ISSN 2249-2232 UGC Approved Journal No. 41080

AMITY LAW REVIEW

(A Peer Reviewed/Refereed Journal)

Volume 13 DECEMBER, 2017

AMITY LAW SCHOOL (DELHI)

Amity Law Review: A Journal of Amity Law School, Delhi

Volume 13 2017

Published and Distributed by
Amity Law School (Delhi)

Amity Law Review is published annually.

ISSN: 2249-2232

Disclaimer:
Views expressed in the Amity Law Review are those of the contributors. The Editors and ALSD do not necessarily subscribe the views expressed by the contributors. The Editors and ALSD disclaim all liability and responsibility for any error or omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:
Editor,
Amity Law Review
Amity Law School (Delhi)
(An Institution of the Ritnand Balved Educational Foundation)
(Affiliated to Guru Gobind Singh Indraprastha University, New Delhi)
F-1 Block, Sector 125, Amity University Campus
Noida-201313 (U.P.) Tel: 0120-4392681
E-mail : alsdelhi@amity.edu Website: www.amity.edu/als

Printed at
K. S. Enterprises
28/8, Street No. 15, 60 Feet Road, Vishwas Nagar,
Shahdara, New Delhi - 110032
Phone : 011-22570110, Mobile : 9810757460
E-mail : k.s.enterprises1957@gmail.com

Amity Law Review

A Journal of Amity Law School, Delhi

ISSN 2249-2232
Volume 13
2017

CONTENTS

ABOUT AMITY LAW SCHOOL

The Amity Law School, Delhi has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges in 2016, the Institution has been ranked no.11 in the INDIA TODAY (THE INDIA TODAY NIELSEN SURVEY), 12 by THE WEEK (HANSA RESEARCH SURVEY), 10 by the OUTLOOK (OUTLOOK GfK-MODE SURVEY) and 11 by THE WEEK (HANSA RESEARCH SURVEY) in 2015.

The Law School has the unique distinction of being the first Law School in Dehi to start a 5-year integrated LL.B. (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legel education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School, is a great philanthropist and a man of extraordinary vision. This vision of his has been translated into practical reality through the establishment of various educational institutions he has set up including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, Chairman, Amity Law Schools.

The School has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL.B. (H) programme and the affiliation has been approved by the Bar Council of India.

The programme seeks to promote multi-disciplinary analysis of the socio-legal problems by designing its course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

AMITY LAW SCHOOL, DELHI

(An Institution of Ritnand Balved Education Foundation, Affiliated to Guru Gobind Singh Indraprastha University, Delhi)

F-1 Block, Amity University Campus, Sector-125, Noida-201313 (Uttar Pradesh) Tel: 01204392681

E-mail : alsdelhi@amity.edu Website: www.amity.edutals

Printed at K. S. Enterprises, Delhi

FREEDOM OF RELIGION IN AUSTRALIA: AN INTRODUCTORY OUTLINE

Paul Babie*

I. Introduction

The freedom of religion and belief constitutes a keystone right essential for its cumulative effect in ensuring protection of the panoply of fundamental rights and freedoms.[1] Put another way, 'for the seeker of religious truth, the answer may be obvious: Religious freedom creates the conditions, the "constitutional space," for investigation and pursuit of truth.'[2] Free exercise of religion itself 'embraces two concepts,— freedom to believe and freedom to act';[3] '[i]t is…because of the close linkage of expression [action] to the inner domain of "thought, conscience and religion", and thereby to the core of human dignity, that freedom of expression is so important in the constellation of constitutional and human rights.'[4] Thus, free exercise of religion, the freedom to believe (the internal forum of conscience) and to act on one's beliefs (the external forum that occurs in the 'public square') lies at the very core of the matrix of fundamental human rights and freedoms recognised and protected in most western liberal systems.

The right to free exercise finds protection both in international human rights instruments and in national constitutions. The Universal Declaration of Human Rights,[5] for instance, provides in Article 18 that:

---

* Professor of Law, School of Law, Adelaide (SLA) Australia. This essay is a revised version of a lecture delivered at the Amity Law School, Amity University, 22 February 2018.

1 A Keith Thompson, 'Freedom of Religion and Freedom of Speech — The United States, Australia and Singapore compared: Freedom of Conscience and Freedom of Speech are Inseparably Connected' in Paul Babie (ed), *Proceedings of the 6th Annual International Conference on Law, Regulations and Public Policy* (LRPP 2017) 18, 18.

2 Brett G Scharffs, 'Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent and Those Hostile to Religion Should Care' (2017) 2 *Brigham Young University Law Review* 957, 957 (footnote omitted).

3 *Cantwell v Connecticut*, 310 US 296, 303-4 (1940).

4 W Cole Durham, Jr, and Brett G Scharffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2010) 165.

5 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('UDHR').

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The International Covenant on Civil and Political Rights,[6] Article 18(1), that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The Canadian Charter of Rights and Freedoms[7] provides in s 2 that:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

And the Constitution of India provides, in s 25, that:

Freedom of conscience and free profession, practice and propagation of religion.—

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

Notice something important about the Indian Constitutional provision: the right of the individual is named and protected within the context, the matrix, of the rights of the community, in the form of public order, morality and health, as well as economic, financial and political and other secular considerations. This recognises, in defining and protecting the individual right, that the interests of the community may sometimes require the restriction, limitation or even abrogation of the individual's

6 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

7 Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms').

right to free exercise. The UDHR, the ICCPR, and the Canadian Charter of Rights and Freedoms achieve the same 'balancing' of the sometimes competing interests of the individual and that of the community. The UDHR, Article 29(2), for instance, establishes that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The ICCPR, Art 18(3), that:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

And the Charter of Rights and Freedoms, in s 1, the very first provision of the Charter, that:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[8]

These limitations provisions, which allow for those bodies charged with adjudicating potential violations of fundamental rights and freedoms, make clear that all rights must be considered as part of a wider matrix of rights which will sometimes, inevitably clash, and therefore require balancing. This will require examining the individual right said to be violated as against the wider interests of the community which claims, through the state, that a restriction, limitation or abrogation is justified for certain reasons in certain circumstances.

In contrast to UNDR, the ICCPR, and the Indian and Canadian Constitutions, however, the First Amendment to the United States Constitution provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

8 Early in the history of the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada established a test for use in applying s 1 to rights violations: *R v Oakes* [1986] 1 SCR 103.

Neither in the text of this amendment, nor anywhere else in the first ten amendments which together form the United States Bill of Rights, does one find a limitation provision similar to that found in the UDHR, the ICCPR, and the Indian and Canadian Constitutions. The American judiciary, however, has, over time, crafted a standard by which to assess limitations which might be placed upon the free exercise clause of the First Amendment.[9] Again, in this judicial creativity, we find a recognition that no right is absolute, always existing within the broader matrix of the full range of fundamental rights and freedoms.

Understanding the importance of the matrix of rights protection which will sometimes require a balance to be struck between protecting an individual's right of free exercise and the wider interests of the community is important background to understanding the protection of free exercise in Australian law. In fact, Australia remains the last western liberal democracy lacking a comprehensive, coherent, national instrument providing for the protection of fundamental rights and freedoms. Rather, unlike the international human rights instruments and national constitutions considered above, each of which, in their own way, provide for comprehensive protection of fundamental human rights and for the balancing of those rights against the wider interests of the community, religious freedom, like all fundamental rights and freedoms in Australia, finds protection only in a piecemeal and ad hoc way.

In this essay, I provide a brief introductory outline of the protection of free exercise in Australian law through the convergence of the Constitution and various pieces of federal (Commonwealth) and state and territory legislation. The essay contains five parts. Part II sets out the protection for religious freedom found in the Australian Constitution and considers the way in which that provision has been interpreted by the Australian judiciary, specifically the High Court (the final appellate court in Australia). It also examines the judicial 'implication' of a freedom of political communication— which encompasses religious speech— found in the Australian Constitution. Parts III and IV briefly examine Commonwealth, state and territory legislation which provides some protection for free exercise for individuals and religious organisations or bodies. Part V concludes.

II. The Constitution

The Australian Constitution received royal assent in 1900 and commenced on 1 January 1901. It contains two possible routes for the protection of free exercise: s

9 *Sherbert v Verner*, 374 US 398 (1963); *City of Cleburne v Cleburne Living Center,* 473 US 432, 439 (1985); See *Hazelwood Sch Dist v Kuhlmeier*, 484 US 260, 273 (1988); *Korematsu v United States*, 323 US 214 (1944). See also Charles J Russo, *The Law of Public Education* (Foundation Press, 9th ed, 2015) 11, and see 9–12.

116 and the implied freedom of political communication. This part considers each in turn.

A. Section 116

Section 116 provides that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Australia is a federal democracy—and it is clear that in its terms, s 116 applies only to the national, federal, or Commonwealth government, and not to the states. Yet, s 116 is found in Chapter V of the Constitution, entitled 'The States'. Why, if it is directed to the Commonwealth government alone is s 116 found in a chapter dealing with the States? The answer lies the reasons for the adoption of s 116 itself, which in turn we find in the story of the Preamble to the Constitution, which reads:

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

The framers of the Australian Constitution considered at length whether the words 'humbly relying on the blessing of Almighty God' ought to be included in the Preamble. Having ultimately decided that they should, the framers turned their attention to the concern that this might confer upon the Commonwealth government the power to legislate in respect of religion, perhaps to establish a state church, or to restrict free exercise, and so forth. For that reason, the framers sought to include a clause which would prohibit the exercise of legislative power in respect of religion. In its early incarnation, the clause was drafted so as to apply to both the Commonwealth and to the states; thus, it was situated in the chapter dealing with the states. Before the Constitution was ultimately adopted, however, the framers had changed the language so as to omit reference to the states in what ultimately became s 116. Yet, its positioning within the Constitution remained the same, within Chapter V, The States. Thus, in the final form of the Constitution which we find today, a guarantee of religious freedom which applies only to the

Commonwealth government resides anomalously in the chapter dealing with the states.[10]

Having ascertained how it came to be included in the final Constitution, we can turn our attention to what it protects. On its face, s 116 seems a robust protection for religious freedom, containing four separate guarantees: against the establishment of a state religion, and prohibiting the imposition of religious observance, of free exercise, and of a religious test for holding an office of the Commonwealth government. Yet the Australian judiciary has restrictively interpreted s 116, greatly reducing the potential for it to provide a strong protection for religious freedom. Before turning to that treatment, however, we must first consider what constitutes 'religion'.

While it dealt with the application of tax exemptions for religious organisations, the High Court decision in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*[11] is generally taken to establish the legal definition of 'religion' for the purposes of applying s 116 of the Constitution. That case presented three different definitions of religion in three separate opinions. The first, and typically taken as being the controlling definition, is found in the opinion of Mason ACJ and Brennan J, who wrote:

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[12]

Justices Wilson and Deane set out five 'indicia' of religion:

(i) That the collection of ideas and practices involved a belief in the supernatural (being something that could not be perceived by the senses);

(ii) That 'the ideas relate to man's nature and place in the universe and his relation to things supernatural';

(iii) That the adherents accept certain ideas as requiring them or encouraging them to observe particular codes of conduct or specific practices having some supernatural significance;

10 For this history, see Paul Babie, 'The Concept of Freedom of Religion in the Australian Constitution: A Study in Legislative-Judicial Cooperative Innovation' [2018] *Quaderni di Diritto e Politica Ecclesiastica* forthcoming.

11 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* ('*Scientology Case*') (1983)154 CLR 120.

12 Ibid 137 (Mason ACJ and Brennan J).

(iv) The adherents themselves form an identifiable group or groups;

(v) The adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.[13]

Justice Murphy provided the broadest definition:

Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or the judiciary to determine what religion is, this poses a threat to religious freedom. Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in".[14]

Establishing that one's beliefs constitute a religion triggers the operation of s 116. But the High Court has turned what appears to be four guarantees of individual rights into a limitation of legislative power. The distinction might esoteric, but it has allowed the High Court to reach a restrictive interpretation of religious freedom in s 116. It might have been different. The Judicial Committee of the Privy Council ('JCPC'), while it remained the final court of appeal for Australia, had suggested that s 116 contained a guarantee of individual rights, wrote in *James v Commonwealth*,[15] that;

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the

13 Ibid 164-77 (Wilson and Deane JJ) as summarised by Mark Darian-Smith, '*Church of the New Faith v Commissioner for Pay-Roll Tax*' (1984) 14 *Melbourne University Law Review* 539, 543.

14 *Scientology Case*, above n 11, 150 (Murphy J).

15 *James v Commonwealth* (1936) 55 CLR 1 (JCPC).

full import of that meaning. It has been said that "in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted" (*British Coal Corporation v. The King*). But that principle may not be helpful, where the section is, as sec. 92 may seem to be, a constitutional guarantee of rights, *analogous to the guarantee of religious freedom in sec. 116*, or of equal right of all residents in all States in sec. 117. The true test must, as always, be the actual language used.[16]

But once the break with the JCPC had been effected between 1968 and 1986, the High Court rejected this approach in *Attorney-General (Vic); Ex rel Black v Commonwealth* (*DOGS Case*),[17] affirming that s 116 'is not, in form, a constitutional guarantee of the rights of individuals…. Section 116…instead takes the form of express restriction upon the exercise of Commonwealth legislative power.[18]

Given that it is a limitation on power, aimed only at the Commonwealth and not at the states, the High Court restrictively interprets s 116. In fact, very little judicial attention has been given s 116 over the course of Australian federation; indeed, the second guarantee, prohibiting the imposition of religious observance, has never been judicially considered.

Of the remaining three guarantees, establishment and a religious test for a Commonwealth office have been considered in one case each. In the case of the former, in the *DOGS Case*, the High Court found that Commonwealth financial support for state religiously affiliated schools did not establish a state religion. Chief Justice Barwick wrote that:

establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth "establishment."[19]

And while asked in to address the issue in *Williams v Commonwealth*,[20] the High Court refused to consider whether Commonwealth funding of school chaplains in state schools constituted the imposition of a religious test for a Commonwealth office

16 Ibid 43-4 (Lord Wright MR) (emphasis added and internal citations omitted).

17 *Attorney-General (Vic); Ex rel Black v Commonwealth* ('*DOGS Case*') (1981) 146 CLR 559.

18 Ibid 605 (Stephen J), 653 (Wilson J).

19 Ibid 582 (Barwick CJ), see also 604 (Gibbs J), 612 (Mason J), and 653 (Wilson J).

20 *Williams v Commonwealth* (2012) 248 CLR 156.

guarantee. As such, we have no judicial guidance as to the interpretation of that component of s 116.

In relative terms, one finds the greatest judicial attention given to the free exercise guarantee; still, that involves only three High Court decisions: *Krygger v Williams*;[21] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*;[22] and *Kruger v Commonwealth*.[23] And one need only consider *Krygger*, for that case established the interpretation of the free exercise guarantee—affirmed by *Jehovah's Witnesses* and *Kruger*. There Griffith CJ wrote that s 116 protects against:

prohibiting the practice of religion – the doing of acts which are done in the practice of religion. To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of [s] 116.[24]

In other words, a legislative or executive act must have as its express purpose the infringement of free exercise so as to run afoul of s 116. The effect of such an act is not enough to violate the free exercise guarantee.

B. Freedom of Political Communication

While arriving at a restrictive interpretation of the guarantees found in s 116, the High Court nonetheless provides some Constitutional protection for free exercise, at least as concerns the internal forum of conscience, as expressed through speech. This protection arises from the implication of a freedom of political communication in the Constitution, recognised by the High Court in *Nationwide News Pty Ltd v Wills*[25] and *Australian Capital Territory v Commonwealth*,[26] as modified by *Lange v Australian Broadcasting Corporation*[27] and *Coleman v Power*.[28] Together, these cases stand for the proposition 'that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth.'[29]

21 *Krygger v Williams* ('*Krygger*') (1912) 15 CLR 366.

22 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* ('*Jehovah's Witnesses*') (1943) 67 CLR 116.

23 *Kruger v Commonwealth* ('*Kruger*') (1997) 190 CLR 1.

24 *Krygger*, above n 21, 369 (Griffith CJ).

25 *Nationwide News Pty Ltd v Wills* (1992) ('*Nationwide News*') 177 CLR 1.

26 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

27 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559-62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted).

28 *Coleman v Power* (2004) 220 CLR 1.

29 *Nationwide News*, above n 25, 72-3 (Deane and Toohey JJ).

The freedom of political communication, however, is not an absolute right. In *McCloy v New South Wales*,[30] the High Court determined that in assessing infringements, a two-stage test applies:

The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may «exercise a free and informed choice as electors». It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.[31]

In *Attorney-General (SA) v Corporation of the City of Adelaide*, the Court found that some "religious" speech may also be characterised as "political" communication for the purposes of the freedom […] Plainly enough, preaching, canvassing, haranguing and the distribution of literature are all activities which may be undertaken in order to communicate to members of the public matters which may be directly or indirectly relevant to politics or government at the Commonwealth level. The class of communication protected by the implied freedom in practical terms is wide.[32]

Thus, political speech includes religious speech.

In sum, the Australian Constitution provides some limited protection for the religious freedom of individuals, through the convergence of s 116, albeit limited through the restrictive interpretation of the High Court, and the implied freedom of political communication. Further protection may be found in Commonwealth, state and territory legislation.

III. Legislative Bills of Rights

Two Australian jurisdictions, the Australian Capital Territory and the state of Victoria, have enacted human rights legislation, which some have referred to as legislative 'bills of rights': in the case of the formers, the Human Rights Act 2004 (ACT), and in that of the latter, the Charter of Human Rights and Responsibilities Act 2006 (Vic).

30 *McCloy v New South Wales* [2015] HCA 34 (7 October 2015), [2] (French CJ, Kiefel, Bell and Keane JJ).

31 Ibid (footnotes and citations omitted).

32 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43-4 (French CJ), see also 73-4 (Crennan and Kiefel JJ).

Both statutes protect religious freedom; the Victorian provision is representative:

Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

While both statutes provide for the protection of individual rights, neither has received significant judicial attention. Indeed, the religious freedom provisions have received no judicial scrutiny whatsoever.[33] As such, these legislative bills of rights provide have been of little use either to individuals or to groups in protecting free exercise.

IV. Anti-Discrimination Legislation

The final recourse for the protection of religious freedom is found in Commonwealth and state and territory anti-discrimination legislation, such as the Racial Discrimination Act 1975 (Cth)[34] in the case of the former, and the Equal Opportunity Act 2010 (Vic)[35] in the case of the latter.

The state and territory anti-discrimination legislation provides for prohibited grounds of discrimination. The Victorian legislation, for instance, provides in s 6 that:

The following are the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 4—

33 See Nicholas Aroney, Joel Harrison, and Paul Babie, 'Religious Freedom Under the Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 120.

34 In addition to this, the Commonwealth has enacted the Age Discrimination Act 2004 (Cth), the Australian Human Rights Commission Act 1986 (Cth), the Disability Discrimination Act 1992 (Cth), and the Sex Discrimination Act 1984 (Cth).

35 Every state and territory has enacted similar legislation: see Discrimination Act 1991 (ACT); Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1996 (NT); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 1984 (WA).

(a) age;

(b) breastfeeding;

(c) employment activity;

(d) gender identity;

(e) disability;

(f) industrial activity;

(g) lawful sexual activity;

(h) marital status;

(i) parental status or status as a carer;

(j) physical features;

(k) political belief or activity;

(l) pregnancy;

(m) race;

(n) religious belief or activity;

(o) sex;

(p) sexual orientation;

(pa) an expunged homosexual conviction;

(q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Such legislation, however, also sets out exceptions to or exemptions from the prohibited grounds of discrimination for religious organisations. Thus, the Victorian legislation provides, in ss 82-84, that:

(1) Nothing in Part 4 applies to—

(a) the ordination or appointment of priests, ministers of religion or members of a religious order; or

(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or

(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

(1) This section applies to a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.

