Harvey, 'The Right to the City' (2008) 53 *New Left Review* (2008) 23.

22 See, for example, Darrel C Menthe, 'Aesthetic Regulation and the Development of First Amendment Jurisprudence' (2010) 19 Public Interest Law Journal 225,256; Samuel Bufford, 'Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation' (1980) 48 UMKC Law Review 125; Kenneth Pearlman, Elizabeth Linville, Andrea Phillips and Erin Prosser, 'Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation' (2006) 38(4) The Urban Lawyer 1119–1121; Kathleen M Sullivan, 'Symposium: Cities on the Cutting Edge: A Symposium of Emerging Municipal Legal Issues: Discrimination, Distribution, and City Regulation of Speech' (1998) 25 Hastings Constitutional Law Quarterly 209.

23 David Asher Ghertner, 'Rule by Aesthetics: World-Class City Making in Delhi' in Ananya Roy and Aihwa Ong (eds) *Worlding Cities: Asian Experiments and Being Art of Global* (Wiley-Blackwell 2011) 279-306; David Asher Ghertner, 'Analyses of New Legal Discourse behind Delhi's Slum Demolitions' (2008) 43(20) Economic and Political Weekly 57; Ashok K Jain, *Law and Environment* (Ascent 2005).

24 Bhuwania (n 2) 75.

25 Perhaps, useful remains what is suggested by Daniel A Farber and Suzanna Sherry: 'Our argument is directed in part against those who see a stark choice between a formalistic conception of law and raw politics as the basis for judicial decisions. Our approach to constitutional adjudication, then, cannot be captured in a catchword or a set of instructions. We must instead describe in detail the processes by which judges should—and largely do—decide constitutional cases, and the built-in constraints that filter the effect of politics or personal values.'
See their *Judgment Calls: Principle and Politics in Constitutional Law* (OUP 2009) 5. They also rightly say, 'If judges must attain perfection in order to be legitimate, the critics are clearly correct in their disdain for our current body of constitutional law. But this demand for perfection is a guarantee of failure. We view the judiciary as a human institution, and so we ask only whether the judiciary can do its job well enough to make the enterprise worthwhile. We believe the answer is clearly yes: Judges collectively can do a reasonably good job of deciding constitutional issues, guided by text, precedent, history, and contemporary values. As a great Chief Justice of the Israeli Supreme Court

(straddling choice-making between different meta-theories of the state of law and judgment, or interpretation). But one is not quite sure whether he wishes to be regarded as such.

IV. The Weak and Strong Thesis

It is important to note, that the thesis of the book is not a weak but a strong thesis. The weak thesis will argue against this or that trend in 'PIL' decision-making. The strong thesis is that the progress narrative of 'PIL' misleads us entirely because there is no such thing as 'good' or 'bad' PIL but 'free rein' to 'mercurial judges'.[26] Dr. Bhuwania observes:

> Once a frankly instrumental role is accepted for PIL courts, with its decisions moored only by concepts as capacious as 'social justice', whose meanings necessarily vary with the zeitgeist, it should be no surprise that the issues taken up by a new generation of PIL judges for their social activism are of a very different sort from the original votaries of PIL.[27]

What matters, he insists, is '… the delegitimisation of legal procedure that accompanied the rise of PIL in India… has actually made it easier for courts to justify and overlook departures from the basic principles of criminal procedure that mark such statutes.'[28] This re-invention of judicial review power renders senseless any talk of 'good PILs' and 'bad PILs', or 'abuses of PIL'. Rather, 'PIL' is itself presented as the problem, not a part of solution. The judicial arbitrariness, even 'lawlessness', stands writ large in case of slum demolitions and sealing of properties where industrial processes were carried on in domestic complexes (all in Delhi) and related cases where the non-procedural and arbitrary use of judicial discretion is most manifest.

One of the main difficulties here is that we do not quite get the senses in which Dr. Bhuwania uses the term 'procedure'. One meaning of that term will be procedure as prescribed *hitherto* by the law and constitution; another will be *new* procedure as evolved by Justices in their work either from the existing provisions or newly made ones; the third one speaks of procedure as prescribed by the apex Justices for a particular type or group of cases, and fourthly, procedure as meaning antiformalism *in extremis* or farewell to any idea of procedure itself. For the most part, Dr. Bhuwania means the last sense.[29]

But it is just plain wrong to apply this meaning across the board to all 'PIL' and 'SAL', as

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put it, 'The life of the law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together'.

26 Bhuwania (n 2) 130.

27 Bhuwania (n 2) 116.

28 Bhuwania (n 2) 26.

29 See Bhuwania (n 2) 33-34, 40-43 for examples of Dr. Bhuwania's usage of 'procedure' in the sense of the fourth meaning.

one cannot ignore the special procedures for filing, listing, hearing, and disposal that the Court has developed for this purpose. Dr. Bhuwania, of course, recognises that no judicial change is ever possible in searching for a determinate meaning beyond all interpretation. This work is mainly about the fourth proposition above, but this proceeds in a way that denies the other (here second and third) meanings of procedure in 'SAL' as well as 'PIL'.

But as it is framed at present, his thesis does not allow a reading of all innovative judicial action as arbitrary. To all this, we need to add the further distinction of being 'instrumental' (pejoratively as deploying something for an individual ends) as opposed to being teleological (acting in pursuit of a social goal). The goal(s) may often be ambiguous and poorly pursued and even have unintentional results and all this may furnish a valid ground of criticism of a decision or even a decisional trend; but to say directly or indirectly that Justices act in self-interest – power or glory or material acquisition – requires stronger evidence than is provided in this work. The difference between a judicial and political action is that the latter while seeking to pursue a public interest is really, almost always, geared to further a private interest of maximising power, while judicial action is in the realm of constitutional gains. (Of course, when it is seen to be otherwise, impeachment or removal with due process of law provides a legal redress).

The second meaning may be that the 'PIL' or 'SAL' follows a procedure laid down by a Justice in each case.

The strong thesis has a second aspect which is stated in the very last paragraph of the book which asks of how to impart a 'normative critique of the Indian political present, without succumbing to a negative comparison with a global norm?' For the same reason how does one 'impart normativity and popularity' to the practices of the 'PIL'? I turn to only to the first aspect of the strong thesis towards the conclusion, attending now to the portrayal of the 'PIL' in the book.

V. The Charismatic Moment

Dr. Bhuwania's presentation of 'PIL' development is interesting precisely because he, like the Justices who developed it, does not offer any definition of it. But a search for the defining element of the 'PIL' is rather richly rewarded. The first is anti-formalism (called delegitimation of existing procedures); the second is informalism of a worrying kind in the administration of constitutional justice; the third consists of the 'mercurial' handling of the case and the fourth is the corruption of the entire system of 'PIL'.

One may add ancillary elements such as (what I call) the nationalisation of 'SAL' (as the case brought by my friend Sheela Barse) and 'PIL' justice through the *amicus curiae* system, leading to a displacement of the petitioner-in-person and the voices of subaltern and

marginalised peoples.[30] The displacement of the petitioner-in-person, and even activist lawyers who helped the 'PIL' (like Sanjay Parekh) through the sovereign voice of the amicus have been valuably archived by Dr. Bhuwania. So is the deployment of otherwise unobjectionable *suo motu* power, where the court commences the proceedings: Dr. Bhuwania shows through many instances how this power has been converted through PIL sometimes at the pure judicial whim of individual Justices, dressed as public interest.[31]

Second, what may we say in the distinction between a 'PIL' case and a non-'PIL' petition? What precisely are the borderlines and how are they maintained? Is the law declared under Article 131 any different in 'PIL' from a writ petition or a special leave petition? Third, have all Courts in India followed the same course as the Delhi High Court and Supreme Court of India in slum demolitions and allied cases or are there notable differences? Fourth, the seductive force of the 'strong' thesis arises out of an all too easy, and sometimes careless handling of difficult and contested concepts such as 'populism' and 'judicial populism', compassion and pity,[32] neoliberalism and structural adjustment, and Weberian purpose-rationality.[33] I will resist the temptation to discuss these notions here but one example will suffice to demonstrate the point. Dr. Bhuwania's strong thesis reminds one of the criminology theory discourse concerning 'free will' and 'determinism'.[34] One can take the path of 'soft' determinism or a 'hard' one. Obviously, Dr. Bhuwania takes the latter route but why is alternate soft determinism not legitimate or worthy of recourse? Further, is it only on the basis of soft determinism that one may talk about symbolic and instrumental potential?[35]

Fifth, how does the culture of 'PIL' affect the cultures of adjudication in other situations? Sixth, at least in terms of studying these 'cultures', would some attempt at periodisation of 'PIL' help? Regarding the Supreme Court, I have tentatively suggested the following moments, overlapping in practice but still distinct in theory: [1] the charismatic moment; [2] nationalisation; [3] bureaucratisation; [4] farming out (either to the High Court or to

30 Sheela Barse was exasperated by adjournments and state's repeated failures to file affidavits directed by the apex court. She had to come at her own expense from Bombay. The result of her indignant outburst was the first instance of what I have termed 'the nationalisation of SAL' (transfer of proceeding to a state human rights agency). On amicus curiae, see Bhuwania (n 2) 40, 43.

31 Judicial discretion to initiate or pursue the itinerary of 'PIL' decisional discourse is beyond the scope of this analysis but Dr. Bhuwania provides some useful instances and indictors: for example, the we derive an empirical measure by studying the afterlife of 'PIL' discourse. The measure is: whether this was followed up by the Court itself or dropped out of sight with the retirement of a Justice.

32 Bhuwania (n 2) 37-39.

33 Bhuwania (n 2) 117-119.

34 Alf Ross, *On Guilt, Responsibility, and Punishment* (Alastair Hannay tr, University of California Press 1975); Upendra Baxi, Review Article, (1979) 21(3) Journal of the Indian Law Institute 407, 418.

35 See Upendra Baxi, 'The Dimensions of Impact Analysis' in Manoj Kumar Sinha and Deepa Kharb (eds) *Legal Research Methodology* (Lexis-Nexis 2017) 181-190.

National Human Rights Institutions). Finally, (without being exhaustive) is the charismatic moment a good yardstick, or other criteria prevail or are yet to be constructed? If the founding (charismatic) moment gave us 'SAL', did the subsequent moments only yield 'PIL'? What if the charismatic moment also was fractured, serving both the expansion of arbitrary growth of judicial power and the ends of justice beyond the law?

VI. Is PIL a Contemporary Revival of the German 'Free Law Movement'?

Much Indian debate on the 'PIL' is jurisprudentially insufficient without advertence to what was moment of free law movement (FLM) named misleadingly as the 'Free Law School' in Germany in the last few decades of 19th century. Both the 'PIL' and 'SAL' carry the imprint of the main tenets of the FLM, although innocent of its histories. Perhaps, the FLM came to India indirectly: the messages and the spirit of FLM has had a direct impact both on the sociological jurisprudence of Roscoe Pound and American Realism, especially on American realism via Karl Llewellyn. Pound's approaches had an indirect impact on Indian taught law, research, and Indian justicing. The FLM was expounded by some very notable jurists — including Rudolf von Jhering, Fredrick Von Savigny, Eric Stammler, Eugene Ehrlich, François Geny, and of course young Hermann Kantorowitz.

FLM, as well as the realist movements were animated by 'legal scepticism' which has been summarized by three axioms and corollaries:

a. Axiom: law is indeterminate. *Corollary*: law is not predictable norm or the basis of court decisions; the 'rule of law' is a myth.

b. Axiom: law is a mask for the exercise of political power. *Corollary*: a judge's personal prejudices and worldview dictates the decisions; legal justifications are an ad hoc coverup.

c. Axiom: law is inseparable from ideology (politics and morality). *Corollary*: a legal system is not autonomous; purely 'legal' rules and 'legal' reasoning are impossible and illusory.[36]

The principal tenets of the FLM are difficult to summarise but they all accepted the idea of 'gaps' in the legal order which can only be filled by judicial interpretation. The FLM arose as a reaction against positivism and in a frank recognition that a normative legal order may have gaps; correspondingly there was a duty cast on judges to make law by interpretation to avoid such a gap in law. Hermann Kantorowicz insisted that the sphere of 'formal' (authoritative) law always coexisted with the sphere of 'free law', as 'nascent', 'potential' or 'inchoate' law. And later, Julius Stone was to add that 'it was nearer to reality to regard free judicial activity as normally moving in circumspection within the leeways of existing legal order… rather than

36 James E Herget and Stephen Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73(2) Va L Rev 399-455, 400.

diverging from it through mere 'hunch' or 'visceral reaction'.[37]

Though difficult to summarise a very fertile body of thought, its principal points have been noted as under:

> First traditional formal and conceptual methods of interpretation are not trustworthy. *Judicial opinions and legal scholarship that are confined to the 'autonomous' legal system are suspect if not worthless*. Second, certainty in the law is illusory. Syllogistic justifications of decisions are manufactured post hoc to conceal the real basis of decision. *If judges would be more open about their decisions, law would become more predictable*. Third, *the function of the judge is a creative one. He must tailor the law for the case; in doing so, he may conceal the reasons for his decision behind a wooden dogmatic construct, or he may invoke free law, drawn from observation of society and knowledge of social consciousness, to arrive at a just decision*. Fourth, judges and legal scholars must direct their attention to *the 'real' sources of legal decisions; these sources are outside the formal law*. They may be studied through the application of sociology, psychology, economics, and political science, and through familiarization with the social (legal) consciousness of the community. *Finally, legal education must be drastically modified to reflect this orientation*.[38]

The emphasis that the real sources of judicial decisions 'lie outside the law' (the third and fourth propositions) is the kernel of the FLM; so is the emphasis on 'social and legal consciousness' (the fourth proposition). But what are we to make of social consciousness and social organisation: how is one to know it and deploy it? Put another way, what lies beyond the law and how is that to guide interpretation of the law by Judges?

Not just broadly political but also juristically technical difficulties surround the concept of *volksgeist.* Not all legal principles are deeply embedded in the 'spirit of the people'. As Sir Carleton Kemp Allen was to say (in 1930),[39] if the origin and development of law is to be grasped in terms of people's legal consciousness (*Volksgiest*), 'custom comes early among' its manifestations, and not as the law's 'hammer' but as 'the spark struck from the anvil', whose 'effect is to make known the existing *Geist*'.[40] Allen instanced the writ of *habeas corpus* as a 'principle resident in the entire British community'. But a judicial construction of a legal rule is not easily to be related to *Volksgiest*. He famously said, 'The truth is that the Judge who

37 Julius Stone, *Social Dimensions of Law and Justice* (Universal Law Publishing Co Ltd. 1989) 731-732.

38 Herget and Wallace (n 36) 416-17 (emphasis added). See also, Eugene Ehrlich 'Judicial Freedom of Decision: Its Principles and Objects' in Association of American Law Schools (ed), *Science of Legal Method* (Ernest Bruncken and Layton B. Register trs, Boston Book Company 1917) 47, 65.

39 C K Allen, *Law in the Making* (2nd edn, OUP 1930).

40 ibid 46.

has played a new variation on the Rule in Shelly's Case is operating in a sphere as remote from 'popular consciousness' as a mathematician who has discovered a new law of Elliptical Functions'.[41]

The high theory FLM recourse to these admittedly indeterminate terms stood here animated by a concern with changing social reality in which justicing sustained a conversation both *within* the law and *beyond* the law.

A shining example of the impact of FLM is the Article 1 of the Swiss Civil Code, 2017, which retains the original insistence of 1907 Code:

1. The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
2. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, *in accordance with the rule that it would make as legislator.*
3. *In doing so, the court shall follow established doctrine and case law*.[42] [emphasis supplied]

The last phrase is instructive: it is the duty of justices to fill gaps in the normative legal order, when all else is not available by interpretation as *if justices were legislators*. One meaning that the phrase bears is that just as legislative will to make a law exists, so does the judicial will. An allied sense is that it is only interpretation of that gives rise to the discovery of a 'gap'. But is 'interpretation' an act of will or reason or both? And how may judicial law making as an act of *will* differ from judicial law making an act of *reason*? How do we analyse judgments which are an act of adjudicative will as distinct from those which are acts of adjudicative reason?

If we adopt the thesis that justices decide what to do first and then rationalise the decision later, what we have is judicial or adjudicative will in operation. Alternately, judges may be open-minded and decide only after the matter has been thoroughly argued by counsel on both sides, and issue a reasoned opinion. The difficulty arises when a judgment offers reasoned elaboration but as a camouflage on what has already been decided. How does one decide when a judgment articulates judicial will to power, or its other – will to abdicate that power?

Perhaps, Dr. Bhuwania offers some sustained illustration of decisions as products of judicial will rather than reason.We may add to his illustrations some non-'PIL' decisions such

41 ibid 72-73.
42 Swiss Civil Code 2017, art 1.

as *Shiv Kant Shukla*,[43] *Golak Nath*,[44] and *Kesavananda Bharati.*[45] The last two provide a bold assertion of the judicial assertion on the limits of amending powers and the first represents a will through legalism to abdicate all judicial power. All these decisions are marked by cogent dissents, which enable us to make complex elements of judicial will and reason. One may also say that some judicial decisions must remain pure acts of will in the sense that these are not merely law (creative) but exercises of co-constituent power and adjudicative prowess.[46]

In any case, lawfinding and lawmaking activities of courts are always an invention that justices and courts *resort* to with reason. If judicial decisions are acts of arbitrary law-making (and if all law-making is necessarily arbitrary at least in the sense of when to make the law, change it or repeal it is an act of legislative/political will), is judicial arbitrariness also writ large on judicial process and power when it has the visage of courts acting as legislators? If so, the major question is not whether there is any violation of the separation of powers doctrine or the myth but rather when that judicial arbitrariness may be considered creative or despotic (uncreative).[47]

The career of the FLM is fascinating. Indeed, it started as a protest (to borrow a phrase regime of Kantorowicz) 'legal megalomania'[48] but also became a new orthodoxy, as it were. However, the FLM earned a very bad name when it was deployed in Nazi regime to interpret law merely as the command of the *Führer*. The further revival and democratisation of the doctrines occurred with Roscoe Pound and the American realists but the immanent tendency towards judicial arbitrariness and even despotism cannot be conceptually eliminated by any theory of law – whether FLM, positivism, sociological or realist conceptions of law.

Is 'PIL' then the implicit Indian version of FLM? What continuities and breaks do we notice in Indian PIL? How do we study its varied histories – merely as judicial inclination towards ever-expanding juristocracy[49] or largely as a gesture of solidarity towards the demos it recreates and follows? These, and other allied questions, need to be considered in judging 'PIL' both structurally and historically: does the distinction between 'PIL' and 'SAL' help at

43 *ADM, Jabalpur v Shiv Kant Shukla* AIR 1976 SC 1207.

44 *Golak Nath v State of Punjab* AIR 1965 SC 1643.

45 *Kesavananda Bharti v State of Kerala* (1973) 4 SCC 225.

46 I have described this as co-constituent power of democratic governance: see Upendra Baxi, 'Demosprudence and Socially Responsible/Response-Able Criticism: The NJAC Decision and Beyond' (2016) 9 NUJS L Rev 153-172.

47 ibid.

48 ibid.

49 Ran Hirschel, 'The Political Origins of Judicial Empowerment through Constitutionalisation: Lessons from Four Constitutional Revolutions' (2000) Law and Social Inquiry 25, 91-149; Ran Hirschl, *Towards Juristocracy - the Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Ran Hirschl, Neal Tate, and Tom Ginsburg, *Judicial Review in New Democracies - Constitutional Courts in Asian Cases* (CUP 2003); Chintan Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom* (OUP 2017).

all in this regard?[50]

VII. Social Action Litigation as Distinguished from PIL

I have always distinguished between 'SAL' and 'PIL' and I gave my reasons for this in the unjustly ignored observations in 'Taking Suffering Seriously', which need to be quoted in full here:

> Throughout this paper, I use the term 'social action litigation' (SAL) in preference to the more voguish term 'public interest litigation' (PIL). The label PIL has slipped into Indian juridical diction as effortlessly as all Anglo-American conceptual borrowings readily do. But while labels can be borrowed, history cannot be. The PIL represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth and, possibly, decay are also distinctive to American history….
>
> The PIL efflorescence in the United States owed much to substantial resource investment from the government and private foundations; the PIL work was espoused mainly by specialized public interest law firms... The issues within the sway of PIL in the United States concerned not so much state repression or governmental lawlessness but rather civic participation in governmental decision making… Nor did the PIL groups there focus pre-eminently on the rural poor. And, typically, PIL sought to represent "interests without groups" such as consumerism or environment. Given the nature of state and federal politics, PIL marched with public advocacy outside courts through well-established mechanisms like lobbying... In brief, the PIL movement in the United States involved innovative uses of the law, lawyers and courts to secure greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society…'. [51]

Instead of cogently rebutting the idea of SAL, Professor Surendra Agarwala recited the very same American law review sources that I had cited to advance a contrary thesis to name the phenomenon as 'PIL'! It did not help that while in personal conversations, he was more ambivalent than in his published work. This aggravated the analytic and historical tasks by

50 Where to situate Dr. Bhuwania discourse in FLM is a very difficult task, indeed. On the question of whether the 'PIL' is akin to FLM, probably Dr. Bhuwania will say 'yes'. But how this analogy holds is extremely unclear, as Dr. Bhuwania seems to be against 'de-formalisation' inherent to 'PIL'.The FLM, in at least many phases of it, sought to deformalise the law: does Dr. Bhuwania seek its formalisation? Certainly, a strong similarity animates the critique of the pathologies of judicial power but beyond these matters of mood lurk theoretic as well as empirical concerns.

51 Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation Before the Supreme Court of India' (1985) 4 Third World Legal Studies 107-132.

claiming that change of names did not affect the phenomenon.[52]

The conflation between SAL and PIL has caused much scholarly and judicial, confusion and mischief: it is my firm belief that not every 'PIL' is an SAL. It is an established fact, that it was the SAL opening that made 'PIL' on a large scale possible. This happened, as by now is well-known, by a radical democratisation of standing: the rule henceforth was that the Court will grant any citizen the right to sue under Article 32 on some prima facie showing of violation of other citizens' basic human rights. 'Other' friendly and regarding ways of interpretation of standing was indispensable to SAL.[53] This was a great contribution of Justice Bhagwati which is wantonly characterised as 'forum-shopping that Justice Bhagwati's monopoly of PIL made possible'.[54]

This is a frivolous accusation. No doubt Court No. 2 (which Justice Bhagwati presided over) for nearly a decade attracted most SAL petitions but it is wrong to say that he 'monopolised' the judicial activist voice. For Dr. Bhuwania to at all persist in the claim, a more detailed study of how benches are constituted is necessary; it is also necessary that one looks at how other Justices helped develop SAL, and how the law of standing was explicitly enunciated not in the *Agra Home Case*[55] (an inaugural letter-petition, which was filed by Lotika Sarkar and myself) but in the *Judges Case*[56], where the entire Bar was the petitioner concerning the appointment and transfer of judges. I believe that keeping SAL distinct from PIL would enable us to articulate better a socially response-able criticism of SAL.[57]

Analytically, the emphasis in SAL is on the petitioner and the other-regarding cause represented by the petitioner. The Court here acts as a trustee of people's rights, and even aspirations. Its methods of fact finding in a typical SAL take the form of a multidisciplinary

52 S K Agrawala, *Public Interest Litigation in India: A Critique* (Indian Law Institute, New Delhi 1985); see also Bhuwania (n 2) 122.

53 To reiterate my observations: 'The substance of the SAL in India is also distinctive to its contemporary condition. In essence, much of SAL focuses on *exposure of repression by the agencies of the state, notably the police, prison and other custodial authorities. Close to this category are the cases which seek to ensure that authorities of the state fulfil the obligations of law under which they exist and function. In other words, much of SAL is concerned with combating repression and governmental lawlessness*.' See Baxi (n 51) 119 (emphasis in original).

54 Bhuwania (n 2) 125.

55 *Dr. Upendra Baxi v State of Uttar Pradesh* (1983) 2 SCC 308, cited by the germinal discourse in *S.P. Gupta v. Union of India* AIR 1982 SC 149.

56 *Supreme Court Advocates-on-Record Assn v Union of India* (the NJAC case) (2016) 5 SCC 808.

57 For this notion see, Baxi (n 46). And for leading literature see Note 35 of that article. I have borrowed this term from Jacques Derrida. See, John Llewelyn, 'Responsibility with Indecidability' in David Wood (ed) *Derrida: A Critical Reader* (Blackwell Publishers 1992); David Campbell, 'The Deterritorialisation of Responsibility: Levinas, Derrida, and Ethics After the End of Philosophy' (1994) 19 Alternatives: Global, Local, Political 455. See also, Upendra Baxi, 'Foreword', Girish Patel, *Public Interest Litigation and the Poor in Gujarat: Experiences of Lok Adhikar Sangh* (Ahmedabad, Girish Patel Abinadi Samiti 2009).

group often called socio-legal commissions formed to investigate conditions and circumstances often triggered by letter petitions converted into judge-induced writ petitions. Further, the history of SAL indicates that from being judge-led, petitions have very often met with strict scrutiny, are not even admitted and face severe questioning about the credentials and financial status of the petitioner group or person. A comparative study of other forms of litigation with the SAL will be indeed prove very instructive.

'PIL' can be appropriated by special interests such as the Resident Welfare Associations in which courts act as slum demolition apparatuses (or rather 'governance machines'—to here deploy Michel Foucault's term). Justices may provide outcomes favourable to some appropriators. When they do so, these may be praised or condemned, as the first premise of transparency, accountability and responsibility of the academic critic may dictate. But can the outcome analyses alone enable one to arrive at the conclusion that Justices and courts so act so as to increase their judicial power? It was never intended by the founding Justices of SAL to help property-owners (or 'propertiat' to deploy Justice Krishna Iyer's vivid imagery) but for the propertyless, disadvantaged, disenfranchised and the dispossessed proletariat, SAL as a litigation technique remains available to others acting for personal gain or private interests. Adjudicatory leadership should always be vigilant to protect the rights of the rightless, or as Hannah Arendt put it, the human 'right to have rights'.

The two questions students of SAL need to confront are: Is 'social action' the same as 'public interest' and should one consider all appropriation as evil. The first invites attention to what is lost in translation; the second asks us to consider a theory of evil and perhaps even resultant denial that out of evil may ever spring a good, even in the eye of future history. Obviously, the first concern is relatively easily addressed than the second. But even here, one has to be wary of aggregating different public's interests as *the public interest* and difficulties in drawing any sharp distinction between 'public interest' and 'social action'. However, courts and Justices in their daily work have to struggle to draw precisely this distinction and the scholar has to remember that he does not always have answers to difficulties (of drawing bright lines) that Justices constantly face.

Genuine SAL beings should also exercise strict vigilance over courts and justices who decide to treat PIL petitions as SAL ones without care for neoliberal and authoritarian uses, consequences, and the impacts of their decisions. The conceptual distinction between SAL and PIL is difficult to draw but the difficulty in drawing bright lines do not counsel its abandonment. Rather, it is this distinction that makes demosprudence unique to India.

No doubt, like Surendra Agarwala, his contemporaries and those who succeeded him, remain anxious about a modicum of institutional discipline. He specifically suggested '… guidelines for non-adversarial procedures' and particularly for setting up judicial socio-legal

commissions of enquiry. The Supreme Court and High Courts have made much progress since then, heeding this and other advice. But the problem of institutional discipline and integrity of rights-structures continues to arise anew in traumatically changeful circumstances for each generation of Justices and academicians.

VIII. Strong Thesis: The Is/Ought Dichotomy

Dr. Bhuwania asks us to consider in the very last paragraph of his work: how does one 'impart normativity and popularity' to the practices the 'PIL's? His basic concern is with the sphere of norms which have a 'validity' of their own contrasted with the 'practices' of 'PIL'. The Is/Ought question abides, even though Eugene Ehrlich founded the discipline of sociology of law by telling us about 'the normative force of the factual',[58] or (in Julius Stone's terms) 'the normative tendency of the factual'[59] and Hans Kelsen's demonstration that law may give rise to a *legal ought*, in a sharp distinction from the *moral* ought.[60] The general point is that practice, in so many ways, very often gives rise to norms of law. Much depends on how we conceive 'practice' as distinct from a 'rule'. Ever since Wittgenstein (in philosophy)[61] and H.L.A. Hart (in jurisprudence),[62] it simply would not do to sharply distinguish a 'practice' from a 'rule': in law, they seem to be directly related.

Of course, Dr. Bhuwania flags this as a question at the very end of the book. But we may benefit if it is posed frontally at the beginning. Is the work then, contrary to author's intent, best read as posing a series of questions about the PIL and SAL, and the distinction we can make between these, and good practices of PIL and SAL? And are equally good norms available for this hallmarking of practices as good, bad, ugly and catastrophic? In any event, the perfection of such norms and concepts formed the task, I had thought, of constitutional ethnography – to differentiate among incommensurate practices and to make sense of the normative worlds that engender these. Perhaps, we should hesitate to regard the pathological as the new normal and the tendency to tolerate catastrophic judicial decisions as mere judicial aberrations; indeed, we ought to combat the tendency towards judicial despotism as fiercely as any other in critical solidarity together with the impoverished peoples. However, the strong thesis that all SAL is

58 Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press 1936).

59 Julius Stone, *Social Dimensions of Law and Justice* (Universal Book Housing 1999) 550-551.

60 Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967); Carsten Heidemann, 'Facets of "Ought" in Kelsen's Pure Theory of Law' (2013) 4(2) Jurisprudence 246; Robert Alexy, 'Hans Kelsen's Concept of the "Ought"' (2013) 4(2) Jurisprudence 235.

61 Ludwig Wittgenstein, *Notebooks 1914-1916* (Blackwell Publishers 1961). See also, Hans Sluga and David G Stern (eds), *The Cambridge Companion to Wittgenstein* (CUP 1996); Ernest Gellner, *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (CUP 2004). Consult also, Hannah F Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press 1972).

62 Hart (n 10). See also, Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (Routledge 1958); Mary Douglas, *Collected Works* (Routledge 2008).

pathological, and that it lacks all 'procedure' cannot be sustained. Not all 'PIL' and 'SAL' is lawless, at the mercy of a justice or a group of justices and there is constitutional *everything* to choose between 'PIL' and 'SAL'.[63] Put another way, what holds for some outcomes is not true of all SAL. And any study of SAL has to count among the outcomes the democratic spaces created and maintained, for social action groups and individuals and the dialogue between the supreme judiciary and the supreme executive. To be sure, there are often major lapses in SAL; Dr. Bhuwania ably focuses on these. But the task of the critique is to engage the fairy tales as well as the horror stories and provide a reconstruction and true pathway of thought, deliberation, and constitutional action.

63 Indeed, despite some severe criticisms, I may here randomly name a few normatively successful endeavours of SAL:(i) the doctrine of public trust in the 'distribution' of community resources; (ii) the doctrine of unjust enrichment; (iii) normativity concerning sexual harassment; (iv) solicitude for the Fifth and Sixth Schedule citizens; (vi) the importation of international human rights norms and standards in constitutional law; especially the right to development; (vii) incorporation of directive principles of state policy; (viii) the inventions of notions of creamy layers to eliminate runway reservations; (ix) gradual dilution of asymmetric federalism; and (x) the invention of new rights, jurisdictions, and the careful development of the domain of the basic structure.
Of course, many question these very achievements; often normative backslidings occur which are inexcusable; the gap between the law-in-the-books and law-in-action widens and compliance as well as impact remain often problematic, Judicial power and process remain impaled on the horns of a dilemma – on the one side is the constitutionally desired social order which exerts some pressure on the constitutional courts to themselves become new social movements, on the other side, the courts remain an integral aspect of the sovereignty of the State. Of course, many question these very achievements; often normative backslidings occur which are inexcusable; the gap between the law -in-the-books and law-inaction widens and compliance as well as impact remain often problematic, Judicial power and process remain impaled on the horns of a dilemma – on the one side is the constitutionally desired social order which exerts some pressure on the constitutional courts to themselves become new social movements, on the other side, the courts constitute the signatures of the sovereignty of the State. The dilemma is common to activist justices and courts everywhere: constrained somewhat by their legalist/restraintivist brethren, at times they hurry slowly and at times fast forward adjudicatory powers. They use the doctrine of 'separation of powers' both as a sword and as a shield. Making prediction a risky affair, they move to exercise judicial power in one step forward two steps backwards mode. This indeterminacy lies at the very heart of judicial co-governance or demosprudential leadership of the Nation. The only question is whether in particular cases judicial discretion is used in arbitrary ways – modes of creating a juristic meaning which spells a social disaster—or in response-able ways (furthering constitutional values, goals, and standards in favour of the rightless peoples).

THE PRIMA FACIE STANDARD FOR INTERIM INJUNCTIONS IN INDIA

Aditya Swarup*

One of the most significant and engaging aspects of a civil suit is the granting of an interlocutory injunction pending the final decision in the matter. The grant of such an injunction is meant to be purely provisional in nature, with the objective of maintaining status quo, and in the hope that a party does not suffer irreparable harm. Indian courts have time and again stated that to grant an interlocutory injunction, the existence of a prima facie case, irreparable harm and a balance of convenience must be shown. With regards to prima facie case, as far back as 1900, Sir John Woodroffe presciently wrote that being a severe remedy, an injunction will not be granted in the first instance except upon a clear prima facie case and upon positive averments of the equities on which the application for the relief is based. However, the term 'prima facie' case has acquired varied meanings and conceptions over time. It is one of the purposes of this paper to set out the varied meanings of the term.

The central argument of this paper is that our varied conceptions of a prima facie case are closely linked to judicial backlog and delays. Today, as a consequence of trials taking years to complete, interlocutory injunction hearings have become so-called 'mini-trials'; in stark contrast to the strictures and guidelines passed by various court decisions, important among them being the House of Lords decision in American Cyanamid v Ethicon – a case that is painstakingly revered in India. To understand the phenomenon of 'mini-trials' and its link to a prima facie case, this paper would also examine the British experience in the 1960s and 70s.

I. Introduction

The American scholar John Leubsdorf, in a landmark article, described interim injunctions as 'the most striking remedy wielded by contemporary courts'.[1] The statement remarkably

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holds true even today. With burgeoning litigation in most courts in India, interim injunctions are an important component of litigation. As far back as 1900, Sir John Woodroffe presciently wrote[2] that being a severe remedy, an injunction will not be granted in the first instance except upon a clear prima facie case and upon positive averments of the equities on which the application for the relief is based. To show a prima facie case, the applicant must allege positively the facts constituting his ground for relief, although it is not essential that he should establish his case upon an application for an interlocutory injunction with the same degree of certainty that would be required upon the final hearing.[3] The Court will not and ought not to decide which of the parties is in the right and it will merely look at all the facts of the case and consider whether it is right that the applicant should suffer the alleged threatened injury whilst his rights are being investigated.[4] If the statement of facts alleged by the applicant is true and raises a substantial question as to what the rights of the parties are, an injunction will be granted. The Court must proceed on probabilities and a contradiction upon the facts in itself is not a bar to the issue of an interim injunction. The Court must be guided by a discretion according to the exigencies and the nature of each particular controversy.[5]

While most of what was stated by Sir John Woodroffe elucidates what the law ought to be, it is respectfully submitted that it does not reflect the current state of law. The phrase 'a prima facie case' literally means 'at first sight' and can be legally construed to mean 'on first appearance but subject to further evidence or information'.[6] It had long been accepted that an applicant was not required to demonstrate that he would succeed at trial.[7] This paper is an attempt to further examine the scope and extent of an inquiry into a prima facie case.

Further, even though the Courts have said that the discretion vested in them to grant injunctions has to be exercised not arbitrarily or capriciously, but judiciously and fairly on reasonable grounds,[8] the Courts have given varied interpretations of what needs to be established to show a prima facie case. One line of cases in the past indicated that the applicant was only required to show that there was 'a serious question to be tried'[9] and the claim was not

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Cyanamid: Procedural and Timely Justice' (2012) 31(4) Civil Justice Quarterly 475-493. I would like to thank Himanshi Bhadoria, a third year student at Jindal Global Law School for assisting me with further research and painstakingly putting together this article.

1 John Leubsdorf, 'The Standard for Preliminary Injunctions' (1978) 91 Harv L Rev 525.

2 J G Woodroffe, *The Law Relating to Injunctions in British India* (1st edn, Thacker, Spink, and Co 1900) 100-102.

3 ibid.

4 ibid

5 ibid.

6 *Black's Law Dictionary* (10th edn, West 2014) 2-3, 1909.

7 *Powell v Lloyd* (1827) 1 Younge and Jervis' Exchequer Reports 427. See Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles & Practice* (3rd edn, Sweet & Maxwell 2013) para 10.29.

8 *Allahabad Bank v Rana Sheo Ambar Singh* AIR 1976 All 447.

9 *Walker v Jones* (1865) 16 ER 151; *Jones v Pacaya Rubber and Produce Co Ltd.* [1911] 1 KB 455;

frivolous or vexatious.[10] Another line of cases stated that the applicant was required to show 'a probability' that he would be entitled to relief.[11] A third line of cases states that the applicant must show 'a strong prima facie case'[12] based on affidavit evidence and the Court would make out a prima facie case only after 'carefully analysing the pleadings and documents on record'.[13] In light of these authorities and the varied conceptions of prima facie case, it is difficult to state what the law really is.

The central argument of this paper is that our varied conceptions of prima facie case are closely linked to judicial backlog and delays. Today, as a consequence of trials taking years to complete, interlocutory injunction hearings have become so called 'mini-trials', in stark contrast to the strictures and guidelines passed by various court decisions, important among them being the House of Lords decision in *American Cyanamid v Ethicon*[14] – a case that is painstakingly referred to this day in India. To understand the phenomenon of 'mini-trials', we would do well to learn from the British experience in the 1960s and 70s. Part II of this paper would examine the varied definitions of prima facie case in India and trace its historical origins. Part III would analyse the decision of the House of Lords in *American Cyanamid* and its use in case management. Part IV would analyse the impact of *American Cyanamid* in India. Part V looks at the present day understanding of prima facie case in India.

II. A 'Serious Question to be Tried', 'Probability of Success' and a 'Strong Prima Facie Case'

The early conceptions of what constitutes a prima facie case arose out of two sets of decisions; *Walker v Jones*[15] on the one hand, and *Preston v Luck*[16] and *Challender v Royle*[17] on

American Cyanamid Co v Ethicon [1975] AC 396. For Indian cases, see *Bishambar Nath Jaithy v Municipal Commissioner* AIR 1926 Lah 589; *Damodar Valley Corporation v Haripada Das* AIR 1978 Cal 489; *Shankarlal Debiprasad v State of Madhya Pradesh* (1978) MPLJ 419; *United Commercial Bank v Bank of India* AIR 1981 SC 1426.

10 *Rajesh Kumar v Manoj Jain* (1998) 47 DRJ 353; *Prasanta Kumar Ganguly v Ashir Chandra Sen* 2012 SCCOnline Cal 10192; *Damodar Valley* (n 9); *Supreme General Films v Durgaprasad* AIR 1984 Bom 131.

11 *Challender v Royle* (1887) 36 Ch. D 425; *Preston v Luck* (1884) 27 Ch D 497. See also *Vithal v Dawoo* AIR 1931 Nag 106; *Colgate Palmolive Ltd. v Hindustan Unilever Ltd.* (1999) 7 SCC 1; *Dalpat Kumar v Prahlad Singh* (1992) 1 SCC 719; *Sreedhara Shenoy v K Thanumalayam* AIR 1952 Ker 90.

12 *J T Stratford & Son Ltd v Lindley* [1965] AC 269; *New Delhi Theatres v Kailash Chand* AIR 1933 Lah 73; *Andhra University v PNV Raju* (1974) 1 APLJ 158; *Mukesh v Deo Narayan* AIR 1987 MP 85; *Shiv Kumar Chadha v Municipal Corporation of Delhi* (1993) 3 SCC 161; *Uniply Industries v Unicorn Plywood* (2001) 5 SCC 95.

13 *Maria Sequeria Fernandez v Erasmo Jack* (2012) 5 SCC 370 [86].

14 *American Cyanamid* (n 9).

15 *Walker* (n 9).

16 (1884) 27 Ch D 497.

17 *Challender* (n 11).

the other. In *Walker v Jones,*[18] Lord Justice Turner stated:

> The real point before us upon this appeal is, not how these questions ought to be decided at the hearing of the case, but whether the nature and difficulty of the questions are such that it was proper that the injunction should be granted until the time for deciding them should arrive…[19]

Early Indian cases reverently followed[20] the principle laid down in *Walker v Jones.* In *Israil v Samser Rahman*,[21] the plaintiff co-owners sought an interim injunction restraining the remaining co-owners from constructing a building on the land in their possession. The Calcutta High Court, while approving the decision in *Walker v Jones* and granting the injunction, held:

> It is not necessary for our present purposes, indeed it is not right, that we should further examine the point with reference to the special facts before us and thus anticipate the decision of the question in contention between the parties in the suit. What the Court has, at this stage, to determine is whether there is a bona fide contention between the parties, or… 'whether there is a fair and substantial question to be decided as to what the rights of the parties are'….[22]

In *Brajendra Nath Ghosh v Kashi Bai*,[23] the Court stated that it is enough for granting an interlocutory injunction if the plaintiff can show that he has a fair question to raise as to the existence of the right which he alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question can be disposed off. In interfering by an interlocutory injunction, the Court, in general, does not profess to anticipate the determination of the right but merely gives it, if, in its opinion, there is a substantial question to be tried.[24] The aversion of the Court to examine the merits of the case arises out of procedural justice concerns; that any examination of the merits of the case would amount to prejudging the case on its merits.[25]

In 1975, the House of Lords in *American Cyanamid v Ethicon*[26] stated that all an applicant

18 *Walker* (n 9).
19 ibid 156; *Pacaya* (n 9).
20 *Israil v Samser Rahman* AIR 1914 Cal 362; *Bishambar Nath* (n 9). See also *Firm Ram Kishun Shah v Jamuna Prasad* AIR 1951 Pat 469; *State of Bihar v Thakur Manmohan Das* AIR 1964 Pat 367; *Bhagwat Prasad v Jitendra Narain* 1991(18) ALR 207.
21 ibid.
22 ibid 364.
23 AIR 1946 Pat 177. See also *State of Orissa v Orissa Oil Industries* AIR 1982 Ori 245; *Akesh Kumar Jain v Harneet Bakshi* 2001 (92) DLT 745.
24 ibid [7].
25 *Bishambar Nath* (n 9) [1]; *Damodar Valley* (n 9) [5]; *Billimoria Jehan Bux Tehmuras v Indian Institute of Architects* (2005) 2 Mah LJ 206.
26 *American Cyanamid* (n 9).

had to prove to show a prima facie case was that 'the claim was not frivolous or vexatious; in other words, that there was a serious question to be tried'.[27] Indian courts were quick to borrow from the decision and apply it in India.[28] In *Damodar Valley Corporation v Haripada Das*,[29] the Calcutta High Court rephrased the guidelines in *American Cyanamid* in its own words and, inter alia, held that 'it is not necessary for grant of an ad interim injunction on a balance of convenience that the plaintiff should succeed in establishing a prima facie case or a probability that he would be successful at the trial of the action'.[30] On the other hand, and around the same time, there was a series of cases stating that the applicant was required to show 'a probability' that he would be entitled to relief[31] to obtain an interim injunction. In *Preston v Luck*,[32] the Court of Appeal in England held that though a Court is not called upon to decide finally on the rights of the parties, 'it is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief'.[33] In *Challender v Royle*,[34] where the plaintiff patentee brought an injunction to restrain threats of legal proceedings from the defendants, Cotton LJ stated:

> It is very true that in all cases of interlocutory injunctions the Court does consider and ought to consider the balance of convenience and inconvenience in granting or refusing the injunction. But there is another very material question to be considered, has the Plaintiff made out a prima facie case? That is to say if the evidence remains as it is, is it probable that at the hearing of the action he will get a decree in his favour?

In India, the departure from prima facie case meaning 'a serious question to be tried' to a 'probability' of success appears with the decision of the Court in *Ismail v Tayaballi Essaji*.[35] In that case, the plaintiffs, claiming to be legal heirs of a deceased relative, brought a suit for partition and possession of certain immovable properties of the deceased. The plaintiffs were successful in obtaining an interim injunction restraining the defendants from disposing off the properties. The High Court observed that the suit was filed in 1924, about 26 years after the

27 ibid 406.
28 *Gobind Pritamdas Malkani v Amarendranath Sircar* [1980] 50 Comp Cas 219 (Cal); *Amal Kumar Mukherjee v Clarian Advertising Service Ltd.* [1982] 52 Comp Cas 315 (Cal); *Amar Talkies v Apsara Cinema* 1982 JLJ 812; *Shankarlal* (n 9).
29 *Damodar Valley* (n 9).
30 ibid [5]. See also *Preeti Singha Roy v Calcutta Tramways* AIR 1986 Cal 305; *Hari Kishan Sharma v MCD of Delhi* 1988 (14) DRJ 134 .
31 *Challender* (n 11); *Preston* (n 11). See also *Vithal* (n 11); *Colgate* (n 11); *Dalpat Kumar* (n 11); *Sreedhara* (n 11).
32 *Preston* (n 11).
33 ibid 506.
34 *Challender* (n 11).
35 AIR 1929 Sind 182. See also *Daily Gazette Press v Karachi Municipality* AIR 1930 Sindh 287.

death of the deceased and that it was instituted with the object of preventing the sale of the properties of the defendants for as long as possible and harassing the defendants.[36] The Court further observed that 'such injunctions are too frequently issued notwithstanding the decisions of this Court to the contrary'[37] and that even though the plaintiffs had a prima facie claim for trial, it was not enough to grant an injunction. The Court held that 'a person who seeks the aid of the Court by way of interlocutory injunction must as a rule be able to satisfy the Court… that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that he will be entitled to relief…'.[38] Accordingly, the Court examined the merits of the case to conclude that there was no probability that the plaintiff would be entitled to any relief and vacated the injunction order.

