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Articles

Case Comments

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NCU Law Review is a peer-reviewed biannual academic publication of the Centre of Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University (NCU), Gurugram. This publication is an endeavour to serve as a forum for the promotion and circulation of views on contemporary legal issues among members of the legal profession, academicians, and students. The Law Review aims at legal research centres, policy makers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

EDITORIAL NOTE

The NCU Law Review, since its birth, has endeavoured to deliver pioneering and unconventional research. This journal is in succession to the previous issues, and like its predecessors aims to bring severalty of legal perspectives to the mind of the reader. This issue is particularly special in so far we received academic scholarships from across the borders truly representing the expansive reach of the journal. We are proud to announce the arrival of this issue which encompasses a broad spectrum of literature on diverse domains of law and policy ranging from corporate governance, regional mechanism for protection of human rights, socio-legal issues like child marriage, cross-border defamation, Cyber Law, Judicial Process, International Law, and Constitutional Law.

The Editorial Board is appreciative of active involvement of hard-working student editors, namely, Ms. Priyanshi Sharda, Ms. Divya Singhal, Kumari Tanu, Ms. Gaurangi Kaushik and Mohammad Azhad Hasan at every phase of this publication process.

Dr. Zubair Ahmad Khan in his article, "Administrative Reforms Through Corporate Governance in Banking Regime: Critical Issues" seeks to explore the current governance practices of banks across the country in light of the banks' financial situation over the past few decades. It explains the governance issues that banks face and the consequences that banks face as a result of poor corporate governance in the banking industry. Additionally, it investigates the efficiency of regulatory authorities' governance-related actions and the viability of the existing legislative framework.

"Evaluation of Fundamental Rights: A discussion about the Regional Level and the Inter-American System for the Protection of Human Rights" authored by Jorge Isaac Torres-Manrique and Nuccia Seminario-Hurtado discusses the adjudication of Human Rights at the regional level and specially at Inter-American level. They begin with brief evaluation and assessment of fundamental rights setting in the broader context of justice, and delves into questions of human rights and fundamental rights. It points the issue of non-execution of judgments of Inter-American Human Rights Court.

Saransh Yadav's "A Critique on Prohibition of Child Marriage (Amendment) Bill, 2021" critiques recent bill which raises the marriageable age of women

from 18 to 21 years of age. The article sets the background for bringing the Child Marriage Amendment Bill, 2021, and the government's declared position on it. He further assesses the feasibility of such a decision. He suggests there are other measures which should be introduced to affirm women's position.

In the article titled, "Regulating Cross Border Defamation in Cyberspace: Private International Law Perspective", Dr. Gurujit firmly posits that dissemination of defamatory statements about one or the other party with impunity on various platforms in a boundaryless cyberspace creates an adverse and irreversible impact on the reputation of victim across the globe. Regulating such defamatory statement and offender is always a difficult task due to technical and non-technical legal issues. It presses for a principles approach in international and harmonization of choice of forum, choice of law, and enforcement of foreign judgment.

Aarohi Kashyap's article titled "Cyber-Crimes and Challenges Associated with Cyber-Crime Investigations In India" traces the nature of cybercrimes and the issues in their investigation. The article discusses both aspects- prevention and detection. For former, role of cyber safety agencies is underlined whereas the latter involves the analyses of provisions of Code of Criminal Procedure, 1973. The article makes suggestions ranging from cyber safety awareness, analysing behavioural factors of cyber-criminal, collaborative partnership with the influencers etc.

"Administrative Tribunal Perpetuating the Cause of Constitutionalism" authored by Saurav Kumar studies the role and development of tribunal system in India. Further the article is educating on the relationship of judicial system with the tribunal system through a series of case law. The article terminates with conclusion highlighting the importance of efficiency and neutrality in adjudication system for the litigants.

Jasvir Singh in his article titled, "Law of Investigation of Black Money Cases and Its Efficacy" presents the issues relating to investigation in black money cases. It details the issues by reliance on semi-structured interviews and use of case law. It further compares the case study examples from the USA and the UK. The article makes certain suggestions to strengthen the existing framework.

Dr. M.K. Nagaraja in his article “The Dynamics of Judicial Process”, rekindles the debate between legislative and judicial powers. The article details the jurisprudential aspects of judicial process and its legitimacy. Further, there are different aspects of judicial process such as basic features of the Constitution, Judicial Interpretation, Judicial Reasoning and the like which nourish judicial outcomes.

Shubham Shanu and Saket in their article, “Judicial Evaluation of Amazon v. Future Case: Resolving the Dispute Surrounding Emergency Arbitrator In India” examines the pertinent issues surrounding the Emergency Arbitrator’s order in India, such as its recognition and enforceability, including the role of party autonomy in enforcing Interim orders in India. It also explores the issue regarding the appeal against such order as per the domestic provisions and analyses Section 17(2) of the Act concerning an appeal against the order of the Arbitral Tribunal.

In the case comment “An Analysis of Nautilus v. Biosig Instruments: New Standards Set for Definiteness of Patent Claims in the US” Sulok S K has highlighted that in determining patent boundaries is an age-old problem, and its impact is huge when it comes to medicines and medical devices in terms of access. Hence,the US Supreme Court has laid down tests to fulfill the definiteness requirement is that of ‘reasonable certainty’. Though the court has correctly observed that absolute precision of patent boundaries is unattainable, the standard laid down is a vague one.

The Editorial Board expresses heartfelt gratitude to the authors for their scholarly contribution. We would further extend our appreciation to Sh. Daulat Singh, Hon’ble Chancellor, NCU, Hon’ble Members of the Governing Body, NCU; Prof. (Dr.) Prem Vrat, Hon’ble Pro-Chancellor, NCU; Prof. (Dr.) Nupur Prakash, Hon’ble Vice-Chancellor, NCU; Cmde. Diwakar Tomar NM (Retd.), Hon’ble Registrar, NCU for their continuous support, guidance, and cooperation in this academic endeavour. We are also thankful to the reviewers, the dedicated staff of the University and Decorpac (I) Pvt. Ltd.

Editorial Board

NCU LAW REVIEW

MESSAGE FROM THE VICE-CHANCELLOR, NCU

Research is a crucial and revered responsibility of the Higher Education Institutes. Not only it is a way of giving back to the community, but also ensures opening up of the academic vistas remaining to be explored. Hence, with immense pleasure, I present you with pride and happiness, the first and second issues of the fifth volume of NCU Law Review published under the aegis of the Centre for Post-Graduate Legal Studies (CPGLS) at School of Law, The NorthCap University.

Our previous two volumes were a success taking within its fold running currents and trends of law. In fact, the issues through their amplified circulation reached the hands and minds of legal luminaries in the academic circles and legal profession. The present journal endeavours to carry the legacy of success forward and keep the vibrancy of legal research vigorous. The law review intends to keep the spirit of inquiry and legal reform alivein the minds of avid readers, young and old academicians, advocates, and aspiring lawyers. The articles published in the journal meticulously scrutinize the legal quagmires, and fertile the soil for further thought and action.

I sincerely appeal to all legal scholars to contribute to the future issues of the law review, and further the cause of knowledge.

The publishing, editing and shaping up of the law review would have been impossible without the determined, and accurate work of the editorial team. I congratulate the entire team. I acknowledge my thanks and due regards to the contributors of the journal and hope for our long and continued relationship in future.

Best Wishes and All the Success!

Prof. (Dr.) Nupur Prakash,
Vice Chancellor,
The NorthCap University,
Gurugram

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LAW OF INVESTIGATION OF BLACK MONEY CASES AND ITS EFFICACY

Jasvir Singh[*]

ABSTRACT

The term 'black money' has been applied in the context of both investigation of black money cases under the Income Tax Acts as well as under the Prevention of Money Laundering Act, 2002. Therefore, it becomes necessary that the process of investigation, both in terms of income tax laws and anti-money-laundering laws need to be explored. This article deals with a legal framework for investigation in general and of black money cases in particular. It also focuses on the efficacy of the legal framework, its flaws and also the weaknesses of the enforcement structures explained in terms of conviction rates. The article examines the general investigative procedures under the criminal law in India and its application in black money cases under general and special laws. The poor conviction rate in India coupled with prolonged and delayed trials have undermined the efficacy of the system and are some of the key challenges. The article employs a mixed approach and is based on a qualitative analysis of the relevant material. In addition to some empirical work in the form of focused and unstructured interviews, the article primarily relies on descriptive, analytical and comparative tools to scrutinize the relevant laws, articles, books etc.

Fearless investigation is a sine qua non of exposure of delinquent 'greats' and if the investigative agencies tremble to probe or make public the felonies of high office, white-collar offenders in the peaks may be unruffled by the law. An independent investigative agency to be set up in motion by any responsible citizen is a desideratum.

Justice V.R. Krishna Iyer

[*] Ph.D. Scholar, National Law University, Delhi

I. INVESTIGATION: AN OVERVIEW

Investigation is pursuit of truth. It is necessary to understand the investigative procedures and legal framework in India. Investigation is also the very foundation of the criminal justice system. The aim of the investigation and the entire Criminal Justice System is to discover the truth.[1] The impact of criminal investigation is important for the Criminal Justice System because a negligent investigation could result in a miscarriage of justice if the collection of evidence is vitiated by error or malpractice. On the other hand, a good and well-planned investigation will result in Successful prosecution of the guilty because it depends on a thorough and careful investigation.[2] Investigation of crime is primarily an important phase of the criminal justice system. Its importance can also be gauged from the fact that it marks the inception of the criminal justice process. It lays down the foundation of fair and impartial trial. Investigation is the first step in the criminal justice process. Various interpretations have been given to the process of investigation. According to *Black's Law Dictionary* 'investigation' is "to inquire into a matter systematically; to make a suspect the subject of a criminal inquiry".[3] To investigate as per *Corpus Juris Secundum*[4] means 'to ascertain by careful research; to inquire into systematically, a minute inquiry, a scrutiny, a strict examination[5], the action or process of searching minutely for truth, facts or principles.'[6] Criminal investigation is the backbone of any criminal justice system if it is "based on fidelity, accuracy and sincerity in lawfully searching for the facts and ensuring faithfulness, exactness and probity in reporting the results".[7] In *H.N. Rishbud* v. *State of Delhi*[8], the

[1] For achieving this goal, the investigating officers must be properly trained and supervised, and necessary scientific and logistical support should be made available to them.

[2] It is the primary responsibility of the Police to protect life, liberty, and property of citizens. For the protection of these rights, the Criminal Justice System has been constituted with an important responsibility assigned to the Police. They have several duties to perform. Two primary duties of the police are: Firstly, maintenance of Law and order; and secondly Investigation of offences.

[3] *8 Bryan A. Garner, Black's Law Dictionary, (West Group 8th ed., 2004).*

[4] XLVIII, *Corpus Juris Secundum*, (The American Law Book Co., Brooklyn N.Y. 47th ed., 1982).

[5] *Mora* v. *Great Western Inc. Co.* 206 F.2d 377 (1953).

[6] *Wright* v. *Chicago.* 639 N.E.2d 203 (1994) also referred in.

[7] 5, Hans G. A. Gross, *Criminal Investigation* (Maxwell Ltd., London 5th ed., 1962).

Supreme Court of India stated that the investigation of an offence generally consist of proceeding to the spot, ascertaining of the facts and circumstances of the case, discovery and arrest of the suspected offender, collection of evidence relating to the commission of the offence which may further consist of examination of witnesses, search of places or seizure of things relevant to investigation etc.

II. INVESTIGATION: PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE, 1973[9]

To understand the investigation of black money cases in India, the general features of investigation under the criminal procedure code in India need to be understood. When investigations are conducted under the Prevention of Money Laundering Act, 2002 the general procedure under Criminal Procedure Code applies to all such cases being investigated with some exceptions. Some of the salient features of the investigation and the criminal procedure together with some provisions of Indian evidence Act are enumerated below:

- The word investigation has also been defined in Code of Criminal Procedure 1973 under section 2 (h), according to which "investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."[10] All the proceedings under this code has a special connotation under the Code of Criminal Procedure 1973 (Cr PC) because there are other special statutes such as NDPS Act 1985[11] etc., which have its procedure or procedures and are substantially different. In normal course, investigation is considered synonymous with criminal investigation. But the procedure for criminal and civil cases is different. As

[8]H.N. Rishbud v. State of Delhi, A.I.R. 1955 196 (India).
[9]The Code of Criminal Procedure was first enacted in 1861 under British rule and later substituted in 1872 and 1882. It was the fourth Code of Criminal Procedure of 1898 that spelt out the framework of investigational procedures which was further revised in 1973 and the same came into force on 1st April 1974.
[10] Code of Criminal Procedure (Amendment) Act, 1973, No. 2, Acts of Parliament, 1974(India).
[11] The Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61, Acts of Parliament, 1985 (India).

mentioned above, the investigations of black money cases fall both under civil and criminal categories, though income tax laws also provide investigation and criminal prosecution.[12]

- While the police officer has to investigate cognizable cases, they are enjoined not to investigate the non- cognizable offences without the order of the magistrate as governed by section 155 (2)[13] of the Cr PC. It may be noted that only an official investigation in charge of a police station has been empowered by the code as per section 156[14] of Cr PC for investigation.[15]

- One of the salient provisions regarding investigation is investigation by any person. [16] Any person aggrieved by the commission of any cognizable offence need not necessarily go to the police for redress. He can, as will be seen later, directly approach a magistrate with a complaint. Investigation in such a situation proceeds differently. The magistrate taking cognizance has the power to direct an investigation to be made by a person other than a police officer,[17] and such person shall

[12]See chapter XII of Income Tax Act, 1061. Also it may be noted that investigation for tax evasion/black money cases and money laundering is also not wholly governed by the Cr PC, though some provisions may be applicable such as in the case of Prevention of Money Laundering Act 2002, procedures of seizure and arrests etc. are governed by the Cr PC only
It is also relevant to note that the term evidence has been defined in section 3of the Indian Evidence Act, 1872. Indian Evidence Act, 1872 deals with evidence under two broad categories of oral and documentary evidence but evidence under investigation may entail physical evidence such as a firearm or a semen-stained cloth in cases of murder or rape, or recovery of hard discs, computers, and electronic devices in financial crimes etc.
[13]Information as to non-cognizable cases and investigation of such cases: (2) No police officer shall investigate non-cognizable cases without the order of a Magistrate having power to try such case or commit the case for trial.
[14]Police officer's power to investigate cognizable cases:(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try.
[15]Investigation under the Cr PC is conducted by police officers ordinarily not below the rank of sub-inspector acting under the Police Act, investigations under the income tax laws are conducted by income tax officers who Act as quasi-judicial authorities. In the case of investigation by the police in criminal matters, a distinction has been made between cognizable and non-cognizable offences, which demarcates the powers of the police investigation in relation to concerning criminal investigations.
[16] R.V. Kelkar, *Criminal Procedure* (Eastern Book Company, Lucknow, 5th ed., 2008).
[17]Section 202 Code of Criminal Procedure 1973: Postponement of issue of process:

have for that investigation all the powers conferred by this code on an officer in charge of a police station except the power to arrest without warrant.[18] The culmination of the investigation process is reached by filing charge sheet in case the offence is found to have been committed under section 173[19] of Code of Criminal Procedure 1973.[20]

2.1. Investigation in Black Money Cases

In India, police investigate all the offences either directly or after an order from the Magistrate.[21] Investigative procedures for investigating white-collar crimes, economic offences and public welfare offences are significantly different from the investigation followed in traditional crimes. Investigation of black money, tax evasion, money laundering and bank frauds follow distinct procedures as the mode of collection of evidence in each of these cases is different. Together with the mode of collection of evidence, the legal provisions governing their investigations and the agencies are also different in such cases.

(i) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:
Provided that no such direction for investigation shall be made,—
(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or
(b) Where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200
(ii) In an inquiry under sub-section (i), the Magistrate may, if he thinks fit, take evidence of witness on oath: Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath
(iii) If an investigation under sub-section (i) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

[18] Ibid.

[19] Report of police officer on completion of investigation -
(1) Every investigation under this Chapter shall be completed without unnecessary delay
(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government etc.

[20] H.N. Rishbud v. State of Delhi, A.I.R. 1955 196 (India).

[21] See section 154 and 190 of the Cr PC.

The normal practice in India is that investigations are conducted by investigating officers working under the police stations. However, there are specialized agencies such as Central Bureau of Investigation (CBI) which conduct investigations primarily in corruption cases, economic offences, and also sensitive traditional crimes such as murder or kidnappings etc. The CBI conducts investigations under the direction of the Central Government or the constitutional courts. In contrast, the investigation of money laundering cases is conducted by the Enforcement Directorate (ED). The investigating officers of the ED are conferred powers of investigation not by Cr PC but by PMLA (Prevention of Money Laundering Act, 2002) though as mentioned above, some provisions of Cr PC are applicable to investigation of money-laundering cases.[22]

As mentioned above, investigation of black money cases in India proceeds under two different set of laws. Firstly, both civil and criminal investigations and prosecutions are conducted under the Income Tax Act, 1961. Secondly, investigations done by ED under the PMLA, 2002. Of the two, it is primarily the investigation done by CBI and the ED which involve offences such as money laundering etc.

2.2. Investigation under PMLA

The investigation under PMLA is conducted by ED officials who have been conferred powers under the PMLA, 2002, as amended from time to time

[22]It is relevant to note the manner in which the investigations are conducted. In normal course, the investigations are conducted by individual officers. Though of late, there is a proposition to have investigations conducted by a group of officers, and this practice is followed in some police organisations. The recent experience in India shows that in a system of a single investigating officer investigating a case, on his/her transfer, the investigations suffer adversely. The chances of corrupting a single officer are also higher than a team of officers where manipulation of cases under extraneous pressures would be lower. Questions have been raised about the efficacy of investigative skills of police agencies in India which is particularly relevant for the investigation of financial crimes such as black money/money-laundering cases. Issues have been raised regarding the low conviction rates. Poor investigative skills are also attributed to inadequate training and insufficient educational standards prescribed for police personnel at the cutting edge. Police personnel involved in investigations are poorly trained, such observations have also been made by the courts in some of its judgments. Lack of financial resources also hampers objective, scientific and fair investigations. Appointment and transfers of police personnel and senior officers is also important issue which affects the quality of investigations. Tenures of investigating officers and senior supervisory officers are not stable and the progress of police reforms despite order of the supreme-court in Prakash Singh v. Union of India, 2006 (8) SCC 1.

(including the 2013 and subsequent amendments). Previously, the filing of an FIR by any investigative agency such as the CBI or the state police is an essential precondition for the ED to take cognizance of the offences related to money-laundering. The PMLA, 2002 provides a list of offences under which the ED has been empowered to take cognizance. The ED is empowered to attach property of the accused under the provisions of PMLA, 2002. For attachment of property of the accused even before filing of the FIR, a recent Supreme Court judgment has held that ED has the authority to attach property even before FIR is filed under certain circumstances.[23] Although the provisions of criminal procedure code are applicable and the nature of offences investigated under the Act are criminal, the PMLA has also provided some procedures which are distinct from the criminal procedures under the normal laws. For instance, the procedure regarding the adjudicating authority, which are quasi-judicial authority under the Act, is empowered to attach properties connected with the case under investigation as mentioned above.[24] Some of the salient features of the Act and provisions regarding investigation, search/seizure procedures, punishments etc. under the Act are summarized below.

2.2.1. General Background: PMLA

In furtherance of enacting the Prevention of Money Laundering Act, the appointment of an Inter-Ministerial Committee had been initiated in 1996. The purpose of such a committee had been to analyze the various elements of money laundering and providing suitable solutions or suggestions in legislative form, if necessary[25]. The committee prepared a report and strongly recommended the enactment of a comprehensive legislation to deal with the menace of money-laundering. The Prevention of Money Laundering Bill, 1998 was introduced in *Lok Sabha* on August 4, 1998. The bill was subsequently referred to the standing

[23]PTI, *SC upholds ED's power to arrest, attach property, search & seizure under PMLA*, THE PRINT, (Jul. 27, 2022, 5:00 PM), https://theprint.in/india/sc-upholds-eds-power-to-arrest-attach-property-search-seizure-under-pmla/1057477/

[24]See, Section 5 of PMLA, 2002.

[25]The committee was appointed by the Ministry of Finance, Government of India in 1996. The committee was appointed in pursuance to the UN resolution adopted by the Gen assembly of UN on the political declaration and global program of action in February 1990, calling upon member states to enact money-laundering legislations and programs.

committee of finance on August 5, 1998, for examination and report. The standing committee made certain suggestions regarding amending the bill but the bill lapsed because the Parliament got dissolved. The recommendations of the Parliamentary standing committee were incorporated in the subsequent bill and the same was passed by the *Lok Sabha* on 22nd December 1999 by the *Lok Sabha*. One of the prime objectives was to prevent the laundering of proceeds of drug crime[26], and even the threat to national integrity and sovereignty.[27] The *Rajya Sabha* then referred the bill to its select committee, which presented its report on the 24th of July 2000 and the Act was thereafter enacted in 2002 and came into force on 1st July 2005.[28]

2.2.2. Money-Laundering: Definition under the Act

The definition of money-laundering under the prevention of money laundering Act, 2002 is based on two major components. The first being the concept of 'proceeds of crime'. and the second is regarding the projection of 'proceeds of crime' by the offenders as untainted and clean money. This implies that the Act to constitute money-laundering shall have to satisfy both the constituents of the definition of money-laundering. The definition under the Act[29] is thus: "Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected[30][proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering".[31] It is relevant to note that the scope of the act has been expanded under the 2019 amendment.[32]

[26]G.P. Sahi, The Prevention of Money Laundering Bill, 1999: Issues (30 *Chartered Secretary* A46 2000).
[27]K.Srinivasan, Aspects and Implications of the Prevention of Money-Laundering Bill, 1998 (30 *Corporate Law Advisor* 121 1998).
[28]See G.S.R. 436 (E), dated July 1, 2005, as published in the Gazette of India.
[29]Section3,The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[30]Subs. by Act 2 of 2013, sec. 3, for "with the proceeds of crime and projecting" (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013).
[31]See definition of money-laundering as enacted under 1998 UN Convention against Illicit Traffic in Narcotic Drug and Psychotropic Substances" is somewhat similar to and not the same. Attempt under the act has been made punishable. Completion of the act is not necessary. The punishment being the same for both. The use of the word 'knowingly'

2.2.3. Punishment

The punishment under the Act has been prescribed under section 4 of the PMLA, 2002. Depending on the seriousness of the crime, the Act envisages attachment of tainted property, as a part of adjudication and confiscation of property of the offender. Section 4 provides thus:

> Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine:
>
> Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under

shows that *mens-rea* is necessary. The proceeds of crime have been defined under section 2(u) of the act.

[32] Section 3 (after the 2019 amendment) contains provisions relating to "offence of money laundering". An Explanation was inserted to Sec. 3 to the following effect:
''Explanation.—For the removal of doubts, it is hereby clarified that,—
(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—
(a) concealment; or
(b) possession; or
(c) acquisition; or
(d) use; or
(e) projecting as untainted property; or
(f) claiming as untainted property,
In any manner whatsoever;
(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.". (emphasis supplied). It may also be noted that the definition of the offence of money-laundering has undergone changes following the observations by the Financial Action Task Force (FATF), in 2010. See, M.S. Krishna Kumar, Amendments to PMLA by Finance Act 2019 – Widening the scope of the Legislation, https://in.search.yahoo.com/yhs/search;_ylt=AwrxhWgU5gljBlwAKAznHgx.;_ylc=X1MDMjExNDcyMzU1OQRfcgMyBGZyA3locy1pbWEtZmluZGVyZXhwbG9yZQRmcjIDc2ItdG9wBGdwcmlkA3RJd2t2ZVk2U2FlWWFzaW5TOXJZZkEEbl9yc2x0AzAEbl9zdWdnAzAEb3JpZ2luA2luLnNlYXJjaC55YWhvby5jb20EcG9zAzAEcHFzdHIDBHBxc3RybAMwBHFzdHJsAzQ5BHF1ZXJ5A21vbmV5JTIwbGF1bmRlcmluZyUyMGFtZW5kbWVudCUyMGFjdCUyMDIwMTklMjBiYXIlMjBhbmQlMjBiZW5jaAR0X3N0bXADMTY2MTU5MzExNw--?p=money+laundering+amendment+act+2019+bar+and+bench&fr2=sb-top&hspart=ima&hsimp=yhs-finderexplore&vm=r&type=q3040_A061O_ga_bsfq (Last visited on May 21, 2022).

paragraph 2 of Part A of the Schedule[33], the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted.[34]

2.2.4. Attachment and Confiscation

The officers under the Act have been authorised to attach the property during the pendency of the proceedings. The attachment would be subject to final adjudication and confiscation.[35] The properties and assets which are suspected to be 'proceeds of crime' are provisionally attached.[36] The final decision of confiscation of property is taken at the level of adjudicating officer. Once the adjudication officer is satisfied that the assets or properties so attached arise from 'proceeds of crime', the same may be confiscated by the competent officers.[37] The powers of the civil Court have been conferred on the officers of ED for the purpose of collection of evidence and relevant documents.[38] It is also relevant to note that the international legal regime mandates the banking companies and financial institutions to cooperate with the authorities in keeping and providing requisite information. And also maintain a constant vigil on the customer's business practices.[39] In case the banking companies and other institutions fail to comply with the directions under the Act, they are liable to be fined by the Enforcement Directorate (ED).

[33]The PMLA, 2002 has three schedules which encompass the scheduled offences. It is on the strength of these scheduled offences that the investigative agencies/Enforcement Directorate which is the only investigative agency for enforcement of Money-Laundering offences and conduct investigations.
[34]Some further changes have been made in the PMLA
[35]Section 8 (6),The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[36]Chapter III, Section 2, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[37]It may be noted that the Central Government has adequate powers for management of the attached assets.
[38]Sections 10 and 11, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[39]Section 12A/12B, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).

2.2.5. The Power of Search and Seizures

The power to conduct surveys, searches, and seizures under PMLA Act has been conferred on the ED. The search of persons is also permissible under the provisions of the Act. In addition, the power to make an arrest has also been given and every arrest is mandated to be reported and the accused will have to be produced before the magistrate within 24 hours.[40] The authorities may also make presumptions as to records, and interconnected transactions under the Act.[41]

2.2.6. Standards of Evidence and Burden of Proof

The burden of proof under PMLA, 2002 lies on the accused. The provisions of the Act make a clear departure from the conventional rules of evidence in that it is the accused who has to show that he or she is innocent.[42] It may also be noted that as per the international legal regime, the intent and knowledge required to prove money-laundering offence need to be consistent with the standards as set forth under the UN conventions.[43] The intention and knowledge has to be gathered as in the conventional crimes. The purpose has to be ascertained. The motive or intention of the offender must be to launder money i.e., to project tainted money as legitimate or accounted and clean money without any intent to camouflage or disguise the origin of the property.[44] But it is to be noted that the requirements of the mental elements are not absolute and the burden of proof has primarily been shifted on the accused.[45] The intent knowledge may be gathered from objective factual circumstances.[46] At the same time, *actus-reus* as

[40]Section 9, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[41]Section 22 and 23, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[42]Section 24, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).
[43]See article 1 (p) of The Narcotics Convention; article 2 (e) of the Transnational Organized Convention (TOC) convention; and article 2 (e) of the U.N. Convention against corruption.
[44]See article 3 (b) of the narcotics convention, and article 6 of the TOC convention.
[45]Section 24, 23, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India)..
[46]*Ibid* article 3 (3) of Narcotics Convention.

broadly laid down under the international conventions has been largely incorporated under the PMLA.[47]

2.2.7. Authorities under the PMLA and their Powers

One of the unique and distinctive features of the Act is that it combines executive and judicial functions which are assigned to various authorities in the ED. The directors, additional directors, deputy directors, assistant directors and comprise executive authorities who initiate steps for adjudication, confiscation and prosecution in special courts established for trial of money-laundering cases. Once the adjudicating authority[48] decides the case, the appeal lies to the appellate authority. After the appellate authority has decided the appeal, the accused or affected party may approach the High Court.[49] The High Court can exercise appellate and revision jurisdictions.

The powers conferred on the authorities may be summarized below;

- The directors, additional directors etc. are entrusted with the powers to issue summons etc.[50] The summons may be issued whenever it is necessary to secure the evidence of any person and direct him to produce any records, documents or in order to take his oral testimony as a witness.
- The Central Government also has the power to issue directions.[51] The directions, instructions, orders etc. may be required for proper administration of the Act, and such directions shall be followed. The

[47]Article 3 of narcotics Convention, article 6 of TOC convention, and article 23 of anti-corruption convention. In addition to this article 6 of the 1990 Council of Europe Convention. The requirement of *actus-reus* in terms of act of conversion or transfer of property, for the purpose of concealing or disguising the illicit origin of the property. Also assisting, aiding or abetting any person involved in the commission of such offence to evade the legal consequences of the action are also acts treated as forming the *actus-reus* of money-laundering offence.

[48]Adjudicating authorities are appointed under sub-section 1 of Section 6 of the PMLA, 2002.

[49]Section42, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).

[50]Section 50 (2), The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).

[51]Section 52, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India).

directions so issued cannot be as to requiring any authority[52] to decide a particular case in a particular manner or interfering with the discretion of adjudicating authority in exercise of its functions.

Apart from this provisions have been made for adjudicating authorities[53] and special Courts[54] for adjudication of cases investigated under the Act. Apart from this some miscellaneous provisions have also been made.

2.2.8. Some Miscellaneous Provisions

There are provisions under the PMLA where false information may be punished under the Act.[55]

III. INVESTIGATION OF BLACK MONEY CASES UNDER INCOME TAX ACT 1961

Unlike investigation under PMLA, the investigation of black money cases under the Income Tax Act is basically different. Under the income tax laws, the

[52]Section 193, 228, Indian Penal Code, 1860, No. 45, 1860.
The adjudicating authority has been given wide powers under the Act. Section 11 (3) clearly lays down , "Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

[53]The adjudicating authority comprises a chairman and two other members. If the adjudicating authority has reason to believe that any person has committed an offence under section 3 of the act, a notice not less than 30 days may be served on the person calling upon him to indicate the source of his income, earning assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5 or, seized under section 17 or section 18. The evidence on which he relies and other relevant information and particulars, is to show cause why any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government.

[54]The act provides that the establishment of appellate tribunal to be headed by a chairman who should be either a Supreme Court judge or a High Court judge. The tribunal shall comprise two other members. The qualifications of the members and the conditions of the service, terms of office etc. have also been prescribed under the act. The procedure is also clearly laid down. It may be noted that the act has provided for a machinery which makes a simultaneous attachment of property, adjudication of issues and confiscation of property on the initiation of proceedings by the executable authority, the directorate. As far as special Courts are concerned, the primary function of special courts is to prosecute the offenders. The provisions of the Cr PC, 1973 are applicable under PMLA. Public prosecutors prosecute the cases in special courts.

[55]Section 62, The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India). False information are also liable to be punished. Not furnishing information required for prosecution has also been made punishable. Prior sanction of the Central Government is mandatory for prosecution of the offences. Civil suits have been barred and it is peculiar to see that the act enacts punishment of companies as well.

provisions relating to compounding of offences and the availability of the option of settlement commission make the criminal proceedings or prosecution different from the purely criminal nature of the proceedings under PMLA etc.

3.1. Survey and searches

The Act provides for conducting surveys and searches as a part of its investigations into the cases of tax evasion which are primarily responsible for the generation of black money. There is a basic difference between a search and a survey. While surveys are meant to discover Assessees who may have plans to evade or may have evaded taxes. It is a mode of conducting on-site investigation and gathering on spot information regarding the stock and cash and other related subjects. Searches on the other hand are conducted as a part of investigations into those cases where there is a continued non-compliance by the assessees. The assessees may not be responding to the notices issued by the income tax Department or bear the income tax officials have clues to undisclosed income including possession of cash, bullion, jewelry, or such other valuable articles.[56] During surveys, income tax officials can search only those premises which are deemed to be the place of business or profession while in a search, all premises including residential buildings, vehicles, or any other place without any notice, may be searched. Depending upon the facts of the case, surveys conducted by the department may be converted to searches also and investigations may proceed further accordingly.

3.2. Penalties and Prosecutions

There are several provisions under the Income Tax Act under which prosecutions may be launched. The punishments for tax evasion and other offences under the Act are not very rigorous compared to other jurisdictions such as in the US and UK. Successful prosecutions may lead to punishments up to a maximum seven years together with the fines. A summary of some of the key provisions pertaining to prosecutions shall be convenient at this stage:

[56]Utsav R. Doshi, *Income Tax Raids-Understanding Surveys Vs Search*, Tax Guru, (Apr. 30, 2020), http://taxguru.in/income-tax/income-tax-raid-understanding - survey-search.html.

Table 3.1-List of Key Sections under which Prosecution can be launched against the Assessees

Section of Income Tax Act, 1961	Offence
275A	Contravention of order u/s. 132(3)
276	Removal, concealment, transfer or delivery of property to thwart recovery of taxes.
276A	Failure to comply with provisions of sections 178(1) and 178(3).
276AB	Failure to comply with provisions of section 269 UC, UE, UL.
276B	Failure to pay the tax deducted at source.[57]
276BB	Failure to pay the tax collected at source.
276C	Wilful attempt to evade tax.
276CC	Failure to furnish the return of income.
276CCC	Failure to furnish the return of income in search cases.
276D	Failure to produce account books and documents.
277	False statement in verification, etc.
277A	Falsification of books of account or documents, etc.
278	Abetment of false returns etc.

[57]The punishment under the section may result in rigorous imprisonment up to a period of seven years. There is a provision for mandatory prosecution where TDS is more than RS 1 lakh and prosecution based on facts and circumstances of the case where TDS is between Rs. 25,000 to RS 1 lakh. Also, Instruction No. F No. 285/90/2008 dated April 24, 2008, issued by the CBDT, which was later modified by Instruction No. F No. 285/90/2013 dated February 7, 2013 (collectively referred to as "Instructions"). Further, by way of a press release dated August 6, 2013, the CBDT clarified that delay in remittance would attract prosecution regardless of the period of delay.