(2) Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution that—

(a) conforms with the doctrines, beliefs or principles of the religion; or

(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

While they afford some protection to individuals, these exemptions apply, though, largely to religious organisations or bodies. The Victorian legislation, in s 81, offers this definition:

"religious body" means— (a) a body established for a religious purpose; or (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

As such, while exemptions or exceptions from the prohibited grounds of discrimination provide some protection for religious freedom, this avails only religious organisations or bodies, and not individuals.

V. Conclusion

Free exercise of religion is the keystone right which, in its cumulative effect, establishes the constitutional space for the protection of the full matrix of human rights protection both in international and in the national constitutional law of many states. In protecting the full matrix of such rights, a balancing of the individual or group right of free exercise is often necessary in order to ensure that the interests of the wider community are also protected. Again, both international law and many national constitutional systems provide for such balancing through either the express provision of a limitations clause within the relevant human rights instrument, or through judicially created standards.

Australia, however, enjoys no national, comprehensive framework or matrix of fundamental human rights protections. Rather, the protection of free exercise, both for the individual and for groups, organisations or bodies occurs through the piecemeal and ad hoc convergence of express provision (s 116) or implication (the freedom of political communication) in the Australian Constitution, and exemptions or exceptions to prohibited grounds of discrimination found in Commonwealth, state and territory legislation.

This approach to protection of free exercise in Australian law is cause for concern, not only those who care about free exercise, but also, because of the importance of that right for the full matrix of fundamental human rights, for all Australians. We do well, then, to remember the sobering words of James Baldwin:

If they take you in the morning, they'll be coming for us at night.[36]

36 James Baldwin, 'An Open Letter to My Sister, Angela Y. Davis' in Angela Y Davis, Ruchell Magee, the Soledad Brothers and Other Political Prisoners (eds), *If They Come in the Morning: Voices of Resistance* (The Third Press, 1971; repr Verso, 2016) 19, 23.

CAN INSIDER TRADING BE COMMITTED WITHOUT TRADING?

Russell Stanley Q. Geronimo*

ABSTRACT

Before a person can be prosecuted and convicted for insider trading, he must first execute the overt act of trading. If no sale of security is consummated, no crime is also consummated. However, through a complex and insidious combination of various financial instruments, one can capture the same amount of gains from insider trading without undertaking an actual trade. Since the crime of insider trading involves buying or selling a security, a more sophisticated insider can circumvent the language of the Securities Regulation Code by replicating the economic equivalent of a sale without consummating a sale as defined by law.

Through the use of financial derivatives in the form of options, swaps, and forwards, an insider who is not a shareholder in a company can obtain economic exposure to changes in the market value or price of shares of stock, without purchasing or obtaining ownership of the shares. The actual stockholder or dealer of security transfers his economic exposure to the insider, but retains all stockholder rights. The insider obtains returns associated with the share of stock by assuming the financial risks inherent in stock ownership, while the person holding the shares of stock is insulated from such risks.

This paper demonstrates how constructive trades circumvent the insider trading law by allowing an insider to obtain economic exposure over a share of stock without obtaining or divesting his title over the stock.

Introduction

Before a person can be prosecuted and convicted for insider trading, he must first execute the overt act of trading.[1] If no sale of security is consummated, no crime is also consummated.[2] However, through a complex and insidious combination of various financial instruments, one can capture the same amount of gains from

* Juris Doctor, University of the Philippines College of Law, Philippines

1 Section 27.1 of the Securities Regulation Code (R.A. No. 8799)

2 Article 6 of the Revised Penal Code (Act No. 3815) states that "[a] felony is consummated when all the elements necessary for its execution and accomplishment are present."

insider trading without undertaking a trade.[3] Since the crime of insider trading involves buying or selling a security, a more sophisticated insider can circumvent the language of the Securities Regulation Code by replicating the economic equivalent of a sale without consummating a sale as defined by law.[4]

Through the use of financial derivatives[5] in the form of options[6], swaps[7], and forwards[8], an insider who is not a shareholder in a company can obtain economic exposure to changes in the market value or price of shares of stock, without purchasing or obtaining ownership of the shares.[9] The actual stockholder or dealer of security transfers his economic exposure to the insider, but retains all stockholder rights.[10] The insider obtains returns associated with the share of stock by assuming the financial risks inherent in stock ownership, while the person holding the shares of stock is insulated from such risks.[11] We shall call this "constructive trade"[12], as opposed to an actual trade.

3 Thel, Steve, *Closing a Loophole: Insider Trading in Standardized Options*, 16 FORDHAM URB. LJ 4 (1987)

4 Wang, W.K., *A Cause of Action for Option Traders Against Insider Option Traders*, 101 HARVARD LAW REVIEW 5, 1056 (1988)

5 Rule 3.1.9 of the 2015 Implementing Rules and Regulation of the Securities Regulation Code states, "Derivative is a financial instrument whose value changes in response to changes in a specified interest rate, security price, commodity price, foreign exchange rate, index of prices or rates, credit rating or credit index, or similar variable or underlying factor. It is settled at a future date"; BSP Circular No. 594 series of 2008 states, "derivative is broadly defined as a financial instrument that primarily derives its value from the performance of an underlying variable."

6 *Sps. Litonjua vs. L&R Corporation* (G.R. No. 130722, March 27, 2000) defines an option as the "choice granted to another for a distinct and separate consideration as to whether or not to purchase a determinate thing at a predetermined fixed price."

7 *BDC Fin. LLC v. Barclays Bank PLC* (2012 NY Slip Op 33758)

8 *Commodity Futures Trading Com'n v. Zelener*, 387 F.3d 624 (7th Cir. 2004)

9 Knoll, M.S., *Put-call Parity and the Law*, 24 CARDOZO L. REV. 61 (2002)

10 Hu, Henry T. C. and Black, Bernard S., *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 SOUTHERN CALIFORNIA LAW REVIEW 811 (2006)

11 There must be no agency, partnership, trust or nominee arrangement between the insider and the stockholder; if such an agreement exists, then the stockholder is either a co-principal or accomplice of the insider, which would put the transaction between the insider and the stockholder within the purview of the insider trading law.

12 A similar concept can be found in U.S. tax regulation, called "constructive sales", involving hedging transactions and offsetting positions, often with the aid of financial derivatives. While no actual transfer of ownership takes place, certain transactions are considered sale under law to prevent abusive tax avoidance and deferral schemes. *See* Paul, W.M., *Constructive Sales Under New Section 1259*, 76 TAX NOTES 1467 (1997).

Economic Interest Without Ownership

The common denominator underlying options, swaps and forwards is their ability to create economic interest without ownership.[13]

A. Options

Through an option contract, a stockholder or dealer agrees to give another party the right, but not the obligation, to purchase shares of stock at a future date and at a fixed price.[14] Upon the arrival of the future date, three scenarios are possible: the price stipulated in the option is higher, lower or equal to the prevailing share price.[15] If the option-holder is an insider, he has unfair advantage in the market because he possesses material non-public information that share prices will considerably increase at a future date.[16] And if indeed share prices increase after the publication of the information, the option-holder *exercises* the option.[17] However, as insider, the option-holder is criminally prohibited from executing a sales contract over the underlying shares.[18] Hence, the option-holder simply agrees to receive from the stockholder an amount representing the difference between the prevailing share price and the fixed price stipulated in the option.[19] The option-holder effectively exacts the amount of profits that he would obtain had he purchased the shares of stock directly from the stockholder or dealer before share prices increased.[20]

B. Swaps

Through a swap contract, one party who holds a security agrees with another party holding another security to exchange the cash flow of their respective securities.[21] Thus, if X holds a bond and Y holds a share of stock, X transfers the yield of the bond to Y, and Y transfers the return on the share of stock to X.[22] In this scenario, X (who is a bondholder) assumes the risk in the fluctuation of share prices over

13 Hu, Henry TC, and Bernard Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 13 JOURNAL OF CORPORATE FINANCE 2, 343 (2007)

14 *Gill v. Easebe Enters. (In re Easebe Enters.)*, 900 F.2d 1417 (9th Cir. 1990)

15 *Supra* note 9.

16 Section 27.1 of the Securities Regulation Code (R.A. No. 8799)

17 *Supra* note 9.

18 Section 27.2 of the Securities Regulation Code (R.A. No. 8799)

19 This is called "cash settlement". *See*, e.g., *Republic National Bank v. Hales*, 75 F. Supp.2d 300, S.D.N.Y. 1999)

20 This is called "synthetic equity". *See,* e.g., *Johnson v. Couturier*, 572 F.3d 1067 (9th Cir. 2009)

21 *See*, e.g., *Korea Life Insurance Co., LTD v. Morgan Guaranty Trust* (269 F. Supp.2d 424, S.D.N.Y. 2003)

22 *See*, e.g., *Corre Opportunities Fund, LP v. Emmis Commc'ns Corp.*, No. 14-1647 (7th Cir. Jul 02, 2015)

time, while Y (who is the stockholder) is insulated from that risk and obtains a fixed return equal to the yield of the bond.[23] Meanwhile, X does not obtain title over the shares of stock and does not divest his ownership of the bond, while Y does not obtain title over the bond and does not divest his ownership of the shares.[24] If X is an insider with respect to the issuer of the shares held by Y, X can execute a constructive trade involving a swap contract to capture gains from insider trading without trading shares of stock.[25]

C. Forwards

Through a forward contract, one party obligates himself to purchase or sell a security at a fixed price to be paid at a fixed future date.[26] While an option gives the holder a right, without the corresponding obligation, to buy or sell underlying shares of stock, a forward contract obligates the parties to buy or sell in the future.[27] Upon the arrival of the stipulated future date, the parties are compelled to enter into a sale.[28] However, if one of the parties is an insider with respect to the issuer of the underlying shares in the forward contract, they settle their obligations by having the seller pay the prevailing price of the shares, instead of delivering the actual shares of stock to the buyer. And since the buyer is obligated to pay the stipulated price in the forward contract, the seller will just pay the difference between the prevailing share price and the stipulated price, under the principle of legal compensation.[29] The buyer does not acquire title over the shares, but he effectively obtains economic exposure to the movements in the price of the shares.[30]

Our purpose in this article is to demonstrate how constructive trades circumvent the insider trading law by allowing an insider to obtain economic exposure over a share of stock without obtaining or divesting his title over the stock.[31] We shall demonstrate this through a specific scheme of constructive trade that uses a loan agreement coupled with two option contracts.

23 *Supra* note 9.

24 *Supra* note 13.

25 *Supra* note 10.

26 *See*, e.g., *Grain Land Coop v. Kar Kim Farms, Inc.,* 199 F.3d 983 (8th Cir. 1999)

27 *Abrams v. Oppenheimer Government Securities, Inc.*, 589 F. Supp. 4 (N.D. Ill. 1983)

28 *Id.*

29 This is an example of a cash-settled forward contract. *See*, e.g., *Levion v. Generale*, 822 F.Supp.2d 390 (S.D.N.Y. 2011)

30 *See*, generally, *Caiola v. Citibank, N.A.*, 295 F.3d 312 (2d Cir. 2002)

31 *See*, e.g., *Frank Lyon Company v. United States* (435 U.S. 561, 1978)

Existing Insider Trading Regulation

Let us say that during a board meeting at the start of the first quarter of the current year, the CEO of ABC Mining Corporation reported the discovery of a mining lode that can double the earnings of the company for the next 5 to 10 years.[32] X is a non-holder of ABC shares. Z, a member of the Board of Directors, discloses the "tip" exclusively to X, but the information is not scheduled for public announcement until next year.[33]

Insiders are either primary or secondary.[34] A primary insider has actual knowledge of material non-public information by virtue of his position of power or importance in the issuer corporation.[35] On the other hand, a secondary insider is a person who does not hold such position or who is not formally affiliated with the issuer, but who learns material non-public information from a primary insider.[36] In this illustration, Z is a primary insider and X is a secondary insider, pursuant to Section 3.8 of the Securities Regulation Code (R.A. No. 8799), which includes in the definition of an insider "a director […] or […] a person who learns such information by a communication from any of the foregoing insiders."

The "tip" given by Z to X is material non-public information, pursuant to Section 27.2 of the Securities Regulation Code (R.A. No. 8799), which states that "information is 'material nonpublic' if: (a) It has not been generally disclosed to the public and would likely affect the market price of the security after being disseminated to the public and the lapse of a reasonable time for the market to absorb the information; or (b) would be considered by a reasonable person important under the circumstances in determining his course of action whether to buy, sell or hold a security."

The information is not "generally available" to the public because it has not been disclosed in any form of media except through a report by senior management to the Board of Directors during a board meeting. The Supreme Court in *SEC vs. Interport Resources Corp.*[37] states that information is "generally available" to the public

32 For the relationship between the business model of a mining company and prices of mining stocks, *see* Poskitt, R., *Are Mining-Exploration Stocks More Prone to Informed Trading Than Mining-production Stocks?*, 30 Australian Journal of Management 2, 201 (2005)

33 Presentation of earning prospects by the corporation to the public is usually conducted through annual earnings announcements. *See* Beaver, W.H., *The Information Content of Annual Earnings Announcements*, Journal of Accounting Research 67 (1968).

34 Section 3.8 of the Securities Regulation Code (R.A. No. 8799)

35 *Id.*

36 *Id.*

37 G.R. No. 135808, October 06, 2008

if "found in a newspaper, a specialized magazine, or any cyberspace media" or "made known to the public through any form of media."

The information is "material" because a public announcement is likely to increase share prices, and that a reasonable person would consider the projected income stream of the corporation as a factor in deciding whether to buy or sell ABC shares. Again, the Court in *SEC vs. Interport Resources Corp.* states, "A discussion of the 'materiality concept' would be relevant to both a material fact which would affect the market price of a security to a significant extent and/or a fact which a reasonable person would consider in determining his or her cause of action with regard to the shares of stock."

Possession of material non-public information prohibits X from purchasing, and Z from selling, ABC shares before public disclosure of the material information, pursuant to Section 27.1 of the Securities Regulation Code (R.A. No. 8799), which states:

It shall be unlawful for an insider to sell or buy a security of the issuer, while in possession of material information with respect to the issuer or the security that is not generally available to the public[.]

There are two modes of committing insider trading. First, where the insider is already an existing holder of a share of stock or security, the insider averts losses by selling the security, expecting price to drop after publication or announcement of the material information.[38] Second, where the insider is not a holder of the share or security, the insider makes a gain by buying the share or security, expecting price to increase after publication or announcement.[39] These prohibited overt acts in Section 27.1 are illustrated as follows:

It is not necessary to realize the gains in order to consummate insider trading. It is enough that the insider buys or sells the security of the issuer while in possession of material non-public information.[40]

38 Section 27.1 of the Securities Regulation Code (R.A. No. 8799)

39 Section 27.1 of the Securities Regulation Code (R.A. No. 8799)

40 Profit is not an element of insider trading under Section 27.1, R.A. No. 8799.

The insider who is a seller transfers ownership of shares of stock and delivers certificates of stock to the buyer.[41] The buyer pays the selling price based on market value and the insider averts the imminent loss on the price of the shares.[42] On the other hand, the insider who is a buyer obtains ownership and possession of the shares of stock, and pays the selling price, also based on current market value.[43] The insider obtains unrealized gains from the price increase, and he needs to sell, transfer, exchange or dispose the purchased shares in order to realize those gains.[44]

Insider Trading Without Trading

Now assume that the indicative price increase of ABC shares after public announcement is from ₱100 to ₱150 per share, for a gain of 50%.[45] If there were no insider trading law, X would exploit the information by buying 1 million ABC shares at the current price of ₱100 per share, and by selling the same number of shares at the increased price of ₱150 per share after public disclosure of material information.[46] The hypothetical transaction is summarized as follows:

	Per Share (₱)	**Total (₱)**
Selling Price (after announcement)	150	150,000,000
Less: Acquisition Cost (before announcement)	100	100,000,000
Gain from Insider Trading	50	50,000,000

As insider, X does not want to incur criminal liability for trading ABC shares.[47] Nevertheless, he wants to profit from the expected increase in share price without executing an actual trade.[48] Suppose that, being a sophisticated investor, X knows how to combine financial instruments in such a way that he can capture or mimic the gains in a share of stock without trading that stock.[49]

41 Observe, however, the concept of "scripless" securities in the trading of publicly listed securities (*San Miguel Corp. vs. Corporation Finance Department*, SEC *En Banc* Case No. 10-10-219, 09 December 2010)

42 The insider is "bearish". (*U.S. v. Heron*, 525 F. Supp.2d 729, E.D. Pa. 2007)

43 The insider is "bullish". (*State v. Plummer*, 117 N.H. 320, N.H. 1977)

44 For realization of unrealized gains, *see*, e.g., *S.R.G. Corp. v. Department of Revenue*, 365 So.2d 687 (Fla. 1978)

45 For the effect of announcement of discovery of mining lode in price of mining stocks, *see*, e.g., *SEC v. Texas Gulf Sulphur*, 312 F. Supp. 77 (S.D.N.Y. 1970)

46 *Supra* note 43.

47 *Supra* note 1.

48 Arnold, T., Erwin, G.R., Nail, L.A. and Bos, T., *Speculation or Insider Trading: Informed Trading in Options Markets Preceding Tender Offer Announcements* (2000), available at SSRN 234797.

49 Lin, J.C. and Howe, J.S., *Insider Trading in the OTC Market*, 45 THE JOURNAL OF FINANCE 4, 1273 (1990)

Assume that the current date, which is before the announcement, is 04 January 2015, and that the date of the announcement is 04 January 2016. Next, we will add a third party named Y, which is a hedge fund, broker, financial institution or dealer in securities.[50] The constructive trade is executed between X and Y through the following contracts, with their respective terms and stipulations:

1. A loan agreement[51] extended by X to Y, with a principal amount equal to what the original acquisition would be if X purchased the ABC shares;

2. An option to buy[52] the ABC shares, giving X the right, but not the obligation, to purchase ABC shares, with strike price equal to the full amount of the loan at maturity (i.e. principal and interest) and with exercise date on or after the date of publication or announcement of the material information; and

3. An option to sell[53] ABC shares, giving Y the right, but not the obligation, to sell ABC shares, with strike price equal to the full amount of the loan at maturity (i.e. principal and interest) and with exercise date on or after the date of publication or announcement of the material information.

We shall discuss each of these instruments in the following sections.

The Loan Agreement

In an actual trade, the insider pays the purchase price to obtain ABC shares from an existing stockholder, who transfers the shares to the insider.[54] In a constructive trade, the insider grants a loan, with a principal amount equal to what the amount of the purchase price would be if the insider executes an actual trade.[55] Through constructive trade, X (the insider) becomes a creditor of Y (the dealer in security who is not an insider). The initial transaction is illustrated as follows:

50 For the participation of hedge funds and dealers in securities in the transfer of risk-return profile of securities without actual transfer of ownership, *see* Hu, H.T. and Black, B., *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 13 JOURNAL OF CORPORATE FINANCE 2, 343 (2007)

51 Schlunk, H.J., *Little Boxes: Can Optimal Commodity Tax Methodology Save the Debt-Equity Distinction*, 80 TEX. L. REV. 859 (2001)

52 Knoll, M.S., *Financial Innovation, Tax Arbitrage, and Retrospective Taxation: The Problem with Passive Government Lending*, 52 TAX L. REV. 199 (1996)

53 Gergen, M.P., *Afterword Apocalypse Not*, 50 TAX L. REV. 833 (1994)

54 Such would be covered by a Stock Purchase Agreement (*Romago Electric Co. vs. CA*, G.R. No. 125947, June 08, 2000)

55 The loan represents any debt instrument. In finance, the traditional instrument is a zero-coupon bond. A loan with zero interest replicates the economic characteristic of a zero-coupon bond. (Bossu, S., *Put–Call Parity*, ENCYCLOPEDIA OF QUANTITATIVE FINANCE (2010))

On 04 January 2015, the current share price is ₱100 per share, so that a block of 1 million ABC shares is equivalent to ₱100 million. Instead of buying 1 million ABC shares (which would fall within the purview of insider trading), X lends a sum of money to Y. The sum of money represents the principal amount of ₱100 million, which is equal to the current purchase price of 1 million ABC shares at ₱100 per share. X and Y also stipulate that the interest on the loan is 5%.