Similarly, in *Vithal v Dawoo*,[39] the plaintiffs brought a suit against their father and his various creditors seeking a declaration that the debts mentioned in a list attached to the plaint were not binding upon their share in the family property, and claiming a partition of the property. The plaintiffs also applied for an interim injunction restraining any sale or disposition of the property. The Court observed that there was more than a suspicion that the suit was a collusive suit with the obvious intention to defeat or, at any rate, delay the claims of the creditor.[40] Accordingly, even though the Court reiterated the principles for the grant of an injunction and that a prima facie case meant only a finding that there was a serious question to be tried, it held that the plaintiffs had a burden of proving that the debts did not apply to them and it was 'difficult for the Court to pass an order on the application for a temporary injunction without to a certain extent prejudging the case; and the plaintiffs themselves are to blame if, by pressing an application for a temporary injunction, they draw upon themselves an adverse order of the Court'.[41]

In the above two cases, the Courts departed from inquiring whether there was a serious question to be tried and started examining the probability of the applicant succeeding at trial to grant an interlocutory injunction. Such departure was prompted by a belief that during that period, frivolous suits were filed by plaintiffs and injunctions were granted too frequently by the Courts despite decisions to the contrary – as a consequence of which, the defendants were continually harassed.[42] Hence, the Courts felt that a further enquiry into the plaintiff's case could ensure that the suit is not frivolous or vexatious. In *Gopalji Jha v Gajendra Narayan*[43] the defendant alleged that the suit brought by the plaintiff was barred in law. In

36 ibid [9].
37 ibid [45].
38 ibid [46].
39 *Vithal* (n 11).
40 ibid [6].
41 ibid [5].
42 *Ismail* (n 35) [9].
43 *Gopalji Jha v Gajendra Narayan* AIR 1936 Pat 226.

those circumstances, the Court held that though it is not called upon to decide whether the plaintiff will succeed in the suit, it still has 'to consider the probability or otherwise of the plaintiffs being entitled to any relief in the suit'.[44] Furthermore, in the context of mandatory injunctions, the Courts resorted to looking at the probability of success as an injunction would have the consequence of disturbing the status quo and not preserving it.[45]

It could be argued that the discretion and flexibility accorded to the Courts to grant injunctions – in view of its equitable roots — permits the Court to divert from inquiring whether there is 'a serious question to be tried' or assessing the probability of success depending on the facts and circumstances of each case[46]. In *Allahabad Bank v Rana Sheo Singh*,[47] the Hon'ble Court stated:

> It is however to be remembered that the purpose sought to be achieved by giving to the court discretion to grant an interlocutory injunction would be frustrated if the discretion were clogged by a technical rule forbidding its exercise if the Court evaluated the chances of the plaintiff's ultimate success at the trial at 50 per cent or less but permitting its exercise if the chances were more than 50 per cent. No such mathematical formula can be evolved for this purpose. The discretion has to be exercised not arbitrarily and capriciously but judiciously and fairly on reasonable grounds depending on the facts and circumstances of the case and the evidence available to the Court at the hearing of the application.

With time, the Courts have also started considering 'a strong prima facie case' to determine whether or not to grant an interlocutory injunction.[48]

How does one reconcile these varied interpretations of prima facie case? Is there any connecting thread between these conceptions and decisions? What is the current state of the law? It is submitted that, as will be observed from the pages to follow, these varied conceptions of prima facie case are a consequence of and a response to the problems of judicial backlog and delay, and frivolous and vexatious litigation. Interlocutory injunction hearings have today become 'mini-trials' – where the Court conducts a thorough examination of the merits of the case at the interim stage so as to dispose off the matter. However, to better comprehend this situation, we need to understand the British experience in the 1960s and early 70s when, in the face of huge backlog, the Courts were observed to engage in 'mini-trials' and the response to

44 ibid 166.
45 *Gogineni Gopaya v Manikonda* AIR 1927 Mad 188.
46 *Lakshminarasimhiah v Yalakki Gowda* AIR 1965 Kant 310.
47 *Allahabad Bank* (n 8).
48 *New Delhi Theatres* (n 12); *KM Multani v Paramount Talkies* [1943] 18 Comp Cas 90; *Mac Laboratories v VR Nathan* (1968) ILR 3 Mad 253; *S Krishnaswamy v South India Film Chamber* AIR 1969 Mad 42; *Upendra Das v Krushna Sahu* AIR 1972 Ori 12; *Uniply* (n 12); *Shiv Kumar* (n 12).

such a phenomenon by the House of Lords in *American Cyanamid*.

III. The English Experience and American Cyanamid and its Aftermath

As in India, there were diverging opinions in England as to the meaning of a prima facie case and the extent to which it was to be proved. Some authorities stated that it only needed to be shown that there was a 'case to be tried'.[49] As stated earlier, in *Preston v Luck*,[50] Cotton LJ again argued for the requirement to show a 'probability that the plaintiff is entitled to the relief'. In *Stratford and Sons Ltd. v Lindley*,[51] Lord Upjohn, while using the phrase 'strong prima facie' case, stated that the determination of a prima facie case is based upon affidavit evidence and must not influence in any way the judgment of the trial judge when it comes to finally deciding the matter on the merits. In the late 1950s and 1960s in England, there was a sudden surge in litigation and more importantly, intellectual property litigation. Little was done in terms of legislative and administrative reform to address this problem. The Courts however, in response, began to use the interlocutory injunction as a means of providing a rapid and relatively cheap method of adjudication of disputes. The usual process being that both the parties would exchange affidavits and the Court would, without making any deliberation on the requirement of a strict 'prima facie case', hear full arguments on the documentary evidence and substantive law, and allow or refuse an interlocutory injunction.[52] In effect, a 'mini-trial' was conducted.[53]

Two factors allowed the Court to embark on such a course. First, the idea that interlocutory injunctions are a discretionary and flexible remedy accorded to the Courts to do justice so as not to render the judgment in the case ineffectual.[54] As a consequence, there was no clear deliberation as to the extent to which each of the factors to be taken into account in granting an injunction, i.e. prima facie case, damages being an inadequate remedy, irreparable harm and balance of convenience, ought to be considered. This gave the Court a degree of flexibility to devise its own rules depending on the case at hand.[55] Such a robust attitude was given a further fillip by a second factor concerning the extent and scope of the phrase 'prima facie case'. Judicial decisions in that period maintaining that inferences as to 'strong prima facie' case are

49 *Pacaya* (n 9)
50 *Preston* (n 11) 506.
51 *J T Stratford* (n 12).
52 Christine Gray, 'Interlocutory Injunctions since Cyanamid' (1981) 40(2) CLJ 307.
53 Grant Hammond, 'Interlocutory Injunctions: Time for a New Model?' (1980) 30 U Toronto LJ 240, 251. See also 'Note' (1974) Annual Survey of Commonwealth Law 737.
54 *Hubbard v Vosper* [1972] 1 All ER 1023. This concept is applicable in India and has its roots in equity. See *Seema Arshad Zaheer v Municipal Corporation of Greater Mumbai* (2006) 5 SCALE 263.
55 Robert J Sharpe, *Injunctions and Specific Performance* (3rd edn, Canada Law Book 2000) para 2.70.

to be made out when granting interlocutory injunctions[56] allowed the Court to delve deeply into evidence and ascertain the relative strengths of the parties. For instance, in *Cavendish House (Cheltenham) Ltd. v Cavendish- Woodhouse Ltd.*,[57] the Court specified that one must first look for a prima facie case, the relative strength of the parties, and then the balance of convenience in granting an interlocutory injunction. To quote Prescott:

> The practical effect of the doctrine was that the interlocutory injunction became a cheap and speedy means of testing the strength of the parties' cases. That the standard of justice done on motion was high is demonstrated by the fact that only in very few cases was the result at trial different from that arrived on the motion.[58]

Before *American Cyanamid*, the question was whether the plaintiff had made out a 'prima facie' case of succeeding at trial and this, to quote the White Book, 'often required a "trial in miniature"',[59] involving a detailed investigation of the plaintiff's prospects of success against those of failure. Parties would submit extensive affidavits to the Court detailing the reasons for which injunctions ought to be granted and the Court, based on the facts in the affidavits, would delve into the merits and give a decision which was interlocutory in form but frequently final in practice. In some cases, the parties, at the start of the hearing asked the Court to treat the interlocutory hearing as a 'trial of the action' and accepted the order as final judgment.[60] According to Grant Hammond,[61] this system worked remarkably well as the quality of the Chancery bench was such that in very few cases was the result at trial different from that on the motion.[62]

One consequence of such a procedure was that, based on the result of the interlocutory injunction, the parties were able to predict the outcome of the final determination and use the interlocutory order as leverage to settle. Indeed, most passing-off cases were settled on that basis[63] and Lord Denning himself, in the later case of *Fellowes and Sons v Fisher Ltd.,*[64] commented on the procedure that more than ninety nine percent of the cases were settled on the basis of this system.[65] In fact, he conveniently referred to it as the 'practice of the

56 *Stratford and Sons v Lindley* [1965] AC 269.
57 [1970] RPC 234.
58 Prescott, 'Notes' (1975) 91 LQR 168, 169.
59 Jackson*, The White Book Service 2012* (Sweet & Maxwell 2012) vol II para 15-9.
60 *Computer Vision Corp v Computer Vision Ltd.* [1974] FSR 206; *Hutton v Esher Urban District Council* [1974] Ch 167; *Earl of Leicester v Wells* [1973] Ch. 110; *Attorney General v Chaudry* [1971] 1 WLR 1614; *A & M Records v Darakdijan* Unreported May 21 1974; *Coney v Choyce* [1975] 1 WLR 422; *Sinfield v London Transport Executive* [1970] Ch 550.
61 Hammond (n 53). See also 'Note' (n 53).
62 Hammond (n 53).
63 Prescott (n 58) 168, 169.
64 [1976] QB 122.
65 ibid 133.

profession' deeply ingrained in case law since 1884.[66]

As mentioned earlier, one of the reasons the Court could embark on such a task during that period was due to the degree of flexibility that it accorded to itself in deciding an injunction. Even in the 1960s, it was emphasised that the grant of an injunction should be flexible and discretionary and courts must not be tied down by other considerations.[67] This measure of flexibility allowed the courts to have varied interpretations of the factors that need to be considered in granting an interlocutory injunction – importantly, a prima facie case.When faced with huge judicial delays, under the garb of a strong prima facie case, the court could delve deeply into the facts of the case and look into the merits by, in effect, conducting a mini-trial. While Lord Denning answered critics and justified in *Fellowes and Son v Fisher* [68] the practice of the Court embarking on such 'mini-trials',[69] such a phenomenon surely raised questions of civil and procedural justice in a sense that the entire procedure prescribed by law to conduct trials was rendered futile as parties did not wish to proceed after the interim injunction order.

Grant Hammond notes that though the English Courts were endeavouring to achieve flexibility in the face of the litigation explosion, it should nevertheless have been predictable that sooner or later, questions would be raised as to the desirability of 'mini-trials'.[70] It was against this background that *American Cyanamid Co. v Ethicon*[71] was decided.

In *American Cyanamid Co. v Ethicon*,[72] American Cyanamid contended that Ethicon was marketing surgical sutures in violation of its patent and brought an action for patent infringement. It also sought an interim injunction restraining Ethicon from marketing its product. The High Court judge, after a 3-day hearing, found that American Cyanamid had made out a strong prima facie case and granted the injunction. The Court of Appeal, after hearing the case for eight days, held that American Cyanamid had no prima facie chance of success on the issue of infringement.[73] The decision rested on the Court's interpretation of technical terms in the patent legislation.

The House of Lords, unanimously approving the speech of Lord Diplock, stated that it would be an unnecessary exercise to look at the merits in detail for the purpose of finding a

66 *Fellowes and Son* (n 64) 131. Lord Denning referred to *Preston* (n 11).
67 *Harman Pictures NV v Osborne* [1967] 1 WLR 723; *Donmar Productions Ltd. v Bart* [1967] 1 WLR 740; *Hubbard v Vosper* [1972] 2 QB 84. See also Alastair Wilson, 'Granting an Interlocutory Injunction' (1975) NLJ 302.
68 *Fellowes and Son* (n 64).
69 His Lordship was referring to articles by Prescott and Alistair Winston cited above.
70 Hammond (n 61).
71 *American Cyanamid* (n 9).
72 ibid.
73 The Court of Appeal order is reported at [1974] FSR 312.

'strong prima facie case'. Lord Diplock clearly stipulated that in granting an interlocutory injunction, all that the plaintiff had to show was that that the claim was not frivolous or vexatious; in other words, that there was a serious question to be tried.[74] Phrases such as 'real prospect of succeeding', having 'an arguable case' and 'serious question to be tried' have been used interchangeably in this light.[75]

One of the main reasons why *American Cyanamid* is one of the most revered judgments as regards granting interim injunctions today is because for the first time, the House of Lords attempted to lay down steps or guidelines[76] as to the manner of granting interlocutory injunctions. These may be summarised as follows:

(a) The purpose of an injunctive remedy is to minimise the amount of damage until the case is decided. To this end the court should not consider the merits of the case beyond satisfying itself that there is a serious question to be tried.

(b) After that, if damages would be an adequate remedy to compensate the plaintiff, then no injunction should be granted as the damage would cease to be irreparable.

(c) If damages are not an adequate remedy, the court should consider whether the defendant would be adequately compensated out of the plaintiff's undertaking as to damages, should the defendant succeed at trial. If so, then normally an injunction would be granted.

(d) Where there is doubt as to the adequacy of damages and whether the undertaking can compensate the defendant, the court should consider the balance of convenience. The factors constituting this balance will vary from case to case.

(e) If this factor is evenly weighed, 'it may not be improper to take into account in tipping the balance the relative strength of each party's case…'.[77] This should only be done when it is clear from the evidence that one party's case is disproportionately stronger – the Court should not embark upon a preliminary trial of the action on conflicting written evidence.

It is crucial to note then that Lord Diplock in *American Cyanamid* deprecated the inquiry into the merits or relative strength of the parties' cases. Robert Sharpe argues that an inquiry into the merits would have required the House of Lords to delve into the technicalities of

74 *American Cyanamid* (n 9) 406. See also Zuckerman (n 7) para 9.31.

75 The different terms have been taken to have identical meaning. See *Smith v Inner London Education Authority* [1978] 1 All ER 411; *Mothercare Ltd v Robson Books Ltd* [1979] FSR 466. See also *Tetrosyl v Silver Paint and Lacquer Co Ltd* [1980] F.S.R. 68. See also Zuckerman (n 7).

76 In *Cayne v Global Natural Resources Plc* [1984] 1 All ER 225, the Court of Appeal mentioned that the American Cyanamid criteria were mere guidelines and to treat them otherwise would fetter the discretion granted to the courts in giving interlocutory injunctions.

77 *American Cyanamid* (n 9) 409.

patent law, and the decision then was probably the only way out.[78] Lord Diplock, in a sweeping statement noted that 'there was no such rule' that the court ought to be convinced of a strong prima facie case.

This position in England is certainly consistent with the policy behind interim proceedings, namely that it is not the task of the court to determine who is in the right before a trial has been conducted, but to maintain a balance so that the action can be tried and determined at a later date.[79]

Criticism of the judgment was not slow to come. Authors like Gore,[80] Prescott,[81] and Wilson[82] argued that the House of Lords probably got it wrong and prescribed a test that was too rigid. Prescott argues that if it is pertinent to ask 'Will the plaintiff suffer irreparable damage if no injunction is granted?' it also ought to be permitted to ask, 'How sure are we that the applicant will ultimately suffer legal damage at all?'[83]

Two cases after *American Cyanamid* sought to create exceptions as to the inquiry into the merits of the case; *Fellowes and Son v Fisher*[84] and *NWL Ltd. v Woods*.[85] In *Fellowes and Son v Fisher*,[86] the defendant employee had signed a contract with the plaintiff, a solicitor's firm, that he would not work in a competing firm for a certain period after leaving the plaintiff. He left the plaintiff and started working for a competitor. The plaintiff sued him and applied for an interlocutory injunction restraining him from working for the competitor until the suit was decided. Lord Denning, acknowledging that this case was peculiar in the sense that any order given would achieve a sort of finality even though the trial had not taken place, noted that Lord Diplock in *American Cyanamid* himself stated that 'there may be many other special factors to be taken into consideration in the particular circumstances of individual cases'.[87] According to Lord Denning, when such circumstances arise, it may not be inappropriate to look into the relative strengths of each party's case and give an interlocutory injunction accordingly.

In *NWL Ltd. v Woods*,[88] Lord Diplock, in a labour dispute, interpreted his own decision in *American Cyanamid* to state, 'There is nothing in my view in American Cyanamid to suggest

78 Robert Sharpe, *Injunctions and Specific Performance* (4th edn, Canada Law Book 2012) para 2.220.
79 Andrew Keay, 'Whither American Cyanamid?: Interim Injunctions in the 21st Century' (2004) 23 CJQ 132, 133; Adrian Zuckerman, 'Interim Injunctions on the Merits' (1991) 107 LQR 196. See also *Shri Westarly Dkhar & Ors. v Shri Sehekaya Lyngdoh* 2015 STPL (Web) 57 SC (SC)(DB).
80 Andrew Gore, 'Interlocutory Injunctions—A Final Judgment?'(1975) 38(6) MLR 672.
81 Prescott (n 58).
82 Wilson (n 67).
83 Prescott (n 58) 168.
84 *Fellowes and Son* (n 64).
85 *NWL Ltd v Woods* [1979] 3 All ER 614.
86 *Fellowes and Son* (n 64).
87 *American Cyanamid* (n 9) 409.
88 *NWL* (n 85).

that in considering whether or not to grant an interlocutory injunction, the judge ought not to give full weight to the practical realities of the situation to which the injunction will apply.'

The Learned Judge then added that when the grant or refusal of the interlocutory injunction would have the practical effect of putting an end to litigation, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from deciding the application one way or the other.

In *Factortame*,[89] while accepting the primacy of *American Cyanamid*, Lord Goff held that the principles would not apply to cases where there was a pure question of law involved.[90] Similarly, it has been held that the interlocutory decision achieves a certain finality in cases involving fundamental rights and thus one ought to look into the merits of the case.[91] In the context of mandatory injunctions, it has been held that a strong showing of the relative strengths of the parties on the merits is required.[92]

With all these exceptions being created, it is pertinent to ask whether the principles laid down in *American Cyanamid*, especially as regards a merits review, hold good today. Adrian Zuckerman,[93] writing in 1991, argues that the decision in *American Cyanamid* that the Court ought not to test the relative strength of the parties' cases has been put to rest by three decisions of the court; *R v Secretary of State for Transport Ex. p Factortame*,[94] *Cambridge Nutrition Ltd v BBC*[95] and *Lansing Linde v. Kerr*.[96] In these cases, the Court sought to create exceptions to the rule in *American Cyanamid* and Zuckerman argues that the existence of these exceptions undermines the justification for the decision itself.[97]

It may also be opined that after the Privy Council decision in *National Commercial Bank of Jamaica v Olint Corp. Ltd.*,[98] the strictures passed in *American Cyanamid* against a merits review are irrelevant. In that case concerning mandatory injunctions, Lord Hoffmann indicated that among the matters which the court may take into account in granting interim

89 *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 AC 603.
90 The same has been held to apply for public law cases. See *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Interim Injunction)* [2003] UKPC 63.
91 *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462; *Cream Holdings Ltd and others v Banerjee* [2004] UKHL 44.
92 *Hounslow London Borough Council v Twickenham* [1970] 3 All ER 326; *Shepherd Homes v Sandham* [1971] Ch 340; *Bryanston Finance Ltd v de Vries (No.2)* [1976] Ch. 63; *De Falco v Crawley BC* [1980] 1 All ER 912.
93 Zuckerman, 'Interim Injunctions on the Merits' (n 79).
94 *Factortame* (n 89).
95 *Cambridge Nutrition Ltd. v BBC* [1990] 3 All ER 523 (CA).
96 *Lansing Linde v Kerr* [1991] 1 WLR 251.
97 Zuckerman, 'Interim Injunctions on the Merits' (n 79) 198.
98 [2009] 1 WLR 1405, 1409.

injunctions are:

> The prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, *the court's opinion of the relative strength of the parties' cases*.[99]

As a parting observation, it ought to be noted that while the Courts in England have tried to create exceptions to the guidelines in *American Cyanamid*, the exceptions are mainly restricted to intellectual property cases or cases that achieve a form of finality at the interlocutory stage. These exceptions, however, do not cover the entire gamut of cases that interlocutory injunctions address, i.e. property cases, contract cases, company law matters and instances of specific performance.[100] To this extent, *American Cyanamid* is still followed in these cases and continues to be considered good law.[101]

American Cyanamid and Case Management

After understanding the historical background leading up to the decision in *American Cyanamid*, it would be appropriate to examine its relationship with case management and the justice delivery system in England. Case management in this sense, refers to the various procedures and rules that are designed to ensure that the final decision in the case is decided in a timely and cost-effective manner, i.e. without unnecessary delays and involving the appropriate use of resources in proportion to the importance of the case.

The White Book[102] states that the *American Cyanamid* principles, in a sense, are crude case management rules designed to reduce costs and delays and, in particular, avoid cases being tried twice.This comment is better understood in the backdrop of the situation existing before American Cyanamid where huge judicial workload and backlog of cases in the 1960s and 1970s was mainly the result of tremendous satellite litigation, sometimes called 'interlocutory warfare'.[103] As mentioned earlier, rather than merely relying on a strict prima facie case, i.e.

99 ibid. (Emphasis added)

100 Recent cases where *American Cyanamid* has been followed are *Lauffer v Barking* [2009] EWHC 2360 (QB); *Everett v University of East London* [2009] EWCA Civ 402; *Sports Network Ltd v Calzaghe* [2008] EWHC 2566 (QB).

101 Lionel Astor Sheridan has compiled a list of recent case law where the decision has been followed. See Lionel Astor Sheridan, *Injunctions and Similar Orders* (1st edn, Barry Rose Law Publishers 1999) app 9A.

102 White Book (n 59) 2792.

103 UK Lord Chancellor's Department, *Civil Judicial Statistics* (HM Stationery Office, London 1969-

a serious question to be tried, the courts of first instance delved deeply into the merits of the case and ended up making findings of fact based on affidavit evidence.These findings, if not resulting in the parties settling the case, gave grounds for interlocutory appeals – mainly on facts- generating further delays and additional costs.

A study of case law before the decision in *American Cyanamid* buttresses this opinion of the situation existing before 1975. Under the garb of seeking a 'strong prima facie' case, courts often delved deeply into the case and made findings of fact. Consequently, the Court of Appeal also decided a large number of interlocutory appeals on grounds of fact rather than important questions of law.[104] For instance, in *Wallersteiner v Moir*,[105] on an application for an interim libel injunction, the trial judge heard the matter for 15 days after which the Court of Appeal heard the appeal over 14 days and gave a lengthy judgment with various findings of fact.

Such trends were more conspicuous in intellectual property injunctions. In copyright and passing-off cases, the judges would often make findings of fact and infer the 'strong possibility' of the existence of an infringement.[106] In cases concerning patents, the situation was no different. In *Carrol v Tomado Ltd*,[107] Graham J held that the principles on which injunctions are granted in patent cases ought to be the same as in other cases. This was around the time of the decision in *Hubbard v Vosper*.[108] However, reports of patent injunctions indicate that hearings took days and even weeks in some cases with judges carefully dissecting each piece of evidence in the affidavits to infer an infringement. In *Oila Mathieson v Biorex Labs*

1974). The Report for 1969 observes a marked rise in the number of Motions filed before the England and Wales High Court, i.e. 1779 in 1969 compared to 1460 in 1968. The Report notes that while it is not possible to give a breakdown of what these motions were for, presumably the great majority of these were for injunctions.

104 See *Wallersteiner v Moir* [1974] 1 WLR 991; *Roche Products v Berk Pharmaceuticals* [1973] FSR 345; *Hutton* (n 60); *Duke v Robson* [1973] 1 WLR 267; *Total Oil Great Britain v Thompson Garages Ltd.*[1972] 1 QB 318; *Hoffman La Roche v DDSA Pharmaceuticals* [1969] FSR 410; *Legal and General Assurance Society v Daniel* [1967] FSR 512.

105 *Wallersteiner* (n 104).

106 *Computer Vision* (n 60); *British Northrop Ltd v Texteam Blackburn* [1973] FSR 241; *Pickwick International Inc. v Multiple Sound Distribution Inc.* [1972] 1 WLR 1213; *Evans v Eradicature Ltd.* [1972] FSR 137; *Spillers v Quaker Oats* [1969] FSR 510; *Effluent Disposal Ltd. v Midlands Effluent* [1969] FSR 468; *A Levey v Henderson-Kenton(Holdings) Ltd* [1973] FSR 425.There are however some cases in this period where the Judges categorically stated that being an interlocutory hearing they cannot give findings of facts and decided injunctions according to normal principles of 'prima facie' case and balance of convenience.See *Globelegance BV v Sarkissian* [1973] FSR 461; *LRD International v Lila Edets Sales* [1972] FSR 479; *Morcream Products v Heatherfresh* [1972] FSR 111; *Temple Investments v Hollis Hell* [1971] FSR 634; *Coral Index Ltd. v Regent Index Ltd.* [1970] FSR 13.

107 *Carrol v Tomado Ltd*. [1971] FSR 218.

108 *Hubbard* (n 54).

Ltd.,[109] Graham J heard an injunction application for more than 20 days and delved deeply into the facts. A similar approach was taken in *American Cyanamid* itself, where the Judge (Graham J) took 3 days to hear the interlocutory application.

The fact that the court took an unnecessarily large number of days to decide interlocutory applications rather than proceed with the trial of the case led to huge delays and inevitably, a case management concern. As a principle of case management, it is quite obvious that spending more time in deciding interlocutory applications inevitably means that the court has less time available to hear other cases thereby leading to judicial delays. At the same time, parties had resigned themselves to considering interlocutory hearings as mini-trials, and used the order in the injunction application as leverage to settle the case. Another trend observed is where parties, seemingly troubled by the huge delays in the court, at the start of the hearing asked the court to treat the interlocutory hearing as a trial of the action.[110]

The result of the decision in *American Cyanamid* that all that was required was for the applicant to show a serious question to be tried was that the court had lowered the threshold for determining whether an injunction ought to be granted.[111] Thus, unless a question of law was involved, the parties had very little chance of appealing against the injunction order. Gray further notes that very few cases appealing against interlocutory injunction orders are reported after the decision of the court in *American Cyanamid*[112] and argues that the weakness of the pre-*Cyanamid* approach lies in the problem of coming to a decision on the merits on the basis of inadequate, untested, evidence and subsequently the Court of Appeal hearing the appeal on the same evidence.[113]

Even judicial pronouncements recognized the impact of *American Cyanamid* on the court workload. Balcombe LJ, in *Lawrence David v Ashton*,[114] noted that interlocutory applications consumed too much time and resources and that trials would probably proceed faster if that were not the case. He also stated that there was a marked improvement in case management after *American Cyanamid.*[115] In *Benchairs Ltd. v Chair Centre Ltd.*,[116] when considering the extent to which the Court of Appeal can intervene with the lower court's findings in an interlocutory appeal, the Court stated that its powers in such a situation are 'untrammelled' in nature. Such a ruling inevitably gave a free hand to the appellate courts in hearing interlocutory

109 [1969] FSR 361.
110 *Computer Vision* (n 60); *Hutton* (n 60); *Earl of Leicester v Wells*, [1973] Ch 110 ; *Attorney General* (n 60); *A & M Records v. Darakdijan*, Unreported May 21 1974; *Coney* (n 60); *Sinfield* (n 60).
111 White Book (n 59) 2792.
112 Gray (n 52) 315.
113 ibid.
114 [1989] 1 FSR 87, 98.
115 ibid. The same is noted by L A Sheridan (n 101) 170.
116 [1973] FSR 123. See also *Bennax v Austin* [1955] AC 370.

injunction appeals and interfering with the discretion of the judge.

The argument may be summarised thus; there was an existing problem of burgeoning delay in the 1960s in response to which, judges started delving deeply into the merits when considering whether or not to grant interlocutory injunctions. This system, according to some authors and judges, worked extremely well in that the parties would know at the interlocutory stages itself, their chances of success and then attempt to settle the cases. If anything, the rates of disposal and settlement during that period highlight the benefits of this practice.[117] *American Cyanamid*, by banning an inquiry into the merits of cases at the interlocutory stages, sought to nip the problem of delay in the bud by greatly reducing satellite litigation. To this extent, it was also a decision in case management. From the latter half of the 1980s however, there was an increase in satellite litigation in the United Kingdom due to changes in the rules of discovery and costs, leading to delays – not attributable to injunctions.

IV. American Cyanamid in India

It wasn't long after 1975 that the decision in *American Cyanamid v Ethicon*[118] came to be recognised by the courts in India. Indian courts soon realised the value and importance of the judgment and started referring to its principles in deciding cases. At the outset, it would be interesting to note that what the Indian courts imbibed was not the step-by-step inquiry that *American Cyanamid* proposed, but the decision's independent reasoning on prima facie case and merits inquiries in granting interlocutory injunctions.

In *Purna Investments v Southern Steelmet Alloys*[119] - one of the first few cases citing *American Cyanamid*- the Karnataka High Court in a case of oppression and mismanagement under the Companies Act 1956 held that there was no requirement to show a 'strong prima facie' case to grant an interlocutory injunction. Citing *American Cyanamid*, the Court held that all that was required was whether there was a serious question to be tried and the court need not delve deeply into the merits of the dispute.[120] Similar cases followed.[121] In *Shankarlal Debiprasad v State of MP*,[122] the Madhya Pradesh High Court referred to each of the principles enumerated by Lord Diplock in *American Cyanamid* and applied them in deciding an interlocutory injunction application. At the same time, in *Amar Talkies v Apsara Cinema*,[123] the High Court noted that there had been considerable criticism of the judgment

117 Lord Chancellor's Department, *Civil Judicial Statistics* (HM Stationery Office, London 1969-1974).
118 *American Cyanamid* (n 9).
119 [1978] 48 Comp Cas 264 (Kar).
120 ibid.
121 *Gobind Pritamdas* (n 28); *Amal Kumar* (n 28); *Amar Talkies* (n 28); *Shankarlal Debiprasad v State of MP* (1978) MPLJ 419.
122 (1978) MPLJ 419.
123 *Amar Talkies* (n 28).

in *American Cyanamid* immediately after its pronouncement. It held, following the decision in *Fellowes & Sons v Fisher*,[124] that the decision in *American Cyanamid v Ethicon* that the Court must not look at the merits of the case was not a general rule and peculiar to the facts and circumstances of that case. This decision appears to have been wrongly decided and has not been referred to in later case law.

In *Damodar Valley Corporation v Haripada Das*,[125] the Calcutta High Court rephrased the guidelines in *American Cyanamid* in its own words. However, the guidelines seem to merely illustrate the Court's understanding of *American Cyanamid* and do not have any precedential value as later cases do not seem to have referred to them.

A few observations ought to be mentioned. First, that unlike England in the 1960s and 70s, India did not witness a situation of huge case delays and backlogs[126] during the same period. Second, the decision in *American Cyanamid* that the Court ought not to take into consideration the relative strengths of the parties' cases and only to enquire whether there was a 'serious question' to be tried was not revolutionary when applied in Indian law.Even before the decision in *American Cyanamid* there were cases in India[127] where the Courts expounded the meaning of 'prima facie' case to hold that 'prima facie' would not involve delving into the merits of the case, but merely enquiring whether there was a chance of success based on the material on record.

What is however to be observed is that there were divergent views on this matter before 1975[128] and in this sense, *American Cyanamid* did great service by clarifying the law on the subject. While the High Courts were conspicuous in their reference to the principles laid down in *American Cyanamid* it was only in 1994 that the Supreme Court first referred to the decision. In *Power Control Appliances v Sumeet Machines,*[129] the Supreme Court, in a case concerning copyrights referred to the decision but noted however, that the principles in *American Cyanamid* were similar to the 1957 decision of the Madras High Court in *Mohd. Aboobacker v Nanikram Maherchand*.[130]

Before one proceeds to the other Supreme Court decisions referring to *American*

124 *Fellowes and Son* (n 42).
125 *Damodar Valley* (n 9).
126 See Supreme Court of India, 'Statement of Institution, Disposal & Pendency of Cases in the Supreme Court of India from the year 1950 to 30.09.2008' in *Annual Report of the Supreme Court 2007-2008*, 63 <http://supremecourtofindia.nic.in/annualreport/annualreport2007-08.pdf> accessed 3 June 2012.
127 *Mohd. Aboobacker v Nanikram Maherchand* (1957) ILR Mad 1049; *Seth Banarsi Das Gupta v Seth Brij Bhushan* (1981) 20 DLT 437.
128 *Vellakutty v Karthayayani* AIR 1968 Ker 179; *Mohan v Narain* 1983 MPWN 241; *Lakshmi v Kunju* 1964 KLT 664.
129 (1994) 2 SCC 448.
130 *Aboobacker* (n 127).

Cyanamid, it would be pertinent to mention that in the United Kingdom, *American Cyanamid* arose out of a specific situation, i.e. patents and sought to apply the principles generally to ordinary cases such a property and contractual disputes. In that sense, while it would have been difficult to enquire into the merits at the interlocutory stage as regards intellectual property cases- merely due to the complexity involved- it would have been far easier to ascertain the chances of success for parties in ordinary cases like contract, property disputes and torts. In India, the trend has been to refer to *American Cyanamid* in ordinary injunction cases and to restrict its application altogether to intellectual property cases- diverging from the trend in the United Kingdom.[131] This shall hereto be explained.

In *Colgate Palmolive (India) Ltd v Hindustan Lever*,[132] the Supreme Court was considering whether the guidelines in *American Cyanamid* were too rigid and raised doubts as to the legal efficacy of the guidelines. The Court referred to the ratio of Laddie J in *Series 5 Software*[133] to note that the decision in *American Cyanamid* in no way sought to impinge on the flexibility granted to the Courts in granting interlocutory injunctions. As in *Series 5*, the Court took a lenient view of *American Cyanamid* to hold that all that the Court forbade was attempts to resolve serious issues of fact on affidavit evidence. If, however, as in ordinary injunctions, the Court is able to come to a view as to the strength of the parties' cases on credible evidence, it can do so.[134]

The implication of this decision was that the Courts could make inferences as to the strength of the parties' cases as long as they could be made by the evidence placed on record without resolving difficult, contested issues of fact. As regards situations like intellectual property disputes where it would be difficult to ascertain the strength of the parties' case on a bare reading of the evidence, the Supreme Court departed from *American Cyanamid* to frame its own test.

In *SM Dyechem Ltd. v Cadbury (India) Ltd.*,[135] the plaintiff applied for an interlocutory injunction restraining the defendant from using its trademark. The Court was asked to consider whether when granting a temporary injunction, it ought to consider a prima facie case or the comparative strength of the case of either parties or merely find out if the plaintiff has raised a 'triable issue'. The Supreme Court, citing the earlier case of *Colgate Palmolive* held that *American Cyanamid* hadn't diverged from any established legal principles governing the grant of interlocutory injunctions. Jagannadha Rao J held that:

131 *Colgate Palmolive* (n 11); *Transmission Corporation of AP v Lanco Kondapalli* (2006) 1 SCC 540.
132 *Colgate Palmolive* (n 11).
133 *Series 5 Software v Clarke* [1996] FSR 273.
134 *M Gurudas v Rasaranjan* (2006) 8 SCC 367; *Nestle India v Mood Hospitality Private Limited* 2010 (42) PTC 514 (Del); *Omega SA v Avanti Kopp Electricals* 2003 (27) PTC 327 (Mad).
135 (2000) 5 SCC 573.

> American Cyanamid cannot be understood as having laid down anything inconsistent with the 'old practice'. We may also add that now the courts in England go into the question whether the plaintiff is likely or unlikely to win in the suit i.e. into the comparative strength of the case of the rival parties - apart from the question of balance of convenience.[136]

Thus, after *SM Dyechem*, the Courts in India now look into the comparable strength of the parties' cases when granting interlocutory injunctions in trademark matters. With time, this principle has also been extended to other areas of intellectual property like patents[137] and copyrights. As will be seen later, such decisions have been crucial in terms of enabling the Indian courts to embark on mini-trials at the interlocutory stage.

Thus, we would notice that the principles based on which interlocutory injunctions are granted in India are very similar to those in England.In many instances, it has been observed that when in doubt, Indian courts still refer to English judgments as to the position of law.In this light, the decision in *American Cyanamid* has greatly influenced Indian law. However, it will be noticed that *American Cyanamid*, being the case in intellectual property rights does not find application on that subject in India. As regards intellectual property cases, the Indian courts have categorically held that the 'comparable strength' of either party ought to be considered when granting an interlocutory injunction in intellectual property matters - diverging from the trend in English law where *American Cyanamid* principles are still held sacrosanct in intellectual property cases.

V. The Present Day Understanding of A 'Prima Facie' Case

The preceding paragraphs explain the different conceptions of a 'prima facie' case and the manner in which the courts observe a prima facie case to grant an interlocutory injunction in England. With respect to present day injunction hearings in India, it is submitted that like in England in the 1960s, interlocutory injunction hearings have become so-called 'mini-trials'. Such mini-trials are a consequence of the huge caseload and judicial backlog in the country and are in stark contrast to the strictures and guidelines set out by Courts in the past.

At the outset, it is imperative to bring clarity to our understanding of 'mini-trials'. As we know, ordinarily, the court ought to make the common enquiries when granting interlocutory injunctions; a prima facie case, irreparable harm, and a balance of convenience in favour of the applicant. In such a situation, a prima facie case may involve an enquiry on whether

136 ibid [21], citing *Barclay's Bank Inc v R.B.S. Advanta* 1998 RPC 307 (Laddie, J) where such a question was posed and where *Series 5 Software* was followed. Therefore, in trademark matters, it is now necessary to go into the question of 'comparable strength' of the cases of either party, apart from balance of convenience.

137 *Hindustan Lever Ltd. v Godrej Soaps Ltd.* AIR 1996 Cal 367.

that is a serious question to be tried[138] or even ascertain the strength of the parties 'on the face of the material' on record.[139] When the judge transcends these legal prescriptions and seeks to enquire in detail the respective strengths of the parties by perusing all the evidence placed on record under the garb of a 'prima facie' case, one can infer the existence of a mini-trial. In *Series 5 Software Ltd v Clarke*[140] Laddie J, when examining the opinion of Lord Diplock in *American Cyanamid*[141] extrapolated the various characteristics of 'mini-trials'. While holding that Lord Diplock in that case intended to state that the courts are not justified in embarking upon anything resembling that of a trial of the action upon conflicting evidence, he stated that the objective was so as to not engage in mini-trials.[142] The learned judge stated that the courts 'should not attempt to resolve difficult issues of fact or law on applications for interlocutory relief' and that the Court of Appeal decision in *American Cyanamid* itself was the best example of such trials.[143]

It is this understanding of mini-trials that we shall analyse when looking at the situation in India. Despite the right to speedy and effective justice being recognised, the huge backlog of cases and delays in the courts are damaging the reputation of the judiciary and denying to the citizens, the rights guaranteed under the Constitution. As of 2011, there are a staggering 32 million cases pending in various courts in India.[144] Of these, at least 80 cases were pending a decision or hearing for the past 20 years in the Supreme Court. In addition, over 500,000 cases involving criminal and civil laws were pending in different High Courts for over 10 years. Moreover, over 800,000 cases were awaiting disposal by the country's subordinate courts in 32 States and Union Territories.[145] Estimates record that at the current rates of admission and disposal, it would take 466 years to clear the backlog of the Delhi High Court alone.[146] In this light, one can give numerous instances of mini-trials in India.[147]

138 *United Commercial* (n 9); *Brajendra Nath v Kashi Bai* AIR 1946 Pat 177; *Nimcha Coal Ltd v Srinivas Goenka* (1966) 70 CWN 1108; *Allappuzha Municipality v TJ Paul* AIR 1995 Ker 36; *Shakuntala Devi v Manoj Kumar* 1995 (60) DLT 358 .

139 *J Krishnamoorthy v Bangalore Turf Club* (1975) 2 Kant. LJ 428; *Ratna Paul v Subhash Ranjan Paul* AIR 2001 Gau 133; *Uniply Industries v Unicorn Plywood Ltd.* 2001 PTC 417 (SC); *Bate Krishna Damini v Kailash Chand* AIR 1995 SC 453 : *Maria Sequeria Fernandez v Erasmo Jack* 2012 (3) SCALE 550; *A Shanmugam v Ariya Kshatriya*(2012) 4 SCALE 666.

140 *Series 5* (n 133) 286.

141 *American Cyanamid* (n 9).

142 ibid 285.

143 ibid.

144 'Pendency of Cases in Indian Courts: 2011' (PRS Legislative Research 2011) <http://prsindia.org/parliamenttrack/vital-stats/pendency-of-cases-in-indian-courts-2011-1837/> accessed 16 May 2017.

145 V Adhivarahan, 'Case Management and ADR for the Banking Sector' (Paper presented in International Conference on ADR and Case Management, Law Commission of India 2003).

146 'It would take Delhi HC 466 yrs to clear backlog: CJ' *Indian Express*, (New Delhi 13 Feb 2009).

147 In *Ultra Tech v Alaknanda Cement* (Suit No. 743/2006, Bombay High Court, Interlocutory order dated 28 June 2011 in Notice of Motion No. 1183/2006) the plaintiff filed a suit in the year 2006

Unlike in *American Cyanamid* where the English Courts deprecated the practice of mini trials, the Indian courts have in fact given sanction to this practice. In *Colgate Palmolive (India) Ltd. v Hindustan Lever Ltd.*,[148] the basic question before the Court was the extent of consideration of the strength of a parties' case when granting an interlocutory injunction. The Court, examining the decision in *American Cyanamid,* observed that the decision has been 'more misunderstood than understood'[149] and concurred with the views of Laddie J in *Series 5* that Lord Diplock did not intend by the last-quoted passage to exclude consideration of the strength of the cases in most applications for interlocutory relief, and that what was intended was that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so.

The Supreme Court further held that Laddie J in *Series 5* went on to 'record that the House of Lords in *American Cyanamid* did not suggest that it was changing the basis upon which most courts had approached the exercise of discretion'[150] and that Laddie J's view has 'been able to resolve the issue' of whether the courts can examine the strength of the parties' case 'without any departure from the true perspective'[151] of the decision in *American Cyanamid.* Accordingly, the Supreme Court stated its own considerations in the matter of grant of interlocutory injunctions in India to guide the exercise of discretion of the court, which include that the Court, while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's.

However, while the aforesaid remains the law, it is submitted that the approach of the Hon'ble Court in *Colgate Palmolive* and its interpretation of *American Cyanamid* and *Series 5*

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accompanied with a notice of motion asking for an interlocutory injunction to protect his trademark against the defendant. Kathawala J, after a period of 5 years in 2011 extensively delved into the facts of the case, the evidence presented by the parties, exhibits and pronounced a 34 page interlocutory order- as if it was a judgment in the suit itself. The said order was appealed to the division bench of the Bombay High Court and decided within a period of 8 months. In that judgment, the Hon'ble bench examined the law related to the case, the controversial facts and upheld the single judge's order. The suit is still pending in court.

In *Lucent Technologies v ICICI Bank Ltd.* (CS OS No. 386/2005, Order dated 13 October 2009, Delhi High Court) in a suit filed in 2005 relating to breach of contract, Gita Mittal J of the Delhi High Court pronounced a 130 page interlocutory order in 2009 settling contentious issues of fact based on the evidence submitted. The parties appear to have settled the dispute after the order.

In *Parle Products v Parle Agro* (Notice of Motion No. 4431/2007 in Suit No 3203/2007, Order dated 18 December 2008, Bombay High Court), Roshan Dalvi J., gave a 30 page interlocutory order after–as earlier–examining the complex facts and circumstances of the case. In 2012, after 4 years of the interlocutory order remaining in force, the plaintiffs withdrew their suit as it seems that they had reached a settlement.

148 *Colgate Palmolive* (n 11).

149 ibid 12.

150 ibid 22.

151 ibid 22.

is rather misplaced. In *American Cyanamid*, Lord Diplock deprecated a merits based enquiry as it was not proper to conduct a mini-trial based on facts stated by the parties on affidavits, untested by oral cross-examination.[152] He further held that it was no part of the court's function at an interlocutory stage 'to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend.'[153] After detailing the governing principles on which the court should grant an interlocutory injunction, Lord Diplock held that it is only after enquiring into the 'uncompensable disadvantage' to the parties, and at stage of examining the balance of convenience that 'it may not be improper to take into account in tipping the balance, the relative strength of each party's case'.[154] It was more of an exception than a rule.

In *Series 5*, Laddie J did not elucidate the stage at which the strength of the parties' case is to be taken into consideration and this has led to considerable confusion. Nevertheless, it could be argued that he intended to adhere to the idea that the consideration of the relative strength of parties' cases was an exception rather than a rule. Any other interpretation would mean that *Series 5* is inconsistent with *American Cyanamid*.[155] In fact, as stated hereinabove, even though the courts have tried to create exceptions to the guidelines in *American Cyanamid*, the exceptions are mainly restricted to intellectual property cases or cases that achieve a form of finality at the interlocutory stage. These exceptions, however, do not cover the entire gamut of cases that interlocutory injunctions address, i.e. property cases, contract cases, company law matters and instances of specific performance.[156] To this extent, *American Cyanamid* is still followed in these cases and continues to be considered good law.[157]

The interpretation of *American Cyanamid* and *Series 5* as placed by the Hon'ble Supreme Court has the effect of making the exception, i.e. examining the relative strength of the parties' cases, the rule. Later decisions of the Supreme Court have accepted this as an established principle and further extended it.[158] In *Sree Jain Swetambar v Phudan Singh*,[159] the Supreme Court held that where the trial court grants a temporary injunction without recording its prima facie satisfaction on merits, the appellate court can set aside the order. In *Laxmikant Patel*

152 *American Cyanamid* (n 9) 406.
153 ibid 407.
154 ibid 409.
155 Keay (n 79).
156 Recent cases where *American Cyanamid* has been followed are *Lauffer* (n 100); *Everett* (n 100); *Sports Network* (n 100).
157 LA Sheridan has compiled a list of recent case law where the decision has been followed. See LA Sheridan (n 101).
158 See *Sree Jain Swetambar v Phudan Singh* (1999) 2 SCC 377; *SM Dyechem v Cadbury (India) Ltd.* (2000) 5 SCC 573; *Laxmikant Patel v Chetanbhai* (2002) 3 SCC 65; *M Gurudas* (n 134); *Transmission Corpn.* (n 131).
159 *Sree Jain* (n 158) 381.

v Chetanbhai,[160] the Supreme Court held that 'a refusal to grant an injunction in spite of the availability of facts, which are prima facie established by overwhelming evidence and material available on record justifying the grant thereof, occasion a failure of justice...'.

In *SM Dyechem v Cadbury (India) Ltd.*,[161] one of the issues before the Court was whether for grant of a temporary injunction, should the Court go by the principle of prima facie case (apart from balance of convenience) or comparative strength of the case of either parties or by finding out whether the plaintiff has raised a 'triable issue'. In that case, the appellant sought for a temporary injunction seeking to restrain the respondent from using the appellant's trademark. The trial court granted the injunction which order was overturned by the High Court in appeal. With respect to the issue, the Supreme Court stated that though in *American Cyanamid* the House of Lords observed that it was sufficient if there was a 'triable issue',[162] there was considerable criticism of the principles laid down in that case.[163] The Court further held that 'now the courts in England go into the question whether the plaintiff is likely or unlikely to win the suit i.e. into the comparative strength of the rival parties– apart from the balance of convenience', and that 'in trademark matters, it is now necessary to go into the question of comparable strength of the cases of either party, apart from the balance of convenience.'