IV. SOME LATEST DEVELOPMENTS: BLACK MONEY ACT

In order to make further provisions for investigation of black money cases under the Income Tax Act, provisions have been made under the Finance Act of 2015-16/assessment year 2015-16[58], provisions have been made regarding the compulsory disclosures about foreign accounts, foreign assets held by assesses and visits made abroad in connection with the businesses etc. This appears to have been done under public pressure and on political considerations as the subject of poor investigations in black money cases has become an issue of serious concern and widespread public debate in the present times. However, the government's response has been allegedly dithering and ambivalent as far as implementation is concerned.[59]

One of the developments is that in the union budget 2015-16, evasion of tax in relation to foreign assets has been made punishable with rigorous imprisonment up to 10 years. It has also been made non-compoundable under the proposed bill called' The Undisclosed Foreign Income and Assets (Imposition of Tax), Act 2015, was introduced in 2015. The penalty rate under the Act has been made 300% and the offender will not be permitted to avail of the settlement commission. At the same time, non-filing of returns/filing of returns with inadequate disclosures has also been made punishable with imprisonment up to 7 and even 10 years.[60] It is pertinent to note that the act has also made any

[58]The tax authorities have made several additions to the income tax return forms for the assessment year 2015-16 seeking details about foreign assets and income from any source outside the country, and details of all bank accounts held in India at any time during the previous year. A taxpayer will have to give details of any bank account opened or closed during the previous year, including those where a taxpayer has a signing authority. Further, it wants information related to immovable property etc.
TNN, New income tax forms to seek details of foreign travel, bank A/Cs, Economic Times, (Apr. 18, 2015),
http://economictimes.indiatimes.com/articleshow/46966549.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[59]As per media report the provision in the Finance Act is being revisited. The news item is available at: Sanjeev Sharma, Centre to revisit new I-T return form, Tribune India, http://www.tribuneindia.com/news/nation/centre-to-revisit-new-i-t-return-form/69396.html.

[60]See section 51which says, "51. (1) If a person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act,

attempt to willfully evade any tax, interest etc. as a predicate offence under the PMLA, 2002.[61] Undisclosed income from foreign assets is to be taxable at the maximum marginal rate. The filing of returns in regard to foreign assets has been made mandatory under the Act. It shall be mandatory for the entities, banks, financial institutions including individuals should all be liable for prosecution and penalty. The Act received the assent of the president on 26thMay, 2015.[62]

V. INCOME TAX ACT AND THE PMLA

Despite all the amendments in PMLA, cases of serious tax evasion have not been incorporated as an offence under the schedule of the Act with the exception of evasion of foreign income, as discussed above.[63] In addition to this, there is no central legislation for tackling organized crime in India except that Maharashtra has enacted a law in this respect. Also, foreign exchange manipulations on account of offences of tax evasion, smuggling, foreign trade law violations and Foreign Exchange Management Act provisions are also not a part of the money laundering Act India. Of all these offences, one which is immediately relevant to the present discussion is 'tax evasion'. As is known that

willfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to ten years and with fine."

[61] Section 88,The Prevention of Money Laundering Act, 2002, Act of Parliament, 2002 (India). in the Schedule, in Part C, after entry (3), relating to the offences against property under Chapter XVII of the Indian Penal Code, the following entry shall be inserted, namely:—

(4) The offence of wilful attempt to evade any tax, penalty or interest referred to in section 51 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (India).

45 of 1860.

[62]A copy of the gazette notification is available at: https://prsindia.org/files/bills_acts/bills_parliament/2015/Black_money_act,_2015.pdf (Last Visited on May 22, 2021). The Act has become operational from 2016 onwards. There shall be charged on every assessee for every assessment year commencing on or after the 1st day of April, 2016, subject to the provisions of this Act, a tax in respect of the total undisclosed foreign income and asset of the previous year at the rate of thirty per cent. of such undisclosed income and asset:

[63]C. Satpathy, "Money Laundering: New Moves to Combat Terrorism" 38 (7) *Economic and Political Weekly* 599 (2003). Also see Prevention of Money Laundering Amendment act, 2005, 2009, and 2012. None of these amendment acts incorporate 'tax evasion', as a scheduled offence under PMLA.

investigation of black money cases involves investigation of tax evasion cases also under the Income Tax Act. Under the Income Tax Act, investigation of black money cases is more or less a civil offence. In some cases where an option for prosecution is provided but recourse is taken generally to the settlement commission or other compounding alternatives provided under the Act, which make the whole investigation ineffective and deterrence is extremely poor. It is highly expedient that some sections relating to tax evasion under the income tax need to be incorporated under the schedule of the Prevention of Money Laundering Act, 2002 which may include the following offences under the Income Tax Act to start with.

Section of Income Tax Act, 1961	Description of Offence
276	Removal, concealment, transfer or delivery of property to thwart recovery of taxes.
276C	Wilful attempt to evade tax for all incomes.
277	False statement in verification, etc.
277A	Falsification of books of account or documents, etc.
278	Abetment of false returns etc.

Investigation of Black Money Cases: Some Comparative Perspectives

While the principal theme of this research work is related to the impact of DTTAs/TIEAs etc. on the investigation of black money cases, it may be appreciated that the investigation of black money cases has been conducted successfully in some jurisdictions including UK and US. Obtaining tax-related information from foreign jurisdictions is one of the integral and central components of investigation of cases relating to black incomes and money laundering. It has been achieved with considerable success by the UK and US. It is therefore imperative, from the perspective of understanding the reasons

behind successful legislation and enforcement in the UK and US. A comparative analysis of their legal framework and enforcement architecture is relevant to the present theme.

5.1 United States

The US along with the UK has been seen as one of the inspiring jurisdictions in so far as the investigation of black money cases are concerned. The legal framework and particularly the enforcement mechanisms which are in place in the US are far superior to other jurisdictions including India. The laws in the US are compatible to those in the UK to that extent. The comparative investigation of the two jurisdictions of UK and US with the legal provisions and enforcement mechanisms under the Indian laws is relevant from the viewpoint of understanding investigation of black money cases. It is relevant to explore why some jurisdictions have structurally better laws and better enforcement mechanisms, while others don't have? It is also relevant to analyze why some jurisdictions are having better enforcement records. The investigation of black money is dependent on a number of factors including the legal frameworks and enforcement structures designed to enforce the laws.

5.1.1. General Legal Framework in the United States

In order to prevent black/tainted money from entering the financial system, the U.S. has passed legislative enactment known as Bank Secrecy Act, 1970 (BSA, 1970).[64] The investigations of black money cases in the US are conducted under, *inter alia*, BSA, 1970. Some of these provisions are being examined together with the enforcement mechanisms. The Act was passed in 1970 with the prime objective of recording financial transactions and ensures that money laundering is prevented and detected. The US is one of the few countries in which it is

[64]The act passed in 1970 is a part of a series of acts constituting anti-money-laundering framework and requires financial institutions in the US to assist Government agencies to prevent and detect money-laundering. The financial institutions are required to keep record of transactions such as records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $ 10,000, and any other suspicious activities. The act was amended in the 1990s, imposes an obligation on the financial institutions to report certain specified transactions and suspicious transactions as mentioned above. Several AML acts, including provisions in Title III of the USA PATRIOT Act of 2001, have been enacted to amend the BSA. (Also See 31 USC 5311-5330 and 31 CFR Chapter X.

mandatory for financial institutions to report cash transactions exceeding a certain limit (at present $ 10,000). The reports are filed with the United States Department of the Treasury. [65] So recording financial transactions on a mandatory basis is one of the effective ways of controlling generation of black money and tackling money-laundering in the US.

In 1986, a relatively more comprehensive legislation Namely Money Laundering Control Act 1988[66](MLCA) was enacted by the US. As a part of the Anti-Drug Abuse Act 1988, this Act was further amended. It may be mentioned that before the enactment of these Acts, federal enforcement agencies in the US were relying on drug charges, racketeering charges, and the Banking Secrecy Act, 1970 to prosecute money-lenders.[67] One of the key features of the Money Laundering Control Act is extremely rigorous and deterrent punishments. For both domestic and international money-laundering, the punishments may extend

[65]The Department is an executive agency that formulates the economic and fiscal policies of the United States and is responsible for promotion of the conditions enabling economic growth and stability both internally as well as externally i.e., outside the US. Further details are available at: http:// www.treasury.gov/about/role-of-treasury/Pages /default.aspx, US Department of The Treasury. The department also plays a very critical role in protecting national security by way of implementation of economic sanctions against foreign threats to the US and also improving the US financial systems.

[66] The text of the Act is available at http://www.ffiec.gov/bsa_aml_infobase/ documents/regulations/ml_control_1986.pdf.

[67] Jyoti Trehan, *Crime and Money Laundering, The Indian Perspective* 194 (Oxford University Press, New Delhi, Third Impression, 2008). Some of the salient features of the MLCA in US as amended in 1988 and being summarised below:

•It makes 'money laundering' a federal offence

•It connects provisions pertaining to both domestic and international money laundering and also provides hosting/undercover operations. The act clearly defines both the domestic and international aspects of money laundering under a variety of circumstances and also clearly explains sting operations.

•The act provides for both civil and criminal or feature of proceeds of crime, the term Specified Unlawful Activity (SUA) has been clearly defined. It also provides for sharing of assets between domestic agencies and international authorities of the forfeited proceeds.

•The act sets out clearly the meanings of financial institutions, transactions of a national nature, monetary transactions etc. (under the act monetary transactions in excess of $ 10,000 in cash to specified unlawful activity are subject to penal provisions of fine and imprisonment.

•More importantly, the act prohibits the structuring of currency transactions in order to evade reporting requirements; it incorporates extraterritorial jurisdiction and penalties for financial institutions and their employees in case of non-compliance with the provisions of the act.

up to 20 years with or without fine of up to US$ 5, 00,000 or twice the value of money laundered.

5.1.2. Agencies and Mechanisms to Combat Money Laundering

In US, Financial Crimes Enforcement Network (FinCEN)[68] has been conferred powers under the Currency and Financial Transactions Reporting Act of 1970.[69] The secretary of the treasury department has been entrusted with the responsibility and authority for implementing, administering, and enforcing compliance with the BSA and associated regulations. It may also be further noted that Financial Crimes Enforcement Network has certain other duties and responsibilities which comprise central collection, analysis, and dissemination of data reports under Financial Crimes Enforcement Network's regulations in support of Government and financial industry partners at federal, state, local and international levels. Other federal agencies under the Department of Justice, Department of Treasury and Department of State are charged with enforcing

[68]FinCEN functions as a bureau of the US Department of the Treasury. The principal function of the Centre is safeguarding the financial system from abuse, combating money-laundering, promotion of national security by way of collection, analysis, and dissemination of a national intelligence. It also receives and maintains financial transactions data and makes the same available for application by various enforcement agencies. For fulfilling responsibilities delegated to FinCEN, it performs some of the major functions as summarised below:
•Issuance and interpretation of regulations as provided by the statute
•Supporting and enforcing compliance with regulations formulated under the statute.
•For supporting, coordinating, and analysing data regarding compliance examination functions assigned to other federal regulators
•The data filed under FinCEN's reporting requirements is managed, processed, stored, disseminated, and protected by it.
•It maintains a government-wide access service to data, and network users with common interests. It provides data as and when required by law enforcement investigations and prosecutions in the U.S., shares information and coordinates with foreign Financial Intelligence Unit (FIU) counterparts on AML/CFT efforts. It also undertakes analysis for the benefit of policymakers, law enforcement, regulatory, and intelligence agencies.
•FinCEN also serves as the FIU for US and it also has the responsibility to share information with its counterpart FIUs all over the world.

[69]The act has been amended by Title III of the USA PATRIOT Act of 2001 and "Bank Secrecy Act" (BSA). BSA is the first American statute which provides a comprehensive legislative framework for federal anti-money-laundering and counter-terrorism financing. The principal mode of functioning is to 'follow the money'. The criminals look forward to enhancing their financial gain and also while transferring their ill-gotten assets, leave substantial trails of transactions across banks, institutions etc. Such offenders perpetrate frauds, tax evasion, and depend heavily on financial and other support networks. These financial and support networks *are* closely monitored by FinCEN.

various money-laundering regulations.[70] The principal agency under the Department of Treasury is FinCEN already mentioned above. Other agencies under Department of Treasury include IRS-criminal investigative division (IRS-CI),[71] the U.S. Customs service (Customs)[72] , the United States Secret Service (USSS),[73] and the Bureau of Alcohol, Tobacco, and Firearms (ATF). One of the most powerful legislations today in US is FATCA (Foreign Account Tax Compliance Act). Compared to the 2003 EU directive on foreign savings, which considers only interest-bearing deposit accounts (equity portfolios are not covered, though large amounts of money are held primarily in the form of stocks), FATCA considers stocks as well. It applies to all the banks all over the world although it also has some limitations in that certain trust funds and foundations can afford to escape reporting.[74]

[70]See Jyoti Trehan *supra* note 59 at 196

[71]The criminal investigation Branch of IRS serves as an agency to investigate potential criminal violations of the Internal Revenue Code. It is comprised of nearly 3500 employees worldwide including 2500 agents who can investigate tax, money-laundering, and bank secrecy act laws. IRS is the only agency under the Federal Government in US which can punish potential criminal violations of Internal Revenue Code. The criminal investigation Branch executes three independent programs comprising Legal Source Sex Crimes, Illegal Source Financial Crimes, narcotics -related and counter-terrorism financial crimes.

[72]US Immigration and Customs Enforcement (ICE) has taken several initiatives to detect and closed on weaknesses within US financial, trade and transportation sectors that can be exploited by international money-laundering gangs and organised criminal syndicates. A group of more than 250 members from more than 55 law enforcement agencies in New York and New Jersey, including federal agents, state and local police investigators, intelligence analysts and federal prosecutors has been formed and called *El Dorado* task force. This special group targets financial crimes at all levels. It also educates the private financial sector to identify and eliminate vulnerabilities and promotes anti-money-laundering legislation by training and various other outreach programs. It specially targets vulnerabilities such as the black market Peso Exchange and commodity-based money-laundering. It also undertakes foreign corruption investigations where corrupt foreign officials opened the state coffers for personal benefits and attempt to place those funds in the US financial system and also investigates cases relating to credit-based money-laundering having an alternative remittance system that allows underhanded and illegal organisations to on, move and store proceeds of crime by various modes including invoicing, over invoicing and under invoicing etc.

[73]It takes care of counterfeiting of US currency and is also presently engaged with the special security arrangements of foreign dignitaries visiting United States. See further details http://www.secretservice.gov/whoweare.shtml, United States Secret Service.

[74]Under the act, all the foreign banks are required to report to the treasury department about bank accounts and investments held abroad by US tax-payers.

5.2. United Kingdom

UK has developed an extensive and rigorous anti-money laundering legal framework in order to tackle the problem of money-laundering and terrorist financing. There are four principal Acts in the UK. Terrorism Act 2000[75], Anti-terrorism, Crime and Security Act 2001[76], Proceeds of Crime Act 2002[77] and Serious Organised Crime and Police Act 2005.[78] Historically, The UK law has been spread over several enactments including Criminal Justice Act 1993[79], The Drug Trafficking Act 1994[80], The Prevention of Terrorism Act 1989[81], and Money-Laundering Regulations 1993.

Despite the multiplicity of the Acts, the enforcement of AML (Anti-Money-Laundering) laws in the UK is much more effective and inspiring. In fact, the UK legislation regarding controlling money-laundering is inspired by international efforts being made by the European Union (EU), and Financial Action Task Force (FATF) etc. The EU promulgated various directives largely following FATF recommendations.[82] The primary legislation in the UK is the Proceeds of Crime Act, 2002. Modeled on the European provisions such as the

[75] The act was passed on 20th July 2000 and subsequently amended by The Anti-terrorism, Crime and Security Act 2001 and the Terrorism Act 2006.http://www.legislation.gov.uk/ukpga/2000/11/contents.

[76] The act received Royal assent on 14th December 2001 and together with it The Money-Laundering Regulations 2001 were also placed before the Parliament on 9th November 2001. http://www.legislation.gov.uk/ukpga/2001/ 24/contents.

[77] Received Royal as and on July 24, 2002.http://www.legislation.gov.uk/ ukpga/2001/24/contents. It was followed by publishing of The Money-Laundering Regulations 2003 (SI 2003/3075), The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order, 2003 (SI 2003/3074) and The Terrorism Act 2000 (Business in the Regulated Sector and Supervisory Authorities) order 2003 (SI 2003/3076). It may also be noted that the steps mentioned here were taken by UK in compliance to 2nd EC Money Laundering Directive, as was agreed in December 2001. The regulations came into effect on March 1, 2004.

[78] Serious Organized Crime And Police Act, 2005. .

[79] *Criminal Justice Act, 1993, (U.K. Act).*

[80] Drug Trafficking Act, 1994, (U.K. Act).

[81] Prevention of Terrorism (Temporary Provisions) Act, 1989, (U.K. Act).

[82] John Drage, *Countering Money Laundering*, November Bank of England Quarterly Bulletin 418-420 (1992).

4, William Gilmore, *Dirty Money: The Evolution of International Measures to Counter Money Laundering andthe Financing of Terrorism* 34 (Council of Europe Publishing, 4th ed., 2011).

38 5, Peter Ellinger (et al.), *Ellinger's Modern Banking Law* 96, (Oxford University Press, 5th ed., 2011). In all these works, the money-laundering regime in the UK has been divided into three major components. The first being the influence of the European Union and FATF. The second is offences under the Proceeds of Crime Act 2002. The third is Money-Laundering Regulations 2007.

Directive on Prevention of the Use of the Financial System for the Purpose of Money-Laundering[83], UK passed Money-Laundering Regulations 1993, and the Criminal Justice Act 1993. Also, The Proceeds of Crime Act, 2002. Subsequently Money-Laundering Directives of 2007, were also promulgated towards compliance of Directive 2001/97/EC. [84] As a part of secondary legislation, Money-Laundering Regulations 2007 too has been published. [85] Apart from this, Industry and Professional Guidance, Joint Money-Laundering Steering Group Guidance (JMLSG) are also available for reference of anti-money-laundering enforcement authorities. [86] It is, however, a noteworthy feature of the UK's anti-money-laundering legal framework that despite the multiplicity of enactments and directives, the enforcement and even the legislative enactments are well coordinated and better enforced. A look at some of these provisions would throw light on how some of the provisions from the foreign jurisdictions could provide some clues for adoption and adaptation. Some substantive provisions of the U.K.'s Proceeds of Crime Act, 2002 would illuminate the issue further.

5.2.1. Some Substantive Offences under the Proceeds of Crime Act 2002 (POCA)

A summary of the offences is given below in a tabular form and is self-explanatory:

Table-3.2 Some Key Provisions of Proceeds of Crime Act, 2002 (U.K.)

S.No	Section of the Act	Description of the Section	Other Remarks
1.	327	Concealing, disguising, converting, transferring criminal property. Concealing has been further defined as concealing or disguising its	This corresponds to the placement stage of money-laundering

[83]Council Directive 91/308/EEC [1991] OJ L 166/77.
[85]http://eur-lex.europa.eu/resource.html?uri=cellar:57ce32a4-2d5b-48f6-adb0-c1c4c7f7a192.0004.02/DOC_1&format=PDF.
[85]See Directive 2005/60/EC of the European Parliament. The regulations were published in pursuance of the said directive of Europe in Parliament.
[86]Under the UK legal framework, money-laundering is primarily related to concealing or disguising property and converting or transferring property or removing it from a jurisdiction. To constitute an offence the money has to be the 'proceeds of crime'.

		nature, source, location, disposition, movement or ownership or any rights with respect to it	
2.	328	It concerns arrangements through acquisition, retention, user control of property, which one knows or suspects of being criminal. For the property to be criminal, the person should either know or suspect that it is criminal.[87]	An objective element in the commission of crime is indicated in the four elements. The offence is not committed if an 'authorised disclosure' is made under section 338.
3.	329	It is related to acquisition, use or possession of criminal property.	

It may be noted that the emphasis on the preventive part of the laws is much more highlighted in the UK laws compared to India's emphasis on the punitive and seizure part.

5.2.2. Concept of Ancillary Offences under UK AML (Anti-Money Laundering) law

There are some other general notable features including the role of financial institutions and confiscation of 'proceeds of crime' etc.[88] As the sharing of

[87]Proceeds of Crime Act, 2002, (U.K. Act).

[88]Some other important general features are:

a. Laundering another person's 'proceeds of crime' which actually means assisting the other to retain proceeds of crime etc. To constitute the offence of 'laundering another person's proceeds of crime, knowledge, suspicion and reasonable grounds to believe under various circumstances are necessary conditions.
b. Only in drugs and terrorist -related offences, the failure to disclose the knowledge of suspicion of money-laundering has been enacted as an offence.

information and confiscation of the proceeds of crime are some of the salient features under the UK law. Cooperation at the global level amongst countries based upon reciprocity is another important feature of UK money-laundering law.[89] Furthermore, an extremely useful feature of the POCA, 2002 in the UK is the concept of ancillary offences under the Act. Under ancillary offences, emphasis has been provided on the preventive aspect of money-laundering and generation of black money in the system. Ancillary offences are not offences *per se* and are of only ancillary nature. These provisions are preventive in nature and their prime object is not to punish, but to prevent.[90] The ancillary offences have an element of 'suspicion'.[91] In *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd*[92], it was held that suspicion "at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflective of firm belief". However, it was further clarified in *R v. Da Silva*[93], that 'vague feeling of unease' would not suffice. It was also accepted by the court that the plain meaning of the term can be explained to the jury and the connotations of the term 'suspicion' has to be formed on the basis of something credible or, reasonable, implying a certain degree of objectivity. All these principles have also been reaffirmed and upheld in *K Ltd v. National Westminster Bank plc (Revenue and Customs Commissioners and another intervening)*[94] , and *Shah v. HSBC Private Bank (UK) Limited.*[95]Most of the provisions relating to ancillary offences are reporting requirements for employees of financial institutions and a standard of suspicion has been settled by various judgements of the courts. This

c. The banks and financial institutions have been put under obligation for identification, record keeping and training of employees. And failure to install anti-money-laundering systems have been provided under Money-Laundering Regulations 1993.

[89]The UK law on money-laundering clearly provides for sharing and confiscation of proceeds of crime both at a domestic and international levels.

[90]See section 330. This section deals with a class of cases where persons working in the 'regulated sector' failed to make the required disclosure to either their nominated officer or to the Serious Organised Crime Agency (SOCA) despite having the knowledge of money-laundering or having reasonable grounds of suspicion.

[91]Lord Devlin in 1970 viewed 'suspicion' as 'a state of conjecture or surmise where proof is lacking'.

[92]Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others, (2003) 1 A.C. 469.

[93]R v. Da Silva (2007) 1 W.L.R. 303.

[94]Revenue and Customs Commissioners and another intervening (2007) 1 W.L.R. 311.

[95]Shah v. HSBC Private Bank (UK) Limited (2010) EWCA Civ 31.

is one of the reasons for a relatively higher success of prosecutions under the law. The law enables prompt freezing of an account once suspicion is formed on a certain case unlike in India.[96] It may be noted that recently some bars on the attachment of properties have been lifted by the Apex Court in India.[97] As far as Punishments under UK laws are concerned, sanctions are more stringent, in terms of the maximum number of years an offender may be imprisoned is up to 14 years.

5.2.3. Judicial Approach to Money Laundering/Black Money in UK:

It is also apt to study the anti-money-laundering legal framework in the UK from a jurisprudential perspective and also the views taken by the British courts in this respect. The right to confiscate property was well settled under the UK laws as also laid down in *Gordon* v. *Chief Commissioner of Metropolitan Police*.[98] Alldridge has argued that the power to confiscate the property acquired through illegal trade across the boundaries of nation-states is hard to be dealt with under the common law.[99] It was held by House of Lords in *Attorney-General* v. *De Keyser's Royal Hotel*[100], It was held that there is no common law power permitting the state to seize the proceeds of crime. Therefore, the roots of anti-money-laundering laws in the UK may be traced back to morality and norms of 'natural justice'.[101] Like in other parts of the world, most of the efforts

[96]George Brown and Tania Evans, *The Impact: The Breadth and Depth of the Anti-Money Laundering Provisions Requiring Reporting of Suspicious Activities*, 23(5) *Journal of International Banking Law and Regulation* 274-275 (2008).

[97]PTI, *Supreme Court ruling paves way for ED to attach assets, conduct raids prior to predicate offence, says former ED chief (Jul. 31, 2022)*https:// www.firstpost.com/india/ supreme-court-ruling-paves-way-for-ed-to-attach-assets-conduct-raids-prior-to-predicate-offence-says-former-ed-chief-10987061.html.

[98]*Gordon v. Chief Commissioner of Metropolitan Police (*1910)2 K.B.1080.

[99]Alldridge, *The Moral Limits of the Crime of Money Laundering* 5 *Buffalo Criminal Law Review* 283 (2001).

[100]Attorney-General v. De Keyser's Royal Hotel, (1920) A.C. 508.

[101]Adam Smith, *An Enquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., University of Chicago Press, 1976). Adam Smith has expressed admiration for those who ignore laws that are contrary to the norms of 'natural justice'. Furthermore, it is also interesting to note that on the one hand the forces of globalisation advocated loosening of control over international capital movements. However, money-laundering creates an important check on the unregulated international capital movements.

towards controlling money-laundering in diverse jurisdictions began with checking trafficking in narcotic drugs and psychotropic substances.[102]

In *R* v. *Anwoir (Illam)*[103] , it was held that it shall be open to prosecution to argue that the property in question is derived from criminal proceeds by showing that it is derived from illegal conduct or an offence. The manner of handling of the property also indicates that it was a product of crime. However, some issues regarding the fault elements required to prove the offence have also been dealt with by the British Court with clarity and firmness. In *R* v. *Saik (Abdulrahman)*[104] , commission of basic offences and conspiracy to commit offences have been distinguished. It was also held that the *mens-rea* requirement for the basic offences is one merely of suspicion, while for the conspiracy offences, *mens-rea* required is knowledge and not merely suspicion.[105] The

[102]United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 ("Vienna Convention 1998") and numerous EU directives set the tone for law making in various countries to control the 'proceeds of crime' from sale and drug dealings to enter the financial markets. And the money-laundering efforts may be seen as a part of larger initiatives taken towards enacting drug-trafficking offences and UK was no exception in this regard. Drug-Trafficking Offences Act of 1986 was passed in this backdrop. However, money-laundering was not given an equal importance compared with the drug-trafficking offenders in the initial years.

[103]R v. Anwoir (Illam), (2009), 1 W.L.R. 980.

[104]R v. Saik (Abdulrahman), (2007])1 A.C. 18 (HL).

[105]Criminal Law Act 1977 S.1 (1). 6. One of the salient features of the MLR 2007 regulations is that it has shifted the burden of Anti-Money-Laundering (AML) and Combating the Financing of Terrorism (CFT) to the 'relevant persons", as defined under the 2007 regulation. Financial institutions like banks and 'small or medium-sized firms' may face serious difficulties. It is quite strange, as asserted by Haynes, that the financial institutions and professionals are required to spy on their clients on behalf of the state. It has also been argued that financial burdens being born by professionals for AML compliance is comparatively higher, as highlighted in which is in fact justified, as the majority of accountancy firms are providing innumerable range of services and placing on it a degree of regulatory responsibility make sense in terms of deterrence as credibility of the financial sector may otherwise be at stake. Once efficient legal framework is in place, the role of the enforcement agencies becomes crucial.

See Financial Services Authority (2007), "Frequently asked questions" as cited in dissertation 2012/13 "A Comparative Analysis of Anti-Money-Laundering Law in the United Kingdom and Pakistan" available at: http://papers.ssrn.com/ sol3/papers.cfm? abstract_id=2372983 (visited on March 15, 2015).

Regulation 3 of 2007 MLR. The regulation actually provides a list of relevant persons, and in addition to financial institutions, this list comprises legal, insolvency, tax, audit and accountancy professionals as well. MLR 2007 also introduced 'due diligence measures' under the regulation 5 which goes much beyond 'Know Your Customer' requirements. Identification of the customer's identity, ascertaining the nature of a purpose of the business and the identification of any beneficial owners is a mandatory

judicial attitude or the British Court in general is positive, coherent and firm in matters related to property theft, black money/money-laundering cases.[106]

5.2.4. Enforcement Mechanism in UK

As far as the recovery of proceeds of crime are concerned, The Financial Services Authority,[107] has also been charged with some functions related to enforcement. The recovery of proceeds of crime are made under Financial Services Act 2000 And the Financial Services Authority has been authorised to use civil as opposed to criminal proceedings. It has also been proposed to set up a National Confiscation Authority in the UK to ensure the proceeds of crime are forfeited/confiscated in a targeted and focused manner by several agencies involved in this process.

requirement if the 'relevant person' happens to fulfil one of the tasks under regulation 7 (1).

Andrew Haynes, Money Laundering: From Failure to Absurdity,11(4) *Journal of Money Laundering Control* 303- 312. (2008).

Rowan Bosworth-Davies, *Money Laundering: Chapter Five – The Implications of Global Money Laundering Laws*, 10(2) *Journal of Money Laundering Control* 189-190 (2007).

[106]It may also be noted that the traditional approach towards the money-laundering was based on 'proceeds of crime' acquired from drug trafficking and the law being applied was Drug Trafficking Offences Act 1986. However, with the enactment of POCA 2002, the anti-money laundering legal regime of UK got streamlined. The concept of 'criminal property' emerged which if possessed, acquired or used while in knowledge or suspicion of its criminal source, was made punishable. The concept of criminal offence and criminal conduct under the POCA Act was widened and was not dependent upon the old predicate offences. According to UK's Financial Services Authority, the amount of money involved in laundering offences was to the tune of 23-57 billion pounds in the year 2007 which is approximately 2 to 5% of the GDP. It is equally important to note that the UK achieved a conviction rate of 50.15% from 1999 to 2007 and while in the same period, the conviction rate in US was 52.27%. Out of a total of 7569 prosecutions for money-laundering, 3796 convictions were secured.

Robert Bell, *Abolishing the Concept of "Predicate Offence"*, 6(2) Journal of Money Laundering Control 137-139 (2002). Also see Financial Services Authority (2007), "Frequently asked questions" as cited in dissertation 2012/13 "A Comparative Analysis of Anti-Money-Laundering Law in the United Kingdom and Pakistan" *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372983 (visited on March 15, 2015).

[107]Is an independent non-Governmental body and has been conferred statutory status by The Financial Services Markets Act 2000. It is a company limited by guarantee and financed by financial services industry. The Executive Committee is Supervised by a Board Which Is Responsible for Setting out the Policy Framework.

HM Revenue and Customs,[108] has also provided rules and exercises supervision. The better enforcement together with well-enacted laws are responsible for better convictions under the anti-money-laundering laws as well as taxations laws in UK.

5.2.5. Convictions under UK and US Laws

The convictions secured by the UK in money-laundering prosecutions in the period from 1999 to 2007 is more than 50%. In contrast, India till 2016 did not have a single conviction under the Act, though the law was enacted in 2002.[109] The conviction scenario in UK has also been summarised in the table below:

Table-3.3 Comparative convictions across jurisdictions in USA and UK

Name of the Country	Period of Time	ML prosecutions/ cases	ML convictions/cases	Percentage of ML convictions (%)
UK[110]	1999-2007	7569	3796	50.15
USA[111]	1994-2001	N/A	18,500	
	2006-2008	6204	3243	52.27

[108]An authority (Her Majesty's Revenue and Customs) which looks after UK's tax and customs. Customs is meant to facilitate legitimate trade and protect U.K.'s economic, social and physical security. Available at: HM Revenue & Customs - GOV.UK (www.gov.uk) (Last visited on May 15, 2021).

[109]In reply to a question in the parliament, it was told by the Government that till July, 2022, 0.5 % convictions have taken place. Available at: ED's conviction rate 0.5%, just 23 out of 5422 charge sheets, Parliament informed (nationalheraldindia.com), last visited on June 25, 2022.

[110] UK Director of Public Prosecutions (2009), Written evidence by the Crown Prosecution
Society (CPS), cited in Ali Alkaabi, George Mohay et.al., " A Comparative Analysis of the Extent of Money Laundering in Australia, UAE, UK and the USA" by *Information Security Institute,* Queensland University of Technology, Australia, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539843 (visited on March 15, 2015).

[111]*Id* at 8

Source: since 1999 to 2000 from Jackey Harvey, from 2003-2007, as per Director of Prosecutions, UK.

Money-Laundering Prosecutions and Convictions in the UK (1999-2007)

	1999	2000	2001	2002	2003	2004	2005	2006	2007
Prosecutions	126	129	182	256	300	552	1327	2379	1348
Convictions	39	50	75	86	123	207	595	1273	1348
Percentage of ML convictions (%)	30.95	38.76	41.21	33.59	41	37.5	44.84	53.51	58. 15

Source: *Source: 1999 to 2002 from Jackie Harvey, as of 2003 to 2007 from the UK Director of*

Public Prosecutions as cited in Ali Alkaabi, George Mohay et.al. "A Comparative Analysis of the Extent of Money Laundering in Australia, UAE, UK and the USA" by Information Security Institute, *Queensland University of Technology*, Australia, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539843 (visited on March 15, 2022).

5.2.6. Prosecutions in UK: A Case Study 'UNTOUCHABLE'[112]

Johnny Daniels in the UK had been subject of previously failed investigations. Intelligence reports indicated that he had accumulated over £ 100,000 in a bank account. He was engaged in the business of providing security to building sites. The lawyer identified that Daniels had not undergone registration under SIA (Security Industries Association) and all the funds he was receiving was 'criminal property'. The bank was put on alert and continuously monitored his transactions. It was decided that the offender should be arrested without any further loss of time. The bank informed that Daniels was about to remove his assets. A good relationship between the bank and the agencies proves beneficial and provides timely information. Without any further delay, Daniels was arrested and subsequent investigations revealed evidence of connection to murder. Convicted of conspiracy to murder and money laundering. A confiscation order of £ 500,000 was made. Sentence served was 14.5 years. In the case of default, a payment of the confiscated amount, an additional 3.5 years shall be served by him in prison. In contrast in India, PMLA came into force in 2005 and not a single conviction has reportedly taken place in India till 2016.[113]

[112]Lan Davidson and Martin Gill, Police Foundation Conference, *Money-Laundering to Reduce Organised Crime*http://www.police-foundation.org.uk/uploads/holding/annual_conference/follow_the_money.pdf

[113]The researcher found out about the convictions by ED under PMLA during an interview with the officials of the ED. However, no written record was provided by the directorate.

As per the fresh reports, the conviction rate in India is only 0.5 percent as in July 2022.[114] There have also been large scale allegations of misuse of the ED machinery for political purposes.[115]

VI. CONCLUSION

The basic elements of the investigative process followed in India are twofold. At the first level, investigations are conducted under the anti-money laundering Act, 2002, called PMLA, 2002. The Act makes converting black money into white a criminal offence. While at the second level, it is the investigation which is conducted by the Income Tax Department under income tax laws. Although, acquisition of information related to tax evasion and other black money matters is crucial for investigation in black money cases, yet the significance of enactments for tackling tax evasion and money-laundering and the various enforcement mechanisms for such enactments, cannot be undermined. Some jurisdictions like the UK and the US have framed much more effective legislative enactments and enforcement instruments which place them at a pedestal much higher than what India has been able to do so far. The presence of strong preventive provisions in UK laws and better conviction rates in both the USA and UK may be emulated in some ways. From the cases discussed above and data from the UK, the average conviction rate between 1999-2002 & 2003-2007 is more than 50% in both the UK and the US. The case study 'Untouchable' shows that the punishments are very stringent. Some good practices may be adopted from foreign jurisdictions and adapted to suit the local conditions.