The Option to Buy

After the loan, X and Y execute an option contract over the ABC shares. The Supreme Court in *Eulogio vs. Sps. Apeles*[56] defines an option as "a contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former's property at a fixed price within a certain time."

More formally, an option contract has the following elements:

(1) Underlying asset[57]

(2) The right, but not the obligation, to buy the underlying asset[58]

(3) Strike price[59]

(4) Exercise date[60]

(5) Option style[61]

The underlying asset consists of 1 million ABC shares. The option has two parties: the owner[62] of property and the holder of the option. The option-holder is the party given the right, but not the obligation, to buy the property.[63] In this case, Y is the owner and X is the option-holder. Since the option involves a right to buy, it is a call option.[64]

56 G.R. No. 167884, January 20, 2009

57 *Ruppert v. Alliant Energy Cash Balance Pension Plan*, 08-cv-127-bbc. (W.D. Wis. Dec 29, 2010)

58 *Deutschman v. Beneficial Corp.*, 668 F. Supp. 358 (D. Del. 1987)

59 Ross, S.A., *Options and Efficiency*, THE QUARTERLY JOURNAL OF ECONOMICS 75 (1976)

60 *Steele v. Northup*, 259 Iowa 443 (Iowa 1966)

61 *Hollingshad v. Deutsche Bank AG*, Civil Action No. 3:05-CV-2235-L., N.D. Tex. Oct 03, 2006

62 In actual commercial practice, a party to an option giving the option-holder a right to buy the underlying asset does not even have to be the owner at the time of execution of the option contract. *See*, e.g., *People v. Daman*, C069199 (Cal. Ct. App. Feb 25, 2013).

63 *Deutschman v. Beneficial Corp.*, 841 F.2d 502 (3d Cir. 1988)

64 *Moskowitz v. Lopp*, 128 F.R.D. 624 (E.D. Pa. 1989)

The strike price is the fixed future price at which the option-holder would buy the underlying asset should he decide to exercise the option.[65] The exercise date is the date when the option-holder can decide to avail of his right to buy the underlying asset.[66] If the exercise date lapses and the option-holder failed to exercise the option, the option contract expires.[67]

The option style refers to the period during which the option-holder can exercise the option.[68] The style can be European or American. Under the European style, the holder can only exercise the option at (and not before) the agreed exercise date. Under the American style, the holder can exercise the option any time before and at the agreed exercise date.[69]

For the purpose of our illustration, let the strike price be ₱105 per share, or a total of ₱105 million. Let the exercise date be at 04 January 2016, which is the date of the announcement. Finally, let the call option between X and Y be a European-style option, i.e. capable of being exercised only upon the arrival of 04 January 2016. To summarize, the parameters of the call option are as follows:

Option-Holder	X
Owner of Underlying Asset	Y
Underlying Asset	1 million ABC shares
Style	European
Strike Price	₱105 per share, for a total of ₱105 million
Exercise Date	04 January 2016

It is essential that the strike price of the call option must be equivalent to the full amount of the loan at maturity, i.e. the principal amount *plus* the amount of interest.[70]

Before we move to the next step, we must clarify the legal nature of the call option contract between X and Y. Since the call option gave X the right to buy the ABC

65 *Wasserman v. Triad Securities Corp.*, Case No. 8:05-cv-1898-T-24TBM. (M.D. Fla. Jun 12, 2006)

66 *Allaire Corp. v. Okumus*, 433 F.3d 248 (2d Cir. 2006)

67 *Lerner v. Millenco, L.P.*, 23 F. Supp.2d 337 (S.D.N.Y. 1998)

68 For examples of different option styles, *see*, e.g., *New Millennium Trading, LLC v. Commisioner*, 131 T.C. 275 (T.C. 2008)

69 There are other styles aside from American and European. *See*, e.g., *Thomas Investment Partners, LTD v. U.S.* (Nos. 09-55638, 09-55639, 09-55641, 09-55642, 09-55650., 9th Cir. Jul 20, 2011)

70 *Supra* note 9.

shares, the question is whether X had engaged in "trading". Is the execution of a call option contract, *even before the exercise of the option by X*, considered a "purchase" of the underlying asset, for which X would be liable for insider trading?

Execution of Option Contract

The overt act of insider trading is explicitly defined in Section 27.1 of the Securities Regulation Code (R.A. No. 8799), which states that "[i]t shall be unlawful for an insider to sell or buy a security of the issuer[.]" The Supreme Court in *Eulogio vs. Sps. Apeles*[71], however, states that "[a]n option is not of itself a purchase, but merely secures the privilege to buy. It is not a sale of property but a sale of the right to purchase." Moreover, the Supreme Court in *Sps. Litonjua vs. L&R Corp.*[72] states, "Observe, however, that the option is not the contract of sale itself."

A contract of sale has three stages: negotiation, perfection and consummation. The Supreme Court in *Manila Metal Container Co. vs. PNB*[73] states:

[T]he stages of a contract of sale are as follows: (1) *negotiation*, covering the period from the time the prospective contracting parties indicate interest in the contract to the time the contract is perfected; (2) *perfection*, which takes place upon the concurrence of the essential elements of the sale which are the meeting of the minds of the parties as to the object of the contract and upon the price; and (3) *consummation*, which begins when the parties perform their respective undertakings under the contract of sale, culminating in the extinguishment thereof.

Prior to the exercise[74] *of the option*, the sale of the shares of stock was not yet perfected. In order for a sale to be perfected, there must be a meeting between offer and acceptance, pursuant to Article 1319 of the New Civil Code, which states that "[c]onsent is manifested by the meeting of the offer and the acceptance upon the thing and the cause which are to constitute the contract. The offer must be certain and the acceptance absolute. A qualified acceptance constitutes a counter-offer."

In the mere execution[75] of an option contract (i.e. prior to the exercise of the option by the holder), there is still no concurrence of offer and acceptance. The

71 G.R. No. 167884, January 20, 2009

72 G.R. No. 130722, March 27, 2000

73 G.R. No. 166862, December 20, 2006

74 Not to be confused with "execute". Execution entails the creation of the option contract. To exercise the option means that the option-holder decides to avail of his right to buy or sell the underlying asset of the option, within the period or at the time stipulated in the option contract.

75 Not to be confused with "exercise".

Supreme Court in *Adelfa Properties vs. Court of Appeals*[76] states that "[a]n option, as used in the law on sales, is a continuing offer […] It is also sometimes called an 'unaccepted offer.'"

The Supreme Court in *Asuncion vs. CA*[77] states:

The option, however, is an independent contract by itself, and it is to be distinguished from the projected main agreement (subject matter of the option) which is obviously yet to be concluded. If, in fact, the optioner-offeror withdraws the offer before its acceptance (exercise of the option) by the optionee-offeree, the latter may not sue for specific performance on the proposed contract ("object" of the option) since it has failed to reach its own stage of perfection.

Article 1479 of the New Civil Code defines an option contract as a unilateral promise supported by a consideration distinct from the price. It states:

An accepted unilateral promise to buy or to sell a determinate thing for a price certain is binding upon the promissor if the promise is supported by a consideration distinct from the price.

The Supreme Court in *Eulogio vs. Sps. Apeles*[78] distinguishes between the sale of an asset, on the one hand, and the sale of the right to buy the underlying asset, on the other. The Court provides:

He does not sell his land; he does not then agree to sell it; but he does sell something, *i.e.,* the right or privilege to buy at the election or option of the other party. Its distinguishing characteristic is that it imposes no binding obligation on the person holding the option, aside from the consideration for the offer.

Is the sale of the right or privilege to buy a stock considered trading the stock? A strict construction of Section 27.1 of the Securities Regulation Code shows that this is not covered by the prohibition on insider trading. The provision states that "[i]t shall be unlawful for an insider to sell or buy a security of the issuer[.]" The purchase of a security is not equivalent to the purchase of a right to purchase the security. Although Section 3.1 of the Securities Regulation Code states that "securities" include options, Section 27.1 of the the same Code states that insider trading involves the selling or buying of the security "of the issuer", and the option contract in this case is not issued by ABC Inc. It is a private contract between X and Y. Accordingly, execution of an option contract does not constitute "trading" under Section 27.1.

76 G.R. No. 111238, January 25, 1995

77 G.R. No. 109125, December 02, 1994

78 G.R. No. 167884, January 20, 2009

So far, X and Y executed two agreements: a loan contract and a call option contract. The next step is the execution of another option, whereby X gives Y the right, but not the obligation, to sell 1 million ABC shares to X.

The Option to Sell

The Supreme Court in *Limson vs. Court of Appeals*[79] states that an option contract may also give to the owner of the property "the right to sell or demand a sale". This type of option contract is called a "put option", and is the opposite of a "call option".[80]

Under a call option, the option-holder has the right, but not the obligation, to buy the property. Under a put option, the owner (who is the option-holder) has the right, but not the obligation, to sell the property to a non-owner.[81]

Under a call option, the owner has the unconditional obligation to sell the property the moment the option-holder exercises his option to buy. Under a put option, the non-owner has the unconditional obligation to buy the property the moment the owner (who is the option-holder) exercises his option to sell.[82]

The put option gives Y the right, but not the obligation, to sell 1 million ABC shares to X on 04 January 2016 at a strike price of ₱105 per share, or a total of ₱150 million. It has the following parameters:

Option-Holder	Y
Counterparty	X
Underlying asset	1 million ABC shares
Option style	European
Strike price (₱)	₱105 per share, for a total of ₱105 million
Exercise date	04 January 2016

The strike price of the put option must be equivalent to the strike price of the call option, which in turn is equivalent to the principal amount of the loan *plus* interest.[83]

79 G.R. No. 135929, April 20, 2001

80 *Gentile v. Rossette*, C.A. No. 20213 (Del. Ch. May 28, 2010)

81 *Madison International Liquidity Fund, LLC v. Al. Neyer*, Case No. C-1-08-305. (S.D. Ohio Jul 17, 2009)

82 *Anserphone of New Orleans, Inc. v. Protocol Comm.*, Civil Action No. 01-3740, Section "A" (1) (E.D. La. Dec 05, 2002)

83 *Supra* note 9.

The following is a summary of the equivalent values:

$$Beginning\ Share\ Price = Principal\ Amount\ of\ Loan$$

$$Strike\ Price\ of\ Call\ Option = Strike\ Price\ of\ Put\ Option = Principal\ Amount\ of\ Loan + Interest$$

In the example, the share price as of 04 January 2015 (the beginning date) is ₱100 million, which is equal to the principal amount of the loan. And the strike price of each option is equal to ₱105 million, which is equal to the loan principal amount of ₱100 million and the interest of ₱5 million upon maturity.

Aside from the equality of strike prices, the call and put option must have the same underlying asset (1 million ABC shares), the same exercise date (04 January 2016), and the same style (European). Moreover, the exercise date of either option must also be the same as the date of maturity of the loan. These relationships of equality are essential to the constructive trading scheme of X, to be discussed in the following sections.

Exercising the Option

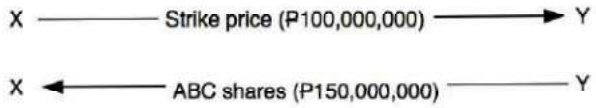
Now assume that on 04 January 2016, upon public disclosure of the material information, there is an instantaneous reaction in the financial markets and the price of ABC shares accordingly adjusts to the news.[84] Three scenarios can occur: (1) the new share price is higher than the strike price of either option, (2) lower than the strike price, or (3) equivalent to the strike price.

If the unrealized gain is ₱50 per share, the new share price is ₱150 per share, computed as follows:

	Per Share (₱)	**Total (₱)**
Share Price (04 January 2015)	100	100,000,000.00
Less: Unrealized Gain	50	50,000,000.00
Share Price (04 January 2016)	150	150,000,000.00

Since the new share price of ₱150 per share is higher than the strike price of ₱105 per share, X exercises the call option, for a profit of ₱45 per share in favor of X equivalent to the difference between the new share price and the strike price. X has an obligation to pay the strike price and Y has the obligation to deliver the shares. This is illustrated as follows:

84 For the relationship between stock prices and news, *see* McQueen, G. and Roley, V.V., *Stock Prices, News, and Business Conditions*, 6 REVIEW OF FINANCIAL STUDIES 3, 683 (1993)



What is the legal implication of exercising the option contract? Will it not constitute "trading" for purposes of the insider trading law?

Legal Implication of Exercising the Option

Under the law on sales, the perfection of a sale is different from its consummation.[85] Exercising the option constitutes the perfection of the sale, but delivery of the object of sale constitutes the consummation. Therefore, strictly speaking, the act of exercising the option can be made without a subsequent delivery of the shares from Y (seller) to X (buyer), and it is possible to perfect the sale without consummating it later on.

We shall elaborate this by recalling the three stages of a contract. The Supreme Court in *C.F. Sharp & Co. Inc. vs. Pioneer Insurance & Surety Corp.*[86] states:

[C]ontracts undergo three distinct stages, to wit: negotiation; perfection or birth; and consummation. Negotiation begins from the time the prospective contracting parties manifest their interest in the contract and ends at the moment of agreement of the parties. Perfection or birth of the contract takes place when the parties agree upon the essential elements of the contract. Consummation occurs when the parties fulfill or perform the terms agreed upon in the contract, culminating in the extinguishment thereof.

This is illustrated as follows:

	Stages of Sale		
	Negotiation	**Perfection**	**Consummation**
Acts of the Parties	X and Y execute the option contract	X exercises the option contract	X pays the strike price of ₱105 million, and Y delivers the shares of stock valued at ₱150 million
Juridical Nature of the Acts	Y extends a unilateral promise to sell[87]; an unaccepted offer[88]	X and Y have a bilateral promise to buy and sell; meeting of offer and acceptance[89]	X and Y perform their respective obligations[90]

85 *Sps. Serrano and Herrera vs. Caguiat*, G.R. No. 139173, February 28, 2007

86 G.R. No. 179469, February 15, 2012

87 Article 1479 of the New Civil Code

88 *Reyes vs. CA*, G.R. No. 94214, December 01, 1992

89 *Sps. Litonjua vs. L&R Corp.,* G.R. No. 130722, March 27, 2000

90 *Far East Bank and Trust Company vs. PDIC*, G.R. No. 172983, July 22, 2015

The execution of the option contract constitutes the negotiation stage, pursuant to Article 1479 of the New Civil Code, which defines the option contract as a unilateral promise to sell. The Supreme Court in *Atkins, Kroll & Co., Inc. vs. Cua Hian Tek*[91] also states that "[a]fter accepting the promise and before he exercises his option, the holder of the option is not bound to buy. He is free either to buy or not to buy later."

Exercising the option contract constitutes the perfection stage. At this point, X has accepted the unilateral promise of Y. The meeting of offer and acceptance yields to the bilateral promise to buy and sell. The Supreme Court in *Sps. Litonjua vs. L&R Corp.*[92] states that "[o]nce the option is exercised timely, i.e., the offer is accepted before a breach of the option, a bilateral promise to sell and to buy ensues and both parties are then reciprocally bound to comply with their respective undertakings."

In other words, at the perfection stage, there already exists a contract of sale. The Supreme Court in *Atkins, Kroll & Co., Inc. vs. Cua Hian Tek*[93] states that "upon accepting herein petitioner's offer[,] a bilateral promise to sell and to buy ensued, and the respondent *ipso facto* assumed the obligations of a purchaser." This is supported by the Concurring Opinion in *Sanchez vs. Rigos*[94], stating that "[i[f […] acceptance is made before a withdrawal, it constitutes a binding contract of sale. The concurrence of both acts – the offer and the acceptance – could in such event generate a contract."

Finally, the performance of the respective obligations of X and Y constitutes the consummation stage of the sale. The obligation of X is to pay the strike price, and the obligation of Y is to deliver the shares of stock. The Supreme Court in *Far East Bank and Trust Company vs. PDIC*[95] states that "[t]he consummation stage begins when the parties perform their respective undertakings under the contract, culminating in its extinguishment."

And what are their respective undertakings? Article 1458 of the New Civil Code states that "[b]y the contract of sale one of the contracting parties obligates himself to transfer the ownership and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent." The Supreme Court in *ACE Goods, Inc. vs. Micro Pacific Technologies*[96] states that "[t]he very essence of a contract of sale is the transfer of ownership in exchange for a price paid or promised."

91 G. R. No. L-9871, January 31, 1958
92 G.R. No. 130722, March 27, 2000
93 G.R. No. L-9871, January 31, 1958
94 G.R. No. L-25494, June 14, 1972
95 G.R. No. 172983, July 22, 2015
96 G.R. No. 200602, December 11, 2013

With respect to the transfer of ownership of shares of stock, the Supreme Court in *Fil-Estate Golf and Development, Inc. vs. Vertex Sales and Trading, Inc.*[97] states that "[in a] sale of shares of stock, physical delivery of a stock certificate is one of the essential requisites for the transfer of ownership of the stocks purchased." Section 63 of the Corporation Code provides:

Shares of stock so issued are personal property and may be transferred by delivery of the certificate or certificates indorsed by the owner or his attorney-in-fact or other person legally authorized to make the transfer. No transfer, however, shall be valid, except as between the parties, until the transfer is recorded in the books of the corporation showing the names of the parties to the transaction, the date of the transfer, the number of the certificate or certificates and the number of shares transferred.

If X exercises the call option, the act perfects the contract of sale over the shares of stock, and X and Y are now bound by a bilateral promise to buy and sell.[98] However, X and Y are prohibited from consummating their respective obligations—i.e. X is prohibited from paying the strike price to Y, while Y is prohibited from delivering the shares of stock to X.[99] If X acquires title over the shares, he consummates the proscribed activity of insider trading.[100]

How to Settle the Option Without Transfer of Shares

There are two ways to settle an option contract: physical delivery of shares or cash netting arrangement.[101] Physical delivery of shares requires the transfer of the shares of stock in the name of the buyer.[102] Cash netting arrangement, on the other hand, is a mode of settlement whereby the seller, who promised to deliver the shares to the buyer, will instead pay the fair market value of the said shares.[103] Since the fair market value is paid through a sum of money, the parties offset the strike price with the payment representing the shares' fair market value, so that the seller will only pay the difference between the fair market value and the strike price if the fair market value is higher.[104] On the other hand, the buyer will pay the difference to the seller if the strike price is higher than the fair market value.[105]

97 G.R. No. 202079, June 10, 2013
98 *Sps. Litonjua vs. L&R Corp.,* G.R. No. 130722, March 27, 2000
99 Section 27.1, R.A. No. 8799
100 Section 2, R.A. No. 8799
101 Feder, N.M., *Deconstructing Over-the-Counter Derivatives*, COLUM. BUS. L. REV. 677 (2002)
102 *Morris v. Kaiser*, 292 Ala. 650 (Ala. 1974)
103 *Republic National Bank v. Hales*, 75 F. Supp.2d 300 (S.D.N.Y. 1999)
104 *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 14-CV-7126 (JMF) (S.D.N.Y. Mar 28, 2016)
105 *Id.*

In order to realize the profit of ₱45 million without transferring ownership over the shares in the name of X, the parties settle through a cash netting arrangement.[106] Since physical delivery of shares effects a transfer of ownership over the shares of stock,[107] X and Y can only settle the option through a cash netting arrangement, which entails an objective novation coupled with legal compensation.[108]

Upon the exercise of the call option by X, both parties now have the following set of rights and obligations under the loan contract and call option contract:

Parties	**Loan**	**Call Option upon exercise by X**	
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Obligation to pay ABC shares at strike price of ₱105 million	Right to receive ABC shares at new share price of ₱150 million
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Right to receive strike price of ₱105 million	Obligation to deliver ABC shares at new share price of ₱150 million

Instead of transferring title over ABC shares,[109] which would consummate a "trade", X and Y agree to settle the call option by delivering the monetary equivalent of the ABC shares. This is in the nature of a novation.[100] Hence, we modify the table above, as follows:

Parties	**Loan**	**Call Option upon exercise by X**	
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Obligation to pay ABC shares at strike price of ₱105 million	Right to receive the monetary equivalent of ABC shares at new share price of ₱150 million
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Right to receive strike price of ₱105 million	Obligation to deliver the monetary equivalent of ABC shares at new share price of ₱150 million

106 Corbi, A., *Netting and Offsetting: Reporting derivatives under US GAAP and under IFRS*, International Swaps and Derivatives Association (ISDA), New York, USA (2012)

107 Section 63 of the Corporation Code

108 Article 1278 of the New Civil Code

109 Section 63 of the Corporation Code

110 Article 1291 of the New Civil Code

This is sanctioned by Article 1291 of the New Civil Code, which states that "[o]bligations may be modified by […] [c]hanging their object or principal conditions." The object of the call option is the right to purchase 1 million ABC shares. This was modified, under the concept of objective novation, by extinguishing "the right to purchase ABC shares" and introducing a new one, "the right to receive the monetary equivalent of ABC shares"; and by extinguishing "the obligation to deliver ABC shares" and introducing a new one, "the obligation to deliver the monetary equivalent of ABC shares".