The Court merely stated that its earlier decision in *Colgate Palmolive* was correct and applied it accordingly. Further, it justified its departure from the *American Cyanamid* principles on the ground that 'now the courts in England go into the question whether the plaintiff is likely or unlikely to win in the suit i.e. into the comparative strength of the case of the rival parties — apart from the question of balance of convenience'. With respect, this statement is factually incorrect. While the courts in England have tried to create exceptions to the guidelines in *American Cyanamid*, the exceptions do not cover the entire gamut of cases that interlocutory injunctions address. In fact, *American Cyanamid* is still reverently followed in a large number of cases in England.[164]

While it could be argued that the ratio of the Supreme Court in *SM Dyechem* was only restricted to trademark cases, the same was extended to cases under Section 9 of the Arbitration and Conciliation Act 1996 in *Transmission Corpn. of AP Ltd v Lanco Kondapalli*[165]and

160 *Laxmikant Patel v Chetanbhai* (2002) 3 SCC 65, 75.
161 *SM Dyechem v Cadbury (India) Ltd* (2000) 5 SCC 573.
162 ibid 590.
163 The Hon'ble Court referred to C Floyd, 'Interlocutory Injunctions since Cyanamid' (1983) 5(9) European Intellectual Property Review EIPR 238; Cole, 'Interlocutory Injunctions in U.K. Patent Cases' (1979) European Intellectual Property Review EIPR 7; M Edenborough and Tritton, 'American Cyanamid Revisited' (1996) European Intellectual Property Review EIPR 234.
164 See Keay (n 79).
165 *Transmission Corpn.* (n 131) 553.

thereafter applied to ordinary injunction cases in *M Gurudas v Rasaranjan*.[166] As a result, when looking into a prima facie case, the current practice of the Indian courts is to examine the strength of the parties' cases on merits, based on untested affidavit evidence.

It could be argued that even legislation lends credence to this practice. Before 2002, under the Code of Civil Procedure 1908 ('the Code'), parties were required to submit their respective plaints and written statements within specified time limits and thereafter present a list of documents and depositions of witnesses at the trial stage.[167] Only the document on which the suit or defence was based would be filed along with the pleadings, and the remaining documents could be filed 'at or before the settlement of issues'.[168] Such practices were reminiscent of the law and procedure in England and seem to have worked quite well. However, in order to tackle the increasing judicial backlog, a reform in civil procedure was necessitated and the Code was amended in 2002.

A distinguishing feature of the amendment in 2002, relevant to our purpose, was that it now became obligatory for the parties to file all the documentary evidence available- even if minimally relevant- and relied on in the pleadings.[169] The Delhi High Court in *Asia Pacific Breweries v Superior Industries*[170] noted that the sole purpose of asking the plaintiff to file all documents in his power and possession and to file a list of those documents which are not in his power and possession was so that the defendant, while filing a written statement should not only respond to the averments in the plaint, but should suitably be able to respond to those documents which are relied upon by the plaintiff and should file its own documents, if any, in order to defend the claim of the plaintiff. Such procedure would invariably help in the reduction of satellite litigation by not allowing parties to file evidence at every stage of trial. It would further help in the framing of issues since all the documentary evidence will be placed on record. In *Asia Pacific Breweries*,[171] the Court further held that the sole purpose of the amendment was the early completion of trials and reduction of satellite litigation; and that such purpose would be defeated if the submission of a majority of documents is delayed by either party and sneaked in at the time of taking evidence – resulting in a de novo trial since in response to the document allowed to be filed by one party, the other party is to be given a chance to admit/deny the new allegations and file documents.

166 *M Gurudas* (n 134) 376.

167 For instance, Order VIII, Rule 1 of the Code stipulates that the written statement shall be filed by the defendant within 30 days of the date of service of the summons to him. Order XVI, Rule 1 of the Code provides that within 15 days of framing the issues, he parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

168 Arun Mohan, *Justice, Courts and Delays* (1st edn, Universal Law Publishing 2009) vol I 412.

169 The amended Order VIII, Rule 1A of the Code provides that it is the duty of defendant to produce all the documents upon which relief is claimed or relied upon by him along with the Written Statement.

170 158 (2009) DLT 670.

171 ibid.

The fact that such documents are to be presented before the first hearing – accompanied with the interlocutory injunction application – make all the evidence readily available to a judge when deciding an injunction application. As we are aware, Lord Diplock deprecated the enquiry into the relative strengths of the respective parties because he felt that at the interim stage, a court ought not to form an opinion based on inadequate material and evidence on record.[172] However, it could be argued that the 2002 amendment addresses his concern about mini-trials and makes available to the judge all the documentary evidence that each party wishes to rely upon. A judge may then, not only enquire whether there is a serious question to be tried, but is also given an opportunity to analyse the relative strengths of the parties and to form an opinion on the merits of the case. This is further facilitated by the fact that most evidence today is documentary in nature as a result of the changing times and requirements of the law. A combination of the law and practice then inevitably, facilitates a mini trial.

Furthermore, the Supreme Court in *Maria Sequeria Fernandes v Erasmo Jack*[173] has held that in the broad category of prima facie case, it is imperative for the Court to carefully analyse the pleadings and the documents on record and only on that basis must the court infer a prima facie case.[174] This decision adds to a series of decisions whereby the Court has diverted from the initial understanding of a 'prima facie' case to mean only a triable issue or a 'serious question to be tried' to a careful scrutiny of the documents and inferences on the relative strengths of the parties' cases.

VI. Conclusion

This article has attempted to show that first, there are varied formulations of what constitutes a prima facie case in the context of an application for grant of an interlocutory injunction and that each of these formulations is possibly linked to judicial delay. Second, the determination of what constitutes prima facie case is also related to case management. Given the grave problems of delay and huge caseloads in India – in the face of lack of reform by the Government – the Court has devised mechanisms to conclude trials in an effective and speedy manner, i.e. by engaging in mini-trials at the interlocutory stage. This conduct of engaging in mini-trials, however, is not to be considered a problem but one of the consequences of the problem. As mentioned earlier, one of the factors that allowed the Courts in the UK[175] and India to embark on such a course was that interlocutory injunctions are a discretionary and flexible remedy accorded to the Courts to do justice so as not to render the judgment ineffectual.[176] This gave the Court the flexibility to decide on the interplay of the principles for

172 *American Cyanamid* (n 9) 409. See also *Series 5* (n 133).
173 *Maria Sequeria Fernandez v Erasmo Jack* 2012 (3) SCALE 550.
174 ibid. See also *A Shanmugam* (n 139).
175 Hammond (n 61) 251.
176 *Allahabad Bank* (n 8). See also *Wander v Antox* (1990) Supp SCC 727; *Gujarat Bottling v Coca Cola* (1995) 5 SCC 545.

the grant of injunctions depending on the case at hand.

It is then pertinent to question whether the practice of mini-trials is 'just' in nature. The expression 'just' in this sense would involve the ideals of civil justice; that it is the function of the courts to resolve disputes by following due process and increase the probability of getting the correct result.[177] As highlighted by Adrian Zuckerman, this idea of justice involves dimensions of procedural and timely justice; that procedures be suited to achieve a just and correct outcome, and that such outcome be achieved in a timely manner noting that justice delayed may amount to justice denied. In the context of mini-trials and huge procedural delays, this creates a certain predicament in that mini-trials may not follow the apparatus of established procedures but rather seek to achieve timely justice in attempting to resolve disputes quickly. Adrian Zuckerman highlights this predicament to argue that in the current age, litigants would most likely be willing to sacrifice procedure leading to a correct judgment – determined after huge delays – in favour of a timely decision.[178] Until the problems of judicial backlog and delay are ameliorated, the current manner in which hearings on interlocutory injunctions are adjudicated in India is here to stay.

177 'Principles of Judicial Procedure' in John Bowring (ed), *The Works of Jeremy Bentham* (1st edn, William Tait 1938-43) vol 2 <http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-2> accessed 12 February 2017. See also Adrian Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 OJLS 353.

178 ibid.

THE LEGALITY AND VIABILITY OF TWO-TIER ARBITRATIONS

Nakul Dewan* & Vinayak Panikkar**

Parties to an arbitration agreement may provide for an appeal mechanism from an arbitration award to a second arbitral tribunal. The validity of such arbitration agreements was considered by the Supreme Court in Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd. While upholding the validity of such arbitration agreements, the Supreme Court considered the drafting history of the Model Law upon which the Arbitration and Conciliation Act, 1996 is based, and the internationally recognised principle of party autonomy. This article shall first consider the viability of the appeal mechanism under the Model Law and the Arbitration & Conciliation Act, 1996, in light of certain conflicting provisions. Subsequently, it shall consider the position under certain institutional arbitration rules which provide for an appeal mechanism.

I. Introduction

Neither the Model Law nor the New York Convention gives a right to the losing party in an arbitration to seek to set aside an award on the ground that the arbitral tribunal made an error of law or fact.[1] For this reason, on some occasions, parties opt for a contractual mechanism to challenge the award before an appellate/second arbitral tribunal.[2] This is either done by selecting specific institutional rules which provide for an appeal mechanism, or by expressly providing for the same in the arbitration agreement.

The legality of an arbitration agreement setting out a provision for an appeal mechanism

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1 An award is rarely challenged on substantive grounds on the basis that the arbitral tribunal made a mistake of law. See Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) [10.34-10.38], [10.64], [10.75].

2 Mateus Aimoré Carreteiro, 'Appellate Arbitral Rules in International Commercial Arbitration' (2016) 33 J Int'l Arb 185; Rowan Platt, 'The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?' (2013) 30 J Int'l Arb 531.

came up for consideration before the Supreme Court of India (Court) in *Centrotrade Minerals & Metals Inc. v Hindustan Copper Ltd.*[3] (Centrotrade 1). The arbitration agreement that was under consideration read as follows:

> 14. Arbitration - All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.
>
> If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in effect on the date hereof and the result of this second arbitration will be binding on both the parties. Judgment upon the award may be entered in any court in jurisdiction.

When the matter was first heard, there was a difference of opinion amongst the bench comprising of Justice S.B. Sinha and Justice Tarun Chatterjee, and the matter was referred to a larger bench. Recently, a three-judge bench comprising of Justice Madan B. Lokur, Justice R.K. Agrawal and Justice D.Y. Chandrachud, rendered its decision in *Centrotrade Minerals and Metal Inc. v Hindustan Copper Limited* (Centrotrade 2).[4] The Court held that an arbitration agreement which allowed parties to contractually provide for an appellate mechanism was valid under the provisions of the Arbitration and Conciliation Act, 1996 (the "Act").

II. Scope of Two-Tier Arbitrations under the Model Law

In reaching its finding, the Court placed significant reliance on the drafting history and *travaux préparatoires* of the Model Law. A perusal of the *travaux préparatoires* of the Model Law makes it clear that the Working Group agreed that:

> [T]here was wide support for the view that parties were free to agree that the award may be appealed before another arbitral tribunal (of second instance), and that the Model Law should not exclude such a practice although it was not used in all countries'.[5] It is further evident from the *travaux préparatoires* that Article 34 of the Model Law does 'not exclude recourse to a second

3 (2006) 11 SCC 245.

4 (2017) 2 SCC 228.

5 See UNCITRAL, 'First Working Group Report' A/CN.9/216 (23 March 1982), as cited in Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989) 929. However, the Working Group was also of the view that there was no need to include a provision in the Model Law to recognise such a practice.

> arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).[6]

However, notwithstanding the discussions set out in the *travaux préparatoires*, parts of Articles 34 to 36 of the Model Law appear to not be in sync with the concept of two-tier arbitrations. For instance, Article 34(3) sets out that an award may be challenged (before a court in setting-aside proceedings) only within 3 months from the date on which the award is received and Article 35(1) sets out that the award shall be binding on the parties.

Time Limit to Challenge

In a situation where the arbitration agreement provides for a two-tier arbitration, the losing party has no other option but to challenge the Award in an appeal before a second arbitral tribunal and not through the statutory mechanism by filing an application to set aside an Award, even if that is the remedy it wants to undertake.In fact, for all practical purposes, the time to challenge the first Award under Article 34(3) would expire if the appellate remedy is undertaken. The anomalous situation which this leads to is best understood by way of an example. Suppose party A loses the arbitration in the first instance and is required to pay damages of ₹100 crores. It files an appeal against the first Award and succeeds. However, party B now files its statutory application to set aside the second Award. That leaves party A in a quandary, because should party B succeed in the setting aside proceedings, it would simply allow the first Award to come back into operation, and party A would have no recourse to challenge the decision, simply because it would be time-barred. Party A would have to accept the first Award despite having successfully challenged it in appeal.

While in litigation this may not be anomalous, such cannot be said in the case of an arbitration.That is because the grounds on which an Award is challenged under a contractually appellate mechanism are different from those under the statutory setting-aside regime. Therefore, even if party A is right on merits, it can be put in the piquant situation where it may be relegated to an unmeritorious position on procedural grounds.

There were extensive discussions on the issue of whether a challenge could be made to the first Award during the drafting process of the Model Law.[7] A draft provision was proposed setting out that in a situation where an appeal mechanism was provided for, the setting-aside period would begin on the date of the receipt of the decision of the appellate arbitral tribunal.[8] However, the Working Group declined to adopt the proposal because it considered it to be

6 See UNCITRAL, 'Seventh Secretariat Note Analytical Commentary on Draft Text' A/CN.9/264 (25 March 1985), cited in Holtzmann and Neuhaus (n 5) 964.

7 ibid 918.

8 ibid.

'unnecessary'.[9] The only way to overcome this hurdle is by allowing the time limit to challenge an award under Article 34(3) to not start running until the appellate award is received by the losing party, because that Award may also require to be challenged.

Final and Binding Nature of the Award

Further, providing for an appeal against an Award goes against the final and binding nature of the Award under Article 35(1).

> The initial decision is not necessarily an award; only the final decisions, either confirming the first-instance decision or arriving at a different resolution, constitute awards. One French decision explained this in more generally-applicable terms: 'a principle exists whereby, in an arbitration involving two tiers of jurisdiction, an action to set aside can only be brought against the award made at second instance'.[10]

The anomaly in such a situation arises because while the first Award is not final and binding if challenged, it does become an executable award if neither party is dissatisfied.This was considered by the Supreme Court in *Centrotrade 2* in the following manner:

(1) The Petitioner had argued that the first part of the arbitration agreement which provided for arbitration in India resulted in an 'arbitration result', as opposed to being an 'award' as understood in the conventional sense.[11] The Court rejected this argument on the basis that in a situation where neither of the parties was dissatisfied with the 'arbitration result', there would be no method of enforcing this 'arbitration result' if it was not considered to be an award as understood in the conventional sense.[12]

(2) The Respondent had argued that a two-tier arbitration agreement would be contrary to the provisions under Sections 34 to 36 of the Act on the basis that these provisions accorded finality to the award, subject only to challenge before a court.[13] The Court rejected this argument on the ground that Section 34 did not use the word 'only' i.e. Section 34 did not contemplate that recourse may be had *only* to a court against an award.[14] Further, the Court held that merely because recourse to a court is available to a party for challenging an award under the Act, which would not preclude the parties

9 ibid.
10 Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) vol 3 2926. See also S I Strong, *International Commercial Arbitration: A Guide for US Judges* (Federal Judicial Center 2012) 79.
11 *Centrotrade 2* (n 4) [7].
12 ibid [7]-[12].
13 ibid [26].
14 ibid.

> from agreeing on having an appeal mechanism for challenging the award before a second arbitral tribunal.[15] This, the Court held, was the principle of party autonomy.[16]

In addition to the two points set out above, it is also evident from the drafting history of the Model Law that the award rendered by the first arbitral tribunal is not considered to be binding on the parties and does not have the 'authority of res judicata' if the losing party has the option of filing an appeal to the second arbitral tribunal.[17]

III. A Two-Tier Arbitration Clause is Valid Even if the Institutional Rules Make no Provision for it

There is an interesting difference in the scope of a two-tier arbitration clause under institutional rules and otherwise by the choice of parties. Under institutional rules, the institution sets out time limits for filing appeals and provides a complete mechanism for the appeal. On the other hand, if the appeal is by the choice of parties, then it is open for parties to, for example, choose that the first arbitration will be governed by the Rules of the SIAC and the challenge to be governed by the Rules of the ICC, even though neither of them provides for an appellate mechanism.

In relation to institutional appellate mechanisms, conventionally, the provision for an appeal to a second tribunal was common in commodities arbitrations.[18] This was specifically noted in the *travaux préparatoires* of the Model Law.[19] It was for this reason that the Working Group agreed that Article 34 of the Model Law 'should not be interpreted to exclude such procedures'.[20]

For instance, the Rules of the Grain and Feed Trade Association (GAFTA) set out that the losing party may appeal to a Board of Appeal within 30 days. In the event that the appeal is not filed within the stipulated time-limit, it can be concluded that the losing party would not have a recourse to the second arbitral tribunal. Thus, the first award would attain finality and be amenable to challenge or enforcement before a court. Institutional rules which provide

15 ibid.

16 ibid [24], [28]-[29], [38], [42].

17 See UNCITRAL, 'Secretariat Study on The New York Convention' A/CN.9/168 (20 April 1979), cited in Holtzmann and Neuhaus (n 5) 917; UNCITRAL, 'First Secretariat Note Possible Features of a Model Law' A/CN.9/207 (14 May 1981), cited in Holtzmann and Neuhaus, (n 5) 923; UNCITRAL, 'Fourth Secretariat Note Comments and Suggestions on The Fourth Draft' A/CN.9/WG.II/WP.50 (16 December 1983), cited in Holtzmann and Neuhaus (n 5) 942-943.

18 UNCITRAL, 'First Secretariat Note Possible Features of a Model Law' A/CN.9/207 (14 May 1981), cited in Holtzmann and Neuhaus (n 5) 923; UNCITRAL, 'Seventh Secretariat Note Analytical Commentary on Draft Text' A/CN.9/264 (25 March 1985), cited in Holtzmann and Neuhaus (n 5) 964.

19 ibid.

20 ibid 918.

for two-tier arbitrations also provide for time-limits in which the appeal must be filed. For instance, the 2013 Optional Appellate Rules of the American Arbitration Association, the 2007 International Institute for Conflict Prevention and Resolution Arbitration Appeal Procedure, the 2003 JAMS Optional Arbitration Appeal Procedure, the 2015 European Court of Arbitration Rules, and the 2011 amendment to the Rules of the Spanish Court of Arbitration provide for time-limits within which an appeal may be filed.[21]

However, the arbitration agreement being considered in *Centrotrade 2* fell within the second category. Although the parties specifically chose institutional rules to govern the two arbitrations (the first arbitration was under the Rules of Arbitration of the Indian Council of Arbitration, and the appellate arbitration was under the ICC Rules), neither of the institutional rules provided for an appellate mechanism. Therefore, naturally, the arbitration agreement was also silent on the time-limits. Accordingly, since there were no time-limits in which the appeal was to be filed, the losing party could oppose the enforcement application on the ground that it had the right to appeal to a second tribunal and that the right could be exercised from when the cause of action arose, i.e. from the date of the Award. However, the Court held that notwithstanding that, if the parties had chosen a two-tier mechanism, then that choice ought to be respected.

IV. Conclusion

The decision of the Supreme Court recognising and validating two-tier arbitrations is further affirmation that Indian arbitration jurisprudence is now in sync with international arbitration jurisprudence, under which precedence is given to the principle of party autonomy. Given that the decision in *BALCO*[22] was only rendered in 2012, the jurisprudential sea-change in only five years is a welcome development for the growth of arbitration in India.

21 For a discussion of these institutional rules, see Carreteiro (n 2); Platt (n 2).

22 *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* (2012) 9 SCC 552.

SOVEREIGNTY, DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW: SOME INSIGHTS FROM WTO DISPUTE SETTLEMENT

Sannoy Das*

In this paper, the author examines the relationship between developing nations and the WTO dispute settlement framework, focusing on the interpretative methods of, and epistemic protocols employed by WTO adjudicatory bodies. The imperialist history of international law in general, and of international economic law in particular, has meant that the sovereignty of developing nations has always been a negotiable commodity, subject to the interests of western capital. The author argues that this imperialist strain has cast its long shadow on the prevailing interpretative methods of the WTO dispute settlement bodies. By leaning in favour of a strict textualist approach, while failing to factor 'development' as a teleological aim of the international trade order, the WTO mechanism has prioritised vague notions of certainty over substantive justice in international trade. Aside from the inherent suitability of such a textualist approach to the furtherance of entrenched neo-liberal ideals, the adoption of formalistic reasoning by WTO dispute settlement bodies narrows the ability of States to claim broad regulatory justifications for their policy choices based on their development interests. Thus, despite the rhetoric of 'development' being at the forefront of the political discourse of international trade in the 21st century, 'development' as such is excluded from the process of WTO dispute settlement. In this way, it is argued that the international trade order retains, as any imperialist system of a governance, a sense of liberal politics while acting through deeply conservative law.

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I. Introduction

Compared to the period between 1947 and 1994, when international trade was subject only to the multilateral rules under the General Agreement on Tariffs and Trade (GATT) 1947, the trade regime since the formation of the World Trade Organization (WTO) in 1995, has become more 'legalised'. This is a transformation that has included the formulation of a greater number of detailed rules, and has been accompanied by a better mechanism for their enforcement.[1] One important feature of this legalised regime is the dispute settlement function of the WTO, which is far busier than any other international tribunal and which, though not free from critique among legal scholars,[2] has largely been judged as an 'effective' forum for dispute settlement. The relationship of developing countries to this 'legalised' regime, and to the dispute settlement function, is a vexing question. As a general matter, it is possible to argue that structural elements of WTO dispute settlement, including costs of litigation and time-periods involved, are stacked against the poorest member States. This paper however, examines the interpretive methods and epistemic protocols employed by adjudicatory bodies of the WTO (the Panels and the Appellate Body) with a view to exploring the relationship of the WTO dispute settlement process to the question of 'development,' and argues that the interpretive methods load the dice against the interest of developing nations.

The relationship between the idea of 'development' and international trade is as old as the concept of free trade itself. Ricardo's theory of comparative advantage, which is at the heart of the liberal international trade order, was premised on the increased income of all nations participating in free trade. But as the years of the long nineteenth and early twentieth centuries have shown, free trade ideology has been intrinsically connected to the colonisation of large parts of the globe and the imperial interests of western capital.[3] The legal architecture supporting this 'imperialism of free trade' has been the international law fashioned by the colonial encounter,[4] at the core of which lies the construction of 'sovereignty' of western

1 Joost Pauwelyn, 'Transformation of World Trade' (2005) 104 Michigan Law Review 1.

2 See C A Thomas, 'Of Facts and Phantoms: Economics, Epistemic Legitimacy, and WTO Dispute Settlement' (2011) 14(2) Journal of International Economic Law 295 (dealing with the repeated errors of Panels and the Appellate Body in accepting, and using econometric evidence). There is also the criticism that Panels and the Appellate Body have overreached the political masters of the WTO. For a review of this, see Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53(4) International & Comparative Law Quarterly 861 (arguing however, that the fear of judicial activism might be rhetoric); Daniel K Tarullo, 'The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions' (2002) 34 Law & Policy of International Business 109.

3 Vladimir Lenin, *Imperialism, The Highest Stage of Capitalism: A Popular Outline* (Zhizn i Znaniye 1916); John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) New Series 6(1) The Economic Series Review 1.

4 See generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004); Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) Harvard Law Review 1.

States and of sub-imperial entities. How then, does modern international trade law differ from the colonial period? A ready answer that is often offered is that while colonial international law was in the service of imperialism, modern international trade law is concerned with the development of all people. This paper contends that despite the efforts of developing countries to use 'development' as a tool to undermine the colonial foundations of international economic law, and the apparent centrality of this concept to the WTO, questions of development continue to remain absent as a factor of legal analysis. This legal exclusion is enabled by a 'textualist' interpretive attitude, which bears upon the historical relationship between the legal concept of sovereignty and the competing political goals of imperialism and development. The paper will thus demonstrate a historical continuity of the legal regime with its imperialist past that prevents the decolonisation of international law.

The paper is structured as follows. In Part II, I review the construction of sovereignty in international law, and with the example of international economic law, illustrate the erosion of the sovereign powers of some State actors as a means for securing the interests of exporters of capital at the expense of 'development' interests of peripheral nations. Further along these lines, in Part III, I trace the particular history of international trade law from the years of the GATT, 1947 with a view to examining its treatment of the sovereign State, its role in globalising neoliberal notions of the global economy, and the importance of 'development' as a response articulated by developing nations to this imperialist orientation. With this as the historical context within which questions of development have come to feature in the international trade discourse, in Part IV, I examine the role of the dispute settlement function of the WTO and how this contributes to thwarting claims to development.

II. Sovereignty and International Economic Law

The working of the WTO dispute settlement mechanism is the product of a curious tension between an international order that is formally based on positivist notions of sovereignty, and a simultaneous erosion of the unrestrained competence associated with its nineteenth century understanding. John Jackson has used the example of international economic law in general, and WTO law in particular, to explain this changing conception of the sovereign. His argument is that at present, a traditional notion of an unrestrained sovereign must be discarded and should instead be replaced with the idea of 'sovereignty-modern', a concept relevant to allocation of powers (horizontally, within the State), and vertically (between international institutions and the nation-State).[5] This changing conception of sovereignty plays an important role in determining the relationship of international law to the development of peripheral economies. In order to appreciate this, some important markers in the history of international law must be revisited.

5 John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2009) 57 – 78.

A. The Sovereign and its Displacement in International Law: 19th and 20th Century Developments

At all relevant points of time since the nineteenth century, international law has treated the question of sovereignty as its central theme. All international legal doctrine is based on the assertion of sovereignty of States on the one hand, and the simultaneous assertion that the competence associated with sovereignty has been ceded, in a binding fashion, to the 'law'-like character of international law. The tension between these two propositions has seen a shifting balance over time but neither end of the spectrum has been fully determined.[6] The centrality of the 'sovereign' to international law was the product of a nineteenth century turn towards legal positivism.[7] Given the critical requirement of an identifiable 'source' for any law, as positivist jurisprudence posits, international lawyers in the nineteenth century embraced the sovereign state as the source of international law, to which the state was bound solely by its own consent. While this failed to satisfy 'hard' positivists like Austin about the law-like character of international law, positivist international lawyers opined that the critical condition of legal validity had been met. The debate between positivists notwithstanding, international law in the nineteenth century had decisively broken with its 'naturalist' past (associated with the writings of Grotius, Pufendorf and Vattel).

The positivist turn in international law has endured through the twentieth century but some crucial shifts must be noted. The rise of 'international institutions' in the early part of the twentieth century lent credence to the notion that States were subject more strongly to international law, suggesting a shift in the balance away from the sovereignty pole. Yet, those very institutions reified the sovereign nature of States. That sovereign consent was clearly the basis of the international legal order was asserted by the earliest bodies of international dispute settlement.[8] The second half of the twentieth century shows that despite the development of more international law, the position of the sovereign was not clearly diluted. While the ninth edition of Oppenheim's treatise (originally written in the heyday of the positivism of the long nineteenth century) asserts that 'sovereignty' in international law now only refers to a method of identifying the subject of international law, rather than its competence on the international plane, the most cited developments in the period of the twentieth century belie this position.[9]

6 For a review of the contests that shape the liberal international order from the standpoint of a 'realist', see MS Helal, 'Am I My Brother's Keeper? The Reality, Tragedy and Future of Collective Security' (2015) 6(2) Harvard National Security Journal 383-473.

7 See Henry Wheaton, *Elements of International Law* (Little, Brown & Company 1885) 1-26; For a review, see James Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 3-12; Anghie 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (n 4).

8 *The SS Lotus (France v Turkey)* (1927) PCIJ Rep Series A No 10, 18.

9 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, OUP 2008) 14, 119-126.

The most prominent example that is offered in support of the proposition that sovereign competence has been limited by international law is the development of international human rights law. But in reality, the new rules in this sphere have done little to displace the classical sovereign. The key interpretive principles for much of modern day international law are in fact deferential to sovereignty, such as, the principles of '*de minimis* thresholds' (implying that States must only meet a minimum core of international obligations), 'due diligence' (implying that the nature of obligation cast on the State is mostly procedural), and 'deference to domestic regulation' (implying that States are entitled to subjectively interpret how international principles are best suited to their domestic contexts).[10]

Instead of describing human rights law as a decisive break on the question of sovereign competence, it is more useful to examine it as a continuity of colonial international law. Human rights law has after all, been the language for universalising a liberal notion of 'good governance', which has been rightly criticised by third world scholars as reproducing colonial class hierarchies,[11] quite apart from the fact that its ethnocentric formulations have marginal utility in protecting a diversity of victims.[12] More perniciously, it has been shown that the rhetoric of good governance is primarily linked to restructuring non-Western economies to free trade, and thus, has been in service of the material interests of western capital for access to non-Western markets.[13] However, given that the effect of human rights law and the IMF/World Bank rhetoric of 'good governance' on sovereignty is contestable,[14] analysing this any further is of marginal utility to the argument in this paper. It is here then, that we must turn our attention to modern international economic law, its departure from classical and 20th century

10 Crawford (n 7) 607-667.

11 Brad Roth, 'Marxian Insights for the Human Rights Project' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 220 – 251.

12 See for example, the formulations of torture in human rights law in Tobias Kelly, *This Side of Silence* (University of Pennsylvania Press 2012).

13 BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15(1) European Journal of International Law 1-37; Anghie *Imperialism, Sovereignty and the Making of International Law* (n 4) 245-263; William P Alford, 'Exporting the Pursuit of Happiness' (2000) 113 *Harvard Law Review* 1677-1715; David P Fidler, 'A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies and the Standard of Liberal, Globalized Civilization' (2000) 35 Texas Journal of International Law 387.

14 The legal peg for good governance, the 'rule of law', is incapable of being clearly defined and contests about the 'rule of law' have added complexity to institutions like the World Bank. This has rendered the effect of these institutions on the 'third world' as resistant to homogenous criticism – see Alvaro Santos, 'The World Bank's Use of "Rule of Law" Promise in Economic Development' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 253-300. It is also important to note that the nature of the colonial encounter, varying from extractive colonies (like Belgium in Congo) to settler colonies (like Australia, New Zealand), has shaped legal institutions in the colonies differently, which have had lasting impacts in the nature of development of the colonies – see D Acemoglu, S Johnson and J Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91(5) American Economic Review 1369.

international law, and Jackson's idea of an evolved notion of sovereignty.

B. International Economic Law and the Erosion of the Sovereignty

International economic law,[15] which is a body of law including international investment law, the law of the WTO, and regional trade agreements, goes the farthest in bringing certain assumptions about 'sovereignty' into question within international law. Importantly, its incursion into state sovereignty has resulted in disparate effects, replicating the imperialist history of international law.[16] A prominent example in this respect is the body of rules commonly designated as 'international investment law,' which originated within the context of expansion of western capital, and most notably for the protection of early American investments in Latin America.[17] Present day international law, despite the absence of a colonial context, has not undergone a radical transformation, indicating a lasting colonial legacy. In fact, it casts a discernibly neo-imperial gaze on countries importing capital. In the decade from 1990, there was an explosion in the number of bilateral investment treaties signed, and nearly all of them contain an Investor-State arbitration clause of the widest amplitude, designed *solely* to protect the 'investment' made by owners of capital from actions of the sovereign government of the State receiving the investment while creating no international liability for the ill-effects of the investment activity.[18] Under these treaties, in an exceptional break with general international law, individual investors are allowed to sue sovereign States before an international dispute resolution forum. Not surprisingly, several investors from capital exporting countries have used this mechanism to challenge social welfare actions by governments and the *threat* of arbitration has resulted in chilling the ability of States to take appropriate regulatory measures in exercise of their sovereignty.[19] Through a number of disputes commenced against States by investors since 1990, a substantial body of 'investment law' has come into existence which universalises neoliberal positions on treatment of capital and where an alternate explanation

15 I deliberately exclude from this ambit, the arrangements of the international monetary system. These arrangements have more often been the product of choices made by individual countries, rather than multilateral negotiations and is therefore supported by too thin a legal structure to examine here. For a review of the international monetary system's role in shaping the movement of capital, see Barry Eichengreen, *Globalizing Capital: A History of the International Monetary System* (2nd edn, Princeton University Press 2008).

16 BS Chimni, 'An Outline of a Marxist Course on Public International Law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008). See generally James T Gathii, 'Imperialism, Colonialism and International Law' (2007) 54(4) Buffalo Law Review 1013-1066.

17 Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding Capital* (CUP 2013).

18 See generally M Sornarajah, *The International Law on Foreign Investment* (CUP 2010).

19 Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606-628.

of a State's exercise of sovereign power is a non-starter.[20]

International investment law appears particularly stark in reminding how the initial shaping of international law by the colonial encounter casts its long shadow on international law today, in the service of an imperial domination of capital exporting countries, even if such countries may have changed a shade.[21] Does the nexus with imperialism appear as clearly in international trade law, comprising largely of the law of the WTO, as it does with the investment regime? It is submitted that the construction of 'sovereignty' through WTO dispute settlement offers an interesting framework for analysing this question; and in order to explain this construction, this paper will study the methods of interpreting WTO law that are employed by its Dispute Settlement Body. This choice is important because existing literature has addressed how the WTO in general, is a part of an 'unholy trinity' of international institutions, aimed at globalising a neoliberal consensus about the world economy.[22] There is also a considerable body of literature that demonstrates how particular elements of WTO law are aimed at opening up markets of economically backwards nations, and at restructuring their internal legal order to protect the interests of western capital.[23] However, the dispute settlement function of the WTO has escaped such critique; even though it may be applying a body of unfair legal rules, the DSB is lauded as being militant in its neutrality[24] and in fact, an opportunity for developing nations to assert their own interests in the face of an imbalance of world power.[25] More recent work has claimed that within the limits of the WTO system, developing countries can, and have strategically used WTO litigation to nudge the ambiguities in WTO law in favour of their interests.[26] Against this view, this paper will argue that the methods of WTO dispute settlement are structurally biased, and that this bias is linked to the imperialist history of international law. It will in fact, be useful to bear in mind that

20 M Sornarajah, 'Evolution or Revolution in International Investment Arbitration? The Descent into Normlessness' in Brown and Miles (n 19) 631-657.

21 For example, Ethyl Corporation's commencement of arbitration proceedings against Canada led to Canada's withdrawal of the ban on the gasoline additive, MMT (methylcyclopentadienyl manganese tricarbonyl). See North American Free Trade Agreement (NAFTA) Chapter 11; *Ethyl Corporation v Government of Canada* (1999) 38 ILM 708.

22 Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books 2009).

23 See Arun Ghosh, 'Socialism, Modern Capitalism and Democracy' (1993) 28(14) Economic & Political Weekly 551.

24 Some empirical work suggests that there is no 'bias' against developing countries so far as outcomes of WTO Dispute Settlement go. See Don Moon, 'Equality and Inequality in the WTO Dispute Settlement System: Analysis of the GATT/WTO Dispute Data' (2006) 32(3) International Interactions 201-208.

25 For a review of the possibilities presented by WTO Dispute Settlement, and the challenges to increased participation by developing countries, see Chad P Bown, *Self Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institution Press 2009).

26 Alvaro Santos, 'Carving out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico' (2012) 52(3) Virginia Journal of International Law 551-632.

while some developing countries have made copious use of WTO litigation, no African nation has ever commenced a dispute before the WTO.

III. Sovereignty, Development and the WTO

WTO dispute settlement, as a part of international law, is legitimate because sovereign States have consented to it. The body of WTO law is a highly legalised sphere and is naturally therefore, replete with ambiguity. But unlike general international law, States cannot claim 'margins of appreciation' in defining their compliance with ambiguous legal rules. Instead, the mechanism of WTO dispute settlement is largely effective in binding States to particular resolutions of these ambiguities through the process of litigation. At the same time however, the question of sovereignty is not rendered irrelevant; because the source of legitimacy is sovereign consent, States protest any 'overreach' on the part of the DSB.[27] This brings to bear a peculiar orientation on the question of sovereignty – every State desires that in a process of dispute settlement, *other* sovereign States are held accountable to the fullest extent of their WTO obligations but is *itself* held to nothing more than what it has consented to.[28] This tension over the question of sovereignty shapes the interpretive attitude of the Dispute Settlement Body – there is a general disavowal of a national deference principle and, more importantly, formalistic arguments, rooted to the 'text' of WTO laws,[29] are privileged in contrast with those that rely on teleological claims about the international trade order.[30] As this paper will show, this construction of sovereignty, which is achieved by excluding certain type of claims, has a profound effect on the question of development.

A. From GATT 1947 to the WTO: A Changing Concept of Sovereignty

27 See for example, the United States' blocking of the reappointment of South Korean judge Seung Wha Chang to the Appellate Body – Manfred Elsig, Mark Pollack & Gregory Shaffer, 'The U.S. is causing a major controversy in the World Trade Organization: Here's What's Happening' *The Washington Post* (Washington DC, 6 June 2016).

28 See Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) LT/UR/A-2/DS/U/1 art 3.2 <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 27 November 2016.

29 Sol P Picciotto, 'The WTO's Appellate Body: Legal Formalism as Legitimation of Global Governance' (2005) School of Public Policy Working Paper Series 14 ISSN 1479-9472 <https://www.ucl.ac.uk/spp/research/publications/downloads/spp-wp-14.pdf> accessed 10 November 2016; ACM de Mestral, 'Dispute Settlement Under WTO and RTAs: An Uneasy Relationship' (2013) 16(4) Journal of International Economic Law 777, 810.

30 Certain interpretive tools permit Panels and the Appellate Body to look beyond the absolute confines of the text, for example, principles of "good faith" in treaty interpretation and in the determination of obligations of parties. However, the Appellate Body has been circumspect in allowing expansive use of such tools – see Helge Zeitler, '"Good Faith" in the WTO Jurisprudence: Necessary Balancing Element or an Open Door to Judicial Activism' (2005) 8(3) Journal of International Economic Law 721.

The contests over the question of sovereignty in international trade law must be traced historically in order to draw some conclusions about the aforesaid orientation of WTO dispute settlement. The negotiations for regulating international trade through a multilateral framework of international law, subject to the administration of an international institution, began in 1945 in the context of an international economic order soon to be shaped by the two Bretton Woods institutions. However, the trade-arm of what may have been a trinity of international institutions was stillborn. The failure of the International Trade Organization, which was to be the institutional framework for the General Agreement on Tariffs and Trade, 1947, is an oft-repeated story - the United States, having driven negotiations so far as the Havana Charter for the ITO, did not ultimately ratify the Charter, given the unwillingness of the Congress to consider ceding ground of US trade policy to an institution that was to be administered through the United Nations.[31] This unwillingness too must be considered in the context of the early years of the post-war world, where the United States while holding all the purse strings, was caught in a sticky negotiation with its allies about the nature of, what Harry Dexter White called, the 'new deal for the new world order.' As the Bretton Woods negotiations show, while crafting an international economic order, there were serious disagreements linked strongly to the nationalistic interests of the United States and Britain.[32] Within this context, a strong multilateral institution for regulating international trade would have been an absurdity.

In the period between 1947 and 1994, international trade was subject to multilateral regulation only through the treaty mechanism of the GATT; and absent a permanent international institution, a rudimentary institutional structure formed around the GATT itself.[33] This was achieved through seven rounds of 'negotiation' by the parties to the GATT, which grew in number from 23 to 128 during this period, with each round leading to progressive lowering of tariffs in the international trade of (mostly industrial) commodities, and with some 'international law' being formed on vexed questions like subsidies, countervailing duties, dumping and the like. Featuring in the context of the GATT years, are two important markers of the second half of the twentieth century – decolonisation and the Cold War. On the one hand, reservations for imperial preferences were written into the text of the GATT,[34] trade concessions were extended to imperial territories and colonies of GATT members acceded to the GATT upon decolonisation. On the other, even while economies of GATT member States were not uniformly liberal and the relationship of the GATT to Cold War era politics

31 See generally Peter Van Den Bossche, *The Law and Policy of the World Trade Organization* (3rd edn, CUP 2013) 74-81.

32 See Benn Steil, *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White and the Making of a New World Order* (Princeton University Press 2013).

33 Bossche (n 31).

34 For a review of the GATT deliberations that secured the imperial preferences exception, see Richard Toye, 'The Attlee Government, the Imperial Preference System and the Creation of the GATT' (2003) 118(478) The English Historical Review 912-939; General Agreement on Tariff and Trade (15 April 1994) 33 ILM. 1153 art 1.2 (previously, GATT 1947).

remained fraught, the GATT certainly became a forum for the leading western States to assert the bedrock principle of capitalism - free trade.[35] In this context of international relations, it is possible to explain the GATT years as cautiously building an international legal framework for free trade among old capitalist powers and newly independent nation States, but with weak legal principles, deferential to State sovereignty.[36] The fall of the Berlin Wall in 1989 was after the launch of the final round of GATT negotiations in 1986 at Punta del Este, Uruguay. From 1990 onwards, during the course of the Uruguay Round, proposals were tabled for the formation of a multilateral trade organization. By 1994, the Clinton administration came around to supporting an institution of this nature, and the WTO was born.[37]

With the withering away of the Cold War context, and the triumphalist sentiments of liberalism, concerns for sovereignty naturally receded, and an institution to legalise international trade took shape. But the incursion into sovereignty that WTO law entailed had disparate effects on economies at different stages of development. Neoliberal globalisation cost the developing world in terms of market access, while the promised benefits of free trade remained elusive; this globalisation had its natural discontents.[38] The Seattle ministerial conference in 1999 symbolised the discontentment with the WTO both from the political right and the left[39] amidst growing scepticism among developing nations over the question of whether the international trading system set by the legal architecture of the WTO was geared to meet their needs.[40] In this context, the launch of the Doha Round in 2001 must be seen as an important turning point in the history of international trade law.

B. Challenges from Below: Entrenching Development and the Doha Round

35 Francine McKenzie, 'GATT and the Cold War: Accession Debates, Institutional Development, and the Western Alliance, 1947-1959' (2008) 10(3) Journal of Cold War Studies 78-109.

36 For a review of the importance of the GATT in shaping the post-war international trade order, its achievements and shortcomings, see Douglas A Irwin, 'The GATT in Historical Perspective' (1995) 85(2) American Economic Review 323.

37 See Bossche (n 31).

38 For a more detailed discussion on the disenchantment with institutions regulating the world economy, particularly, the IMF and the World Bank, see Joseph Stiglitz, *Globalization and its Discontents* (WW Norton 2002).

39 See Noah Smith, 'The Dark Side of Globalization: Why Seattle's 1999 Protesters were Right', *The Atlantic* (Washington D.C., 6 January 2014) <http://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/> accessed 10 November 2016.

40 '[…] In response I can only say that if the WTO Agreements do not contribute to the development of the less fortunate Members, these Agreements are irrelevant for them. We find that there are subtle attempts to link implementation to issues like policy environment, good governance etc. However, these attempts cannot succeed in masking the real issues.' Preparations for the 1999 Ministerial Conference: Communication from India to the General Council Special Session (25 February 1999) WT/GC/W/150.

At the close of the Seattle ministerial conference, it had become fairly clear that the developing world would find a rules-based international system of trade legitimate depending on the ability of these rules to "focus on all round development capable of eradicating poverty".[41] The launch of a new 'round' of negotiations at Doha was by no means without controversy. Following the debacle at Seattle, the WTO was in need of finding relevance. At the behest of its most powerful, developed members, it ushered a new, comprehensive round of trade negotiations, with its work program taking up issues of trade and environment, labour, competition, investment and a search for more rules on issues of intellectual property. The schism between this agenda and the wishes of the developing and least developed members could not have been more prominent. Despite the express opposition of several third world actors,[42] the draft Ministerial declaration prepared for adoption at Doha suggested that the round be dedicated for negotiations on all those issues, whose relevance to the developing world was either marginal or whose effect on the development of the poorer nations would have been adverse.[43] India, for example, noted that the draft declaration was 'neither fair nor just'.[44] This draft declaration was nonetheless adopted and its legacy is interesting – the draft declaration, despite its substantive provisions, made frequent references to the question of development, suggesting, almost ironically, that the WTO was to place the 'needs and interests [of developing countries] at the heart of the…Declaration'.[45]

The Doha Declaration has come to be known as the Doha Development Agenda but as the circumstances of its adoption show, it hardly signified a break with the long history of international trade law and its particularly fraught relationship with the question of development. This continuity notwithstanding, the rhetoric of development has become the most significant marker of international trade discourse in the twenty first century. In the years following the adoption at Doha, frequent assertions have been made over the commitment of the WTO to the question of development. A former Director General of the WTO asserted that 'development is the raison d'être of the Doha Round.'[46] In light of such statements, a pertinent question that arises for an institution supporting a multilateral *legal* framework for international trade, is how the idea of 'development' is embedded in WTO law?

41 Statement by Mr. Murasoli Maran, Minister of Commerce and Industry, India, Ministerial Conference Seattle (30 November 1999) WT/MIN(99)/ST/16.

42 For a review, see 'NGOs Condemn Manipulation of Draft Doha Declaration' (*Third World Network*, 3 November 2001) <http://www.twn.my/title/twr133h.htm> accessed 10 November 2016.

43 See Draft Ministerial Declaration, Ministerial Conference Fourth Session, Doha (9-14 November 2001) WT/MIN (01)/DEC/W/1.

44 Statement by Mr. Murasoli Maran, Minister of Commerce and Industry, India, Ministerial Conference Doha (9-14 November 2001) WT/MIN(01)/ST/10.

45 See Ministerial Declaration, Ministerial Conference, Fourth Session (14 November 2001) WT/MIN(01)/DEC/1.

46 WTO Committee on Trade and Development, 'Lamy Says the Round's Development Potential must be Preserved' (*World Trade Organization*, 28 November 2005) <https://www.wto.org/english/news_e/news05_e/stat_lamy_28nov05e.htm> accessed 10 November 2016.

A set of formal and largely procedural provisions is strewn across WTO law according 'special and differential treatment' to developing and least developed countries. Plenty of literature on these provisions demonstrates that the value of these provisions, as 'law', particularly in the context of WTO disputes, is marginal; their effectiveness in ushering in transformative change in the development of the poorer nations is greatly in doubt.[47] In such circumstances, we must turn our attention to the methods of WTO dispute settlement in order to further examine the relationship of development to WTO law. In doing so, it is equally important to note that the political function of the WTO, which is to create more trade law, has become largely dormant over the last few years. A recent neo-conservative turn in world politics is likely to perpetuate this stalemate. In such a context, the role of the dispute settlement function of the WTO assumes even further significance if we are to examine whether and how the half-promises of Doha can be answered.

IV. Legalised Development and the WTO Dispute Settlement Body

As shown above, the contests over development and sovereignty have been central to the evolution of WTO law, and the continuing relevance of the WTO after the launch of the Doha Round. The construction of 'sovereignty' in WTO disputes is therefore critical to assessing the role of the Dispute Settlement Body in either aiding or impeding the 'development' of less developed economies. The key question that falls for consideration is whether the interpretive methods adopted in WTO Dispute Settlement have the effect of constraining the policy-choices that a sovereign State, particularly a developing country can make? It is important to note that scholars of the critical legal studies tradition have asserted that 'formalism', or the method of interpretation that stresses on fidelity to the written words of a legal text, is particularly suited to the politics of neo-liberalism, when the text itself is the product of neoliberal thought.[48] But that alone does not address the question of whether this process is particularly ill-suited to meet the aspirations of its less developed participants.