However, despite some improvements have taken place, a lot more needs to be done in context of India. In order to improve conviction rates in the black money

[114]As reported in the newspapers and as informed by the Government to the Parliament, of a total of 5422 cases filed by the ED, it has secured convictions in 23 cases alone, a conviction rate of 0.5 percent.

[115]Bharat Bhushan, *Why the Enforcement Directorate is being seen as a political weapon*, BUSINESS WEEKLY, (Aug. 1, 2022) https://www.business-standard.com /articleopinion/why-the-enforcement-directorate-is-being-seen-as-a-political-weapon-122080100110_1.html.

ED's list of political accused reads like a opposition's who's who. Makes it harder for the agency to earn trust, Indian Express (Jun.3, 2022) https://indianexpress.com/article /opinion/editorials/enforced-directorate-7949693/.

cases, both the enactment of well-structured laws and the effective enforcement systems in particular is an essential ingredient. There is also an element of international collaboration involved for achieving this goal. A prompt exchange of information in black money cases by way of international tax treaties such as DTAAs (Double Taxation Avoidance Agreement) etc., and by making special and mandatory bilateral provisions in this regard, would provide the necessary impetus. Therefore, as far as the investigation of black money cases is concerned, India has a long way to go. The emphasis needs to be on incorporation of effective preventive clauses in the law, reduced political intervention, improved conviction rates. An effective and time-bound implementation of the available provisions, the goal of an effective, accountable and sustainable investigation can be achieved early.

THE DYNAMICS OF JUDICIAL PROCESS

Dr. M.K. Nagaraja*

ABSTRACT

It is of great interest for legal luminaries to comprehend the dynamics of judicial process owing to paradigm shifts noticed in the legal process. Conspicuously, the legal process was founded on juristic approach in the legal regime and jurisprudential inquiries in the yester years. 'La-Volonte' involving the 'will' and 'intention' of the sovereign or a legislator intervening upon 'wrongs' and 'evils' of the society. On the contrary, the judicial process has set in the legitimacy quotient of the Supreme Court which is free from ill-effects or to rectify the 'Mischief Rule' in a statute by means of judicial interpretation in as much as removing 'defects', 'deficiencies' or 'ambiguities' in legislative codes. Adjudication on juristic basis is justified as it involves tracing the precepts as a necessity traits of judges in different ambits of judicial process. It is imperative that no statute or legislative code and even a judge-made law can sustain in perpetuity, as they are prone to repeals, amendments or by overruled judgments based on a new principle or precedent evolved by the judge in a case. The time-tested statute and well-founded 'ratio' judgment can only sustain over a period of time. If the Parliament or State legislature requires to enact a statute in tune with the dynamic character of the society, judiciary need to respect the social values or justice, or the resultant outlook of life in the changed scenario. Violation of basic features or infringement of fundamental rights guaranteed by the constitution or policies is subject to judicial review and scrutiny. The likely conflict between the legislature and judiciary needs to be avoided by strictly adhering to the well-established principles. Judicial process incidentally applies to legislative enactments too. I tried to bring out different ambits of judicial process in this article.

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I. JUDICIAL PROCESS

The judicial process involves judge-made laws with absolute objectivity and well-established principles. Justice John Marshall, the U.S. Supreme Court said, "Judges, like anyone else, will have to earn respect. They cannot demand respect by demonstrating their power. The power of judiciary lies not in deciding cases, not imposing of sentences, not in punishing for contempt, but in the trust, confidence and faith of the common man." The judicial process being an age-long process, it has witnessed paradigm shifts to fine-tune the well-established legal principles and processes. The evolution of judicial process could be traced in two phases: -

1.1. Legal process in the erstwhile legal order

Basically, jurisprudence is a spectrum of legal thought, where the nuances of thinkers are delicately blended with each other in the erstwhile legal order towards evolving the law. Obviously, it was jurisprudence[1] which involved the study of nature, origin and development of law by embracing certain disciplines. The Common Law written by Oliver Wendell Holmes (1881) is a well-known example which traces the evolution of civil and criminal with liabilities. The doyens of jurisprudence in yester years have provided clarity to law. Coke said that "the common law was the science of judges in which they avail the method of reasoning and Judges must draft the best court order to accomplish this goal."

Formalism propounds that law as science in as much as a mathematician or scientist identifying the relevant axioms. Formalists also rely on inductive reasoning to settle legal disputes which began with inferring from the broader legal principle. Ronald M. Dworkin was the foremost formalist in 1970's who maintained that law must be best explained as a rational and cohesive system of principles that judges need to apply with absolute integrity. Legal realism propounds that judges must resolve by balancing the competing economic and social interests of the parties. The legal realism[2] gained force during the times of

[1]The term 'jurisprudence' is derived from a Latin phrase, *juris prudentia*, meaning the knowledge of law or science of law.
[2]Jerome Jerome Frank coined the phrase 'legal realism' who became a judge in the U.S. Court later.

president Franklin D. Roosevelt. Utilitarianism was propounded Jeremy Bentham[3]. Jeremy Bentham argued that the law must seek to achieve the 'greatest good for the greatest number of people' in society. Jeremy Bentham in his Utilitarian approach mentioned the *censorial jurisprudence*, meaning 'what the law ought to be'. Roscoe Pound availed the insights of sociological jurisprudence to reform the law. According to him, the aim of constitutional or statutory laws is to enhance the welfare of the society. Positivism propounded by John Austin and others propagated that law implies written rules enacted by rulers or the government and said, "law is a command of the sovereign"[4]. The essential tenet of legal realism is that all laws are made by human beings and are therefore subject to human frailties and imperfections.

1.2. Judicial process in the Neo-Legal order

The conceptual clarity is an essential factor in judicial reasoning. Any kind of law without an element of justice is incomplete since justice is inherent in the law. Law without justice is like a donkey which can kick anybody. Therefore, law must be seen as a legal instrument towards achieving justice which includes even the social justice to all and ensuring their rights guaranteed under the constitution of India. The principle of ‘equality before the law’ is recognized under Article 14 of the constitution of India. Herbert Spencer in his 'Principles of Ethics' said, "every man is free to do whatever he wishes to do, provided that his acts do not infringe the legal freedoms of others." John Salmond said, "Law is the body of principles recognized and applied by a sovereign State in the administration of justice". John Austin said, “Law is a command of the sovereign which obliges persons to a course of conduct’. He gave this definition based on his imperative theory of law in which he propagated that commands issued by the sovereign are enforced by the sovereign authority by force or compulsion. The modern sovereign States possess similar authority of issuing commands to its citizens backed by sanction to enforce them.

[3]Exponent of the utilitarianism theory aimed at economic analysis of the law and to maximise aggregate wealth of the society.

[4]John John Austin's theory presupposes three essential elements, namely: (i) existence of a political society (ii) existence of a political superior or the sovereign and (iii) habitual obedience by the bulk of the people.

In judge-made laws, the ultimate goal of the judge is to weigh the value of competing interests in a lawsuit which implies introspection, common sense, empathy, analogy, precedent, custom, experience, intuition and induction to reach the appropriate balancing of interests. Law derives its source from the legislative codes or statutes, well established customs and judicial decisions. The superior courts are vested with powers to make laws for subordinate courts to regulate their own judicial process by discipline. Benjamin M. Cardozo, Associate Judge of the U.S. Supreme Court has stressed the need for conscious judicial process by the judges while deciding a case, which he meant logical consistency and standards of justice. He had also suggested the judges to take into consideration of morals, well-established customs and social welfare so as to render judge-made laws more realistic. Further, he added that conscious of the judge shall be a guiding principle in the delivery of justice and said, "A judgment that sans justice is no judgment at all". The judges need to be free from subconscious state of the mind or influence of their cultural background. The wrongs of the rich and rights of the poor need to be balanced fairly while delivering a judgment[5]. The Britishers followed the 'Rule of Law' to control the Indian subjects and their oppressive rule paved the way for our country's struggle for freedom. The judicial murder of Raja Nand Kumar demonstrates the rule by law than rule of law. In addition, the legal scholarship shall be ensured in the justice delivery. The wrong notion that the judge-made law is independent of itself. It is true that statutes enacted by the legislature are essential to award the quantum of punishment to the guilty. In any case, a statute or judge-made law should not be inconsistent with the constitution. The courts have to base their judgments on the rightful claims of the litigants as a mandatory norm. There have been multi-agencies in the law-making process which include the legislature, courts, customary law, personal law-making body and international conventions. The doctrine of incorporation under Articles 51(c) & 253 of the constitution facilitates incorporating the decisions at the international conventions into Municipal laws, provided they do not contradict the policy of

[5]It may be pertinent to mention here that the Nobles and Clergy in olden days were not punished for their crimes, other than confiscating the weapon with which crime was committed, but a hungry boy committing theft of a loaf of bread was convicted.

the nation. The U.S. imperialists have advocated judge-made laws as the best legal system.

II. LIVING FORCE OF THE JUDICIAL PROCESS

Judicial process is a process of search for dynamic principles by the judge. The spirit of legal realism aims at bringing about harmony with the principle of present rules and the present needs. Montesquieu said that judges are the mouths to pronounce the words of law who can moderate it with force and vigour. Marshall, who provided clarity to the U.S. constitutional law, desired that judges should exercise their Will while delivering their pronouncements in cases. Way back in 1908, the U.S. President Mr. Roosevelt made a statement that "judges are the chief law-makers in the country as they interpret contract, property, vested rights, due process of law, liberty and give direction to the law-making."[6]. His statement was criticized by the critics saying that the function of the judge is to discover objective truth[7]. Objectivity of law for a judge means aspirations, convictions, philosophies of men and women of their time. Therefore, the task of the judge should be enduring and ephemeral, in the sense that 'what is just should endure and what is erroneous should perish'. The House of Lords in the United Kingdom are bound by their own previous decisions[8]. In the process of judicial legislation, judges can legislate where there is ambiguity or insufficiency in a statute by interpretation. The judges need to ensure adherence to the juristic principles or jurisprudence of courts under *'par la doctrine et la jurisprudence*'[9]. The law-making by judicial decisions should be in adherence to the standards of justice and fair dealing. It is necessary to recognize the truth that extends to the domain of concrete facts of the case.

What is the source for a judge to base his judgment? Obviously, the judge derives the source from the constitution, a statute, new principle, a well-

[6]Congressional Record, Part 1, P.21, dated; 8th December 1908.
[7]BENJAMIN N. CARDOZO, The Nature of the Judicial Process 173 (Steven Alan Childress ed., Quid Pro Books 1921).
[8]Pound Pound, "Juristic Science and the Law", 31 Harvard L.R. 1053.
Roscoe Pound, Juristic Science and the Law, 31 Harvard L.R 1053.
[9]Perick, "The Swiss Code", XI Continental Legal History Series, P.238.
Perick, The Swiss Code, XI Continental Legal History Series 238.

established custom and a precedent. In addition, the material facts assume significance to arrive at the logical conclusion of the case[10]. Pound, in his "Courts and Legislation" (vide P.226) concurred with the definition of J.C. Gray. It becomes the task of the judge to discover the latent intention of the legislator towards removing uncertainties, deficiencies or errors and to take the case to its logical conclusion. In other words, courts need to unearth the 'living force' behind facts. The judicial interpretation is an enlarged ascertainment of the meaning and intention of the lawmaker. Blackstone said, "the judge is the living oracle of law", which applies only when a statute is silent about the meaning and purpose of the law. In such cases, the judge is required to take recourse to the finding on the basis of a new principle that can be applied in a case. In America, legal realism favours the judge-made laws wherein the judge sets the decisive precedent or the new principle while deciding the case. They form the juridical conceptions out of the judicial reasoning. The judge sets the ratio or the new principle which becomes the beacon of light for future cases. It creates the binding force within the scope of Article 141 of the constitution of India. The court may set the precedent in a case which the subordinate courts have to follow as a legal discipline. Redlich in his "The Case Method of American Law Schools"[11] said, "Every precedent has a directive force for future cases of similar nature." The precedent emerges as new principle or legal norm[12]. The hypothesis arrived at, or from the new principle needs to be tested in the law courts to confirm it as absolute justice. It is incumbent that rule arising out of the 'new principle' should be legally sound, failing which the new principle found in the precedent needs to be re-tested[13]. The directive force of the precedent may be found in the new principle. The emerging principle, ratio or the precedent becomes the dictum unless it is balanced.

I may invite the attention of readers to Hohfeld's concern about his analysis of fundamental concepts, logical conclusions and philosophical implications in the

[10]J.C. Gray, in his "Lecture Series on Nature and Sources of Law" defined 'facts' as those difficulties arising when the legislature sans intention by means of raising the query.
[11]Cambridge Foundation Bulletin 37.
[12]J.C Gray, Judicial Precedents, 9 Harvard L.R 27.
[13]Pound, Courts and Legislation, 7 Am. Political Science Review 214

consistent development[14]. Benjamin N. Cardozo concurred with his view and said, "analytical matter is an indispensable tool." Halsbury said, "A case is only an authority for what it actually decides"[15]. Benjamin N. Cardozo in his "The Nature of Judicial Process"[16] opined that law is not always logical wherein a cluster of cases involving similar legal issues and the parties expect the same outcome in their cases too. Confusion may prevail where earlier decisions are overruled by the Apex Court, sometimes its own earlier rulings. It should be remembered that adherence to the precedent is a rule rather than an exception, unless the new principle is set in the subsequent case. The reversal of the precedent, ratio or the new principle results in the snatching away of what was already given to either party in a case. It may amount to mockery of justice if the new judgment is not well-structured or improperly reasoned. In such cases, precedents set in earlier cases vanish. The real complex situation arises in respect of decisions relating to property disputes arising out of the Hindu Succession Act, 1956. The reversal of decisions of earlier cases may cause injustice to either party. It is essential that a judge must perceive the conflicting interests in the fundamental concepts. The seller has to sustain the loss who agrees to sell his chattel to the buyer if the chattel is destroyed before the title is passed[17]. On the other hand, the loss falls on the buyer when the seller agrees to sell his house and the house is destroyed before the title is passed and the seller can sue for equity for specific performance[18]. These outcomes are based on the principle of logical conclusions and a different one to another conclusion. In the execution of a Will, the legatee who kills the testator is not permitted by equity to enjoy the benefits of the Will[19]. The principle of binding force governs the Will in the disposal of estate of the testator in accordance with law. This principle clearly states that 'no one can profit from his own inequity or take advantage of his own wrong'. The legal title must be passed to the legatee based on the 'constructive trust' and the murderer loses the legacy.

[14]W.N. HOHFELD & WALTER WHEELER COOK, Fundamental Legal Conceptions As Applied In Judicial Reasoning (Creative Media Partners LLC 2015).
[15]Quinn v. Leatham, AC 495, 506 (1901).
[16] The Stories of Lectures delivered at Yale University
[17]Higgins v. Murray, 73 N.Y. 252, 254 (1878).
[18]Paine v. Meller, 6 Vas. 349, 352 (1801).
[19]Riggs v. Palmer, 115 N.Y. 506 (1889).

The law-making or legislative power of the judge relates to the gaps or deficiencies in the law. However, they need to adhere to the principles of legislation while doing so. In other words, the judge has to make good what the statute has omitted by his interpretation function[20]. The modern juristic thought relates to subjecting the judicial process to introspective scrutiny to serve the social needs. A judge needs to look beyond micro-level issues while giving judgment in obedience to the fundamental principles and societal interest. The true meaning and interpretation of a statute could be unearthed by the correct interpretation of a statute[21]. In fact, a code or statute does not limit the discretion of the judge to interpret the statute or section of law. In fact, a good statute must have a provision for judicial interpretation instead of narrating the legal concepts. The fissures in the statute need to be bridged by judicial interpretation. It is all the more essential that the judge should not surpass the 'statutory symmetry' or the legal structure. Judges have to bear in mind certain ethical considerations in the administration of justice. The validity of a statute relates to the misunderstanding of law rather than the misunderstanding of facts. A statute should not declare anything that is arbitrary or void[22]. Judges also need to realise that the statute shall not be viewed in isolation or in vacuo, but to set the framework based on realistic conditions[23]. Statutes are designed to meet the exigencies of the hour and amendments become essential with the changing of such exigencies. Imperatively, principles of the constitution are meant for the expanding future. Our constitution embodies within itself the 'Rule of Law' as reflected in its preamble and other Articles. The constituents of social justice cannot be ignored by the judges and make or unmake rules at their pleasure. Furthermore, judges cannot make laws contrary to natural equity. The 'rule of law' must uphold values like; human dignity, demonstrative norms and ideas of justice and equity. Since the common law, which India is following, consists of the new combination of legal principles and judicial precedents, judges need to apply them when the rules are inconvenient and unreasonable. What is

[20]Kiss, Equality of Law, 9 The Modern Legal Philosophy Series 161.
[21]Kohler, Interpretation of Law, 9 The Modern Legal Philosophy Series 192.
[22]People v. Williams, 189 N.Y. 395 (1907).
[23]Pound, Courts and Legislation, 9 The Modern Legal Philosophy Series 225.

significant is the relevance of the 'rule of law' in the prevailing conditions as well as future times. Justice Homes has favoured the judge-made laws. Judges need to pronounce judgments on their own findings of facts of truth. Such pronouncements should not breed distrust or suspicion in the minds of the parties to the suit or a case. The rulings of the judge based on evidence have been the prominent feature in the judge-made law. However, such judgments have to stand the' test of sustenance' in the appellate courts. The conscious mind of the judge would, sometimes, suffice for attainment of moral ends. Stamler said, "A judicial judgment should be a judgment of objective right and not a subjective or free opinion." Prof. Gray concurred that judges decide cases on the notion of 'right and wrong' prevalent in the community as objective standards. Brult was one of the staunch supporters of objective mind rather than the subjective mind as standards relate to practices and beliefs. Francois Geny said, "Apriori, the process of research is imposed on the judge in finding the law. It seems to be analogous to the legislative duty. Facts Sub-Silenti[24] are detrimental to fair judgment.

The right to participate in the judicial process by the victim of the crime is a paradigm shift which is recognised by the efforts of Late Justice Malimath who propagated victims' rights. Conspicuously, accessibility to justice should be an essential principle. The complaint in a criminal case, hitherto, has been isolated from participating in the judicial process, except filing his First Information Report and deposing his evidence. Now, the victim's right to participate in the judicial process. Conspicuously, fair play is ensured in civil litigations to both the plaintiff and the defendant.

Since the social welfare is akin to the public policy for the collective good[25], judges need to place reliance on social values[26] in a dynamic society. The judge shaping the 'rule of law' needs to comply with the 'mores' of the day[27]. In this regard, Pound said, "Perhaps the most significant advancement in the modern

[24]Facts that are not brought to the notice of the judge by the prosecution or facts not brought to the notice or the judge or argued by the defence counsel.
[25] 'mores' of the community.
[26]Social values imply the logic, coherence and consistency.
[27]Pound, Courts and Legislation, 9 The Modern Legal Philosophy Series 212

science of law is the change from analytical to functional attitude"[28]. Emphasis placed on the content of a legal precept for remedy is a paradigm shift in as much as the judicial function shifting to a certain content. The danger is that the Will of the sovereign State is likely to impose on the judge or the legislature enacting a statute in a haste that inflicts hardship on individuals or class of people or parties concerned. The legislator should not suffer from insufficiencies while appreciating the general situation. The judge decides a particular case to avoid dangers of arbitrary action and base his decision on objectivity. The statute is no law unless the judge interprets its meaning and intention[29]. Gray propounded his theory that Statutes, precedents, experts' opinions and customs formed as sources of law. The firmly established customs are not laws unless they are adopted by courts[30]. Jethro Brown said it is not a law till it is construed by the judges accordingly[31] and he termed the statutory law as 'ostensible law'. He believed that court decisions are confined to the parties to the litigation as once the judgment is overruled, all previous decisions render to be no longer laws. Unsettled law arises when there is obscurity in a statute or judge-made law. The diverse judgments cause confusion in the judicial process. The powers of the judge need to be exercised judiciously to ensure justice in relation to the rights of the parties or litigants. In other words, the judge has to obey the juristic principle which limits the powers of the judge. The judge needs to embody good dictates of reason and conscience in his judgment[32].

Any Act given force with retrospective effect is contrary to the rule since it should always be given with prospective effect. For instance, Onel De Guzman, a citizen of the Philippines wrote a program called "I Love You Program" which resulted in colossal loss to the tune of Billions of Dollars owing to the crashing of computers all over the world when computers were opened. America being the worst affected country, it pressured the Philippines government to enact Information Technology Law and to prosecute Onel De Guzman. Accordingly,

[28]ROSCOE POUND, Administrative Application of Legal Standards, 441, 449 (Gale Making of Modern Law) (1919)
[29]JOHN CHIPMAN GRAY, The Nature and Sources of the Law (Routledge) (1909).
[30]JOHN AUSTIN, Jurisprudence 37, 104.
[31]Law of Evolution, 29 Yale L.J 394.
[32] THOMAS ERSKINE HOLLAND, Jurisprudence 54.

the Philippines government enacted the Republic Act No.8792 and charged him under the new Act by giving it force with retrospective effect. The court has struck down the sections of the new Act from the charge sheet on the ground that judges have no discretion to prosecute a person under the non-existent Act[33]. The law being the body of principles, it creates, regulates and redresses the grievances by assuring civil rights. The conscious abuse of power amounts to violation of law[34]. The retrospective effect of the judge-made law is a felt need, either to exclude hardship to the party to litigation or hardship becoming inevitable where no rule is declared. It is to be remembered that such a hardship should not be grave in nature.

A judge has to imbibe in him the principles, values and assess the evil effects of a wrongful act by deducting the logical consequences. While developing a new precedent, the Privity assumes the significant factor for imposing liability on the wrongdoer. Adherence to the rule is necessary where substantive right is involved. An occupant of a car sued the manufacturer on the ground that he sustained injury in the car. Since there is no Privity involved in it, the manufacturer of the car is held not liable to an occupant by the Circuit Court of Appeal in Macpherson v. Buick Motor Company[35] and the complaint was dismissed. Contrary is the case of Donoghue v. Stevenson[36] wherein the House of Lords held that the manufacturer was liable to the end-user.

If the court in its final decision declares a statute as void, intervening decisions are governed by earlier decisions. In the case of overruled judgment, operation of intervening decisions is rendered void[37]. Conflicting decisions creates dilemma among the parties in the event of winning or losing the case in the final stage. The question of validity of earlier judgment changes due to such ruling about the operation of the law[38]. It is now inevitable to look into different ambits of judicial process: -

[33]This principle is based on the maxim; nallamcrimen sine lege, meaning there is no crime in the absence of law.
[34]BEALS, Conflict of Laws, 132.
[35]Macpherson v. Buick Motor Company, 217 N.Y. 382 (1916).
[36]Donoghue v. Stevenson 100 HL U.K. (1932).
[37]Carpenter, Court Decisions and Common Law, 17 Columbia L.R. 593.
[38]Wigmore, The Judicial Function, 9 The Modern Legal Philosophy Series xxxviii, xxxviii.

(i) *Basic features of the constitution as benchmark*: First and the foremost is the 'independence of judiciary' as one of the basic features of the constitution under the doctrine of separation of powers. In S.P. Gupta v. President of India[39], Supreme Court of India held that independence of the judiciary is the basic feature of the constitution. The doctrine of basic structure of the constitution[40] cannot be altered or diminished[41]. It is a conspicuous feature in the constitution for 'clipping the wings' of the Parliament or legislature in amending the constitution where infringement of fundamental rights guaranteed to the citizens of India is noticed. The Supreme Court of India has clearly demarcated between the fundamental right and the statutory right in its judgment in K. Krishna Murthy v. Union of India[42]. The basic structure doctrine was staunchly propounded by the Supreme Court of India in its judgment in Kasavananda Bharati case and ruled that the Parliament has no power to amend the constitution if the fundamental rights guaranteed in Part-III are violated, altered, diminished, or abridged[43]. Earlier, in Indira Gandhi v. Raj Narain[44] The Apex Court invoked the doctrine of the basic structure and abrogated Clause (4) of Article 320(A) of the constitution which was inserted by the Thirty Ninth Constitution (Amendment) Act, 1975. Furthermore, the Apex Court in Minerva Mills Ltd., v. Union of India[45] limited the power of the parliament to amend the constitution and ensured independence of the judiciary. It is evident from these landmark judgments that the constitution has adopted the doctrine of basic structure as 'benchmark'. The word 'may' is used in Article 245(1) of the Constitution, but not 'shall' for making laws by the parliament. The legislative competence is subject to the Doctrine of Pith & Substance. Article 368 prescribes the procedure to be followed by the Parliament while amending the

[39]P Gupta v. President Of India, (1981) 1 S.C.C. 87 (India).

[40]The basic structure of the constitution also includes; (i) supremacy of the constitution (ii) democratic form of government (iii) secular character (iv) federal character of the government and (v) separation of powers.

[41]Kesavananda Bharati v. Union of India, (1973) 4 S.C.C. 225 (India).

[42]K. Krishna Murthy v. Union of India, (2010) 2 S.C.C. 385 (India).

[43]The 'doctrine of waiver' has no application to Part-III as held in Behram Khurshid v. Bombay State, 1955 SC 123.

[44]Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299 (India).

[45]Minerva Mills v. Union of India, (1980) 3 S.C.C 625 (India).

constitution[46]. The Supreme Court held that exercise of unlimited power by the Parliament affecting the principle of equality and basic features of the constitution of India is prohibited.

(ii) *Judicial interpretation*: Lord Denning said, "A judge cannot simply fold his hand when a defect surfaces, then he must set forth to find the true legislative intent and must supplement the same with written words so as to give it force and life ... the judge must not alter the material of which the Act is woven, but he can and should iron out the creases." The judicial interpretation of a statute or a section of law needs to be consistent with the basic features of the constitution and rectifying the *mischief rule* in the statute. It will not be a good law if the mischief rule is not interpreted by the judge in its literal sense, as held in Letang v. Cooper[47]. Courts can further develop law by removing uncertainties and defects. The judicial interpretation arises when there is ambiguity, defect or error noticed in the statute and wherever there is lack of clarity. The conceptual clarity in a statute or section of law is also significant to comprehend the intention and meaning. For instance, Justice Krishna Iyer in BWSSB v. Rajappa &Ors.[48] has defined the term 'industry' and laid down 'Triple Test' as criteria[49]. In the absence of legal definition under the Information Technology Act, 2000, judicial definition is given to 'cyberspace' by Justice Bedlam in R v. Governor of Brixton Prison, ex P Levin[50] as, "The operation of the keyboard by a computer operator produces a virtual instantaneous result on the magnetic disk of the computer even though it may be ten thousand miles away. It seems to us artificial to regard the act as having been done in one rather than the other place."

(iii) *Judicial review*: In Marbury v. Madison[51], Chief Justice Marshal said that, "It is emphatically the province and duty of the judicial department (judiciary) to say what the law is. Judicial scrutiny of the validity of legislation is an essential

[46] Substituted by the Constitution (Twenty-Fourth Amendment) Act, 1971, S.3.]. In Glenrock Private Ltd., v. State of Tamil Nadu [2010) 10 SCC 96.
[47]Letang v. Cooper, 232 1 Q.B. 240 (1965)
[48]BWSSB v. Rajappa &Ors, A.I.R. 1978 S.C. 553 (India).
[49]Triple Test includes; a) there must be 20 workers in any industry b) there must be a regular process of production and c) there must be marketing strategy for the produce.
[50]R v. Governor of Brixton Prison, 3 All E.R. 289 (1997).
[51]Marbury v. Madison, 5 U.S. 137 (1803).

protection against the possible oppression." This judgment has established the principle of judicial review, thereby empowering the U.S. Courts to strike down the legislations or enactments that are contrary to the U.S. constitutional provisions. Alexander Hamilton in Prentiss et al v. Atlantic Coast Line Company[52] said, "It would require a great deal of fortitude in judges, to do duty as faithful guardians of the constitution, where legislative invasions have been instigated by major voice of community." The Supreme Court in SAIL v. Dibyendu Bhattacharya[53] held that courts can exercise limited power of judicial review to ascertain whether the State authorities are rational and just or prejudicial. The Supreme Court in Assam Sillimanite v. Union of India[54] held that Article 31(C) of the constitution does not bar the judicial review. While reviewing earlier judgments, the judiciary should respect the values and the resultant outlook of life. Earlier, the judiciary had no power to review statutes or Acts listed in the Ninth Schedule of the constitution but now authorized to review them based on the constitutional validity. Since the inception of democracy in India, judicial review has received complete freedom in as much as ensuring fairness and legitimacy. The Supreme Court of India in L.C. Golaknath v. State of Punjab[55] held that one has to discern between judicial review and overreach for, they act as vital to smooth functioning of democratic foundation and also in consonance with the doctrine of separation of powers. Conspicuously, the Supreme Court can review its own earlier decisions.

(iv) *Judicial reasoning*: The Supreme Court in Employees Association v. Union of India[56] held that there is no law where the court assigns no reason in its judgment. Judicial reasoning is essential in judge-made laws. Any law declared by the Supreme Court shall be based on proper reasoning as observed in Ramesh Birch v. Union of India[57]. In the judicial process, the majority of judges decide cases based on their own reasoning. Sometimes, the dissent opinion(s) expressed by one or two judge(s) become the law at a later stage. The legal coherence is all the more essential between earlier decisions and the subsequent decisions. The

[52]Prentiss et al v. Atlantic Coast Line Company, 211 U.S. 210 (1908).
[53]SAIL v. Dibyandu Bhattacharya, A.I.R. 2011 S.C. 897 (India).
[54]Assam Sillimanite v. Union of India, A.I.R. 1992 S.C. 938 (India).
[55]L.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643 (India).
[56]Employees Association v. Union of India, A.I.R. 1990 S.C. 334 (India).
[57]Ramesh Birch v. Union of India, A.I.R. 1990 S.C. 560 (India).

new principle set in the subsequent decision needs to be based on material facts as observed by the Supreme Court in Indra Sawhney v. Union of India[58]. Disagreement between two different judges of two division benches could be settled by referring the matter to the larger bench as decided by the Supreme Court in Sundarjas Kanyalal Bharthija v. Collector, Thane, Maharashtra[59]. When the court reviews an earlier decision, it needs to take into consideration the fresh facts and new principles set for the larger number of cases at a later stage. The Apex Court provides for a raider clause in the Supreme Court Employees Association v. Union of India[60] that there is no law where the judge (court) assigns no reason in his (its) judgment. Where earlier judgments are overruled, subsequent judgments should not cause injustice or confusion as they are based on the processes of reasoning. The logical conclusion based on reasoning from the hallmark of judge-made laws. Truth being an underlying philosophy of justice, it constitutes coherence to the legal system.

(iv) *Judicial Binding authority*: Well-founded precedents have binding authority, provided they have legal value as held by the Supreme Court in Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd.[61] , held that Article 141 of the constitution of India imposes judicial binding in respect of the law declared by the superior court on lower courts. Where the Supreme Court declares that a legislation enacted by the State becomes *ultra vires*, the decision is binding on the State[62]. Conspicuously, the ruling in a case with binding nature may or may not be correct as held by the Supreme Court in the Central Board of Dawoodi Community v. State of Maharashtra[63]. The binding nature of the judgment also depends on the ratio set in a case under ratio decidendi. The ratio set in Donoghue v. Stevenson supra, has been sustained even after a century. The time-tested ratio decidendi operates in perpetuity, the truth being the underlying philosophy of the truth. In the State of Uttar Pradesh v. Synthetics & Chemicals Ltd.,[64]The Supreme Court ruled that Obiter Dicta i.e. statements that are not part of the ratio decidendi are excluded from the purview of binding effect. The decision per*curiam* i.e. the decision given out of ignorance of the terms of the

[58]Indra Sawhney v. Union of India, A.I.R 1993 S.C. 477 (India).
[59]Sundarjas Kanyalal Bharthija v. Collector, Thane, Maharashtra, A.I.R 1990 S.C. 261 (India).
[60]Supreme Court Employees Association v. Union of India, A.I.R. 1990 S.C. 334 (India).
[61]Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd., A.I.R. 2003 S.C. 511 (India).
[62]State of Gujarat v. Kasturch and Chhotalal, A.I.R 1991 S.C. 511 (India).
[63]Central Board of Dawoodi Community v. State of Maharashtra, A.I.R 2005 S.C. 752 (India).
[64]Uttar Pradesh v. Synthetics & Chemicals Ltd., (1991) 4 S.C.C 139 (India).

statute or rule in force, sub-silentio or a decision given without argument of a particular issue and Order made with the consent of parties cannot be treated as cases of judicial binding. Any decision made by the Court under the doctrine of stare *decisis* cannot be considered as a binding authority as observed in Chikkusappa v. State of Karnataka[65]. The lack of uniformity between earlier decision and the subsequent decision needs to be examined based on the new principle within the ambit of the constitution on material facts, as observed by the Supreme Court in Indra Sawhney v. Union of India[66]. The disagreement between two judges or two Division Benches can be settled by referring to the larger bench as held by the Supreme Court in Sundarjas Kanyalal Bharthija v. Collector, Thane, Maharashtra[67]. R*atio legis* applies to statutory law, while *ratio decidendi* to judicial courts. Here the maxim, 'cessanteratione legis, cessatipsa lex', meaning if the reason for thelaw ceases, the law itself ceases becomes appropriate.