The Supreme Court in *Ajax Marketing & Dev't Corp. vs. CA*[111] states:

Novation is the extinguishment of an obligation by the substitution or change of the obligation by a subsequent one which extinguishes or modifies the first […] Novation, unlike other modes of extinction of obligations, is a juridical act with a dual function, namely, it extinguishes an obligation and creates a new one in lieu of the old. It can be objective, subjective, or mixed. Objective novation occurs when there is a change of the object or principal conditions of an existing obligation[.]

With the novation, X and Y have become mutual debtors and creditors under the call option, pursuant to Article 1278 of the New Civil Code, which states that "[c]ompensation shall take place when two persons, in their own right, are creditors and debtors of each other." Article 1279 of the New Civil Code provides the requisites for legal compensation:

In order that compensation may be proper, it is necessary:

1. That each one of the obligors be bound principally, and that he be at the same time a principal creditor of the other;
2. That both debts consist in a sum of money, or if the things due are consumable, they be of the same kind, and also of the same quality if the latter has been stated;
3. That the two debts be due;
4. That they be liquidated and demandable;
5. That over neither of them there be any retention or controversy, commenced by third persons and communicated in due time to the debtor.

Legal compensation, as a mode of extinguishing an obligation, takes place by operation of law.[112] This modifies the table of rights and obligations between X and Y, as follows:

111 G.R. No. 118585, September 14, 1995

112 *UBP vs. DBP*, G.R. No. 191555, January 20, 2014

Parties	Loan	Call Option upon exercise by X after setoff
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Right to receive ₱45 million[113]
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Obligation to pay ₱45 million[114]

Based on the table, Y has a total obligation of ₱150 million, representing his obligation under the loan contract *plus* his obligation under the call option. Hence, Y pays the amount to extinguish both obligations. In doing so, he may or may not dispose the ABC shares in the market. If he disposes the ABC shares, he obtains ₱150 million as proceeds of sale in 04 January 2016, which is exactly what he needs to extinguish his total obligation to X. But if he does not dispose the ABC shares, he retains title to the ABC shares at the new market value of ₱150 million, and can pay his obligation at the same amount to X using his remaining cash. Whether or not Y disposes the ABC shares is a matter of indifference to X.

X has a positive payoff from the call option at ₱45 per share (the difference between the monetary equivalent of the new share price and the strike price). In addition, we must add to this positive payoff the amount he receives as full payment for the loan extended to Y. His economic position is as follows:

113 The difference between the right of X to receive ₱150 million and an obligation to pay the strike price of ₱105 million

114 The difference between the obligation of Y to pay ₱150 million and a right to receive the strike price of ₱105 million.

	Per Share (₱)	Total (₱)
	1	
Monetary Equivalent of ABC Shares (04	5	150,000,00
January 2016)	0	0.00
	1	
	0	100,000,00
Less: Strike Price	5	0.00
	4	45,000,000.
Payoff from Call Option	5	00
		105,000,00
Add: Loan Receivable		0.00
		150,000,00
Total Amount Entitled (04 January 2016)		0.00

X's entitlement to ₱150 million represents the following: (1) repayment of the principal amount of the loan extended to Y, which is ₱100 million; (2) interest income on the loan, which is ₱5 million; and (3) gain resulting from economic exposure to the price of ABC shares, which is ₱45 million. Note that ₱150 million is exactly the total value of ABC shares in his portfolio if he purchased it from the market, in violation of the insider trading law.

Y, on the other hand, has zero net position (i.e. he neither gains nor loses any amount), computed as follows:

Strike Price	105	105,000,000.00
Less: Monetary Equivalent of FMV of ABC Shares (04 January 2016)	150	150,000,000.00
Negative Payoff from Call Option	(45)	(45,000,000.00)
Add: New Share Price (04 January 2016)	150	150,000,000.00
Gross Position	105	105,000,000.00
Less: Loan Repayment		105,000,000.00
Net Position		0.00

This illustrates the transfer of economic exposure to the price of ABC shares from Y to X. Ownership of ABC shares was not transferred to X, but he benefited from the increase in the stock price of ABC shares. And even though Y retained the stock ownership, he did not benefit from the increase in the stock price of ABC shares.

Under an ordinary buy-and-sell transaction, which is criminally prohibited in this context if executed by X, the latter would have made the same gain, as follows:

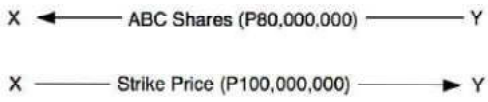
	Per Share (₱)	Total (₱)
Selling Price (after announcement)	150	150,000,000
Less: Acquisition Cost (before announcement)	100	100,000,000
Gain from Insider Trading	50	50,000,000

Through the combination of loan agreement, option to buy and option to sell the shares of stock, X's financial position in the end mimics, simulates or replicates gains from trading without engaging in an actual trade. There was no consummated sale, exchange, transfer or disposition of ABC shares in any manner.

Suppose, however, that instead of an increase in share price from 04 January 2015 to 04 January 2016, ABC shares dropped in market price. If the unrealized loss is ₱20 per share, the new share price is ₱80 per share, computed as follows:

	Per Share (₱)	Total (₱)
Share Price (04 January 2015)	100	100,000,000.00
Less: Unrealized Loss	20	20,000,000.00
Share Price (04 January 2016)	80	80,000,000.00

Since the new share price of ₱80 per share is lower than the strike price of ₱105 per share, Y exercises the put option in order to protect himself from the decrease in the share price. X has an obligation to pay the strike price and Y has the obligation to deliver the monetary equivalent of the new share price. This is illustrated as follows:



Recall that, in 04 January 2016, both parties have the following set of rights and obligations under the loan contract and put option contract:

* 3rd year, BBA LLB, College of Legal Studies, University of Petroleum and Energy Studies
** 3rd year, BBA LLB, College of Legal Studies, University of Petroleum and Energy Studies
96 Henry Campbell Black, BLACK'S LAW DICTIONARY (4), 519
97 Henry Campbell Black, BLACK'S LAW DICTIONARY (4), 1157
98 Henry Campbell Black, BLACK'S LAW DICTIONARY (4), 458

Parties	Loan	Put Option upon exercise by Y	
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Obligation to pay ABC shares at strike price of ₱105 million	Right to receive ABC shares at new share price of ₱80 million
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Right to receive strike price of ₱105 million	Obligation to deliver ABC shares at new share price of ₱80 million

Instead of transferring the title over ABC shares, X and Y agree to settle the put option by delivering the monetary equivalent of the ABC shares, as follows:

Parties	Loan	Put Option upon exercise by X	
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Obligation to pay ABC shares at strike price of ₱105 million	Right to receive the monetary equivalent of ABC shares at new share price of ₱80 million
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Right to receive strike price of ₱105 million	Obligation to deliver the monetary equivalent of ABC shares at new share price of ₱80 million

With the novation, X and Y have become mutual debtors and creditors under the put option. The Civil Code provision on legal compensation takes place by operation of law, as follows:

Parties	Loan	Put Option upon exercise by X after setoff
X	Right to receive principal amount of ₱100 million, and interest of ₱5 million, for a total of ₱105 million	Obligation to pay ₱25 million
Y	Obligation to repay principal amount of ₱100 million, and to pay interest of ₱5 million, for a total of ₱105 million	Right to receive ₱25 million

With the setoff, X and Y are still mutual debtors and creditors with respect to the loan and the put option. To settle the loan, we offset their obligations, as follows:

Parties	Loan and Put Option after setoff
X	Right to receive ₱80 million
Y	Obligation to pay ₱80 million

The total amount that X is entitled to receive is computed as follows:

	Per Share (₱)	Total (₱)
Monetary Equivalent of ABC Shares (04 January 2016)	80	80,000,000.00
Less: Strike Price	105	105,000,000.00
Payoff from Put Option	(25)	(25,000,000.00)
Add: Loan Receivable		105,000,000.00
Total Amount Entitled (04 January 2016)		80,000,000.00

X's entitlement to ₱80 million represents the following: (1) repayment of the principal amount of the loan extended to Y, which is ₱100 million; (2) interest income on the loan, which is ₱5 million; and (3) loss resulting from economic exposure to ABC shares, which is ₱25 million. The amount of ₱80 million is exactly the total value of ABC shares in his portfolio if he purchased 1 million shares.

Y neither gains nor loses any amount, computed as follows:

	Per Share (₱)	Total (₱)
Strike Price	105	105,000,000.00
Less: Monetary Equivalent of ABC Shares (04 January 2016)	80	80,000,000.00
Payoff from Put Option	25	25,000,000.00
Add: New Share Price of ABC Shares (04 January 2016)	80	80,000,000.00
Gross Position	105	105,000,000.00
Less: Loan Repayment		105,000,000.00
Net Position		0

Now suppose that the new ABC share price is equal to the strike price. The unrealized gain is ₱5 per share, so that the new share price is ₱105 per share, computed as follows:

	Per Share (₱)	**Total (₱)**
Share Price (04 January 2015)	100	100,000,000.00
Less: Unrealized Gain	5	5,000,000.00
Share Price (04 January 2016)	105	105,000,000.00

Since the new share price of ₱105 per share is equal to the strike price of ₱105 per share, neither party exercises his respective option, letting the option to expire. X does not have an obligation to pay the strike price and Y does not have the obligation to deliver the monetary equivalent of the new share price.

Accordingly, X has zero payoff from either option. Nevertheless, he receives the full payment of the loan extended to Y at maturity date. The total entitlement of X is computed as follows:

	Per Share (₱)	Total (₱)
Monetary Equivalent of ABC Shares (04 January 2016)	105	105,000,000.00
Less: Strike Price	105	105,000,000.00
Payoff from Either Option	0	0.00
Add: Loan Receivable		105,000,000.00
Total Amount Entitled (04 January 2016)		105,000,000.00

Y still does not gain or lose anything:

	Per Share (₱)	Total (₱)
Strike Price	105	105,000,000.00
Less: Monetary Equivalent of ABC Shares (04 January 2016)	105	105,000,000.00
Payoff from Either Option	0	0.00
Add: New Share Price (04 January 2016)	105	105,000,000.00
Gross Position	105	105,000,000.00
Less: Loan Repayment	105	105,000,000.00
Net Position	0	0.00

The point of these illustrations is to establish that, through the combination of the loan and the call and put options, X can replicate stock ownership in ABC shares, even though title over the stock did not transfer to him. On the other hand, Y became indifferent to the change in the share price of ABC shares, as if he ceased to be an owner of the stock.

Economic Explanation of Constructive Trading

Without the option contracts, X is simply a creditor to a loan agreement, and Y is a stockholder entitled to residual returns in surplus corporate profits.[115] As creditor and stockholder, they enjoy a set of economic rights provided by default under law,[116] as follows:

	ABC Shares Held by Y	**Loan Agreement Extended by X**
Legal character of security	Equity instrument	Debt instrument
Risk exposure of original investment	Exposure to capital gain or capital loss of ABC shares	Security of principal
Income stream	Variable and non-guaranteed returns	Fixed and guaranteed interest income
Participation rights	Voting and other control rights	No voting and other control rights

With the option contracts, some (but not all) of the economic rights pertaining to their respective financial instruments have been exchanged,[117] as follows:

	ABC Shares Held by Y, coupled with Option Contracts	**Loan Agreement Extended by X, coupled with Option Contracts**
Legal character of security	Equity instrument	Debt instrument
Risk exposure of original investment	Virtual security of principal	Exposure to capital appreciation and capital loss of ABC shares
Income stream	Virtual interest income	Exposure to variable and non-guaranteed returns of ABC shares
Participation rights	Voting and other control rights	No voting and other control rights

115 *Supra* note 9.

116 Pratt, K., *The Debt-Equity Distinction in a Second-best World*, 53 VANDERBILT LAW REVIEW 4, 1055 (2000); Emmerich, A.O., *Hybrid Instruments and the Debt-Equity Distinction in Corporate Taxation*, 52 THE UNIVERSITY OF CHICAGO LAW REVIEW 1, 118 (1985)

117 Hu, H.T. and Black, B., *Debt, Equity and Hybrid Decoupling: Governance and Systemic Risk Implications*, 14 EUROPEAN FINANCIAL MANAGEMENT 4, 663 (2008)

In finance, this scenario can be explained through the put-call parity theorem. The theorem provides that, given a particular time period, the *return* on a share of stock *plus* the *payoff* from an option to sell the share of stock is equivalent to the *return* on a loan agreement *plus* the *payoff* from an option to buy the share of stock. This is expressed as follows:

$$\begin{aligned} &Return\ on\ Shares\ of\ Stock + Payoff\ from\ Option\ to\ Sell \\ &= Return\ on\ Loan\ Agreement \\ &+ Payo\square f\ from\ Option\ to\ Buy \end{aligned}$$

Two features are noteworthy. First, the four terms of the equation speak of "returns" and "payoffs". Second, the left side of the equation involves an equity instrument while the right side involves a debt instrument. Therefore, the theorem describes a situation where holding an equity instrument is economically equivalent to holding a debt instrument, given the proper combination of two option contracts.[118]

For this equation to be true, the following conditions[119] must be satisfied:

1. The strike price of the call option must be equal to the strike price of the put option;
2. The strike price of each option must be equal to the principal of the loan and interest at maturity;
3. The principal of the loan must be equal to the beginning price of the share of stock;
4. The call and put option must have the same underlying asset, which is the share of stock;
5. The call and put options must both be European-style options; and
6. The exercise date of either option must be the same as the maturity date of the loan.

Thus, a party seeking to replicate the economic profile of an equity instrument, *without holding the equity instrument*, can hold a debt instrument, provided these six conditions exist. This is illustrated as follows:

$$\begin{aligned} &Return\ on\ Share\ of\ Stock \\ &= Return\ on\ Loan\ Agreement + Payoff\ from\ Option\ to\ Buy \\ &- Payoff\ from\ Option\ to\ Sell \end{aligned}$$

Similarly, a party seeking to replicate the economic profile of a debt instrument, *without holding the debt instrument*, can hold an equity instrument, given the six conditions. This is illustrated as follows:

118 *Supra* note 9.
119 *Id.*

$$\begin{aligned} &Return\ on\ Loan\ Agreement \\ &\quad = Return\ on\ Share\ of\ Stock + Payoff\ from\ Option\ to\ Sell \\ &\quad - Payoff\ from\ Option\ to\ Buy \end{aligned}$$

These mathematical relationships show that while the law classifies transactions in clear and categorical terms, it is possible to have two transactions with different legal classifications and different regulatory treatments, but have the same economic characteristics. The more calculating trader or investor will always choose the less onerous classification and treatment as a way to evade regulatory restrictions.

Conclusion

Through the proliferation of derivative contracts in the financial system, investors and market players acquire the tools to unbundle economic interest from stock ownership. This has significant ramifications in several areas of regulation, and insider trading is only one area in which derivatives can sidestep the State policy behind these regulations.

In foreign investments law and corporate nationality, for instance, a foreign investor prohibited from purchasing shares of stock in a corporation engaged in a nationalized economic activity, can replicate the economic profile of the shares of stock without acquiring title over the prohibited shares through the same transaction we demonstrated for constructive insider trading. Moreover, in the law on foreign ownership of land, a foreigner can obtain economic exposure in the increased prices of land without owning or buying lands, the ownership of which are reserved to Filipino citizens. In the rules on beneficial ownership in securities regulation, a holder can enjoy the cash flow stream of a security without triggering the acquisition of at least 5% of issued shares of stock in a corporation, and therefore avoiding the beneficial ownership reporting obligation in the Securities Regulation Code. In the capital gains tax system, a taxpayer can cash out or monetize his unrealized gains on a capital asset without triggering a taxable realization event, allowing him to defer capital gains tax liability to another period. In general banking law, a bank that has maximized its equity investment limitation in an allied or non-allied enterprise can still acquire interests that simulate equity investments in said enterprise without acquiring additional shares. In Islamic financing, an Islamic financial institution, which is prohibited by *Shar'ia* from exacting interest income from clients, can simulate interest-like returns on *Shar'ia*-compliant products.

Constructive trading through derivative contracts is a derogation of the State Policy in Section 2 of the Securities Regulation Code, which mandates that "[t]he State shall […] minimize if not totally eliminate insider trading and other fraudulent or manipulative devices and practices which create distortions in the free market." The

Supreme Court in *SEC vs. Interport Resources Corp.*[120] provides guidance on how to construe the insider trading law by stating that "'the broad language of the anti-fraud provisions,' which include the provisions on insider trading, should not be 'circumscribed by fine distinctions and rigid classifications.' The ambit of anti-fraud provisions is necessarily broad so as to embrace the infinite variety of deceptive conduct." And it is submitted that constructive trades belong to the "infinite variety of deceptive conduct" that the insider trading law is meant to regulate.

120 G.R. No. 135808, October 06, 2008

COMPETITION LAW COMPLIANCE STRATEGY: A NEW MINDSET FOR CORPORATES

Dr. Qazi Mohammed Usman*

"It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently." —Warren Buffett

I. Introduction

In the business world, recently the corporates are expected to comply with many laws, rules and regulations for smooth business activities. However, the infringement of such legislations leads them towards many consequences such as heavy penalties from the regulators and the loss of good will in terms of reputation damages& economic loss. So it is important for each enterprise, starting from the large corporates to small must aware of the risks of infringing such laws and must act or develop a suitable compliance strategy for the same. The purpose and objectiveof the competition law was to protect all kinds of business and consumers from the anti-competitive behavior while focusing and encouraging on dynamic free markets, innovation and enhance productivity.[1] At the same time the recent establishment of number of competition authority and adoption of competition law in different jurisdictions is the evidence of importance and relevance of competition law. With this, the corporates are expected to conform to the provisions of competition law and policy, to avoid heavy penalties from the regulators and to save itself from economic loss.[2]

The existence of any corporate stands on two pillars; namely good corporate governance practices that helps corporates to control the internal disciplines & governance in terms of relationships among officers, directors, managements & shareholders, and on the other side the competition compliance that controls all the

* Assistant Professor, Faculty of Law, Jamia Millia Islamia, New Delhi.

1 See the preamble of the Competition Act, 2002. Available at www.cci.gov.in (last visited 15th April, 2017).

2 Only a bunch of developed countries had adopted competition law a few decades ago. However, the recent picture stated that nearly 140 jurisdictions with different legal traditions and levels of economic development have adopted competition law in their domestic legislation from all over the globe. See Mehta, Pradeep S. & Evenett, Simon J. (2006), 'Promoting Competition Around the World: A Diversity of Rationales and Approaches'. In: Mehta P.S. Competition Regimes in the World: A Civil Society Report. CUTS International.

external conduct of the corporate in the market. Thus it is important for the corporates to keep themselves informed, updated and accordingly chalk out their strategy towards the compliance with the different laws and regulations of modern era. The recent competition law demands that all the trades and businesses activities should follow their business activities in accordance with its provisions with more responsibilities and accountabilities. These accountabilities and responsibilities are not only restricted to corporates but also towards itsstaff members such as directors and senior managements etc. This article provides the significance of competition compliance from corporate perspectives.