A. Treatment of 'sovereignty' against 'development' in WTO Dispute Settlement: Two Criticisms

The erosion of the sovereign competence of States in taking regulatory decisions affecting international trade owing to the rules of WTO law has the effect of reducing policy space for economic development.[49] The adoption of formalistic reasoning by WTO dispute settlement

47 Amin Alavi, *Legalization of Development in the WTO: Between Law and Politics* (Wolters Kluwer 2009) 153-184.

48 See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006) 63-73.

49 However, for an early defence that the Appellate Body is meaningfully deferential to legitimate

panels (and the Appellate Body) narrows the ability of States to claim broad regulatory justifications for their policy choices based on their development interests. The concern with respect to the question of development is not simply whether this constraint is in itself problematic, but whether the application of formalistic standards is even-handed.[50] Do the constraints imposed by formalistic reasoning affect developing countries disparately? B S Chimni, for instance, has suggested that this has indeed been the experience of developing countries with WTO dispute settlement.[51] As a remedial measure, he suggests that developing countries must negotiate for the adoption of new principles for the resolution of WTO disputes, one of which would be to oblige dispute settlement panels to defer to sovereign choices, unless such policy choices are egregious violations of the WTO legal principles. In other words, on ambiguous propositions of law, dispute settlement panels must grant a margin of appreciation to the regulatory powers of a State.[52] Chimni, it appears, is suggesting that in order to ensure 'development', the competence of the 'sovereign' must be restored in WTO law. However, more interestingly, he does not wish for this principle of 'deference' to be incorporated universally, as a part of WTO law, but merely as one operating in favour of developing nations. To the extent that international economic law is based on, and has reproduced, a colonial hierarchy between exporters and importers of capital (and capital intensive industrial commodities), Chimni wishes to recover a more powerful sovereign position for the third world nation-States. The suggestion strikes at the heart of the imperialist history of international economic law, and is for that very reason, rendered politically infeasible. Also, the question that remains begging is, why haven't large developing countries like India, which is an active participant in WTO negotiations, taken up this plank? There may be two possible explanations – *first,* that developing countries in general perceive that this is an unrealistic negotiating position; and more sceptically, *second,* that large developing countries are not aligned towards an explicit 'third-world' strategy, which might run counter to their interest vis-à-vis further peripheral members.

Diametrically opposed to Chimni's argument is the claim that the development of all people through liberalised international trade is thwarted by the very assertion of State

national regulatory interests, see William J Davey, 'Has the WTO Dispute Settlement Exceeded Its Authority?' (2001) 4(1) Journal of International Economic Law 79. For a critique of this deference, as with the Appellate Body in *US-Shrimp* allowing an expansion of the term 'natural resources,' see BS Chimni, 'China, India and the WTO Dispute Settlement System: Towards an Interpretive Strategy' in M Sornarajah and J Wang (eds), *China, India and the International Economic Order* (CUP 2010) 217-226.

50 See Julia Ya Qin, 'Pushing the Limits of Global Governance: A Commentary on the China-Publications Case' (2011) 10 Chinese Journal of International Law 292; Paolo D Farah and Elena Cima, 'Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel' (2013) 16(3) Journal of International Economic Law 707, 728.

51 Chimni (n 49) 226-27.

52 Chimni (n 49) 242.

sovereignty in WTO law. This liberal internationalist view argues that if international trade law is to contribute to development as promised, its effect must be deeper, and that States ought not to be able to resist its application based on claims of sovereignty. To this end, it has been suggested that international trade law must act as a vehicle for enforcing 'human rights' obligations, including a 'human right' to development, against poverty, upon sovereign States. In this sense, international trade law would be a part of a global constitutional government.[53] But this 'constitutional governance' framework ought to hold little appeal for post-colonial States. It appears to reproduce the visibly colonial rhetoric of 'good governance' imposed externally, and is philosophically grounded in a Eurocentric liberalism.[54]

B. Formalist Interpretation Techniques and the Exclusion of 'Development'

The two criticisms described above can be united and met by positing that the legitimacy of WTO decision-making should depend on whether a decision appropriately balances trade interests with development interests. Balancing and proportionality tests are abound in WTO jurisprudence, but Panels and the Appellate Body have eschewed 'development' as a factor in any of its legal formulations. There is a clear reason for this – outside limited 'special and differential treatment' provisions (many of which are limited by hortatory language), the texts of covered WTO agreements do not refer to development as a factor in the analysis of disputes. To explicitly factor development concerns would be 'moving beyond' the texts of WTO agreements, to teleological considerations about the relevance of development as an 'object' of the WTO legal system. Were dispute settlement bodies to move in this direction, WTO decision-making would gain legitimacy among both, developing States, and civil society participants whose interests may not fuse with those of the State. Most significantly, this would signal an epistemic rupture with the colonial history of international law in general, and the visibly imperialist strain in international economic law in particular.

Undoubtedly, with an expanded discretion to consider development interests, not of States alone, but of populations within them, WTO decision making would become unpredictable, or to some extent, unstable. But importantly, this would disrupt the carefully constructed balance over the question of sovereignty and sovereign competence, which has been central to the imperialist history of international trade law. There may be concern that when adjudicatory bodies exercise greater discretion, rather than maintaining fidelity to rules, it gives rise to

53 See Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Hart Publishing 2012) 7.

54 See for example, Ernst-Ulrich Petersmann, 'Multilevel Governance Problems of the World Trading System beyond the WTO Conference at Bali, 2013' (2014) 17(2) Journal of International Economic Law 233-270 (containing blithe assertions that postcolonial stress on socialism has contributed to poverty in countries like India, and suggesting that the future of the international trade order must draw on Kantian and Rawlsian principles).

'judicial law-making/ activism' and negates more 'democratic' political processes.[55] However, it must be noted that the preference for a political process, and the demand that judicial bodies respect textually defined political outcomes is neither universal nor free from critique. Whether political processes are better indicators of democratic will is questionable. Textualist interpretation calls for deductive methods of reasoning, which are themselves susceptible to abuse.[56] At any rate, basic insights from critical theory make it clear that no objective 'will' can be discerned from written texts – the acts of translation involved in writing legal texts, and their 'textualist' interpretation, cannot transliterate the democratic will. In other words, it is difficult to say that the 'agreement' arrived at in a political process can easily be discerned through textualist interpretation.

The preference for an adjudicatory process that pegs decision-making to the text of covered agreements is therefore, a preference for predictability over substantive development interests. This choice should be subject to political contestation because it marks a continuity with an imperialist past. While it is true that factoring teleological arguments in contentious cases imposes a cost in the form of some loss of predictability in decision-making, there is nothing to suggest that this cost, in the WTO context, will be inherently disproportionate, or objectively greater than development gains. Yet, the realisation of this method of interpretation as a means of decolonising international law is replete with difficulty, contributed in no small measure by the failures of large developing countries, such as India, to address the question of interpretation in WTO Dispute Settlement. India has been a party to nineteen WTO disputes and has participated in several others as a 'third party' to the litigation. However, in its approach to WTO dispute settlement, there has been no discernible attempt to seek a revision of the textualist method of interpretation. The fact that India has emerged 'successful' in respect of several of its claims in the course of these disputes has only further forced the question of interpretative methods to the background.[57] It is worth noting here that the resistance to an expanded role of the Dispute Settlement Body is significant. The DSU requires that the dispute settlement function will not add to or modify the disciplines imposed by the Agreements. This is the peg on which most criticism of the 'activism' of the Appellate Body rests. Indeed, it has been suggested that a stress on teleological considerations would

55 See WTO, Negotiations on Improvement and Clarifications of Dispute Settlement Understanding: Further Contribution of the United States on Improving Flexibility and Member Control in WTO Dispute Settlement: Communication from the United States (October 2005) TN/DS/W/82; WTO Dispute Settlement Body, Minutes of Meeting (22 July 2003) WT/DSB/M/150.

56 Francois Geny, 'The Negative Critique of the Traditional Method' in *Méthodé d'interprétation et sources en droit privé positif* (Duncan Kennedy and Amanda Knudsen (trs), 2nd edn, LGDJ 1919) [translation is on file with the author].

57 For discontentment with India's strategy at the WTO in the early years of the institution, and its fate in WTO disputes, see Sumitra Chishti, 'India and the WTO' (2001) 36(14/15) Economic & Political Weekly 1246.

destroy the faith of members in the dispute settlement system.[58] Understood in the context of the WTO, where the dispute settlement function is the only active function left, this sounds ominous. And yet on the other hand, the more conservative the dispute settlement function becomes, the promise of development is eroded that much further.

If a State party to a WTO dispute were to argue that a trade measure is justified in the interest of its development, the argument would be deemed nonsensical. It is a non-starter because there exists no balancing doctrine in international trade law that permits consideration of 'development' as a factor. How can this situation be viewed theoretically? A popular insight from social epistemology that is useful here, is Foucault's concept of an *episteme* – roughly, the structure that unites all discursive practices at a time in a manner that makes formalised systems of knowledge possible (or to put it simply, accord 'sense' to statements).[59] Viewed along these lines, there exists an international trade law *episteme* constructed by the discursive practices of the community of WTO Member States that renders it impossible to argue against the grain of textualist interpretive technique. What permits the construction of this *episteme* is the absence of alternative discursive practices, or that an alternative discursive practice is made invisible by the structures of power. The historical trajectory of international law in general, and of international economic law and international trade law in particular as sketched earlier in this paper, may suitably explain this absence.

C. The Discursive Frame of WTO Dispute Settlement

The absence of an alternative discourse about how the WTO dispute settlement body ought to interpret WTO law, and how this may be linked to the question of development, is often examined by reference to the decision in US-Shrimp. For the purpose of this article, I propose however to examine the case titled *India-Solar Cells*[60] which was decided by the Appellate Body in September 2016. Of interest here though, are the original proceedings, which illuminate some of the questions that this paper has sought to tackle. In the course of this dispute, the adjudicating panel was faced with the task of interpreting the meaning of Article XX(j) of the GATT for the first time. The United States had initiated proceedings against India on the basis that 'domestic content' requirements that were imposed on solar power developers selling electricity to the Government of India violated WTO law. The

58 See for example, Michel Cartland and others, 'Is Something Wrong with WTO Dispute Settlement' (2012) 46 Journal of World Trade 979.

59 See Michel Foucault, *Order of Things* (Alan Sheridan tr, Routledge 1989); the term 'episteme' in later works gives way to 'apparatuses' and 'disciplines', concepts that clarify the role of 'power' in shaping discursive formations – See Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings* (Colin Gordon ed, Pantheon Books 1980) 196-97.

60 Panel Report, India – Certain Measures Relating to Solar Cells and Solar Modules (24 February 2016) WT/DS456/R [88]-[98].

Indian regulations that were subject to challenge required that solar power developers in India use domestically manufactured solar modules (to different extents) in their power projects. Given that this measure has the effect of limiting the access of importers of solar modules to the Indian market, thus treating them unlike domestic manufacturers, it entailed a violation of WTO law. However, India argued that the measure was necessary to boost the domestic industry in respect of a product that was in local short supply, i.e. solar modules, and for such reason, the measure fell within the ambit of the exception contained in Article XX(j) of the GATT allowing the adoption of measures essential to the acquisition or distribution of products in short supply.

In dealing with this defence, the important question that the Panel sought to determine was the import of the term 'general or local short supply' and the circumstances under which a product would be found to be in such 'short supply'. Given its textualist orientation, the Panel determined with a great deal of verbosity that 'short supply' referred to a situation when the supply was unable to meet a local demand. On the question of whether solar cells and modules were indeed in short supply, India argued that the condition must be deemed as met when domestic manufacturing capacity could not ensure local supply. Reading the provision as a whole, India argued that the term 'supply' ought not to be judged based on available imports but on domestic production only. It further argued that in a globalised world, the provision would have little meaning if imports were to be considered as a factor of 'domestic supply'. In this sense, India requested the Panel to interpret the provision in an 'evolutionary manner' in light of present circumstances rather than with an eye to the conditions prevalent at the time when the GATT was drafted.[61] Consistent with the earlier practice of adjudicatory bodies, India's argument was based on interpreting the 'language' of the provision; the key assertion being that the term 'domestic supply' was linguistically equivalent, or ought to be treated as equivalent, to 'domestic production'. But taken to its logical end, India's argument would also mean that Art XX(j) can be invoked to protect almost any policy of import substitution industrialisation. Undoubtedly, this would be found to be incompatible with the *telos* of a liberal world trade order. Curiously, this incompatibility was not noted by the Panel – instead, it ruled on the basis of semantic difference between 'supply' and 'production'. The fallout of this is that imports must be factored when determining the 'short supply' calculus. Structurally, this calculus is biased against developing countries.

61 'Evolutionary Interpretation' refers to a method of interpreting language of treaty provisions based on the changes in context between the time of writing of a treaty provision, and the date when the interpretation is called for. The applicable law for interpreting treaties is contained in Article 31 of the Vienna Convention on the Law of Treaties, which requires that the meaning of a provision be determined with reference to 'the ordinary meaning... given to the terms of the treaty in their context and in *light of its object and purpose* (emphasis supplied). This provision is applicable to interpreting WTO treaties. Article 31 of the Vienna Convention clearly permits both textualist and teleological modes of interpretation. In *Namibia Advisory Opinion* [1970] ICJ Rep 1971 16, the International Court of Justice ruled that it also permitted the interpretation of treaties in an 'evolutionary manner.'

The Panel's ruling on Art XX(j) would serve to sustain a trade regime where the poorest members continue to remain importers of capital and/or capital-intensive goods, reifying the world system's division between the core and the periphery. Would this then be consistent with the political rhetoric about the trade order? It is submitted that the better approach would have been for the Panel to have examined if India's defence under Art. XX(j) struck a suitable balance between the competing goals of 'development' and 'liberalised trade'. The outcome of this balance would necessarily differ based on the country invoking the defence. Indeed, it is not the suggestion here that India ought to have succeeded in this argument, but that the method of deciding the issue ought to have been different. However, neither the contestant nor the Panel found it fit to address the underlying question of the balance between trade-liberalisation and development. In this way, an opportunity to bring the question of development to the forefront of WTO dispute settlement was lost. As described above, contests between the questions of development and liberalised trade are the bases for the continued legitimacy of WTO law in the 21st century. But if this contest recedes to the background in the dispute settlement function, then attempts to re-characterise the normative foundations of international economic law (away from that of economic imperialism) will be foiled.

V. Conclusion

The discursive framework within which WTO dispute settlement operates is such that the obvious political questions that are central to decision-making are masked in a series of textualist interpretive manoeuvres. Epistemic protocols employed by adjudicating bodies in the WTO render a frank contest on the question of development difficult, if not impossible. This paper has attempted to demonstrate that this particular orientation of dispute settlement, which excludes the question of 'development' of the less developed economies, is linked to the imperialist history of international law. This exclusion is made possible by maintaining a particular balance on the relationship of sovereignty of States to WTO law. The dispute settlement function ensures that sovereign consent remains central to international trade law, while reducing sovereign competence in a way that developing countries cannot freely chart their course to development. International law in general, and international economic law in particular, has been constructed by, and in service of the colonial encounter and its doctrine has been particularly useful in protecting the interests of capital, capital exporting countries, and commodities manufactured in capital-rich economies. The legal architecture of the international economy has been crucial to sustaining a neoliberal globalisation. Recognizing this, third world actors have sought to contest the foundations of international economic law, and undermine its imperial character by asserting that international economic law must be reshaped to factor concerns about development. However, in tune with its imperialist history, the doctrinal formulation of sovereignty in international trade law has maintained a disjunction between conservative law and progressive politics. Thus, while the

World Trade Organization has, since the turn of the century asserted in political rhetoric that the central focus of international trade law is to ensure the development of all people, its dispute settlement function has retained a conservative flavour. Thus, despite the question of development having become central to the politics of international trade, international trade *law* has been able to relegate it to the background.

NOT SO CIVIL – THE MONEY LAUNDERING ACT AND ARTICLE 20

Abhinav Sekhri*

In 2016, a Single Judge of the Delhi High Court went against the grain to hold that the provisions of the Prevention of Money Laundering Act 2002, could only apply prospectively.[1] The decision placed the problematic setup of the money laundering statute in sharp relief and serves to reignite debate surrounding the applicability of the guarantees of constitutional criminal procedure in this context. This paper focuses on two such guarantees under Article 20 of the Indian Constitution – a protection against retrospective imposition of penal liability, and the right against self-incrimination. It is argued that a keener appreciation of the Prevention of Money Laundering Act 2002 provides an arguable case for extending these rights to persons arraigned under the statute.

I. Introduction

31 January 2017 will be marked as the day when the Prevention of Money Laundering Act 2002 (PMLA) saw its first conviction – an ex-minister of the Jharkhand government was found guilty of money laundering under Section 3 and punished to seven years rigorous imprisonment with an additional fine of Rs. 50,000.[2] This conviction was secured nearly twelve years after the PMLA first came into force,[3] within which time it had seen bouts of

* Advocate, Delhi High Court. I would like to thank Mr. Shri Singh, Advocate, for his inputs, and Mr. Rohan Dhariwal for his invaluable research assistance. Some of these ideas were refined through a moot court competition conducted for the students of National Law University, Delhi, and I remain grateful to all those who participated.

1 *Mahanivesh Oils & Foods Pvt Ltd v Directorate of Enforcement* (2016) 228 DLT 142 (Bakhru J). The decision was immediately appealed – LPA No 144 of 2016, and is being heard currently. On 30 November 2016, the Division Bench passed an interim order holding that none of the observations by the Single Judge were to be considered binding till the appeal was decided.

2 Press Trust of India, 'First Money Laundering Conviction: Jharkhand ex-minister jailed for 7 years' *LiveMint* (31 January 2017) <http://www.livemint.com/Politics/7zCE0XMOy0CPDF7rAQZ52H/First-money-laundering-conviction-Jharkhand-exminister-jai.html> accessed 28 May 2017.

3 The statute came into force *vide* GSR 436(E), dated 1 July 2005, published in the Gazette of India, Extra, Pt II, Sec 3(i), dated 01.07.2005.

extensive amendments.[4] Although enticing, the thought that Directorate of Enforcement officers were twiddling their thumbs all this while is far from true. Properties worth more than nine thousand crore rupees were attached in 2016 under the PMLA.[5]

While the criminal apparatus seems to have struggled to get off the ground, the civil law machinery of attaching property has been implemented in full swing. Since prosecutions are highly belated, few challenges have been made to the problematic definitions of offences in the statute.[6] However, several litigants have argued that the provisions for inquiry and confiscation of properties violate basic guarantees under Article 20 of the Indian Constitution. A mixture of canonical Article 20 jurisprudence and the peculiar structure of the PMLA have been decisive for High Courts to reject these challenges. In this paper, I argue that such reasoning is flawed.

I argue that the attack on property results in inflicting higher penalties for predicate crimes upon which the money laundering edifice has been erected. The narrow interpretation of 'penalty' under classical Article 20(1) jurisprudence cannot be extended to justify the PMLA confiscation regime. Further, I argue that the blanket exclusion of Article 20(3) protections against self-incrimination, from inquiries conducted under the PMLA, is certainly unconstitutional. The conclusion I offer, then, is that spheres of exclusion must be created upon a nuanced reading of the statute to ensure a balance between the rights of individuals and the interests of the State.

II. The PMLA Regime

India's enactment of an anti-money laundering statute is part of a global movement

4 The Prevention of Money Laundering Act 2002 (PMLA 2002) has been amended through the (i) Prevention of Money Laundering (Amendment) Act 2005; (ii) Prevention of Money Laundering (Amendment) Act 2012; (iii) Prevention of Money Laundering (Amendment) Act 2013. Tweaks to the statute have also been made by other legislation, namely: (i) Finance Act 2016; (ii) Benami Transactions (Prohibition) Amendment Act 2016.

5 Lok Sabha Debates, Unstarred Question No 344 (3 February 2017). The Minister of State in the Ministry of Finance, stated that the Enforcement Directorate had provisionally attached properties in various cases, with the numbers being as follows:

Items	**2014**	**2015**	**2016**
Number of Cases	127	106	104
Value of assets attached (Rs in Crores)	2797.83	3639.69	9298.02

See also Lok Sabha Debates, Unstarred Question No 2142 (28 July 2017). The Minister of State revealed that the ED had issued 175 Provisional Attachment Orders attaching property worth Rs. 11032 crores in the last one year itself.

6 A division bench of the then Andhra Pradesh High Court upheld the offence definitions in *B Ramalinga Raju v Union of India* (2011) 164 CompCas 149 (AP).

towards preventing individuals to profit from their crimes.[7] Initially, this movement targeted proceeds of drug crimes, creating a process to confiscate profits from crime after conviction.[8] Subsequently, it evolved into criminalising the process by which persons were understood to have projected assets acquired from crime as having a legal basis, giving us the money laundering offence.[9] Traditionally then, 'money laundering' is supposed to involve three key aspects[10] –

(i) Generation of proceeds from criminal activity and their *placement* into the financial system of a country, i.e. through investments in a bank;

(ii) The *layering* of these criminal proceeds within a set of complex financial transactions, with a view to obscure the criminal genesis of those proceeds, and;

(iii) The *integration* of criminal proceeds into the economy, successfully projecting them as untainted.

Indian provisions defining the money laundering offence are closely modelled on this idea.[11] There must first be some 'Proceeds of Crime'[12] alleged to have been generated in

7 See Peter Alldridge, *Money Laundering Law* (Hart Publishing 2003); Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (CUP 2003); Michael Levi and Peter Reuter, 'Money Laundering' (2003) 34(1) Crime and Justice 289. For a polemical account of this global development, see R T Naylor, 'Wash-out: A Critique of the follow-the-money methods in crime control policy' (1999) 32 Crime, Law and Social Change 1. Professor Alldridge has recently come out with a critique of the UK money laundering regime as well, see Peter Alldridge, *What Went Wrong with Money Laundering Law?* (Palgrave Macmillan 2016).

8 See, The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (The Vienna Convention), 1582 UNTS 95. This instrument is considered as the first international treaty recognising money laundering as a global problem.
The move towards confiscating proceeds of crime is perhaps best recalled by considering the House of Lords decision in *R v Cuthbertson* (1981) AC 470. With considerable regret, the House of Lords held that prevailing legislation (Misuse of Drugs Act 1971) *did not* allow for confiscation of the profits of crime. This resulted in the Hodgson Committee Report titled *Profits of Crime and Their Recovery* (1984), which suggested introduction of a legal basis to confiscate profits from crime, which were incorporated almost immediately.

9 See Alldridge, *Money Laundering Law* (n 7) 1-27, 89-106; Stessens (n 7) 6-14.

10 Stessens (n 7) 84; Levi (n 7) 311. The Financial Action Task Force, the body created by the erstwhile Group of Seven (G-7) Countries for tackling money laundering and cross-border economic crime, also approves of this formulation. See, Financial Action Task Force, 'Money Laundering' <http://www.fatf-gafi.org/faq/moneylaundering/> last accessed 28 April 2017.

11 See Statement of Objects and Reasons, PMLA 2002. It must be observed that following global cues assumes importance for India in its efforts to gain international recognition. The Anti-Money Laundering regime has been driven by the G-7 countries, and non-cooperation not only brings disrepute but also black-marks which hamper efforts to secure international investment from more developed nations. See, Financial Action Task Force, 'Topic: High-risk and non-cooperative jurisdictions' <http://www.fatf-gafi.org/publications/high-riskandnon-cooperativejurisdictions/?hf=10&b=0&s=desc(fatf_releasedate)> accessed 28 April 2017.

12 PMLA 2002, s 2(u).

relation to a 'Scheduled Offence'[13], in existence for the PMLA to operate. The offence, as defined under Section 3, then makes it punishable for anyone who:

(i) directly or indirectly *attempts to indulge* or *knowingly assists* or *knowingly is a party* or is *actually involved* in any process or activity connected;

(ii) with *proceeds of crime including* its concealment, possession, acquisition or use, projects or claims it as untainted property.[14]

Allegations that Proceeds of Crime exist are necessary to trigger the PMLA attachment and confiscation procedures.[15] An authorised officer must have 'reasons to believe'[16] that property held by someone is Proceeds of Crime, which will be 'concealed, transferred, or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime'.[17] These attachment orders do not require any notice to be issued to the affected persons, and are time-bound.[18] Affected persons are afforded an opportunity to be heard before the Adjudicating Authority,[19] before which a formal complaint must be filed by an officer within thirty days of this provisional attachment to prevent a lapse.[20]

Hearings before the Adjudicating Authority are not restricted to provisional attachment but

13 ibid, s 2(y).

14 The FATF conducted a Mutual Evaluation Report for India in 2010, recommending certain changes to the offence requirements, which were incorporated through the 2012 amendments. This was approvingly noted in the Follow-Up Report of the FATF published in 2013. See Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism – India* (25 June 2010); Financial Action Task Force, *8th Follow-Up Report – Mutual Evaluation of India* (23 June 2013).
Interestingly, the 2010 Mutual Evaluation Report noted how Indian law had lower thresholds for *mens rea* requirements than those prescribed under the United Nations Convention against Organised Transnational Crime (Palermo Convention) [(2004) ATS 12]. Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism – India* (25 June 2010) 37.
The FATF Follow-Up Report was concerned about the presence of 'and' linking the acquisition of proceeds and their projection seemingly limited the scope of the offence. But, it noted how these fears were allayed by existing judicial decisions. Financial Action Task Force, *8th Follow-Up Report – Mutual Evaluation of India* (23 June 2013) 9-10.

15 PMLA 2002, ch 3.

16 ibid s 5(1). A Division bench of the Indian Supreme Court in *Aslam Mohammad Merchant v Competent Authority* (2008) 14 SCC 186 elaborated upon the necessity of furnishing adequate reasons to believe, in context of forfeiture and confiscation provisions under the Narcotics Drugs and Psychotropic Substances Act 1985. This has provided a staple ground for challenging administrative action across contexts where forfeiture powers exist, causing such problems, that in the Finance Bill 2017, the Government has sought to o remove a requirement to disclose reasons altogether in context of the Income Tax Act 1961. See, Finance Bill 2017, cl 50-51.

17 PMLA (2002), s 5(1)(b).

18 ibid, ss 5(1) and 5(3).

19 ibid, ss 6, 7, 8.

20 ibid, s 5(5).

extend to seizures of property believed to have been 'involved' in money laundering,[21] as well as requests for retention of records and property seized during searches.[22] The Authority, in all these hearings, is separately required to assess whether there is any basis in the allegations, after having received a complaint following attachment.[23] If the Authority thinks that the 'person has committed an offence under Section 3 or is in possession of proceeds of crime'[24] then that person shall be called upon to indicate the sources of income, etc., explaining how the property attached/seized, was acquired.[25]

The proceedings afford a chance for everyone having an interest in the property to be heard.[26] Once hearings are concluded, the Authority must pass an order, recording whether all or any of the properties are 'involved in money laundering'[27] and if so, the Authority confirms the attachment or retains the seized property.[28] Crucially, this remains in force 'during the pendency of the proceedings relating to any offence under this Act',[29] and is set aside if the Special Court finds that no offence of money laundering took place or that the property was not involved in money laundering.[30] A separate appellate structure is nonetheless provided for aggrieved persons to challenge this interim order of attachment.[31]

The materials on which the officers and Adjudicating Authority ground their 'reasons to believe' are often acquired from persons to whom the property is linked. These powers of inquiry are conferred under Section 50 of the PMLA, which authorises officers to summon any person to give statements or produce records.[32] Those summoned are bound to state the truth, and non-compliance can result in a separate prosecution.[33] The statements and materials obtained during these inquiries are admissible as evidence in other proceedings.[34] Along with this, officers are granted powers of arrest,[35] search and seizure;[36] all of which can also be exercised to collect materials for supporting an attachment order.

21 ibid, s 18.
22 ibid, s 17.
23 ibid, s 8.
24 ibid, s 8(1).
25 ibid, s 8.
26 ibid.
27 ibid, s 8(2).
28 ibid, s 8.
29 ibid.
30 ibid.
31 ibid, s 26.
32 ibid, s 50.
33 ibid.
34 ibid.
35 ibid, s 19.
36 ibid, s 17.

III. Contextualising the PMLA Framework

To appreciate the peculiarity of the PMLA regime, it becomes necessary to place it within the broader context of Indian statutes providing for attachment/confiscation of properties related to crime. Compare this with the mechanisms found in the Indian Customs Act 1962 (Customs Act)[37] and the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS).[38] Under the Customs Act, goods suspected of being smuggled can be frozen pending adjudication before the Commissioner of Customs and Central Excise.[39] Importantly, though, if the Commissioner concludes that the property was indeed smuggled, the confiscation order immediately vests the property with the Central Government.[40] A prosecution for this act of smuggling has no bearing upon the vesting of property.[41] According to the Supreme Court, the prosecution of offences is only incidental to achieving the aims of this statute.[42] While the Customs Act regime focuses on the goods themselves, the NDPS forfeiture regime is only triggered *after* a conviction or execution of warrant for arrest,[43] and thus focuses on the person. The prosecution is central; if an arrested person is subsequently tried and acquitted, or a convict secures an acquittal in appeal, the properties are also returned.[44]

A direct ancestor to the PMLA regime is the machinery established by the Criminal Law (Amendment) Ordinance 1944, which continues to be in force today.[45] Part of measures undertaken to forestall burgeoning corruption during the Second World War,[46] it targeted property that a person was alleged to have procured from committing certain offences listed in the Schedule to the Ordinance.[47] An officer of the concerned government could file an

37 Indian Customs Act 1962 (Customs Act 1962), ch 14. This replaced the erstwhile Sea Customs Act 1878, which also contained provisions for attachment and confiscation of properties.

38 Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS Act 1985), ch V-A.

39 Customs Act 1962, s 122.

40 ibid, s 126.

41 Punishable under Section 135.

42 *State of Punjab v Barkat Ram* (1962) 3 SCR 668. The observations were upheld in *Romesh Chandra Mehta v Collector of Customs* (1969) 2 SCR 461.

43 NDPS Act 1985, s 68A.

44 ibid, s 68Z.

45 This is a perplexing instrument. The Ordinance was brought in force at a time when the six-month limit on the lifetime of an Ordinance was relaxed. Once the Indian Constitution came into force in 1950, it kept alive prior legislation that was not inconsistent with constitutional requirements. The Supreme Court upheld the validity of such permanent ordinances in *Hansraj Moolji v State of Bombay* AIR 1957 SC 497. Currently, a challenge to the 1944 Ordinance is pending before a three-judge bench of the Supreme Court in *Birsa Oraon v State through CBI* WP (Crl) No 110/2007, connected with Crl Appeal No 375/2006, and Crl Appeal No 1512/2008.

46 Criminal Law (Amendment) Ordinance 1944 (Ordinance 1944), Statement of Objects and Reasons.

47 The Schedule lists offences punishable under the Prevention of Corruption Act 1988. Besides this, it includes offences punishable under Sections 406, 408, 409, 411, 414 of the Indian Penal Code. These are offences pertaining to property, and the Ordinance provisions only trigger if the property involved belongs to the government. It also includes offences punishable under Sections 417 and

application before a District Judge requesting for attachment of this property.[48] Civil procedure was expressly applied to treat this as yet another suit by the government.[49] The District Judge could order properties to be provisionally attached before hearing the aggrieved,[50] and after considering any objections raised to the attachment the Judge could render it absolute.[51] From this property, the District Judge was authorised to direct forfeiture of the amount that the person was found to have procured by committing the scheduled offence,[52] with the rest, if any, to be refunded.[53]

Locating the PMLA in this context, it becomes easier to appreciate why I label it a *sui generis* regime. Unlike the traditional model seen in the Customs Act, here the trial for money laundering offences is critical to the outcome of attachment. The 1944 Ordinance suggests close linkages with the PMLA but even then, clear divergences exist. The Ordinance was directly linked to recovering property considered as belonging to the State, lending some credit to the Supreme Court suggesting in 1963 that the Ordinance merely fast-tracked recovery proceedings for losses suffered by the State.[54] The PMLA, even at a stretch, cannot be considered a recovery procedure unless we consider the State to have a claim over all ill-gotten wealth.[55]

What about links between the attachment and confiscation, and the Scheduled Offence? Till 2011, the PMLA expressly recognised it under Section 8.[56] When the FATF recommended that India remove this clause as per global best practices,[57] it duly obliged, and so today an acquittal for the Scheduled Offence does not impact the PMLA attachment proceedings.[58] Little attention seems to have been paid to how this mechanism has been criticised in the UK and Europe for giving rise to a fractured jurisprudence.[59] But what is more surprising,

420 of the Indian Penal Code, where government officials or institutions are cheated.

48 Ordinance 1944, s 3.

49 ibid, s 3(2).

50 ibid, s 4.

51 ibid, s 5.

52 ibid, s 13.

53 ibid, s 13(5).

54 *State of West Bengal v S K Ghosh* (1963) 2 SCR 111.

55 The Ministry of Finance itself has recently labelled the attachment and confiscation measures taken in accordance with the PMLA 2002 a 'punishment', in the Explanatory Note on a draft for the 'Fugitive Economic Offenders Bill 2017'.

56 Section 8(5) of the original PMLA stated that 'Where on conclusion of any trial for any scheduled offence, the person concerned is acquitted, the attachment of property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.'

57 Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism* (FATF, India 25 June 2010).

58 Brought into force with the Prevention of Money Laundering (Amendment) Act 2012.

59 See Colin King, 'Civil Forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) Legal Studies 371-394, at 382-88.

is how the legislature did not choose to amend the definition of Proceeds of Crime itself, which remains wedded to a Scheduled Offence. This renders the de-linking little more than a cosmetic change to the statute.[60]

I conclude this section by stating that to view attachment and prosecution as separate, civil and criminal halves, making up the PMLA whole, would squarely contradict the provisions of the statute.[61] Having considered the PMLA regime, I now turn my attention to the relevant folds of constitutional criminal procedure in India, providing a brief overview of the protections first and following it up is by testing the PMLA regime on this anvil.

IV. Constitutional Criminal Procedure in India

Article 20 of the Constitution provides the bulk of rights specifically relevant to criminal defendants,[62] enshrining protections against retrospective penal liability, double jeopardy and compelled self-incrimination. For this paper, only the first and third rights are relevant.[63]

Article 20(1) consists of two parts and is narrower than the guarantee against *ex post facto* laws in the American Bill of Rights.[64] The first part protects a person from a *conviction* for an offence which was not a law in force when the relevant conduct took place. The second prevents imposition of a *penalty* greater than which might have followed at the time of committing the offence. The Supreme Court has read these two parts together, restricting the scope of 'penalty' to only punishments imposed in judicial proceedings,[65] i.e. only what

60 This is something that the Single Judge observed in *Mahanivesh Oils & Foods* (n 1).

61 The issue of a civil-criminal divide has troubled academics in the USA and England for several years. Traditionally, criminal remedies have been given a varnish of civil law to evade the more stringent procedural requirements of the criminal setup. Professor Levy considered this specifically in context of American forfeiture laws in *License to Steal*, at 177-205 (University of North Carolina Press 1994). See generally Paul Robinson, 'The Criminal-Civil Distinction and the Utility of Desert' (1996) 76 Boston University Law Review 201-214; The entire issue of the Yale Law Journal carrying a Symposium on Punishment: 101 (8) *Yale Law Journal* (June 1992).
As an example of a money laundering legislation incorporating clear civil and criminal halves, see Proceeds of Crime Act 2002 applicable in the United Kingdom and Wales.

62 Constitution of India 1950 (Constitution 1950), art 22 contains other protections, specifically concerning the arrest and detention of individuals. Constitution 1950, art 21, guaranteeing the right to life and personal liberty, has also been expanded to include a host of other rights to persons including criminal defendants.

63 It may well be argued that a person is prosecuted for the same offence twice where the same underlying conduct is now broken up into additional parts and criminalised. For instance, Cheating is punishable under Section 420 IPC and requires deceiving someone *and* obtaining property. It could be argued that the PMLA makes an additional offence of this latter part and thus punishes the same act twice. However, owing to the restricted definition of 'same offence' adopted in India, the argument is doomed from the outset. On the interpretation of 'same offence', see *State (NCT of Delhi) v Sanjay* (2014) 9 SCC 772.

64 *Rao Shiv Bahadur Singh & Anr v State of Vindhya Pradesh* (1953) SCR 1188, 1198-99.

65 *Maqbool Hussain v State of Bombay* (1953) SCR 730, 738-39; *Biswanath Bhattacharya v Union of*

follows upon conviction in the trial for the offence as specified under Section 53 IPC.[66] Confiscation and forfeiture of property imposed by a tribunal is, therefore, considered beyond the scope of 'penalty' for Article 20(1).[67] The Court has allowed retrospective forfeiture of property even where the basis for this was prior criminal convictions recorded at a time when the confiscation law was not in force.[68]

Article 20(3) guarantees that 'no person accused of an offence shall be compelled to be a witness against himself'. Though similar, this is again narrower than American Fifth Amendment protections against self-incrimination.[69] According to the Supreme Court, one becomes 'accused of an offence' only after a formal accusation is levelled.[70] Where a police officer is involved, this is understood to mean the registration of a First Information Report which normally commences an investigation.[71] However, with other agencies, this 'accusation' is only seen to come at the *completion* of an inquiry with the filing of a formal complaint before court.[72] Comparatively, lesser attention has been paid to interpreting the idea of 'compulsion' under this clause, which is accepted as meaning physical compulsion or duress.[73] Finally, a person accused of an offence must be compelled *to be a witness*. This phrase has been understood to exclude materials sought for purposes of comparison, such as blood samples,[74] and to include all materials conveying evidence of a testimonial nature.[75] The incrimination through such compelled statements is not restricted to the same proceedings, but to those which the *accused* thinks can arise as an implication from her statements.[76]

V. Viewing Confiscation as Penalty

Can the attachment and confiscation of Proceeds of Crime be considered 'penalty' for Article 20(1)? The Supreme Court is yet to decide this issue, but every High Court decision that could be traced on point concluded that the attachment and confiscation of Proceeds

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India & Ors (2014) 4 SCC 392.

66 *S K Ghosh* (n 54); *Jawala Ram & Ors v State of Pepsu & Ors* (1962) 2 SCR 503, 506-508; *Shiv Dutt Rai Fateh Chand & Ors v Union of India & Anr* (1983) 3 SCC 529.

67 *S K Ghosh* (n 54).

68 *Biswanath* (n 65).

69 The Self-Incrimination Clause of the Fifth Amendment reads 'no person shall be compelled to be a witness against himself in any criminal case'.

70 *M P Sharma & Ors v Satish Chandra & Ors* (1954) SCR 1077, 1088.

71 ibid.

72 *Romesh Chandra Mehta* (n 42) 470, 479; *Veera Ibhrahim v State of Maharashtra* (1976) 2 SCC 302; *Poolpandi v Supdt, Central Excise* (1992) 3 SCC 259; *K I Pavunny v Asst Collector (HQ), Central Excise Collectorate Cochin* (1997) 3 SCC 721.

73 *State of Bombay v Kathi Kalu Oghad* (1962) 3 SCR 10, 35-6.

74 ibid 29-32.

75 ibid 30-32.

76 *Nandini Satpathy v P L Dani & Anr* (1978) 2 SCC 424, 451.

of Crime was not 'penalty' for the purposes of Article 20(1) of the Constitution[77] based on accepted doctrine, i.e. these are not criminal proceedings for the offence. But is that view applicable to this context?

Recall that the PMLA is a rather different creature from the traditional setup. The regular process was specifically *in rem*, i.e. it targeted the property alone rendering culpability a non-issue. Here, culpability remains central to the confiscation of property and so the proceedings are really *in personam*.[78] The immediate attachment by an authorised officer is only granted a further lease of life by the Adjudicating Authority if it thinks the property is 'involved in money laundering', and confiscation only occurs once the Special Court convicts an individual for a money laundering offence. The problem, I argue, is that the High Courts have wrongly viewed interim attachment proceedings as divorced from the ultimate confiscation. We are told that an admittedly criminal sanction becomes a civil one, for some time, before turning criminal again. This is mere sophistry. Can my incarceration during trial be considered differently from my post-conviction jail term? No. So how can we consider a forfeiture of my property during trial differently from the ultimate forfeiture that conviction would bring?[79] Such illusory argument carries extremely dangerous consequences owing to high rates of judicial delay,[80] which seem especially high for the PMLA.[81] Thus, a holistic consideration of the attachment and confiscation process shows how this is certainly a 'penalty' for Article 20(1).

I argue therefore, that a retrospective application of PMLA to allow forfeiture of Proceeds of Crime is an increased penalty for committing the Scheduled Offence. The relevant date would be the enactment of the PMLA, or the insertion of the offence in the Schedule, whichever is later. Allowing forfeiture for acts before that date would offend the guarantees of Article 20(1) of the Constitution. Currently, the idea of Proceeds of Crime is directly linked to allegations concerning a Scheduled Offence. For most Scheduled Offences, the very commission of that offence results in *deriving* or *obtaining* property. Imagine a cheating offence punishable under Section 420 IPC – X deceives Y into parting with Z. Z represents the wrongful gain, which

77 *B Ramalinga Raju v Union of India* (2011) 164 CompCas 149 (AP); *M Saraswathy v Registrar, Adjudicating Authority* 2013 (1) MWN (Cr.) 193; *Alive Hospitality & Foods Pvt Ltd v Union of India* 2014(2) RCR (Criminal) 311; *Mahanivesh* (n 1).

78 The substitution of the property for the 'value' of property makes it extremely difficult to sustain this as an *in rem* proceeding. For criticism about the *in rem* and *in personam* distinction, see Colin King (n 59) 378-79.

79 The absence of 'property' from the text of Article 21 may perhaps be a stumbling block to the comparison I wish to make. It could well be argued that personal liberty and property have been deliberately not placed on the same pedestal and therefore such a deprivation of property is legal. But depriving a person of all assets and property certainly cannot be de-linked from her right to life. Such a restrictive reading of Article 21 has thankfully been consistently rejected by the Supreme Court, and the strength of my argument depends on this judicial evolution of the guarantee.

80 See Daksh, *State of the Indian Judiciary: A Report* (Eastern Book Company 2016).

81 *Livemint* (n 2).

is an element of cheating, but is also now Proceeds of Crime that may be forfeited. If Z is not available in its original form, the person stands to lose an amount of equivalent value. The acts constituting the Scheduled Offence thus come to now have an increased penalty.[82] Currently, there is nothing preventing the Enforcement Directorate from picking up case files for Scheduled Offences, pending or decided, and instituting PMLA proceedings. This is exactly what the guarantees against retrospective penal liability were meant to protect.

Taking this position necessarily means rejecting conclusions arrived at by the Supreme Court in *Maqbool Hussain*[83] as they were applied in *S K Ghosh*[84] to uphold the retrospective application of forfeiture provisions under the 1944 Ordinance. *Maqbool Hussain* saw an Article 20(2) challenge to a prosecution under the erstwhile Sea Customs Act 1872 once the confiscation proceedings were complete. While deciding this, the Court made certain *obiter* remarks on how Article 20 contained words that indicate its scope was restricted to criminal proceedings.[85] In *S K Ghosh*, the Court used this to hold that 'penalty' could only mean punishments specified in the IPC. So, although forfeiture was one such punishment, the Court reasoned that if that forfeiture was not imposed during criminal proceedings, it was not within the confines of Section 53 IPC, and by extension, beyond the scope of Article 20(1).[86]

S K Ghosh is a bad decision. No explanation is offered for why the two parts of Article 20(1) were to be read conjunctively, circumscribing 'penalty' to mean punishment under the IPC.[87] While it may be argued that *Maqbool Hussain* was correct within the narrow confines of double jeopardy, surely such an extension denudes Article 20(1) of any force. The Court's logic to term the 1944 Ordinance as carrying out civil proceedings was also problematic. Effectively, the Court tells us that *because* the Legislature has decided to not call these proceedings criminal, it will not do so either.[88] These criticisms notwithstanding, my argument

82 The location of this additional penalty in a different statute is immaterial, i.e. it can be in a different statute from the one creating the offence itself.

83 *Maqbool Hussain* (n 65).

84 *S K Ghosh* (n 54).

85 See *Maqbool Hussain* (n 65) 738-39: 'Proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.'

86 *S K Ghosh* (n 54).

87 This anchoring of constitutional provisions in the text of prevailing statutes is a frequent technique that the Supreme Court employs while considering Article 20. This has contributed to a narrowing of the set of rights, where it has been argued that the Supreme Court's focus on public order has shone through. *See*, Aparna Chandra and Mrinal Satish, 'Criminal Law and the Constitution' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds) *Oxford Handbook of the Indian Constitution* (OUP 2016) 794-813.

88 See William Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 (3) Michigan Law Review 505-600. See also Henry Hart, 'The Aims of the Criminal Law' (1958) 23 Law and Con-

holds even by distinguishing *S K Ghosh* due to the differences in context that have been adumbrated above.

Before concluding this section, I must discuss the conclusions arrived at by the Supreme Court recently in a batch of petitions reported as *Yogendra Kumar Jaiswal v State of Bihar & Ors*.[89] The States of Bihar and Orissa had passed Special Courts Acts[90] which created a new procedure for attachment and confiscation of property in all cases, pending and prospective, where allegations under Section 13(1)(e) of the Prevention of Corruption Act 1988 had been levelled.[91] This was to be conducted by an Additional Sessions Judge[92] with evidence recorded in these proceedings inadmissible in the trial for predicate offences.[93] Further, the property stood confiscated to the government at this stage itself,[94] i.e. before a conviction, and if the trial brought an acquittal then the property was to be returned to the accused or equivalent monetary amounts refunded with interest.[95]

These are notable deviations from the PMLA regime, and they only strengthen the argument against the exclusion of such a setup from the realm of Article 20(1). The forfeiture of property is handled by a criminal court and is *complete* at this stage itself. Persons facing trial for disproportionate assets at a time when this penalty never existed, now stand to face immediate confiscation of their assets – possibly running into crores of Rupees – based on *mere allegations*, for the duration of a trial that could last for years. Yet, the Supreme Court refused to interpret these clauses as only having a prospective effect. It held firmly to the classical notion of penalty meaning 'punishment' as defined in the IPC.[96] If what I have argued above is tenable, the conclusions in *Yogendra Kumar Jaiswal* appear indefensible. But how does this affect a discussion on the PMLA? The Petitioners' counsels used the PMLA regime as the vehicle to advance their arguments, and while doing so incorrectly characterised the confiscation as an *interim* measure.[97] Today, then, very little prevents another bench of the Supreme Court from extending *Yogendra Kumar Jaiswal* to the PMLA when the time comes.