(v) *Judicial Restraint v. Judicial Activism*: In Empress v. Burah Singh[68], Calcutta High Court enunciated the theory that every government with a written constitution forming the most fundamental and paramount law of nations must be the Act of legislature repugnant to the constitution and effectuating the same would overthrow what was established in theory and make it operative in law. It is not law. Conspicuously, the Supreme Court of India stepped into British shoes for a specific period between 1950 and 1975 as evidenced in A.K. Gopalan v. State of Madras[69] where narrow construction was given to Article 21 of the constitution of India which led to judicial restraint. It may be construed that the judicial overreach is a transcendence from the legitimate judicial activism. The Apex Court has issued guidelines or directives on various issues which formed part of judicial activism. In Visaka v. State of Rajasthan[70], Supreme Court issued guidelines to prevent sexual harassment in the work place.

vi) *Doctrine of correction of judicial errors*: The Supreme court in Nanavati v. State of Bombay[71] adopted the doctrine of correction of judicial errors for

[65]Chikkusappa v. State of Karnataka, A.I.R. 2006 N.O.C. 472 (India).
[66]Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477 (India).
[67]Sundarjas Kanyalal Bharthija v. Collector, Thane, Maharashtra, A.I.R. 1990 S.C. 261 (India).
[68] Empress v. Burah Singh, C.A.L 64, 87, 88 (1878)
[69]A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 (India).
[70]Visaka v. State of Rajasthan, (1997) 6 S.C.C. 241 (India).
[71]Nanavati v. State of Bombay, A.I.R. 1961 S.C. 112 (India).

granting clemency under Articles 72 and 161 by the President of India and governors of States respectively since no human system of judicial administration is free from imperfections of proportionate to crime. The competent court has power to review the grant of pardon given by the Governor of a State as held by the Supreme Court in Epuru Sudhakar v. Government of Andhra Pradesh[72]. The juristic thought is essential to probe the principle in the formulation of proper law. The basic tenets of the constitution together with the legal principles must be consistent with the statute enacted by the Parliament or State legislature. Though the judicial process relates to judge-made laws, incidentally it applies to legislative enactments. Any legal defect, error, inconsistency or ambiguity in the statute renders it to be liable for repeal or amendment. The judge-made law could be either enduring or ephemeral in the sense that proper judgments endure and erroneous or unjust judgments perish. In India, judgements become tentative and redundant once they are overruled.

(vii) *Pro-active role of judiciary*: During the COVID-19 period, Indian judiciary played a pro-active role by seeking explanation from the government about the distribution of vaccine process and insisting that policies must be in conformity with the 'standards of reasonableness and non-arbitrariness'[73]. The High Court of Delhi also ordered National Task Force to take care of the distribution process for medical oxygen based on scientific reasoning and to facilitate audits in States and Union Territories[74].

III. CONCLUSION

The likely conflict between the law-making body and the judiciary could be avoided by adhering to the basic features of the constitution of India. It is absolutely necessary that judicial freedom should not be taken away by the law-making authority. Reversing the Nehruvian tenure of premiership, the conflict was fairly free between the parliament and the judiciary when compared with the tenure of premiership of Smt. Indira Gandhi. The conflict between the law-making body and the judiciary would paralyse the judicial process in the absence of an independent judiciary.

[72]Epuru Sudhakar v. Government of Andhra Pradesh, (2006) 8 S.C.C. 161 (India).
[73] In Re: Distribution of Essential Supplies & Services During Pandemic: Suo Motu W/P(C) No. 3 of 2021
[74]Union of India v. Rakesh Malhotra &Anr. SLP, A.I.R 2021 S.C. 375 (India).

EVALUATION OF FUNDAMENTAL RIGHTS: THE REGIONAL AND THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS

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ABSTRACT

In order to protect and advance human rights in the Americas, the Inter-American System, which is made up of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) plays a crucial role. In this article, the authors highlight the urgent need to unravel the performance of effectiveness of the validity of conventionality in the light of its tutelary organisms, that is, international justice in human rights. The article also explores the interaction between regional and national human rights mechanisms, as well as the relationship between the Inter-American System and national legal systems, with a focus on the subsidiarity principle.

I. INTRODUCTION

In Europe the position of the fundamental rights is internalized and maintained through effective access to their protection, such as the actual existence of social rights, for example social security or adequate medical care; on the other hand, in Latin America there is no clear understanding of the existence and scope of these; and, in many cases, they are seen as aspirations rather than as enforceable rights.

Latin America is living in fear due to public insecurity, economic instability, corruption, and the current pandemic, in this context of ignorance of fundamental rights, their societies are developing a rationale in which the protection of fundamental individual rights, such as security, health or work, should be the responsibility of each individual, not of state institutions, however,

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the access to social rights is left in the well-intentioned hands of these institutions in which the majority of the population does not trust. This institutional violence added to the growth of poverty and inequality, corruption and violence, fear, and lack of constitutional culture, which means that citizens are more interested in solving their private problems than in defending their human rights.[1]

On the other hand, the advent of the control or examination of conventionality, as well as its initial and gradual compliance by the States parties, brought with it diverse resistances, controversies, and, above all, expectations, regarding its supposed nature as a panacea or a sort of synonym with the historical and elusive justice.

In this article, the author evaluates the performance of the guardianship bodies of the Inter-American Human Rights System (IAHRS), mainly the Inter-American Court of Human Rights (IACHR).

II. What Type of Justice is Currently in Force?

First of all, we have legal justice, constitutional justice, conventional justice, restorative justice, justice. Are they synonyms? In this opportunity, we will address the demarcation corresponding to the different terms referred to.

First, the so-called legal justice, because it is received with the provisions of the respective legal norms, that is, when it is in the judicial or administrative seat, based on which it is determined only in the matter of law in question, it is also invoked for the specific situation of the granting of rights expressly established in the law.

Secondly, there is a definition of constitutional justice that strictly adheres to the postulates of the Magna Carta in force. Then, this justice is not the same as legal justice, because it is responsible for prevailing the constitutional norms over any other legal framework of lower rank.

[1]Lindley Cremades, Nicolás & Calvo- Sotelo. Covid-19 and fundamental rights in Latin America. Online, retrieved on 1/1/22 from: https://www.expansion.com/juridico/opinion/2020/10/03/5f776a24468aeb4a178b461b.html. Madrid, 2020.

Thirdly, the traditional justice that is premised on the legalization in the American Convention on Human Rights: its scope or proximity to justice is superior to legal and constitutional justice, in order to apply a justice that has an impact on society.[2]

Fourth, the meaning of “restoring justice” is analyzed, which has to do with "restoring" the spirit of thinking about the offended or aggrieved subjects. Although it rehabilitates all those who have been offended or harmed, it does not necessarily grant what corresponds to the victim, but what the victim subjectively believes or knows to be rehabilitated. In many cases, the high emotional content means that the offended party needs to give the offender a sincere apology and satisfaction to take responsibility for not incurring the corresponding offense or grievance.

In addition to this, we consider that the so-called Restorative Justice acts as a justice of compassion that allegedly would pretend to repair the damage caused directly or indirectly to the victim, although not all their needs are compensated, such as the transgression of their life project and other related fundamental rights that allow them to develop their continuity as a physical person, it would pretend to resolve the conflict peacefully. With this, the victim will be somehow satisfied. Thus, restorative justice goes a step beyond any existing type of justice.

Finally, we will mention justice itself, the only one comparable to legitimacy, to justice that will allow more equitable restitution to the victim, in order to guarantee and promote a universal justice and parameterized to legality, but at the same time, that the restitution is proportional to the damage caused to the victim.

From all this, we denote that the existing relationship between justice and legitimacy for a more accurate interpretation occurs when the existence of the internal regulations in force in the States is promoted, however, these are not

[2] Torres Manrique, Jorge. "Legal justice, constitutional justice, conventional justice, restorative justice, justice - are they synonyms?". Online, retrieved on date 24/1/22 available at https://www.el-terno.com/colaboradores/Jorge-Isaac/Justicia-legal-justicia-constitucional.html

properly aligned to international human rights treaties, therefore, many times it is not possible to apply a type of equitable justice, so it is necessary to introduce the principle of universal justice to judge several empirical laws, thus harming the victims and the existing types of justice.

III. PRELIMINARY QUESTION: FUNDAMENTAL RIGHTS AND HUMAN RIGHTS

As an initial point, it is necessary to state that usually the denominations: human rights, and fundamental rights, are assumed as unmissable, in their meaning. However, since this is not true, it is worth mentioning the respective demarcation.

Thus, we have, in principle, that human rights are the result of a permanent and continuous struggle through time, in order to achieve their recognition. An initial historical turning point is the assault on conscience after the atrocities of the Second World War, which originated the worldwide recognition of rights. In addition, it should be added that human rights apply without distinction to all people, strictly with their human nature.

Human rights are based on the dignity of the human being, which appears as a philosophical concept that existed since ancient times, having acquired a canonical category with the illustrious Immanuel Kant in the eighteenth century, with special emphasis on human dignity as a moral requirement for the respect and inviolability of the rights of individuals.

Subsequently, dignity is conceived as a -legal concept- due to its consideration as an inherent attribute of natural persons in the first declarations on human rights, such as the following: The Declaration of Independence of the USA (1776), the Declaration of the Rights of Man and the Citizen (France, 1789) and the Universal Declaration of Human Rights (1948).[3]

Now, human dignity by its nature focuses on the existential realization of its meaning -being-, hence it is attributed the notion of "universalization" since it points to tolerance, equality, and respect reflected in the uniqueness and

[3]Habermas, Jürgen. The concept of human dignity and the realist utopia of human rights. Diánoia, LV (64), 3-29, 2010 Online: Retrieved on date 24/1/22 from http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-24502010000100001

singularity of mankind; and acts from several functions, such as heuristic, catalytic, creative, mediating, political-legal and catalytic because it involves the enforceability of human rights in a given society.

For the prominent professor Jürgen Habermas, the relationship between dignity and human rights refers to a conceptual link that is identified through the construction of moral and traditional meaning, recognized in the international legal framework and recent constitutions. In addition, he establishes that their relationship is found in a historical reconstruction that allows conceiving -universalism- to its credit.[4]

In addition, the author states that dignity is related to human rights due to the functions it performs. As contextualized in this table:

Table 1. Functions of human dignity in human rights

Functions	Relationship to human rights
Seismograph	Human rights must conceive of themselves voluntarily in a society.
Catalyst	Human dignity and human rights are built through morality and respect.
Creative	Human rights can be detected from some violations that transgress the dignity of people.
Legitimating	It grants constitutional recognition, safeguarding the inalienable rights that start from the dignity of individuals.
Political-legal	Human dignity is based on human rights, therefore, there must be state intervention to guarantee them.

[4]Habermas, Jürgen. The concept of human dignity and the realist utopia of human rights. Diánoia, LV (64), 3-29, 2010 Online: Retrieved on date 24/1/22 from http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-24502010000100001

Mediating	Human dignity fulfills the role of acting within the moral duties to legal requirements of States.

Source: Own elaboration

On the other hand, it is worth noting that fundamental rights provide a guarantee of their respect in the internal headquarters of each country, which is effectively viable in each legal system and materializes concretely in the legal and constitutional headquarters (in this second case, they acquire the additional denomination of constitutional rights). Unlike human rights, which are more related to their broad, global, evaluative, philosophical aspect (the Universal Declaration of Human Rights is a clear example), as has already been mentioned; fundamental rights are those that can be claimed by every person. However, we infer that they embrace a relationship of genus and species. The former corresponds to human rights and the latter to fundamental rights.

It is worth mentioning that both fundamental rights and human rights must be duly guaranteed by the State, due to their nature of creation, in this sense, the figure of the administration of justice is included. Consequently, it is clear that in this article we will focus on developing it in the light of fundamental rights.

IV. A Discussion on the American Fundamental Rights

Latin American or "developing" countries, compared to developed European countries, have always been at an economic and social disadvantage, lagging in these aspects, as well as in legal and cultural matters, among other difficulties. As a result, they were influenced and controlled by the developed States under the excuse of achieving their development, a marked presence of colonialism in the middle of the 20th century. This situation was also evident in the regime of Law and the Constitution. This scenario would change due to the nonconformity of the organized societies, which demanded that the Constitution and the Law be elaborated in accordance with their culture and particular circumstances of their environment. [5] From this, the principles that would be transgressing are mentioned:

[5]Romero Burbano, Carolina. Fundamental rights in Latin America. Paradigm shift in the conception of the subject of rights. In: Discusiones actual essobrelosderechos

Table 2. Principle's basis that is violated in Latin American countries

Principles	**Basis**
Principle of hierarchical equality of fundamental rights	Latin American constitutions establish a hierarchy of fundamental rights in their content and classification, in this sense, a guaranteeing vision predominates through this branch.[6]
Plurinational States of Law	Predominates inter culturality and the guarantee of the rights of indigenous communities, based on a society where cultural and linguistic diversity prevails, hence, we denote Andean constitutionalism as the supremacy of legal norms that respect a multicultural society.
Democracies and authoritarianism	In this case, the authoritarian current restricts fundamental rights, such as the political rights of citizens, who are building a democratic spirit. [7]
Fundamental rights to expression,	Amnesty International reports that the governments of Puerto Rico,

fundamentalesen América Latina. MOLINA HINCAPIÉ, Sergio and TARAPUÉS SANDINO, Diego Fernando. Online, retrieved on 1/1/22 from: https://libros.usc.edu.co/index.php/usc/catalog/view/4/2/44-1. Editorial Santiago de Cali. Valle del Cauca, 2019, p. 59.

[6] Romero Burbano, Carolina. *Ob Cit*. P. 63.

[7] Cáceres López, Roslem, QUEVEDO PEREYRA, Gastón. Regime, fundamental and social rights in Latin America, 2019. Online, retrieved on 1/1/22 from: https://www.redalyc.org/journal/993/99365404005/html/. Maracaibo, 2021.

opinion, information	Paraguay, or even Colombia, threaten and use violence against human rights defenders, as well as those who work in journalism.[8]
Right to life, sexual choice, and non-spousal violence	Violence against vulnerable communities, such as women, LGTBIQ+, and indigenous peoples, occurs due to factors involving segregation and discrimination in a given society.[9]
Fundamental right to protest	Human rights activists have been suffering constant aggressions for exercising their fundamental right to protest, despite being duly guaranteed in the Latin American Magna Carta.
Fundamental rights for non-human persons	Latin American countries, such as Argentina and Colombia, have recognized in their jurisprudence the fundamental rights of non-human persons. Such is the case of the orangutan Sandra, confined in the Zoo of the Autonomous City of Buenos Aires, or, of Chucho Bear, who was in

[8] Torralba, Carlos. The deterioration of human rights in Latin America intensifies. Violence and discrimination against minorities worsened in the region according to Amnesty International. Online, retrieved on 1/1/22 from: https://elpais.com/internacional/2018/02/21/actualidad/1519243640_296369.html. Madrid, 2018.
[9] Torralba, Carlos. *Ob Cit.*

	terrible conditions in a zoo in Colombia.

Source: Own elaboration

V. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: NATURE AND DEGREE OF JUSTICE

The Inter-American system for the protection of human rights is in force in Latin American countries, and its purpose is to protect, safeguard and monitor compliance with human rights in countries of the region, in order to verify compliance with treaties on inalienable rights.

We consider that the Inter-American system seeks to guarantee equal justice to the victims in human rights matters, in order to compensate for the total damage and eradicate the absolute suffering, in addition to this, it intends to cause an impact on Latin American societies since a duly motivated decision is part of the internal normative system of these.

On the one hand, the excessive time taken by the Inter-American Court of Human Rights, hereinafter IACHR Court, to resolve the cases under its jurisdiction, as well as to execute the same, in the terms set forth by the same.

This, in the context of the paradox that arises between the quintessence of the ISHR, IACHR, and IACHR Court, to control and ensure the safeguarding of fundamental rights and the objective performance of their functions, which goes against the very nature of which they were conceived and put into effect.

VI. ANALYSIS

We have determined the existence of four points to be considered for the respective analysis. Thus, we have:

First, the nature of the existence of the ISHR and therefore, the IACHR Commission and the IACHR Court, are not synonymous with the word justice.

Secondly, the excessive and unjustified time taken by the IACHR Court.

Thirdly, again, the inexplicably long time it takes for the IACHR Court to execute its judgments.

Finally, in fourth place, the questioning of the points referred to in order to determine the legitimacy of the existence of the ISHR.

VI. OBJECTIONS

Thus, we have that an ISHR that largely fails to achieve its objective fails in turn to demonstrate the necessity or forcefulness of its existence.

This is if we take into account the ten years required to exhaust the domestic remedy. Then, it the almost twenty years to issue the sentences. And to conclude, to add ten more years to attempt the execution of the same.

Consequently, this does not justify the existence and validity of the ISHR, since the remedy has become worse than the disease.

VII. CONCLUSION

Worrying violation of fundamental rights by governments. It is regrettable that it is precisely the States that should be committed to their observance, safeguarding, and realization.

For its part, the ISHR has been making *a mea culpa* about the abdication of its quintessence and commitment to safeguarding the rights of those who see their fundamental rights violated by the signatory States, since it recognizes that there is a great delay accumulated over approximately thirty years and consequently has launched a strategic plan.

This delay has been causing serious damage to the configuration of the IAHRS and the safeguarding of the fundamental rights of individuals. In addition, it should be added that it is not enough to consider expediting the attention of the backlog of cases, but also that the judgments issued by the IACHR Court be duly executed and with the utmost speed by the States Parties.

It is also worrisome, since it took more than a few decades for this recognition and the implementation of this strategy to be carried out; since the ISHR's

purpose is to safeguard the fundamental rights that were violated by the States Parties.

In this sense, it is of great concern that the IACHR itself is becoming a continuation of the aforementioned violations. Moreover, without taking into account that those who resort to the international jurisdiction (ISHR), had to wait an average of ten years to exhaust the domestic remedy.

VIII. SUGGESTIONS

We suggest the recognition and strengthening of new fundamental rights. *Verbi gratia*: to life, health, protest, drinking water, digital disconnection, circulation throughout the national territory, and what we have called: "Fundamental right to choose without fear, anxiety, despair".

Training and awareness of the importance and prevalence of fundamental rights. The IACHR Court and in general the ISHR must evaluate the very early establishment and implementation of new measures to achieve an update, streamlining the attention of cases with an inconceivable backlog. The IACHR Court needs to establish measures to ensure that the execution of its judgments is carried out within the deadlines established and in the terms required by the States Parties. It requires that the States Parties demand that the IACHR Court observe the deadlines and the due safeguarding of the fundamental rights of those subject to international jurisdiction. Likewise, the States Parties must assume the commitment to abide by the judgments issued by the IACHR Court and execute them within a reasonable time period.

REGULATING CROSS BORDER DEFAMATION IN CYBERSPACE: PRIVATE INTERNATIONAL LAW PERSPECTIVE

Dr. Gurujit Singh*

ABSTRACT

Normative standards for regulating social behavior have evolved over the time in the form of civil and criminal laws with the objective of maintaining peace and tranquility in society. These normative standards are equally useful in predicting the outcome of specific social behaviors. While it is easy to accommodate and enforce norms effectively in local territory, the cross-border enforcement of standards on the same parameter posed challenges for domestic as well as foreign legal system due to diversity and non-uniformity of culture and concepts. Analyzing the issue from the above stated rudimental understanding, it is not difficult to appreciate that regulation of defamation in cyberspace always posed legal challenges from private international law perceptive. Dissemination of defamatory statements about one or the other party with impunity on various platforms in a boundaryless cyberspace creates an adverse and irreversible impact on the reputation of victim across the globe. Regulating such defamatory statements and offenders is always a difficult task due to technical and non-technical legal issues. The paper attempts to analyze the non-technical legal issues in particular the private international law treatment to cross border defamatory issues. The paper takes into consideration the development of comparative jurisdiction on the same issue to identify the evolving jurisprudence.

I. INTRODUCTION

The interface of a traditional concept and modern technology always create new challenges for regulators to address. The interface of cyberspace and traditional concept of defamation is just a perfect example justifying the above statement. The traditional media is slow in dissemination of defamatory information;

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however, the dynamics of cyberspace make it convenient for the faster dissemination of information without much physical, psychological and economic efforts. While physical publication of the statement may be intentional and a very calculative move to defame the victim, cyberspace may not give due regard to the intention of the parties as it may be accidental or mistakenly done. However, irrespective of unintentional or mistakenly dissemination, it will lead to catastrophic impact on the reputation of the victim in the eyes of his community. There should not be iota of doubts that defamation in cyberspace is more disastrous than any other media.

State have developed adequate measures to deal with the territorial issues of defamation identifying it as civil and criminal offence as per their law and policy. The regulatory treatment to defamation issue is subjected to other related rights i.e., freedom to freedom of speech and expression and privacy rights. Within the domestic boundaries of State, the conceptualization of both rights decides the nature of defamation suit and related exceptions before the court of law. However, in case of cross border defamation instance, the matter gets complicated due to nature of related rights and the established territorial jurisprudence with regards to it. This pattern becomes more prominent in case of defamation on cyberspace through one or the other social media platforms, leading to defamation of the victim at more than one jurisdiction at the same time without causing significant investment of money, power and time. The impact of defamation on cyberspace more adverse due to its widespread audience across the globe. Regulating defamation on cyberspace is possible through application of private international law principles i.e, jurisdiction, choice of law and Recognition and Enforcement of foreign judgment.

II. ISSUES OF CONFLICT

Regulating cross border defamation in particular cyberspace is a daunting task due to differences in factors of socio cultural political and rule making process. There is substantial as well as procedural differences of conflicting nature in the legal framework making it a complicated legal subject matter. The paper does not deal with the procedural requirement prescribed by the respective State to deal with the defamation case, though significantly it is the *lex fori* rule which

governs this aspect of the problem. Therefore, it is the exclusive domain of the state to deal with the matter. The paper deals with some crucial substantial legal issues arising out of the various nature of legal system prevailing at global level. This part to the article highlights three basic points of conflicting concepts complicating the resolution of defamation issue from the substantial law point of view.

a. Defamation vs. Freedom of Speech and Expression & Related Rights vs. Privacy issues

Freedom of speech and expression is the basic right of the individuals guaranteed by State[1] and international law i.e., International Convention of Civil and Political Rights[2] and is cornerstone of a democratic State. States as per the nature of governance incorporate the principle of free speech and expressions. Therefore, variations in the application of freedom of speech and expression are very much part of the governance. The contour of application of freedom of speech and expression decides the effectiveness of defamation related suits. Application of right to free expression aggressively by State negate the reputation right of the victim. Hence a proper balance is required which is a subjective matter of State. There are fair instances when a statement made in State X can be considered as defamatory and therefore invite the suit against offender, but in State Y, it may turn out to be a crystal-clear matter of free speech and expression ignoring the damage it causes to the reputation of victim.

The addition of privacy element in the whole debate creates more clouds as to other respective rights as the privacy laws are in the process of evolving. Generally, privacy issue is broadly cover various component such as information privacy[3], bodily privacy[4], personal privacy[5] and territory privacy[6]. There is no uniformity and universality with regards to the above concept. State

[1]Constitution of India., Article 19; USA Constitution, First Amendment; UK Human Rights Act 1998., Article 10; Universal Declaration of Human Rights 1948., Article 19.
[2]International Convention on Civil and Political Rights 1976., Article 19.
[3]Information privacy cover Credit information, Medical Report, Government Records etc.
[4]Bodily privacy covers Genetic mapping, DNA, Drug testing, Physical selves etc.
[5]Personal privacy covers Communication like Telephone call details, emails, SMS etc.
[6]Territory privacy covers intrusion or trespassing at home or workplace etc. against consent.

as per their convenience and standards of privacy decide the magnitude of the rights. From Indian perspective till *Justice K.S. Puttuswamy (Retd.) & Anr. v. Union of India & Ors.*[7] case the status of Privacy right was uncertain. In the absence of proper legal framework for privacy and data protection, its ambit is not crystal clear. Hence there is bound to have conflict between freedom of speech and expression and privacy/data protection rights. States around the world are at various stage of appreciation of concept and conflicting rights. While USA and European Union have sound robust legal system at place, India is still in the process of deliberation and framing bill.

b. Single Publication vs. Multiple Publications

Publication of the statement is cardinal requirement for the offence of defamation from civil or criminal perspective. The cause of action for the victim against the defendant starts from the date of publication of defamatory nature of statement to third party. As per the Limitation Act, 1963 the limitation period for filing the suit against the defendant is one year from the date of publication of statement. Under the single publication rule the statement first created is considered published and the status of limitation runs as soon as the communication to third party. However, the multiple publication rule considers the activation of cause of action every time the offending matter is disseminated to new parties. Therefore, the limitation period relating to the statement loses legal significance. Cyberspace through social media is one such medium where the defamatory content remains intact and activates every time leading to fresh cause of action.

Earlier the UK practice was to follow the multiple publication rule propounded in the case of *Duke of Brunswick v. Hormer*[8]. In January 1, 2014, UK adopted the Defamation Act, 2013 and under section 8 of the Act legislature has done away with the multiple publication rule. USA also followed the single publication rule in cyberspace or newspaper publication. New York introduced

[7] *Justice K.S. Puttuswamy (Retd.) &Anr. v. Union of India &Ors*. (2017) 10 SCC1
[8] *Duke of Brunswick v. Hormer* 1849 14 QB 185

the single publication rule in cyberspace in the case of *Firth v. State of New York.*[9]

Analyzing the law from Indian jurisprudence, the courts were following the multiple publication rule for defamation suits. However, the Delhi High court in the case of *Khawar Butt v. Asif Nazir Mir*[10], rejected multiple publication rule and adopted the single publication rule. Justice Vipin Snaghi remarked that:

> "I am of the view that the Single Publication Rule is more appropriate and pragmatic to apply, rather the Multiple Publication Rule. I find the reasoning adopted by the American Courts in this regard to be more appealing than the one adopted by the English Courts, prior to the amendment of the law by the introduction of the Defamation Act, 2013. It is the policy of the law of limitation to bar the remedy beyond the prescribed period. That legislative policy would stand defeated if the mere continued residing of the defamatory material or article on the website were to give a continuous cause of action to the plaintiff to sue for defamation/libel. Of course, if there is re-publication resorted to by the defendant-with a view to reach the different or larger section of the public in respect of the defamatory article or material, it would give rise to a fresh cause of action."

The Australian High Court in the celebrated case of Dow Jones & Co. v. Gutnick[11], supported the multiple publication rule for defamation. Court held that the defamation proceedings need to balance the rights of the publisher publishing defamatory statement and the rights of the victim who suffer irreversible damage to his reputation. According to them the multiple publication rule provides them the required justice.

The conflict of single vs. multiple publication rule is a fundamental one for defamation suit. Single publication rule is more favorable to publishers in a traditional print environment, where the defamatory statement surface on the

[9]*Firth v. State of New York* 775 N.E. 2d 463 (2002)
[10]*Khawar Butt v. Asif Nazir Mir* CS(OS) 290/2010, http://164.100.69.66/ jupload/ dhc/VSA/judgement/07-112013/VS07112013S2902010.pdf (Last visited 10.04.2022)
[11]*Dow Jones & Co. vs. Gutnick* (2002) HCA 56

instance of investigator and information tends to fade with time. However, in case cyberspace and social media information can be easily accessed without much labour and information does not fade with time. Hence the victim suffers from the defamation even after the limitation times causing immense social embarrassment and injustice, while the offender is get rewarded for creating fake sensational news.

c. Intermediaries Liability

Cyberspace or internet is net of networks. This net of network is globally regulated and controlled by various stakeholders i.e., State, private players, public private partnership. Therefore, various model of internet governance[12] is being recognized to regulate the cyberspace. The emergence of social media in particular has been very instrumental in dissemination of information and exercise of freedom of speech and expression. The laws are framed by the State to regulate and fix the liability of intermediary like social media. State regulation and their procedure vary in absence of any uniformity on Intermediary liability internationally. A variety of internet governance models influence the liability of the intermediaries involved in circulating or disseminating the defamatory statement at their platform. For example, the USA promotes privatization/commercialization of information communication technology and hence the legal system are structured in a way to facilitate the working of cyberspace amicably. The Defamation Act of the USA exempts the intermediary for any use of their platform in dissemination of information. Though the Republic of China or Russia has centralized approach of regulating internet. Though private players are engaged but they are heavily regulated by the State's law to the extent they promote localization of data. Hence in the legal system intermediaries are under scrutiny as per the nature of content they disseminate and corresponding liabilities.

Indian approach to the intermediary's liability is covered under Information Technology Act 2000. The Act identify social media[13] as one of intermediaries. Following the horizontal approach of the legislation, social media related any kind of crime or contraventions are regulated by the Information Technology

[12]Intergovernmental Organization, Hierarchical Multi-Stakeholders Organization, Equal Footing Multi-Stakeholders Organization, Participatory Accountability Mechanism.

[13]The concept of social media is not defined under Information Technology Act, 2000. Section 2(w) defines the concept of intermediaries which includes ISP, Search Engines, Ecommerce Website etc.

Act in particular section 79 and The Information Technology (Intermediary Guidelines and Digital Media Ethics Code), Rules, 2021. The section highlights three scenarios in which the social media or intermediaries will not be responsible ie., (1) if intermediaries/social media does not initiate itself, (2) select the receiver of the transmission, (3) select or modify the information contained in transmission.[14] Due diligence is expected from the social media not to allow its platform to be misused by the third parties. In case of misuse and getting knowledge about the defamatory messages, it is the duty of the social media to promptly take action to control its dissemination.

III. PRIVATE INTERNATIONAL LAW DILEMMA

This part of the article elaborates on the jurisdiction, choice of law issue and recognition of foreign judgment issues of private international law. Though Hague Conference deals with the Conflict of Laws issue of various nature but have not explored on Defamation issue so far. In the absence of any uniformity regarding the conflict of law provisions relating to defamation this part highlights certain State's practice with regards to it.

a. Jurisdiction

i. European Union: It follow the Brussel I Regulation widely known as "Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters" for deciding the jurisdiction issue in both contractual and tort matters. Article 5(3) prescribed the jurisdiction rule that defamation claim can be brought to the court of the forum in which the harmful event occurred. In the case of *Handelskwekerij G. Bier BV v. Mines de potasse d' Alsace SA*[15], the European Court of Justice (ECJ) interpreted Article 5(3) to mean that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of event giving rise to it. The first option of "the place where the damage occurred" provide an option to the plaintiff to file the suit in any State where they claim their reputation has harmed. So, the ECJ permits the plaintiff to bring a defamation suit claim in a

[14]Information Technology Act 2000., Section 79(2)(b)
[15]*Handelskwekerij G. Bier BV v. Mines de potasse d' Alsace SAEuropean Court Reports 1976 -01735,* https://curia.europa.eu/juris/liste.jsf?&num=21/76 *(Last visited on 10.04.2022)*

forum where defamatory publication is read in cyberspace. This freedom gives the plaintiff an option for forum shopping. Supporting the above ratio, the case of *Fiona Shevill v. Presse Alliance SA*[16], the court held that when a person has been defamed in two or more European Union States, the Brussel Regulation allow the plaintiff to bring a claim wherever her reputation was harmed and the plaintiff was not required to prove damages before bringing suit in a given forum. As per the ECJ, the court cleared the position on the liability by holding that a defamation suit can be brought either in the country of publication or in any country where the plaintiff's reputation was harmed, but the available remedy might be limited if the plaintiff elects the later.

ii. Canada: For the defamation suit the court decide the jurisdiction based on the real and substantial connection with the subject matter of the suit and defendant test as appropriate rule for assumption of jurisdiction. The court in the case of *Club Resorts lt. v. Van Breda*[17], refined the test by holding that the preferred approach in Canada should be to rely on a set of specific factors which are to be given effect for ensuring security, predictability in the law governing the jurisdiction. Following factors were added like: (a) The defendant is domiciled or resident in the province; (b) the defendant carries on business in the province; (c) The tort was committed in the province; and (d) A contract connected with the dispute was made in the province.[18] The court has the opinion to look for the review of the connection over period of time. In identifying the new connection, the court should give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors.[19] With regards to the third connection, the court held that the situs of the tort of defamation mean the place where the damage was sustained.

iii. USA: The courts in the USA has proactively addressed the dynamics of cyberspace and therefore have modified or expanded the contours of jurisdiction to meet new dynamics of cyberspace. Two landmarks' cases to a greater extent

[16] *Fiona Shevill v. Presse AllianceSA* Case C-63/98, Judgment para 49-57, https://curia.europa.eu/common/recdoc/convention/gemdoc95/pdf/03-z-en-95.pdf (Last visited on 10.04.2022)
[17] *Club Resorts lt. v. Van Breda* 2012 SCC 17, [2012] 1 SCR 572
[18] Id.,
[19] Id.,

have introduced new jurisprudence of jurisdiction ie., Zippo's[20] "sliding scale test" and Calder vs. Jones's[21] "effect test".

In the case of Zippo case, the court deciding the person jurisdiction of the court on the ecommerce website, classified the webpage into three categories as passive, interactive and active website. While the first and last category of website are the two cornerstones of website, the middle website is the following the middle approach. Passive websites only provide the information to those who seek it, the active website is involved in creating contacts, contracts, sharing information, providing services etc.. Hence, the court held that the passive nature of website do not attract court's jurisdiction, while the active nature of website attract court's attention. The interactive nature of website is more than active nature of website providing interactive connectivity to the other party. Court held the nature of information and connectivity need to take into consideration to reach to conclusion whether court can apply jurisdiction or not.

In the case of Calder v. Jones the court held that plaintiff need to prove the effect of defendants contact by nature of his act. The court looked into three issue to identify the effect test:

> "(1) whether defendant committed an intentional act, (2) the act of defendant is specifically aimed at the forum state, (3) the intended act cause harm that the defendant knows is likely to be suffered in the forum state."

The court has either applied one or the other test or both the test to decide the competency of the court of cross border nature. These tests have been heavily relied upon by the court in cyberspace related cases even in the case of defamation in cyberspace through any medium or platform.

iv. India: The judicial jurisdiction in case of Indian court is as per the Code of Civil Procedure 1908 (CPC). Section 20 of CPC deals with the general grounds of jurisdiction of court. They are primarily defendant centric ie., where the

[20] *Zippo Manufacturing Company v. Zippo Dot Com, Inc*. 952 F. Supp 1119 (W D Pa 1997)
[21] *Calder v. Jones* 456 US 783 (1984)

defendant resides[22] or carries on business[23] or where the cause of action initiate[24]. These jurisdiction grounds are important for the court to initiate and entertain any international dispute before them. Apart from the general jurisdiction rules, the special rules of jurisdiction are also applicable as per the specific disputes. These special rules of jurisdiction are plaintiff centric ie., where plaintiff resides or carry of business. The Hindu Marriage Act 1955[25], Indian Copyright Act 1957[26], Indian Trademark Act 1995[27] are some of the examples with regards to it.

The application of defendant centric or plaintiff centric jurisdiction rule has its own limitation in cyberspace due to its technical nature where parties are present omnipresent. Hence the Indian courts through judicial activism have adopted some of the best practices with regards to jurisdiction in cases related to cyberspace. Courts heavily influenced by new jurisdiction rules evolved by the US courts. In Zippo[28] case the US Court evolved the concept of sliding scale jurisdiction rule. Court categorized websites as 'passive', 'interactive' and 'integral' part of the business depending on nature and function of websites.

[22]CPC, Section 20 "(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or"

[23]Id., Section 20 "(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution; or"

[24]Id., Section 20 "(c)The cause of action, wholly or in part, arises."