II. COMPETITION LAW COMPLIANCE: WHY STRATEGY MATTERS?

The main goal of the competition law & policy ensures economic growth and overall welfare by promoting market conditions in which the nature, quality, and price of goods and services are determined by competitive market forces. In addition to that the competition law restricts anti-competitive behavior, ensures full protection to consumers, business and trade in order to liberate customer welfare, dynamic market and enhance productivity & Innovation. But in other side, the non-compliance of competition law by corporates to gain and maximize their profits through adept strategic behavior, face-off in serious consequences, which costs corporate houses in terms of economic and social loss at large. A positive strategy towards compliance has greater benefits than the gain achieved from non-compliance. The competition compliance gives the corporate long-term value in terms of risk of facing anti-competitive enquiry and heavy penalties to it. Thus the compliance statuses are not the obligations for corporates rather it brings up the positive corporate governance image and long-term benefits in the business that helps corporates to achieve it vision and mission.[3]

A. Reasons for Competition Law Compliance

Threat of Financial Loss: The possible threat of financial loss is one of the main reasons of competition law compliance. The recent ordered on huge financial penalties passed by different competition authorities across the globe relating to violation of competition law provisions evident such activities. The violation of competition law at the corporate level or employee level creates a credible threat of penalties such as huge financial penalty that must exceed the expected gain from the violation. In this context, the possibilities of

3 Drivers of Compliance and non-compliance of Competition Law (2010), Office of Fair Trading Report, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf (last visited 20th April, 2017).

financial penalties to corporates and individuals are the reasons of competition law compliance. However, in the individual case, the decision makers in the corporates are responsible for non-compliance of the law and therefore to comply with the legal mandates of the law. Similarly, the possibility of civil and criminal sanctions against the individuals, forced to comply with competition law.[4]

Threat of imprisonment: As mentioned in the above point, criminal sanctions against the individual decision maker is one of such reasons that encourage corporates to properly comply with the competition law. In this context, most of the competition authorities across the globe adopted criminal sanctions against the individual to fight against the hard-core cartel. Therefore, threat of imprisonment/jail sentence for a business-man/employees is beyond imagination for a business tycoon who spends luxurious life. Additionally, the reputational factors of corporates along with business-man/employees self-respect, forced corporates to strategies and adopt competition compliance.[5]

Threat of Damages to Individual and Firm reputation: One of the primary objectives of each corporate is to protect its reputation in the market by owing consumers trust. The same is applicable to the professional Individual, where big business tycoons are very sensitive to maintain their name and fame in the market. Therefore, this is one of the reasons of competition law compliance, where corporates and individuals are very responsible, to comply with the competition law provisions. Because they know that the infringing the competition law, lands them nowhere in the market that not only hampers the reputation of the firm but also results in loss of revenue, customers, consumers, partners, employees, and the destruction of shareholder value.[6]

Effective compliance training programs: The adoption of effective compliance programmes is one of the key reasons of competition law compliance. The corporates understand the importance of competition in competitive market and the reason being corporate strategies, design and train

4 Business Compliance with Competition Rules (2011), Position Paper, Business Europe. Available at http://ec.europa.eu/competition/antitrust/compliance/businesseurope_compliance_en.pdf (last visited 25th April, 2017).

5 Drivers of Compliance and non-compliance of Competition Law (2010), Office of Fair Trading Report, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284405/oft1227.pdf (last visited 25th April, 2017).

6 The impact of competition interventions on compliance and deterrence (2011), Office of Fair Trading Report. Available at http://webarchive.nationalarchives.gov.uk/20140402165036/http:/oft.gov.uk/shared_oft/reports/Evaluating-OFTs-work/oft1391.pdf (last visited 30th April, 2017).

their employees time to time on the competition compliance programmes starting from the top to bottom to avoid any kind of infringement. Thus, these kinds of awareness programmes and strategy ensure the risk associated with competition law violation by staffs and decision makers. Nonetheless, it has been argued that employees inclined to engage in anti-competitive practices can learn from compliance training programs how to engage more effectively in anti-competitive practices or how to avoid being detected and punished for the infringement of the competition law provisions

Morality & Ethics: These are two primary objectives of the corporate governance norms. The firms and each employee working in should be very responsible and accountable for each action. Therefore, the morality and ethics of each staff and firm must be focus to not violate any laws; regulations and the same time perform honestly without any crime in mind. The corporate crime also affects the firms and individual equally. A good compliance programme and proper strategy plan may help the firms and staffs on these aspects.

Threat of costly litigation and investigation: Violation of competition law by corporates leads to costly litigation and investigation. Therefore, this is one of the reasons by which corporates strategies to comply with the competition law. Generally, corporates avoid to be investigated and drag to any litigation on the violation of competition law because of damage to their reputation in the market.[7] In addition to that there is chance of monetary, compensatory damage along with number of prosecutions possible in the case of private action for the infringement of competition law. Therefore, the above issues forces the corporates to strategies to comply with competition law for better business.

Better Compliance Culture: Lack of strategy towards competition compliance culture among the corporate screate more complexity that damages its existence in many ways in terms of financial damages, reputation damages and stringent penalty. Therefore, corporate should strategies and more focused towards adoption of better competition compliance culture. Similarly, corporate culture is the set of enduring and underlying assumptions and norms that determine how things are done in an organization. Hence, a genuine corporate culture is based on shared beliefs, values and understandings that shape the behavior across the organization.

7 West, Jeremy k. (2011), Promoting Compliance with Competition Law 2011, OECD Competition Policy Roundtables, Available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf (last visited on 30th April, 2017).

B. **Reasons for Competition Law Non-compliance**

Absence of Corporate Culture within Corporates: This is well witnessed that many countries have adopted competition law recently and few are on the process of adoption. This makes corporates leisure attitudes towards non-compliance of competition law culture among them. Further, as the senior managements are the cornerstone & decision makers of corporates, their ineffective involvement towards the non-compliance of competition law culture helps the corporate not too serious about competition law. Therefore, the existence of the corporates depends upon the strategy, decisions and most importantly the compliance culture developed by these top managements. The top managements and directors must encourage cultivating a competition law compliance culture within business with proper strategy.

***Absence of Competition Law Experts*:** One of the non-compliance of competition law reasons is absence of competition law knowledge and competition law experts in corporates. Generally, the competition compliance requires the knowledge of economics and law, and therefore a corporate should develop a team of experts from legal background and other necessary background for taking any major business decisions. However, the absence of concerned knowledge and expertise, impose the effective decisions by top managements without following the basic legal steps and other steps required. Additionally in certain circumstances the potential violator knowingly violates the competition law due to earn profits because the punishment cost is lower than the benefits earned.

Absence of Competition Compliance Department: Generally, the corporates do not focus on the compliance mechanism, if yes in certain cases but not in stricter sense. The establishment of compliance department should be one of the main concerns for every corporate that may be used as a watch-dog on different anti-competitive activities of the corporate. Further, the enterprise should appoints experts in the competition matter, who can really add value in terms of advice to the company in different crucial time along with the promotion of compliance culture inside the corporates. The non-establishment of the competition division is one of the reasons of non-compliance of competition law.

Certain market condition: Sometimes market condition itself favors corporates, as there are no proper transparency and information to the commission regarding the infringement of the competition law. For instance, markets where there is a small number of players, price transparency, a homogenous product, continuous exchanges of information among

competitors, or public signals about planned price or output level, tend to facilitate the formation of cartels. This particular factor leads to the non-compliance of competition law.

III. COMPETITION LAW COMPLIANCE: ACT NOW OR NEVER

"Ignorance of law excuses not" and "Ignorance of law excuses no one" is a legal principle that directs to each individual and corporates. Therefore, corporates should take proper actions towards it before its too late. The growing competition compliance concerns directed corporates to evaluate its existing compliance strategy to save them from monetary sanctions imposed on corporations or individuals, threat of imprisonment, threat of damage to individuals or corporate reputation etc. Additionally, corporates must respond to the growing issues arising out of non-compliance of competition law and need to limit the gap for better achievements.[8]

A. Growing Cartel Activities

Cartels are the most heinous crime in recent decades and corporates face heavy penalties due to cartel activities. Recently the growing cartel activities attack the very heart of free economy and impact on corporate governance directly. The cartel behavior of the enterprise restricts the followings; Firstly, cartel behavior is known as anti-consumer that widely impacts on the consumer choice, preference and monopoly price charges towards consumer goods & restricts the supply in the market. Secondly, cartel behavior by big enterprises forced the small enterprises to leave the market due to the increased costs of competitors, destructive pricing, and several other destructive actions. Thirdly, the cartel activities also restricted the profitability, productivity and innovation in the market. Thus the growing cartel concerns and the non-compliance of competition law grants competition authorities enough power to investigate and impose penalty that may cost enterprises in terms of reputational damage, heavy fines and loss of business opportunities.[9]

In India, recently, many enterprises have indulged in cartel activities and the CCI has imposed heavy penalty on them. For instance, the competition Act, 2002 forbids any agreement that causes, or is likely to cause substantial adverse effect on competition in markets in India. Such agreement would not be operative and thus void. The covenants entered among companies not to compete on customer, products or price are called Cartels.[10] Thus 'Cartels' are

8 Competition Compliance Programme for Enterprise, Advocacy Book Series, No 6, Competition Commission of India, Available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf(last visited 10 May, 2017).

9 See Section 3(1) read with Section 3(3) of the Competition Act 2002.

10 West, Jeremy k. (2011), Promoting Compliance with Competition Law 2011, OECD Competition Policy Roundtables, Available at http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf (last visited on 30th April, 2017).

recognized as most serious competition contraventions and utmost evil of competition. The penalty on various sectors, namely cement, steel, tyre, real estate, trucking, have witnessed the failure and non-compliance of competition law at the enterprise level. As a result, the corporate face huge financial loss, credibility loss and loss of goodwill in the market that impact for both economy of the country and the existence of the corporate. In addition to that most of the competition authorities have started imposing criminal liability for the violation of competition law.[11]Therefore, each corporate should very narrowly judge, strategies and thoroughly comply with the competition law for better business and existence before its too late.

B. Responsibilities& Accountabilities: Senior Managements

Now-a-days most of the corporates have accessed different markets in domestic level as well as global level. Therefore, to avoid risks of violation of competition law, the responsibility of corporates along with the accountability of the decision makers are important for it. Additionally, to avoid the risks and to save the enterprise from enormous costs, the duty & involvement of senior managements are essential. Commitment of senior management must be driven from the top most level to take responsibility for its implementation. However, many cases the lack of coordination among senior or junior staffs creates unnecessary problems such as non-compliance of many laws.

Directors & Senior Managements in Company

Directors are the senior most officers in the enterprise, who generally engage with all the compliance culture of the enterprise that restrict the enterprise in terms of

11 The Competition and Markets Authority (CMA) has, for the first time, used its power to ban a director for breaches of competition law. In August 2016 the CMA found that Trod Ltd. and GB eye Ltd. had entered into an anti-competitive arrangement for retail sales of licensed sport and entertainment posters and frames (including poster frames) which they both sold on Amazon UK, having agreed not to undercut each other on prices where there was no cheaper third party seller on Amazon UK. They had utilized automated software to implement the arrangement. Trod Ltd was fined £163, 271. In December, the CMA announced further action, this time against Mr. Daniel Aston, who was Trod's managing director at the relevant time. The CMA found that Mr. Aston had been guilty of the breach of competition law, and concluded that he would be unfit to be a company director for five years. The CMA accepted an undertaking from Mr. Aston that he would not act as a director of any company of UK for five years. Like a formal disqualification order, the undertaking means that Mr. Aston must not act as a director of any UK company or of any foreign company with UK connections such as running a business or having assets here, nor may he be involved in forming, marketing or running a company even if not appointed as a director. Available at Danielle Harris and Mauzima Bhamji, UK: Company Director Banned For Competition Law Breach, 2017.Availableathttp://www.mondaq.com/x/560302/Directors+Officers/Company+Director+Banned+For+Competition+Law+Breach(last visited on 15th May, 2017).

risk of fines and penalties. In a modern enterprise, directors, including the non-executives, are expected to have the knowledge of competition law, as the competition compliance is a crucial matter for their enterprise. *For instance*, in EU and UK, the regulators imposed savior penalty on directors of the enterprise those indulge in the failure of non-compliance of competition law. In addition to that, the regulator expected that every director must know the price-fixing, market sharing and bid-rigging agreements is unlawful. For example, last year the Competition and Markets Authority (CMA) has banned director for violating competition law[12]. Similarly in India, Competition Act 2002, section 48[13] and section 27[14] deals with the provision relating to violation of any provisions of the Act in the enterprise by any person. As a result, the competition commission of India has started seeking individual culpability in different cases not in strict sense but precedent on the subject. The recent orders of CCI in 40 cases, where the CCI has imposed penalty for infringement of the provisions of the Act, approximately in around 9 cases the CCI has either imposed penalty on individual and in approximately 7 cases decided to pass orders imposing penalties on individuals after responses and income tax returns are received from the individuals identified by the Director General (DG) during investigation.[15] Though this particular move by CCI has received mix result from the corporate world, few argued that this cannot be ignored as the individual culpability would help in increasing compliance of competition. Additionally, the Companies Act, 2013under Section 134(3)(c) read with Section 134(5)(f) requires Directors' Responsibility Statement, which shall specify that the directors would have to establish appropriate mechanism to confirm compliance with all relevant laws. As competition law is applicable to all companies, the directors of corporations in India are required to achieve compliance with the provisions of competition law. In the broader context, this would create directors and the top decision makers more responsible and accountable while taking the decision for enterprise.

Company Secretary

The Companies Act, 2013[16]states that company secretary who comes under the key managerial person in an enterprise, is answerable and accountable for all enterprise's

12 See Section 48 (1) of the Competition Act, 2002.

13 SeeSection 27 of the Competition Act, 2002.

14 Manchand, Deeksha (2016) Liability of individuals under the Competition Act, 2002, Chartered Secretary, the Journal for Corporate Professional, VOL 46, NO. : 11, Pg. 1-168. Available at https://www.icsi.edu/WebModules/LinksOfWeeks/ICSI_CS_Nov2016.pdf(last visited on 17th May, 2017).

15 See Section 2(51) of the Companies Act, 2013.

16 See Section 205(1)(a) of the Companies Act, 2013.

compliance actions. It will not be wrong, if the company secretary is called as proactive compliance officers or governance secretary of the modern enterprise. The modern enterprises, engaged company secretary in most of the board meeting to advise them in terms of compliance with all statutory duties under the law, disclosure obligations, listing rule requirements and maintain professional standard with internal standards.[17]But these below points are few concerns seen at the enterprise level:

- In many circumstances, the role of company secretary is limited in many cases in terms of taking decisions, advise to board members in an enterprise, which are primarily dominated by other senior officers or directors of the enterprise.
- In an enterprise, it is required that a company secretary may professionally experienced only in matters relating to corporate governance certification under Clause 49 of the Listing Agreement and may not specialize in FEMA matters, competition law matters and other regulatory matters.[18]

As competition law is one of the important regulatory laws for enterprise, the company secretaries required to ensure about the knowledge, expertise of compliance of competition law. Section 35 authorizes a company secretary holding a certificate of practice under Section 6(1) of the Company Secretaries Act, 1980 to appear before CCI. In addition to that the Clause 49 of the Listing agreement of SEBI includes compliance of Competition Act, 2002. Therefore, it becomes the primary responsibility of a company secretary to guide and give proper direction &advises the company to comply with provisions of the Competition Act, 2002.

C. Efforts towards Competition Compliance Programme

The competition compliance programmes not only ensure compliance with competition law but also restrict the enterprise a concrete steps not to violate any provision of the Act. There are three main objectives of the competition compliance programme stated by CCI[19]:

(i) Prevention of violation of the Competition Act, 2002 and all the Rules, Regulations & Orders made there under.

17 Dixit, S K & SandujaVinay (2007), Role of Company Secretaries in compliance of Competition Law, ICSI. Available at https://www.icsi.edu/WebModules/Programmes/PCS/8PCS/8PCS-BACKGROUNDER.pdf(last visited 20th May, 2017).

18 Competition Compliance Programme for Enterprise, Advocacy BookSeries, No 6, Competition Commission of India, Available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf (last visited 30th May, 2017).

19 Competition Compliance Programme for Enterprise, Advocacy BookSeries, No 6, Competition Commission of India, Available at http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCP.pdf (last visited 30th May, 2017).

(ii) Promotion and encouragement of a culture of compliance, and

(iii) Encouragement of good corporate citizenship

However, in most cases enterprises stay away from such compliance programmes due to lack of unwillingness or proper action plan for its own behavior. There are few concerns, which every enterprise should revisit its compliance strategy and follow more efforts towards it.

Revisit the Enterprise Internal Governance: The enterprise's internal governance and ethical standards counted as main areas and source of the enterprise commitments towards better governance. Therefore, a genuine competition compliance programme and finally the initiatives of top managements towards the promotion of such compliance are required. Very often these are the few areas where enterprises fail to maintain a good competition compliance programme.

Revisit the Compliance Training Programmes: Training and awareness are two vital parts, where enterprise must revisit as most of the corporates either do not update or completely ignored the compliance training programmes, specifically on competition law. It is important for every enterprise to take serious actions towards the awareness and training programmes for its employees, especially those staffs who handle the competition compliance section.

D. Vigil Mechanism & Transformation of Various Divisions

Establishment of Vigil Mechanism/Gatekeepers: The vigil mechanism and gatekeepers are few required actions by corporates to secure its internal governance before deal with any business activities. In addition to that the enterprises need to focus on their internal audit system and competition compliance audit, as in many cases this area is completely neglected by corporates. The competition compliance audit helps enterprise to review the business practices and find the risk associated with legal provisions or detect the actual and potential violations of competition laws. The competition audit further ensures about good competition compliance programme for enterprise along with the review of each agreements, company documents, contracts including electronic files and interviews with relevant employees and key officers of the enterprise who deal with competitors, customers or suppliers. Therefore, a proper competition audit and vigil mechanism is the need of the time that can give the final approval for any business.

Focus towards Compliance Culture: Generally, enterprises mainly focused on corporate governance standards and not serious about the compliance of competition law. The behavior of the enterprise leads the enterprises towards more complexity and danger. The lack of competition compliance culture violates competition law provisions that hugely impact the enterprises and its associates in terms of financial damages, reputation damages and stringent penalty. Therefore, enterprises should follow the corporate governance standards along with the competition compliance to establish a better compliance culture inside.

Establishment of Competition Compliance Division: In India, enterprises do not focus on the compliance mechanism, if yes in certain cases but not in stricter sense. The establishment of compliance division should be one of the main concerns for every enterprise that may be used as a watchdog on different anti-competitive activities of the enterprise. Further, the enterprise should appoint experts in the area of competition law, who can really add value in terms of advice to the company in different crucial time along with the promotion of compliance culture inside the enterprise.

Initiatives towards Awareness on Competition Law: Many enterprises face challenges due to lack of legal and business knowledge expertise relating to competition law, which lead them into violation of competition law. Therefore, compliance of competition law requires expertises that have proper legal knowledge of competition law and the commitments of managements to support and equally dedicate them for the same. In India, competition law is a new subject and the experts in competition laws are few in numbers. Therefore, this may be one of the concerns for enterprises to seriously look at the legal experts; those can save them from infringement of competition law.

IV. CONCLUSION

Every company has a business agenda to realize and to achieve the agenda successfully, proper strategy and action required. Further, they should comply with laws and regulations of the land along with new competition law. And the competition compliance would be successful once the reasons of compliance need serious attention by corporates such as;

- The top managements and directors must encourage nurturing of the atmosphere where acompliance of competition law becomes mandatory for every business enterprises inceit will help reduce the risk of penalty being imposed upon the enterprise or on them personally.

- The duty of the top managements to encompass the important function and should ensure different education programme such as board programmes, competition law programmes for every staff starting from the board to the junior staffs according to their profile and functions. In addition to that, they should timely review the training programmes offered and update the relevance of the programme for better compliance.
- Similarly, the appointment of legal officers and compliance officers in firms, those are generally responsible for stakeholder relationships with key regulators to meet their demands and comply with the different standards of laws including the competition law compliance.
- Finally, the compliance manual is one of the important aspects where the firms should not only focus but also take initiatives to develop the manual for all round development of the corporates. Further, the corporates also need to develop the compliance manual with proper guidance and inputs from experts from legal, economics, accounts and finance sectors. This manual should be distributed to each staffs of the company with an instruction to compliance of the provision of the Act.