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temporary Problems 401-441.
In the Indian context, such a deference to the legislature is perhaps unwarranted today in an era where the Supreme Court has affirmed substantive due process as being part of Article 21 of the Indian Constitution. See *Mohd Arif v Registrar* (2014) 9 SCC 737.

89 (2016) 3 SCC 183.

90 The relevant statutes were the Orissa Special Courts Act 2006 and the Bihar Special Courts Act 2009. The Bihar statute was modelled on the earlier one passed by the State of Orissa, and it is the Orissa law that is referred to in the following notes.

91 Orissa Special Courts Act 2006, ss 2(d) and 6.

92 ibid, s 3.

93 ibid, s 14(3).

94 ibid, s 15.

95 ibid, s 19.

96 *Yogendra Kumar Jaiswal* (n 89) 274-77.

97 ibid, 241-42.

VI. Limiting the Scope of Section 50 Inquiries

Assessing Section 50 inquiries within the framework of Article 20(3) throws up two questions: who will be a 'person accused of an offence' in the PMLA context, and what would amount to compulsion. Addressing the first, it is obvious to suggest that 'any person', in Section 50 PMLA, must be read as excluding 'persons accused of an offence' found in Article 20(3) of the Constitution.[98] Here, I argue in favour of including two categories of persons within this excluded subset: (i) those against whom an attachment order has been passed under Section 5 PMLA, (ii) persons who are accused of committing a Scheduled Offence. I also argue that the view of the High Court for Andhra Pradesh and Telangana, that persons specifically named in an Enforcement Case Information Report (ECIR) remain outside the realm of Article 20(3),[99] is incorrect. On compulsion, I argue that binding a person to state the truth on explicit threats of prosecution must render the statement *compelled*, making it inadmissible.

A. Persons Accused

It has been a central focus of this paper to argue that the PMLA attachment and confiscation regime is an inextricable mixture of civil and criminal processes, ultimately coloured criminal due to its reliance upon the verdict of guilt by a Special Court. Now let's take a bird's eye view of the process. Once there is a provisional attachment, Section 5 PMLA mandates that a complaint must be filed before the Adjudicating Authority. Thereafter, attachment is confirmed but subject to the Special Court's verdict, implying that *criminal proceedings will necessarily occur*. Thus, once a person is summoned under Section 50 PMLA to give a statement after having received a notice under Section 5 PMLA, she can be certain that the criminal proceedings *will follow*.

My sense of certainty is exaggerated because the authorised officer may yet desist from filing a complaint before the Adjudicating Authority, or the Authority itself may disagree with the department and release properties from attachment. By this logic, no person accused of an offence should receive any protections because the police may close the investigation at the outset and the criminal court may yet acquit. In any event, this uncertainty is very different from the kind that the Supreme Court relied upon in cases under the standard regime for economic crimes to suggest that Article 20(3) could not apply.[100] There, the Court held a

98 This follows from the Supreme Court decision in *State of Gujarat v Shyamlal Mohanlal Choksi* (1965) 2 SCR 457. A Constitution Bench held that 'any person' contained in Section 93 of the erst-while Criminal Procedure Code 1898 [Criminal Procedure Code 1973, s 91], would exclude persons accused of an offence.

99 *Dalmia Cement (Bharat) Ltd v Assistant Director of Enforcement Directorate* 2016 (4) ALD 47.

100 *Raja Narayanlal Bansilal v Maneck Phiroze Mistry* (1961) 1 SCR 417, 438-441; *Romesh Chandra* (n 42) 470, 479; *Veera Ibhrahim* (n 72); *Poolpandi* (n 72); *Pavunny* (n 72).

statute allows for levy of fines / penalties *without any need of criminal proceedings*, and so it cannot be said that one will stand accused after having been asked to give a statement as the authorities may decide to not prosecute.[101] Here, no such equivocation exists.

On the other hand, I noted how the Supreme Court has insisted that the protection does not remain limited to the courtroom. Incrimination can occur during an investigation, and extend to offences that the *accused* thinks she can be implicated for and not merely the one under which the investigation is progressing. Which brings me to my second point. A Scheduled Offence is the primary pre-requisite for any PMLA charge. If someone is accused of a Scheduled Offence, and is called for questioning under Section 50 PMLA, then should she be entitled to refuse a statement citing Article 20(3)? This is a logical extension of the present position and in harmony with the basic idea of having a right protecting us against compelled incrimination. But the consequences are potentially fatal for the PMLA regime. Section 50 inquiries are rendered partially redundant since no longer can the Enforcement Directorate summon the primary targets for statements.[102]

Surprisingly, courts do not seem to have yet faced this issue directly. The one issue that came up was whether persons named in an ECIR can claim Article 20(3) protections, and the High Court of Andhra Pradesh and Telangana in *Dalmia Cement* held that they could not.[103] The ECIR is not statutorily provided for in the PMLA. But it is a formal document, signed by an officer of the Enforcement Directorate, naming a person and alleging she committed offences under the PMLA. Yet, the High Court found this insufficient to trigger Article 20(3). The basis for this ruling, was that unlike a First Information Report, the ECIR never went to a Magistrate and so could not be considered as a formal accusation.[104] This requirement of Magisterial notice is not present anywhere within the text of Article 20(3). It does not find any mention in the dictum that gives us the *formal accusation* test either, and only came up when the Supreme Court dealt with the Customs Act, where no initial accusation was formally levelled. Such a requirement unduly narrows the protection, akin to the other contrivance of extending it only once the accusatory authority decides to prosecute. But in the PMLA context, we need not debate the merits of this problematic canon of Article 20(3) jurisprudence. For here, we have in the ECIR an accusation levelled by the very authority that

101 *Raja* (n 100) 438-441.
The current technical regime of the Supreme Court is hardly convincing in the first place. After all, what is the purpose of protections against compelled self-incrimination, if it only applies once an authority decides to prosecute after one is forced to incriminate oneself?

102 Perhaps this could force the legislature to consider the merits of carving out exceptions regarding the use of statements, akin to those found in the Orissa Special Courts Act 2006 noted above. 'Use immunity' is not alien to Indian law, and can be found in Section 132 of the Indian Evidence Act 1872 as well, which prohibits using statements that a witness makes when compelled to under oath to institute any prosecution.

103 *Dalmia Cement*, (n 99).

104 ibid [52].

will be subsequently prosecuting the same offences. That is, surely, as good as it gets.

B. Who Pulls the Trigger

This brings us to the issue of what is *compulsion*. In 1962, eleven judges held that compulsion meant physical force, or duress, and therefore merely being called to the police station could not be viewed as being *compelled*.[105] In a quixotic decision[106] delivered in the aftermath of the Emergency,[107] Krishna Iyer J attempted to expand this view to include psychological pressures that an individual may face during questioning.[108] But he drew a line at the pressures employed by police to answer questions, and contradicted himself in the next immediate sentence by refusing to include penalties for choosing to remain silent as being silent was 'running a calculated risk.'[109] This is hardly compelling reasoning and highlights a perennial failing of the Supreme Court to convincingly engage with the rationale behind this fundamental right. What difference does it make if the gun of compulsion is triggered by the statute itself and not by an officer, when no such distinctions are present in Article 20(3) itself?[110] The truism does not offer any logic to explain *why* the bright line ought to be drawn here, to link compulsion as emanating from the physical presence of authority.

Unfortunately, these homilies represent the greatest attention paid by the Supreme Court to this issue of statutory threats of prosecution as amounting to compulsion.[111] This turns my attention to the recent jurisprudence of the European Court of Human Rights (ECHR) where the issue has often cropped up.[112] Largely following the dictum of the Privy Council

105 *Kathi* (n 73) 35-36.

106 *Nandini Satpathy* (n 76).

107 ibid. Nandini Satpathy, a Congress stalwart, had been called for questioning at a police station. The allegations against her were for committing offences under the Prevention of Corruption Act 1947, and the Indian Penal Code 1860. The move largely viewed as politically motivated, and perhaps the bias in the Supreme Court's decision becomes apparent when we view the introductory observations of Krishna Iyer J, where he labels the accusations against her as 'tragically and traumatically so common against public persons who have exercised and exited from public power, and a phenomenon so suggestive of Lord Acton's famous dictum'.

108 *Nandini Satpathy* (n 76) [57].

109 ibid.

110 In fact, the immunity granted to witnesses answering under oath in Section 132 of the Indian Evidence Act 1872 arguably supports de-linking compulsion from physical authority.

111 See also *Tukaram Gaokar v R N Shukla* (1968) 3 SCR 422, 426; *Percy Basta v State of Mahrashtra* (1971) 1 SCC 847.

112 *O'Halloran & Francis v United Kingdom* (2008) 46 EHRR 41; *Jailoh v Germany* (2007) Crim LR 717; *Weh v Austria* (2005) 40 EHRR 37. For a discussion of compelled self-reporting in the European context, see Mark Berger, 'Compelled Self-Reporting and the Privilege against Compelled Self-Incrimination: Some Comparative Perspectives' (2006) 1 EHRLR 25-38. See also Angus MacCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) Legal Studies 211-237.

decision in *Brown v Stott*,[113] the European Court has accepted the argument that such threats of prosecution to elicit statements are indeed, of a compelling nature. Their validity has been sustained by relying upon the benefits of maintaining public order in the peculiar context of the various regulatory activities in which they are invoked (e.g. motor vehicle laws), where convictions carry nominal punishments.[114] The validity of this logic is certainly open to criticism and the creeping expansion to other areas has merited deserved criticism already.[115] However, at least there is some justification offered to explain why must an individual be forced to cooperate with the State in its efforts to prosecute her.

So, then, I argue that threats of prosecution for non-compliance with Section 50 notices amount to 'compulsion' within the meaning of Article 20(3). Evaluating this within the ECHR framework, one finds the PMLA sanctions far from being merely administrative penalties required to maintain the benefits offered by the smooth running of the system. Relying upon the statements procured from an individual by placing her under the threat of prosecution would contravene the constitutional guarantee against compelled self-incrimination.

VII. Conclusion

This paper strived to argue that currently, the Prevention of Money Laundering Act 2002 is operating beyond constitutional boundaries set by Article 20. By masquerading clearly criminal sanctions as civil penalties, it is imposing retrospective penal liability upon individuals. Further, it is compelling individuals to face this liability, by forcing them to make statements under threat of prosecution. The logic employed by various High Courts to dismiss constitutional challenges has been hardly impeccable. A consistent reading of Article 20 jurisprudence confirms that the scope of the PMLA must be narrowed down. Historically, the

113 (2003) 1 AC 681.

114 For a discussion, see Andrew Ashworth, 'Case Comment: Human Rights: Article 6(1) – Privilege Against Self-Incrimination – Offence under the Road Traffic Act 1988 s. 172 of failing to furnish information' (2007) Crim LR 897-900; J R Spencer, 'Case Comment: Curbing Speed and Limiting the Right of Silence' (2007) 66(3) Cambridge Law Journal 661-663; Malcolm Birdling, 'Self-Incrimination goes to Strasbourg: *O'Halloran and Francis v United Kingdom'* (2008) 12 International Journal of Evidence and Proof 58-63.
The American context has the 'required records' doctrine which mandates that individuals maintain certain records, which they can be compelled to produce under threat of prosecution. These records are pertaining to regulation of business activity. Now, there are two distinct issues here: *one*, whether complying with the record-keeping requirement amounts to compulsion, and *two*, whether furnishing the records under threat of sanction amounts to compulsion. The decisions here do not hold the use of legal threats as not being *compelling*, rather these activities are placed outside the scope of the self-incrimination protection altogether. For a discussion, see, 'Required Records and the Privilege against Self-Incrimination' (1965) 65(4) Columbia Law Review 681-695; Stephen Saltzburg, 'The Required Records Doctrine: Its Lessons for the Privilege against Self-Incrimination' (1986) 53(1) University of Chicago Law Review 6-44.

115 Andrew Ashworth, 'Self-Incrimination in European Human Rights Law: A Pregnant Pragmatism?' (2008) 30(30) Cardozo Law Review 751-784.

Supreme Court's jurisprudence on Article 20 has relied upon a web of technicalities to deny individuals their constitutional rights in various contexts spanning the breadth of economic offences. Perhaps this time with the PMLA and its complexities, the house of cards will finally collapse upon itself. Narrowing down the scope of the legislation by creating spheres of exclusion would avoid this consequence, which ultimately can only help the government in employing what remains the harshest tool in its arsenal to target economic offenders today.

ARBITRATION & CONCILIATION AMENDMENT ACT, 2015 - ENFORCING INTERIM ORDERS, WHERE IS THE RELIEF?

Ajar Rab*

The amendment to the Arbitration & Conciliation Act, 1996 incorporated several amendments to the arbitration regime in India, closing several gaps in policy and application. Some of the major amendments are with respect to interim measures and the enforceability of the interim orders. However, the amendment, though a step in the right direction, falls short of practical application when it comes to enforcement of interim orders. This paper examines the power of the Court and the arbitration tribunal to grant interim relief, how the interim orders will be enforced, the disobedience punished, and whether the amendment succeeds in providing effective relief to parties with respect to interim measures. It also discusses, in brief, the Mumbai Centre for International Arbitration Rules, which provide for emergency arbitration and how the award passed by such an arbitrator will be enforced. Further, the paper examines the procedure for securing interim relief and the litigation strategies used to frustrate interim relief applications. These shed light on the actual problems plaguing arbitration in India and how the amendment does nothing more than mere lip-service to creating a pro-arbitration regime.

I. Introduction

India has been hard-selling its 'Make in India' campaign to attract investors. The government has made many commitments, including the promise of speedy and transparent justice, especially to foreign investors. Fulfilling those promises, the government recently passed the Arbitration & Conciliation (Amendment) Act 2015, No.3 of 2016 (the Amendment) incorporating several amendments to the Arbitration & Conciliation Act 1996 (Act) in order to send a message to the international community that India is at par with global jurisprudence on arbitration and the lacunae in the legal regime have been plugged to make India pro-arbitration.

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Earlier, one of the biggest criticisms of arbitration in India had been the long, cumbersome and delayed judicial intervention required for interim relief.[1] Parties had to juggle between courts and the arbitration tribunal (Tribunal) for seeking effective protection of their rights till the time the Tribunal was formed or until the final award was passed because the Act provided for different forums and provisions for interim measures which were not at par with each other.

The Act contained, *inter-alia,* two sections for interim relief, i.e. Section 9 and Section 17 of the Act. While Section 9 of the Act dealt with the powers of the Court to grant interim relief, 'before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36', Section 17 provided for interim relief by the Tribunal. However, it failed at granting any sanctity to such orders as the Tribunal did not have the power to enforce such orders. While Section 9 provided that '...the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it', such language was missing from Section 17, making it unclear how the interim relief granted by the Tribunal was to be enforced.

On the face of it, the situations contemplated by both sections suggest well thought out provisions for interim measures in an arbitration proceeding. However, the Act fell short of elaborating how the interim orders are to be enforced. Section 27(5) of the Act only provided for the assistance of the Court in enforcement of the orders of the Tribunal, thus compounding the problem of juggling between the Court and the Tribunal.

Through the Amendment, Section 17 was brought on par with the un-amended Section 9 as it now ends with providing that the Court shall have the same power for making orders as it has for the purpose of any proceeding before it.[2] Since the definition of 'Court'[3] means the principal Civil Court, and the Act is substantive law, the procedural law applicable to enforcement of orders would be the Code of Civil Procedure 1908 (CPC). However, it remains unclear whether the Court will exercise this power under (i) Section 94 of the CPC; (ii) Order XXXIX Rule 1 or 2 of the CPC; (iii) Section 151 of the CPC and consequently punish the defaulting party under the CPC; or (iv) the Contempt of Courts Act 1971 (Contempt Act).

Moreover, with the recent establishment of the Mumbai Centre for International Arbitration

1 'Working Paper on Institutional Arbitration Reforms in India' (2017) Indian Council of Arbitration Working Paper <http://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> accessed 25 July 2017.

2 Arbitration and Conciliation Act 1996 (ACA 1996) s 17(2) (inserted by The Arbitration & Conciliation (Amendment) Act 2015): '(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court.'

3 ibid, s 2(1)(e).

and the provision for emergency arbitration in its rules,[4] it becomes imperative to examine the provisions for interim measures and their enforcement, especially in light of the fact that the Amendment did not incorporate the suggestion of the Law Commission of India regarding emergency arbitrators. The Law Commission had suggested that the definition of an 'arbitral tribunal' under Section 2(d) of the Act be expanded to include an 'emergency arbitrator', if the arbitration is conducted under the rules of an institution providing for emergency arbitrators.[5]

This paper examines the power of the Court and the Tribunal under the Act, the recent Amendment and the practical application of the provisions of the Act providing for interim measures, including the procedure for enforcing interim orders. It delves into the powers to pass interim orders under Sections 9 and 17 of the Act to seek their enforcement through the Courts, in accordance with the CPC, as the Act itself does not contain provisions for enforcement of interim orders. By pointing out these deficiencies in the civil procedure, the aim is to highlight the need for enforcement measures in the Act itself. The paper also briefly examines the Mumbai Centre for International Arbitration Rules 2016 (MCIA Rules) which provide for an emergency arbitrator and how the interim award[6] passed by the emergency arbitrator will be enforced.

II. The Power to Grant Interim Relief

A. Section 9 of the Act

It is widely known that Section 9 is the most efficacious remedy for interim measures till the time the Tribunal is constituted. However, the original intent of the provision under the UNCITRAL Model Law on International Commercial Arbitration 1985, was that it merely expressed the principle that a Court could provide interim relief and that providing such interim measure was not 'incompatible' with the fact that parties had agreed to refer their dispute to arbitration.[7] Thus, it was not meant to be a holistic provision providing recourse to interim measures when parties had chosen arbitration as the means of dispute resolution.

Over time, the jurisprudence on the subject developed to effectively make Section 9 the primary recourse for interim measures. In order to seek interim relief from a Court in India, the following became essential:

4 Mumbai Centre for International Arbitration Rules 2016 (MCIA Rules 2016) r 14.

5 Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com Report No 246, 2014) 37. The Note to the suggested amendment states 'This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules which provide for an emergency arbitrator are given statutory recognition in India.'

6 MCIA Rules 2016, r 1.3.

7 PC Markanda, Naresh Markanda and Rajesh Markanda, *Law Relating to Arbitration and Conciliation* (8th edn, LexisNexis 2013) 303.

(i) The existence of an arbitration agreement or an arbitral clause,[8] which is a *sine qua non*;

(ii) A dispute with respect to the subject matter of the contract and is to be referred to arbitration;

(iii) Manifest intention by the applicant to take recourse to arbitration proceedings at the time of filing;[9]

(iv) The subject matter of the arbitration should come with the original civil jurisdiction of the Court, being the District Court, before which the relief is sought.[10]

It is well-recognised by Courts that the general provisions to be had resort to when exercising their power under the Act, are Order XXXIX of the CPC and the Specific Relief Act.[11] General principles such as *prima facie* case, balance of convenience and irreparable injury are considered by the Court when dealing with applications seeking interim relief.[12] Curiously, the Allahabad High Court has taken the view that the power conferred under Section 9 of the Act should be exercised only in exceptional circumstances.[13] This view, however, seems to be in consonance with the legislative history of the provision insofar as the provisions of the Act were designed to reduce the interference of Courts in arbitration proceedings.[14] Thus, the power under Section 9 is to be used only to facilitate arbitration and ensure that the award passed by a Tribunal is capable of enforcement.[15]

Following this rationale, sub-section (3) to Section 9 of the Act has now been inserted which bars the application under Section 9 to a Court if the Tribunal has been constituted.[16] Thus, post the Amendment, the position is clarified that Section 9 is to be resorted to only when the Tribunal has not been constituted and once orders are passed under Section 9(1), the

8 *Punj Llyod Ltd v Valentine Maritime (Mauritius) Ltd* [2008] (2) RAJ 422 (Del); *Ramji Bharany v Ambience Developers & Infrastructure Pvt Ltd* AIR 2010 NOC 1031 (P&H).

9 The issuance of notice to refer the matter to an arbitration tribunal is sufficient to manifest this intention. *Sundaram Finance Ltd v NEPC India Ltd* AIR 1999 SC 565.

10 ACA 1996, s 2(1)(e); *Fountain Head Developers v Maria Arcangela Sequeira* AIR 2007 Bom 149.

11 *Adhunik Steels Ltd v Orissa Manganese and Mineral Pvt Ltd* (2007) 7 SCC 125; *Shin Satellite Public Co Ltd v Jain Studios* [2009] (1) RAJ 369 (Del); *Lalit Kumar v Anil Kumar* [2011] (2) RAJ 373 (Del).

12 *Arvind Construction Co Ltd v Kalinga Mining Corporation* (2007) 6 SCC 798.

13 *Deepak Mitra v District Judge* AIR 2000 All 9.

14 *Bhatia International v Bulk Trading SA* AIR 2002 SC 1432; *Deccan Asian Infrastructure (Mauritius) Inc v BPL Communications Ltd* [2005] (2) Arb LR 450.

15 *National Shipping Co of Saudi Arabia v Sentras Industries Ltd* AIR 2004 Bom 136; *Reliance Infocomm Ltd v BSNL* [2005] (1) RAJ 52 (Del); *Kumaradas v Indian Medical Practitioner's Cooperative Pharmacy & Stores Ltd* [2007] (4) RAJ 272 (Del).

16 ACA 1996, s 9(3) (inserted by The Arbitration & Conciliation (Amendment) Act 2015): 'Section 9(3)- Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.'

Tribunal has to be constituted within 90 days.[17]

It is pertinent to note that Courts have taken the view that Section 9 is similar neither to Order XXXVIII Rule 5 of the CPC, nor to Section 18 of the Arbitration and Conciliation Act, 1940 and that the Court can order interim measures without the necessity of reliance on the provision under which the interim relief is being sought.[18]

This line of thought creates an uncertainty with respect to interpretation and grants a wide discretion to Courts in granting interim relief and exercising power under various legal provisions for the same. It does not consider the fact that the provision under which the interim relief is granted becomes instrumental at the time of *enforcement* of the interim order of the Court as the procedure provided in the CPC under Section 94, Order XXXIX Rule 1 or 2 and Section 151 is different from that provided under Order XXI Rule 32, etc. Moreover, the provisions for *appeal, revision or review* would be triggered depending upon the provision under which the interim order was passed. More importantly, the relevance of the interim order being passed under a particular provision of the CPC would determine the *recourse* available to the aggrieved party in case such order is violated.

B. Section 17 of the Act

Similarly, one of the biggest criticisms of the Act was the lack of teeth to the arbitrator in enforcing the orders passed by the Tribunal, especially under Section 17.[19] Before the Amendment, the Act did not provide for the enforcement mechanism of orders passed under Section 17. It was unclear whether interim orders passed by a Tribunal could be enforced in the same manner as of a Court order under Section 9 as there is a clear distinction between an *arbitrator* and *court*. Hence, the disobedience of an order of the Tribunal by a party could not be penalised under the Contempt Act and similarly could not be enforced under the CPC as the arbitrator was not a 'Court'.

Even the Indian Evidence Act 1872 specifically excludes an arbitrator from the definition of 'Court' in Section 3. Furthermore, Courts had repeatedly taken the view that Section 17 of the Act did not confer any power on the arbitrator to enforce the award, unlike the power conferred under Section 9 of the Act.[20]

17 ACA 1996, s 9(2) (inserted by The Arbitration & Conciliation (Amendment) Act 2015).

18 *Ganesh Benzoplast Ltd v Sundaram Finance Ltd* [2002] (3) RAJ 120 (DB) (Mad).

19 Markanda (n 7) 583.

20 *MD, Army Welfare Housing Organisation v Sumangal Services (P) Ltd.* AIR 2004 SC 1344; *India Bulls Financial Services Ltd v Jubilee Plots and Housing Pvt Ltd*, CRP (PD) Nos 2657 to 2659 of 2009 and MP Nos 1 of 2009 (Mad); *Sundaram Finance Ltd v NEPC India Ltd* 1999 (2) SCC 479.

It is pertinent to mention that Section 27(5) of the Act[21] did refer to the consequences of contempt of the orders passed by the Tribunal, but instead of punishing a defaulting party for contempt, it provided for the Tribunal to seek the assistance of the Court in enforcing its orders. Therefore, the applicant complaining of contempt of the orders of the Tribunal had to apply to the Tribunal for making a representation to the Court to punish the defaulting party for contempt and the Tribunal, on being satisfied, would then make a representation to the Court.[22] However, the Supreme Court has recently clarified that Section 27(5) does not empower the Tribunal to make a representation to the Court for contempt of interim orders passed by the Tribunal, unless the same are with respect to taking evidence.[23] Interestingly, the legal jurisprudence was also silent on the procedure after the representation by the Tribunal had been sent to the Court and it remained unclear whether the court was to exercise its power under the CPC or under the Contempt Act. This mechanism further delayed the proceedings and made the interim measures largely ineffective.

Post the Amendment, clause (2) has been added to Section 17 of the Act which states that the order of the Tribunal shall be enforceable as if it were an order of the Court.[24] Thus, the position of law, post the Amendment, is that all orders of the Tribunal will be enforced as if passed by a Civil Court.

However, in a recent judgment passed after the Amendment, the Kerala High Court has held:

> Enforcement implies a force to implement. The law enforcement [sic] is a Sovereign and State function. The nature of the Arbitral Tribunal's composition emanates from a contract though, [sic] the powers of the Arbitral Tribunal is governed by the Statutory provisions. Nevertheless, it confers no power on the Tribunal to enforce its own order. Conferring the power of the Civil Court to the Tribunal for passing an interim order does not mean that the Tribunal is conferred with the power of enforcement. The Tribunal, by its constitution or creation, inherently lacks power to deal with any sovereign function or public law in the sense that their [sic] authority is founded in a contract and power is regulated by the statute…The Arbitral Tribunal's by very nature of its composition cannot exercise any such power vested with the Court, which discharges sovereign function.[25]

21 ACA 1996, s 27(5): 'Persons failing to attend in accordance with such process, or making any other fault, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences is suits tried before the Court.'

22 *Sri Krishan v Anand* [2009] 3 Arb LR 447 (Del).

23 *Smt Alka Chandewar v Shamshul Ishrar Khan* Civil Appeal No 8720 of 2017 (SC).

24 ACA 1996, s 17(2) (inserted by The Arbitration & Conciliation (Amendment) Act 2015).

25 *Pradeep KN v The Station House Officer* AIR 2016 Ker 211 [13].

In effect, the Court held that the applicant should have first approached a Civil Court for the enforcement of the interim order and without the same, an order passed by the Tribunal under Section 17 is incapable of being enforced altogether. This view thwarts the purpose of the Amendment and runs foul of the principle of non-interference by Courts in arbitral proceedings. The Kerala High Court practically nullified the amendment to Section 17 of the Act and provided room for further delays in the enforcement of interim orders passed by arbitral tribunals. Also, this interpretation renders Section 17 completely meaningless if after an order under the same, a party has to approach the Court again.[26]

However, the recent judgment of the Supreme Court in appeal against the view of the Bombay High Court,[27] placing reliance on the report of the Law Commission,[28] has held that the addition of Section 17(2) was intended as a 'complete solution' to the problem of enforcement of orders passed under Section 17 of the Act.[29] The Court also clarified that after the Amendment, the Tribunal need *not* apply to the High Court for contempt of its orders and as they would be deemed to be orders of a Civil Court, enforceable under the CPC as orders of the Court.

Although the Supreme Court has settled the matter with respect to the practice of Tribunals applying to Courts for assistance in enforcement of their orders, the question still remains as to the legal mechanism available for the *actual* enforcement of these orders, since the Act does not contain any specific provision for the violation of orders passed under Section 17.

C. Emergency Arbitrator under the MCIA Rules

The recently established centre for arbitration at Mumbai provides for emergency arbitration, i.e. the appointment of an arbitrator for seeking urgent interim relief even before constitution of the Tribunal.[30] Rule 14.8 of the MCIA Rules provides that any interim relief ordered by an emergency arbitrator shall be deemed to be an interim measure ordered or awarded by a Tribunal.

Reading the aforesaid rules holistically, the MCIA Rules provide for interim relief by an emergency arbitrator to be enforced under Section 17 of the Act. Therefore, the next logical step is to examine how to approach the Civil Court for enforcement of the orders under Section 9 and 17.

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26 *Krishan* (n 22); Markanda (n 7) 585.
27 *Chandewar* (n 23).
28 Law Com Report No 246 (n 5) 37.
29 *Chandewar* (n 23).
30 MCIA Rules 2016, r 14.

III. Enforceability of the Orders of the Court & the Tribunal

From the foregoing, it is clear that interim measures sought under the Act, whether before a Civil Court or before a Tribunal, can only be enforced effectively by a Civil Court. Thus, the real test is whether the Amendment succeeds in bridging the gap between policy and practical application and helps creating a legal system which is quicker and pro-arbitration.

It is pertinent to examine the procedure for enforcing orders of the Court or penalising the contempt of such orders. The first question which arises here is whether the enforcement of interim orders would be akin to execution proceedings and hence enforceable under Order XXI? Authoritative interpretation by courts suggests that resort to Order XXI for executing a decree is not required, as a combined reading of Sections 36 and 2(14) of the CPC would make it clear that unless 'there is a formal expression of an order of the Civil Court' in an order, resort is to be had to Order XXXIX Rule 2A or Section 94 of the CPC.[31] Only after final adjudication of the dispute, can an application be filed under Order XXI.[32] Thus, Order XXI would apply to execution of decrees and not orders.[33]

Therefore, once interim relief is granted to a party, whether under Section 9, or the now amended Section 17 of the Act, the enforcement of the same can be under the following:

(i) Section 94 of the CPC;
(ii) Order XXXIX Rule 2A of the CPC;
(iii) Section 151 of the CPC;
(iv) Contempt of Courts Act 1971.

An interim order under Section 17 of the Act can be implemented in a manner similar to the Court, as the Tribunal exercises its power under Section 27(5) of the Act.[34] It has also been held that disobedience of an order of injunction is punishable under Order XXXIX Rule 2A of the CPC whether it is granted under Rule 1 or 2 or Section 94 or Section 151 of the CPC.[35] However, it is pertinent to note that this view is only limited to injunctions, is outdated, and not in direct reference to arbitration proceedings where interim relief sought is often not limited to injunctions alone.

31 *Pradeep* (n 25).
32 *Kanwar Singh Saini v High Court of Delhi* (2012) 4 SCC 307.
33 *Thummu Koti Nagaiah v D Sambaiah* AIR 1963 AP 136.
34 *Pradeep* (n 25).
35 *Rattu v Mala* AIR 1968 Raj 212; *Hiralal v Popatlal* AIR 1969 Guj 28; *Adaikkala v Imperial Bank* AIR 1926 Mad 574; *Sitaram v Lachminarain* AIR 1946 Pat 47; *Thummu* (n 33); Sudipto Sarkar and VR Manohar, *Sarkar's Code of Civil Procedure* (10th edn, Wadhwa & Co 2002) 2062.

A. Application for Interim Relief

Applying the aforesaid provisions in a practical scenario means that if a party to the arbitration proceedings seeks interim relief, before the constitution of the Tribunal, then such party will first approach the Court and file an application under Order XXXIX Rule 1 or 2 or under Section 94 of the CPC for an ad-interim injunction.[36] Thereafter, the Court may, in its discretion, either grant the injunction without hearing the other party, i.e. pass an ad-interim injunction, or may issue notices to the other party to present their case before the grant of a temporary injunction.[37]

In the event an ad-interim injunction is not granted, the Court will first issue summons to the opposite party, the service of which the opposite party will try to avoid. Once the summons are served, the opposite party will continue to seek time as the opposite party has to be granted an opportunity to file objections against the interim application, and in effect, frustrate the applicant's request for urgent interim relief. Another mechanism often adopted by a person apprehending a Court proceeding under Section 9 of the Act is to file a caveat[38] before the Court, and then seek time for objections against the interim application. Thereafter, adjournments are sought on some ground or the other, in effect rendering the application for interim relief useless.

Even in the case where an interim relief is granted, whether ad-interim or otherwise, if the opposite party violates the order of the Civil Court, the party who had sought interim relief has to file a separate petition before the same Court and prove how the opposite party violated the order of the Court. The opposite party is once again given a chance to defend the proceeding, and only thereafter is an order passed under Order XXXIX Rule 2A or Section 94 of the CPC by the Court.[39] This results in major delays in the interim order being actually passed, the disobedience being proved, and the defaulting party being penalised for contempt or the interim order being actually enforced. Thus, a defaulting party can easily frustrate the application for interim relief, even to the extent of rendering the final award incapable of enforcement, by deliberately violating the interim order till the contempt is proved.

B. Disobedience of Interim Orders

On a literal reading of the Act post Amendment, it appears that all orders, whether passed under Section 9 or 17 can be enforced as orders of the Court. That is to say, that once an order

36 'Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals' (2016) Nishith Desai Associates Research Paper <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf> accessed 25 July 2017.

37 Code of Civil Procedure 1908 (CPC 1908) o 39, r 3.

38 CPC 1908, s 148A(1).

39 Provided in the General Rules (Civil) of each State.

has been passed by the Court or Tribunal, the order is deemed to be an order under Section 94 or Order XXXIX Rule 1 or 2 and the disobedience of the order would then be punishable under Section 94 or Order XXXIX Rule 2A.[40] However, it is pertinent to note that the CPC does not provide for the mechanism of enforcement of the orders passed under Section 94 or Order XXXIX Rule 2A.[41] While Order XXXIX Rule 2A provides for attachment of property and detention in civil prison, the same can only serve as a penalty.[42] Neither does the appendix to the CPC contain any pro-forma for committing a person to civil prison for disobedience under Order XXXIX Rule 2A. In order to successfully enforce an order, resort has to be had to Section 151 of the CPC, which makes the enforcement of the order dependent on the subjective satisfaction of the presiding Judge.[43]

Thus, the applicant seeking interim measures will first have to prove the case for interim relief, then prove how the interim order has been violated and then once an order for disobedience or contempt has been passed, it is unclear how the same will be enforced. Though Order XXXIX Rule 2A of the CPC is exhaustive as to the penalty for disobedience and similar to Order XXI Rule 32(1) of the CPC, it actually provides no relief to a party in whose favour the interim is granted.[44] If there is disobedience of the order during the pendency of the suit, relief can only be granted under Section 151 of the CPC.[45] Moreover, Courts have time and again taken the view that the power under Section 94 and under Order XXXIX Rule 2A of the CPC should be used very sparingly[46] and it has been held that Section 10 of the Contempt Act cannot be resorted to for contempt of interim orders since relief can be obtained under Order XXXIX Rule 2A.[47] Furthermore, throughout the entire process the opposite party will have a right to object and in effect, seek time to object at every stage, thereby rendering the entire exercise of the applicant frustrating and without effective relief.

Therefore, the current structure for interim relief under the Act, even post the Amendment is largely based on voluntary compliance rather than the threat of legal consequences. A defaulting party can easily frustrate the enforcement of the final award by delaying the process

40 *Adaikkala* (n 35).

41 *Rayapati Audemma v Pothineni Narasimham* AIR 1971 AP 53. Here, it was held that 'It has to be noticed that O. 39. R. 2(3) Civil P. C. provides only for punishment by attachment of the property or by detention in civil prison of the person who committed breach. But it does not further provide for implementation of the order of injunction itself. Order 39. Rule 2(3) cannot be said to be an express provision with respect to implementation of the order of injunction, but is only a provision which provides penalty for disobedience of the order.'

42 *Thummu* (n 33).

43 *B. Chandra Sekhar Reddy v K Naga Raju Yadav* CRP No 6251 of 2012 (AP).

44 Sarkar (n 35) 2063.

45 *Magna v Rustam* AIR 1963 Raj 3; *Harinandan v SN Pandita* AIR 1975 All 48; Sarkar (n 35) 2063.

46 *Sitaram v Ganesh* AIR 1973 All 449; Sarkar (n 49) 2063.

47 *Nitinkumar Pramodbhai Pandya v Spenta Colour Lab Pvt. Ltd.* (1996) 1 GLR 14 (Guj); *Gajjan Singh v Tarsamlal, Assistant Sub-Inspector of Police* (2001) (3) Punj LR 538 (540) (P&H).

for interim relief or wilfully disregarding the order of the Court or the Tribunal as the actual enforcement of the interim order is limited by the dependence of the Act on the Court which in turn has to rely on the aforementioned provisions of the CPC. In effect, the Amendment does nothing more than provide lip-service to creating a pro-arbitration regime with respect to interim measures and their enforcement.

IV. Conclusion

While India has taken steps in the right direction with respect to closing the gaps in policy, the recent Amendment has yet again fallen short of providing clarity for practical application when it comes to securing interim measures under the Act. Enforcing orders of Courts in India has always been a cumbersome process and the Amendment, while a step in the right direction, has neglected the ground reality of litigation in India. Though it may be argued that the enforcement of the orders is under the CPC and not a lacuna under the Act, it cannot be denied that the Act could be implemented in a more effective manner if it did not rely on Civil Courts for its compliance and becomes a complete code in itself with sufficient powers for enforcement and penalty.

The Act can be further amended to clarify the nature of the order passed, especially under Section 17 of the Act and in light of giving teeth to the orders of an emergency arbitrator, with respect to their enforcement under the CPC or the Contempt Act. For the purposes of Section 17, it may be amended to delink the enforcement of the orders of the Tribunal from the Court. The Act should provide for imposition of costs by the Tribunal on the party violating the interim orders and failure to comply should automatically result in the dismissal/striking-off of their pleadings. Such dismissals can also be extended to violations of orders passed under Section 9 of the Act to ensure that the very purpose of such orders is not defeated and the dismissal serves as a deterrent against the temptation of flouting interim orders. The intervention of the Court under Section 27(5) of the Act should be a residuary measure, invoked only when the Tribunal is of the opinion that imposition of costs and striking-off of pleadings alone may not be adequate and that one party is likely to defeat the ends of justice. Even in such cases, it is recommended that the Act be amended to clarify the specific provision of the CPC under which the orders are to be enforced. Such an amendment would not only add to the authority of the Tribunal but would also save the aggrieved party from the procedural onus and delay of filing and proving a separate case for contempt. More importantly, the severance of the proceedings before the Tribunal from their dependence on the Court would save the Tribunal and its orders from the limitations outlined in the CPC.

The present jurisprudence on the subject provides for a strict interpretation and allows only a limited use of Order XXXIX Rule 2A, Section 94, Section 151 of the CPC and the Contempt Act. In this scenario, an applicant has to discharge a rigorous and enormous burden

of proof first at the stage of seeking the interim measure, then at the stage of enforcement of the interim order (not to mention the delay in litigation and the strategy used by the opposite party in frustrating the request for interim relief outlined above), and ultimately to rely on the subjective satisfaction of the Court with respect to enforcement. Thereafter, the same may also be subject to appeal, wherein the appellate court may stay the order passed in the contempt proceedings, rendering the entire exercise of enforcement of the interim orders futile.

Thus, if India has to truly become pro-arbitration, i.e. reduce the time taken by arbitration proceedings and render true justice to parties who have agreed to resolve their disputes through arbitration, the law needs to be further amended to not only provide for interim measures but for their practical enforcement as well.

CRITICAL ANALYSIS OF THE WADA CODE 2015 WITH REGARD TO THE PRINCIPLES OF PROPORTIONALITY AND HUMAN RIGHTS

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The World Anti-Doping Agency Code 2015 (WADC 2015) is the latest international standard in the field of anti-doping regulation. It greatly enhances the power of anti-doping agencies across the world to punish erring athletes, and also imposes much higher sanctions by way of such punishment.

This piece examines whether the said sanctions are in accordance with the Doctrine of Proportionality, particularly in light of the ground realities faced by athletes in developing countries such as India. The authors identify the contours of the Doctrine of Proportionality from a Euro-centric human rights perspective, as also from the perspective of Fundamental Rights jurisprudence in India. In light of the practical conditions faced by athletes from India (and developing countries in general), including poor / non-existent education, scientific facilities and lack of basic coaching guidance, the authors conclude that a 4-year ban for first offenders is excessive and disproportionate to the gravity of the offence and the aim sought to be achieved. Thus, unless amended, the WADC 2015 is likely to see substantial interference by the judiciary in India.

I. Introduction

Drug-use has been a part of sports since time immemorial. However, the regulatory response towards the issue only started in the late 1960s with the death of European cyclists Kurt Jensen and Tony Simpson.[1] The fight against doping has become a major concern for the sport governing bodies in the recent years. With doping methods becoming increasingly complex, anti-doping agencies have had to respond by using more stringent mechanisms to catch and punish dopers, which is evident through the introduction of provisions like the

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1 Detlef Thieme and Peter Hemmersbach (eds), *Doping in Sports*, vol 195 (Springer-Verlag 2009) 171.

whereabouts clause and blood passport in anti-doping regimes.

The World Anti-Doping Agency (WADA) introduced the World Anti-Doping Agency Code (WADC) to ensure uniformity in the practices of anti-doping agencies across the globe. The latest in this series is the WADA Code 2015 (WADC 2015), which not only reflects the developments that have taken place in the field of anti-doping vigil mechanisms, but also enhances the power of the anti-doping agencies to punish the erring athletes. However, there is a concern that this war, even though against intentional cheats, may become a relentless persecution in which innocent athletes may get caught due to lack of information, especially in developing nations like India.

This paper is an attempt by the authors to analyse the increased scope of punishment as laid down in the WADC 2015 vis-à-vis the doctrine of proportionality and human rights with special focus on India. In the first part of the paper the authors lay down the provisions of the WADC 2015, and analyses the changes brought about in the regime for sanctions for the first violation by an athlete. In the second part, the focus is on the scope and requirements of the Doctrine of Proportionality. Further in the paper, the authors analyse the various case laws decided by the European Court of Justice (ECJ) on the issue of Human Rights and Proportionality. The next part of the paper contains a discussion on the decisions rendered by the Court of Arbitration for Sports (CAS) with regard to the issue of proportionality of sanctions imposed upon the athletes. The authors then evaluate the 4-year punishment envisaged by the WADC 2015 in relation to the Indian laws, in light of the Fundamental Rights guaranteed to the citizens of the country and the rulings by the Indian Courts on the issue of proportionality. The authors further elaborate upon the peculiar conditions and practical realities which the athletes especially those in India face. In its conclusion, the authors find that the 4-year sanction as per the WADC 2015 is not proportional in the Indian context, and thus, is liable to interference by the Courts.

II. The World Anti-Doping Codes

The WADC is a document aiming to harmonise anti-doping rules in all sports worldwide by liaising with domestic authorities and governments and setting globally acceptable standards. The WADC 2003 was the first attempt by WADA to fulfil this aim. However, the Code came across as obstinate. The Code was therefore amended after 4 years, keeping in mind the issue of inflexibility that drew attention in the *Torri Edwards* case.[2] In this case, the athlete was banned for a period of 2 years for consumption of glucose powder and being

2 Mike Morgan, 'Ensuring Proportionate Sanctions under the 2015 World Anti-Doping Code' (*Blog Symposium, ASSER International Law Centre,* 30 October 2015) <http://www.asser.nl/SportsLaw/Blog/post/blog-symposium-ensuring-proportionate-sanctions-under-the-2015-world-anti-doping-code-by-mike-morgan#_ftn2> accessed 14 May 2017.

unable to meet the thresholds of 'no fault' and 'no significant fault'.[3]

The WADC 2009 was enacted with the aim of avoiding cases like the Edwards case and to be seen as a more flexible code. Article 10.2 in the WADC 2009 envisaged a maximum sentence of 2 years for a first offence. While Article 10.5 gave the athlete an opportunity to have a reduction or elimination of this punishment, Article 10.6 of the WADC 2009 provided for an enhanced penalty of 4 years in aggravating circumstances, with the burden to prove the aggravating circumstances upon the anti-doping authorities.[4] As a matter of fact, the provision laid down under Article 10.6 was invoked in the rarest cases and it was an accepted norm that it shall be applied only in special cases involving conspiracy or common intention to dope.[5] However now, under WADC 2015, the burden of proof to avoid the enhanced sanction, in cases of prohibited substances, is upon the athlete.

Changes in Sanctions under the WADC 2015

The WADC 2015 has brought about changes in the sanctions that can be imposed by doping agencies against athletes violating its provisions. These changes were discussed and approved in the World Conference on Doping in Sport held in November 2013, and according to WADA, has the approval of athletes in a bid to punish the real cheats.[6] The WADC 2015 has implemented a stricter regime of punishment for athletes found guilty of intentional acts of doping. The focus now is on punishing the 'intentional cheats'.[7]

Under the WADC 2015 regime, Article 10.2 deals with the duration of ineligibility. The period of ineligibility has been raised to 4 years for a first offence in cases where (i) the adverse finding is in relation to a Prohibited Substance, unless the Athlete can prove before the Panel that the substance was not taken intentionally, or (ii) the adverse finding is in relation to a Specified Substance and the relevant Anti-Doping Organization can prove that the substance was taken intentionally. Further, under the allied Article 10.3, even athletes who refuse to participate in, evade or tamper with the sample collection process shall be liable under the increased ineligibility period.[8]

While the term 'intention' has been defined in Article 10.2.3 of the WADC 2015, it must

3 *Torri Edwards v IAAF & USATF* (2003) Court of Arbitration for Sport CAS OG 04/003.
4 World Anti-Doping Agency, *World Anti-Doping Code 2009* (2009).
5 *USADA v Collins* (2004) American Arbitration Association No 30 190 00658 04.
6 World Anti-Doping Agency, 'What Major Changes does the 2015 Code Include' (2015) <https://www.wada-ama.org/en/questions-answers/2015-world-anti-doping-code#item-887> accessed 14 May 2017.
7 World Anti-Doping Agency, 'Significant Changes between the 2009 Code and the 2015 Code' (Version 4.0, 2015) <https://www.wada-ama.org/sites/default/files/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf> accessed 17 May 2017.
8 World Anti-Doping Agency, *World Anti-Doping Code 2015* (2015).

be noted at the outset that the definition is vague. The Article holds that the term 'intentional' is meant to 'identify the athletes who cheat', and involves actions on the part of the Athlete or other persons despite being aware of the violation being committed, or being aware of such a risk and acting recklessly despite the knowledge.[9]

III. The 4-Year Ban under WADC 2015 vis-à-vis Proportionality

Despite its stated objectives and the methods to ensure such objectives, there have been questions raised as to the proportionality of the sanctions as envisaged under the WADC 2015. There have been various comments on the issue that a punishment of 4 years imposed on the athlete is excessive and amounts to a death-knell for the career of an athlete.[10] However, before the issues of the sanctions being disproportional can be analysed in greater detail, the doctrine of proportionality merits a brief discussion.

The doctrine of proportionality is a rule dealing with constitutional and administrative actions. The principle ordains, 'the administrative measure must not be more drastic than is necessary for attaining the desired result.'[11] As per Diplock J, 'you must not use a steam hammer to crack a nut if a nut cracker would do.'[12] This concept is considered an anvil upon which the reasonability of administrative actions must be judged, and is widely used as a part of judicial review in common law jurisdictions.