[25]The Hindu Marriage Act, 1955; Section 19**. "**(iiia) in case the wife is the petitioner, where she is residing on the date of presentation of the petition;"

[26]Indian Copyright Act, 1957; Section 62. "(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain."

[27]Indian Trademark Act, 1999; Section 134 "(2) For the purpose of clauses (a) and (b) of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or proceeding, or, where there are more than one such persons any of them, actually and voluntarily resides or carries on business or personally works for gain."

[28]*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)

According to it the passive website doesn't invite jurisdiction of the court, since the website is static in nature and only provides one sided information. Interactive websites depending on the nature and intensity of the interaction invite the jurisdiction of court. Since the website interacts with the customer and form contact with them, therefore the court's jurisdiction prevails. The third category is about those kinds of websites which are deliberately created to extend the presence of creator of information deliberately. This kind of website should be an integral part of the business. In this case the court definitely has jurisdiction. Further in Calder[29] case the court added the element of specific intentionally targeted and caused harm or effect in the forum test. Apart from the interactive nature of the website, it needs to establish the effect test.

The courts in India have adopted the above mentioned two tests in ecommerce[30] and intellectual property rights[31] cases. Therefore, dissemination of defamatory information from cross border websites resulting to reputation of individual invite the Indian court's jurisdiction on the basis of nature of website and the intentional harm it caused to the individual. It is safe to analyze that the jurisdiction rules of the Indian legal system have evolved with time and capable of dealing with cross border cases amicably.

b. Choice of Law

Choice of law or applicable law indicates the justified law applicable to adjudicate the matter by Court. The competent court needs to decide the applicable law since more than one law may have justification for its application depending on the cross-border nature of case. In this scenario the court needs to decide the most appropriate law to decide the matter. Though the social media operators clearly mention in their terms and conditions in contractual form with regards to the application of jurisdiction and choice of law. It unilaterally makes the jurisdiction and choice of law favorable to them by indicating the law of the

[29]*Calder v. Jones*, 465 U.S. 783 (1984)
[30] *World Wrestling Entertainment, Inc. v. M/s. Reshma Collection &Ors*FAO(OS) 506/2013 & CM Nos. 17627/2013, 18606/2013
[31]*Banyan Tree Holding (P) Ltd. V. A. Murali Krishna Reddy* CS(OS) 894/2008 (High Court of Delhi, 23 November 2009), *Super Cassettes Industries Ltd. v. MySpace Inc. & Another* IA No. 15781/2008 (High Court of Delhi)

foreign State. However, these jurisdiction and applicable law provisions are enforceable between the parties but not with regards to the third parties. Third party making use of social media to disseminate the defamatory statements and hurting the victim are not governed by the prescribed terms and conditions fixed by the social media terms and conditions. Due to cross border impact of the media and participations of victim and offender, the choice of law principle will be applicable. There is no uniformity with regards to the principle of choice of law applicable. Some of the choice of principles applicable are lex fori, lex loci delicti, double actionability etc.

i. United Kingdom: European Union enacted the Rome II Regulation on non-contractual issue, however it does not applicable to defamation and privacy issues and therefore rule of principle for UK remains same. Court in UK follow the double action ability for cross border tortious act. The concept of double action ability has been elaborated in the case of *Philips v. Eyre*[32], as

> "as a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England i.e., lex fori ; Secondly, the act must not have been justified by the law of the place where it was done."

The above rule has been heavily criticized by English Law Commission as it give more prominence to *lex fori* principle. Due to the double verification of justification for defamation action, there are less chances for the victim to succeed in the case. The success of the case depends on the generosity of the legal system of the law of the place where the wrong was done.

The United Kingdom enacted the Law Reform (Miscellaneous Provisions) Act, 1995 to reform the private international principles. As per the new Act, the choice of law for the tort action is the law of the country where the 'events' constituting tort occur; and if such event occur in different countries, the law to be applied is:

[32]*Philips v. Eyre* (1870) LR 6 QB 1

1. For a cause of action with respect to personal injury caused to an individual or death resulting from personal injury – the choice of law applicable should be "the law of the country where the person injured was when the injury took place";

2. For a cause of action with respect of damage to property – the choice of law applicable should be "the law of the country where the property was when the damage took place";

3. In cases other than the above categories – the choice of law should be "the law of the country in which the most significant elements or elements of those events occurred".[33]

The third category of principle creates more problems in identifying the applicable law as it needs comparison of factors connecting torts among State to identify the most significant factors. This new principle is not applicable in the case of defamation and privacy issues. Hence the double action ability principle is still applicable in case of defamation.

ii. Canada: For Canada the choice of law for the defamation case is again lex loci delicti meaning the law of the place where the wrongful act or omission occurred. This is because of the factor that the law of that place must determine the character of the wrong and its legal consequences. Court in Canada has admitted number of exceptions to the rigid application of the lex loci delicti for fairness in certain circumstances. The Civil law of Quebec through article 3126 of the Civil Code apply the lex loci delicti as the law of the country where injurious act occurred, but also provides for the application of the law where the damage occurred if the person who committed the injurious act should have foreseen that the damage would occur there. This limited exception to the basic rule could allow Quebec courts to apply the law of the place where the plaintiff suffered the most substantial harm to his or her reputation.

iii. Switzerland: In Switzerland, the choice of laws are codified in Swiss Code on Private International Law[34]. Article 139 of the Swiss Code provides the

[33]Law Reform (Miscellaneous Provisions) Act, 1995., Section 11 of the Act

victim friendly choice of law in case of defamation. It allows the victim to choose between the law of the State "where wrongdoer has his habitual residence", or the law of the State "where the victim has his habitual residence", or the law of the State "where the harmful act occurred". The court applies the applicable law as per the choice of the victim.

iv. India: It follows the common law double action ability test. The Madras Court in the case of *Govindan Nair v. Achuta Menon*[35], applying the double action ability test dismissed the case since under the law of Cochin the communication from superior to their subordinate was exempted from the concept of malice and therefore not giving rise to any civil liability. There has been criticism to the double criminality test as it may turn out to be rigid and due to difference in legal provisions may not provide any solution to victim.

IV. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT

Recognition and Enforcement of foreign judgment is the third pillar of Private International Law. A judgment delivered by a foreign court does not make much sense if it is not recognized or not possible to enforce in domestic jurisdiction where the affected parties reside or domiciled or have commercial interest. Hence, this aspect of private international law completes the circle of a cross border dispute. The concept has its own relevance due to the fact that every State is a sovereign State. Every State has a unique legal setup, procedural and substantial law requirements, judicial system to resolve disputes. Even within States that follow common law system[36] or civil law system[37], differ on many issues of procedural or substantial laws. One State court can't dictate or function like a superior court to another State court even if the dispute pertains to citizens of their State.

[34]Swiss CPIL, Umbricht Attorneys, Zurich (Switzerland) 2017. https:// www.umbricht.ch/fileadmin/downloads/Swiss_Federal_Code_on_Private_ International_Law_CPIL_ 2017.pdf (Last visited on 10.10.2023)
[35]*Govindan Nair v. Achuta Menon* 1915 ILR 39 Mad 433.
[36]India, UK, USA follow the common law system. The judiciary in these States are proactive and are capable of making laws while interpretating the laws.
[37]France and Germany follow civil law system. The judiciary of these state are not that proactive and confine to boundaries set by the legislature.

Generally, a State recognize and enforce the foreign judgment on the basis of comity principles.[38] There is no universal convention which laid down the rule with regards to the enforcement of foreign judgment, though there are some specific Conventions of bilateral or multilateral nature. In the absence of unification on the issue, every State has identified certain rules of recognition and enforcement of foreign judgment. To a greater extent there are similar grounds or defense of recognition, however practical application differs on some issues from State to State. Some of the common grounds or defense that are equally applicable in case of cross border defamation case are as follow:

a. Jurisdiction

State does not recognize a foreign judgment if they find that the court pronouncing the judgment in a foreign State is not competent to deal with the issue in hand. Hence, competency of the court is the foremost requirement. The issue which makes it a complicated one is which laws applies in deciding the issue of competency of court. There are two laws which may be involved in deciding it, one as per the application of foreign law, the second, as per the receiving State. According to UK, whether the foreign court had jurisdiction or not on the specific foreign judgement is to be determined as per the English court applying their own rules and not the rules of foreign court. The above rule creates problems of its own nature. France considers the competency of the court based on exclusive or non-exclusiveness jurisdiction of the French court in a given nature of dispute. In case as per French rules, the French court has exclusive jurisdiction debarring others from it, then a foreign judgment by the foreign court will not be accepted. Foreign judgment by the foreign court having non-exclusive jurisdiction to the French court will be accepted by the French court. The rule to a greater extent resembles to Article 35 of the European Union Brussel I Regulation on Jurisdiction and the Recognition and enforcement of Foreign Judgment in Civil and commercial Matters, 2001.[39]

India also considers jurisdiction of court as important component in enforcement of foreign judgement. [40] According to it the foreign court should have jurisdiction in international sense. The jurisdiction of the court must be

[38]JHC Morris: The Conflict of Laws, 4rth edition 2004 104
[39]Council Regulation (EC) No. 44/2001 Brussel I Regulation on Jurisdiction and the Recognition and enforcement of Foreign Judgment in Civil and commercial Matters, 2001
[40]Code of Civil Procedure 1908., Section 13

evaluated not in term of territorial law of the foreign state but by the rule of private international law. Indian court in the case of *Shankar Govindan v. Lakshmi Bharati*[41] held that that jurisdiction in international sense means that the foreign court has jurisdiction in case (a) where defendant is a subject of foreign state, (b) during the course of action and afterwards defendant resides there, (c) as plaintiff selected and submitted to foreign court's jurisdiction, (d) submitted to foreign court as per contract. Further in the case of *Y. Narasimha Rao v. Y. Venkata Lakshmi*[42] the apex court laid down the narrow as well as broader understanding of jurisdiction issue. Court held that requirement of competent court should be interpreted to mean "the court which the law under which the parties were married so recognizes unless both parties voluntarily and unconditionally concede to the jurisdiction of any other Court". First, the court narrows down competency of court to a court under law which recognize the marries between the parties, and secondly autonomy to both parties to mutually decide any other court as per their convenience. Hence, competency aspects of the court vary state to state.

b. Fraud

Fraud is quite a broad concept. There are a variety of kinds of frauds. Any act which deceives or created with intention to cause wrongful benefit and wrongful loss to others is a fraud. There is almost uniformity that any judgment obtained by fraud is against fair justice. Hence, the element of fraud in a case foreign judgment can make it non enforceable. Court of UK in case of foreign judgment is sensitive to fraud on part of court[43] or successful parties[44]. The courts in India have also laid down that any judgment obtained by fraud will not be entertained. In *Sankaran and Lakshmi* case[45] the court differentiated between judgment obtained as per the merit of the case and judgment obtained by court after tricked into giving judgment. Indian court will enforce foreign judgment on merit and will not question the merit of the case, even if not meritorious. In other case where the judgment has been tricked and fraud is committed on court, the foreign judgment will not be accepted. Court in the case of *Satya v. Teja*[46]

[41]*Shankar Govindan v. Lakshmi Bharati* AIR 1974 SC 1764
[42]*Y. Narasimha Rao v. Y. Venkata Lakshmi* (1991) 3 SCC 451
[43]*Ochsenbein v. Papelier* [1872] 8 Ch. App. 695
[44]*Price v. Dewhurst* [1837] 8 Sim 279
[45] See., *Supra note 34*
[46]*Satya v. Teja* 1975 2 SCR 1971

refused to recognize the foreign judgment of Navada court as they found that the decree has been awarded on the ground of fraudulent misrepresentation by one of the parties to the case.

c. Natural justice

A foreign judgment can be questioned always on the issue of violating natural justice. The court proceedings are initiated for justice and if the basic aspect of justice itself is violated, then it vitiates the whole proceedings. The court in the UK does not enforce such foreign judgment. Providing equal opportunity to both parties to present their case and evidence is a basic element of natural justice. From Indian perspective section 13 of CPC also incorporate this component in accepting a foreign judgment. Apex court has laid down in *R. Vishvanathan*[47] court held that generally court looks into three grounds in determining the principle of natural justice in a foreign judgment as follows (a) notice of proceeding served to defendant, (b) adequate opportunity to present the case, (c) conflict of interest. In *Y. Narasimha Rao v. Y. Venkata Lakshmi*[48] case the emphasis on the need for compliance of this principle in every judgment. According to them the principle should not only be applicable to the procedural requirements but beyond it.

d. Public Policy

The USA recognizes the public policy ground for avoiding foreign judgment. Any judgment which is repugnant to fundamental notion of what is decent and just in the State where it is supposed to be enforced[49] is a judgment against public policy. If the judgment tends to "undermine public interest, public confidence in the administration of the law or security for individual right of the person liberty or of private rights"[50], it is against public policy of State. The case of *Yahoo Inc. v. La Liue Contre Racismeet Lantisemitisme (LICRA)*[51] landmark on the issue of public policy. LICRA filed a civil complaint in French Court

[47]*R. Vishvanathan v. Rukn-Ul-Mulk Syed Abdul Waji,* AIR 1963 SC 1
[48] See., *Supra note 35*
[49]*McCord v. Jet Spray Intern Corp.,* 874 F. Supp 436
[50]*Ackermann v. Levine* 788 F. 2d 830
[51]*Yahoo Inc. v. La Liue Contre Racisme et L antisemitisme (LICRA)* 145 F. Supp 2d/ 1168, 1179 (N D Cal 2001)

against Yahoo for cease and desist for providing auction services for Nazi product in their websites. The website was containing material related to Nazi uniforms, emblems resembling those worn by Nazis during world war holocaust. The French court passed the order directing Yahoo to not promote the Nazi related product in website and asked to take it down from all Yahoo servers. Yahoo asked the court for reconsideration as it is possible to implement the order with regards to French version of Yahoo ie., yahoo.fr, but not possible due to technical issue of net of networks. Hence, Yahoo approached District Court of Northern California for non-implementation of the French order in the USA. Court found that the order of the French court was inconsistent with the USA first Amendment. It held that "France has the sovereign right to regulate what speech permissible in France, this court may not enforce a foreign order that violate the protection of the US Constitution." Article 34 of European Union Directives on Enforcement of foreign judgment also contained public policy defense for non-enforcement of foreign judgment.

From Indian perspective, a foreign judgment opposed to public policy is not listed under section 13 CPC as ground of non-enforceability of foreign judgment, however, it has been established as important principle the court is more curious about. Court in the case of *Renusagar Power Co. Ltd. V. General Electric Co.*[52]made an observation of the nature obiter held that any foreign judgment which is contrary to the public policy of State, then it cannot be enforced. The court held that public policy includes (a) fundamental policy of India, (b) interests of India, (c) justice and morality. In landmark case of *Oil and Natural Gas Co. v. Saw Pipes*[53], Apex court of India added forth element in public policy in addition to Renusagar Case ie., patent illegality. In *Mcdermott International Inc. v. Burn Standard Co. Ltd.,*[54] the apex court elaborate the patent illegality to mean that it should be so unfair and unreasonable that it shock the conscience of the court. Further in *ONGC Ltd. V. Western Geco International Ltd.*[55], the Apex court explained the "fundamental policy of Indian

[52]*Renusagar Power Co. Ltd. V. General Electric Co.* AIR 1994 SC 860
[53]*Oil and Natural Gas Co. v. Saw Pipes* 2003 5 SCC 705
[54]*Mcdermott International Inc. v. Burn Standard Co. Ltd.* 2006 11 SCC 181
[55]*ONGC Ltd. V. Western Geco International Ltd.* (2014) 9 SCC 263

Law" to include the principle of (a) judiciary should decide the case judiciously and not arbitrary or whimsical, (b) principles of natural justice to be followed, (c) court's decision should not be irrational and beyond reasonable person's imagination. The Arbitration and Conciliation Amendment Act 2015 incorporates judicial ration in law. Hence, the Indian legal system is very sensitive to the issue of public policy in enforcement of foreign judgment. In a defamatory foreign judgment, the affected parties can always take the benefit of such broad interpretation of public policy as defense.

V. Conclusion and Suggestions

The right to speech and expression is the fundamental right of human beings. It is one of the most sacrosanct and jealously protected rights of an individual. State as per their policy balance this right with the corresponding duties. How far the balancing act is fair and equitable is a matter of subjective analysis of State, which is influenced by the socio economic and cultural value system of State. Hence, there is no uniform standard with regards to it. In the case of cross border defamation facilitated over cyberspace adds complication in resolving the dispute from conflict of laws perspective. The non-uniformity of procedural and substantial law with regard to defamation creates technical problems. The conflict of law provisions on the issue of jurisdiction and choice of law also differs from State to State. In the absence of uniformity from the conflict of laws perspective, State follows their own practice of law which promotes the issue of forum shopping, creating advantage for one or the other party at the cost of other. When it comes to the recognition and enforcement of foreign judgment, it has its inherent contradictions, which makes it a herculean task to enforce a foreign judgment. Cyberspace takes advantage of this gap and makes it difficult to regulate effectively cross border defamation. Further technological development will lead to more complications. The popularity of metaverse the virtual space is a different set up and currently in experimental mode. Hence there is an urgent need to harmonize conflict of law principle to provide certainty and justice to the party. Law also needs to upgrade itself at the pace of technological developments.

ADMINISTRATIVE REFORMS THROUGH CORPORATE GOVERNANCE IN BANKING REGIME: CRITICAL ISSUES

Dr. Zubair Ahmed Khan*

ABSTRACT

Efficient governance can always bring transparency and accountability in the functioning of banking institutions. It will assist in increasing the deposit of banking institutions and investment by customers. It helps in bringing significant administrative reforms in banking regime and improves the goodwill of banks in global market for investment purpose. This paper provides a critical analysis of the current governance practices of banks across the country in light of the banks' financial situation over the past few decades. It explains the governance issues that banks face and the consequences that banks face as a result of poor corporate governance in the banking industry. Additionally, it investigates the efficiency of regulatory authorities' governance-related actions and the viability of the existing legislative framework.

I. INTRODUCTION

"Corporate Governance" as a term can be defined as the activity of controlling a company which deals with the ways in which the suppliers of finance to the corporations assure themselves of getting a stream of return on their investments.[1] Corporate Governance is one of the most basic requirements for management of business. The term can be defined as the compendium of the general set of customs, regulations, habits, and laws that determine to what end a firm should be run. In recent years, governance in corporations, has gained demand, recognition and eminence and includes a relationship between the stakeholders, the corporation and also the goals which need to be achieved. One of the most required measures is to ensure accountability at the very basic level and trying to eliminate the principal-agent conflicts. A firm commitment and

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[1]Andrei Schleifer, *A Survey of Corporate Governance*: t*he journal of finance* 2, Vol. 52, 2012.

adoption of the ethical measures and guidelines are to be followed by the corporations to comply with the good governance provisions. For a wholehearted adoption of these guidelines, a system of efficient supervision, maintaining a balance amongst the interests and keeping a check on all the actions of the corporation needs to be adopted. The growth, sustainability, profitability and overall performance of the corporation is governed and influenced by these measures. It is a multi-level process which needs to be extracted from the culture, the nature, the ethics and the morality of the organization and the members running it.[2].The foundation in the amendments and reforms brought about in the Companies Act, was laid by the Irani Committee in 2004, which reviewed the existing policies and made several recommendations which eventually paved the way for the introduction of the new Companies Act, 2013 which introduced several provisions of Corporate Governance.

The World Bank in its document titled "Governance and Development (1992)" has laid down a multi-tiered system of parameters for good governance, which are as follows:

a) Legitimacy of the political system. This implies limited and democratic government.
b) Freedom of association and participation by various social, economic, religious, cultural and professional groups, in the process of governance.
c) An established legal framework based on the rule of law and independence of judiciary to protect human Rights, secure social justice and guard against exploitation and abuse of power.
d) Bureaucratic accountability including transparency in administration.
e) Freedom of Information and expression required for formulation of public policies, decision-making, monitoring and evaluation of government performance.
f) A sound administrative system leading to efficiency and effectiveness.
g) Co-operation between government and civil society organizations.

The citizens lose faith in the government and other authorities when secrecy is claimed for the smallest or the most basic routine work. The right to know is

[2] Kshama V. Kaushik and Kaushik Dutta, *India Means Business: How the Elephant Earned its Stripes* (Oxford, 2012, Page 324).

intrinsic to good governance. [3] The disclosures and transparency poses as an antidote to fraud, malfeasance and corruption as it limits arbitrariness, protects liberty and provides the consumers with information. Good corporate governance promotes peoples' participation and creates awareness.[4] Those who invest in a corporation and choose the authorities should have the right to question the authority too. The investors should ask for the details of where their money is being used and not keep mum instead. The right of information and the ultimate will to know the truth behind the decisions details of all the actions and the decisions taken if utilised properly will make the organizations more vigilant and thus encourage improvement in the functioning.

Corporate governance is most often viewed as both the structure and the relationships which determine corporate direction and performance. The board of directors is typically central to corporate governance. Its relationship to the other primary participants, typically shareholders and management, is critical. Additional participants include employees, customers, suppliers, and creditors. The corporate governance framework also depends on the legal, regulatory, institutional and ethical environment of the community. Whereas the 20th century might be viewed as the age of management, the early 21st century is predicted to be more focused on governance. Both terms address control of corporations but governance has always required an examination of underlying purpose and legitimacy. [5] The regime of corporate governance include arrangement of all initiatives that are beneficial to the interest of creditors, investors, customers, bankers, shareholders, employees and other stakeholders.[6]

II. NEED FOR GOOD CORPORATE GOVERNANCE

The public-private and all the other types of corporations need to actively make available the information required for disclosures, as under the governance principles. This system of proactive transparency and zealous participation is the

[3] Bland GA, *Democratic Governance in RTI Publications*, (RTI Internationals Publications April, 2007).
[4] *Ibid*.
[5] Corporate Governance Defined, 1999, *available at:* https://www.corpgov.net/author/ jamesmcritchie /, (Visited on June 17, 2018).
[6] Marc Goergen and Renneboog, "Insider Trading, News Releases and Ownership Concentration", 6 JoF Vol. 61 (2006).

base and the primary requirement of democracy and a transparent market with prospering and flowing capital. It also acts like an antidote or a cure to corruptive activities. Everyone has the right to know and thus an equal opportunity should be given to them to know about the contracts, business activities or the tenders, etc., the corporation they invested in is engaged in.[7] These principles are a good and quick fix to the problem of concealment of information and maintaining secrecy with the documents and activities as the money of the taxpayers or investors are involved in these bodies.[8]

Independent oversight is important as "Experience has shown that where Information Commissioners or Ombudsmen handle the implementation of access to information laws, they can make a positive contribution to building a new culture of openness within a government. Such officials should have independence of mandate and budget and those appointed to the post should have relevant experience and be selected by a public process, with an opportunity for civil society organizations to make submissions related to the qualifications of the candidates." Delinquency is also essential as "Bodies such as Information Commissioners and official persons do, however, need to be monitored to determine their effectiveness in promoting implementation." Transparency culture is the first step to achieving trust and this is supported by open and honest communications. Lack of disclosures can create suspicion and doubt in the minds of the investors and the shareholders or other stakeholders. Respect and protection of the rights of the shareholders and the recognition of their interests by making regular disclosures in case of conflicts, contradictions or an RTI should be encouraged, and the culture of transparency should be promoted. Transparency is thus the heights to which the information can flow and become accessible.

III. CII CODE ON CORPORATE GOVERNANCE

One of the first initiatives in the field of corporate governance was the Confederation of Indian Industry (CII), which was introduced in 1996, with the

[7] Right to Information, *available at*http://www.isidelhi.org.in/hrnews/ isidownload/ Nhrc/Rti/RTI-2008.pdf (Last visited on 3June, 2018).
[8] Rajbir Singh, *Right to Information and Good Governance* (Concept Publishing Company, 2010).

sole purpose of advocating a written and a definite system of governance measures, which was required to be incorporated by the Indian Corporations within their functioning. This initiative was introduced as a retaliation and an acknowledgement of the investors' concerns after having been duped and cheated by the several scams that took place in the country. The code promoted accountability and transparency and encouraged the companies to acquire and meet the international standards of governance.[9] Having taken inspiration from the Anglo-Saxon Model of Corporate Governance, even the CII model encouraged and recommended a system of self- governance and the framing of a voluntary code which suits the corporation as only the members can know what is best for their company. Though the Anglo-Saxon Model of Corporate Governance is very efficient and effective code for governance, as far as Indian society and environment is concerned, it had its very own set of limitations. For example, the Indian society and corporations need to govern and regularise the dominant shareholders or the head position holders as they need to be supervised to meet the interests of the minority shareholders and stakeholders in contrast to the foreign countries like US or UK where the main issue is to discipline the management and make accountability more effective and efficient. India also lacks a proper implementation policy of the already laid measures as even though the written measures are well framed, the implementation fails to capture the real essence due to lack of complimentary actions and cooperation by others. Published under the name, "Desirable Corporate Governance: A Code"[10] in 1998 and was appreciated for its efforts. For a big country like India, even after much appreciation, the code failed to have a persuasive and a satisfactory effect on the companies and thus the need for another code or a more stringent measure was felt, which was taken up and introduced by SEBI.[11] CII gained importance in the early 2000s with the introduction of Clause 49 of the Listing Agreements which mandated the companies to comply with the CII code.

[9]Dr. C.K. Roy, *Corporate Governance, Values and Ethics* (Vayu Education of India, 2010, Page 25).
[10]Desirable Corporate governance: a code (CII code), http://www.acga-asia.org/ public/ files/CII_code_1988.pdf (Visited on May 15, 2018).
[11]Kumar Mangalam Birla Committee Report, http://www.sebi.gov.in/commreport/corpgov.html(Visited on May 15, 2018).

IV. SEBI CODE ON CORPORATE GOVERNANCE/ BIRLA COMMITTEE REPORT

A Committee chaired by Shri Kumar Mangalam Birla, Member, SEBI Board, was setup by SEBI in 1999 to facilitate the growing standards of listed companies with the incorporation and implementation of Clause 49 upon its recommendations. The need for audit independence and independent directorship was also recognized by the Committee. The report published by this committee activated the need for corporate governance in India. Stipulations were made in the listing agreements and an annual award was instituted for excellence in corporate governance. The first initiative in direction to promote and encourage long term interests of the shareholders and other stakeholders was for the first time taken up by the Birla Committee Report or the Kumar Managalam Report. The foundation of good corporate governance in India was strictly laid down by this committee only.

V. NARESH CHANDRA COMMITTEE

The Department of Company Affairs (DCA) under the Ministry of Finance and Company Affairs appointed the Naresh Chandra Committee in 2002.[12] The committee appointed recommended an independent oversight authority which shall remain impartial and unbiased along with the measures of the necessity of financial disclosures. These recommendations triggered the need to redraft and completely amend the Companies Law under the expertise and supervision of another Committee instituted under the chairmanship of Dr. J.J. Irani on 2nd December 2004. The legal basis for corporate governance was to be set with the introduction of these measures starting from the very basic level and at the primary most stages. The need to protect the interests of the shareholders and investors was felt and recognised and thus, the Irani Committee[13], recommended the Government of India to introduce a new bill, namely, the Companies Bill, 2008 in the Parliament. This Bill aimed at improving the work environment in the corporate sector and to effectively enforce the best international practices that harbour investment and encourage good entrepreneurship. However, the

[12]Naresh Chandra-Report, *available at*: http://www.nfcgindia.org/executive_summary.html(Visited on April 20, 2018).
[13]The Companies Bill, 2009 (Bill No. 59 of 2009).

Bill lapsed due to the dissolution of the then government and had to be re-introduced later in 2009.

VI. LIMITATIONS ON GOVERNANCE MEASURES

India continues to be at a considerably low rank in the empirical study of 49 states conducted by Kee-Hong Bae and co-authors[14] in 2007. India has time and again been ranked below the average rating in good governance surveys and studies due its deviations from International Accounting Standards. There are various limitations which hinder India's movement towards establishment of a good governance system, and which pose as a barrier between the country and prosperity, namely:

1. Auditors: To provide assurance on adequacy and operational effectiveness of corporate governance, there is a requirement of greater efforts and work by auditors and other members of the company. The members are often not very vigilant about their duties and the auditors often end up becoming parties to the fraudulent acts of the authorities under pressure or greed. The members thus, instead of helping with governance system, contribute to fraudulent activities and involve in irregular actions.
2. Cost: The regulations and implementation of so many policies alongwith their supervision and assurance of compliance requires more staff and more resources. This increases the time and cost of doing business or internal functioning, which may subsequently outweigh the benefits of the corporations which are not big enough or do not make enough profit.
3. Efficiency: The enhanced accountability, liabilities of boards and regulations has blurred the distinction between the executive and board functions. The clear distinction between the functions of the executives and the board authorities has been diminished and now they have become overlapping thus, reducing the efficiency of decision making in the corporation.
4. Time consuming: Good Corporate Governance has been efficiently and quickly increasing and more and more corporations are heading towards the good governance system. There has been an improvement in the confidence of

[14]Chanwoo Lim and John Wei, "Corporate Governance and Conditional Skewness in the World's Stock Markets," 79 2999-3028, *JoB* (2006).

shareholders and investors due to the transparency and accountability to the shareholders and the information which is shared by the corporate authorities to the public, which has further improved their decision making, the focus on these compliance measures and the efforts put in its implementation has led to an increase in the time and efforts for strategic planning and decision making. Now with the time divided and involvement of more people, it has become more difficult to reach a conclusion and arrive at a decision which suits everyone's interests.

5. Lack of resources: Not all organizations are large or resourceful and well equipped with enough finance or resources to be able to comply with all these guidelines. Some corporations do not have the adequate source and resource to comply with all these good governance practices and thus often lag behind in compliance.

6. Biased policies: Since the policies or the legislations are framed by the policy makers who are directly indirectly friends of the large company members due to corporation- politics relationships, there is an argument that these measures have an easier application with the big corporations and not so with the small-scale businesses. They instead of a boon, pose as a burden upon these corporations as they are more favourable and lenient or comfortable to the large influencing corporations.

7. Lack of content: The measures have helped in regularising the quality of disclosures and also the quantity of the disclosures as more investors and people are becoming vigilant, about their right to know before decision making, but not all the recommendations or measures have an appropriate benefit and are mere "form over content."

8. Lack of awareness: The companies also sometimes find it difficult to report adverse practices, namely, insider trading, fraud, etc. due to lack of awareness amongst the sections of the company, due to involvement of the top authorities or such practices being hard to detect, thereby, defeating the very purpose of transparency and disclosures.

9. Board size: With the help of various surveys and analysis it has been observed that large board size often drops the performance of the corporations and leads to more corruption. Boards in Indian companies are many a times large in size

and engage very few independent directors which leads to authority hierarchy and the transfer of head positions within family.

10. Lack of public shares: Shareholding patterns in India has revealed that a majority of the shares are in the hands of the promoters. More power rests with insider controlling authorities, namely, the directors and the promoters, the public and the non-members of the core community of the corporation have a very little say in the matters of the company.

VII. Significance of Corporate Governance in the Banking Sector

The primary factor for growth of any economy' is securing effective governance as corporate governance encourages sustainable development. It makes resources flow to those sectors which have proper manufacturing of goods and services, and return is sufficient to fulfill the wants of stakeholders. There is different corporate governance manifestations that exist in many nations. Considering the multifarious nature of corporate governance regime around the globe, the Basel committee referred four significant suggestions in the year 1999 to be included in the institutional framework of any bank for surveillance and supervision.

1. Checks and balance by the directors and regulatory board
2. Checks and balance by independent individuals not engaged in daily working of business
3. Different business areas should inculcate direct supervision
4. Solo risk management and audit functions.

It is true that the existing banking regime has become more complex and multi-structured. Such complexity demands the requirement of qualitative standard on internal audit, configuration, responsibility of regulatory board, disclosure benchmark & risk minimization. Such benchmark of disclosure can put India along the lines of global benchmark. Globalization and highly competitive market are the key factors that encourage the augmentation of corporate governance. These days, banking institutions are facing a competitive and sharp fluctuating ambience than different institutions. Banking institutions play a

central role in financing commercial entities. It also provides credit facility to large-scale of population. Certain banking institutions also provide credit services & liquidity depending on nature of different market demand and situation. Considering the significant role of banking institutions in Indian financial regime, specific attention on corporate governance in banking system is a pressing issue. Though, it is clear that any kind of inefficiency in the benchmark of corporate governance in financial banking and non-banking regime leads to rise of economic vulnerability. Disadvantageous instances and development in one banking institution can create adverse repercussion in other banking institution, that's why efficacy of corporate governance must be taken seriously with strategic planning. Banking institutions make a significant contribution in providing finances and its flow. Such institutions got better accessibility in capital market and its financial capacity provide capital adequacy ratio. As a result, it has substantial number of investors and shareholders. It is sign of good corporate governance that its policies and stake of investment in security market retain and attract new investors in large number. Such retention and attraction depend upon fundamental tenets of governance like explicitness, responsibility and uprightness by banks at institutional level. Such practice promotes dissemination of credible financial information and better assessment of portfolio management by maintaining liquidity risk. It increases the trust and confidence of investors & shareholders in the larger interest of economic sustainability and better annual returns.

VIII. Challenges and Issues of Governance Faced by the Banks in India

The public sector banks face more challenges as compared to the public sector banks, the reason being the government having major control over the functioning of the same and RBI has little powers unlike the case of public sector banks. There are some concerns related to power & responsibility of RBI under Banking Regulation Act,1949 which are totally applicable to public sector banks. For instance, there is no explicit authority for employing and expelling chairpersons, managing directors, approving of licences or other similar matters. Though, RBI can investigate and scrutinize overall functions of the bank, in case

of necessity, there is scope of consultation with government in appointing leading bank officer and have a nominee in PSB's committee. [15] There are some grey areas of banking institutions that lead to key challenges within the purview of public sector banks. Firstly, many branches of the bank in rural regions are facing continuous loss for a considerable period of time. It usually happens because of predominance of barter practice in many parts of rural regions and high expenditure. The increased overdue debts of farmers are another major obstacle to the growth of banks in rural regions. Even waiving off all loans of farmers in rural branches of banks won't reduce the dilemma but raises the predicament leading to financial instability. Presently, the commercial banks don't have any mechanism to ensure that their loan agreements are turning out to be efficacious in the public interest. Due to lack of efficient supervision, there is an increase of bad debts and non-performing assets over the years resulting into enormous losses. There are banking institutions which are incapable of securing consistent adequacy ratio due to such compelling factors. RBI has taken many initiatives in the context of corporate governance reforms, one of such measure asked banking institutions to go for full disclosure of non-performing assets so that appropriate action could be taken to address the issue of undeclared and unreported NPAs of various banks.