INTERNATIONAL COMMERCIAL ARBITRATION: ROADMAP FOR A BRIGHTER FUTURE

Ms. Prachi Tyagi[1]
Mr. Shaharyar Asaf Khan[2]

ABSTRACT

Arbitration assumes a significant role in providing a level playing field for robust trade and commerce. With India being a promising destination for foreign investment, it is essential that India's arbitration law is aligned with the contemporary international practice. This minimizes the fear of prolonged litigation in case of disputes. Speed and cost-efficiency are the hallmarks of arbitration, and obstruction of either can adversely affect international trade, retarding our economic growth. The excessive paternalistic approach of the Indian judiciary to interfere with arbitration has been recently rectified by it. The arguments which had been advanced by it to justify its interference were heavily misplaced. This became prominent especially in disputes involving high monetary stakes, with speedy justice being but a distant dream. Reversing this negative trend was crucial for achieving a conducive environment for a healthy business practice in India. Notably, enforceability of awards without judicial review of the merits is what makes it as an attractive alternative to litigation. Thus, it is important that the grounds for judicial intervention should be construed narrowly, giving paramount consideration to the principle of party autonomy.

Institutional arbitration posits a more secure environment for arbitration than that conducted at an ad hoc basis. The reputation of these institutions is gradually built up through sustained standards of integrity and can be tarnished by a single incident of favouritism/unfairness. While no institution (including the judiciary) is infallible, it would be pragmatic to trust arbitral institutions given the self-corrective and testing nature of the arbitration process, in which the onus of quality rests on the institution. This needs to be urgently redressed and an attempt is made to delve into factors which place Institutional Arbitration at a higher pedestal.

The Backdrop

Spurred by the discontent with the incongruent standards of dispensation of justice and the dysfunctional condition of public courts across the world, Arbitration has evolved as the most effective mechanism for resolution of international commercial

1 Assistant Professor, Amity Law School Delhi,
2 Assistant Professor, Amity Law School Delhi,

disputes. Judicial systems are plagued by endless delays, political influence, prohibitive costs and corruption, and are usually at the root of the malady of 'Misrule of law'. Notwithstanding the fact that the vast majority of states otherwise fulfil the formal requisites of statehood, their institutional capabilities are appalling, with justice being a luxury available only to the privileged few in the developed countries. The basic institutions in many states are grossly inadequate - without substantive legislative, judicial or law enforcement mechanism, which considerably hampers social and economic growth.

As globally economy spawned disputes, an internationally uniform practice became a prerequisite to facilitate transnational economic exchanges, devoid of risks. Often huge amounts were held up due to lengthy litigation clogged in national adjudication systems. Liquidity being a critical factor, International Arbitration proved to be a convenient alternative being expeditious, cost-effective and confidential[3].

With India being a promising destination for foreign investment, it is essential that India's arbitration law is aligned with the contemporary international practice. This minimizes the fear of prolonged litigation in case of disputes. Such a response to the changing requirements will ensure a promising future for India as a favourable destination for arbitration, and can become a game changer for the progress of our economy as a developing nation. A robust arbitration regime in India would eliminate the possibility of investors having transactions in India to resort to arbitration elsewhere, since it would not only be convenient and time saving but also inexpensive. This is a strong contention to promote and market India as a world class facility for arbitration.

With judicial legislations increasingly sanctioning judicial intervention in the arbitral process, the growth of the arbitration in India had been throttled. Evidenced by a plethora of decisions of the apex court, the objective behind arbitration seems to have evaporated into thin air. In the landmark judgment of *Bharat Aluminium Company v Kaiser Aluminium Technical Service*[4] *(hereinafter* 'BALCO'), the Supreme Court has declared that Part I of the Arbitration and Conciliation Act, 1996[5] (*hereinafter* 'the 1996 Act') is inapplicable to arbitrations held outside India. This is likely to have huge repercussions, catalysing the flow of foreign investment into India.

3 It protects the reputation and trade secrets of the parties by maintaining confidentiality of the whole process.

4 (2012) 9 SCC 552.

5 Act 26 of 1996.

Legitimacy & Universality

Propelled by the expansion of international private commercial relations, trans-border arbitrations have multiplied manifold, breeding a plethora of complexities including the claim of state sovereignty. It is important to neutralize such unrestrained defensive claims of state exclusivity, which have the potential to disrupt the greater legal order.

Law must ultimately be relevant to the social reality. A legal order is a set of norms acknowledged by a social order to be authoritative. Its existence may be independent and based on *rights* guaranteed by authorities other than the state.[6] Arbitration draws its legitimacy from its practical effectiveness and can be categorised as a private social institution.

Arbitration subjects private disputes to a separate regime[7] outside the operation of rules of law, which would have been applicable in the ordinary course. It affords to the parties the freedom to choose the procedural and the substantive law. Placing primacy on the consent of the parties to the contract, it postulates that social groups may create distinct legal orders, existing within a greater legal order which tolerates and nourishes them without imposing itself on the domain for which the sub-group has prescribed its own rules. Thus, 'arbitral order' does not trump the national order. It emerges out of the necessity of co-existence. It does not reject law but merely reproves certain facets of it, especially the apparatus.

Paradoxically, arbitration relies on the cooperation of the very public authorities, from which it tries to disengage itself, seeking the power and authority of the state only to support arbitration, not to interfere in it. This makes it obligatory to connect the conduct of arbitral proceedings to a national legal system, which will support and supervise it and encompasses *inter alia* fixing of the permissible degree of party autonomy (curtailed by mandatory or non-derogable rules), assistance by grant of provisional measures and in collection of evidence by the court (especially in cases of procedural matters affecting the position of third parties who are not subject to the jurisdiction of the arbitrators).

In a short span of time, International Arbitration has become the norm for resolving international commercial disputes, and the success of UNCITRAL Model Law on International Arbitration[8] bears witness to its claim of universality. The UN Commission on International Trade Law[9] adopted the Model Law in 1985 and the

6 Max Weber, LAW IN ECONOMY AND SOCIETY, Harvard University Press. pp. 16, 17.

7 In cases of foreign players it is also a *neutral fora*, independent of their respective municipal laws.

8 *Hereinafter* referred to as 'Model Law'.

9 *Hereinafter* referred to as 'UNCITRAL'.

UN General Assembly subsequently recommended its incorporation in domestic legislations.[10]

The Arbitration and Conciliation Act, 1996 regulates the conduct of arbitration in India[11] and reproduces the model law almost verbatim with a few notable exceptions. It seeks to minimise the supervisory role of the courts to effect speedy disposal of disputes and provides finality to the arbitral awards by making them enforceable as a decree of a court.[12] The 1996 Act is divided into four parts with the first concerned with arbitration in India; second with Enforcement of 'certain' foreign awards (Arbitral awards given in countries signatories to New York Convention, Geneva Convention and Protocol); third with conciliation and the fourth lays down the supplementary provisions. It has consolidated within its scope domestic arbitration[13], international commercial arbitration and enforcement of foreign arbitral awards.

Till recently, the Indian judiciary had been perplexed by two competing and conflicting policy considerations of injustice, resulting from delay due to its review of the merits of arbitral awards, and that from a patent illegality in an award (genuine excesses or abuses by arbitrators). The arguments which had been advanced by it to justify its excessive paternalistic approach of interference were heavily misplaced. This became prominent especially in disputes involving high monetary stakes, with speedy justice being but a distant dream. The Supreme Court in BALCO has taken a step in the right direction for ensuring that Arbitration develops as an effective method of dispute resolution in India. Notably, the enforceability of awards without judicial review of the merits is what makes it an attractive alternative to litigation.

Convoluted Jurisdiction

Modern Arbitration thrives on a pluralistic environment and it is plausible to have overlapping legal orders giving effect to it. They may regulate different aspects of arbitral relationship and may not be exclusively that of one state. They can be categorised as[14]:

1) **Proper law of the arbitration agreement:** It governs the agreement to arbitrate and to honour the arbitral award. It determines the validity of the

10 UNGA 40/72 (11th December, 1985).

11 Earlier it was regulated by The Arbitration Act, 1940, The Arbitration (Protocol and Convention) Act, 1937, and The Foreign Awards (Recognition and Enforcement) Act, 1961.

12 Statement of Objects and Reasons, The Arbitration and Conciliation Act, 1995.

13 UNCITRAL Model Law was designed to be applicable to international arbitrations and not domestic arbitrations.

14 *Sumitomo Heavy Industries Ltd.* v. *ONGC Ltd. and Ors.,* (1998) 1 SCC 305.

arbitration agreement, the question of arbitrability of dispute, validity of notice of arbitration, constitution of the arbitral tribunal, the question whether the award is within the jurisdiction of the arbitrator as well as the formal validity of the award. It is the source of authority of the arbitrators. It would apply to the filing of the award, to its enforcement and to its setting aside.

The arbitration clause embedded in a contract which creates the obligation to refer a dispute to arbitration is governed by a proper law of its own. It is recognised as independent of the contract, having a distinct life of its own and capable of surviving the termination of the substantive agreement.[15]

2) Curial or procedural law (*lex arbitri*): It is the law applicable *to* arbitration and is operative during arbitration. It deals with 2 sets of issues[16]:

(A) **Internal**: It governs the conduct of the individual reference, procedural powers, appointment and duties of the arbitrator (e.g. whether they must hear oral evidence; questions of evidence; misconduct); the determination of the proper law of the contract.

(B) **External**: It is the source of authority to entertain applications for incidental reliefs and to ensure that the procedure adopted in the arbitral proceedings conforms to the requirements of the curial law. This power is discretionary in nature and lies with the courts administering the curial law. It determines court's power of supervision such as remedies available for challenging the award (lack of jurisdiction or serious irregularity) once it has been rendered but before its enforcement is sought. The power to remove arbitrators and to secure attendance of witnesses is also under its domain. It also specifies the circumstances in which such judicial remedies may be excluded by the parties. Curial law does not apply to the filing of an award in court since the enforcement process is subsequent to and independent of the proceedings before the arbitrator.

Pragmatism entails that parties choose curial law corresponding to the 'seat' of arbitration i.e. the place at which proceedings to be conducted. In the absence of agreement to the contrary, prima facie presumption exists that parties intend the curial law to be the law of the 'seat' of the arbitration, on the ground that it is most closely connected with the proceedings.[17]

15 Section 16(a) & (b) of the 1996 Act.

16 *Dicey, Morris & Collins*, THE CONFLICT OF LAWS, '*Chapter 16: Arbitration and Foreign Awards*' (14 ed., 2007) pp. 722, p. 16-029.

17 *Mustill & Boyd*, COMMERCIAL ARBITRATION, '*Chapter 4: The Applicable Law and the Jurisdiction of the Court*' (2nd ed., 1989), p. 64.

In BALCO, the apex court pointed out the distinction between 'seat'/'place' and 'venue' of arbitration. The 'seat'/'place' is a juridical concept distinct from the 'physical seat' or 'venue' which can be a geographically convenient place[18] chosen to conduct particular hearings. There can be only one 'seat' of arbitration;[19] however, the tribunal is free to hold meetings or hearings at any other place for the sake of convenience. This is in consonance with its previous judgment in *Videocon Industries Limited* v. *Union of India and Anr.*,[20] wherein the arbitration as per the agreement was to be conducted at Kuala Lampur, Malaysia, but was later shifted to London.[21] It was held that the mere change in physical venue of hearing from Kuala Lumpur to London did not amount to change in juridical seat of arbitration.

The law at the 'seat'/'place' of arbitration is the wellspring of the binding character of the arbitral award. The courts at the 'seat' are the sole supervisors and primary supportive functionaries of the proceedings, except where *lex arbitri* is different from law at the 'seat', wherein party autonomy will be restricted by mandatory rules (non-derogable) of the latter. In case of conflict between them and upon a subsequent failure to comply with the latter, the courts at the 'seat' can set aside the award. It also stipulates directionary rules or 'fall back provisions' which apply if the parties have not made their own arrangements. BALCO reaffirms this by positing that only if the 'seat'/'place' of Arbitration is in India, will Part I of the 1996 Act be applicable.[22] If the 'seat'/'place' is outside India, Part I would be inapplicable to the extent it is inconsistent with the arbitration law of the 'seat', even if the agreement purports to provide that the1996 Act shall govern the arbitration proceedings.[23]

3). **Proper law of the contract or the Substantive law (lex causae):** It is the law applicable *in* arbitration and governs the contract. It is the source of the substantive rights of the parties, in respect of which the dispute has arisen, and determines the law to be followed in making the award. It forms the basis of the arbitrator's decision.

18 As stipulated by Article 16(2) of UNCITRAL Arbitration Rules which state - 'The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration'. Also, see Section 20(3) of the 1996 Act.

19 BALCO and *Dozco India P. Ltd.* v. *Doosan Infracore Co. Ltd.* (2011) 6 SCC 179.

20 (2011) 6 SCC 161.

21 Due to outbreak of epidemic SARS.

22 BALCO p. 100.

23 *Ibid.*

The determination of the applicable law was examined in *National Thermal Power Corporation* v. *The Singer Company and ors.*[24], wherein it was affirmed that in absence of any express choice and any contrary indication, the presumption lies that the proper law of the contract and the law governing the arbitration agreement are same as the law of the 'seat'. If proper law of the contract is chosen by the parties, it must govern the arbitration agreement.

Enforcement Jurisdiction & The New York Convention

The main loophole in arbitration is the enforcement mechanism, which is often beset by 'court intervention'. Arbitrations carry a significant risk that enforcement jurisdiction might not agree to recognise and enforce the award since it may be susceptible to manifold challenges. Most of the complexities in arbitration arise due to the unpredictability of the enforcement jurisdiction. Usually, these cannot be contemplated at the time of arbitration agreement or even at the time of commencement of arbitration. The attitude of the legal order of a country where the debtor has his assets is highly relevant to efficaciousness of the arbitration. However, uniformity has been possible largely due to increasing interdependence between states.

Judicial systems of countries are usually prepared to enforce an arbitral award if they are satisfied that it will be 'binding' either due to conventions or the principle of comity. The pervasive reach of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958[25] (*hereinafter* 'New York Convention') exemplifies the former. With 146 signatory countries,[26] it is the dominant tool for recognition and enforcement of international arbitral awards made in signatory jurisdictions, without requiring prior approval of the courts at the seat of arbitration.[27] Its signatories cease to be bound by the predecessors of the convention: [28] Protocol on Arbitral Clauses, 1923,[29] and Convention of the Execution of Foreign Arbitral Awards, 1927,[30] thereby rendering them archaic. [31] Only Myanmar, The Gambia,

24 (1992) 3 SCC 551.

25 UNTS No. 4739.

26 http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en.

27 Article III. "Awards are binding as per the rules and the procedure of the territory where the award is relied upon."

28 Article VII, New York Convention.

29 *Hereinafter* referred to as 'Geneva Protocol'.

30 *Hereinafter* referred to as 'Geneva Convention'.

31 This was due to the wide acceptability of the New York Convention and its superseding effect over them. These instruments were the results of the efforts to achieve uniformity under the auspices of the League of Nations.

Guyana, Iraq and The Democratic Republic of Congo are parties to the earlier instrument and not to New York Convention.

The strength of the New York Convention lies in its relative simplicity and widespread adherence. While emphasising the integrity of national order, it limits the grounds for refusal to enforce awards[32] to seven cases listed in Article V.[33] Thus, it negates any scope of concurrent jurisdiction to courts in the enforcing territory with respect to entertaining challenges as to the binding nature of the awards.[34] Significantly, certain states like Switzerland do recognise an agreement between the parties to opt out of judicial review of the arbitral awards.

The question of arbitrability is basic to the arbitral process. The New York Convention and the Model Law recognise this by referring to disputes that are 'capable of being resolved by arbitration', implicitly acknowledging that all disputes are not legally arbitrable.[35] Multi-territorial contracts yield a multitude of potentially relevant jurisdictional criteria e.g. place of signing, of residence/work of the parties, of its enforcement. The same set of facts can lead to different interpretations of obligations by legal systems of two countries. National orders are dissimilar and can impute different outcomes to the same event. However, it has been left to the enforcement forums to test the award against their conception of public policy and arbitrability.[36]

Judicial Legislation: The Fiasco

In *Bhatia International* v. *Bulk Trading S.A. and Anr.*[37], the court had drawn an absurd analogy between Part I & II of the 1996 Act. It had construed the absence of the word 'only' in Section 2(2) (in light of the non-obstante clause[38] in Section 45 and 54) to hold it only as 'an inclusive and clarificatory provision'. It held that a conjoint reading of the 1996 Act makes Part-I applicable to offshore international commercial arbitrations wherein Indian law governed the contract, unless the parties, by agreement express or implied, excluded all or any of its provisions (including those

32 The award cannot be set aside but can only be refused to be enforced.

33 Incapacity of parties; Invalidity of arbitration agreement (including inarbitrability); Violation of principles of Natural Justice (sanctions the application of standards of due process of the enforcement forum); Excess of Jurisdiction (decisions beyond the scope of submission to the tribunal); Breach of Procedural law (including mandatory rules of the seat of arbitration) ; Award not binding; Public Policy.

34 Article V. It lays down the grounds under which the Recognition & Enforcement of an award may be challenged or refused.

35 Article V (2)(b), New York Convention.

36 Article V(2), New York Convention.

37 (2002) 4 SCC 105.

38 It reads '*notwithstanding anything contained in Part I*'.

non-derogable). However, in arbitrations held in India the non-derogable provisions would be mandatorily applicable.[39]

The court was concerned that exclusion of Part I to offshore International Commercial Arbitration would leave those parties remediless who secured arbitral awards in non-convention countries (which are not signatories of New York or Geneva Conventions), for such a construction would have left no provision for their enforcement under the 1996 Act. According to it, this would amount to holding that there was a lacuna in the law. The court did not consider that India had exercised both the *Reciprocity* and the *Commerciality* reservations.[40] There is a mandatory requirement of notification in the Official Gazette before offshore arbitral awards become enforceable. This also extends to a country acceding to the New York[41] and Geneva Convention[42]. Thus, the 1996 Act explicitly excludes enforcement of awards obtained in non-convention jurisdictions as a decree and a suit has to be filed for their enforcement in India.

The decision in BALCO has prospectively overruled the aforesaid judgment. The constitutional bench in BALCO held that Part I of the 1996 Act, is inapplicable to arbitrations held outside India in so far as the arbitration agreements were entered into after September 9, 2012.[43]

Interventionist Role Of The Indian Judiciary: The Era of the Concurrent Jurisdictions

Prior to BALCO, national courts whose laws govern the arbitration agreement were held to be the competent courts in respect of matters arising under the arbitration agreement, and the jurisdiction exercised by the courts at the 'seat' was merely concurrent, and not exclusive and strictly limited to matters of procedure. [44] Section 48(1)(e) of the 1996 Act states that for the enforcement of foreign awards, they need to be binding as per the law of the land where the 'challenging' jurisdiction rests. This evidently suggests a difference between 'challenging' jurisdiction and the 'enforcement' jurisdiction which was overlooked. Though ambiguously demarcated, they are not concurrent. Such judicial pronouncements asserting concurrent jurisdictions rendered arbitration an expensive affair, negating the cost-effectiveness of arbitration which makes it an attractive alternative to traditional litigation.

39 This view has been affirmed in *Venture Global Engineering* v. *Satyam Computer Services Ltd. and Anr.* (2008) 4 SCC 190/

40 Article 1(3) of New York Convention/

41 Section 44, the 1996 Act.

42 Section 53, the 1996 Act.

43 BALCO p. 200.

44 *National Thermal Power Corporation* v. *The Singer Company and ors.,* (1992) 3 SCC 551.

In BALCO, the court categorised regulation of arbitration as comprising of the following four stages:

(a) the *commencement of* arbitration;

(b) the *conduct* of arbitration;

(c) the *challenge* to the award; and

(d) the *recognition or enforcement* of the award.