The term proportionality thus enquires into whether the legislator or administrator has made use of appropriate and the least restrictive measures to regulate the exercise of the fundamental rights of people in an attempt to ensure that the object of the legislation or administrative order is efficaciously fulfilled. The court, while deciding whether the proportionality principle has been followed, determines whether the legislature and the administrative authority have maintained a proper balance between the adverse effects that their legislation or administrative orders have on the rights, liberties or interests of persons and the purpose that was intended to be served.[13] Given the flexibility and the relative nature of the principle, the principle is applied in a case-specific manner depending upon the subject matter of the litigation.

9 ibid.

10 James Duffy, 'Proportionality of sanctions under the WADA Code: CAS jurisprudence and the need for a strict approach' (2013) 24(1) Australasian Dispute Resolution Journal 26; Mike Morgan, 'The Role Of Arbitration In Dealing With Sporting Fraud Issues' (2010) <http://www.morgansl.com/pdfs/131023SportingFraudArticleConference.pdf> accessed 14 May 2017; N Trainor, 'The 2009 WADA Code: A More Proportionate Deal for Athletes?' (2010) 8(1) Entertainment and Sports Law Journal [3].

11 Justice Anand Byrareddy, 'Proportionality vis-à-vis Irrationality in Administrative Law' (2008) 7 Supreme Court Cases (Journal) 29, 32.

12 *R v Goldsmith* [1983] 1 WLR 151, 155.

13 *Teri Oat Estates Pvt Ltd v UT, Chandigarh* (2004) 2 SCC 130.

A. European Union: Doctrine of Proportionality and Human Rights

While the principle of proportionality was not explicitly mentioned in the European Charter or any additional protocols initially.[14] However, it became recognised as a general principle of law of the European Union; meaning that it is found in various systems of law across the Union.[15] The doctrine has found its way into the Treaty on European Union, as Article 5(4), which provides that, 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. [16] The ECJ has applied the test in various circumstances to assess whether the administrative measure taken by a body is appropriate and necessary in order to reach the desired ends.

The ECJ has invoked the proportionality principle in a number of cases to balance out administrative actions against private interests and fundamental rights of individuals.[17] Accordingly, the application of the principle by the EU can be classified into three categories: i) in reviewing the EU measures, ii) in reviewing national legislations that are in derogation of the EU rights and iii) in reviewing national measures that seek to implement the EU law.[18]

Similarly, while the EC Treaty lays down fundamental freedoms, human rights were not specifically laid down in the same manner. The protection of human rights was left to the individual member states and the ECHR. However, human rights have become a general principle of EC law through the decisions of the ECJ in the *Stauder*[19] decision, wherein the ECJ held that fundamental human rights are contained within the general principles of the Community law. The principle has further evolved over various decisions,[20] and the ECJ now views the four fundamental freedoms and human rights as being integral to fundamental rights.

However, the ECJ has noted that the fundamental rights stipulated by the Court are not absolute, and restrictions can be imposed upon the rights 'provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.'[21] Similarly, in the *Connolly* decision, the ECJ noted that restrictions could be imposed upon the right of expression by the justifiable

14 Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158.
15 ibid.
16 Treaty on European Union (Maastricht Treaty) (1992) art 5(4).
17 WADA (n 6).
18 *R (On the application of Lumsdon) v Legal Services Board* [2015] UKSC 41.
19 Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.
20 Case 4/73 *Nold v Commission* [1974] ECR 491; Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125.
21 Case 5/88 *Hubert Wachauf* v Federal Republic of Germany [1989] ECR 2609.

objective of protecting the rights of others.[22]

Thus, as can be seen, while the ECJ allows restrictions upon the fundamental rights of athletes, such restrictions have to be proportionate to the intended objectives. This analysis has been confirmed by the decisions of the ECJ relating to sports.

Sport is not a subject matter upon which EU can specifically legislate and the EU can only regulate sporting activities insofar as it is an economic activity within the meaning of the term under the (erstwhile) Article 2 of the EC Treaty. This deference was evident in the initial sports related decisions by the ECJ.

In the decision of *Walrave and Koch*, a case of discrimination on the basis of nationality, the ECJ held that the EU law did not apply to rules that were purely sporting in nature.[23] Thus, the ECJ carved out a 'sporting exception' to the EU law, which was interpreted to mean that the ECJ would not interfere unless such rules were disproportionate and not limited to their stated objective.[24]

However, the landscape of such interpretation changed subsequent to the landmark *MecaMedina* judgment.[25] The decision came about due to a challenge to the WADA Anti-Doping Rules by two swimmers who had challenged the proportionality of the sanction imposed on them. While the ECJ found the sanctions to be proportional, it noted that sporting competitions are bound by the laws of the European Union, especially Article 81 of the EC as 'the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable … are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events.'[26] The Court noted that the mere fact of a rule being purely sporting in nature did not exclude it from the scope of the Treaty. Thus, in order to justify the sanctions under EU Law, WADA must show that the prohibitions envisaged have a legitimate object and 'are limited to what was necessary to ensure the proper conduct of competitive sport'.[27]

B. CAS Decisions pertaining to the issue of Proportionality

The Court of Arbitration for Sports (CAS) has noted the need for proportionality of

22 Case C-274/99P *Bernard Connolly v Commission of the European Communities* [2001] ECR I-1611.

23 Case 36/74 *Walrave and Koch v Union Cycliste Internationale* [1974] ECR 1405.

24 Samuli Miettinen and Richard Parrish, 'Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)' (2007) 5(2) Entertainment and Sports Law Journal 12.

25 *David Meca-Medina and Majcen v Commission of the European Communities* [2006] 5 CMLR 18.

26 ibid.

27 ibid.

sanctions in a number of awards. This principle had been noted even prior to the enactment of WADC.[28] Subsequent to the enactment of the WADC and the inbuilt mechanism for the reduction of sanctions, the CAS has noted the need for the Panel to measure the sanctions laid down in the Code in terms of proportionality to the peculiarities of each case. The CAS Panel in the case of *Squizzato* noted that:

> The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules. They are still – like before – regulations of an association which cannot (directly or indirectly) replace fundamental and general legal principles like the doctrine of proportionality a priori for every thinkable case.[29]

The decision of CAS with regard to proportionality in *Mariano Puerta*[30] is the most celebrated decision to date. In this case the CAS Panel reduced the sentence from 8 years to 2 years for a second doping offence, upon finding that Mariano Puerta had inadvertently ingested a banned substance before a match while drinking from a glass in which his wife had poured medicines for herself. The Panel found that an 8-year sanction upon the athlete for the offence was not proportionate in the circumstances and there was a gap filling exercise that the Panel was required to undertake. In arriving at the decision, the Panel also noted that an eight year ban would be tantamount to a lifetime ban: 'An eight years ban would mean the end of his career as professional player and the forfeiture of all earning potential, his only livelihood.'[31]

In the case of *Katrin Krabbe*,[32] the IAAF had given the athlete an enhanced sentence of 3 years and 9 months for the use of a drug that was not prohibited at the time the athlete had used it. The German Athletic Federation had already handed her a year-long suspension for unsporting conduct. Further, the athlete had not been afforded a right to present her case before the IAAF Panel. In such circumstances, the German court found the duration of enhanced sentence to be disproportionate.[33] Thus, with the enhanced punishment in the 2015 Code, there are serious questions as to whether or not the 4-year ban would be held to be justified.

IV. Proportionality of a 4-Year Ban in Context of India

The provisions of the 2015 WADA Code have been incorporated by the National Anti-

28 *Foschi v FINA* (1996) Court of Arbitration for Sport CAS 1996/56; *Baxter v FIS* (2002) Court of Arbitration for Sport CAS 2002/A/396; *B v Fina* (2001) Court of Arbitration for Sport CAS 2001/A/337.

29 *G Squizzato v FINA* (2005) Court of Arbitration for Sport CAS 2005/A/830 [10.24].

30 *Mariano Puerta v International Tennis Federation* (2006) Court of Arbitration for Sport CAS 2006/A/1025.

31 ibid.

32 *Katrin Krabbe* v *IAAF et al* SpuRt 1995, 161 (LG Munich).

33 ibid.

Doping Agency of India (NADA) as the Anti Doping Rules of NADA 2015. In the preface of the Rules, it is noted that the Rules are:

> …aimed at enforcing anti-doping principles in a global and harmonised manner, they are distinct in nature from civil and criminal laws, and are not intended to be subject to or limited by any national requirements and legal standards applicable to criminal or civil proceedings.[34]

However, despite the above stated rhetoric, the fact remains that these sanctions will be governed by the concerned principles in the nation. This is clear from the fact that WADA itself is concerned about the WADC falling afoul of the EU law, which is reflected in the fact the it has regularly sought opinions from EU upon the provisions of the WADC.

It is pertinent to note that Part III of the Indian Constitution guarantees its citizens certain basic rights in the form of certain 'fundamental rights'. The fundamental right under Article 19(1)(g) provides the citizens the right to 'practise any profession, or to carry on any occupation, trade or business',[35] subject to the reasonable restrictions which can be imposed by the State for the benefit of the general public.[36]

In the context of sanctions imposed upon athletes by NADA, while the penalty imposed under the doping regulation certainly affects the right of the athlete to practice his or her profession as guaranteed by the Constitution, a ban for using the prohibited substances can be justified on various grounds. Firstly, sports regulating authorities and sportspersons are required to have a clean image in public as they are role models, particularly for young fans, who have impressionable minds. Secondly, doping has harmful effects on the health of the athlete which they are often unaware of, and the sporting authorities have a responsibility to ensure that their health is not affected by such usage. Thirdly, doping affects the rights of the other athletes who are participating in the competition as it gives an unfair advantage and destroys a level-playing field. However, despite this, it is undeniable that the sanction imposed upon the athlete must be reasonable and proportional to the intended objective.

The Supreme Court of India in various cases has dealt with the principle of proportionality. The doctrine was explicitly accepted as a part of the Indian legal system for the first time in *Om Kumar v Union of India.* The Court noted:

> Administrative action in India affecting fundamental freedoms has always been tested on the anvil of 'proportionality' in the last fifty years even

34 National Anti-Doping Agency, India, 'Preface, The Anti-Doping Rules 2015' (2015) <http://www.nada.nic.in/View/Downloads/writereaddata/NADA_Anti_Doping_Rules_2015.pdf> accessed 14 May 2017.

35 Constitution of India 1950, art 19(1)(g).

36 Constitution of India 1950, art 19(6).

> though it has not been expressly stated that the principle that is applied is the 'proportionality' principle… There are hundreds of cases dealt with by our courts. In all these matters, the proportionality of administrative action affecting the freedoms under Art. 19(1) or Art. 21 has been trusted by the courts as a primary reviewing authority and not on the basis of Wednesbury principles. It may be that the courts did not call this proportionality but it really was.[37]

The Court applied the principle in various cases to check that the action proposed to be taken is in consonance with the object sought to be achieved. In the case of *Bhagat Ram v State of HP*,[38] a forest guard allowed the illegal felling of trees. While compensation had been paid for the illegal felling by the person concerned, a disciplinary inquiry was initiated against the forest guard for being involved in the illicit felling of trees, which had caused loss to the Government and amounted to negligence in the performance of his duties. The inquiry found the guard guilty of the same and was removed from service. However, upon appeal, the Supreme Court, observed that: '…the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would violate Article 14…',[39] and overturned the decision to remove the guard from service.

Similarly, in the case of *Ranjit Thakur v Union of India*,[40] a signalman in the Army who was already serving a punishment for insubordination, refused to eat his food despite being directly ordered to do so. Due to this act, the signalman was tried for summary court martial and was removed from service. On appeal, Supreme Court referred to the landmark decision by Lord Diplock in *Council for Civil Services Union v Minister of Civil Service* and held:

> A sentence should not be so disproportionate to the offence as to shock the conscience and that the doctrine of proportionality would ensure that if a decision of the court even as to sentence is an outrageous defiance of logic, then it was not immune from correction.[41]

While the above list of cases includes civil matters, Indian courts have also played an extremely proactive role in governing and rebuking sports bodies whenever they have acted arbitrarily. This is unlike the United Kingdom, where the courts have been hesitant to interfere in the functioning and decisions of such bodies.[42] Indian courts in a series of

37 *Omkumar v Union of India* AIR 2000 SC 3689 [53].
38 *Bhagat Ram v State of Himachal Pradesh and Ors* AIR 1983 SC 454.
39 ibid [15].
40 *Ranjit Thakur v Union of India and Ors* 1987 AIR 2386.
41 ibid [25].
42 *R v Disciplinary Committee of the Jockey Club, ex p The Aga Khan* [1992] EWCA Civ 7; *R (Mullins) v Appeal Board of the Jockey Club* Reference [2005] EWHC 2197 (Admin).

decisions have held that the National Sports Federations are amenable to the writ jurisdiction of the High Courts as they are performing public function.[43] NADA has been established by the Government of India with 'the objective of acting as the independent Anti-Doping Organization for India having a vision of dope free sports'. Further, the Minister for Youth Affairs and Sports is also the ex-officio member of the body in his official capacity. Thus, it cannot be denied that it is performing a public function and lies within the writ jurisdiction of the High Courts. In such circumstances, especially in cases of severe punishment, the courts will not hesitate to interfere for the purpose of protecting athletes from a sanction which Courts deem to be disproportionate.

From the perspective of Indian Athletes

The challenge of doping scandals is not new for administrators of sports in India. In fact, rhe problem only seems to be increasing every year.[44] India has been ranked third in the 2013 Anti-Doping Rule Violations Report released by WADA, after Russia and China, for the maximum number of doping scandals.[45] While it cannot be denied that intent to cheat is a major reason for the increase in the violations, a major and inherent reason behind these violations is also the humble background of the athletes and the lack of education regarding doping and its harmful effects. It is a direct result of the insufficient efforts being made by authorities to spread awareness among athletes in the country. On a perusal of the various cases before the NADA, it can be clearly seen that the NADA is not undertaking the education of athletes and other persons as robustly as is required, which puts Indian athletes at a greater risk of committing Anti-Doping rule violations in the face of the stricter anti-doping regime. Even the Appellate Tribunal of NADA has lamented the situation.[46] It is therefore disputed whether the imposition of such stringent sanctions would be proportional in such conditions.

Athletes, by taking part in competitions, undertake a responsibility to understand the relevant provisions. However, it is extremely questionable for such onerous responsibilities to be imposed upon the athletes only, given the ground realities in the country. It is the athlete who suffers the adverse consequences of being caught unaware due to NADA failing in its obligation of spreading awareness, while the NADA itself is not as such affected in any manner.

Another major reason to question the proportionality of the duration of the sanction is

43 *Board of Control for Cricket in India v Cricket Association of Bihar and Ors* (2016) 8 SCC 535; *Zee Telefilms Ltd v Union Of India* (2005) 4 SCC 649; *Ajay Jadeja v Union Of India* 95 (2002) DLT 14.

44 NADA, 'List of Sportspersons Banned', <http://www.nada.nic.in/View/Downloads/writereaddata/List%20of%20sportspersons%20banned%20by%20ADDP%20New.pdf> accessed 14 May 2017.

45 World Anti-Doping Agency, '2013 Anti-Doping Testing Figures Report' (2015) <https://www.wada-ama.org/en/resources/laboratories/anti-doping-testing-figures> accessed 14 May 2017.

46 *WADA v Kavita Chaudhary* (2011) Anti-Doping Appeal Panel Appeal No. ADAP/01/2011.

the fact that most athletes have an awfully small career span. Several studies have classified the career of a professional athlete into three phases: the initiation, the development and the mastery stage.[47] The last of these stages: the mastery stage is where the elite athletes are and those in the development stage seek to be. Even though the total duration of this stage differs depending upon the sport in question, generally, the duration of this stage is extremely small as compared to other careers. Studies have shown that the average duration of the career of an elite athlete in the traditional US sports: baseball, ice hockey, football, and basketball is between 4 to 7 years.[48] On the other hand, the average career span of Olympic athletes is between 10 to 15 years.[49] In fact, most elite gymnasts retire by the age of 19.[50] Thus, a ban of 4 years would effectively mean a life ban and end the career of the athlete at the elite level. This aspect was even noted in the Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes. In context of Article 10.6 of the 2007 Code, which deals with the provision of an enhanced sentence of 4 years, the Opinion notes '… one should bear in mind that a four-year ban would most often put an end to an athlete's (high level) career and thus be tantamount to a life ban…'[51] Further, other authors had also opined that the duration of two years should be the maximum intrusion upon the rights of the athletes in the case of the first sanction.[52]

It would be highly unjust if athletes suffer irreparable damage to their career and are forced to forego their means of livelihood due to a sanction that is brought about because of a lack of education and means to gain knowledge about banned substances, as most of them lack access to even basics like the Internet. It must also be remembered that doping sanctions by

47 Benjamin Bloom, *Developing Talent in Young People* (Ballantine Books 1985), as cited in Paul Wylleman & David Lavallee, 'A Developmental Perspective On Transitions Faced By Athletes' in M Weiss (ed), *Developmental Sport And Exercise Psychology: A Lifespan Perspective* (2004) 507-527.

48 WM Leonard, 'The Odds Of Transiting From One Level Of Sports Participation To Another' (1996) 13 Sociology of Sport Journal 3, as cited in Paul Wylleman & David Lavallee, 'A Developmental Perspective On Transitions Faced By Athletes' in M Weiss (ed), *Developmental Sport And Exercise Psychology: A Lifespan Perspective* (2004) 507-527.

49 P Wylleman, P De Knop, H Menkehorst, M Theeboom & J Annerel, 'Career Termination and Social Integration among Elite Athletes' in S. Serpa, J Alves, V Ferreira & A Paula-Brito (eds), *Proceedings of the VIII World Congress of Sport Psychology* (1993) (902-906); Also See S Nagel, A Conzelmann & H Gabler,*Hochleistungssport: Persönlicher gewinn oder Verlust. Lebenslaufe van Olympioniken* [Elite-level sport: Personal success or loss. Life of Olympians] (Tübingen 2001).

50 G Kerr and A Dacyshyn, 'The retirement experiences of elite, female gymnasts' (2000) 12 Journal of Applied Sport Psychology 115, 117.

51 G. Kaufmann-Kohler and Antonio Rigozzi, 'Legal Opinion on the Conformity of Article 10.6 of the 2007 Draft World Anti-Doping Code with the Fundamental Rights of Athletes' (World Anti-Doping Agency, 2007).

52 Mike Morgan, 'The Role of Arbitration in Dealing with Sporting Fraud Issues' (*Morgan Sports Law LLP,* 2010) <http://www.morgansl.com/pdfs/131023SportingFraudArticleConference.pdf> accessed 14 May 2017.

themselves are harsh on the athletes in India, as they lose governmental aid and sponsors that do not wish to be seen connected to tainted athletes.[53] Also, anti-doping proceedings in India sometimes extend beyond the period of maximum sanction for an offense and in cases where the athlete has obtained employment under sports quota; they do not get paid in their jobs during provisional suspension.[54] A prolonged sanction is therefore not in proportion with the object sought to be achieved as it is highly likely to end the athlete's professional career, and would impact his fundamental right to practice any profession, occupation, trade or business.

It is therefore evident that such circumstances require the principle of proportionality to be read into the sanctions envisaged by the WADC. As noted in the ECJ's decision in the Meca-Medina case, the two requirements of the proportionality principle are (a) capacity, which means that any restriction must be suitable to achieve the aim it pursues, i.e. deterring the athletes from doping and (b) necessity, which implies that no less intrusive restrictions are equally suitable to achieve the legitimate aim pursued.[55]

Thus, reading both the requirements together, the rule that emerges is that while the eradication of doping is a legitimate aim, rules that are made in order to combat the same must not go beyond what is necessary. In case the rules go what is beyond necessary, they would be considered to be disproportionate and may even be held to be a violation of the fundamental rights of the parties. After taking into consideration the reasons stated above – given the lack of education among Indian athletes, the lack of means to obtain relevant information and the level of contamination in products sold in the country, along with the short duration of an athlete's career – a 4-year ban is a disaster waiting to strike Indian athletes.

V. Conclusion

It is undeniable that anti-doping measures are an essential element in modern day sports to protect the health of athletes and to ensure that they compete on a level playing field that maintains the uncertainty and the charm of sporting events. The authors are sympathetic to the problems faced by anti-doping agencies in their efforts to combat doping in light of advanced technologies and research on sophisticated doping mechanisms available to athletes. They also laud the effort of WADA to curb doping in sports. Given how the anti-doping agencies are mostly playing catch-up to such methods, stringent systems are often necessitated to ensure fair competitions. However, the agencies cannot forget that the measures taken by them have to be proportional to the objective of reducing doping in sports and must balance the rights of the athletes.

53 Bill Wilson, 'Doping in sport: Counting the cost' *BBC News* (London, 17 March 2013) <http://www.bbc.com/news/business-21782447> accessed 14 May 2017.

54 *NADA v Saurabh Vij* (Pending) Anti-Doping Disciplinary Panel Case No. 23 ADDP.04.2012.

55 *Meca-Medina* (n 25).

While the WADC 2015 asserts that it 'has been drafted giving consideration to the principles of proportionality and human rights',[56] the authors do not believe that the enhanced punishment serves the intended purpose as it adversely affects the rights of athletes beyond the stated objective. If a challenge is made upon the length of the duration of the sanction, it is highly likely that the 4-year sanction would be declared disproportionate. The authors derive the backing for this from the ECJ and the Indian Courts' decisions on the doctrine of proportionality, along with the interventionist attitude of Indian courts in protecting the rights of the athletes vis-à-vis the sports governing bodies. Given that a 4-year sanction would have the effect of ending an athlete's professional career, such a sanction is certainly questionable. Furthermore with the practical realities of India, where athletes often being illiterate are unable to understand the demands of the anti-doping rules, and the fact that most of them are heavily reliant on sports to earn a living for themselves and their families, it would not be surprising to see interferences by Indian courts in such matters.

The term 'intent' that has been emphasized in WADC 2015 has a fairly broad scope and the burden of proving 'no intention' in cases of prohibited substances is on the athlete. This clearly exposes the athlete to the risk of a career-ending sanction. Therefore, the manner in which this burden of proof is applied by the Anti-Doping Tribunals will be critical.

In the case of a 4-year ban, it would be noteworthy to witness the eventual method chosen by the courts and how WADA reacts to such a ruling. The court could remand the case back to the Anti-Doping Panel for a de-novo hearing on a case-to-case basis, and thus remain deferential to the WADC. However, they could also declare the rule in itself to be per-se unconstitutional due to the violation of the fundamental rights of athletes. While the latter declaration would put India at odds with the global regime, it is not a scenario that is unprecedented, in light of the recent Pechstein ruling.

Instead of enhancing the punishment for athletes and looking at punishing the player support staff such as coaches, the WADA's focus must now shift to the anti-doping agencies themselves and the role played by them in educating athletes about the relevant rules relating to doping and the necessity of fair play in a competition.

Another aspect the WADA must concentrate upon is the formation of the Anti-Doping Agency Panels and monitoring the same. The increased scope of sanction must only be applied in cases of intentional cheats, and persons entrusted with the responsibility must therefore be experts in the field and well-versed with the provisions of the Code, which is often not the case in India. It is important for the panel to be able to identify what may be classified as 'intent' and not punish athletes that have merely been careless or caught unaware. Importance should

56 World Anti-Doping Agency, 'Purpose, Scope and Organization of the World Anti-Doping Program and the Code' (*World Anti-Doping Code, 2015)*.

also be given to the amount of prohibited substance found in the body. For instance, in the case of Shoaib Akhtar, a cricketer, the nandrolone found in his body was close to 15 ng/ml, which was significantly above the permitted level of 2ng/ml, and portrays a higher likelihood of an intention to cheat versus an athlete who may have only marginally higher levels of nandrolone.[57]

Thus, it would be more advisable for WADA to bring about such changes in the Code, balancing the need for a robust anti-doping regime with the careers and the fundamental rights of athletes, along with the practical realities facing the athletes, especially those coming from developing nations.

57 Peter Charlish, 'Cricket pair "not out" in doping row' (2007) 7(4) International Sports Law Review.

NOTE

COMMENTS ON THE DIPP DISCUSSION PAPER ON STANDARD-ESSENTIAL PATENTS AND THEIR AVAILABILITY ON FRAND TERMS

Yogesh Pai*

In 2016, the Department of Industrial Policy and Promotion, Ministry of Commerce, Government of India, floated a discussion paper on 'Standard-essential Patents and their Availability on FRAND Terms'. While litigation in this area has been ongoing for last few years in India, the sudden move by the DIPP in issuing a discussion paper surprised many. Although DIPP stated that the discussion paper was floated with an objective of 'inviting views and suggestions from the public at large to develop a suitable policy framework to define the obligations of Essential Patent holders and their licensees', it was not clear how an executive/administrative intervention could be done as a matter of both law and policy. It is so; especially in the light of the fact that, several judicial forums were already seized of the matters, which the DIPP paper termed as 'issues for resolution'. This note is a response submitted to the DIPP. The comments highlight that caution must be exercised and more empirical based studies must be relied on before assuming that there are immediate policy changes that need to be made. It is submitted that the DIPP must exercise caution in making strong policy interventions in the very dynamic context of innovation and technical change. It is further submitted that policy makers ought to defer to the prevailing statutory framework, regulatory and judicial scrutiny before making irreversible policy changes. It is the opinion of the author that such a deference thesis will help the Government of India to make the right policy changes, wherever needed, and yet save it from making incorrect policy decisions.

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I. Introduction

At the outset, I welcome the initiative by the DIPP, Ministry of Commerce and Industry, Government of India for inviting public comments on the 'Discussion Paper on Standard-Essential Patents and their Availability on FRAND Terms' (hereinafter: discussion paper).[1] This topic has profound implications in achieving the goals of promoting technological innovation and growth in sectors of vital importance, including the wider dissemination of technology products among Indian consumers, especially in network driven industries. Litigation involving Standard-Essential Patents (SEPs) from across the globe has highlighted the complexity of the underlying business models and how they may impact the goals of innovation, economic efficiency and consumer welfare.

I take this opportunity to contribute towards a nuanced and informed discourse on this pertinent topic by offering my preliminary views and comments, both on the content and the methodology adopted in the discussion paper. My submission is based on an objective understanding of the current state of law and its evolving contours in the context of global litigation and practice in the area of SEPs. Although the comments sought in the discussion paper pertain to thirteen "issues for resolution" identified therein, I wish to emphasise that this note is limited to the overall content of the discussion paper, its methodology (or lack thereof), and the nature of questions and outcomes highlighted in the paper for the reasons mentioned below.

It appears from the discussion paper that it has made *a priori* assumptions of actual policy misalignment or incoherence by bringing out a list of 'issues for resolution'. This is a very simplistic approach for identifying policy issues for resolution, especially in an area where there is significant amount of unsettled litigation and diverging scholarly literature. Such litigation is primarily due to breakdown in patent licensing negotiations among market participants and competitors, and hence, it would be pre-mature to classify all or some of those issues as essentially policy issues requiring legislative interventions.[2] It is important to examine the causes that lead to such issues, and take note of comparative jurisdictions where governments have refrained from direct policy action (either legislative/executive action) in order 'to develop a suitable policy framework to define the obligations of Essential Patent holders and their licensees', which is amongst the stated objectives of the discussion paper.[3] It is not clear from the discussion paper as to what policy concerns are sought to be resolved.[4]

1 Department of Industrial Policy and Promotion, *Discussion Paper on Standard-essential Patents and their Availability on FRAND Terms*, (Ministry of Commerce and Industry, 2016) <http://dipp.nic.in/english/Discuss_paper/standardEssentialPaper_01March2016.pdf> (Standard-essential Patents and their Availability on FRAND Terms).

2 ibid 26-27.

3 ibid 4.

4 ibid. The discussion paper broadly states that 'the department hopes to take a step forward towards

For example, is it the case that there has been harm to innovation, competition or consumer welfare in any particular industry or sector? Essentially, what specific policy concerns are the highlighted issues for resolution in the discussion paper wedded to?

In a discussion paper that seeks to ascertain and influence the policy landscape in the area of standard-essential patents, it would be important to adopt and clarify the methodologies used in arriving at the specific policy questions raised. The discussion paper is limited in its approach and is broadly based on speculative information collated from different sources, rather than evidence-based studies that delve in to the relative merits of identifying those specific issues from a policy-based perspective as such. Importantly, the discussion paper has not adduced empirical evidence in the Indian context that should ideally form the basis for determining the necessity for policy interventions and the need to influence certain specific policy outcomes. In fact, the discussion paper has requested empirical evidence by way of public comments. In the interest of fairness and openness, it would be important that such empirical studies must be sponsored by the Government of India, rather than relying on uncontested data. A simplistic approach toward developing a policy framework lacking in empirical evidence is highly conjectural, and may lead to policy interventions based on false positives. Faith-based intellectual property protection or antitrust interventions can do more harm than good.[5]

On many occasions, the discussion paper has failed to appreciate the actual import of the nature of legal requirements, which has led to mischaracterisation of legal propositions that flow from relevant statutes and case laws in India. This may have led to certain incorrect assumptions about the potential role of the government in resolving issues in this area by identifying them as 'policy-based' concerns. The questions raised in the discussion paper presume that a lot could be achieved through government intervention, notwithstanding that there is ongoing litigation in several forums in India and abroad, and that there is a robust judicial/regulatory mechanism to adjudicate these pertinent legal issues. Such an approach may unduly pre-empt or influence judicial decision making, which is the preferred forum for resolving issues involved in the current spate of high-stakes SEPs litigation. It is futile to presume that different aspects of the issues for resolution as highlighted in the discussion paper, which are currently being litigated indifferent forums, are in themselves policy concerns, and that our courts and regulatory agencies may not be in a position to resolve them in a time-bound and efficient manner.

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achieving the national development and technological goals by protecting private Intellectual Property Rights while securing interest of public at large.' However, it fails to contextualise the goals and what concerns must inform the policy changes in the SEPs environment.

5 Mark A Lemley, 'Faith-Based Intellectual Property', (2015) 62 UCLA Law Review 1328. See, Joshua D Wright, 'Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust' (2012) 78 Antitrust Law Journal, 241-271.

As highlighted above, although much is left to be desired in terms of the approach adopted in the discussion paper and the outcomes that it seeks to influence, it is bound to open up the current issues surrounding SEPs litigation to a broader audience of policy specialists. The comments below highlight that caution must be exercised and more empirical based studies must be relied on before assuming that there are immediate policy changes that need to be made. In this regard, the author requests the DIPP to exercise caution in making strong policy interventions in the very dynamic context of innovation and technical change. It is respectfully submitted that policy makers ought to defer to the prevailing statutory framework, regulatory and judicial scrutiny before making irreversible policy changes. It is the opinion of the author that such a deference thesis will help the Government of India to make the right policy changes, wherever needed, and yet save it from making incorrect policy decisions.

II. Deference to Empirical Evidence Identifying Competitive Harm by Studying the Dynamic Nature of Competition in Network-Based Industries Driven by Standardisation

It must be noted that collaboratively set standards are voluntary. They derive market legitimacy precisely because such technical standards are set through detailed processes laid down by the SSOs (Standard-Setting Organisations), by examining their relative technical merits, and on the condition that the patent holder will comply with SSO IP policies.[6] Evidence involving the nature and degree of competition between technical standards and how they can substitute or replace earlier standards can have a profound impact on competition in network industries driven by standardisation.[7] Even assuming that a patent holder is engaged in allegedly anti-competitive conduct, jurisdictions across the world are capable of reigning in such practices through antitrust laws on a finding of competitive harm.[8] However, evidence on how market players in the SSOs could cause harm to competition must form the rational basis for any policy intervention.

SSO IP policies place restraints on the ability of SEP holders to refuse licences by requiring disclosure of all essential patents and imposing FRAND obligations for all essential patents. Hence, SEP holders are bound by their SSO commitments to offer a licence at a fair, reasonable, and non-discriminatory rate. Consequently, a refusal to negotiate a licence may amount to violation of the SEP holder's FRAND obligation, and as a result, essential patents

6 R Bekkers and A Updegrove, 'A study of IPR policies and practices of a representative group of Standards Setting Organizations worldwide' (2012) US National Academies of Science, Board of Science, Technology, and Economic Policy.

7 K. Gupta, 'Technology Standards and Competition in the Mobile Wireless Industry' (2015) 22 George Mason Law Review 865.

8 *Rambus v FTC* [2008] 522 F 3d 456. The D.C. Circuit stated that an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition.

cannot be seen as resulting in a closely held oligopoly. Similarly, implementers must be free to challenge patent validity and to institute suits for specific performance of FRAND obligations. Bargaining power to negotiate licences for both parties must be equally secured. This aspect has not been examined in detail in the discussion paper. Moreover, the countervailing power which might dissuade patent holders from engaging in potential holdups is due to the very fact that a specific patent may only correspond to a particular standard, which often is the only market where the patent holders technology may have value.[9]

The discussion paper relies on a general understanding of patent holdup and royalty stacking from a theoretical perspective, in as much as involving the 'ability of a holder of a SEP to demand more than the value of its patented technology and to attempt to capture the value of the standard itself is referred to as patent "hold-up"'.[10] It may be noted that while courts in comparative jurisdictions have calculated FRAND royalties lower than those demanded during negotiations, it is doubtful if demand for higher royalties has in itself led to systemic and widespread issues of royalty-stacking.[11] Unless the actual rates at which licences get finally negotiated are known to cause competitive harm, the question of whether or not the demanded royalties were unreasonable by merely looking into the difference between FRAND royalties pegged by the court vis-à-vis negotiated royalties *simpliciter*, may not provide an accurate picture.

Recent empirical evidence has shown that in comparison with non-SEP intensive industries, consumer prices in SEP-intensive industries decline much more rapidly.[12] Such

9 Ginsburg et al, 'The Troubling Use of Antitrust to Regulate FRAND Licensing' (2015) 10(1) CPI Antitrust Chronicle.

10 *Microsoft v Motorola* [2012] 696 F.3d 872 explaining the concept of patent hold-up: 'In theory, once a standard has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties from suppliers of standard-compliant products and services. This problem is a form of "patent holdup."'

11 It may be noted that the Indian courts have not significantly brought down the royalty rates in awarding interim remedies in comparison to what was being demanded. See *Ericsson v Intex* [2014] IA No 6735/2014 in CS (OS) No 1045/ 2014. However, the difference in royalties demanded by SEP holders vis-à-vis court mandated royalties are itself controversial. See Anne Layne-Farrar &Koren W. Wong- Ervin, 'An 'Analysis of the Federal Circuit's Decision in Ericsson v D-Link', (2015) CPI Antitrust Chronicle <http://www.crai.com/sites/default/files/publications/An-Analysis-of-the-Federal-Circuits-Decision-in-Ericsson-v-D-Link.pdf> (noting that the way FRAND is calculated may itself be questionable,and explaining the Circuit court's rejection of the approach taken by earlier district courts).

12 Devlin Hartline & Matthew Barblan, 'Debunking the Royalty Stacking Theory: Real-World Evidence From the Mobile Wireless Industry' (2016) Centre for Protection of IP, George Mason University (January 2016). Also see Alexander Galetovic & Kirti Gupta, 'Royalty Stacking and Standard Essential Patents: Theory and Evidence from the World Mobile Wireless Industry' (Hoover IP2, Working Paper No. 15012, 1 May 2015) <http://hooverip2.org/wp-content/uploads/ip2-wp15012-paper.pdf>.

empirical studies must be taken into consideration in the Indian context to identify the nature of concentration and pricing in SEPs driven products. In fact, it is highly recommended that the DIPP institutes empirically grounded market-based studies to examine and understand the nature of competition in network driven industries implicated by standards. It would also be useful to investigate if there is hold-up by virtue of any court in India having granted an injunction in favour of patent holders.[13] Such empirically grounded research must form the basis for policy based interventions, whereas the discussion paper lacks citations or mention of such existing evidence. An evidence based empirical approach will be a useful starting point to bring out policy changes, if and when necessary.

III. Deference to SSO IP Obligations Rather than Direct Policy Interventions or Legislative Action

Since SSOs are bound to be member driven organisations, their IPR policies are generally reflective of their members' concerns over the nature and content of SSOs IPR policy obligations.[14] The common denominator in all SSO IP policies has been the requirement for patent holders to disclose all patents (pending applications/granted) essential to a particular standard, and a commitment to offer a license for such declared patents on Royalty Free (RF) or on Fair, Reasonable and Non-Discriminatory (FRAND) terms.[15] TSDSI led consultation has incorporated similar policies with respect to IPR obligations resonating other leading SSOs from across the globe.[16]

The nature of relationship between patent holders and SSOs has been the subject of some debate among scholars. Some scholars have argued that the nature of the relationship between patent holders and SSOs must be viewed through the theoretical prism of 'market reliance' standard, and that patents subject to such transactions must be treated as pledges and not as an offer to negotiate licences.[17] It is important to note that there is no statutory requirement (either in patent law or as an obligation under competition law) to treat SEPs differently from other patents. This is especially true in light of the nature of exclusionary rights and contractual freedoms flowing from patents and contract law, which place no such encumbrance on the patent holders requiring them to treat their SSO level commitments as patent pledges essential to the standard. It is not clear what legal justification the Government can rely on to intervene

13 To the knowledge of the author, there is no instance of ongoing injunction against any implementer in India. See 'An Update of Standard Essential Patent Litigation in India' (Software Freedom Law Centre, June 2015) <http://sflc.in/an-overview-of-standard-essential-patent-litigations-in-india/>.

14 Beckers and Updegrove (n 6).

15 ibid.

16 See Telecom Standards Development Society India, *Intellectual Property Rights Policy* (2009) <http://www.tsdsi.org/media/Help/2014-12-17/TSDSI-PLD-40-V1.0.0-20141217.pdf>; Also see IPR policies of ETSI, ARIB, and 3GPP etc.

17 Jorge L. Contreras, 'A Market Reliance Theory for FRAND Commitments and Other Patent Pledges' (2015) Utah Law Review 479.

in defining the nature of contractual relationship amongst members, and between members and SSOs, except otherwise by subjecting them to scrutiny under competition law when there is a specific harm to competition. Moreover, the fact that SEPs holders' IP obligation flows from contractual relationship has already been recognised by courts in comparative jurisdictions.[18]

Interestingly, encumbering a patent holder's exercise of his rights by implementing policy changes beyond the rights and obligations of patent holders and their SSO commitments have not been addressed in adversarial proceedings (perhaps owing to its policy nature and that it lacks legal basis deriving from existing provisions in the law). Rather, the relationships between SSOs and patent holders has been upheld by courts on the basis of the principles of contract law, even holding implementers as third party beneficiaries and enforcing their claim for specific performance of the commitments made by patent holders at SSOs.[19] Furthermore, in the Indian context, there is also a lack of clarity on whether the FRAND obligations are akin to a mere offer to licence, in as much as Indian jurisprudence on privity of contract does not recognise the rights of third party beneficiaries to a contract.[20]

It would be desirable for SSOs to increase the transparency and accountability in the standard setting process, in ensuring that the commitments offered by patent holders flow to their assignees subject to legal requirements of laws in force. However, SSOs have generally refrained from imposing ex-ante restrictions on the freedom of the parties by limiting injunctive relief or by requiring compliance to obligations beyond FRAND that inevitably impose constraints on the ability of SEP holders to negotiate a licence based on market conditions.[21] As discussed earlier, evidence of widespread injunctions that block

18 *Innovatio* 2013 WL 5593609; *Microsoft Corp v Motorola* 854 F Supp 2d; *Apple, Inc. v Motorola Mobility* 886 F Supp 2d.

19 In the Opinion of Judge Robart in the case of *Microsoft v Motorola* [2012] 696 F.3d 872, 878 is the concept of a contract between the SEP owners and the Standard Setting Organisations with the standard implementers having sufficient interest in the contract as third party beneficiaries.

20 In India, the decision of the Supreme Court in *MC Chacko v State Bank of Travancore* AIR 1970 SC 504, categorically bars third parties to enforce the contracts to which they are not a party. Considering the views regarding the legal nature of FRAND, it would be certainly difficult for the standard implementers in India who would invariably be affected by an infringement action bought by the patentee but may not possess the countervailing power to demand specific performance of FRAND. UK, for instance, has enacted the Contracts (Rights of Third Parties) Act 1999 which gives rights and imposes liabilities on the third party beneficiaries. Hence, it becomes incumbent for the relevant stakeholders to determine the legal nature of FRAND in context of Indian Contract Act 1872.

21 Recent departure from this position of non-intervention by SSOs is the change in IEEE IPR policy. These changes have been quite controversial in as much as they seek to impose price constraints on the ability of patent holders to negotiate license on FRAND terms flowing from the SSPPU approach. While the DOJ issued a Business Review Letter that has deferred to IEEE changes, it has specifically noted that [T]he Department's task in the business review process is to advise the requesting party of the Department's present antitrust enforcement intentions regarding the proposed conduct. It is not the Department's role to assess whether IEEE's policy choices are right for IEEE as a standards-setting organization (SSO). SSOs develop and adjust patent policies to best

implementation of standards and/or royalty-stacking leading to competitive harm is yet to be tested in the Indian context through data. Moreover, limiting the availability of injunctive relief as a matter of ex-ante policy will eschew those cases where the dispute has arisen as a result of an 'unwilling licensee'.

The four-factor equitable test applied while granting injunctive relief accounts for fact specific situations and has statutory basis, which must not be readily interfered with. Importantly, changes that skew the bargaining power of parties while negotiating licences, especially where constraints are placed on patent holders that fail to account for market realities, runs the risk of replacing market-based valuation of patents on FRAND with an inaccurate valuation that may not correspond to value created by products implementing SEPs. This, in turn, could lead to competitive harm.

In fact, as argued by some commentators, SSOs that influence market-based conditions for pricing of SEPs may be subject to rigorous scrutiny under competition law.[22] Similarly, other commentators have viewed collective attempts by implementers to fix prices with suspicion.[23] However, since SSOs are member driven organisations, governments must refrain from direct legislative interventions to regulate IPR policies of SSOs.

It is also worth noting that there is very limited role for the Government of India to make policy changes in order to influence standardisation activities that are undertaken by different SSOs across the globe. Even Indian SSOs and their policies would have little impact when most SSOs set standards meant for global consumption. Especially in a digital environment, home-grown standards or national SSOs have little role to play unless the technology is widely implemented across the globe.[24] As suggested in the draft National IPR Policy, India firms must concentrate on contributing technology to global standards.[25] This is not to suggest that

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meet their particular needs. It is unlikely that there is a one-size-fits-all approach for all SSOs, and, indeed, variation among SSOs' patent policies could be beneficial to the overall standards-setting process. Other SSOs, therefore, may decide to implement patent policies that differ from the Update [i.e. from that of IEEE]. Scholars and practitioners have been critical of this approach of the DOJ and IEEE and have noted that the 'countervailing concern that the bylaw amendments facilitate collusion among implementers to suppress the royalties they pay for SEPs.' See J Gregory Sidak, 'The Antitrust Division's Devaluation of Standard-Essential Patents' (May 2015) <https://www.criterioneconomics.com/docs/antitrust-divisions-devaluation-of-standard-essential-patents.pdf>.

22 ibid.

23 Rishi Raj, 'Local Handset Makers to Close Ranks in Patent Battle', (*Financial Express*, March 2016) <http://www.financialexpress.com/article/economy/local-handset-makers-to-close-ranks-in-patent-battle/220244/>.

24 'The Chinese experience in nurturing home grown TD-SCDMA standards has proved a damp squib since it was backed by governments' *Caixin Global* (15 May 2014) <http://english.caixin.com/2014-12-15/100762382.html>.

25 IPR Think Tank, 'National IPR Policy' (2014) <http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf>.

SSOs are completely excluded from the regulatory framework. SSOs are severely constrained in their functioning by virtue of application of competition laws and other specific rules or guidelines that are promulgated by governments in requiring transparency and accountability.[26]

IV. Deference to Judicial Decision-Making and Regulatory Scrutiny in The Context of SEPs unless Evidence of Competitive Harm is Shown

The Government of India must approach policy-making in this area based on safe harbours developed by courts and regulators in India and in other comparative jurisdictions. Also, courts are better suited to balance equities in matters concerning FRAND, including the availability of injunctive relief based on the four-factor equitable test, since litigation in this area hinges on the relative position and conduct of the parties involved in the dispute. It is important to note that Indian courts have generally tailored interim remedies viewed through the prism of compensatory liability by granting 'interim royalties'. Although this remedy has not generally been part of the jurisprudence on interim relief,[27] it is likely that interim remedies in favour of the patent holder will include payment of interim royalties. There are no interim/permanent injunctions currently in force that have led to a situation of patent hold-ups as such. Whether or not interim royalties reflect FRAND is a different question, which is discussed below.

Indian courts have implicitly interpreted FRAND by making the availability of injunctive relief dependent upon a finding of an 'unwilling licensee', and alternatively awarding payment of monetary damages by way of interim royalties. The reason why the courts in India have allowed implementers to continue with alleged infringement is also because of the realisation that injunctive relief may convey a market power to the patentee that may not ordinarily flow from the exclusivity conferred by patent law when patents are involved in multi-component products.[28]

Going by the general trend in comparative jurisdictions in assessing the appropriate royalty base by relying on 'entire market value rule' (EMVR), courts in India have also provided a basis for valuation of SEPs which give effect to the combined value generated by the synergistic effects of contributions of patent holders. However, since the law on damages is nascent, there is no significant precedent to calculation of reasonable royalties except in case of compulsory licences.[29] Commentators have argued that the 'smallest salable patent-

26 All WTO members must comply with principles flowing from the TBT Agreement. See, WTO TBT Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards.

27 Prashant Reddy, *'Interim Damages' in FRAND litigation: When did that become a thing?* (*SpicyIP*, April 3, 2015) <http://spicyip.com/2015/04/guest-post-interim-damages-in-frand-patent-litigation-when-did-that-become-a-thing.html>.

28 Yogesh Pai, 'Rational Basis for FRANDly courts denying Injunctive Relief for SEP Infringement' (2014) 19 Journal of Intellectual Property Rights, 146-156.

29 In the context of compulsory licences, The Controller General of Patents in India has awarded a

practising unit/ smallest salable compliant implementation' (SSPPU/SSPPC) provides the appropriate royalty base for calculating FRAND royalties since monetary damages awarded must reflect the value attributable to the infringing features of the product, and not beyond that.[30] While both these methods have their respective merits and demerits and have juridical basis in comparative jurisdictions,[31] it must be noted that calculation of damages in India will depend on the judicial development of the law on damages.

Damages law has strong economic underpinnings[32] in that the price of the end product must reflect the actual value derived from synergistic use of technology, especially where there is high degree of product differentiation owing to technical functionality in such products that can be traced back to contribution of the patented technology. In fact, antitrust authorities in certain jurisdictions have used EMVR to determine remedies in favour of implementers.[33] Although the Indian law on damages is yet evolving,[34] it would be ideal for governments to defer to the development of damages law in this area by the judiciary rather than through policy interventions.