Though there are many attempts taken by banks in this regard, but it is desirable that an inspection committee should look into action plan that deals bringing down the cases of NPAs.

There is another problem of lack of implementation of priority sector lending process. Over the period of time, Government of India took certain initiative in creating different diversification of loan process and its rationalization. But, due to lack of experience, bank officials are not able to execute it resulting into substandard and inadequate recovery rate in banking sector in rural regions. Thus, it is important to strengthen priority sector lending not only in public sector banks but also in cooperative banks. There are different kind of malpractices which has been detected and recorded by banking institutions that

[15]Major Problems faced by India's Nationalized Banks, https://www.economicsdiscussion.net/banks/nationalized-banks/9-major-problems-faced-by-indias-nationalizedbanks/12927 (last visited on May 13, 2020).

adversely affect the growth of banking sector in general. Every year, there is a substantial increase in the cases of frauds resulting into huge loss to banking institution which affects it very badly. Most of such bank frauds invoke cases of forgery, creating spurious records, misappropriation of funds and criminal breach of trust.[16] Thus, it is necessary to create a separate law to deal with cases of bank fraud where special enforcement authority could be empowered to investigate the cases of financial frauds within stipulated time-period. The particular law should reflect the seriousness of such cases of fraud/malpractices in such a way where adverse burden of proof can be presented against fraudsters or habitual defaulters. There are other initiatives which are taken by RBI to boost the element of corporate governance like off-site surveillance technique. The surveillance mechanism ensures that all banking institutions submit their periodical financial information as a part of DSB returns. In this way, RBI fulfills their supervisory role. A prompt corrective action (PCA) is another kind of stimulating remedial measure where trigger points can be created keeping the interest of bank's performance. The appropriate remedy could be decided based on quality of assets and level of profitability of a particular bank.

IX. CONCLUSION

It is necessary to have a comprehensive training session for bank officials so that the overall performance of banks can be improved. Such sessions must include awareness of different aspects associated with conflict of interest which might come in banking functions, discouragement of lending to employees of the same bank, prohibition of partially favourable conditions to loan agreement or bank guarantee. There is a need to strengthen the audit committee of external/independent experts which can give regular reports on compliance and non-compliance of RBI's recommendation and identification of weak issues associated with performance. Apart from audit committee, performance of bank officials needs to be supervised so that personal liability can be fixed in those cases that include deficiency or negligence in the services of such officials resulting in loss of customers/bank. Considering the significance of bank

[16]Editorial, "Rs 71,500 crore worth of bank frauds detected in FY19: RBI report" *The Economic Times,* Aug. 30, 2019.

governance, it is also necessary to improve the incentives of shareholders of banking institutions, so that investors get some confidence in investing on securities of banking institutions.

The RBI and the Government have constantly been in action, setting up review committees; issuing guidelines based on the recommendations; tried to come up with a governance framework taking the global standards into consideration, etc. It will be wrong to say that the agencies have been on a sleeping mode entirely, in fact recently they have been on their toes, mulling new rules to improve the financial position of the banks by dealing with the problem of increasing bad loans in which they have been successful to some extent but the impact of COVID 19 seems to drag us back to the pavilion. Not only with the NPAs, the codes related to the banks have also been amended to provide for a better legislative framework and redressal mechanism. As mentioned earlier neither the regulation nor the agencies can alone bring out the desired changes in the governance structure in the Indian Banking Sector, it is the banks who too have to get actively involved after all it is internal control that makes all the difference. The compliance of legal regulatory framework is not sufficient for banking institutions for effective corporate governance. It is the collective responsibility of board of directors, promoters of banking institutions to fulfill listing requirements, take strategic action in the form of mergers/demergers as per economic necessity and strengthen risk management strategy. The financial position of the banks in recent past has not been so good which can be clearly reflected from the headlines on frauds, increasing NPAs, etc. and it can be attributed to the poor risk management systems and non- compliance with disclosure requirements i.e, dereliction of fair practices in economic interest of banking institutions. The issues of governance have always been the same such as ownership issues, extent of disclosure, poor risk management, redressal mechanisms and so and the suggestions and recommendations have also always been the same, guidelines issued but we still stand in the same place because of non- compliance which is the root cause of every failed attempt that we have made towards improving governance standards in the banks. Complaints are the result of customers' dissatisfaction which may arise due to the difference between the expected service encounter and actual service delivery.

The prominence of customer satisfaction has encouraged the service providers to understand the importance of loyalty of customers through complaint management. Every complaint management is beneficial to the interest of customer and bank and such mechanism has to be upgraded as per necessary technological advancement. The present banking ombudsman also plays a constructive role in shaping corporate governance in banking and non-banking regime. It is important to maintain the customer- friendly standard where grievances can be addressed as a natural course of justice and wherever mediation and conciliation is deem fit and it should be encouraged and implemented. There is need for institutionalized mechanism where blockchain technology could be linked with general banking functions and procedural aspects of banking ombudsman. Such linkage will definitely streamline financial data in a systematic manner with less chances of data breach. It will be easy for financial institutions to overcome the problem of irregularities and possible fraudulent practices. There is no doubt that the entrepreneurship needs complete support of banking and non-banking financial institutions in the long interest and goal of self-reliant India. But the existing financial regime (banking & non-banking institutions) also need to encourage best practices of entrepreneurship so the task of regulation and policymaking could be done in the interest of productive and innovative efficiency.

A CRITIQUE ON PROHIBITION OF CHILD MARRIAGE (AMENDMENT) BILL, 2021

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ABSTRACT

Child marriage remains a pressing issue in many parts of the country, with detrimental consequences for the well-being and development of children, particularly girls. The Indian government recently passed a Bill to amend the existing Prohibition of Child Marriage Act, 2006 to increase the minimum age of marriage for females from 18 to 21 year, which seeks to strengthen the legal framework for preventing child marriages in India. The Bill is also intended to override any other law or custom prevailing in India. The measure was taken up by the government for a variety of reasons, including the welfare of young mothers, the need to lower newly born and maternal death rates, and the need to prohibit child marriage in India. It is commendable that the Bill is a significant step towards women's empowerment if it is effectively implemented. This article aims to contribute to the ongoing discourse involving child marriage and advocate for comprehensive measures to eradicate this harmful practice. It analyses the key provisions of the amendment bill, including raising the minimum age of marriage for girls, enhancing the penalties for offenders, and addressing the issue of voidable marriages.

I. INTRODUCTION

Child marriage continues to be a prevalent and deeply rooted issue in many parts of the world, including India. Millions of children, especially girls, are still coerced into early marriages despite strenuous efforts to end this terrible practise, depriving them of their fundamental rights, access to education, and a bright future. The Prohibition of Child Marriage Amendment Bill, which aims to strengthen the legislative framework and boost protection for children

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vulnerable to such marriage, was introduced by the Government of India in 2021 in response to the necessity of addressing this issue. The Union Cabinet has approved the idea to standardise the age at which men and women can get married. It suggests raising the age requirement for women to be able to lawfully marry from 18 to 21. However, the administration has decided to bring the matter to a parliamentary committee for additional examination in response to the opposition parties' continuous complaints.

All personal and religious legislation governing marriage in India, such as the Hindu Marriage Act of 1955, the Muslim Personal Law (Shariat) Application Act of 1937, the Special Marriage Act of 1954, and the Prohibition of Child Marriage Act of 2006[1], would be superseded by the new marital age for women. It is important to note that all of these laws will need to be changed in order to be in compliance with the bill's requirements.

Therefore, regardless of their religious background, the age of consent for marriage is 18 for all girls and women.

In 1978, the Indian government increased the minimum age for marriage for both girls and boys, raising it from 15 to 18 for females and from 18 to 21 for males.

II. THE BACKGROUND OF THE CHILD MARRIAGE AMENDMENT BILL, 2021

During the most recent budget session, Nirmala Sitharaman, the minister of finance, declared that "the government would set up a Task Force to look into the age of a girl entering motherhood with a goal of lowering maternal mortality rates, improving nutrition levels, as well as ensuring higher education and career opportunities to women." With these objectives in mind, a panel led by the former Samata Party leader Ms. Jaya Jaitly was constituted in June of the previous year. The task force worked with a wide range of civil society organisations,[2] including those that promoted women's and children's rights as well as those of children, as well as with students and researchers.

[1]Shireen Jeejeebhoy, *why raising marriage age of women won't achieve its stated goal*, The Indian Express https://indianexpress.com/article/opinion/columns/raising-marriage-age-women-rights-7684264/ (Last visited on July 21, 2022)
[2]*Id.*

The Task Force's goal was to explain the relative importance of a number of variables, such as the age of marriage (and, consequently, the age of motherhood), fertility rates, maternal mortality rates, nutrition for mothers and their children, sex ratios, and opportunities for women in education and the workforce.

The Panel submitted the report in the month of December 2020. Raising the marriageable age is one of its proposals, claims Ms. Jaitly. A robust push to change patriarchal attitudes is another suggestion, as is expanding access to education for girls.

The Indian Government has been working on this front for a very long time, notwithstanding the Task Factor's unequivocal denial that the necessity for population control was the main force behind their suggestion. "The revision to the Sarda Act of 1929 that was made in 1978 was motivated by population control." The discussion group thought that decreasing the age barrier for marriage would help to "empower" women.

III. THE POTENTIAL IMPLICATIONS OF THE PROPOSED AMENDMENT

It goes without saying that any new legislation will impact the situation in both positive and bad ways. The government claims that this measure benefits women's and children's wellbeing. There is a link between being married early and having kids young, which has an impact on the mother's and the child's nutritional status. Additionally, the Bill will aim to advance women's empowerment and gender equality. Women's possibilities for education and promotion, as well as their living conditions, their health, and their capacity to make significant life decisions are all negatively impacted by getting married at such a young age. If the measure is finally passed, child marriage will become less of a problem in India, where it is a severe one. Women who marry before turning 21 have challenges in their educational levels, living situations, health problems, capacity for decision-making, and ability to become independent.

The government claims that teenage pregnancies raise the risk of a number of medical conditions, including high blood pressure, anaemia, psychiatric disorders, and emotional problems. Raising the marriage age has the potential to

lower the rate of maternal mortality since they can also cause pregnancy difficulties, which can cause the mother's death. One of the reasons why raising the marriageable age can lower the risk of maternal mortality is because of this. They can have more respectable lives since they can further their education, have greater employment options for themselves and are self-sufficient without depending on anybody. Additionally, women who delay marriage might find greater employment prospects.

The union cabinet's decision to change the Prohibition of Child Marriage Act and make 21 the legal age for women to be married is a setback for women's rights and results from the decision to increase this age. The government's decision to increase the legal age of marriage for women is aimed at addressing the complicated concerns of maternal mortality and the socioeconomic position of women. This choice aims to address these problems in the short future.

The prohibition against being married before becoming 18 has existed in some form since the 1900s, yet child marriage continued largely unabatedly until 2005, when over half of all women between the ages of 20 and 24 had wed before turning 18[3]. This number has decreased dramatically to 27 percent by the years 2015–2016, according to the National Family Health Survey Report 4&5, and it was anticipated to decrease even more to 23 percent by 2019–20. This is a significant transformation that is mostly attributable to social changes including improved access to education, raised consciousness, and rising ambitions.

"There are scarcely any cases of infractions of the act appearing in our criminal records," the author writes, "despite the fact that more than one in five persons were married before the age of 18." A sizable proportion of women who are of marriageable age will also be affected, and most of these women will come from economically and socially disadvantaged areas. This will have a significant negative impact on a large number of women. Because of this, it is extremely unlikely that the government will be able to successfully enforce a law that raises the age range and affects such a significant portion of India's population,

[3]Drishti IAS, available at https://www.drishtiias.com/eng (last visited on July 6, 2022).

despite the fact that the government has been unsuccessful in enforcing a law that forbids marriage before the age of 18.

Most crucially, this government measure is an effort to limit young women's reproductive rights who are older than 18 years old. Article 21 of the Indian Constitution outlines certain rights. Additionally, "the age of marriage ranges from 10 to 20 years old around the world." The minimum age for marriage in nations like the United Kingdom, where women's rights are far more advanced than in India, is 18, provided that both parents give their agreement.

The task force's conclusion "was warmly endorsed by students of 16 universities and 15 NGOs across all religions and by the most disadvantaged," according to Jaya Jaitley's remarks, is simplistic, false, and it generalises their study, which is based on a biased sample.

There are 15 non-governmental organisations and 16 colleges that do not adequately represent young women nationwide. Students in universities are a special group since they get perks just for reaching this milestone. Because women are no longer regarded as minors at the age of 18 and are instead regarded as majors, relying on their opinions regarding the ideal age to marry is likely neglecting the right of women to make an informed marriage decisions, including whether they want to marry between the ages of 18 and 20. In a similar spirit, it cannot be said that the 15 favoured non-governmental organisations (NGOs) are representative of all NGOs, and it appears that the concerns that a small number of NGOs had with this idea have been disregarded.

IV. THE WAY FORWARD

The government's goals to make marriage for women legally binding at age 21 are admirable because this is the view held by the majority of urban dwellers, the younger generation, and today's progressives. What about the large portion of the people that live in rural regions, are not in stable financial situations, are underprivileged and disadvantageous, and are members of marginalised communities? Will they be subject to legislation that the government imposes on them rather than seeking these communities' consent? The simple change from the 18 to the 21-year-old marriage age for girls has virtually little impact on

these problems. The researchers stated that other elements, such as poverty and access to healthcare, were "much more effective as levers for enhancing women's and children's health and nutritional status[4]."

Statistics that support this idea are regularly used by those who think raising the marriage age will benefit women in order to support their claims.

In terms of social reality, this apparent relationship is a mirage that puts the statistical wagon before the horse. Women who marry later than other women and have better health and nutrition than other women don't do so simply because they marry later; rather, they marry later because they come from wealthier backgrounds and are more likely to already have all of the necessities of life at the time of their marriage. However, merely because they marry later in life does not affect the health indices of poorer women. The National Family Health Survey data (4), which shows that anaemia is the primary cause of maternal mortality in India and does not change even at marriage ages up to 25 years[5], serves as an example of this. Once other factors are taken into account, however, anaemia is still the leading cause of maternal mortality in India.

The issue that confronts us is whether or not the government can uphold women's rights by only drafting legislation without providing the affected women with any further social support, financial help, or infrastructural upgrades. The administration must initially focus its attention on these crucial issues.

V. CONCLUSION

India still has a long way to go before it achieves the goal of providing women more agency. It is the third lowest in South Asia according to the World Economic Forum's Global Gender Gap Report 2021, coming in at 140th out of 156 nations[6]. The actual causes that will push India toward greater female empowerment have not been effectively addressed by the Indian government. The government has to address these factors.

[4]Mary E John, *Raising marriage age won't lead to women's empowerment*, The Indian Express (Dec. 21, 2021, 11:18 AM) https://indianexpress.com/article/opinion/ columns/ raising-legal-age-of-marriage-to-21-women-empowerment-7682640/.
[5]Id.
[6]Gaon Connection, https://en.gaonconnection.com/india-women-global-gender-discrimination -report-2021-covid/ (last visited on July. 7, 2022).

"The government must invest far more in addressing issues of equity," the measures that will allow the underprivileged to complete their education, the provision of schools, colleges, and various institutions even in the most backward areas, the provision of free counselling to the girls and even to their parents, the addressing of safety issues of women. In public places, the government needs to make far greater investments in tackling equality concerns if it wants to effectively empower women while upholding their freedom to choose.

Our culture differs from others in that it contains complex contradictions like these. They cannot be fixed by a legal solution, especially one that is very difficult to implement. The government should actively take efforts to actually empower women in all facets of their lives rather than turning our youth into criminals. They will be in a better position to decide whether to get married, when to get married, and with whom. There won't be a need for laws to be created in order to delay the scheduling of marriages if the government works to solve these genuine issues.

CHALLENGES ASSOCIATED WITH CYBER-CRIME INVESTIGATION IN INDIA

Arohi Kashyap*

ABSTRACT

The advent of technology has brought forth with it new age techno-legal challenges. Cyber-crimes are only likely to pace up given the reliance on technology for day-to-day business and banal operations. One such major issue is investigation in cyber-crime issues. This article intends to study the cyber-crime investigation scene in India. This article is undertaking a study of different types of cyber-crime and measures taken by the various agencies in cyber-crime prevention. Thereafter, the article enumerates specific issues involved in cybercrime investigation process and ends with some suggestions to overcome those issues.

I. INTRODUCTION

Technology, being the vital irreplaceable tool of the 21st century, has globally expanded the reach of every individual. Millions of people around the world find new ways of connecting every day, allowing people to interact and exchange files/documents/pictures/videos, etc. for both professional and personal reasons as well as online businesses and shopping. However, at the end of these transactions and interactions, there are cyber criminals waiting to take advantage of the growing dependence on information technology. Simply put, cyber-crimes are a combination of crime and technology.

In an increasing cyber dependent world, the number of cyber-crimes has increased substantially, resulting in the necessity of increased cyber security. The modern high-tech world makes use of technology in various activities from house alarm systems and GPS to nuclear power plants and national security. This has substantially increased the vulnerability of people to the attack of cyber criminals. These criminals range from simple hackers and identity thieves to terrorist organizations that threaten national security. They target people, private

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organizations, public organizations, offices, companies, government departments, government agencies, etc. Unfortunately, in India the awareness of cyber-crimes is quite recent. Initially, people were not only unaware of the concept of cyber-crime but many times, unaware of being a victim to cyber-crimes. However, with the exponential increase of cybercrime in the past decade, people have started recognizing and understanding cyber-crime as well as looking for appropriate legal recourse.

Here comes the major issue i.e., investigation of cyber-crime. Cyber – crimes range from identity theft, cyber-stalking and cyber-harassment to child pornography and theft of information from national agencies' databases. These crimes become extremely difficult to investigate and even more problematic to bring to court with credible and substantial evidence. The ability of hackers and other cyber-criminals to delete or encrypt evidence, the suspect being over-seas, the evidence being overseas and police's lack of knowledge of cyber-crimes are just some of the problems that impede the investigations of cyber-crimes and allow the perpetrator to get away with the offence. This article attempts to analyses the types of cyber-crimes and the problems associated with cyber-crime investigations in India.

II. CYBER-CRIME

Cyber-crime is defined as any illegal act which involves information and communication technology.[1] It is a criminal offence that is enabled using electronic and information systems which includes the Internet and/or any other device like computers, hard drives, phones, etc.[2]

The Council of Europe's Cybercrime Treaty uses the term "Cybercrime" to refer to offences ranging from criminal activity against data to content and copyright infringement. [3]

[1]National Cybersecurity Policy Framework for South Africa, 2012, Act of Parliament 2012 (South Africa)
[2]Electronic Communications and Transactions Amendment Bill, 2012, Act of Parliament 2012 (India)
[3]Great Britain: Parliament: House of Commons: Home Affairs Committee: House of Commons - Home with Formal Minutes, Oral and Written Evidence 4 Affairs

Cybercrime is attracting possible offenders by its high rate of return on investment and low risk, as compared to other forms of crime. Accessing sensitive and vital information to use it for a high return and rich harvest, topped with the difficulty of catching such criminals has led to the expansion of cyber-crime across the world.

Initially in the 1990s, when computers and networks were a new development of modern technology, hacking was done to get more information about systems. It increased in popularity to such an extent that competitions began to be held for hacking. This went on to affect several networks: military to private networks to commercial organizations. It took a very long time for people to realize the effect hacking had networks other systems as initially, they were considered a mere nuisance. It made the networks and other systems much slower and vulnerable. The ability and skill of hackers also developed where they began to use their knowledge to exploit others and gain benefits; this marks the development of cyber-crimes around the world.[4] In the modern-day cyber world, criminals now use their skill and knowledge of technology to deceive, exploit, steal and cheat others, to find quick and easy ways to make money or for other motives like cyber-stalking, cyber-harassment and cyber-terrorism.[5] In the Sarl Case[6], a French Company, Sarl Louis Feraud International organized a fashion show in France. Viewfinder, Inc. took several photographs of the show and posted them on their own website. Sarl then filed a suit against Viewfinder for the unauthorized use of the company's intellectual property and engaging in unfair competition by posting photographs of models wearing clothing of their design at various fashion shows. In a case involving a copyright infringement, a court in France ruled that the website Viewfinder.com did not have the necessary authorization to post the plaintiff's collections. The court also noted that the company had taken advantage of the plaintiff's commercial efforts and reputation. The court noted that the photos posted by Viewfinder.com were

Committee: E-Crime - HC 70: Fifth Report of Session 2013-14 [electronic Resource] : Report, Together

[4] Cross Domain Solutions: Cyber Crime, http://www. crossdomainsolutions.com/ cybercrime/(last visited March 29, 2017)

[5] Cross Domain Solutions: Cyber Crime, http://www.crossdomainsolutions.com/cyber-crime/(last visited March 29, 2017)

[6] Sarl Louis Feraud International v. Viewfinder, Nos. 04 Civ. 9760, 9761 (GEL)

taken at public events, and the company had a valid First Amendment right to share them. As far as the designs were concerned, the court ruled that they were protected by copyright. The First Amendment also provides that the publication of news items that are of interest to the general public is protected. The High Court noted that the District Court did not conduct a proper analysis when it ruled that the judgments in France were not enforceable. The court noted that the First Amendment does not allow an entity to disregard intellectual property laws when it engages in speech activity. This means that news organizations must follow proper intellectual property laws in order to maintain their operations.

Cyber-crimes can be categorized into 3 categories:[7]

a. Individual: Cyber-stalking, cyber-harassment, child pornography, pornography distribution, drug trafficking, trafficking, cyber-defamation etc.
b. Property: Credit card scams, stealing bank account details, hack into and disrupt any organization' systems, damage hardware, damage software, online gambling, infringement of intellectual property, etc.
c. Government: hacking into military websites and databases, circulate propaganda, hacking into government websites and government databases, acts posing a threat to national security, etc.

III. TYPES OF CYBER-CRIMES

1. Online scams and/or Fraud

The chances and opportunities for criminals to cam people or defraud people around the globe have increased exponentially. These scams and frauds are basically dishonest and deceitful methods that take advantage of unsuspecting people to gain a profit in terms of money or access to personal information. These scams and frauds are usually hidden in spam and phishing messages. Phishing is a common method employed for online scams and frauds where emails are sent under the name of some reputable company so as to induce the

[7] Karnika Seth, Types of Cybercrimes, KARNIKASETH.COM, (March, 2017) http://www.karnikaseth.com /types-ofcybercrimes.html

individual/ user to reveal personal and private information such as, social security numbers, bank account details, credit card number, etc. There are several types of online scams, the most common being:

- Unexpected prize scams
- Dating scams
- Pen – pal scams
- Unexpected money scams
- Threats and extortion scams
- Jobs and investment scams ▪Identity Theft

2. Cyberextortion

Extortion done by leveraging any attacks being done on the user's website, e-mail, etc. is known as cyberextortion. When the user's computer system or website or e-mail server or social media is threatened with several repeated attacks by hackers such as denial of service attack, etc. and the hacker or perpetrator asks for money or any other gain either for 'protection' or to stop the attacks, it is cyberextortion. The attackers have been known to be increasingly using distributed denial-of-service attack. The Federal Bureau of Investigation (FBI) has reported that cyberextortion has been attacking corporations much more an it impedes the ability of the corporation to operate properly and increases their financial expenses by having to fix the problem, pay off the extorter or recover the lost data.

3. Cyberwarfare

Cyberwarfare simply put are any acts to attack another nation's IT. committed through computers or information networks. It involves any nation-state or international organization that acts to attack or attempt to damage another nation's information networks, nation's computers or any other devices. This can be done through denial-of-service attacks or computer viruses. Cyberwarfare can involve both defensive and offensive operation that relate to cyberattacks,

espionage and sabotage. Countries all over the world have been developing and enhancing their ability and skills to engage in cyberwarfare wither as an offender, victim or both offender and victim.

4. Cyberterrorism

The intimidation and coercion of any organization or government in order to promote and advance the perpetrators own political and/or social objectives is known as cyberterrorism. This is done by launching an attack targeting the computer software or hardware against information or networks stored in them. Cyberterrorism in general can be defined as an act of terrorism committed through the use of cyberspace or computer resources (Parker 1983)[8]

5. Crimes targeting the computer

Although there has been massive computer innovation and development, there are several vulnerabilities and chinks in the armor of computer hardware and software. Sophisticated, skilled and advanced hackers and criminals have found techniques to exploit these vulnerabilities on computers and other countries.

- Unauthorized access or hacking – When the hacker or perpetrator can gain access to your computer, phone or another device without permission through fraudulent and deceptive methods. Hackers usually exploit security weaknesses, phishing or malware to gain access to the user's computer or other devices. After gaining access, the hacker can get information related to the user's bank accounts, emails, social media accounts and private
- documents. They can also change the passwords for the accounts to ensure that the user cannot access their own account.
- Malware (malicious code) – Using malicious software/malware to cause damage and injury to the computer or to monitor the user's inline activity. The perpetrators who use malware often send infected email attachments or click links given in an e-mail sent to the user, which gives the perpetrator access to the user's computer.

[8]Prof. Umesh Kumar Tanwar: Cyber-Crimes and their Impacts: A Review, Vol.IV Issue I International Journal of Research and Innovation in Social Science, Pg 451, 452 http://www.rsisinternational.org/3ICMRP-2016/451-452.pdf

- Denial-of-service attacks – This attack mostly targets business and aims to prevent the proper functioning of the computer. It rarely attacks individuals. This particular form of cyber-crime floods the website or computer with data. This in turn, prevents the computer or website from functioning properly.
    - Denial-of-service attacks usually don't require access to computer systems, unlike malware of hacking. Another method of this attack is distributed denial of service attack.

6. Crimes using computer as a tool

- Fraud and Identity Theft
- Phishing scams – Attempting to obtain sensitive information about usernames passwords, credit card details, etc. for profit. This is done usually by disguising as a trustworthy entity through any form of electronic communication.
- Spam – Unsolicited messaged sent via e-mail which can be used as phishing scams, to introduce viruses into the system, to spy, etc.
- Propagation of illegal offensive and lewd content – This includes content that is offensive, distasteful, obscene, lewd and repugnant like child pornography, harassments, threats, etc.
- Drug Trafficking

IV. CYBER-CRIMES IN INDIA

As stated before, cyber-crime is a relatively new and unexplored concept in India. There has been a significant increase in cyber-crimes in India. It targets individuals, children, companies, and Government departments. The realization of cyber-crimes is quite recent, but the government has attempted to make certain legislations for the protection of e-commerce, e-banking, e-governance i.e., the Information Technology Act, 2000[9]. The objective of the act was to provide legal recognition to the transactions that are carried out through

[9]Information Technology Act, 2000 s.66B, 66C, 66D, Act of Parliament 2000 (India)

electronic data interchange. This type of electronic communication involves the use of various electronic methods to exchange information. It also aims to facilitate the filing of documents with government agencies and improve the efficiency of financial transactions.

There is currently no specific law regarding the protection of intellectual property and privacy in the cyber world. However, in 2008, the Information Technology Act was amended to provide legal recognition to the transactions that are carried out through electronic data interchange. To address the issue, the government has also launched various initiatives to protect and combat cyber-crimes.

V. MEASURES TAKEN BY INDIA FOR CYBER-SECURITY

The CERT-In was established in India to respond to major security threats. It scans the country's cyber space and finds traces of illegal activities that could threaten the security of the nation. The CERT-In is a proactive organization that focuses on identifying and preventing computer security threats. It also performs various reactive roles such as analyzing software vulnerabilities and performing research on harmful codes. In a pioneering move, Bangalore became one of the first cities in India to establish a cyber cell. Despite the number of cyber cells in major cities, the number of cases involving minor cities has increased. To address this issue, the DIT has established a cyber forensics facility at a research center located in Thiruvananthapuram. The CDAC has developed indigenous tools that can help law enforcers carry out investigations related to cyber-crimes. These tools are being used by various agencies to carry out their investigations. A proactive organization that responds to cyber-attacks, the CERT-In acts as a liaison between different agencies in the country and other similar organizations around the world. It also issues advisories, vulnerability notes, and alerts. In 2013, the number of cyber-crimes in India increased by 50 percent annually. Between 2008 and 2013, about 9,000 websites, including those of government agencies, were hacked. Many of these websites were targeted by cross-border attacks. According to a survey conducted by FICCIS, the information and cyber security threats that organizations face are the biggest concerns in India. This has been the same position for the past two years.

VI. Cases of Cyber-Crime in India

There have been several cases in India for cyber-crimes. The year 2003 saw 60 cases registered under IT Act as compared to 70 cases during the previous year i.e., 2002 thereby reporting a decline of 14.3 percent in 2003 over 2002. Nearly 23 percent cases (14 out of 60) were reported from Gujarat followed by Maharashtra (12 cases) and Tamil Nadu (10 cases). Of the total 60 cases registered under IT Act 2000, around 33 percent (20 cases) related to Obscene Publication / Transmission in electronic form, normally known as cases of cyber pornography. There were 21 cases of Hacking of computer systems.[10] In the case of *The State of Tamil Nadu v. Suhas Katti.*[11], In the Yahoo message group, there were numerous offensive and obscene messages directed at a divorcee woman. The messages were allegedly sent by the accused using a fake e-mail account that was opened in the name of his victim. These messages led to the woman receiving constant phone calls.

The police arrested the accused after the victim filed a complaint, stating that he had been stalking her. He was a family friend of the woman, who previously got married to another man, but their marriage ended. He then started contacting her again, and she began receiving harassing messages through the internet.

The court ruled that the accused was guilty of various offenses, including violating sections 469, 509, and 67 of the Information Technology Act. He was sentenced to spend two years in jail and was ordered to pay a fine of Rs.400,000. On the other hand, he was also sentenced to spend one year in simple imprisonment and was required to pay a fine of Rs.500.

The case is regarded as the first instance of its kind in India that was prosecuted under section 67 of the Information Technology Act.

State vs. Mohd. Afzal And Ors.[12] (Parliament Attack Case) was a case where several terrorists attacked Parliament House on 13 December 2001 and Digital

[10] http://ncrb.nic.in/ciiprevious/data/cd-CII2003/cii-2003/CHAP18.pdf
[11] Ankit Mathur, Case Study Cyber Law, State of Tamil Nadu vs Ushas Katti, C.No 4860 of 2004, http://cyber-law-web.blogspot.in/2009/07/case-study-cyber-law-state-of-tamil.html
[12] State vs. Mohd. Afzal And Ors, (2003) DLT 385

evidence played an important role during their prosecution. The accused in this case, put up an argument that computers and evidence can easily be tampered and hence should not be relied. Several smart devices, storage disks were recovered, and a laptop was also recovered from the truck intercepted at Srinagar pursuant to information given by two suspects which included evidence of fake identity cards, video files containing clips of the political leaders with the background of Parliament in the background shot from T.V news channels. A design of Ministry of Home Affairs car sticker was also recovered from the laptop. The court held that the challenges to the accuracy of computer evidence should be established by the challenger. Mere theoretical and generic doubts cannot be cast on the evidence.

In the case, Avnish Bajaj v. State[13], The case was about a student from IIT Kharagpur named Ravi Raj. He had placed an ad on the bazee.com website, where he was offering an obscene video clip for sale. The advertisement was listed on the site at around 8:30 pm on November 27, 2004. It was deactivated at around 10 am on November 29. A complaint was then registered by the Crime Branch of Delhi Police. After carrying out a proper investigation, the police named the website's owners and the person who handled the content as accused. The court found that the website had violated the provisions of Section 292 (2) and 292 (2) of the IPC. It was also found that the site failed to prevent the users from accessing obscene and pornography content. According to the court, the website had run afoul of this law due to its lack of proper filters. The court ruled that the website's owners were liable for the violation of the law due to their knowledge of the advertisement's listing. As far as Avnish is concerned, the judge noted that although the IPC's provisions related to attachment of criminal liability to the director of a company are not recognized by the Indian Penal Code, he can still be discharged under these sections.

As far as the Information Technology Act is concerned, the court noted that there was a prima facie case against Avnish. Since the law recognizes the criminal liability of directors even if their companies are not charged, the court ruled that there was enough evidence to hold him accountable. However, it did

[13]Avinsh Bajaj vs State, (2005) 3 CompLJ 364 Del

not declare him guilty. A schoolboy from Delhi was granted bail by the Juvenile Justice Board. He was then taken into police custody and placed under observation.

VII. CHALLENGES OF CYBER-CRIME INVESTIGATIONS IN INDIA

1. **Jurisdiction:** Jurisdiction[14] is one the major issues that India must face when it comes to investigation of cyber-crime. Cyber-crime is truly, a global phenomenon in that, one case of cyber-crime can involve two or more countries. It is impossible to place a physical boundary on cyber-crimes. For e.g. A person can hack a computer in India while sitting in England. The jurisdictional claim to activities over the Internet has become a battleground for the struggle to establish Rule of Law in the Information Society[15]. The problem with cyber jurisdiction in India stems from the significant rise of the global computer network and its role in destroying the link between geographical location and the power to assert control over cyber space usage/ effects of online behavior on individual/ enforceability of the local sovereign's effort to make rules applicable to this global phenomenon. There are some legislations in India pertaining to the cyber jurisdiction in India. Section 75, IT Act, 2000 implies that the Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence involves a computer, computer system or computer network located in India. Section 3 and 4 of the Indian Penal Code, 1860 specifies deals with the extra-jurisdictional power given to the Courts in India. Section 188 of the Code of Criminal Procedure provides that even if a citizen of India outside the country commits the offence, the same is subject to the jurisdiction of courts in

[14]Jurisdiction means the authority which a court has to decide matters that are litigated before it or to take cognizance if matters are presented in a formal way for its decisions, it could be said that it is the power/authority of the court to decide matters that are brought before him.

[15]Reidenberg, R. Joel, Lex Informatica: The Formulation of Information Policy Rules Through Technology, 76 Texas Law Review p553, 554-55 (1998)

India. In India, jurisdiction in cyberspace is like jurisdiction as that relating to traditional crimes and the concept of subjective territoriality will prevail. *SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra,*[16] India's first case of cyber defamation, the High Court of Delhi assumed jurisdiction over a matter of defamation of a corporate's reputation through e-mails. The court passed an important ex-parte injunction. The concept of consequence and cause of action extends jurisdiction, but a conflicting situation arises where there is no defined regulation at one of the places. For instance, Act does not provide any provision to catch the internet pornography on foreign websites but only for sites in India.