The court has held that though Part I of the 1996 Act regulates arbitrations at all the four stages, Part II regulates arbitration only in respect of commencement, and recognition or enforcement of the award.[45] While upholding the principle of territoriality, it drew a distinction between the 'challenging' jurisdiction and the 'enforcement' jurisdiction and held that challenge to an arbitral award could be done only by the courts of the country in which the arbitration is being conducted as only such courts possess the supervisory power to annul the award.[46] This is in consonance with the scheme of international instruments, such as the Geneva Convention and the New York Convention as well as the UNCITRAL Model Law.

The court stated that Section 48(1)(e) merely recognizes that the courts of two countries are competent to suspend or annul an award. It does not entail concurrent jurisdiction to them to annul an award. Such jurisdiction must be specifically provided in the national legislations of the countries. The corresponding section in Indian law i.e. section 34, does not apply to arbitrations conducted abroad.[47] Furthermore, it elucidated that "under the laws" in section 48(1)(e) pertained to curial law and not the substantive law.[48]

The Public Policy Conundrum

During the *Bhatia* era, public policy had been a bone of contention as a ground for refusal to enforce or setting aside of foreign awards. Indian courts do have the right to refuse recognition to repugnant procedures. But where will the courts draw a line?

In *Renusagar Power Co. Ltd.* v. *General Electric Co.* [49] the SC gave a narrow inclusive construction to 'public policy' in the context of Section 34 of the 1996 Act, holding that an award could be set aside if it was contrary to[50]

45 BALCO p. 126.
46 BALCO p. 128.
47 BALCO p. 138.
48 BALCO p. 157.
49 AIR 1994 SC 860.
50 *Ibid* at p. 64.

(a) fundamental policy of Indian law, or *(b)* the interest of India, or *(c)* justice or morality.

This was given a wider connotation in *Oil & Natural Gas Corporation Ltd* v. *SAW Pipes Ltd* [51] with the inclusion of another expansive ground: 'patent illegality' of the award, encompassing within its scope an award contrary to

(a) substantive provision of law or (b) provisions of the Act or (c) terms of the contract.

However, it cautioned that such illegality must go to the root of the matter and could not be trivial in nature. It affirmed that an award could also be set aside if was unfair and unreasonable to the extent of shocking the conscience of the court.[52]

Post BALCO, a foreign award cannot be set aside under the provisions of Section 34 of the 1996 Act. Notably, the apex court in *Phulchand Exports Ltd. v. OOO Patriot*[53], has upheld indirectly the same "public policy test" under section 34 as being applicable under Section 48 as well. Thus, a foreign award is still subject to the same scrutiny.

The possibility of abuse of the grounds of recourse by a dissatisfied party cannot be ruled out. In the pre-BALCO era the agony of the Arbitral award holder was further exacerbated by the automatic suspension of the execution of the Award upon filing of objections under Section 34 results.[54] It was suggested by many that the delay caused in review of arbitral award be neutralised by allowing enforcement of the award during the pendency of challenge, while providing courts discretion to stay such enforcement. Section 48(3) gives the court discretion to suspend the enforcement of the award in case of an application for setting aside or suspension of the award. This comes as a great relief for those struggling with delay in the over-stretched procedure for enforcement of award.

The Sting: Interim Relief

It is suggested that section 9 should be made applicable for offshore International Commercial Arbitration. It is likely that by the time courts exercising jurisdiction over the seat of arbitration are petitioned for interim measures of protection, the assets of a party located in India will be transferred or removed. The only possible alternative a party has is to obtain an interim order from a foreign Court or the

51 (2003) 5 SCC 705.

52 *Ibid* at p. 30.

53 (2011) 10 SCC 300.

54 *National Aluminium Co. Ltd.* v. *Pressteel and Fabrications Pvt. Ltd.,* (2004) 1 SCC 540.

arbitral tribunal, and file a civil suit to enforce this right. However, the interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of section 13 and 44A of the Code of Civil Procedure, 1908[55] (which chalk out the procedure for enforcement of foreign judgments). The efficacy of enforcement through such a mechanism is suspect. The party obtaining an arbitral award in its favour would more often than not find that the entity against which it has to enforce the award has been stripped of its assets, defeating the award.

It is suggested that since the courts of the 'seat' are the natural forum for granting interim relief, the onus should lie on the claimant to establish why Indian courts should be preferred over them. The discretionary equitable doctrine of *Forum non conveniens* should be applied by courts to decline jurisdiction owing to appropriateness of the other forum.

Non-State Enforcement: A Feasible Alternative

Parties can choose arbitration to be conducted on an *ad hoc* basis or under the auspices of an arbitration institution. Usually, the enforcement of the tribunal's orders on interim measures or arbitral award is done with the assistance of the national courts. However, some arbitral institutions wield sufficient coercive power to enforce their award independent of the state.

The Court of Arbitration for Sports (CAS) has successfully enforced its awards without the assistance of states, since the sports federations accept them as binding. *Clube Atlético Mineiro v. Fédération Internationale de Football Association (FIFA)*[56] perfectly exemplifies a conflict of an international arbitral award with the national legal order, wherein the former triumphed. The award was enforced without the help of the state and against its mandate. A Brazilian footballer had violated his four-year contract with a Mexican Club after a year, for which the club had paid him a transfer fee of $1million. FIFA suspended him from playing worldwide, but a Brazilian court ruled in his favour, allowing him to pursue his career. He started playing for a Brazilian club. However, the FIFA Player's Committee ordered him to restitute the amount, failing which the Brazilian club he was playing for would be liable. This was challenged before CAS which confirmed the decision of FIFA. The club could be counted upon to pay the amount since otherwise it would face sanctions from the Brazilian Federation which in turn would face sanctions from FIFA in case of non-compliance. This could even lead to disqualification of Brazil from the World Cup!

55 Act 5 of 1908.

56 CAS 2005/A/957.

This could be viewed as one of the many international non-state organisations having sufficient coercive power to ensure compliance. They legislate and establish adjudicatory bodies and enforce awards through an array of internal sanctions. Such systems draw legitimacy from being impersonal and intended to exclusively govern specific aspect of social life. It would do good to promote them in the larger common interest.

The International Court Of Arbitration

The International Court of Arbitration (*hereinafter* 'ICC Court') is the arbitration body attached to the International Chamber of Commerce (*hereinafter* 'ICC'). ICC has a wide reach with members and national committees in many countries, which assist in obtaining voluntary compliance from defiant parties.

The ICC Court, established in 1923, is an administrative body charged with the responsibility of overseeing the ICC arbitration process. Its members are chosen for a renewable term of three years by the ICC's World Council in which each National Committee is represented. [57]

The Court is unique both in its composition and its supervisory role. Among its many functions are appointment of arbitrators; reviewing and confirming the appointment of arbitrators; reviewing and confirming the appointment of arbitrators; reviewing and deciding allegations of arbitrator bias or misconduct; extending time limits; fixing fees of arbitrators; reviewing and approving (as to their form) the arbitral awards.

To ensure that the award addresses all the disputed issues, ICC requires Terms of Reference to be spelled out by the tribunal before the commencement of arbitration.[58] This includes the respective parties' claims, relief sought and a list of issues to be determined. Additionally, a provisional time-table is to be submitted, which though flexible, provides a broad framework and deadline for expeditious disposal by the tribunal. The Court also has the power to replace an arbitrator 'who does not fulfil his functions'[59] and has used it on several occasions.

It is mandatory for the ICC Court to approve the form of all arbitral awards[60] and while doing so it may also draw the tribunal's attention to points of substance. Despite being of non-binding nature, this does enhance the quality of the awards.

57 To uphold high standards of integrity, a member is barred from being appointed as arbitrator by the court but is free to be appointed by any party and can also appear as a counsel in any arbitration.

58 Article 18, ICC Rules.

59 Article 12(2) , ICC Rules.

60 Article 27, ICC Rules.

Thus, the legitimacy of the award owes much to supervision of the Court, reinforced by its diverse composition and collective character of decisions. Though no arbitral institution can guarantee ultimate quality and efficacy, the ICC Court has counterbalanced the flexibility and autonomy in arbitration by a highly supervisionary (yet not intrusive) set up.

Ad Hoc Versus Institutional Arbitration

Institutional arbitration posits a more secure environment for arbitration than that conducted on ad hoc basis and is therefore a preferred mode due to cost-effectiveness; pre-laid institutional procedural rules for conduct of arbitration; infrastructure facility; removal of arbitrators by institution; and scrutiny of awards.

Section 11 of the 1996 Act leaves it to the discretion of the Chief Justice to appoint the arbitrator or designate any person or institution to do so. However, in *S.B.P. and Co.* v. *Patel Engineering Ltd. and Anr.*[61] it was held that such delegation could only be to another Judge of the court who could seek the opinion of an institution in exercise of such duty, but the order had to be made only by Chief Justice or such designated judge.[62] This retrograde step is a severe blow to institutional form of arbitration which could be earlier recommended by judiciary.

Notably, the reputation of arbitral institutions is gradually built up over a period through sustained, impeccable standards of integrity and can be tarnished by a single incident of favouritism/unfairness. While no institution (including the judiciary) is infallible, it would be pragmatic to trust arbitral institutions due to the self-corrective and testing nature of the process in which the onus of quality rests on the institution. An institution upholding high standards of justice and transparency would be a natural consensus choice for arbitration.[63] With institutional arbitration being more effective and dependable in practice, this overambitious digression to take absolute control over appointment is required to be reviewed urgently by the judiciary or be rectified by legislative amendment. Such an approach would be consistent with the international framework, appropriately catering to the forthcoming demands.

Legislative Response

The Commercial Division of High Courts Bill, 2009, which was passed by the Lok

61 AIR 2006 SC 450.

62 It held that appointment of arbitrator is a judicial function and not an administrative function.

63 The foundation of arbitration rests upon choice and the parties while selecting an institution will come to a consensus only upon only those, where they feel that they will get 'justice' through a fair and transparent procedure.

Sabha[64] heralds a much brighter future for speedier settlement of commercial disputes. This bill got lapsed. Again in 2015, the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice presented the Seventy-eight Report of the Committee on the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 which finally led to the passing of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

This Act envisages State Governments to set up commercial courts at the District level[65] to try suits and claims pertaining to commercial disputes of a value of at least Rs.1 crore and above[66]. The Act also requires the High Courts to set up Commercial Appellate Divisions within each High Court to hear appeals from the orders of Commercial Courts[67] and endeavour to dispose of them within 6 months of their filing date[68]. The Act defines commercial dispute as disputes arising from ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, export and import of merchandise or service, admiralty and maritime law, transactions relating to aircraft, etc., carriage of goods, construction and infrastructure contracts including tenders, agreements relating to immovable property used exclusively in trade and commerce, infringement of Intellectual Property Rights, exploitation of natural resources, insurance, etc.[69] The definition also includes disputes arising out of agreements of franchising, distribution, licensing, management, consultancy, JV, partnership, shareholders, subscription, investment, etc. To make the expeditious disposal of cases, certain provisions are added. Persons who have experience in dealing with commercial disputes shall be appointed as judges of such courts. In order to curb the delay in decision making process, an outer limit of 120 days has been set for filing defence failing of which the right is forfeited[70]. In such circumstances the court has the right to reject to take delayed submission on record. So as to curb frivolous claims or defences and also to cut short the litigation time, provisions to apply for a summary judgment without trial for dismissal or decreeing of a suit or for acceptance or rejection of any particular claim or defence have been made which can be granted if it is shown to the court that no real prospect of the other party in succeeding in its claim or defence. Affidavits of all the witnesses shall be filed simultaneously instead

64 On December 18, 2009.
65 Sec. 3(1)
66 Sec. 12
67 Sec. 5
68 Sec. 14
69 Sec. 2(1)(c)
70 Schedule to the Act, Rule 4

of one after another. It empowers the Courts to delimit oral arguments and provides for filing of written arguments before oral arguments are commenced. It also provides for the arguments to be concluded within 6 months. It provides for a time limit of 90 days for pronouncement of judgment so as to curb the delay which can be self-induced in the part of judge. Detailed provisions to impose realistic costs by the courts have been made so as to discourage frivolity and protraction of trial.

Conclusion

The Act is very much appreciable piece of legislation however the same is not devoid of obvious drawbacks which erupts from the practical aspect of the same. The definition of the commercial dispute is too vivid so as to avoid any interpretation. The purpose would have been better served if the definition was negative in nature. The intention to curb the delay might not be achieved as the lawyers may prolong the trial by questioning whether a particular dispute is commercial or not. The provisions of summary judgement is very much appreciable but there should be settled principles when it can be proved if the other party has or not the real prospects of losing the claim which might again prolong the trial. Though there is an amendment in the provisions dealing with costs, yet there is ample discretion in the hands of the judge and a sudden change, though required, yet is not expected to come. Besides all these, the fact of setting up the commercial courts in every district on a priority basis, the salaries of the judges, the selection procedure of the judges, infrastructure, qualified judges etc. are not taken care simultaneously in all states, the intention of the Act shall fall flat on the ground.

It is evident that the problem is multi-axial, fraught with complexities of different dimensions. Arbitration assumes a significant role in providing a level playing field for robust trade and commerce. Therefore, it is imperative for the legal framework to rise to the occasion and equip the infrastructure with the requisite tools to tackle the forthcoming challenges with professionalism. Resetting the negative trend of judicial interference is sine qua non for achieving a conducive environment for healthy business in India. Speed and cost-efficiency are the hallmarks of arbitration, and the obstruction of either can adversely affect international trade, retarding our economic growth. Thus, it is important that the grounds for judicial intervention be construed narrowly, giving paramount consideration to the principle of party autonomy, to bring the arbitration regime at par with the global standards.

THE CITIZENSHIP AMENDMENT BILL 2016 AND ITS IMPACT ON MIGRANTS FROM SOUTH ASIA: A CRITICAL ANALYSES

Kumari Nitu[1]

ABSTRACT

The Citizenship Amendment Bill 2016 will bring changes to the Citizenship Act of 1955. The proposed amendment tends to widen the ambit of the original act by allowing certain minority communities from Afghanistan, Bangladesh and Pakistan to get the citizenship of India by Naturalization. It also intends to bring changes to three provisions in the original act viz, to the definition of illegal migrant, overseas citizens of India and reduction in the time limit of acquisition of Citizenship by way of Naturalization. Though the act aims to lay concern to the grievances of the minorities from the above-mentioned categories, it fails to consider the concerns of other Muslim minorities residing in these three countries who also fear persecution and discrimination at the hand of the majority. The Amendment has been criticized for ignoring the principles of secularism and equality on which the edifice of the Constitution is built. In this paper, we will see some of the aspects of the Citizenship Amendment Bill 2016 which has been left unnoticed by the government. The paper ends with giving the possible repercussions of the proposed amendment.

Introduction

The citizenship Amendment Bill 2016 intends to amend the original Citizenship Act of 1955. The key feature of the proposed amendment is to exempt certain migrants from some particular countries from the category of illegal migrants and it also reduces the time period for the acquisition of citizenship by naturalization. The amendment is brought to address the needs of the people and the response of the Government to address the issue of the pressure being created at the border.[2]

One of the key point to be noted in the bill is that it uses the word 'illegal migrants' and not any other word. Sometimes the word refugee and migrants are used interchangeably. But to play safe, the choice of words also matters. For example,

1 Research Scholar, Center for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi

2 Nirja Gopal Jayal, *Citizenship and its Discontents: An Indian History,* Harvard University Press, London, 2013, page 17.

the use of word refugee could have entailed international pressure on the part of India though India is not a party to the 1951 Refugee Convention or the 1967 Protocol, but it has been Indian practice since long.[3] Refugee whether legal or illegal cannot be deported back to the native States whereas migrants are liable to be deported back if they do not have the valid authority and documents to stay.[4]

The amendment can be categorized into three specific provisions for better understanding.

1. Illegal Migrants

The act exempts minority communities viz Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan from the ambit of illegal migrants if they enter India. It also exempts these person from the requirement of clause (c) of sub section 2 of section 3 of the Passport (Entry into India) Act 1920 and from the provisions of Foreigners Act, 1946. It also nullifies any other act posing any restriction on their entry into India. The Act of 1955, on the other hand did not make any distinction on the basis of religion and whoever crossed the border and entered India without any valid passport or travel document or without any other authority prescribed by law were considered illegal migrant. They were liable to be punished by law and subject to deportation.[5] The practice of deporting back the migrants on the ground of demographic imbalances, security and economic reasons fails to recognize the fact that the migration of people from one State to another is driven by several factors such as historic and culture lineage and most frequently due to safety and survival issues.[6] People rarely cross the border for non-serious reasons. There are compelling situations to do so. The receiving State on the other hand deals them with a heavy hand. But when viewed from a human rights perspective, they need protection rather than expulsion.[7]

3 Sreya Sen, "Understanding India's Refusal to Accede to the 1951 Refugee Convention: Context and Critique", ESPMI Network, 2015. Available at: https://refugeereview2.wordpress.com/2015/05/28/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique/

4 Somini Sengupta, "Migrant or Refugee? There is a difference, with Legal Implications", The New York Times, 2015. available at: https://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html?ribbon-ad-idx=3&rref=us & module=Arrows Nav & content Collection=World & action=swipe&region=FixedRight&pgtype=articl

5 Ministry of Home Affairs, Government of India, "The Citizenship Act 1955". Available at: <http://mha1.nic.in/pdfs/ic_act55.pdf>, Accessed on 2 April 2017.

6 Ranabir Samaddar, *The Marginal Nation: Transborder Migration from Bangladesh to West Bengal,* Sage Publications, 1999.

7 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press. 2016.

2. Overseas Citizens

The provisions regarding Overseas Citizens was added to the original Act of 1955 through the amendment act of 2003. Prior to the amendment the Government was reluctant to have any provision for extension of its citizenship for emigrants and wanted the Overseas Indians to integrate with the country they were currently resident of. But the economic needs after the reforms of 1991 compelled the government to have specific provisions for the Overseas Citizens so that the country can benefit from the economic potential of the OCIs.[8]

Section 7 of the 1955 act (as amended in 2003) contains provisions relating to overseas citizens and the proposed amendment bill of 2016 will make changes in Section 7 (D) of the act which deals with provisions related to cancellation of registration of the overseas.[9] Initially, there were five grounds for cancellation of registration. It adds an additional clause to section 7D of the act which states that the registration of the OCI can be cancelled if they have violated any of the provisions of this Act or provisions of any other law for the time being in force.[10] This could be done even on minor grounds such as parking in a no parking zone which sounds bizarre.[11]

3. Citizenship by Naturalization

Citizenship by naturalization is the process through which a person gets the citizenship of a country and can avail the benefits and protection attached to the citizenship.[12] It is an acquired right and the criterion for getting it is laid down by the country concerned. The Government of India lays down the provisions for qualification of acquisition of citizenship by naturalization in Third Schedule of the 1955 Act.[13]

8 Constantino Xavier, "Experimenting with Diasporic Incorporation: The Overseas Citizenship of India, Nationalism and Ethnic Politics", Nationalism and Ethnic Politics, 17(1), 2011, page 34-50.

9 Central Government Act, "The Citizenship (Amendment) Act, 2003". Available at: https://indiankanoon.org/doc/949775/

10 THE CITIZENSHIP (AMENDMENT) BILL, 2016, Bill No. 172 of 2016. Available at: http://www.prsindia.org/uploads/media/Citizenship/Citizenship%20(A)%20bill,%202016.pdf

11 Anviti Chaturvedi, "Legislative Brief: The Citizenship (Amendment) Bill, 2016." Available at: http://www.prsindia.org/uploads/media/Citizenship/Legislative%20Brief%20Citizenship%20Amendment%20Bill%202016.pdf

12 J. R. Snowden et al., "American Indian Sovereignty and Naturalization: It's a Race Thing", Nebraska Law Review, 80, 2001, pages 171-238. Available at: <file:///C:/Users/Kumari%20Nitu/Downloads/80NebLRev171.pdf>, Accessed on 30 March 2017

13 Ministry of Home Affairs, Government of India, "The Citizenship Act 1955". Available at: <http://mha1.nic.in/pdfs/ic_act55.pdf>, Accessed on 2 April 2017.