Reasonableness of the royalty rate is at the core of FRAND obligations. However, no court has held that such reasonableness cannot be achieved through negotiated royalties. A large number of patent licensing agreements (PLAs) are negotiated, and are not subject-matter of disputes. Courts in comparative jurisdictions have at times held that there must be price

royalty of 6% on the net sale value of the licensee's product. See Compulsory License Application No. 1 of 2011.

30 See Jorge L Contreras and Richard Gilbert, 'A Unified Framework for RAND and Other Reasonable Royalties' (2015) 30 Berkeley Technology Law Journal 1451 (arguing that technical and economic characteristics of allegedly infringed patents and their incremental value to the overall product offering must form the appropriate royalty base).

31 See *Cornell v Hewlett-Packard* 609 F Supp 2d 279 (ND NY, 2006) for origins of SSPPU. However, some authors have argued that the development of the law of damages is full of confusing and contradictory opinions. See, J Gregory Sidak, 'The Proper Royalty Base for Patent Damages' (2014) 10 Journal of Competition Law & Economics. 989–1037, 989.

32 Nicolas Petit, 'The Smallest Saleable Patent-Practicing Unit ('SSPPU') Experiment, General Purpose Technologies and the Coase Theorem' (*SSRN*, February 18, 2016) <http://ssrn.com/abstract=2734245 or http://dx.doi.org/10.2139/ssrn.2734245 > (arguing that SSPPU when viewed through lenses of the Coase theorem interferes with the efficient operation of the price system, and is likely to reduce investment in socially beneficial activities) Also see Edward F Sherry and David Teese, 'On the 'Smallest Saleable Patent Practicing Unit' Doctrine: An Economic and Public Policy Analysis' (*SSRN*, January 20, 2016) <http://ssrn.com/abstract=2764614> (noting that very few real-world licenses use the SSPPU as the royalty base and that such an approach does not correspond to real-world comparable licences).

33 James F Rill & James Kress, 'The Application of China's Anti-Monopoly Law to Essential Patent Licensing: The NDRC/QUALCOMM Action' (2015) 2 CPI Antitrust Chronicle (noting that '[w]hile the NDRC remedy can be fairly described, as Forbes does, as having achieved a "35% price reduction," the NDRC accepted the selling price of the end device as the appropriate royalty base')

34 J Sai Deepak, 'Evolving a Culture of Damages' (The Demanding Mistress, 22 April 2016) <http://thedemandingmistress.blogspot.in/2016/04/evolving-culture-of-damages.html>.

constraints on the SEP holders' ability to charge royalties on the assumption that if every player contributing to a standard demands royalties that are unreasonable, the end product may become unviable.[35] Some courts have also suggested that SEP holders must be able to charge royalties in the range that leads to widespread adoption of the standard.[36] However, except in theory, currently we do not have empirical studies that show a causal nexus between royalty rates and whether or not it impedes wider adoption of standards, and hence the need for policy intervention. While the comparative approach is a good starting point to understand the reasonableness of royalty rates, it is important that such comparisons are made keeping in mind the unique market positions of parties and other characteristics that specifically relate to the risk undertaken by enterprises to widely diffuse the standard.[37]

Non-Disclosure Agreements (NDAs) play an important role in patent licensing agreements.[38] NDAs preserve the freedom of the parties to enter into contracts. However, in the context of SEPs, some commentators have suggested that NDAs harm competition in that it leads to discriminatory pricing.[39] They also argue that it violates the "non-discriminatory" prong in FRAND obligations.[40] However, no court in India or abroad has held that the non-discriminatory requirement extends to providing similar set of licensing terms irrespective of the nature of products and commercial strategies of the SEP implementers. It is important to note that the freedom of the parties to enter in to patent licensing agreements must be safeguarded to ensure that royalty rates are negotiated depending on market factors and by taking into consideration competition brought in by new standards that could replace or improve on existing ones, which should ideally lead to a drop in prices for SEPs on older generation standards. Hence, it is important that competition law is applied in deference to the freedom of the parties to contract, such that the dynamics of the market are unimpeded unless and until there is evidence of harm to competition. This is not to deny that some contractual practices involving NDAs may fall foul of competition law.

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35 *Re Innovatio,* MDL Docket No 2303 Case No 11 C 9308.

36 *Microsoft v Motorola* 696 F.3d 872 (9th Cir 2012).

37 Layne-Farrar, Anne and Wong-Ervin, Koren W, 'Methodologies for Calculating FRAND Royalty Rates and Damages: An Analysis of Existing Case Law' (*Law360*, 1 October 2014) <http://ssrn.com/abstract=2668623>.

38 *Ericsson v Intex* (n 11), noting that 'defendant took more than 4 years in executing a Non-Disclosure Agreement which is a sine qua non in every licensing deal, particularly in patent licensing negotiations which entails exchange of various confidential business and technical information between the parties'.

39 R Gilbert, 'Deal or No Deal? Licensing Negotiations in Standard-Setting Organizations' (2011) 77 Antitrust Law Journal 855 (arguing that the non-discrimination clause would require of SEP holders to offer a royalty range through publicly disclosed royalties rates) Also see, J Contreras, 'Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing' (2013) 79 Antitrust Law Journal 47 (arguing that such practices provide uncertainty to market participants).

40 ibid.

The freedom of any party to challenge the validity of patents must not be interfered with as a matter of public policy.[41] Specifically, in the context of SEPs, since the licence is essential for implementing the standards, such clauses may fully block the possibility of any challenge to validity. Indian patent law permits any third party,[42] including licensees, to challenge the validity of a patent.[43] It may also amount to an agreement in restraint of legal proceedings.[44] These provisions can adequately address situations where implementers find that certain patents may be essential to the standards, but are of questionable validity. The question of 'essentiality' of a particular patent will depend on whether or not the patent reads on the standard. As such, these are fact specific issues. Although various SSO IPR policies defer to the declaration of essential patents made by patent holders, it is important to note that over-declaration may have an adverse effect on the firm's reputation. At best, it must be left to SSOs to evolve policies that deter patent holders from such conduct. Competition law scrutiny on such issues can provide an effective remedy against the patent holders. However, the question of whether or not such covenants always have anticompetitive effects is a challenging one.[45] Therefore, it is submitted that policy-makers have little role to play in determining the question of essentiality of a particular standard. There is no need for any formal declassification of non-infringing patents/ patents not in force as such patents may not possesses any market power in as much as it does not constitute patent infringement in the first place. Furthermore, unless the patent can be revoked on grounds mentioned in the Patents Act 1970, any additional rules for declassification may be simply counter-productive.

The relationship between patents and competition law in the context of SEPs poses additional challenges,[46] especially in a nascent jurisdiction like India where the jurisprudence is still evolving.[47] In this context, it is important for policy-makers to defer to ex-post scrutiny

41 *Rates Tech Inc v Speakeasy, Inc* No 11-4462 (2d Cir 2012). The US Federal Circuit Court held that 'we believe that in the patent context enforcing no-challenge clauses in pre-litigation settlements would too easily enable patent owners to "muzzle[]" licensees – the "only individuals with enough economic incentive to challenge" the patent's validity'.

42 This also includes the government where a revocation petition can be filed at the IPAB. For a brief explanation on the forums and timelines available for challenging validity of patents, see, Neeti Wilson, The Supreme Court Clarifies Indian Patent Invalidity Proceedings (2014) 19 Journal of Intellectual Property Rights, 358-360.

43 The Patents Act 1970, s 140.

44 The Indian Contract Act 1872, s 28.

45 Nicholas Roper, 'Limiting Unfettered Challenges to Patent Validity: Upholding No-Challenge Clauses in Pre-Litigation Patent settlements Between Pre-Existing Parties to a License' (2014) 35 Cardozo Law Review 1649.

46 George S Cary, 'The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting' (2011) 77 Antitrust Law Journal 913-945. Also see, Joshua Wright, 'SSOS, FRAND and Antitrust: Lessons from the Economics of Incomplete Contracts' (2013-2014) 21 George Mason Law Review 791.

47 Raju K D, 'The Inevitable Connection between Intellectual Property and Competition Law: Emerging Jurisprudence and Lessons for India' (2013) 18 Journal of Intellectual Property Rights.

of practices involving SEPs under competition law, rather than creating avenues for direct policy interventions through ex-ante regulatory mechanisms.[48] However, some commentators are of the view that since the battle-lines of litigation are drawn between companies who are disproportionately placed in the SEPs context to fight litigation, they have noted that this may have impact of prices and consumer availability and thus may harm competition, innovation and access to knowledge.[49]

As jurisprudence evolves in this area in comparable jurisdictions, it becomes apparent that scrutiny under competition law is quite rigorous and the bar is quite high. This has been done by adopting antitrust safe-harbours.[50] One remarkable step in this direction by the Indian courts has been to defer to the jurisdiction of the Competition Commission of India in cases involving abuse of FRAND obligations.[51] It is important to note that this decision does not convey any position on the question of whether or not certain licensing practices involving FRAND fall foul of the Competition Act 2002. Although some of the issues before the CCI are distinct from those adjudicated in comparative jurisdictions,[52] it is expected that the CCI will also provide clarity by evolving safe harbours and a broad framework defining the type of conduct by market players that would amount to competitive harm and attract liability under the Competition Act 2002.

V. Assessing India's Obligations Involving International IP, International Trade and International Investment Law while Making Policy Interventions

It is pertinent to note in the context of regulation of SEPs that specific policy choices that may be initiated by the Government may have to withstand the scrutiny of India's obligations under the Agreement of Trade-Related Aspects on Intellectual Property Rights (TRIPS)[53] and Bilateral Investment Protection Agreements (BIPA).[54] As noted by scholars, the Code of

48 The Indian Patents Act 1970, s 84 provides a variety of avenues to market participants to approach the authorities for grant of compulsory licences, specifically in a context where conditional refusal to licence (including on ground of unreasonable royalties) may have implications for downstream technical development. It is interesting that such provisions have not been exploited by implementers in their favour and have instead chose CCI as the forum to litigate on the implications of FRAND obligations.

49 Nehaa Chaudhari, 'Standard Essential Patents on Low-Cost Mobile Phones in India, a Case to Strengthen Competition Regulation?' (2015) 11(2) Socio-Legal Review 41.

50 *Huawei Technologies Co v ZTE Corp* Case C-170/13 (16 July 2015).

51 *Ericsson v Competition Commission of India* WP (C) 464/2014 & CM Nos 911/2014 & 915/2014.

52 For e.g. the question of anticompetitive implications of injunctive relief in the context of FRAND obligations is not part of the current investigations by the CCI.

53 WTO Agreement on Trade-Related Aspect of Intellectual Property Rights (adopted 15 April 1994) 1869 UNTS 299.

54 Ministry of Finance, 'List of Indian Bilateral Investment Promotion and Protection Agreements' (*Finmin*, December 2013) <http://finmin.nic.in/bipa/bipa_index.asp>.

Conduct for SSOs under the TBT Agreement of the WTO has little to do with the effect of offering bright-line guidelines on SSO IP obligations.[55] Notwithstanding attempts by China to raise the issue of IP Rights in Standardisation, there have been no targeted deliberations on this issue.[56]

The TRIPS Agreement, however, does allow WTO members to adopt measures to preserve public health and in sectors of vital importance.[57] However, such measures must be shown as both necessary and consistent with the TRIPS Agreement.[58] Moreover, the TRIPS Agreement does recognise that appropriate remedies may be warranted to prevent the abuse of IP rights, irrespective of whether or not such patents are construed as SEPs.[59] However, as discussed below, the policy choices exercised by any arm of the Government (legislative, judiciary or executive) must steer clear of potential violation of several provisions of the TRIPS Agreement.

The policy choices available to WTO members are bound by non-discrimination provisions involving IP holders (nationals) and IP protected goods (both under GATT Article III and Article 27.1 of TRIPS). Under Article 27.1 discrimination based on the field of technology is prohibited in the context of availability and enjoyment of patent rights. Hence provisions to declassify or revoke patents, purely on grounds of such patents being characterised as SEPs, could attract scrutiny by other WTO members. Although, Article 32 does not limit grounds for revocation, the author has argued elsewhere that the scope of grounds available for revocation must be understood from a theoretical prism, especially in the context of provisions on forfeiture under the Paris Convention.[60] Importantly, revocation based on grounds of pure convenience, or formal conditions that do not relate to substantive grounds based on which

55 Christopher Gibson, 'Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards' (2007) 22 Berkeley Technology Law Journal 1403-1484.

56 Although China made representations at the TBT Council in 2006, it has not led to any targeted discussion on the issue of rules governing SSOs. See China's notification to the Committee on Technical Barriers to Trade (25 May 2005) G/TBT/W/251<https://docs.wto.org/> and Baisheng An, 'Intellectual Property Rights in Information and Communications Technology Standardization: High-Profile Disputes and Potential for Collaboration between the United States and China' (2009-2010) 45 Texas International Law Journal 175.

57 WTO Agreement on Trade-Related Aspect of Intellectual Property Rights (adopted 15 April 1994) 1869 UNTS 299, art 8; See Henning Grosse-Ruse Khan, 'Assessing the need for a general public interest exception in the TRIPS Agreement' in Annette Kur, Marianne Levin (eds), *Intellectual property rights in a fair world trade system - proposals for reform of TRIPs* (Edward Elgar Publishing 2011) 167 - 207

58 ibid.

59 WTO Agreement on Trade-Related Aspect of Intellectual Property Rights (adopted 15 April 1994) 1869 UNTS 299, art 8 r/w art 40.

60 Yogesh Pai, 'The Growing Irrelevance of a TRIPS Challenge to India's Patent Law in Won-mog Choi' (eds), *International Economic Law: The Asia-Pacific Perspectives* (Cambridge Scholars Publishing 2015).

an invention is granted, may also warrant scrutiny, especially where they fall foul of other provisions of the TRIPS Agreement.[61] This is also owing to the fact that grounds for revocation would be limited by anti-discrimination provisions in Article 27.1 of the TRIPS Agreement.

The rights granted to patent holders under Article 28.1 can only be subject to limitations and exceptions laid out in Articles 30, 31 and 40. Hence it is important that policy choices and interventions in the context of patents are tuned to the legal requirements of these provisions. Moreover, the freedom of parties to contract is safeguarded under Article 28.2, which in some ways prohibits Government interference in patent owners' licensing freedom based on mere convenience.[62] This is not to suggest that Article 28.2 can be used as a shield against practices that fall foul of competition law, specifically those that are recognised under Article 40. However, government interventions in the form of regulations that cap royalties will have to withstand scrutiny under Article 28.2. It is important to note that even in the context of WTO members exercising power of antitrust scrutiny, Article 40 would require that such powers are exercised on a case-by-case basis and where competitive harm is clearly shown.[63]

Any *carte blanche* limitation on the power of judicial authorities to grant injunctions may also fall foul of Article 44. Although Article 44 does not mandate the grant of injunction in each and every case, the power of judicial authorities to order a party to desist from an infringement cannot be easily interfered with.[64] This resonates with the freedom available to courts to tailor remedies by balancing equities. In the context of SEPs, this has important ramifications for both patent holders and implementers in as much as Article 44 can be seen as specifically barring WTO members from placing structural restraints on the power of the judicial authorities to grant exclusionary relief. Article 50 also states that judicial authorities shall have the authority to order prompt and effective provisional measures (interim injunctions).[65]

Article 45 stipulates that "the judicial authorities shall have the authority to order the

61 ibid.

62 According to a commentator, such grounds of convenience may relate to nature of technology transferred, pricing and other conditions. See, NunoPires De Carvalho, *The TRIPS Regime of Patent Rights*, Wolters Kluwer (4th Edn, Wolters Kluwer 2014) 361-363.

63 However, there is a view that TRIPS does not require a particular standard of review (per sev. Rule of reason) for potentially abusive licensing practices. SeeRobert Anderson, 'Competition Policy and the TRIPS Agreement' *WIPO Symposium on Intellectual Property and Competition Policy* (2010)<http://www.wipo.int/export/sites/www/meetings/en/2010/wipo_ipcp_ge_10/presentations/anderson.pdf>.

64 Andrew C Mace, 'TRIPS, eBay, and Denials of Injunctive Relief: Is Article 31 Compliance Everything?' (2009) 10 Columbia Science & Technology Law Review 232.

65 Some commentators are of the opinion that the meaning attributed to 'judicial authorities shall have the authority' could only require that WTO members make such powers available to their judicial authorities may raise potential non-violation concerns when there is a systematic refusal by the judiciary to apply such powers, which may still be difficult to prove. See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012) 573.

infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity." In the light of this provision, while it's possible the judicial authorities may grant or deny monetary damages, it is difficult to understand how WTO member governments could make policy choices that limit the power of the judicial authorities to grant damages or structure damages law through policy interventions. Such policy changes may have to withstand a TRIPS challenge, to establish that they do not fall foul of the requirement that such damages must be "adequate to compensate for the injury the right holder has suffered because of an infringement", will have to withstand a TRIPS challenge.

Furthermore, TRIPS Agreement does not bar any WTO member from resorting to practices that may not directly contravene the provisions of the Agreement, which are typically classified as non-violation measures.[66] Although, there is a lack of clarity as to what measures could specifically be categorised as non-violation, it is clear that WTO members have the freedom to enhance consumer access to technology products through Government initiatives that do not particularly violate any provision of the TRIPS agreement.[67] Similarly, TRIPS-plus norms on IP enforcement can place significant restrictions on policy choices.

India has a fair bit of experience in dealing with investment law issues.[68] Intellectual property is specifically recognised in most BIPAs.[69] Such International Investment Agreements (IIAs) provide a unique opportunity and forum for private investors to challenge domestic regulatory measures, which although couched in the language of regulation, may amount to creeping expropriation.[70] Jurisdiction in relation to IP matters could specifically arise when IP are defined as investments. Based on commitments made in the BITs, private investors may claim violation of fair and equitable treatment (including where legitimate expectation is harmed), which would make the host State liable for expropriation. Although BITs protection may not specifically relate to compliance with specific standards of IP protection (for e.g. as laid out in the TRIPS Agreement), it may be shown that non-compliance with TRIPS standards

66 Moratorium on non-violation in TRIPS disputes, 'Draft decision agreed on "non-violation" cases in intellectual property' *WTO* (25 November 2015) <https://www.wto.org/english/news_e/news15_e/trip_ss_23nov15_e.htm>.

67 Non-Violation and Situation Complaints- Summary Note by the Secretariat (19 October 2012) IP-/C/W/349/Rev.2 <https://docs.wto.org/>.

68 Prabhash Ranjan, 'India and Bilateral Investment Treaties: From Rejection to Embracement to Hesitance?' (*SSRN*, 30 December 2015) <http://ssrn.com/abstract=2728840 orhttp://dx.doi.org/10.2139/ssrn.2728840>.

69 Law Commission of India, *Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty* (Law Com Report No 260, 2015).

70 Henning Grosse Ruse-Khan, 'Challenging Compliance with International Intellectual Property Norms in Investor–state Dispute Settlement' (2016) 19 Journal ofInternationalEconomic Law, 87-90.

could be read as violation of FET. Hence, in the context of regulating SEPs, it is advisable that policy-makers take note of the legal space available for policy manoeuvring, so that challenges under international investment treaties can be avoided. What is more controversial is whether or not policy-based interventions, including undervaluation of investors' properties, would also fall foul of investment agreements specifically when requirements of 'expropriation' are met. However, scholars have argued that standards under IIAs should not be construed in such a way so as to allow invoking alleged breaches of international IP norms in investor-state dispute settlement.[71]

It is important to note that the Indian model BIT exposes Indian IP law and regulatory measures to challenges by private investors for compliance with the standards laid down in the TRIPS Agreement.[72] It is important to note that IP clauses in BITs can pose substantial restraints on policy choices in the context of SEPs.[73] It is submitted that the Indian Government must exercise its policy choices by evaluating the risks of scrutiny under international investment agreements in the context of regulating SEPs.

VI. Conclusion

India is an evolving market, which also makes it a favoured destination for investments. The patent system is among the foremost ways by which incentives for innovation are preserved. However, it is important that the balance in the patent regime continues to foster its most important objective of innovation and disclosure of knowledge. It is equally important that the ways in which patent holders exercise their exclusivity, especially in the SEP context, is closely watched by regulators and agencies. At the same time, competition agencies and regulators must understand what is routine to the function of dynamic markets and must distinguish it from harm to competition.

Moreover, it is also important to keep the system predictable and transparent. Measures that improve predictability and transparency must be undertaken by the Government. However, it must not ordinarily intervene with the patent system, thereby disrupting the balance created by it, unless there is evidence of harm to competition. In such cases, competition agencies have been empowered to deal with such issues. The Government must institute independent

71 ibid.

72 Prabhash Ranjan, 'India Seeks Protection With New Model Bilateral Investment Treaty' (*WIRE*, Feb 2016) <http://thewire.in/2016/02/26/india-seeks-protection-with-new-model-bilateral-investment-treaty-22423/>.

73 Gavin Periera, 'India's Obligations under Bilateral Investment Treaties (Part A): "Bilateral Inhibiting Treaty?" — Investigating the Challenges that Bilateral Investment Treaties pose to the Compulsory Licensing of Pervasive Technology Patent Pools' (*CIS India*, 31 August 2013) <http://cis-india.org/a2k/blogs/bilateral-inhibiting-treaty-investigating-challenges-that-bilateral-investment-treaties-pose-to-compulsory-licensing-of-pervasive-technology-patent-pools> (noting that it may raise questions on availability of pool based compulsory licences for low-cost mobile technologies).

studies in understanding the nature of competition in industries driven by standardisation. As noted earlier, it is respectfully submitted that the Government may take note of the deference thesis articulated in this note while determining the rightful characterisation of SEPs and whether or not direct policy interventions are warranted. As articulated in this note, if and when the Government agencies find empirical evidence of harm to competition in industries driven by standardisation, it would provide policy-makers with reasonable basis to correct distortions in the market by making specific policy choices and influencing outcomes.

RETHINKING "NON-ARBITRARINESS"

Shankar Narayanan*

This paper examines the relationship between non-arbitrariness and Article 14 of the Constitution. It contends that the traditional test of reasonable classification incorporates a component of non-arbitrariness which has been overlooked in academic literature and case law. The paper argues that the test of reasonable classification should be revisited and recalibrated to meet the normative demands of Article 14. Finally, the paper attempts to demarcate the scope of non-arbitrariness review under Article 14 with respect to the nature of state action.

I. Introduction

Indian constitutional law has an ambivalent relationship with non-arbitrariness. The doctrine is extremely popular amongst lawyers and equally unpopular amongst scholars. As any lawyer who has spent more than a week in a writ court in India would know, a claim of arbitrariness is the simplest argument to build in any challenge that even remotely involves the State.[1] That perhaps explains the doctrine's popularity amongst lawyers.

The reasons for its unpopularity among scholars are also equally clear. Apart from forceful prose in the vein of arbitrariness being a *sworn enemy* of *equality*[2] which in turn cannot be *cribbed, cabined, or defined*,[3] the Supreme Court has not articulated any principled argument in support of the doctrine. Further, as it is not textually connected to Article 14 in any direct way, over the years, it has assumed the form of a vague super law as some feared.[4]

In this paper, I consider the relationship between non-arbitrariness and Article 14 and contend that the test of reasonable classification incorporates a component of non-arbitrariness. In the second and third sections, I point out that this link which has often been overlooked in

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1 Upendra Baxi, 'The Myth and Reality of Indian Administrative Law' in Massey (ed), *Administrative Law* (8th edn, 2012), xxviii.

2 *E P Royappa v State of Tamil Nadu* (1974) 4 SCC 3 [85].

3 ibid.

4 M P Singh, 'The Constitutional Principle of Reasonableness', (1987) 3 SCC Jour 31.

commentaries and judgments, could help us resolve certain conceptual issues that have arisen in judicial review of state action under Article 14.

The "staggering"[5] output of the Supreme Court on Article 14 precludes the application of the conventional method of studying all decisions on a point and then deriving a principle. Such a method could easily end up merely describing a number of decisions of the Court without identifying any clear principle. In a bid to avoid this pitfall, I proceed straight away to construct the argument, weaving in precedent as and when necessary.

II. Article 14 and Non-Arbitrariness

It is both logical and intuitive to start with the text of Article 14.

> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

The earliest decisions of the Court had a fairly consistent view of Article 14.[6] The first part of the article which speaks of equality is commonly accepted to be a guarantee that no person is above the law.[7] This guarantee is made effective by its corollary in the second part which offers to persons the equal protection of the laws. How are these interconnected guarantees made effective? To quote from the minority opinion of Shastri J from *State of West Bengal v. Anwar Ali Sarkar:*

> The second part which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination or favouritism, or as an American Judge put it 'it is a pledge of the protection of equal laws' (Yick Wo v. Hopkins [118 US 356, 369]), that is*, laws that operate alike on all persons under like circumstances*. And as the prohibition under the article is directed against the State, which is defined in Article 12 as including not only the legislatures but also the Governments in the country, Article 14 secures all persons within the territories of India *against arbitrary laws as well as arbitrary application of laws***.** This is further made clear by defining "law" in Article 13 (which renders void any law which

5 Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Choudhry, Khosla, Mehta, (eds), *The Oxford Handbook of The Indian Constitution* (OUP 2016) 701.

6 *Chiranjit Lal v Union of India* AIR 1951 SC 41; *State of West Bengal v Anwar Ali Sarkar* 1952 SCR 284; *Kathi Raning Rawat v State of Saurashtra* 1952 SCR 435; *Kedarnath Bajoria v State of West Bengal* 1954 SCR 30; *Jyoti Pershad v Administrator of Delhi* (1962) 2 SCR 125; The last decision contains a useful summary of the position of law which is extracted from *Ramkrishna Dalmia v Justice Tendolkar* (1959) SCR 279, 299-301.

7 M P Jain, *Constitutional Law of India*, (5th edn, Lexis Nexis 2008) 856; *Sri Srinivasa Theatre v Government of Tamil Nadu* AIR 1992 SC 1004.

> takes away or abridges the rights conferred by Part III) as including, among other things, any "order" or "notification", so that even executive orders or notifications must not infringe Article 14. This trilogy of articles thus ensures non-discrimination in State action both in the *legislative and the administrative spheres* in the democratic republic of India.[8]

Contrary to the belief that arbitrariness was discovered in the seventies, it is clear from the above paragraph from 1952 that Article 14 has, from the very outset, been interpreted as a guarantee against arbitrary action. Second, the guarantee with respect to legislation is not merely on the grounds that the law must distinguish between the like and the unlike, but that it must also operate alike within the class to which it applies. Third, it is made clear that it is not merely legislative action that must not be arbitrary but also executive action, which interestingly, is correlated to Articles 12 and 13. As I will argue later, this simple exposition is sufficient to explain large parts of the Court's jurisprudence of review of state action.

Let us consider the first point. For this we must consider the meaning of the term "arbitrary." It is not necessary to delve into any philosophical or jurisprudential meanings at this point. A standard dictionary defines arbitrary as action based on 'random choice or personal whim, rather than any reason or system'.[9] Applying this meaning to the paragraph quoted above, it then means that for State action to be equal (be it legislative, executive or administrative), it must not be based on any random choice or personal whim, rather it must be based on reasons or a system. Why is the guarantee of equality in Article 14 couched as a guarantee against arbitrary state action?

This can be derived as follows:

1. Let us start with the assumption that all persons are equal.[10]
2. People though equal, differ in some characteristics. This, again, is not a problematic statement as we know that people, though fundamentally equal, have different physical and mental attributes.
3. In light of these differing characteristics, and the infinite variety of human relations,[11] State action can rarely be universal. Therefore, by necessity, the State must then differentiate between people based on these differing characteristics.
4. The guarantee that equality offers in the face of this necessary classification is that only

8 *Anwar Ali Sarkar* (n 6) [8].

9 Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/arbitrary> accessed 30 March 2017.

10 Some commentators such as Seervai form the opposite proposition that people are fundamentally unequal. This is not an acceptable understanding of equality today. H M Seervai, *Constitutional Law of India*, (vol 1, 4th edn, Universal 2002) 439.

11 *Ameerunnissa Begum v Mahboob Begum* 1953 SCR 404.

> justifiable reasons can be the basis of classification. Some unjustifiable reasons such as caste, race, religion and place of birth are enumerated in the Constitution itself.[12]

The presumption that people are fundamentally equal is a strong moral principle[13] which is the anchor of this understanding of equality. However, in addition to this moral principle, it also incorporates a rule of rationality.[14] Any exception to equality is permissible only if the State has justifiable reasons for treating people differently. The validity of state action thus depends on an evaluation of the reasons behind state action. This is the essential link between equality and rationality in Article 14. The absence of such rationality would render State action arbitrary. This link between Article 14 and arbitrariness is crucial to the review of state action, which is discussed in the next section.

III. The Test of Reasonable Classification and Non-Arbitrariness

The standard formulation for review of state action under Article 14 is that one must test for reasonable classification.[15] The form of the test is well known with its components of "intelligible differentia" and a "rational nexus". At the core of the test, what it checks is whether the law makes an arbitrary classification by evaluating the reasons based on which persons are treated differently. Thus, the test incorporates both the moral principle of all people being fundamentally equal and the rule of rationality that the State is bound to provide reasons for any classification.

This point is often overlooked in the debate on the review of legislation under Article 14 ever since the central question in the debate was formulated by Seervai as a choice between a test of classification or a test of arbitrariness. In response to the Supreme Court's claim in E.P. Royappa[16] of having discovered a new dimension of equality based on non-arbitrariness, Seervai asserted that the traditional test does not involve a finding that the law is "arbitrary".[17] Seervai's assertion overlooked the component of rationality in the traditional test, which is borne out clearly by judgments of the Supreme Court. As an example, consider the following paragraph from Mukherjea J, in *Charanjit Lal Chowdhury v. Union of India*,[18] possibly the first case on the point:

> The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a

12 Constitution of India, arts 15 and 16.
13 See Stefan Gosepath, 'Equality' (The Stanford Encyclopedia of Philosophy, Spring 2011 edn) [2.4] <https://plato.stanford.edu/entries/equality/#PreEqu>.
14 On how equality incorporates a rule of rationality, see Isiah Berlin, 'Equality', <http://berlin.wolf.ox.ac.uk/published_works/cc/equality.pdf>.
15 For a list of cases see MP Jain, *Indian Constitutional Law* (6th edn, Lexis Nexis 2010) 1233.
16 *E P Royappa v State of Tamil Nadu* (1974) 4 SCC 3.
17 Seervai (n 10) 441.
18 1950 SCR 869.

> certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be **arbitrary**.

A superficial search reveals that there are more than a dozen relevant references to "arbitrary" in *Chiranjit Lal* alone. Das J who differed from the majority in Chiranjit Lal, emphatically concluded in paragraph 90:

> Therefore, this Act, ex facie, is nothing but an **arbitrary** selection of this particular company and its shareholders for discriminating and hostile treatment and read by itself is palpably an infringement of Article 14 of the Constitution.

The delinking of the reasonable classification test from arbitrariness has caused considerable confusion. It is now widely believed that there are two distinct, mutually exclusive lines of enquiry that can be adopted in any challenge to state action under Article 14. The choice, it seems, is between the 'new' doctrine of arbitrariness and the 'old' doctrine of classification. This differentiation overlooks the area of intersection between the two tests. This is perhaps best illustrated through decided cases. First, in the controversial decision of *Mardia Chemicals*,[19] Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 was held to be arbitrary and unconstitutional. The kernel of the Court's reasoning is contained in in paragraph 64 of Brajesh Kumar J's judgment which reads as follows:

> The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount, and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, **arbitrary** and violative of Article 14 of the Constitution.

This is supposedly an application of the new doctrine of arbitrariness. The Court did not apply the traditional test of classification and proceeded to conclude, rather abruptly, that Section 17 (2) was arbitrary. But the same argument can be reformulated by treating

19 *Mardia Chemicals Ltd v Union of India* (2004) 4 SCC 311.

borrowers as a well-defined class for the purposes of first instance civil action.[20] A civil remedy is made available to this class only on a pre-deposit of 75% of the claimed amount. Are there justifiable reasons for treating borrowers as a class for imposition of onerous conditions for a first instance civil remedy? The analysis would then focus on at least some of the reasons cited by Brajesh Kumar J in the paragraph quoted above.

The inverse is true of a recent decision in *Rajbala v. State of Haryana*[21] which prefers the "old" to the "new". Chelameshwar J upheld the classification of five categories of persons who were barred from contesting panchayat elections finding that the classification is reasonable. After rejecting the "new" doctrine of arbitrariness, in paragraph 80, he notes:

> The impugned provision creates two classes of voters — those who are qualified by virtue of their educational accomplishment to contest the elections to the panchayats and those who are not. The proclaimed object of such classification is to ensure that those who seek election to panchayats have some basic education which enables them to more effectively discharge various duties which befall the elected representatives of the panchayats. The object sought to be achieved cannot be said to be *irrational or illegal or unconnected* with the scheme and purpose of the Act or provisions of Part IX of the Constitution.

The Court then upheld the rationality of the classification. The case again demonstrates the link between arbitrariness and the test of reasonable classification. Once we identify classifications made by the State, and check for under-inclusion or over-inclusion, the next step in the "old" doctrine is to check the *rationality* of classification. Legally and semantically, rationality is the opposite of arbitrariness.[22] Thus, even after rejecting the test of arbitrariness, eventually, Chelameshwar J returns to evaluate the reasons behind the legislation.

A third example worth examining is Andhyarujina's example in which it is claimed that dismissing red haired students from school is arbitrary and unequal while dismissing all students from a school is only arbitrary and not unequal.[23] The second part of the argument is simply not true! First, if all students in a school (which is 'State' under Article 12) are dismissed, the immediate question that would arise is why not students of other such schools. This example demonstrates how State action necessarily classifies persons and cannot address

20 ibid [62].

21 (2016) 2 SCC 445.

22 Rationality is defined as "The quality of being based on or in accordance with reason or logic." Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/rationality> accessed 30 March 2017.

23 Tehmtan Andhyarujina, 'The Evolution of Due Process of Law by the Supreme Court', in BN Kirpal and others (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (OUP 2004) 207

the entire "universe of discourse" which Andhyarujina speaks of.Second, even under the old doctrine, all students in a school would then constitute a class, in comparison to other such schools, which the State would be required to show bears a rational nexus to the object of the State action of dismissing them. If there aren't good reasons, the action would be unequal even under the doctrine he prefers. These questions merely lie hidden in this hypothetical example.

This is not to claim that the two doctrines are identical in scope. They merely share an area of overlap. There is, however, a key distinction. If the new doctrine is a test of arbitrariness with no further prescription, it is truly formless and structure-less. It is incapable of controlling judicial decision-making in any meaningful way, as pointed out by Jeevan Reddy J in *Mc Dowell*.[24]

> In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable.

The above is not true of the test of reasonable classification, which with its precise formulations focusses the attention of the Court to factors relevant to equality. Even while reviewing the rationality of a law, the Court is limited to the connection between the object of the Act and the classification. This, perhaps, is the key distinction between the analysis of Chelameshwar J in *Rajbala*[25] and Brajesh Kumar J in *Mardia.*[26] There is much to commend the former approach to the latter. The test of reasonable classification restricts the non-arbitrariness review of reasons behind state action in such circumstances to those relevant to equality.As I have pointed out earlier, the normative anchor of Article 14 is the presumption that people are fundamentally equal. Where the state action in question deviates from this presumption, judicial review of state action must focus on the reasons for the deviation. In other words, the Court is entitled to conduct a review of suitable intensity of the reasons for selection of a particular class. At the same time, the Court must confine itself to the reasons for deviation from the principle that people are fundamentally equal as Article 14 does not offer any normative justification for review of other reasons behind the state action in question.

There is a further significant distinction. The differentiation into the old and the new, and the period in which it occurred has rendered the test of classification a formal, "deferential"[27]

24 *State of AP v McDowell & Co,* (1996) 3 SCC 709 [43].
25 (2016) 2 SCC 445.
26 *Mardia Chemicals Ltd v Union of India*, (2004) 4 SCC 311.
27 Khaitan (n 5) 704.

test in comparison with its activist counterpart. However, this ought not to be the case. Once it is clear that the range of reasons which the Court can review is restricted to the connection between classification and the object of the legislation, the Court can engage in review of suitable intensity of these reasons. This is where, perhaps, Chelameshwar J's analysis in *Rajbala* is inadequate. Having correctly identified that only reasons relevant to classification can be reviewed, the Court failed to adequately scrutinise the reasons offered by the State. In creating a class of people who cannot contest panchayat elections, the State had brazenly departed from the principle that people are fundamentally equal. The State was bound to satisfy the Court fully that there were convincing reasons for the deviation. This was not the case as is betrayed by language in which the Court expressed its conclusion:[28]

> It is only education which gives a human being the power to discriminate between right and wrong, good and bad. Therefore, prescription of an educational qualification is not irrelevant for better administration of the panchayats. The classification in our view cannot be said to be either based on no intelligible differentia unreasonable or without a reasonable nexus with the object sought to be achieved.

To justify the egregious classification made by the law, the State was required to furnish reasons that were relevant and compelling and not merely reasons which were not "irrelevant" or "unreasonable". By contrast, the burden on the State is accurately described by Nariman J in *Hiral P. Harsora v. Kusum Narottamdas Harsora*[29] where the Court struck down a classification in the Protection of Women from Domestic Violence Act, 2005:

> In holding the date discriminatory and arbitrary and striking it down, this Court went into the doctrine of classification, and cited from *Special Courts Bill, 1978, In re* [(1979) 1 SCC 380] and Maneka Gandhi v. Union of India [(1978) 1 SCC 248] and went on to hold that the burden to affirmatively satisfy the court that the twin tests of intelligible differentia having a rational relation to the object sought to be achieved by the Act would lie on the State, once it has been established that a particular piece of legislation is on its face unequal.

The Court held that there was no rational link between the definition of 'respondent' in Section 2(q) and the object of the Act.[30] The Court was of the view that the section which required a respondent to be an "adult male", overlooked domestic violence perpetrated by women and minors and thus, was contrary to the object of the Act.[31] The decision is an example

28 (2016) 2 SCC 445 [80].
29 (2016) 10 SCC 165 [34].
30 ibid [39].
31 The Act, it seems, was deliberately designed to avoid a situation where a woman is proceeded against for domestic violence- a provision which could be misused in India, possibly even against

of the high intensity review that the reasonable classification test is capable of.

Thus, when compared to the formless new doctrine, the traditional test has two advantages. First, it focuses judicial review to reasons relevant to equality.Second, it is capable of being calibrated to conduct suitably intense reviews of state action depending on the departure from equality that confronts the court.

IV. Non-Arbitrariness and "Equal Protection of the Laws"

In the previous section, I dealt with the requirement of reasonable classification under Article 14. However, this has never been thought to be a sufficient condition for the guarantee of equality. This is clear from principles which had been crystallised as early as 1959 in *Ramkrishna Dalmia v. Justice Tendolkar*[32]:

1. Where a statute itself makes the classification and the Court finds that the classification satisfies the test of reasonable classification, the court will uphold the validity of the law.
2. In cases where the statute does not make any classification but leaves it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply, the statute must be shown to contain the principles that guide this discretion. If the law fails in this regard, the court will strike down both the law as well as the executive action taken under such law.
3. Lastly, where the statute lays down such principles, but the executive action fails to adhere to these principles, the executive action but not the statute should be condemned as unconstitutional.

The guarantee of equality as is clear from the above, is not exhausted by a mere declaration of validity of the classification. If the executive fails to act as per the law, Article 14 renders such actions unconstitutional by its express words. This is the effect of the clause "equal protection of the laws" in Article 14. In other words, under Article 14, a law is required to be non-arbitrary and thereafter, every person is entitled to the fullest protection of the law in its implementation. It is in this sense that every executive action or administrative action pursuant to a law must not be arbitrary. This is the import of the statement of Mukherjea J when he observed that 'it appears to be an accepted doctrine of American courts that the purpose of the equal protection clause is to secure every person within the States against arbitrary discrimination, whether occasioned by the express terms of the statute or *by their*

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a survivor of domestic violence. This reason was not considered by the Court. See Sanjay Ghose, A Gender-Neutral Domestic Violence Law Harms Rather Than Protects Women, <https://thewire.in/77445/a-gender-neutral-domestic-violence-law-harms-rather-than-protects-women/> accessed 4 September 2007.

32 (1959) SCR 279 [12].

improper application through duly constituted agents.'[33]

Earlier in this essay, I have pointed out that non-arbitrariness was not discovered by the Supreme Court in the seventies as is believed. But there were two other developments around that time which had a significant impact on equality. First, until *A.K. Kraipak v. Union of India*,[34] our constitutional courts, following their English counterparts, would not ordinarily issue writs of certiorari against administrative action. Second, until *Rajasthan State Electricity Board v. Mohan Lal*,[35] the term "State" under Article 12 had been understood narrowly. This decision set the precedent for broadening the field of entities that are subject to the jurisdiction of writ courts for violation of fundamental rights.

Following these developments, there existed considerable scope for a coherent textual basis for the expanded review of executive and administrative action. Early opinions of the Supreme Court such as Shastri J's (extracted earlier in this essay) linking Articles 12, 13 and 14 provide a full justification for such an argument. This opportunity was however lost as the Supreme Court did not offer any principled argument in this regard.

Nevertheless, one can set out the complete argument.

1. For a law to be valid under Article 14, it must make clear the rational basis for its application to persons who are subject to it. The law may or may not make the classification itself.
2. Every subsequent action under the law is controlled by the rationality expressed in the law, as each person within the class to which the law applies, is entitled to "the equal protection of the law."

This interpretation can accommodate all three grounds of judicial review enumerated in *Tata Cellular*,[36] i.e. procedural impropriety, illegality and irrationality. For instance, consider a town-planning law which classifies people by prescribing eligibility conditions for a license to set up a factory within the area to which the law applies. Once these conditions of eligibility are found to be fair under Article 14, the operation of the law within the class of people to whom it applies is in the hands of the administrator who considers the grant of license in terms of the law.[37] The guarantee of equal protection would be mean that every applicant is entitled to a fair and equal process of consideration of her application. Second, "protection of the law" would mean that the administrator is bound strictly by the terms of the law in

33 *Anwar Ali Sarkar* (n 6) [51].
34 *A K Kraipak v Union of India* (1969) 2 SCC 262.
35 (1967) 3 SCR 377.
36 *Tata Cellular v Union of India* (1994) 6 SCC 651 [77].
37 *State of A P v Nalla Raja Reddy* (1967) 3 SCR 28 [24] – It is perhaps in this context that Subba Rao J warns that administrative arbitrariness is more subversive of equality as the official wand of arbitrariness can wave in any direction.

granting or refusing to grant the license. Third, in the rare circumstance of the administrator applying the law fairly and yet arriving at an illogical and irrational result, the guarantee of 'protection of the law' can be a ground to claim that the intent of the law having regard to its object, was never to arrive at such an outcome. Thus, judicial review of administrative action on the ground of non-arbitrariness, both procedural and substantive, to a large extent, can be accommodated by such an interpretation.

Combined with the conclusions from the previous section, we now have a complete argument demarcating the scope of non-arbitrariness review under Article 14. When faced with an instance of classification which deviates from the fundamental principle of equality, the objective must be to judge state action for reasons for the deviation. The test of reasonable classification is best equipped to do the job as there is no normative justification for review of any other reason behind the state action.In such a case, judicial review, in so far as non-arbitrariness is concerned, is restricted to the reasons supporting the classification.Where, however, judicial review is concerned with an instance of application of a law or an executive policy within a class of people to whom it applies, the Court is entitled to review such state action fully to ensure that the person concerned has the fullest protection of the law. Here, the nature of review is different in that the object of the review is to ensure that implementation of a law or policy is in fact in terms of the law or policy as the case may be. This is the proper province of full spectrum non-arbitrariness review in the context of equality. Such an interpretation avoids the danger of creating a freestanding test of arbitrariness under which the Court freely reviews policy making.[38]

V. Conclusion: Rethinking Non-Arbitrariness

In this article, I have endeavoured to demonstrate that the test of reasonable classification has a component of non-arbitrariness which permits review of state action to ensure that it is non-arbitrary from the perspective of equality. I have argued that the debate surrounding the choice between the old doctrine of reasonable classification and the new doctrine of non-arbitrariness overlooks the fact that the traditional test of equality has a component of non-arbitrariness.

Second, I put forward an interpretation of Article 14 which resolves some of the conceptual difficulties in understanding the scope of non-arbitrariness review under Article 14. I argue that when faced with state action which classifies people, judicial review must be limited to the reasons behind the classification. This test accommodates non-arbitrariness review to the extent demanded by equality under Article 14. However, when faced with an instance of an application of a law within a class to which it applies, the full spectrum judicial review is permissible, as a person is entitled to the full protection of the rationality of the law.

38 For an instance of such review, see *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1.

TRANSITIONAL JUSTICE: ECONOMIC SOCIAL RIGHTS THROUGH A GENDERED LENS

Aishani Gupta*

This paper forwards a simple argument. It attempts to extend the understanding of a post-conflict society by refocusing efforts merely from issues of prosecution and reconciliation to a more holistic version of development. It argues that looking at development holistically would require a gendered approach to economic social rights. It aims to provide certain principles on the basis of substantive equality that a post-conflict society should consider while trying to move forward from a situation of conflict.

I. Introduction

A period of transition is a difficult time for any society. Transitions are periods of rupture[1] that allow a society to repair[2] their '*present and future effects*'.[3] It is a moment when the society transitions from a situation of conflict to what is termed a 'post-conflict society'. Effectively, these are periods in the life of a society when a conflict has concluded.

The mechanisms of transitional justice are essentially established for the purpose of facilitating '*the transition from conflict to democratic governance*'.[4] In such a situation, a society must ruminate on its goals and decide what measures would be beneficial in achieving these goals. Measures of transitional justice assist a post-conflict society by looking ahead. Of course, this does not mean that the atrocities and struggles of the past should be forgotten. Indeed, that is why the first phase during transition is usually focused on issues of prosecution,

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1 Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights J 69, 87.

2 See generally William Schabas, 'Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission' in Koen de Feyter and others (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005).

3 Daniel Aguirre and Irene Pietropaoli, 'Gender Equality, Development and Transitional Justice: The Case of Nepal' (2008) 2 Int J of TJ 356, 357.