2. **Market for stolen information:** There is now a sophisticated and self-sufficient digital underground economy in which data is the illicit commodity.[17] This basically means, that there is a massive market that has developed for stolen financial, personal and government data. This information can be used to gain access to bank accounts, access to credit and debit cards, access to social media and e-mail accounts and/or to fraudulently establish new lines of credit for monetary gain. This leads to various criminal activities, such as phishing, pharming, and malware distribution. It can be supported by a wide variety of individuals and groups, including web hosts, malware writers, and individuals who can lease networks of compromised computers.
3. **Unprecedented scale of technological development:** In the last ten years, the advances in communications technologies and the information of society have congregated more than ever seen in human history. With this advancement in technology, the number of possible attacks and viruses that could hit private and government users has increased exponentially. The unprecedented scale of the problem threatens the ability of the authorities to respond with millions of viruses and other types of malicious code

[16]SMC Pneumatics India Pvt Ltd vs. Jogesh Kawatra, Suit No. 1279/2001

[17] Rajarshi Rai Choudhury Et Al, Cyber Crimes- Challenges & Solutions, 4(3) International Journal of Computer Science and Information Technologies 729, 730

that are in global circulation. This leads to innumerable computers being compromised every day. Cyber-crime rates continue to increase in line with internet adoption, updates and developments and continuing deployment of broadband Internet infrastructure throughout the world. This introduces new levels of vulnerability for external cyber-attacks and makes it difficult for the officials to investigate these cyber-crimes as they are ill-equipped to deal with the unprecedented scale of development. It becomes extremely difficult for them to stay caught up and informed of the developments in IT sector.

4. **Easy availability of pornography-** One of the biggest concerns of the 21st century's cyber world is the availability of pornography, particularly child pornography. This type of illicit material involves the sexual abuse of a child, usually through multiple sexual acts, It's not often that these hackers go to court. Stopping the attack, minimizing losses and fortifying computer systems for the next attack is a more common outcome, authorities said.
5. **Lack of coordination and absence of legislative harmony**: There is absence of coordination and legislative harmony amongst different countries across the globe is a significant challenge faced not only by India but globally. Hacking and other cyber-crimes can take place from remote areas of one country and can target an internet user from another country. This makes it extremely difficult or agencies to investigate these crimes as they become restricted to their own jurisdiction and find it difficult and near-impossible to coordinate and cooperate with external agencies.
6. **Minimal raining of the executive body of the country:** As stated above, India's awareness and knowledge of cyber-crime is at a very basic and primitive stage. There is a severe lack of knowledge among the people and especially the investigating authorities when it comes to cyber-crime. Due to the extreme basic knowledge of the authorities, the investigation of these cyber-crimes is done as if

they were normal crimes covered under the Indian Penal Code when in fact, the technique for investigating a physical crime is vastly different from the investigation of cyber-crime. This leads to an extremely unproductive and unsuccessful investigation outcome.

VIII. CONCLUSION AND SUGGESTIONS

Cyber-crime has significantly increased in the 21st Century with the development of modern-day technology and the development of the knowledge and skills of cyber-criminals and hackers. It's not often that these hackers go to court. Stopping the attack, minimizing losses and fortifying computer systems for the next attack is a more common outcome.[18] The main issues that arise for the investigation of cyber-crime in India are jurisdiction and lack of training and knowledge of investigation agencies. This is followed by the unprecedented growth of the IT industry and the lack of coordination of international and national agencies. In India. There is a severe lack of legislation and implementation for cyber-crimes. Although the Parliament of India passed certain legislations for the cyber world i.e., Information Technology Act, 2000, this Act has been passed solely for the protection of e-commerce, e-banking, e-governance. There are certain measures that can be taken in order to guard the nation against cyber-crimes and aid in the investigations for cyber-crimes as to bring the perpetrator to justice. This in turn would help implement further legislations for the protection of internet users in India. The development and advancement of technology cannot be stopped or curtailed however, measure can be taken to keep up with the changing technology and ensure proper investigations into cyber-crime matters:

a. Spreading awareness of the concept of cyber-crime, the types of cyber-crime how to guard yourself against it. Awareness should also be spread about the possible legal recourse available to the victims of cyber-crimes.

[18]Governing, Papers, Keeping up with cyber security threats with government system, http://www.governing.com/templates/gov_print_article?id=363663161

b. Actively targeting the underground market and forum for stolen information as to disrupt the circulation of stolen information and cybercriminal tools. Cutting off the demand would ensure the product to become invaluable and pointless.
c. Research and develop an insight into the mental framework and behavior of modern day cybercriminals by means of intelligence analysis, criminological research and profiling techniques.
d. Law enforcement is working in harmony with the influencers of the future. An effective and beneficial collaboration of Indian government agencies with the private sector of information technology. This collaboration can significantly help the investigations of cyber-crime as it would help proactively identify features of future communication technologies and possible developments in viruses and attack systems. If the investigating agencies are kept updated about the developments, it leads to a further understanding of the case which in turn increases the chances of a successful investigation.
e. Establishments of more virtual task forces in India. The taskforces must be equipped with the proper training, knowledge and skills to investigate and combat cybercrime. Collaboration with private sector organizations would significantly help with the virtual taskforces.
f. Establishment of a centralized agency to deal with cyber-crime as to prevent any jurisdictional issue as regards to investigation.
g. Proper collaborations with international bodies as to have a mutually beneficial relationship. A two-way street where India agrees to assist them with any cyber-crime connected to India and the other country agrees to do the same amicably.
h. Blocking pornographic sites, strict deterrent effect and punishment for those who are involved in the same and making specialized taskforces for the investigations into child pornography.

In the modern-day cyber world, technological development is a daily occurrence however, with this same advancement comes a plethora of new techniques to hack, corrupt and destroy other's networks and computers. Cyber-crime is an extremely dangerous crime which is mostly attributed to the fact that it is not often that hackers go to court and stopping the attack and minimizing losses for the next attack is a more common outcome.[19] The executive and legislative bodies of the country need to work on providing a better and more effective system not only to prevent cyber-crime, but to have a proper system of legal recourse that victims of cyber-crime can use to get justice for the invasion of their privacy and violation of their rights. It's time that the legislative and executive organs of the nation be brought into the 21st century.

[19]Governing, Papers, Keeping up with cyber security threats with government system, http://www.governing.com/templates/gov_print_article?id=363663161

ADMINISTRATIVE TRIBUNALS: PERPETUATING THE CAUSE OF CONSTITUTIONALISM

Saurav Kumar*

ABSTRACT

The article revolves around the area of administrative law wherein the Tribunals are defined as the adjudicatory body which is established to resolve disputes between the parties. They do not fall into the hierarchy system of the Judiciary because even though both the courts and the tribunals are serving justice to the public their legal functions are distinct. Tribunals have different judicial and administrative roles than courts. It is the beauty of our constitution that both the courts and tribunals appreciate each other and work for the greater good.

I. INTRODUCTION

Tribunals are usually defined as Bodies with administrative or judicial responsibilities that are not part of the court system's hierarchy." Administrative tribunals are made to settle and resolve all the disputes between, a citizen and the government or a government officer against the government, etc.

An executive body has several quasi-legislative and quasi-judicial duties in addition to the ministerial duties it fulfils. Governmental functions have been increased by leaps and bounds, and even if traditionally the task of settling disputes lies in the hands of only the judicial organ of the state, the task of adjudication of disputes has also been passed on to the executive authorities. For example, levy of penalty imposition of the fine, confiscation of goods, etc. The classical “Liassez Faire” concept has now been discarded, and the former “police state” has become the state of welfare. The influence of the executives has grown to a great degree because of this shift in paradigm in the creation of the state and its functions. It controls labor affairs, maintains production management, initiates companies, etc. The problems resulting

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from such operations are not simply matters of law, because it is not necessary for the court of law to contend with all the socio-economic contradictions facing the parties.

For the sake of explanation, if an industrial dispute arises between the workers and the management of an enterprise it must be settled at the earliest. It is not just for the interest of the parties that the dispute must be resolved quickly but also for the economy as a whole. At the same time, the settlement of such disputes requires a fair and just approach that is free from the vice of arbitrariness and autocracy. Therefore, instead of relying on ordinary courts of law, administrative tribunals are set up to resolve a variety of quasi-judicial matters.

In the case of *Durga Shankar Mehta v Raghuraj Singh*[1], the Supreme Court of India held that: "According to article 136 of the Indian Constitution, a tribunal is not the same as a court and instead refers to all adjudicating bodies as long as they are established by the state and have judicial authority as distinct from administrative or executive duties.

Also, in the case of *Bharat Bank ltd v Employees*[2], The Supreme Court of India observed that "although the tribunals may appear to be courts and may appear to have functions like a normal court of law, they are different from them."

A tribunal may also be defined as an adjudicatory body set up to resolve disputes between the parties and to exercise legal functions as distinct from solely administrative roles, and therefore has some but not all, parallels with the tribunal. It should be emphasized that an administrative body is only an administrative tribunal if it is established by the state and has part of the state's judicial powers. In areas such as calling witnesses, forcing production and finding of documentation, receiving proof on oaths and on affidavits, granting commissions, and so on, the tribunals are often granted the power of a civil court under the Code of Civil Procedure.

[1]AIR 1594 SC 520.
[2]AIR 1950 SC 188.

II. HISTORIC DEVELOPMENT OF ADMINISTRATIVE TRIBUNALS IN INDIA

Albert Venn Dicey wrote in the second half of the nineteenth century and mourned what he regarded as deterioration in regard for the order of law in England. The rule of legislation used to be a proud heritage that differentiated English administration from France's administrative supremacy of Droit administrative, as well as the abstract certainty of paper founding documents in nations like Belgium, and so on and so forth. Legal equality, according to Dicey, was essential to Rule of Law.

Dicey had a way of explaining the Rule of Law in terms of ideas that had simple explanations despite being extremely complicated. His first rule of law premise was that no one may be punished or legitimately made to suffer in body or property until he commits a specific violation of the law as created in the customary legal method before the ordinary courts of the state.

> According to Dicey's idea, legislative bodies should solely be entrusted with the task of establishing laws. These statutes are designed to be enforced by a regular court of law. This is based on a different legal philosophy.

Charles-Louis de Second at, baron de La Brede et de Montesquieu, an eighteenth-century French sociological as well as a political philosopher, created the phrase Trias Political, or separation of powers. His book, Spirit of the Laws, is regarded as one of the most influential works in the history of political thought and jurisprudence, and it served as the inspiration for the Declaration of the Rights of Men as well as the United States Constitution. Under this model, the state's political power is divided into three bodies: the legislative, executive, and judicial. He claimed that these authorities must be distinct and operate on their own for them to be most effective in advancing liberty.

Therefore, the term "separation of powers" refers to the division of duties among the many departments of government in order to prevent one branch from carrying out the fundamental functions of another.

The separation of powers doctrine is violated by the establishment of an administrative tribunal. However, as the government's duties have grown, conventional courts of law have become insufficiently qualified to address specialized matters involving administrative tasks. Ordinary courts are overcrowded, and one must follow tight procedural norms and evidence to be heard. As a result, a system of informal, low-cost, and quick adjudication was desperately needed.

Tribunals have also existed in the past. We would still find it widespread in the medieval period if the origins of the Tribunals were traced. In order to minimize the pressure on the Rulers, there were certain additional courts presided over by some of the higher-ranking officials or those of the lower level, depending on the severity of the matter. According to Wade, the customs as well as excise commissioners were granted enforcement authority almost three centuries ago. Also now, a large number of conflicts between persons and individual citizens and those of individuals as well as between issues and their respective governments are dealt with and resolved by administrative tribunals.

In India, after liberation in 1947, administrative litigation had risen dramatically, and several welfare laws were enacted that gave the authority to settle different issues in the hands of the government and the executives. As a welfare state authority, the new Indian Republic was born and hence also has the responsibility on the govt. to provide the people with lots of welfare services.

The various quasi-judicial authorities gained by the government have led to a wide number of disagreements as to how these regulatory bodies and executives used their actions to arrive at them. The courts then ruled that these bodies had to be placed under scrutiny and had to uphold procedural protections to conform to the standards of natural justice when making decisions. The viewpoint was corroborated by the Report of the 14th Law Commission. The very notion of establishing service courts was also favoured by the Supreme Court of India, which recommended the creation of several

service tribunals in *Kamal Kanti Dutta v. Union of India*[3] rescue court system from the endless stream of written pleas as well as lawsuits in the country's service-related affairs. In the meantime, several states have also formed their own service tribunals, such as a service tribunal constituted by the Constitution (32nd Amendment) Act, 1973, in Andhra Pradesh 1973.

A variety of tribunals were set up by the government at the centre in order to prevent cluttering the jurisdictional mechanism with a large number of cases that would have emerged from the operating condition of these new socio-economic rules. The aim of these tribunals was to have cheap and autonomous, timely, and settled disputes according to the various welfare laws enacted by the government.

The Government established the Administrative Reforms Commission in 1967 in response to the same issue of backlogs and the slowly resolved cases. In 1976, Parliament passed the 42nd Constitution (Amendment) Act, 1976 containing Articles 323A as well as 323B, which authorized the creation of administrative and other types of tribunals to deal with the issues that have been addressed The Framework of Tribunals has since been put under the judicial monitor and checked on the headstone of the judicial monitor several occasions constitutionality.[4]

III. RATIONALE BEHIND ADMINISTRATIVE TRIBUNALS' GROWTH IN INDIA

The requirements of a contemporary collectivist social democrat state economic plan encompassing all facets of human life, delays in legal litigation, the technical aspects of disputes, and rising demand for justice and economics resulted in an emergence of administrative powers governing human actions in a variety of ways, resulting in the expansion of numerous quasi-judicial bodies. These tribunals are formed by the law, while their members are selected by the Government. It makes decisions in a judicial manner, devoid of the technical norms of process and evidence that apply in a court of law, but keeping the

[3]A.I.R. 1980 S.C. 2056.
[4]Sanya Darakhshan Kishwar, 'Tracing the Development of System of Tribunals In India: A Special Reference to Finance Act, 2017', <https://jcil.lsyndicate.com/wp-content/uploads/2017/08/Sanya.pdf>

social needs and established public policy in mind. It should be remembered that administrative tribunals are constitutionally recognized under Articles 32, 136, 226, and 227 of the Indian constitution.

The following factors can be said to have played major roles in the contribution as well as the responsibility for the growth of administrative law in India. They are as follows:

- In the ideology of the function that the state plays, there has been a drastic shift. Over a duration of time, the negative approach to upholding law and order and social security has shifted. The state has not yet reduced the scope of the conventional and minimal security roles and of the implementation and administration of justice, but has followed a positive approach and, as it is a welfare state, has attempted to carry out the various functions of a democratic state.

- The legal system has proven to be insufficient to make judgments on all issues and to address all sorts of conflicts that could arise. It's been very sluggish, very expensive, incompetent, slow, and orthodox. It had already been overwhelmed, and even in the case of very critical matters, it was not feasible for the citizens and the parties to expect timely disposal of proceedings. Simply literally reading the bare clauses of any of the other laws could not address the essential problems, but it took a sincere understanding of various other considerations present in a matter and it could not be accomplished by the ordinary courts of law. Therefore, there were numerous varieties of trade tribunals and labor courts that had the methods and experience to deal with these complicated issues.

- In the nation, the legal system was highly insufficient. It had almost little time and also the methodology to efficiently cope with all the data. They were still unable to set down strict provisions and detailed protocols, even though the detailed provisions, which were specifically laid down by the legislature, were found to be highly deficient and ineffective in

their service. It was, however, incredibly important to transfer those rights to the regulatory authority as well.

- For studies on the administration process, there is a great deal of variation. Unlike the legislation, the provision can absolutely not be extended until the beginning of the next legislative session. However, a law can be created here, tested for some period and if it happens to be very flawed, within a very tight timeframe, the same can be updated or changed. Legislation is often very static in nature, whereas the regulatory mechanism is quite variable.

- Many kinds of technical details should be avoided by the administrative authorities. In the conventional process, administrative law generally reflects the very practical instead of the usual theoretical and statutory approaches. Technically and conservatively, the typical legal system is static. Without some kind of decorum and technicality, it is exceedingly difficult for the courts to resolve lawsuits. In no way are the regulatory tribunals bound by the rules of proof and other procedural laws, and they may take their own realistic view of the situation in order to take judgment on a complicated topic.

- Certain essential prevention steps may also be taken by administrative bodies. Unlike normal courts of justice, disputants do not have to wait for the cases to appear before the tribunal. These prevention steps also tend to be more effective and productive and useful than sentencing an individual after a violation of the law has been committed.

- Administrative bodies should take the appropriate, reliable, and efficient steps to implement any of the precautionary measures alluded to above, such as the removal, termination, demolition of hazardous articles, termination of licenses, etc., which are usually carried out by normal courts.

IV. ADMINISTRATIVE TRIBUNALS IN MODERN STATE

The government took a couple of centuries to introduce the Administrative Tribunals Bill before parliament after article 323A was enshrined into the Constitution by the 42nd Constitution Amendment Act, 1976. Although highlighting the need for timely dismissal of litigation, the declaration of subjects and reasons specifically acknowledges that a substantial majority of instances pertaining to 294 service matters are pending before different courts.[5] Ever since the Supreme Court has in different cases, affirmed the legitimacy of this clause, as it has in Section 6 of the Administrative Tribunals Act, 1985, concerning the selection of an administrative representative as Chairman under the Act, was struck down by S. P. Sampath Kumar v. Union of India[6]. It has given suggestions for changes to section 6(2) of the Administrative Tribunal Act, in order to distinguish the nominating process of the chairman and representatives of the judiciary. Further changes to guarantee autonomy, neutrality, and reasonableness by calling for meaningful consultation in the selection process have also been proposed.[7]

The court further noted that if the administrative tribunals are institutionally, technically, and also locally similar to the High Courts, they will be constitutional.[8] Thus it implies that a tribunal established by the Statute of the Administration Tribunal has the requisite control as well as a jurisdiction to litigate any disputes pertaining to service problems.

As specified in section 3(e) of the Act, a tribunal under the Administrative Tribunals Law stipulates a Central Administrative Tribunal or a State Administrative Tribunal, or a Joint Administrative Tribunal. In accordance with subsection 4 of the Act, the Central Administrative Tribunal was created, with impact from November 1985, by the Central Govt. With regard to the notice, one main bench was formed along with six subsequent benches with

[5]Para 3 of statement of objects and reason, Gazette of India Extraordinary Part ii Section 2 dated 25.1.1985.
[6]AIR 1987, SC 386 (395).
[7]K.I.Bibhuti, 'Administrative Tribunals and High Courts: A plea for judicial review', Journal of. Indian Law Institute, 1987 Vol. 30 (1) p 106.
[8]Ram Sankar Choubey v. Union of India, (1987) 3 ATC 389.

impact from January 1986 that expanded to a total of sixteen in 1996. Through virtue of provisions 14(1), 15(1), and 16, of the Administrative Tribunal Act vests in the Administrative Tribunals all authority relating to service issues of the normal civil courts, and also the High Courts. Section 14(1) sets down the litigation of all the terms of operation of the employees of the central govt. In issues such as pensions, such powers range from keeping a position from selection to resignation and even beyond.[9]

V. PROGRESS OF TRIBUNALS IN INDIA

In India, the factors for the emergence of administrative tribunals can be explained simply:

1. The ineptitude of the conventional judiciary in order to efficiently resolve issues relevant to government, particularly in the case of technical details.
2. It has been stated that the conventional judiciary is sluggish, inefficient, and unnecessarily bureaucratic. The Commission has proposed that autonomous tribunals be formed in the following areas:

   a) Service issues including employee disputes within the state; and

   b) Commands of evaluation for judgment through for Customs, Central Excise, Income Tax as well as directives under the Motor Vehicles Act.

As per Seervai, "the development of administrative law in a welfare state has made administrative tribunals a necessity".[10] Administrative bodies are entities outside the conventional legal system, where acts of the government sector are contested in formal trials by courts or other existing means, to interpret and enforce laws.

Neither a judge nor an administrative body is tribunals. They are rather, a combination of both. Tribunals are judicial in the context that without

[9] Ibid.
[10] H. M. SEERWAI, CONSTITUTIONAL LAW OF INDIA (1968ed.).

contemplating executive action, they have to determine facts and enforce them unbiasedly.

They are administrative and administrative considerations are the factors for preferring them to the regular courtrooms. In *Jaswant Sugar Mills v. Lakshmi Chand*[11], the Supreme Court has set out the following features or measures to decide whether or not a tribunal is an authoritative figure:

1. legislation or procedural law must be used to obtain the authority of enforcement action.
2. It must have the accoutrements of a court and therefore have the right to call witnesses, impose oaths, force testimony to be created, etc.
3. Tribunals aren't constrained by rigid evidence laws.
4. They are to lawfully conduct their duties autonomously of administrative policies and enforce the rules and settle conflicts.
5. Tribunals should be autonomous and free from any political intervention in the execution of their judicial duties.

VI. FORMS OF ADMINISTRATIVE TRIBUNALS

There are over 75 forms of tribunals as well as Administrative Tribunals used very often than the other administrative tribunals are used. Almost all administrative tribunals are formed by legislation and are responsible for the regulation of social and welfare benefits. There are various types of administrative tribunals regulated by the laws, legislation, and regulations of both the federal government and the state government bodies.

1. **Central Administrative Tribunal (CAT)**

   This tribunal generally consists of a Chairman, a Vice-Chairman, and members who are appointed from the administrative and judicial platforms. The CAT's decision is being appealed to the Supreme Court of India.

[11]AIR 1963 SC 677 at 687.

2. **Customs and Excise Revenue Appellate Tribunal (CERAT)**

   In 1986, the CERAT Act was passed by Parliament. With regards to customs and excise income, the Tribunal litigates disputes, grievances, or offenses. In the Supreme Court, the appeals of the decisions of the CERAT lie.

3. **Election Commission (EC)**

   The Election Commission is a tribunal adjudicating questions relating to the distribution to factions of elections logos and other related issues. In the Supreme Court, the judgments of the commission can be contested.

4. **Foreign Exchange Regulation Appellate Board (FERAB)**

   Underneath the Foreign Exchange Regulation Act, 1973, the Foreign Exchange Regulation Appeal Board was established. An application can be brought before the FERAB by a party distressed by a decision of adjudication for inducing violation or performing offenses under the Act.

5. **Income Tax Appellate Tribunal**

   Underneath the Income Tax Act, 1961, the tribunal was created. It has its seats in different cities and complaints against the order issued by the Deputy Commissioner or Commissioner or Chief Commissioner or Director of Income Tax may be lodged before it by disputing parties. The High Court has an appeal against the judgment of this Panel. If the High Court finds fit, an appeal lies to the Supreme Court as well.

6. **Railway Rates Tribunal**

   Underneath the Indian Railways Act, 1989, this Tribunal was established to resolve disputes on matters relating to representations against the railway administration. These may be linked to the railway administration's unequal or arbitrary pricing, excessive fees, or special care granted to individuals. The Supreme Court lies in the appeal against the decision of the Tribunal.

7. **Industrial Tribunal**

The Tribunal was established under the Industrial Disputes Act, 1947. It discusses the conflicts among workers and staff in matters relating to salary, payment periods and procedures, benefits and other privileges, working hours, gratuity, reduction, and closing of the institution. The challenge against the Tribunal's ruling falls before the Supreme Court.

VII. THE ROLE OF THE TRIBUNAL

In India, tribunals were established to alleviate the burden of the court system, facilitate judgments, and have a forum composed of both lawyers as well as professionals in the fields underneath the tribunal's authority.[12]

Administrative tribunals have been established by statute primarily to resolve:

1. Conflicts between a private individual and an agency of the Federal Government, such as state welfare compensation lawsuits, etc.
2. Conflicts requiring professional experience or skills to be applied, such as the determination of reimbursement after mandatory property purchase; and
3. Such cases are deemed inappropriate for the court system by their existence or number, such as the setting of a just rent for property or citizenship appeal.

VIII. BENEFITS OF TRIBUNALS

The administrative tribunals' principal benefits are:

1. Versatility

Unlike normal courtrooms, administrative court action, not limited by formal codes of procedure and muskets of evidence, can stay in sync with the different stages of economic and social life. Versatility and manageability of judicial as well as regulatory tribunals have thus been brought on by administrative adjudication.

[12]M.P. JAIN AND S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW, VOL.I, 713 (6th edn. 2007).

2. Appropriate Fairness

Administrative tribunals aren't the most convenient means of administrative procedure in today's constantly developing world, but also the most reliable means of providing people equal justice.

3. Less Price

In most situations, procedural adjudication involves no stamp payments. The methods are cheap and easily understood by any person. Administrative justice, therefore, guarantees cheap and swift justice.

Support for the Judiciary

As the very aim of the tribunals was to enhance the efficiency of the judiciary, the scheme provides normal courtrooms with much-needed relaxation, which is still overloaded with everyday lawsuits.

IX. Disadvantages of Tribunals

Some of the key disadvantages suffered by the framework or the risks it presents to a representative political system are:

1. With their different rules and processes sometimes created by them, administrative tribunals set a severe cap on the revered concepts of the Legal system.
2. In several instances, administrative tribunals don't have fixed rules, and often even the standards of procedural fairness are abused.
3. Summary hearings are mostly conducted by disciplinary tribunals, and they do not obey any rulings. Simply put, the direction of decision-making purposes cannot be expected.
4. Administrative courts are comprised of administrators as well as technical chiefs, some of who do not have legal backgrounds or qualifications in the area of judicial practice. Any of them do not hold a judge's critical perspective.
5. In administrative adjudication, a standardized rule of practice is not enforced.

X. ADMINISTRATIVE TRIBUNALS UNDER INDIAN CONSTITUTION

The modern state has moved from the Laissez-faire state and the police state to a democratic state. The development and enhancement of administrative tribunals in a modern state is an essential part of a democratic state.

Usually, matters pertaining to the powers of the government and rights of the individuals are not always purely legal in nature which could not easily be resolved through courts. The need was felt to develop a different kind of mechanism to deal with such socio-economic problems and thus Administrative Tribunals were formed in India. It not only decreases the burden on the High Courts but also is specialized to deal in certain matters and leads to speedy disposal of cases as such.

The Administrative Tribunals in India were formed to overcome the delay in the justice delivery system or what is known as *"Lex dilationes semper exhorret"* which means "Law abhors delay" in Latin.

The 42nd Amendment Act was inserted in the Constitution of India in Articles 323A and 323B.

While the Indian Constitution does not define Administrative Tribunals there are basic tests for a Tribunal within Articles 227 and 136 of the Constitution which can be stated below:

It has to be an adjudicatory authority other than what is referred to as Courts and has to perform quasi-judicial functions as distinguished from purely executive or administrative systems. The power of such a Tribunal is to be derived from a statute or a statutory rule. It is not based on an agreement that may exist between the parties. It is not mandatorily bound by the strict rules like rules of evidence like the Courts but has powers that resemble the powers of the Court for instance the power of issuing summons or compelling production of documents.

The discretion invested in the Tribunals has to be exercised by applying the judicial mind and principles of natural justice. The existence of such Tribunals has to be independent of the interference of the Administrative or Executive

bodies. They are established to deal with specific matters. It has to comply and regard the order as given by the High Court and cannot give an order against the ruling of the High Court.

"Article 323A(1) gives the power to the Parliament to provide for the establishment of Administrative Tribunals for adjudication or trial of disputes and complaints relating to recruitment and conditions of services provided to the persons who are appointed in the public services and posts which have a connection with the affairs of Union or any State or any local or other authority within the territory of India or under the control of the Government of India or any corporation owned or controlled by the Government."[13]

Article 323A (2) states that any law that may be made under the sub-clause 1 of this section has to provide for the establishment of separate tribunals for the Union and a particular State or 2 or more states; The jurisdiction, powers, and authority which may be exercised by each of the tribunals so formed has to be specified; The procedure which is to be followed by the tribunals including rules of evidence and periods of limitation; The procedure which is to be followed by the tribunals including rules of evidence and periods of limitation; The jurisdiction of all the Courts is to be excluded except for the jurisdiction of the Honorable Supreme Court under Article 136 of the Constitution which gives discretion to the Supreme Court to grant special leave to appeal against orders or judgments or decrees as passed by the Courts or Tribunals within the territory of India.

The pending cases have to be transferred from the Court to the newly established Tribunals which are created for specific purposes under the Constitution immediately before the Tribunals are so created keeping in mind the jurisdiction of the tribunal. The Tribunal shall have the power to repeal or amend the order passed by the President concerning the formation of the Administrative Tribunal for the State of Andhra Pradesh.

The Parliament may by any amendment or modification make rules for speedy disposal of cases and increasing the efficiency of the administrative Tribunals so formed.

[13]Article 323A

The water disputes of interstate rivers or valleys have to be resolved by the Tribunals created under Article 262(2) of the Constitution. Further, disputes between the States are resolved are to be resolved by the Council created under Article 263 (1) of the Constitution.

Further under Article 323B, the concerned legislature can form an administrative tribunal for the resolution of several matters such as levy, foreign exchange, industrial and lab disputes, land reforms, ceiling or urban property, import and export elections to both House of Parliament or House of Legislature of the State, production, and supply of the foodstuff or the essential commodities, assessment and tax.

In *Bharat Bank Ltd. v. Employees*[14], the Supreme Court categorically noted that though the functions of Tribunals are in some way or the other judicial, they cannot be regarded as equivalent to Courts, and they discharge quasi-judicial functions only.

In *Durga Shankar Mehtha v. Raghuraj Singh*[15], the Supreme Court interpreted the meaning of the word 'Tribunal' as used under Article 136 (Appeal to Special Leave) and stated that Tribunal does not mean any court but means any adjudicating body which discharges quasi-judicial functions which are not related to administrative or executive functions of the government.

In *Associated Cement Companies Ltd. v. P.N. Sharma*[16], the Supreme Court distinguished between the functions of the Tribunal as an adjudicating body deciding disputes between the parties from the purely executive or administrative functions of the other bodies.

XI. ADMINISTRATIVE TRIBUNALS ACT, 1985

The Administrative Tribunals Act, 1985 was passed by the Legislature in accordance with Article 323A of the Constitution. This recognizes 3 types of Tribunals: CAT (Central Administrative Tribunal), SAT (State Administrative Tribunal), and JAT (Joint Administrative Tribunal). Joint Administrative

[14]1950 AIR SC 188
[15]1954 AIR SC 520
[16]1965 AIR SC 1595

Tribunal can be formed for 2 or more states and an agreement between the 2 states forms such tribunal and decides the name for the same, the place where the Tribunal shall sit and expenditure connected with the same, and any other incidental or supplemental provisions.

The Tribunal consists of both Administrative and Judicial Members. The Tribunal shall contain a Chairman and both Administrative and judicial members the number of which will be determined by the Central Government from time to time and will also have the power to transfer the members from one Tribunal to another. The Chairman can discharge either the judicial functions or administrative functions of not only that Tribunal but also other Tribunals. The Act also addresses the Chairman's and Members' qualifications. One of the most fundamental requirements for the Chairman is that he should be or have been a High court Judge in the past. The Government shall appoint both kinds of members and the chairman of such Tribunal after consultation with the Chief justice of India and the President. In the case of the members of the State Tribunals, the President has to consult with the Governor of that particular State or States.

The Administrative Member should have been appointed to the post of the Secretary to the Central or State government for 2 years or any post in the Central or State Government that has the same pay scale as the Secretary to the Central or State Government or if not the above two, then should have held a post of Additional Secretary to the Government for a minimum of five years or any post under both Central or State Government which has the same scale of pay not less than that of Additional Secretary to both the Governments for a minimum period of five years.

The Judicial Member has to be qualified to be a Judge of a High Court or should have held the post of a Secretary in a Legislative Department of the Government like Department of Legal Affairs or Law Commission of India or held such post as an Additional Secretary in the Departments mentioned above for 5 years.

The Act also discusses the term of office of the Chairman and the members.

The Chairman is to hold office for five years from the date on which he enters office. But if before such expiry of the term of five years if he attains the age of 68 years then the term will come to an end on the day he turns 68.

Any Member is also entitled to hold office for five years from the date on which he enters the office, which can be further extended for one more term of five years. But if before such expiry of the term of five years if he attains the age of 65 years then the term will come to an end on the day he turns 65.

The conditions of the appointment of the members will correspond to that of the Judge of the High Court. The Chairman or any Member can be removed by an order made only by the President and only on the grounds of proven misbehavior or incapacity after an inquiry is done by a Judge of the Supreme Court. Such Chairman or member shall be aware of the allegations against him/her and shall be afforded a fair opportunity to be heard with respect to the allegations made against him/her.

XII. PRINCIPLES OF NATURAL JUSTICE AND ADMINISTRATIVE TRIBUNALS

The recommendations of the Franks Committee which were then framing recommendations for England were accepted in India. The fundamental objectives as laid down were openness, fairness, and impartiality. The decisions have to be objective rather than subjective. Hence, the Tribunals are required to follow the Principles of Natural Justice.

In cases like *Dhakeshwari Cotton Mills v. CIT*[17] and *State of U.P. v. Mohd Nooh*[18] where the Tribunal failed to disclose the evidence to the other party and the prosecutor was the adjudicating officer respectively, were held to be against the Principles of Natural Justice and were set aside.

Reasons for decisions are also to be recorded by the Tribunal as it is important in a welfare state that the Trust in Adjudicating authorities is maintained. This view was expressed by Justice Subba Rao in *M.P. Industries Ltd. v. Union of India.*[19]

[17]AIR 1955 SC 65
[18]AIR 1958 SC 86
[19] AIR 1966 SC 671

The Supreme Court in *Union of India v T.R. Varma*[20] have reiterated that Administrative Tribunals are expected to observe the Principles of Natural Justice while adjudicating the cases.

XIII. RULES OF PROCEDURE AND EVIDENCE

Though Tribunals are not bound by fixed rules of procedure and can make their procedure but procedure under CPC is followed for the summoning of witnesses and sending notices. But they are bound to observe procedures of fair play and Natural justice.[21] The Supreme Court cautioned in *Bareilly Electricity Supply Co. Ltd. v Workmen*[22] that because the Tribunals can govern their procedure that does not mean that they are not required to take evidence or do not have to test the admissibility of evidence.

XIV. FINALITY OF ORDER GIVEN BY THE TRIBUNAL

Even if the order is Final as delivered by the Tribunal, it does not automatically bar any other Civil Court to try the case. Section 9 under The Code states that a civil suit of any nature can be tried by the Civil Courts and thus, there is a remedy against the improper orders of the Tribunals. This position has been reiterated by the Supreme Court in *Seth Radha Kishan v. Municipal Committee, Ludhiana.*[23]

Justice Hidyatullah categorically laid down in *Dhulabhai v. State of M.P.*[24] and laid down the following:

- If the Tribunal specially formed has within its powers given the correct decision, then the jurisdiction of the Civil Court can be excluded.
- If the Statute has an express bar of jurisdiction, sufficiency and adequacy of the scheme of the remedies are to be seen. And where there is no expressive bar, special right or liability has to be examined.

[20] AIR 1957 SC 882
[21] Id.
[22] (1971) 2 SCC 617
[23] AIR 1963 SC 1547
[24] AIR 1969 SC 78

- An application challenging the vires of the Act or the provisions under it cannot be brought under to the Tribunal. Even the High Court cannot delve into such a question.

XV. JUDICIAL REVIEW

The Judicial Review, which is a component of the Constitution's fundamental structure, covers three areas: judicial review of legislative activity, judicial review of judicial decisions, and judicial review of administrative law. The statutory finality of the order of the Tribunals does not oust the jurisdiction of the High Court under Articles 227 and 226 or the Supreme Court under Article 136. If the Tribunal passes any mala fide order or has not observed the Principles of Natural Justice; these become a ground for the High Court or the Supreme Court to interfere. Otherwise, the Courts would be reluctant to intervene in cases where it is only alleged that the Tribunal did not appreciate the evidence correctly or detailed reasons were not provided for the decision.

> The Supreme Court has stated in S. R. Bommai v. Union of India[25] that in "judicial review a court is not concerned with the merits of the decision under review, but with, how the decision had been taken or the order made."

The Supreme Court and the High Court cannot be treated as the courts of appeal for the decisions rendered by the Tribunals.

Because of Article 141 of the Constitution, the Administrative Tribunals are obligated by the judgment of the Supreme Court which also specifies that the law as provided by the Supreme Court is governing in all court systems in the Indian union. In the Tribunals, the judgments of the High Court are enforceable.

XVI. CONCLUSION

One of the compelling reasons behind the creation of the Tribunals was the dismissal of a large number of cases and the pause in the transition of cases to the Courts. As a solution for this, quasi-legal entities were set up to act as a free and specialized venue for the sake of administrative tribunals. In a financially stable fashion, the Tribunals will have expedient punishment. Given, the concept

[25] 1994 AIR 1918

of 'separation of powers that forms some portion of the fundamental framework of the Constitution of India, 1950, the judicial powers served by the Tribunals can be separated from fully administrative or executive capacities. To give power to the Swaran Singh Committee Report (1976) which was given against the judgment or order of the Tribunal, the Administrative Tribunals Act of 1985 was created to allow a faction to pursue the Supreme Court according to Article 136 and restrict the jurisdiction of the High Court according to Articles 226 and 227 of the Constitution. The Choksi Committee (1977) articulated the key to developing High Court Special Tax Benches to handle a large number of unresolved tax cases.

The Law Commission of India has faithfully proposed that the High Courts' right to a legal challenge against a decision of the Tribunal is not only cumbersome, but also expensive and that separate High Courts are likely to interpret the same constitutional structure differently. The Commission made an inexcusable argument in its 215th report (2008) that the High Court's right to judicial review may not be as essential as that of the Supreme Court. In favor of such perceptions, no justification or explanation has been given and no judicial precedent has been set for making such statements. That being said, no such result has ever been communicated by any Court or the Legislature. In truth, such views are in contradiction to the law set out in L. Chandra Kumar (Supra) around the seven Judge Panel.

In previous cases, the Supreme Court had ruled that the Tribunals were alternatives to the High Courts. In this context, the method of selection, qualifications, residence, and other safeguards and rights of persons holding a watch on such courts must be the same as that of judges of the High Court. These individuals must have the absolute freedom needed under the 'law of judicial independence,' which is a basic feature of the Constitution. Furthermore, it should be remembered that because the reinstatement has a direct effect on the sovereignty of the organization, it should be kept out of the official's power. In this way, reinstatement must be the exception, not the primary law, to ensure autonomy.

In several separate cases, on the other side, the Supreme Court concluded that the Tribunals should not be replacements nor substitutes for the High Courts. A man who holds a watch on the Tribunal cannot claim equity or advantages with the Judges of the High Court on a regular scale. Be it as it might, in perfectly plain terms, a seven-judge Bench in *L Chandra Kumar v. Union of India*[26] ruled that the Tribunals were complimentary to High Courts and not their replacements.

The preference of persons should be carried out in an unbiased fashion. Thus, the appointment committee does not have a Representative of the Government of India who is still a party to any trial before the Tribunal. Excluding members appointed from the Bench, the reinstatement of persons is unfounded because it deals with the sovereignty of the judicial system. Moreover, for the explanation that the government is a prosecution in all cases, the participation of government departments in the selection process should be marginal.

The right of judicial review bestowed on the High Courts is the same as that imposed on the High Courts by the Supreme Court and is an integral element of the Constitution and is only dealt with by a constitutional amendment. A portion that deals with all issues relating to the recruitment of persons overseeing the Tribunals and the provision of their service rules may be set up by the Government. As a general rule, the authority of the High Court should not be bypassed by agreeing to pursue the Supreme Court against the order of the Tribunal according to Article 136 on the ground that the said Article does not provide for an appeal which gives the Supreme Court the power to grant leave or not. Moreover, on such agreed conditions set by the Supreme Court every once in a while, the Special Leave Petitions are treated as allowing for complete access to the Supreme Court and removing the jurisdiction of the High Court, similar to a breach of the constitutional right of people to access to justice.

When referring to the requirements for selection, the Commission observed the reality that the existing arrangement is inconsistent with the credentials, terms, and conditions, and longevity of the Chairman, the Vice-Chairman, and the

[26](1995) 1 SCC 400.

various persons, and therefore thought that a reform in the process was required because of the lack of continuity which created a notable concern about the successful functioning of the pr. In Tribunals, technical members should be selected only if a specialist's guidance or advice on a specialized or exceptional viewpoint is necessary. The Tribunal should be supervised by law-skilled persons with legal qualifications and appropriate expertise and proven competence and dignity.

A functional judicial system is a requirement for good governance in a nation that upholds the rule of law. Only a judge who the parties to the dispute have faith and confidence in and who is impartial, and fair may make a decision. Any institutional process or power that opposes judicial scrutiny is damaging to the fundamental structure.

For evoking trust and belief in the litigation people they must have an assurance that the individuals judging the disputes are completely and entirely free from the impact of persuasion from the executive. To guarantee impartiality, it is vital that the person nominated in courts have a judicial and objective attitude and also possess adequate information and knowledge of the law.

JUDICIAL EVALUATION OF AMAZON V. FUTURE CASE: RESOLVING THE DISPUTE SURROUNDING EMERGENCY ARBITRATOR IN INDIA

Shubham Shanu,

Saket*

ABSTRACT

Emergency Arbitrators are appointed to provide interim relief to the parties before the constitution of an Arbitral Tribunal. Although it has found its recognition and enforcement in various countries such as Singapore, Hong Kong and the U.K., it was not evident in India. While the High Courts in various states enforced interim relief in such matters, the question of its applicability was not beyond doubt. Further, its omission from The Arbitration and Conciliation (Amendment) Act, 2015, despite being recommended in the 246th Law Commission Report, created a further conundrum in the legal fraternity.

However, the doubt was conclusively clarified in the case of Amazon v. Future, where the division bench of the Supreme Court held that the order of an Emergency Arbitrator is an interim order under section 17(1) of the Act. This case commentary examines the pertinent issues surrounding the Emergency Arbitrator's order in India, such as its recognition and enforceability, including the role of party autonomy in enforcing Interim orders in India. It also explores the issue regarding the appeal against such order as per the domestic provisions and analyses Section 17(2) of the Act concerning an appeal against the order of the Arbitral Tribunal.

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I. INTRODUCTION

The division bench of Supreme Court ("SC") in the matter of Amazon.com NV Investment Holding L.L.C. ("Amazon/Appellants") v. Future Retail Insurance Ltd. and Ors. ("Future/Respondents")[1] held that the awards rendered by an Emergency Arbitrator ("EA") are valid and enforceable as per Section 17 of the Arbitration and Conciliation Act, 1996 ("Act"). Also, the award rendered by an EA. is not subject to appeal to a court of law as per Section 17(2) of the Act. This is a landmark judgement in light of the issue dealt with in this matter and the consequences that follow this judgement.

II. FACTUAL BACKGROUND

This matter finds its origin with the three agreements between Amazon and Future Coupons Private Ltd. ("FCPL"), a subsidiary of Future group. Amazon pledged to invest 1431 Crore INR in FCPL in consideration of a Negative, Protective Right regarding Future Retail Ltd. ("FRL") with a specific focus on its retail stores. As per the negative rights, FRL was restricted from "transferring/encumbering/ selling/divesting/ disposing of" its assets to some "restricted persons" without the prior consent of Amazon. As per the Shareholders Agreement, one of the restricted people was Mukesh Dhirubhai Ambani Group ("Reliance"). However, FRL did precisely the opposite by agreeing to assimilate FRL with the Reliance and its retail assets[2].

Against this action of FRL, Amazon initiated arbitration proceedings as per the Singapore International Arbitration Centre ("SIAC") Rules, as per which an Emergency Arbitrator was appointed. After getting into the details of the matter, the Emergency Arbitrator gave the interim award in favour of Amazon. When the matter reached before the Delhi HC, a single judge bench declined to grant Injunction against the order of EA even after finding Tortious Interference on the part of Amazon. The matter then reached the Division Bench, which stayed the order given by the Learned Single Judge. Against this order by the Court, an appeal was made to the Supreme Court.

[1] Amazon.com NV Investment Holding LLC v. Future Retail Limited &Ors., (2021) SCC 557 (India).
[2] *Id* at 8.

III. FACTUAL PARTY AUTONOMY: THE GRUNDNORM OF ARBITRAL PROCEEDINGS

Party Autonomy is the "*grundnorm*" of arbitral proceedings. It can be inferred from various provisions of UNCITRAL Model law[3] and the Arbitration Act, such as Section 2(1)(a) of the Act, which provides that arbitration is not exclusive to the one conducted before a Permanent Arbitral Tribunal. Section 2(1)(d) further defines Arbitral Tribunal as the one which is inclusive of one performed by a sole Arbitrator. Section 2(6) provides the parties with the right to determine specific issues, including deciding the institution to govern the Arbitration Proceedings. Section 2(8) of the Act extends the above-stated right to determine the arbitration rules.[4] Lastly, Section 19(2) of the Act provides parties with the right to determine the procedure to be followed by the Tribunal in conducting its proceeding. On an extensive reading of Section 2(1)(a) and (d) with Section 2(6), 2(8) and 19(2), it becomes clear that the Act provides for *Party Autonomy* in deciding rules of the arbitration as well as the procedure to be followed.

The judiciary well recognizes this concept of autonomy. In *Antrix v. Devas*,[5] parties decided that the arbitral proceedings must be governed as per the provisions of the UNCITRAL Model Law. The Supreme Court (herein after 'SC'), in this case, held that when the parties have mutually agreed on the provisions that will govern arbitration proceedings, the same cannot be interfered with under Section 11 of the Act. The observation was based on the case of *Atlas Industries v. Kotak*,[6] where it was held that two Indian parties could choose a foreign seat of arbitration. They have the autonomy to do so. However, the concept of Party Autonomy was most comprehensively espoused in the case of *BALCO v. Kaiser*,[7] where the SC stated that:

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[3] Sunday Fagbemi, *The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?*, 6 J. OFSUST.DEV, LAW& POL, Issue 1, (2015).
[4] Arbitration and Conciliation Act, 1996 (India), s.2.
[5] Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd., (2014) 11 SCC 560 (India).
[6] M/s Atlas Export Industries v. M/s Kotak & Co., (1997) 7 SCC 61 (India).
[7] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2016) 4 SCC 126 (India).

"Party Autonomy being the brooding and guiding spirit in arbitration, the parties are free to agree on application of three different laws governing their entire contract –

(i) Proper Law of Contract

(ii) Proper Law of Arbitration Agreement

(iii) Proper Law of the Conduct of Arbitration, i.e. The Curial Law."

Further, in *Centrotrade v. Hindustan Copper Ltd.*[8], the Court emphasised the scope of interpretation in various legal documents. While referring to the contract executed between the parties, the Court held that terms of the contract need to be interpreted in a way parties wanted it to be. The SC later confirmed this in *PASL v. G.E. Power Conversion Ltd.*[9].

Based on these provisions and the judgements cited, the Court recognised the party's autonomy. It made it clear that since both the parties have mutually agreed to be governed as per the provisions of SIAC Rules as mentioned in Section 25 of the FCPL Shareholders Agreement, the provisions of SIAC will govern the Arbitration Proceedings.

IV. EMERGENCY ARBITRATOR: ITS SCOPE AND RELEVANCE

The concept of an Emergency Arbitrator constitutes a methodology by which a party to an arbitration agreement seeks an urgent pro tem or protective measure in furtherance of which an arbitrator is appointed even before the constitution of the Arbitral Tribunal.[10] The idea behind doing so is to preserve the assets at stake from getting destroyed before a proper solution is sought out.[11] The concept of EA was originated in 2006 by "The International Centre for Dispute Resolution" (ICDR).[12] Since then, it has been recognised by numerous

[8] Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd., (2017) 2 SCC 228 (India).

[9] PASL Wind Solution Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd., (2021) SCC OnLine SC 331 (India).

[10] Vardaan Bajaj, *Emergency Arbitrators and the Issue Surrounding Enforcement of their Award: An Indian Perspective*, 1 I SCC J-30 (2020).

[11] See, Lye Kah Cheong, Yeo Chaun Tat and William Miller Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules, (2011) 23 SAcLJ 93.

[12] Vivekananda N., *The SIAC Emergency Arbitrator Experience*, SINGAPORE INTERN. ARB. CNTR. (Feb. 01, 2022, 9:29 PM), https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience.

jurisdictions. For Example: "Article 17H of the 2006 Revised UNCITRAL model law" provides the recognition and enforceability of the emergency arbitrator's order.[13] Singapore in 2012 amended the Section 12 International Arbitration Act to broaden the definition of 'Arbitral Tribunal' to include emergency arbitrator(s).[14] Hong Kong also brought the Arbitration Ordinance in 2013 to include Part 3A, which deals with the enforcement of Emergency Relief.[15] Even U.K. permit the enforcement of Emergency Awards with the judgement of *Gerald Metal SA v. Timis*.[16] The Courts in the US also recognized and enforced the order of E.A. in several cases such as *Yahoo! Inc. v. Microsoft Corporation*, where the New York District Court recognized the award of the EA as final and enforceable.[17]

However, In India, the situation before this judgement was complicated. The 246th Law Commission of India Report suggested adding "Enforcement of Emergency Award" in Section 2(1)(d), thereby recognising the concept of EA by widening the definition of Arbitral Tribunal. This same was, however, not incorporated in the 2015 Amendment Act. An argument can be raised from this action of the legislature they had no intention to recognise or enforce the order of an EA but, the SC with this case nullified the above-stated argument by referring to the judgement of *Avitel v. HSBC*[18] where it was held that

"The *mere fact that a recommendation of a Law Commission was not followed by the Parliament would not necessarily lead to the conclusion that what has been suggested by the Law Commission cannot form part of the statute as properly interpreted.*"

[13]James E Castello and Rami Chahine, *Enforcement of Interim Measures*, GLOBAL ARB. CNTR. (Feb. 01, 2022, 9:40 PM), https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-of-interim-measures#footnote-055-backlink.

[14]Lye Kah Cheong, Yeo Chaun Tat and William Miller, *Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules*, 23 SAcLJ 93 (2011).

[15]Paata Simsive, *Indirect Enforceability of Emergency Arbitrator's Orders*, KLUWER ARB. BLOG (Feb. 01, 2022, 11:00 PM), http://arbitrationblog.kluwerarbitration.com/2015/04/15/indirect-enforceability-of-emergency-arbitrators-orders/.

[16] Gerard Metal SA v. Timis, (2016) ECWH 2327 Ch.

[17] Yahoo! Inc. v. Microsoft Corporation, 983 F Supp 2d 310, 319 (SDNY 2013).

[18]Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713.

Further, in *Raffles Design v. Educomp*,[19] the Delhi High Court ("HC") held that an emergency award in an arbitration seated in India is recognisable and enforceable.

The Amendment of the Act in 2015 brought in Section 9(2) and 9(3) along with Section 17(2) to the Act. Section 9(2) and 9(3) was added to give more power to the Arbitral Tribunal to make it at par with the Court, i.e., Section 17(1) at par with Section 9(1). The reason behind the same was two-fold: (i) To decongest the already clogged Court System (ii) Award will be rendered by the Tribunal inefficaciously and without delay. Section 17(2) was added to make an order of the Arbitral Tribunal enforceable and bring the Act in consonance with the provisions of UNCITRAL Model Law.[20]

The Court in the present case held that the order of an EA is a step in the right direction. Not only does it remove the Court's burden, but it also provides relief to the parties so that the loss of assets can be protected. Further, the party autonomy as recognized by this Act and lack of any provision out rightly rejecting an order of EA make it clear that an Order of an EA is similar to an order of Arbitral Tribunal and therefore enforceable as per Section 17(1) of the Act. The parties are bound by it since they mutually agreed to be governed by SIAC institutional rules, which provides for the appointment of an emergency arbitrator.[21]

V. APPEAL AGAINST THE ENFORCEMENT OF AWARD BY EMERGENCY ARBITRATOR

We need first to understand the provision of Section 9(1) and 17(1) to understand the legislature's intention surrounding an appeal. Both the above-stated provisions have two standard terms, "In relation to" and "any proceedings". The term "in relation to", as stated in the judgement of *Wakf Board v Abdul Azeez*,[22] has both direct as well as indirect relevance, and it

[19]Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd., (2016) 234 DLT 349.
[20]Article 17, 1985 Edition of UNCITRAL Model Law.
[21]See, Singapore International Arbitration Centre Rules, 2013, Rule 26.1.
[22] State Wakf Board, Madras v. Abdul Azeez Sahib, AIR 1968 Mad 79; Bandekar Brothers Pvt. Ltd. v. Prasad Vasudev Keni, SCC OnLine 2020 SC 707.

entirely depends on the context in which it is to be used. However, in the case of *Thyssen v. SAIL*,[23] though the term "in relation" has a broader connotation, such interpretation in the present matter will lead to hardship and confusion, so a restricted use of the term in this relation can be done. Now, coming to the term "any proceeding", the word "any" has been interpreted numerous times in the past by this Court. For Example: - In the matter of *Shri Balaganesan Metals v. M.N.S. Chetty*,[24] it was held that the word "any" has more than one connotation, and it can be used to indicate "all or every as well as some or one" in its meaning in a given statute depending upon the context of the statute. Thus, the expression "in relation to" and "any proceedings" gives the power to enforce the order as per Section 9(1) of the Act. So, order as per Order XXXIX Rule 2-A, in the enforcement of an order made under Section 9, would also be referable to Section 9(1) of the Act. However, this will create an anomaly to section 17(1), as it was given the same power as Section 9(1) after the 2015 Amendment Act. Further, it will lead to a situation where the High Courts are clogged with matter surrounding the contempt of the order of the Tribunal. This is where the significance of Section 17(2) of the Act comes into being.

Section 17(2) of the Act creates a "legal fiction" to enforce the interim order of the Arbitral Tribunal given as per Section 17(1). This was the basic idea behind introducing 17(2) with the Amendment in 2015[25]. However, this legal fiction cannot be extended to include an appeal against such interim order. Reference must be made to the judgement of *PS Patheja v. ICDS Ltd.*,[26] where it was held that the award granted as per Section 36 of the Act was not intended to make it a decree for all purposes under all statutes. It was only restricted to the Arbitration Act, 1996. This can be inferred from the term "As If" used in the said provision. As stated in the case of RSIDIC v. DGDC Ltd[27],

"The term as if creates a Legal Fiction, i.e., when a person is deemed to be something, while in reality, he is not that something but for specific purposes, he

[23]Thyssen Stahlunion Gmbh. v. Steel Authority of India Ltd., (1999) 9 SCC 334.
[24]Shri Balaganeshan Metals v. M.N. Shanmugham Chetty, (1987) 2 SCC 707. Lucknow Development Authority v. M.K. Gupta, (1994) 1 SCC 243 (India).
[25]246th Law Commission of India Report, Pg. 51.
[26]Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322 (India).
[27]Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd., (2013) 5 SCC 470 (India).

is required to be treated that something……. a legal fiction must be limited to the purpose for which it was created"

Further, in the matter of *Industries Supplies (P) Ltd. v. UOI* [28], it was held that when a legal fiction is incorporated in a statute, the reasoning behind such incorporation needs to be looked at. A similar view was taken regarding Section 49 of the Act in the matter of *UOI v. Vedanta Ltd.*[29], where it was held that the fiction created by Section 49 is limited to the enforcement of a foreign award.

Hence, there is no confusion that the "legal fiction" created by the Section 17(2) is for the purposes of enforcement of the interim order of the Arbitral Tribunal. To go beyond such interpretation of the section and include an appeal form such order would go against the legislature's clear intention. Therefore, no appeal lies against the interim order of EA as per Section 17(2) of the Act.

VI. CONCLUSION

The SC with this matter laid two issues to rest. First, regarding the recognition of award rendered by an EA and Second, the scope of appeal against such order. Recognizing and enforcing the award by an EA is a Pro- arbitration move that will help India become an attractive destination to apply for arbitration. Also, it will make the legislation surrounding Arbitration in India at par with International Standards. Moreover, it will help the corporations get an interim relief which will prevent more significant damage while the Arbitral Tribunal is constituted. Concerning an appeal from such order, the Court held that appeal from an order of the Tribunal would vitiate the legislature's intention of strengthening the Arbitration Tribunal. Section 17(2) creates a legal fiction that is subject to the provisions of the Act only. To interpret it for any other purposes, including an appeal from the order, will only lead to confusion and hardship.

[28]Industries Supplies (P) Ltd. v. Union of India, (1980) 4 SCC 341 (India).
[29]Union Of India v. Vedanta Ltd., (2020) 10 SCC 1 (India).

AN ANALYSIS OF NAUTILUS V. BIOSIG INSTRUMENTS: NEW STANDARDS SET FOR DEFINITENESS OF PATENT CLAIMS IN THE US

S K Sulok*

ABSTRACT

Uncertainty in determining patent boundaries is an age-old problem, and its impact is huge when it comes to medicines and medical devices in terms of access. The US Supreme Court has finally attempted to bring some clarity on the definiteness of patent claims. The court has laid down that the test to fulfil definiteness requirement is that of 'reasonable certainty'. Though the court has correctly observed that absolute precision of patent boundaries is unattainable, the standard laid down is a vague one. In India, though there is a requirement of precision of claims under the Patent Act its scope is largely unexplored.

I. INTRODUCTION

Today, the patent regime and especially patenting of medicines and medical devices are very crucial as far as health and access to medicines is concerned. Patenting can to a great extent enhance or hamper access be it in terms of its availability or price. As far as patent and patenting of medicines are concerned, drawing of patent boundaries is crucial and it is the correctness of the boundaries that can determine whether the patent regime is able to balance the interest of the innovator and society.

Uncertainty in drawing patent boundaries is thus a major problem even faced by the US patent regime. The significance of patent boundaries owes to the fact that the clearer the boundary is the better a person will be able to assess the scope of the patented invention. It further helps new innovators to correctly ascertain as to what would constitute violation of the existing patents and thus will be able to create new inventions without the fear of being dragged to the court for infringement litigation.

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There is always a conflict between, on one side the interest of patent holder to keep the claims vague and on the other, the interest of public to keep it as precise as possible. Vague claims make the patent broader and will entitle the patent holder to claim monopoly over wider spectrum. The more precise the claims are the narrower will be the scope of the patent.

So there is need for balance between the two. The balance must be sufficient to incentivize the inventors to further invent and also at the same time to keep sufficient public domain free for further inventions to come. As more and more inventions come, maintaining the balance becomes more and more difficult.

Hence, in this context much awaited judgment of *Nautilus v. Biosig*[1], were analyzed wherein the Supreme Court has set a new standard of definiteness of patent claims. The central question in the case was as to the standard of "definiteness" required under section 112 of the Patent Act.[2] The apex court of the United States has altered the standard of the Federal Court. So, one must see as to how far the new standard set by the court will be helpful in maintaining the delicate balance and since the case is concerning patenting of medical equipment it will go a long way in directly impacting the access to medicine and health.

II. CASE ANALYSIS

The patent in issue involves a heart rate monitor used in association with exercise equipment. The patent was issued to Gregory Lekhman in 1994 and was later assigned to Biosig. The issue arose when Nautilus began using the patented technology without license.[3]

The patent described a heart rate monitor enshrined in a hollow cylinder-shaped bar that the user clasps with both his hands, with one placed on the "live" electrode and the other on "common" electrode. Prior heart rate monitors were often inaccurate due to mixing of ECG (Electrocardiograph) signals produced by heart beat and EMG (Electromyogram) signals produced by skeletal muscles

[1]Nautilus, Inc. v. Biosig Instruments, Inc., 572 (U.S. S.Ct. 2014).
[2]U.S Patent Act, 35 U.S.C § 112 (1952)
[3]See pages 3 and 5 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc., 572 (U.S. S.Ct. 2014).

signals. The patented invention measures equalized EMG signals at each hand and then use the circuitry to subtract identical EMG signals from each other and thus filter out the EMG interference.[4]

The claim comprised of, inter alia, a cylinder-shaped bar fitted with a display device, electronic circuitry with a difference amplifier, where each half of the bar consists of a "live" and "common" electrode on another "mounted in a spaced relationship with each other". The question was whether the term "spaced relationship" met the definiteness requirement under Section 112[5] of the US Patent Act.[6]

The infringement suit was filed by Biosig Instruments against Nautilus. Meanwhile, Nautilus challenged the validity of Biosig's patent.[7] Before the District Court Biosig stated that the term "spaced relationship" referred to the distance between the live and common electrode in each electrode pair. Nautilus countered by stating that "spaced relationship" is more than the width of electrode but failed to provide clear indication as to the proper spacing between the electrodes.[8]

District court construed "mounted…..in space relationship with each other" as the association between the common and live electrode on one side of cylinder and same or different relationship on the other side. The District Court, held in favour of Nautilus concluding that the above words did not tell the court precisely as to the spacing between live and common electrode nor supplied any parameters, rendering it "indefinite".[9]

On appeal before Federal Court of Appeal, reversing the observation of the District Court, had applied the principle that a claim is indefinite only when it is

[4]See page 4 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014).
[5]*supra* note 2.
[6]*supra* note 4.
[7]*supra* note 3.
[8] See page 6 of the judgment, *Nautilus, Inc. v. Biosig Instruments, Inc.*,.572 (U.S. S.Ct. 2014).
[9]*Id*. at 8

"not amenable to construction" or "insolubly ambiguous".[10] Federal Court concluded that the claims were "definite" as there were adequate parameters for a person skilled in the art to accurately ascertain the distance between the electrodes. The maximum distance between the electrodes could not be greater than the size of palms of the hand as for the machine to work it was required that both the electrode pairs must independently touch the hands. The minimum distance could not be lesser than the width of the electrodes as this would lead to effectively merging of the electrodes and would in turn render the machine useless as the detection from each electrode is to be independent.[11]

Federal Court further relied on the declaration by Dr. Lekhman[12] and observed that mere requirement to do some experiments in order to ascertain the spacing would not render it "indefinite" and held that there were sufficient parameters so as to pass the test of section 112 of the Patent Act. Thus, the Federal Court, found in favour of Biosig Instruments.[13]

Nautilus appealed to the Supreme Court. There is the only question to be determined was as to the standard of "definiteness" required under section 112 of the Patent Act. Supreme Court observed that the grant of Patent is a property right, so its boundary must be made clear.[14]

The court stated that the parties agree as to several aspects in relation to the "indefiniteness" enquiry under section 112. Firstly, that definiteness is to be evaluated by a person skilled in the Art[15], Secondly, claims are to be read in light of patent specification and prosecution history[16] and thirdly, definiteness is

[10]See page 7 of the judgment. *Nautilus, Inc. v. Biosig Instruments, Inc.*,572 (U.S. S.Ct. 2014).Also,
Datamize, LLC v. Plumtree Software Inc. 417 F.3d 1342, 1347 (Fed. Cir.2005).
[11]*Id.* at 10
[12]*supra* note 3.
[13]*Id*. at 12
[14]See pages 1 and 2 of the judgment. See pages 1 and 2 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572(U.S. S.Ct. 2014)
[15]See page 8 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014). Also, General Electric Co. v. Wabash Appliance Corp., 371 (U.S. C.t.1938).
[16]See pages 8 and 9 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014). Also, United States v. Adams,383 48-49 (U.S. Ct.1966) and Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co. 535 (U.S. Ct. 2002).

to be measured by person skilled in the art at the time when the patent was filed.[17]

However, the parties differ as to how much indefiniteness section 112 tolerates. Nautilus argues that a claim is ambiguous if a reader could reasonably interpret the claim's scope differently or if it does not provide reasonable notice of the scope of claimed invention. Biosig countered by stating that a claim needs to only give reasonable scope of the invention so as to satisfy the "definiteness" requirement. There are sufficient parameters as to the minimum and maximum space between the electrode pairs.[18]

Court observes that there is need for striking of balance, on one hand taking into account the inherent limitation of the language and on the other hand the requirement of the patent claims to afford clear notice of what is claimed, that is, it must afford the public of what is still open to them. Court explained that absolute precision is unattainable as there are inherent limitations in the expression of any language. What the definiteness requirement under section 112 mandates is "clarity".[19] It is interesting to note that court itself admits that uncertainty is inherent in patent claims so is the court trying to say that patent claims are inherently vague and without any clear boundary.

Court observed that "some modicum of uncertainty is the price of ensuring appropriate incentive for innovation".[20] What is the point that the court is trying to make here? Is it that uncertainty or vagueness in patent claims must be tolerated by the legal system and by the public or is it that only if vague claims are allowed innovators or scientists will be encouraged to innovate? The court also has not specified as to the extent of uncertainty to be tolerated so as to ensure sufficient incentive for innovation. The term "some modicum of uncertainty" is too vague.

Court further observed that claims are addressed not to a lawyer or to public generally but to person skilled in the Art.[21] The question arises as to how to

[17] *Id*. at 16
[18] *supra* note 10.
[19] See pages 9 and 11 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014).
[20] *supra* note 16.
[21] *Id*. at 20

determine the 'person skilled in the Art'. The term 'person skilled in the Art' itself is subject of much controversy and so far no clear definition or yardstick to ascertain 'person skilled in the Art' has been satisfactorily developed. It is interesting to note that even when a 'person skilled in the Art' gives his/her opinion, it is the judges who finally apply their mind and render the judgment. So, is it the judge who finally becomes the person skilled in the Art?

There seems to be inconsistency when the court on one side states that patent claims must afford clear notice to the "public" as to the invention claimed and on the other hand that patent claims are directed towards 'person skilled in the Art' and not towards "public".[22] So one doubts as to which section of public is referred to in the former and which section of public is referred to in the later statement? And further, are the claims really to general public or person skilled in the Art or both simultaneously?

Court observed, that patent applicants are tempted to inject ambiguity. So it is the duty of patent drafter to eliminate such ambiguity.[23] This seems to be an impracticable suggestion as will it be really possible for the patent drafter to draft the claims more precisely against the wishes of the inventor or patent applicant.

The standard laid down by the court was "the certainty which the law requires in patents is not greater than is reasonable, having regard to their subject-matter." Thus a patent claim is indefinite if it fails to inform, with reasonable certainty, person skilled in the art about the scope of the invention.[24] Having said it the court here has also indirectly raised questions as to whether the determining of "definiteness" is a question of law or is solely to be determined based on expert opinion.

The Apex Court also observed that the Federal Court's standard can breed confusion in lower courts for they lack precision.[25] The Supreme Court seems to have relied excessively on the 'person skilled in the Art' to determine the

[22]See page10 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014).
[23]*Id*. at 22.
[24]See page 12 of the judgment. Nautilus, Inc. v. Biosig Instruments, Inc.,572 (U.S. S.Ct. 2014)..
[25]*supra* note 19.

'reasonable certainty' according to the facts and circumstances of each case. Asking a "person skilled in the Art" to ascertain "reasonable certainty" would not give the desired result as both the terms are highly variable, and no sufficient parameters have been given by the Court in this regard. By not clarifying the term "reasonable certainty" the Court also has not given any reliable parameter for 'person skilled in the art' to determine as to how much space is to be left for public domain and the exact level of certainty envisaged by the Court.

It is to be noted that the term "reasonable" is the most ambiguous word and setting of the standard has not in any way helped solve the existing uncertainty in the area. So even after the standard set by the Court, the District Court has no reliable guidance to determine the level of "definiteness" section 112 mandates and thus leaves the patent bar at sea without any reliable compass.

III. INDIAN POSITION

Under the Patent Act 1970, section 10(4)(c) of the Act mandates that complete specification must end with claim or claims defining the scope of the invention. Section 25(1)(g) dealing with grounds of opposition states that if the complete specification does not sufficiently and clearly describe the invention it can be a ground of opposition and section 64(1)(h) dealing with revocation of patent also states to the same effect.[26]

Section 58 and 59 dealing with amendment of claims prohibits amendment of claims leading to inclusion of new subject matter or widening the scope of the invention.[27] The 2015 Guidelines[28] also expressly require precision of claims. Thus from the above provisions we can infer that Indian law also mandates sufficient clarity and definiteness of patent claims and the US court's decision can be seen as an opportunity to rethink as to what should be India's stand on the said issue.

[26]The Patents Act, 1970, No. 39, Acts of Parliament, 1970 (India)
[27]*Id*. at 26
[28]Guidelines for Search and Examination of Indian Patent Applications, Indian Patent Office, 2015, https://www.ipindia.gov.in.

IV. CONCLUSION

This case has indirectly raised some fundamental questions as to how to draw patent boundaries. The Court itself has identified that absolute precision is unattainable and hence some uncertainty is inevitable. It seems that the court has given a very vague standard and has not clarified as to the exact level of uncertainty which can be tolerated.

The question arises as from who's perspective must 'reasonable certainty' be looked from; the society's angle or from that of the patent holder? Besides, one must ask the question as to what indication is the court trying to give? Whether to focus on more and more specific/sophisticated invention or on general inventions? Different field of technology requires different standards, for instance the level of inventive standard is different for biotechnology and software? So how can a generalized standard by the court address the issue?

One thing is clear that the new standard of patent claim definiteness will definitely have its effects on the way in which patent claims will be drafted in future. What is now left to be seen is how the lower courts are going to implement the new definiteness standard and its impact on the nature of future claims made. Anyhow, this judgment is going to have far reached impact as far as patenting of medicines and medical devices are concerned and will have a major impact on the access to medicine and health care. As far as India is concerned our patent laws also require claims to be definite and not vague so this judgment will enable us to plan ahead as to the likely issues which may arise in future.

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