4 Convention on the Elimination of All Forms of Discrimination Against Women, 'General recommendation No 30 on women in conflict prevention, conflict and post-conflict situations' (1 November 2013) CEDAW/C/GC/30 [75].

reparations, and reconciliation. These measures are implemented to come to terms with the past and perhaps uncover the reasons leading up to the conflict and recover from them while simultaneously looking ahead. As Aukerman states, the truth is a form of social catharsis.[5]

At this point, the society has the motivation and morale to make lasting changes. It is a critical time in the life of a society; and the values that a society pursues at this time have an enduring impact. A post-conflict society might pursue a myriad of different goals either individually or in combination with other goals depending on the willingness and resources of that particular society. Though the objectives of prosecution and reconciliation are important, the aim of this paper is to move past these and recognise development as an imperative goal. For ensuring holistic development, the society must focus on economic social rights (ESRs).[6] This paper argues that in a post-conflict context, ESRs cannot be properly implemented without taking gender equality into account. Thus, this paper will focus on principles that a society should incorporate for the purpose of actual implementation of ESRs, thereby laying the groundwork for development. Consequently, this paper does not focus on the goals that a society might pursue or the measures to achieve those goals, rather it discusses certain principles to ensure that gender equality is truly realised in a post-conflict society. Pursuing gender equality should be considered an increasingly critical objective in a post-conflict society, which has an opportunity to break from the past.

The international framework regarding gender equality comprises treaties, conventions, Security Council resolutions and CEDAW recommendations on the issue of women in post-conflict zones. However, it is not the aim of this paper to systematically go through each and every one of them.[7] Rather, as will be noted in the next section, this paper seeks to reflect upon the regime as a whole, the type of protections that are provided, and how they assist in the goal of restoring gender equality in a post-conflict society. Furthermore, the core of the argument in this paper lies in understanding that the equality must be substantive equality, and not simply formal equality. Many societies have tried to achieve a gender equal society through the approach of formal equality, which has been unsuccessful. It is time to use substantive equality and enhance the society on a more solid foundation. Not by simply equating the two genders, but by understanding the differences between them and the disadvantage these differences might lead to, and treating them accordingly.

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5 Miriam Aukerman, 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harvard Human Rights J 39, 47.

6 See generally, Evelyne Schmid, 'Socio-Economic and Cultural Rights and Wrongs After Armed Conflicts' (2013) 31(3) Netherlands Human Rights Quarterly 24; Christine Chinkin, 'The Protection of Economic, Social and Cultural Rights Post-Conflict' (2009) paper series commissioned by Office of the High Commissioner for Human Rights <http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf> last accessed on 11 April 2017.

7 See generally, Chinkin (n 6).

In Section II, I will give an overview of the international regime that as it presently stands with a focus on post-conflict situations for the protection of women. In section III, I will outline the problematic areas in implementing ESRs through a gendered approach. I will demonstrate how the ideal of substantive equality is beneficial in a transitional society by discussing five ESRs in particular, the right to water, health, education, employment, and displacement. Additionally, I will propose principles that assist in creating a gender equal society, leading to an equal and holistically developed society. While it might seem as if the proposals I provide are rather idealistic, I believe such idealism is required if a society is to be successful in a post-conflict situation.

II. International Regime for The Protection of Women in Post-Conflict Situations

The international framework incorporates varied protections that are available to women in a post-conflict situation. I will analyse three regimes: (1) the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); (2) the General Recommendations made by the CEDAW Committee; and (3) resolutions adopted by the United Nations Security Council.

(1) CEDAW contains 30 articles that aim to reduce discrimination against women in two ways. Firstly, CEDAW reiterates that the rights given to men must be extended to women.[8] Secondly, CEDAW contemplates that nations can implement extra measures in the form of temporary special measures, on certain issues for the purpose of ensuring gender equality.[9]

(2) CEDAW, as a treaty concluded under the auspices of the UN, establishes a treaty body known as the Committee on the Elimination of Discrimination against Women, which has the power to make general recommendations. CEDAW recommendations entitled 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' gives recommendations specifically on the issue of women in a post-conflict society. Similar to the argument in this paper, the recommendations aim to advance the notion of substantive equality. It states that in all situations meeting the threshold definitions of conflicts[10] under various international treaties, women are entitled not only to the protection provided to their male counterparts, but also to certain kinds of special protection against crimes such as sexual assault and forced

8 See generally, Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 [CEDAW] art 3.

9 See generally, ibid arts 4-6.

10 International armed conflict as defined in Geneva Convention (adopted 1949) common art 2; Non International Armed Conflict as defined in Geneva Convention (adopted 1949) common art 3.

prostitution.[11] This is also the case under occupation by a foreign power.[12] These recommendations additionally note that specific gender provisions are missing under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Thus, it asserts that CEDAW has an enhanced role to play in such situations.[13] The committee recommends that when state parties look to determine their obligations under one convention they do so with the complementarity of measures in mind.[14]

(3) Under the regime of the UNSC, Resolution 1325 (2000)[15] is a landmark resolution because it was the first that spoke directly to the status of women in a post-conflict state.[16] It recognised the importance that the participation of women in decision-making processes has in a post-conflict state, and the contribution that it can make to continued peace and security. Subsequent resolutions, such as Resolution 1820 (2008),[17] recognised that condemnation of violence against women was not enough. It demanded the cessation of violence against women with immediate effect.

Subsequently, Resolution 1889 (2009)[18] developed four indicators to enhance the understanding of resolution 1325. Namely, prevention, protection, participation, and relief and recovery. In 2013, the UNSC passed resolutions 2106[19] and 2122.[20] Both of these resolutions require that more action must be taken on the topic of gender equality in conflict, and post-conflict situations. The latest resolution on this issue,[21] the UNSC commits to stay seized of this matter. This resolution too is along the same lines as 2122. Though the UNSC is discussing the matter actively, there is only so much they can do. Real change must come from the post-conflict society itself. It should be noted that these resolutions emphasise the reduction of sexual violence in post-conflict situations but do not strongly address the issue of gender equality.

III. A Gendered Approach in a Post-Conflict Society

This section progresses in four parts. First, I discuss why ESRs are not considered important in post-conflict situations. Second, I discuss the overarching problem in terms of

11 See CEDAW/C/GC/30 (n 4) [21].
12 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
13 See CEDAW/C/GC/30 (n 4) [22].
14 ibid [24].
15 UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325.
16 Prior resolutions, mentioned in UNSC Res 1325 (n 15) discuss child soldiers, children and post-conflict situations more generally, and only mention women in a passing manner.
17 UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820.
18 UNSC Res 1889 (5 October 2009) UN Doc S/RES/1889.
19 UNSC Res 2106 (24 June 2013) UN Doc S/RES/2106.
20 UNSC Res 2122 (18 October 2013) UN Doc S/RES/2122.
21 UNSC Res 2242 (13 October 2015) UN Doc S/RES/2242.

gender equality through formal equality. Third, I outline the ideal of substantive equality and demonstrate its benefits in post-conflict situations, by discussing five ESRs in particular, (1) the right to water; (2) the right to health; (3) the right to employment; (4) the right to education; (5) the right to not be displaced. Lastly, I provide some other measures in consonance with substantive equality that a post-conflict society must incorporate. Namely, representation and participation of women, requirements under CEDAW and protection for crimes against women.

A. The 'problem' with ESRs

The classic notion of human rights has led to the belief that unlike civil and political rights, ESRs require positive obligations on behalf of the state. This is a tenuous argument.[22] It is true that through a varied international regime there is a higher burden on state governments in transition. It might be argued, that post-conflict societies often do not have the requisite resources to actually give precedence to ESRs in line with the principles that will be proposed. This argument is problematic for two reasons. First, it does not take into account the idea that though ESRs contain a minimum core obligation,[23] the notion of progressive realisation[24] is likewise inherent within ESRs. Second, the concept of justice must be holistically interpreted.[25] Coming to terms with the past and upholding justice[26] requires emphasis on ESRs. Implementing ESRs is a necessary factor for post-conflict societies trying to procure an equitable future.[27]

The focus in a post-conflict society is generally on issues of reconciliation or prosecution. However, 'a limited focus can take away from broader redistributive reform projects and may impede the progressive political changes necessary for peaceful transition'.[28] I would

22 See generally, James W Nickel, 'Poverty and Rights' (2005) 55 The Phil Quarterly 385; Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 182-185.

23 See generally, UN Committee on Economic, Social and Cultural Rights (CESCR), 'General Comment No 3: The Nature of States Parties' Obligations (art 2, para 1, of the Covenant)' (14 December 1990) E/1991/23; *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 South African Journal on Human Rights 1.

24 CESCR General Comment 3 (n 23).

25 Roger Duthie, 'Towards a Development Sensitive Approach to Transitional Justice' (2008) 2 International Journal of Transitional Justice 292, 295.

26 Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2008) 40 NYU Journal of International Law & Politics 1, 2; Frannk Haldemann and Rachelle Kouassi, 'Transitional Justice without Economic, Social and Cultural Rights?' in Eibe Riedel and others(eds), *Economic, Social, and Cultural Rights: Contemporary Issues and Challenges* (OUP2014) 498, 502-504.

27 ibid.

28 Aguirre and Pietropaoli (n 3) 366.

argue that though matters of prosecution and reconciliation should be part of the post-conflict architecture, ESRs must not be overlooked. Additionally, as Duthie argues, even if the goals of civil political rights and ESRs were pursued differently, they would complement each other.[29] This is because the end goal is the same, a transformed society that has moved past the problems present during conflict. This transformed society is cognisant of the past, seeks to analyse issues that arose during the conflict, and takes corrective measures for the same. Many states would like to overplay the distinction between the two sets of rights arguing that ESRs require burdensome resource allocation. However, it should be noted that for the proper fulfilment of many civil political rights, ESRs are a prerequisite.[30] It should additionally be remembered that civil political rights likewise require certain positive obligations on behalf of the state, for example, judicial machinery or prisons.[31] It is additionally important to acknowledge and analyse the nature of the institutions that implement these rights in the first place. Consequently, for the holistic development of a post-conflict society, the implementation of ESRs is imperative.

B. Is gender equality possible through formal equality?

Formal equality is the 'core of conventional equality law'.[32] As Mackinnon points out, it flows from the Aristotelian approach in 'Nicomachean Ethics'.[33] It is based on notions of sameness and it 'requires same treatment if one is the same'.[34] This kind of thinking has had an impact on gender equality. Under this paradigm, women are different and therefore treating women differently is not problematic. According to Mackinnon, this approach begs the question - will women be equal only when they are no longer women?[35] This is not to say that women have not benefited from formal equality in some legal systems, which have enacted laws taking into account the specific needs of genders.[36]

The approach of formal equality would principally encourage gender-neutral measures. These measures cannot restore equality in a society that has been plagued with gender inequality.[37] Such measures can only lead to formal equality, not true equality, and a post-

29 Duthie (n 25) 295-96.
30 The right to voting is a good example, as it requires information to be able to cast your vote in an informed manner. This information requires some basic level of education, which is an economic social right.
31 Chinkin (n 6) 27-29.
32 Catherine Mackinnon, *Sex Equality* (3rd edn, Foundation Press 2016) 7.
33 Aristotle, The Nicomachean Ethics 1131a-1131b, (J L Ackrill and others tr) 112-117, as quoted in Mackinnon(n 32) 6.
34 Mackinnon(n 32) 7.
35 ibid 22.
36 The India Maternity Benefit (Amendment) Act 2016.
37 Sandra Fredman, 'Engendering Socio-Economic Rights' (2009) 25 South African Journal on Hu-

conflict society should be cognisant of this discord. I would argue that true gender equality can never be achieved on the basis of formal equality. The core of the notion of formal equality is flawed because it categorises individuals on the basis of their differences but does not consider what those differences mean, or how historical disadvantage should be overcome. Furthermore, it does not consider that membership in particular groups in a society could itself be a disadvantage.[38]

Before proceeding to the next part of this section I think it is imperative to point out the overarching problem of gender equality in implementing ESRs. A situation of conflict in any state leads to a breakdown of imperative services in the society. Essential services like water, sanitation, food, and medical aid are interrupted. This results in a lack of access and availability of essential services to people, and can be particularly problematic in rural areas. In these situations, it is the women who would bear the burden of this deficiency.[39] Fredman argues that taking women's needs into consideration would entail understanding that women are the primary care givers in a household and any reduction in the access to essential services would increase the burden, specifically on women.[40] Essentially, it is imperative to understand that extending ESRs to women would not be sufficient until the gendered nature of the social institutions that contribute to this inequality are properly considered.[41] The next part will discuss this problem in detail and outline the benefit of substantive equality in post-conflict situations.

C. Substantive equality and ESRs

Substantive equality calls for a substantive comprehension of inequality.[42] It requires that the notion of formal equality followed in most legal systems should be replaced with the notion of historical disadvantage,[43] as it has been in the Canadian context, which I will discuss in greater detail. At the core of the ideal of substantive equality is the recognition that inequality is a social relation of rank ordering. Essentially, it recognises that the society has historically categorised individuals or groups as higher or lower than others, thereby creating a system of hierarchies.[44] It should be remembered that substantive equality is not a silver

man Rights 410, 433.

38 Sandra Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 South African Journal on Human Rights 163, 165-166.

39 WHO/UNICEF Joint Monitoring Programme, 'Working Group on Equity and Non-Discrimination (End), Final Report', 2012 <www.wssinfo.org/fileadmin/user_upload/resources/JMP-END-WG-Final-Report-20120821.pdf> 9 accessed 12 April2017.

40 Fredman (n 37) 415.

41 ibid 417.

42 Catherine Mackinnon, 'Substantive Equality' (2011) 96(1) Minnesota Law Review 1, 7-8 .

43 *Andrews v Law Society of British Columbia* [1989] SCR 143; Fredman (n 38) 166.

44 Mackinnon (n 42) 11-13.

bullet and might miss the mark on occasion.[45] But replacing the current system of formal equality, which has been unsuccessful, is a step in the right direction.

Substantive equality is especially important because '[s]ocio-economic rights and equality have the potential to form a powerful partnership'.[46] Formal equality simply treats each individual based on merit and ignores the disadvantage that women face.[47] Whereas, substantive equality takes into account power structures, and unlike formal equality, it is not neutral to the outcome of a measure. If different treatment is required for a better outcome, then substantive equality would not be averse to said treatment.[48]

The Canadian experience with substantive equality is instructive in understanding what this ideal means. Substantive equality has been positively enshrined in the Canadian Constitution as Section 15 of the Charter of Rights and Freedoms.[49] The phrasing of the article itself is not what should be lauded. Rather, it is the judicial interpretation by the Supreme Court of Canada that is significant. The judgement in *Andrews v Law Society of British Columbia*[50] struck down a citizenship requirement to be admitted to the Canadian bar on the basis of Section 15. In this judgement, the analysis of Section 15 stated that the section was 'committed to the concept of substantive equality'.[51] However, the judgement was unclear whether positive obligations were required by Section 15. Subsequent jurisprudence was similarly ambiguous on the issue of positive obligations under Section 15.[52] In *Schachter*, for example, it was stated, 'the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts, it will be proper to characterise s. 15 as providing positive rights.'[53] This attitude changed in the 1990s with two judgements. The first is *Eldridge v British Columbia*,[54] which challenged the fact that the public healthcare system in British Columbia did not provide sign-language interpreters. The applicants claimed that this was

45 ibid 10.
46 Fredman (n 37) 410.
47 ibid 418.
48 ibid 419.
49 Equality before and under law and equal protection and benefit of law. s 15(1) states, 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Marginal note: Affirmative action programs
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'
50 [1989] SCR 143.
51 Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge 2012) 118.
52 *Schachter v Canada* [1992] 2 SCR 679.
53 ibid 721.
54 [1997] 1 SCR 143.

discriminatory and in violation of Section 15. The Supreme Court held that though it was unclear that the state had positive obligations under the section, when a benefit is provided it must be done in a non-discriminatory manner.[55] The second judgement of note is that of *Vreind v Alberta*,[56] where the Supreme Court concluded that the Alberta Individual Rights Protection Act, 1988 violated Section 15 because it did not include sexual orientation as a protected ground. Despite the reasoning in these judgements, the Court was hesitant to read Section 15 in an expansive manner in subsequent cases.[57] However, in *R v Kapp*[58] the Court returned to the broader reading of Section 15 by stating that given the character of substantive equality, programs of affirmative action cannot be said to violate Section 15. These judgements of the Canadian Supreme Court illuminate the concept of substantive equality and demonstrate its potential.

I will now turn to discussing five ESRs in particular and how substantive equality as discussed above would improve the implementation of these rights in a post-conflict society.

(1) The right to water in post-conflict situations is marred by intra household inequalities in terms of both access and consumption. This right is not considered a stand-alone right, ordinarily, it is erroneously eclipsed by the right to food. The UN Special Rapporteur on Water has acknowledged that there are severe intra-household inequalities.[59] This means that even though women are the primary water procurers within the household, water would first be given to the men, often leaving women to suffer.[60] Until special consideration has not been taken of these kinds of inequalities, fixing them would be tremendously difficult. Cognisance of this intra-household inequality and implementing measures that actively counteract this would enhance the protection offered by ESRs for a post-conflict society. Formal equality might simply require a solution of rationing water and granting each household a certain amount of water depending on its size. But this policy would fail to take into account the existent intra household inequality. A gendered approach that incorporates substantive equality would go beyond ensuring access to water and provide incentives for households to send men and women in turn.

(2) Decreased access to healthcare tends to target women first. Maternal and prenatal

55 ibid [73].
56 [1998] SCR 493.
57 *Auton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 3 SCR 657.
58 [2008] SCC 41.
59 Report by Special Rapporteur Catarina de Albuquerque, 'Integrating non-discrimination and equality into the post-2015 development agenda for water, sanitation and hygiene' (2012) UN Doc A/67/270 [69].
60 ibid [27]. See generally, Report by Special Rapporteur Catarina de Albuquerque, 'Mission to Egypt' (A/HRC/15/31/Add.3 and Add.1); Report by Special Rapporteur Catarina de Albuquerque, 'Mission to Bangladesh' (A/HRC/15/55).

health is severely compromised if health services are not available. This is generally the case in a post-conflict situation as essential services are disrupted. While this disruption is an immanent result of conflict, states have choices on how to handle it and gendered perspectives can be incorporated in decision-making. Due to the prevalence of sexual violence and the fact that health services are disrupted, unplanned pregnancies rise in conflict situations.[61] Furthermore, there is an increase in the incidence of HIV/AIDS, and other sexually transmitted diseases during this time. Therefore, a post-conflict society must actively think of responsive ways to deal with these situations by utilising ESRs to their advantage. Substantive equality would require that the specific needs of female health be considered and taken seriously. Consequently, it would be necessary that medical centres have a section dedicated to women's health in a post-conflict society, which would not be necessitated under the paradigm of formal equality.

(3) The right to work has a gendered dimension, apart from the fact that there are societies in which women are not allowed to work. Unemployment rates generally burgeon in a society reeling from conflict and usually, the most widely affected group is women.[62] Generally, in these situations 'Widows, women with disabilities, older women, single women without family support and female-headed households are especially vulnerable to increased economic hardship owing to their disadvantaged situation, and often lack employment and means and opportunities for economic survival.'[63] In this regard, CEDAW Committee recommendations[64] argue that employment is an important part of the process of reintegration after a conflict. States make special allocations to increase the employment through gender-neutral measures; this approach would be acceptable under formal equality. However, these measures would not be helpful under an approach that follows the ideal of substantive equality.[65] Substantive equality would require specific remedial measures for women, wherein differences between the genders are considered. A gendered provision would consider the impact that a specific provision would have on women and then determine whether it is advantageous or not.[66]

(4) Post-conflict societies need to engage in mechanisms that are involved in the reintegration of girls and women back into a fully functioning society, and among these the most effective is often education. In most cases, during a conflict, educational services

61 CEDAW/C/GC/30 (n 4) [50]; See generally, Melanie O'Brien, 'Sexual Exploitation and beyond: Using the Rome Statute of the International Criminal Court to prosecute UN Peacekeepers for Gender Based Crimes' (2011) 11 International Criminal Law Review 803.

62 CEDAW/C/GC/30 (n 4) [49].

63 ibid.

64 ibid [51].

65 ibid [30].

66 See generally, Fredman (n 37).

do not exist. Post-conflict, it is girls who get left behind and end up not re-joining schools.[67] This must be taken into consideration at the time of transition. In a transitional setting, programs for the reintegration of girls into schools are extremely important to avoid exclusion of females from society and the economy.[68] In accordance with the notion of substantive equality, an incentive policy could be implemented for every family that sends girls back to school after a conflict. However, the notion of formal equality would require no such incentives for reintegration. Moreover, a post-conflict society should attempt to address problems dealing with education in terms of both formal as well as informal education. Programs of vocational learning that could help children of both genders should be offered. Additionally, it has been argued that girls tend to avoid going to school when menstruating if access to latrines or water is obstructed. This is especially true of girls who are unable to afford sanitary towels.[69] These issues must be considered and addressed when a post-conflict society is being rebuilt.

(5) During conflict, people migrate to areas that are thought of as safer, causing a significant portion of the population to be displaced. Governments generally respond to the situation by setting up temporary refugee camps. These camps are often overcrowded and sometimes function as the hotbeds of sexual violence. The CEDAW committee acknowledges the precarious condition of women in post-conflict contexts especially when it comes to women who have been displaced.[70] Displacement exacerbates the problems that women tend to face in a post-conflict society. Similar to the approach towards employment, a gender-neutral measure would not be effective to tackle this issue. In the context of displacement, it would not be enough for the government to respond to the situation by simply extending the rehabilitation programs that apply to men in a transitional setting to women. There is a need to implement specific programs that take this into account by making security, safety, and health of women their primary concerns. Refugee women are not a homogenous group[71] and might be more vulnerable than non-refugee women.[72] If responses and programs are targeted, by taking substantive equality into account, they will have a greater impact on women and the society as a whole.

The situation of women can be further exacerbated by displacement when issues of

67 CEDAW/C/GC/30 (n 4) [52].
68 CEDAW/C/GC/30 (n 4) [57].
69 See generally Katarina Tomasevski, 'Rights based Education as a Pathway to Gender Equality' in Ineke Boerefijn and others (eds), *Temporary Special Measures: Accelerating de facto Equality of Women under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia 2003) 173.
70 CEDAW/C/GC/30 (n 4) [54].
71 ibid [6].
72 ibid [55].

citizenship arise. At times, refugees seek safe shelter by travelling long distances to be able to protect their families, even involving the crossing of borders. If the law where the women are citizens denies them the ability to pass the status of citizenship to their children,[73] it would be problematic. This was the situation in Nepal prior to the change in the Constitution.[74] Though this is a move in the right direction, there are still some complications that arise in the Constitution of Nepal in this regard.[75] Post-conflict, then, there is a necessity for the state to ensure that citizenship rights are granted equally to women and men so that it can be passed to the next generation.[76] This would widen the reach of ESRs, as access is at times contingent on citizenship.

D. Other measures

In this subsection, I will discuss three issues, (1) representation, and participation; (2) requirements under CEDAW; (3) crimes against women.

(1) Women tend to suffer in post-conflict situations without proper representation within the process.[77] The ability to participate and bring out issues that might be most important in their experience is hindered. To address this, it is important for the government to encourage women to take on roles of leadership[78] in the architecture of the post-conflict society, as well as later in the national government. This participation would accommodate the diverse experiences of women and could be a harbinger of change in the post-conflict structures of governance.[79] Furthermore, it is necessary that civil service organisations have the chance to participate in the process and contribute to mechanisms that increase gender equality. These organisations have the ability to bridge the gap[80] between the government and individuals by giving women the ability to voice opinions and share experiences in an informal manner, which should not be disregarded. This cooperation would allow better dispersal of information during the creation of a transformed society.[81] On the whole, this would make it a more inclusive and participatory process, possibly inspiring an enduring change.

73 Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal' (2008) 2 Internationa Journal of Transitional Justice 378, 380.
74 Constitution of Nepal, art 11(1)-(5), 20 September 2015 Gazette 2072.6.3.
75 ibid art 11(7), which does not allow citizenship to be passed to the child of a Nepali woman and a foreign man.
76 Pasipanodya (n 73).
77 See generally, Schabas (n 2).
78 CEDAW/C/GC/30 (n 4) [42].
79 ibid [43].
80 See generally Alison Corkery and Duncan Wilson, 'Building Bridges, National Human Rights Institutions and Economic, Social and Cultural Rights', in Riedel and others (n 26) 474.
81 CEDAW/C/GC/30 (n 4) [29].

(2) The broad aim of any state should be to eventually fulfil the requirements of CEDAW. This would mean a change in mechanisms of the state and there is no better time to do it than post-conflict. One such requirement is the reporting mechanism created by Article 18 of CEDAW, which requires states to report on their progress and the mechanisms adopted in general. This type of reporting extends to post-conflict societies as well.[82]

(3) The notion of substantive equality should not be overlooked in post-conflict prosecutions, especially when dealing with crimes against women. Post-conflict, it is imperative that women have access to justice. This requires setting up institutional machinery that encourages the use of state based mechanisms to address past wrongs. These mechanisms could be in the form of courts or reconciliation commissions. The approaches to transitional justice are not mutually exclusive; one assists the other. These processes of prosecution must penalise sexual crimes as well. The Rome Statute, for example ensures this through various provisions dealing with sexual crimes and incorporates notions of substantive equality.[83] It goes beyond the statute of other tribunals in this aspect.[84] In these situations, it can be noted that legal provisions are not enough to change reality. However, adhering to these provisions, could assist in changing values in the society, and contributing towards a more positive change.

IV. Conclusion

A transitional society often has high moral capital and low resources. It must pick up the pieces in the wake of tragedy. Moving forward to a sustainable peace is exceedingly difficult for any society without properly dealing with the past. This requires mechanisms of prosecution and reconciliation. It additionally requires understanding the notions of development and justice in a holistic manner. This necessitates emphasis on ESRs, and if the whole of society is to be included, it requires a gendered emphasis on ESRs. Building a post-conflict economy that is sustainable is a likely priority for the post-conflict government. However, in this paper I essentially argue that this cannot be done without considering the large group that comprises women.

I propose an enhanced implementation of ESRs in a post-conflict society through an approach entrenched in substantive equality. This would allow the advent of superior mechanisms for the purpose of a targeted approach towards women, who comprise a vulnerable group within the society. It would allow the society to constructively come to terms with its past while looking forward at the future. I do not believe that a society can

82 CEDAW/C/GC/30 (n 4) [27].

83 Article 7 defines rape as a specific crime against humanity, Article 42 gives powers to the prosecutor to appoint advisers with expertise in the area.

84 It could be argued that Article 54(1)(b) gives precedence to sexual crimes and enhances the protection provided to victims.

truly move forward if a large section of it, i.e. women, are not taken into consideration while creating new policies.

I have deliberately been idealistic in the proposals that I outlined in this paper. I believe that a post-conflict society would need a sense of idealism through an approach entrenched in substantive equality, to fruitfully achieve gender equality. However, it should be noted that this idealism is tempered with some flexibility, in that I leave open for the post-conflict society to decide for itself how it would incorporate substantive equality into this new and transformed society that is being created. Societies cannot overcome the struggle after a conflict overnight, but they can take small steps in the right direction. Replacing formal equality, which has been fairly unsuccessful, with substantive equality is certainly a move in the right direction. Mechanisms of transitional justice require persistent effort. '[I]t is the courage … to advance one's most cherished values day by day to the extent possible. Relentlessly. Responsibly.'[85] These words are as true today, as they were in 1991.

85 José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Right Violations' (1992) 43 Hastings L J 1425, 1438.

OBSCENITY IN THE KISS

Shrutanjaya Bhardwaj*

I. Introduction

> There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered.[1]

Couples being rounded up for allegedly illegally indulging in 'obscene' acts in public places is now commonplace.[2] Sadly, however, much of this often does not have anything to do with the law, but is centred on a self-conferred responsibility of the police to 'discipline' the youth. What is worse is that it is not just the police that polices; self-proclaimed protectors of the Indian culture are often much more pro-active in 'punishing' those who breach its sanctity.[3]

The 'Kiss of Love' protests were an attempt to bring to light these issues and the concerns of personal autonomy.[4] However, the effectiveness of such protests is likely to be extremely low, given that it is the ambiguity in the legal position regarding public kissing which gives the police power to misuse its uniform. In several instances, the police have themselves 'come to the conclusion' that public kissing is an offence under Section 294 IPC.[5]

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1 *S Rangarajan v P Jagjivan Ram* (1989) SCC 2 574 [45].

2 'Operation Majnu: Cops near Delhi punish couples for being together' (*NDTV*, 30 November 2011) <http://goo.gl/trcRDA> accessed 22 January 2016.

3 See for example PTI, 'Couples celebrate Valentine's Day, radicals play spoilsport' *Deccan Chronicle* (New Delhi, 15 February 2014) <http://goo.gl/fzPO5t> accessed 22 January 2016; Ishita Mishra and Ishita Bhatial, 'Couples out on V-Day will be married off: Hindu Mahasabha' *The Times of India* (Agra, 3 February 2015) <http://goo.gl/qBI80X> accessed 22 January 2016.

4 Viju BI, 'Kiss of love movement: They came, dared the mob, did it' *The Times of India* (Kochi, 3 November 2014) <http://goo.gl/0cgBlV> accessed on 22 January 2016.

5 PTI, 'Police Deny Permission for 'Kiss of Love' in Bengaluru' *The Times of India* (Bengaluru, 25 November 2014) <http://timesofindia.indiatimes.com/city/bengaluru/Police-deny-permis-

The Delhi High Court once had the occasion to consider this question.[6] A married couple was arrested on allegations of kissing outside a court premises. The court quashed the FIR under Section 294, but did not consider whether kissing was an 'obscene' act for the purpose of that section. Rather, the case was decided on the fact that 'annoyance', which is also an essential ingredient of the offence under Section 294, was not present.[7]

Thus, the question is still open as to whether the kiss is an 'obscene' act and hence an offence if done in public. In this paper, I argue that as per the judicially evolved standards of 'obscenity' in India, kissing in public is not an obscene act and is hence constitutionally protected. The test of obscenity revolves around a particular kind of social harm, whether conceptualised as one to individuals themselves or as a more abstract harm to the social fabric. I submit that our community has treated the effects of watching two people kiss as not harmful. It has done this by permitting persons of all ages to be exposed to such scenes in movies and television shows. I also attempt to counter the argument that viewing kiss scenes in movies causes lesser harm (a degree which might be acceptable) when compared to watching two people kiss in real life. This is done using the Supreme Court's own jurisprudence around movies and the need for prior censorship.

II. Testing Obscenity

The Constitution of India permits "reasonable" restrictions to be placed on the freedom of expression, but these must find basis and bear a rational connection with one of the grounds mentioned in Article 19(2) of the Constitution.[8] They must not go beyond the requirement of the felt needs of the society and object sought to be achieved, and in applying such a standard, the judicial approach must necessarily be dynamic, pragmatic and elastic.[9] Thus, the restriction cannot be excessive or arbitrary. It must reflect intelligent care and deliberation.[10] As per the Apex Court in *State of Madras v. VG Row*,[11] '[t]he nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time', are all characteristics which must 'enter into the judicial verdict.'[12]

It is also important at this juncture to note the Supreme Court's observation in *S Khushboo*

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sion-for-Kiss-of-Love-in-Bengaluru/articleshow/45273466.cms> accessed on 29 April 2016.

6 *A & B v State* Crl M C 283/2009, High Court of Delhi.

7 ibid.

8 *S Rangarajan* (n 1).

9 *Papnasam Labour Union v Madura Coats Ltd.* AIR 1995 SC 2200, (1995) 1 SCC 501; *Bhavesh D. Parish and Others v Union of India* AIR 2000 SC 2047, (2000) 5 SCC 471.

10 *Chintaman Rao v State of Madhya Pradesh* AIR 1951 SC 118.

11 AIR 1952 SC 196.

12 ibid.

v. Kanniammal:[13] since notions of social morality are inherently subjective, the Court had said, criminal law must not be used to unduly interfere with the domain of personal autonomy.[14]

Proscription of allegedly 'obscene' acts such as kissing etc., is sought to be justified under the ground of 'morality'.[15] Accordingly, Section 294 of the Indian Penal Code punishes the commission of obscene acts in public places.[16] Our question hence leads directly to another: is kissing 'obscene' within the meaning of Section 294?

The Supreme Court today finds itself stuck between two tests for determining the obscenity of a given matter. The first traces its origins to Justice Blackburn's judgment in an archaic House of Lords decision called *Regina v. Hicklin*,[17] and its import in India dates back to 1965 when the Supreme Court in *Ranjit Udeshi v. State of Maharashtra* was faced with Lawrence's (in)famous work, 'Lady Chatterley's Lover'. This was a golden opportunity for the Court to lay down a progressive test for determining obscenity, but it chose to completely rely on the English standard (quite questionably so, as we shall see later). The *Hicklin* test states that a given matter is obscene if it has the tendency to deprave or corrupt those whose minds are open to 'such immoral influences', and into whose hands it might fall. With respect to obscene content, Justice Blackburn had held: '…it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.'[18]

Importantly, this test makes children ('or impressionable minds') the relevant audience for determining the obscenity of a given matter.[19] The judge is required to place himself first in the position of the author and then of the reader, to find out both what was being conveyed and what was being received.[20] But this cannot be done with an extra-sensitive person in mind.[21] Further, what depraves or corrupts is to be determined from the point of view of the contemporary society.[22]

Reliance on *Hicklin* was surprising, given that the U.S. Supreme Court had by then

13 AIR 2010 SC 3196.
14 ibid.
15 See for example *Ranjeet Udeshi v State of Maharashtra* AIR 1965 SC 881.
16 See Indian Penal Code 1860, s 294.
17 (1868) LR 3 QB 360.
18 *ibid* (Cockburn CJ).
19 *Raj Kumar Pandey v MF Hussain* 2008 CriLJ 4107 (Del HC): 'The Hicklin's rule allowed a publication to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults.'
20 *Samaresh Bose v Amal Mitra* AIR 1986 SC 967.
21 *KA Abbas v Union of India* AIR 1971 SC 481.
22 ibid [49]; *See also Samaresh Bose* (n 20); *S Khushboo v Kanniammal* (n 13).

already rejected the standard as outdated.[23] It was even pointed out to the Court in *Udeshi* that through *Roth v United States*,[24] the U.S. had evolved a different, more free-speech-friendly test, which used the 'average person' of the community as the reference point, and protected all speech which had any 'redeeming social value', as not obscene.[25]

But the Constitution Bench observed that *Hicklin* was the position to be followed in our country, having due regard to what it called 'our community mores'.[26] It is difficult to understand what the Court was trying to say here. Community values could surely influence – or even determine – the *application* of the test (i.e. what depraves and corrupts impressionable minds could depend on contemporary community values), but how could they influence *which* test was to be applied? What is it in the Hicklin Test that was understood by the Court as so tremendously compatible with our community mores? The judgment did not engage with this question at all.

Imagine the consequences of using this test in the internet age: an incredibly large amount of material available online is liable to be censored, given especially that all of it is easily accessible to children. The Supreme Court did realise this problem,[27] and ultimately attempted to mark a move away from *Hicklin* in *Aveek Sarkar v. State of West Bengal*.[28] The Division Bench in *Sarkar* held that changing times warranted a revision of the criterion.[29] *Hicklin* could no longer be applied. Instead, the matter charged as obscene had to be understood in context and its overall impact had to be considered for making the determination.[30] Further, obscenity had to be viewed from the point of view of an 'average moral man' instead of those with impressionable minds.[31] The Court seemed to be borrowing this threshold from *Roth* itself, and called it the 'community tolerance test'.[32]

Before we undertake the analysis of public kissing, we must take note of two important considerations. The *first* is the important distinction between 'vulgar' and 'obscene' content. An act would not qualify as obscene merely if the sight of it 'disgusted' the onlookers. Disgust corresponds only to vulgarity, which has not been proscribed – what is essential for obscenity is an appeal to one's prurient interests, which is quite the opposite of disgust.[33]

23 *Roth v United States* 354 US 476.
24 ibid.
25 *Ranjit Udeshi* (n 15) [17].
26 ibid [22].
27 *Ajay Goswami v Union of India* AIR 2007 SC 493.
28 (2014) 4 SCC 257.
29 ibid.
30 ibid.
31 ibid
32 ibid
33 *Samaresh Bose* (n 20).

The *second* is the constitutional problems that plague *Sarkar*. While it may give us a more liberty-friendly scale than *Hicklin*, there are obvious problems with the judgment. The Court tried to couch its reasoning in a 'change in times' argument, what it really sought to do was to overrule a constitution bench decision. Is it for a smaller bench to determine that times have changed since a constitution bench exercised its wisdom on the issue? Further, this 'change in times' argument invokes the same question as it did in *Udeshi* – change in times could influence, or determine the outcome of the application of a test, but could it be a ground to change the scale itself? The Court seemed to be arguing that if the alleged act were to take place in the present, obscenity should be judged from the point of view of adults, while in 1965 it was permissible to judge it with respect to children. However, it does not seem to have any basis for saying this.

Also, it is worthwhile to note that while *Udeshi* had explicitly rejected the use of *Roth* in India,[34] *Sarkar* adopted precisely that standard.[35] Hence, while there are gaps in the reasoning adopted by both *Hicklin* and *Sarkar*, one would treat *Sarkar*'s very legitimacy with skepticism. It suffers from a constitutional problem as it oversteps bounds of judicial discipline. This paper will hence conform to the *Hicklin* test for the analysis of public kissing. This is also a much tougher standard to clear, and if a given matter passed the muster of *Hicklin*, it would undoubtedly pass the other, more generous test as well.

III. Does the Kiss deprave?

Under *Hicklin*, the question to be addressed would be whether being audience to a kiss would deprave or corrupt the youth, or give rise to prurient thoughts in them. As noted above, courts should be sensitive to the changing perspectives and concepts of morality of the society while judging obscenity, as these are bound to change from time to time and place to place.[36] This section will argue in a three-fold manner that the sight of a kiss in public cannot be treated under Indian law as enough to deprave or corrupt impressionable minds: *first*, that courts have recognised that those with impressionable minds are likely to be greatly influenced by and imitate what they see in movies; *second*, that an expert body in its determination has allowed the impressionable minds of the country to be exposed to kissing scenes in movies; and *third*, that courts have placed excessive reliance – very close to complete deference – to the expert body's determinations.

34 *Ranjit Udeshi* (n 15) [22].

35 *Aveek Sarkar* (n 28).

36 *Pawan Kumar v State of Haryana* AIR 1996 SC 3300; *KP Mohammad v State of Kerala* 1984 Cr LJ 745 (Ker).

A. The effect of films on children

Indian jurisprudence around cinematography recognises very well that movies are no ordinary means of dissemination of information. They are unlike other means of communication in the sense that they can stir up emotions much more deeply as compared to others.[37] A Constitution bench of the Supreme Court observed, while dealing with the constitutional validity of the Cinematograph Act, 1952, that pre-censorship is permissible in relation to the motion picture (even though not in respect of other means of communication) because:

> Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen.[38]

The Supreme Court in *S. Rangarajan v. P. Jagjivan Ram*, while exploring the reason why movies leave such a deep impact on the viewer, had observed that:

> The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for everyone who sees it.[39]

Therefore, the Supreme Court is aware of the profound influence that a motion picture leaves on the audience, particularly the young ones. This, to a certain extent, counters the anticipated argument that while public kissing may be permissible in movies, it ought not to be allowed in the public space because of the difference in impact in the two situations. It is clear that the impact of an obscene scene in a movie would be profound enough for any forum to rule its undesirability vis-à-vis young audiences, and that that has not been the case with kissing scenes, as we shall see next.

At this juncture, it must be clarified that it is not sought to be argued that since vulnerable minds in our society are 'substantially' and 'frequently' exposed as audiences to the act of kissing, the same cannot 'deprave or corrupt' them. On the other hand, the argument in this paper seeks to rest its different position on the nature of determination that goes behind permitting these movies to be screened for public viewing.

B. The Central Board of Film Certification (CBFC)

37 *KA Abbas* (n 21).
38 ibid.
39 *S Rangarajan* (n 1) [10].

The CBFC is a statutory body of experts that pre-censors all films before they are released for public viewing in India.[40] A certificate from the Board is a legal requirement before the film can be released.[41] All members of the Board are eminent persons from different walks of life such as the social sciences, law, education, art, film and so on, and thus represent a cross-section of society.[42] Guided by the principle that certified films must not deprave the morality of the audience,[43] and that human sensibilities must not be affected by vulgarity, obscenity or depravity,[44] the Board issues four different kinds of certificates, i.e. 'U', 'U/A', 'A', and 'S'.[45]

Of these, the first two kinds effectively signify that the film is suitable to be screened without restrictions. As per the Rules formulated by the Ministry of Information and Broadcasting, before granting a 'U' i.e. 'Unrestricted Public Exhibition' certificate, the Board must ensure that the film is 'suitable for *family viewing*', which means that 'the film shall be such that all the members of the family *including children* can view it together' (emphasis supplied).[46] Before granting a 'U/A' certificate, it must be ensured that 'the film is suitable for unrestricted public exhibition but with an endorsement of caution that the question as to whether *any child below the age of twelve years* may be allowed to see the film should be considered by the parents or guardian of such child' (emphasis supplied). It may hence be concluded that, particularly for those aged above 12 years, the Board considers that both 'U' as well as 'U/A' certified films do not degrade the morality of the audience.

If that is the law, and if the Board gave a particular movie a U certificate, there could be only one meaning of this certification: in the opinion of the Board, viewing any scene in that movie would not deprave anyone. It must be noted that a substantial number of movies containing kissing scenes have procured 'U'[47] as well as 'U/A'[48] certifications in the recent past. This expert board after considering all relevant aspects has determined that viewing kissing scenes would not deprave or corrupt any person, young or otherwise. Given this, it would be difficult to assert that watching a couple kiss in real life (without the special effects and extra focus that movies provide) has the tendency to deprave and corrupt.

Of course, it still remains to be answered as to what value the courts should accord to the judgment of this expert board. This is sought to be dealt with in the following subsection.

40 See 'About CBFC' <http://cbfcindia.gov.in/> accessed on 5 February 2015.
41 Cinematograph Act 1952, s 7.
42 'Organizational Structure Diagram', available in the Right to Information Section at http://cbfcindia.gov.in/, last accessed on 5 February 2015.
43 Ministry of Information and Broadcasting, Notification (S.O. 836-(E) 6 December 1991) Guideline 3.
44 ibid [Guideline 2(vii)].
45 Cinematograph Rules 1983, rule 24(9).
46 Cinematograph (Certification) Rules 1983, rule 22(9)(a); Notification (n 48) Guideline 5(1).
47 See Jab We Met (2009), Barfi (2012), Krrish 3 (2014) etc.
48 See 2 States (2014), Bang Bang (2014), Haider (2014) etc.

C. Judicial treatment of the Board's opinion

Determinations of the CBFC have been accorded a high status in Indian judicial decisions. In *Bobby Art International v. Ompal Singh Hoon*,[49] the Supreme Court discussed the relevance of the certificate issued by the Board in relation to the film 'The Bandit Queen' which had many scenes containing nudity. Noting that members of the Board are 'qualified to judge the effect of films on the public',[50] the Court allowed the screening of the film. It also cited with approval the following passage from *Raj Kapoor v. State*,[51] which, though held that the Board's certificate might not be conclusive in trials relating to Section 292 IPC, aptly described the importance to be accorded to it:

> I am satisfied that the Film Censor Board, acting under Section 5A, is specially entrusted to screen off the silver screen pictures which offensively invade or deprave public morals through over-sex. There is no doubt – and Counsels on both sides agree – that a certificate by the high-powered Board of Censors with specialised composition and statutory mandate is not a piece of utter inconsequence. It is relevant material, important in its impact… May be, even a rebuttable presumption arises in favour of the statutory certificate but could be negatived by positive evidence. An act of recognition of moral worthiness by a statutory agency is not opinion evidence but an instance or transaction where the fact in issue has been asserted, recognised or affirmed.[52]

Weight has been accorded to the opinion of the statutory expert body in many other cases such as *Directorate General of Doordarshan v. Anand Patwardhan*[53] and *Union of India v. KM Shankarappa*.[54] High Courts have ruled no differently.[55] The Delhi High Court in *Rakeysh Omprakash Mehra* categorically granted a conclusive status to the Board's judgment by holding that the decision as to whether a ground for restriction under Article 19(2) is attracted by a film is 'best left' to the sensibilities of the multi-member expert body specially constituted in this behalf.[56]

In this light, it is difficult to deny that a repeated determination by an expert tribunal in favour of allowing kissing scenes to be screened for public viewing without restrictions is enough evidence of the fact that the prurient interests of our society's vulnerable lot

49 (1996) 4 SCC 1.
50 *Bobby Art International v Om Pal Singh Hoon* (1996) 4 SCC 1 [7].
51 AIR 1980 SC 258, 1980 CriLJ 202.
52 *Raj Kapoor v State* AIR 1980 SC 258 [14].
53 AIR 2006 SC 3346.
54 (2001) 1 SCC 582.
55 *See Lakshmi Ganesh Films v State of Andhra Pradesh* 2006 (4) ALD 374; *Rakeysh Omprakash Mehra v Govt of NCT Delhi* 197 (2013) DLT 413.
56 *Rakeysh Omprakash Mehra v Govt of NCT Delhi* 197 (2013) DLT 413.

have moved beyond the point where they could be appealed to by the mere sight of two kissing people. At best, 'U' and 'U/A' certificates to the aforementioned movies establish it beyond contest that kissing is not an 'obscene' act for the purposes of Section 294. At worst, a rebuttable presumption arises to this effect – and must be rebutted by the State through positive evidence, as held in *Raj Kapoor*.[57]

IV. Conclusion

The lack of a clearly laid-down law on this point depicts a sad state of affairs, particularly in light of the effects it brings along. The closest Indian courts have ever gotten to adjudicating on this issue was in *A & B v State*,[58] where Murlidhar J observed that the act of kissing between a married couple could not be said to be obscene.[59] However, this comment was obiter and did not make law, as the case was decided on the basis of lack of witnesses.[60]

It is, however, beyond doubt that the mere sight of a kiss causes no harm to social morality. Movies have been highlighted time and again by the Supreme Court as a unique mode of communication particularly because of their ability to influence the mind in a way that no other means can. And a statutorily-installed expert body, whose opinion has always had great weight with the Courts, has repeatedly allowed movies containing kissing scenes to be viewed by the public with unrestricted access.

Public kissing, therefore, should not be an offence under Section 294 IPC. The fact that citizens of our country need to hold protests to assert rights already guaranteed to them under the Constitution of India depicts our miserable condition in respect of recognizing civil liberties and bringing laws and their implementation in phase with the same. There is a huge lag between social perceptions of morality and its treatment at the hands of the police, which renders unreasonable a large number of restrictions that the police regularly places on lovers.

This paper has aimed to start a discussion, at least within the academia, about the constitutional and criminal law aspects involved in placing the unreasonable restrictions on the specific act of kissing. One certainly hopes for an overturn of *Udeshi* in a manner more acceptable than the one adopted in *Sarkar* however, until that happens, and given that the ever-so-cherished liberty of expression is being curtailed as we speak, it is imperative that we engage with questions of personal autonomy at a deeper level.

57 *Raj Kapoor* (n 52).
58 Crl MC 283/2009, High Court of Delhi.
59 *A & B* (n 6).
60 ibid.

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