The amendment bill of 2016 amends the criterion for citizenship by naturalization to persons belonging to the minority community of Afghanistan, Bangladesh and Pakistan. After amendment the aggregate period of residence or service of a Government in India as required under the previous schedule be read as "not less than six years" in place of "not less than eleven years".[14]

Purpose of the Bill

The Government in the proposed amendment bill states that many persons of Indian Origin (PIOs) have been applying for acquisition of citizenship by naturalization but have not been able to do so due to the discontinuation of the PIO card scheme with effect from January 9, 2015.[15] The Government took notice of the grievances of the people and tried to address them through the proposed amendment.[16] The amendment bill intends to protect the non-Muslim community who are minorities in the Muslim countries from further persecution and discrimination. It gives them the security that wherever they are, they belong to their roots and their Government is there to help them out.

Migrants and Minorities: Juxtaposing

The amendment bill 2016 states that it will exempt the minorities from specific countries from the purview of illegal migrants. But at the same time, it had specified the basis of determining the minorities on religious grounds. It vehemently declines the needs of the other Muslim migrants by not including them in the bill. For example, Pakistan consists of different sections of people such as Baloch, Pashtuns, Sindhis, Mohajirs, Punjabis, Ahmedis, Hindu and Christian. The Sunni Muslims are in majority and hold the key government posts. The minorities consist of two sections, one is the Muslim Minority and the other is the non-Muslim minority.[17] The country consists of 90 percent Muslim population of which Sunni comprises 80 percent and Shias 20 percent.[18] Similarly, the minorities in Bangladesh

14 THE CITIZENSHIP (AMENDMENT) BILL, 2016, Bill No. 172 of 2016. Available at: http://www.prsindia.org/uploads/media/Citizenship/Citizenship%20(A)%20bill,%202016.pdf

15 "PIO v. OCI", Immihelp. Available at: <http://www.immihelp.com/nri/pio-vs-oci.html>, Accessed on 4 April 2017

16 Ministry of Home Affairs, "The Citizenship (Amendment) Bill, 2016". Available at: <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/172_2016_LS_ENG.pdf>, Accessed on 3 April 2017

17 Wg Cdr C Deepak Dogra, *Pakistan: Caught in the Whirlwind*, Atlanta: Lancer Publishers. 2016, page 91. Available at: <https://books.google.co.in/books?id=3zooCwAAQBAJ&printsec=frontcover&dq=pakistan+caught+in+a+whirlwind&hl=en&sa= X&redir_esc=y#v=onepage&q=pakistan%20caught%20in%20a%20whirlwind&f=false>, Accessed on 12 May 2017.

18 Ibid at page 117.

consist of Hindus, Christians, Buddhists which are the non-Muslim community while Ahmadi being a Muslim community has been reduced to the status of a minority.[19] In Afghanistan also, the predominant population consists of the Sunni sect of Islam and are known as Pashtuns.[20] The rest of the population consists of Hazara, Sikh and Hindus. Pashtuns comprise 42 % of the population while Hazaras are just 9% of the Afghan society.[21] The Amendment bill of 2016 fails to consider all these facts and seems to be politically motivated by tarnishing the secular structure of the Constitution.

Migrants and minorities from specific South Asian Countries (as mentioned in the bill): A Brief Study

Since the act propose to exempt minorities from certain countries from the category of illegal migrants, let us see what is the condition of the minorities in these countries and the reason of forced migration. A brief analysis will also be made as to who are the minorities in the said countries.

The Government of India in the citizenship amendment bill 2016 assigns minority status to Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan. Since these countries are Muslim dominated, the other religious groups have been assigned the status of minorities which are mainly the non-Muslims. A case study of the following countries is as follows:

Pakistan

Pakistan consists of different sections of people such as Balochis, Pashtuns, Sindhis, Mohajirs, Punjabis, Ahmedis, Hindu and Christian. The Sunni Muslims are in majority and hold the key government posts. The minorities consist of two sections, one is the Muslim Minority and the other is the non-Muslim minority.[22] The country consists of 90 percent Muslim population of which Sunni comprises 80 percent and Shias 20 percent.[23] Shias has been the victim of sectarian violence since long. So, one cannot say that only non-Muslims are the minority in Pakistan. After Pakistan was created in the year 1947, its leaders vehemently asserted that Pakistan

19 International Religious Freedom Report for 2012, United States department of State, Bureau of Democracy, "Human Rights and Labour". Available at. <www.state.gov/documents/organization/208636.pdf>, Accessed on 27 April 2017.

20 Ceirra DeHart, "Discrimination Towards Afghanistan's Minorities", Available at: <afghanistantoday.weebly.com/discrimination-towards-afghanistanrsquos-minorities.html>, Accessed on 3 April 2017

21 Ibid

22 Wg Cdr C Deepak Dogra, *Pakistan: Caught in the Whirlwind*, Atlanta: Lancer Publishers. 2016, page 91. Available at: <https://books.google.co.in/books?id=3zooCwAAQBAJ&printsec=frontcov er&dq=pakistan+caught+in+a+whirlwind&hl=en&sa=X&redir_esc=y#v=onepage&q=pakistan%20caught%20in%20a%20whirlwind&f=false>, Accessed on 12 May 2017.

23 Ibid at page 117.

will be a secular State and people of every religion or background will be known as Pakistani and nothing more.[24] The Secular character was again reasserted in the year 1948 during Jinnah's address to the people of United States through radio channel. As a result of all these, the provision for protection of minorities was asserted in the Objective Resolution passed by the first Constituent Assembly of Pakistan in 1949.[25] Equality of status, opportunity and equality before law, social, economic and political justice, freedom of thought, expression, belief, faith, worship and association are some of the fundamental rights given to the minorities in Pakistan.[26]Though considerable amount of rights has been assigned to the non-Muslims, the increasing rate of their persecution still remains a matter of worry.

Hindus and Christians face persecution, torcher and forced conversion and their number is also on decline.[27]Hindu girls are very prone to kidnapping and forced conversion in the Sindh province.[28]These incidents have forced them to cross the border and take refuge in India.[29]But the situation of non-Muslim minorities is no better. The Muslim minorities consist of the Shias, Sufis, Ahmadis and Mojahirs. These communities are also the followers of Islam, but they follow Islam in a different manner. They either reject the fanatic of Islam or are the non-believers of Prophethood of Muhammed.[30] These group owing to their belief are also facing discrimination and persecution by the Sunni Sect.[31] When Pakistan was created it was nowhere mentioned by any of the leaders that Pakistan will be a country only of the Sunni sect and no other sect will have a say in the country.[32] When Mohammad

24 Mu%ammad Nazeer Kaka Khel, "STATUS OF NON-MUSLIM MINORITIES IN PAKISTAN", *Islamic Studies,*23(1), 1984, pages 45-54. Available at: <https://www.jstor.org/stable/20847254>, Accessed on 3 April 2017

25 Ibid at page 47

26 Ibid at page 48

27 Wg Cdr C Deepak Dogra, *Pakistan: Caught in the Whirlwind*, Atlanta: Lancer Publishers. 2016, page 91. Available at: <https://books.google.co.in/books?id=3zooCwAAQBAJ&printsec=frontcover&dq=pakistan+caught+in+a+whirlwind&hl=en&sa=X&redir_esc=y#v=onepage&q=pakistan%20caught%20in%20a%20whirlwind&f=false>, Accessed on 12 May 2017.

28 Kanwar Klasra, "Anger over kidnapping, forced conversion of Hindu girls in Pakistan", *India Today,* Islamabad, April 25, 2016. Available at: <http://indiatoday.intoday.in/story/pakistan-kidnaps-forcibly-converts-teenage-girls-of-hindu-minority-in-sindh/1/650629.html>, Accessed on 12 May 2017.

29 Ibid

30 Wg Cdr C Deepak Dogra, *Pakistan: Caught in the Whirlwind*, Atlanta: Lancer Publishers. 2016, page 91. Available at: <https://books.google.co.in/books?id=3zooCwAAQBAJ&printsec=frontcover&dq=pakistan+caught+in+a+whirlwind&hl=en&sa=X&redir_esc=y#v=onepage&q=pakistan%20caught%20in%20a%20whirlwind&f=false>, Accessed on 12 May 2017.

31 Ibid at page 120.

32 Ibid at page 117

Ali Jinnah was addressing the people of the United States, he said that Pakistan will be a place for all including the non-Muslims and they will play their rightful part in the affairs of the State.[33]

Bangladesh

The Constitution of Bangladesh establishes it to be a country guided by Islam but a ruling of the Supreme Court in the year 2010 overturned the 1975 amendment and held secularism to be the constitutional principle.[34] The constitution guarantees the right of every religious community and denomination to establish, maintain and manage its own religious institutions.[35]Despite being held a secular State, the condition of the minorities and their large-scale persecution is really a matter of worry. The population of Bangladesh comprises of Sunnis which constitute 90% of the population, Hindus 9% and the rest are Christians and the Buddhists.[36]Hindus are the largest minority group in Bangladesh apart from the Buddhist and Christians. The number of Hindus in the country has been on decline during the years due to their cleansing by the majority Sunni sect. They constituted 28 % of the population in 1941 census when east Bengal was still the part of the undivided India but now they make up only 9.4% of the total population.[37] Though after the creation of Bangladesh many have already migrated to India but those who wished to stay there are facing discriminatory State policies and Islamic extremism.[38] They are accused of having loyalty towards India when Bangladesh was still part of Pakistan.[39] The Hindus have been subject to inhuman torcher such as rape, burning of homes, loot and killings. These brutalities have been acknowledged by Amnesty International

33 Muhammad Nazeer Kaka Khel, "STATUS OF NON-MUSLIM MINORITIES IN PAKISTAN", *Islamic Studies,*23(1), 1984, pages 45-54, Available at: <https://www.jstor.org/stable/20847254>, Accessed on 3 April 2017.

34 U.S. Department of State, "Country Reports on Human Rights Practices for the status of the government's acceptance of international legal standards- Bangladesh", 2011. Available at: <www.state.gov/documents/organization/171752.pdf>, Accessed on 25 May 2017.

35 U.S. Department of State, "Country Reports on Human Rights Practices for the status of the government's acceptance of international legal standards- Bangladesh", 2011, Available at: <www.state.gov/documents/organization/171752.pdf>, Accessed on 23 April 2017

36 Ibid

37 Delwar Hussain, "Hindu Muslim Bhai Bhai in a small town in Bangladesh", *Economic and Political Weekly,* 44(21), 2009, pp.21-24. Available at: http://www.epw.in/system/files/pdf/2009_44/21/HinduMuslim_Bhai_Bhai_in_a_Small_Town_in_Bangladesh.pdf , Accessed on 2 April 2017

38 Ibid at page 22

39 Delwar Hussain, "Hindu Muslim Bhai Bhai in a small town in Bangladesh", *Economic and Political Weekly,* 44(21), 2009, pp.21-24. Available at: http://www.epw.in/system/files/pdf/2009_44/21/HinduMuslim_Bhai_Bhai_in_a_Small_Town_in_Bangladesh.pdf , Accessed on 2 April 2017

as well.[40] They have been subject to discrimination not only by the Muslims but by the Government as well. For example, the Enemy Property Act confiscates the property belonging to the Hindus.[41] The government in the beginning was reluctant to accept the atrocities committed against the Hindus but later it admitted the assault and pledged to stop the same.[42]But nothing concrete has been done till now. With respect to Buddhists, the Ministry of Religious Affairs established the Buddhist Welfare Trust for religious and cultural activities but had failed to protect the community. For example, many Buddhist homes and monasteries were vandalized and burnt on the flimsy ground of a rumor that a facebook post has defiled Islam.[43] The condition of the Ahmadi sect of the Muslim community is no better. Ahmadis in Bangladesh also face discrimination owing to their belief. There have been constant demands to declare them non-Muslim. They are subject to harassment and vandalism.[44] They are also subject to discrimination on grounds of burial and construction of mosques.[45] The majority Sunni sect do not allow them to have any room for their religious belief. They neither allow them to have a decent burial nor a mosque for prayers.

Post 1971 Assam Migrants Case

The influx of Bangladeshi migrants has been a matter of concern since long. Since the border is porous it becomes difficult to monitor the same. The migrants settle mainly in Assam and causes demographic and economic imbalances in the region. The illegal influx is said to turning the state into a Muslim majority area.[46] India shares a border of 4,095 kilometer with Bangladesh out of which an area of 6.5 km has not been demarcated yet. The two countries also share a historical, geographical, socio-economic and cultural background and after partition this has caused a plethora of problems among which the issue of illegal migrants is the

40 Ibid at page 21

41 Ibid at page 24

42 Rounaq Jahan, "Bangladesh in 2002: Imperiled democracy", *Asian Survey,* 43(1), 2003, pp 222-229, Available at: <www.jstor.org/stable/10.1525/as.2003.43.1.222>, Accessed on 3 April 2017

43 International Religious Freedom Report for 2012, United States department of State "Bureau of Democracy, Human Rights and Labour". Available at. <www.state.gov/documents/organization/208636.pdf>, Accessed on 27 April 2017.

44 International Religious Freedom Report for 2012, United States department of State "Bureau of Democracy, Human Rights and Labour". Available at. <www.state.gov/documents/organization/208636.pdf>, Accessed on 27 April 2017.

45 Ibid

46 Dr. Rantu Gohain et.al., "Post-1971 Illegal Immigration from Bangladesh: A Demographic Changed Scenario of Assam", International Journal of Scientific and Research Publications, 3(3), March 2013.

biggest bone of contention.[47] The growing agitation by the All Assam Students Union and the subsequent death of the students in the protests that followed testifies the gravity of the problem. The Centre had to sign 'Assam Accord' to bring the state at peace. But this could not last long. Finally, the Supreme Court had to intervene, and it directed the State Government to update the National Register for Citizenship and also asked to deport the post 1971 migrants.[48] But the root of the problem is not growing number of migrants, the problem lies somewhere else which needs proper national and international attention. Poverty has always been counted as the potential reason for such migration and unless we deal with this problem at the national and international level, discrimination as to who will enter and who will not cannot be a solution. It also does not sound fair that the price of the inability of the government to check the infiltration should be paid by the genuine and needy migrants of neighboring countries.

Afghanistan

Afghanistan predominantly consists of the Sunni sect of Islam which is known as Pashtuns.[49] The rest population consists of the Hazara, Sikh and Hindus. Pashtuns comprise 42 % of the population while Hazaras are just 9% of the Afghan society.[50]

The population of Hindu and the Sikh in Afghanistan is 1000 and 3000 respectively and they have been subject to constant humiliation at the hand of the Pashtuns. Their children are forced to recite the verses of Quran despite them not being a Muslim.[51] Though they have been instrumental in building the socio, economic and cultural life of the country, they have not been acknowledged as such.[52] Their population in early 1990s was 50,000 but now they have been reduced to just 4000.[53] They are still subject to large scale persecution. Not only this, the systematic

47 Chirantan Kumar, "MIGRATION AND REFUGEE ISSUE BETWEEN INDIA AND BANGLADESH", Scholar's Voice: A New Way of Thinking, 1(1), January 2009. pp. 64-82

48 Nabajyoti Dutta, "Immigration in Assam: A Historical Perspective", International Journal of Humanities and Social Science Invention,4(1), January. 2015,30-32. Available at: www.ijhssi.org

49 Ceirra DeHart, "Discrimination Towards Afghanistan's Minorities", Available at: <afghanistantoday.weebly.com/discrimination-towards-afghanistanrsquos-minorities.html>, Accessed on 3 April 2017

50 Ibid

51 Ceirra DeHart, "Discrimination Towards Afghanistan's Minorities", Available at: <afghanistantoday.weebly.com/discrimination-towards-afghanistanrsquos-minorities.html>, Accessed on 3 April 2017

52 Anwesha Ghosh, "Longing to belong: Afghan Sikhs and Hindus in India", *The Diplomat,* August 19, 2016. Available at: http://thediplomat.com/2016/08/longing-to-belong-afghan-sikhs-and-hindus-in-india/,Accessed on 23 April 2017.

53 Ibid

targeting and illegal grabbing of their business and property had led to mass exodus. But as said earlier the condition of Muslim minorities is no better. Hazara is one such community which has been subject to torcher not only by the Sunnis but at the hands of their own government and Taliban.[54]Hazaras belong to the Shia sect.[55]They are They are treated as second class citizens and are reduced to the status of servants and labours.[56] They have also been subject to large scale persecution at the hand of the Pashtuns.

A perusal of the above study says that the minorities as mentioned in the 2016 bill are more refugee than migrants. Migrants are usually those people who migrate from one place to another not from the fear of persecution but with the hope of finding better opportunities or to escape hunger and poverty.[57] In light of this, the picking up of certain community and leaving other appears to be discriminatory.

Other Migrants from South Asia

Apart from the migrants mentioned in the proposed bill, India has constantly been feeling the pressures at borders by migrants from other States of South Asia as well such as Myanmar, Bhutan, Nepal, Maldives and Sri Lanka. But this has not been covered under the bill. The migrants from Nepal and Bhutan are protected through the bilateral agreement between the States.[58] The 1950 Treaty of Peace and Friendship between India and Nepal protects the movement of people and commodities across the borders.[59] India-Bhutan Friendship Treaty of 2007 asserts in Article 5 that both the governments will provide equal justice to subjects of each other at par with their own nationals.[60]

54 Anwesha Ghosh, "Longing to belong: Afghan Sikhs and Hindus in India", *The Diplomat,* August 19, 2016. Available at: http://thediplomat.com/2016/08/longing-to-belong-afghan-sikhs-and-hindus-in-india/,Accessed on 23 April 2017.

55 Ibid

56 Ibid

57 Somini Sengupta, "Migrant or Refugee? There is a difference, with Legal Implications", The New York Times, 2015. available at: https://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html?ribbon-ad-idx=3&rref=us&module=ArrowsNav&contentCollection=World&action=swipe&region=FixedRight&pgtype=article

58 Ravi Shrivastav and Arvind Kumar Pandey, "Internal and International Migration in South Asia: Drivers, Interlinkage and Policy Issues" UNESCO, 2017. Available at: https://www.unescogym.org/wp-content/uploads/2017/06/Internal-and-International-Migration-in-South-Asia.pdf

59 Rajeev Kumar, "India–Nepal Open Border: Springboard for Opportunities", International Studies 50(1&2), 2016

60 India-Bhutan Friendship Treaty. Available at: https://mea.gov.in/Images/pdf/india-bhutan-treaty-07.pdf

The current crisis of Rohingya refugees from Myanmar via Bangladesh in India has grasped huge international attention. India's response on the other hand has not been up to the mark with the ministers at the top level threatening to push back the refugees citing safety and terrorism concerns.[61] With respect to Maldives, the number of migrants migrating to India is miniscule as compared to the large chunk from other South Asian countries.[62]

Legal facet of the Illegal Migrants

Apart from the amendment bill of 2016, two existing acts also deals with illegal migrants which is the Immigrants (Expulsion from Assam) Act 1950 and The Immigration (Carriers' Liability) Act 2000. Immigrants (Expulsion from Assam) Act 1950 empowers the Central Government to expel or deport any person from the territory of India if the central government is of the opinion that such illegal migrants are detrimental to India or to any of the scheduled tribes in Assam or any section thereof.[63] The Immigration (Carriers' Liability) Act 2000 on the other hand empowers the central government to impose monetary punishment on a carrier who has brought an illegal migrant in violation of the rules laid down in Passport (Entry into India) act 1920. The act imposes a fine of Rupees 1 lakh on the carrier.[64] At the international level there are certain declaration and conventions which are meant for protection of migrants. These include the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention relating to the Status of Stateless Persons, the Convention relating to the Status of Refugees, and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.[65]

Conclusion

The proposed amendment though takes care of the concerns of the non-Muslim minorities in Muslim dominated country, it fails to consider certain vital issues such as non-consideration of conditions of Muslim minorities in the specified countries

61 Meenakshi Ganguly, "India's Response to the Rohingya Crisis Is Timid", Human Rights Watch 2017. Available at: https://www.hrw.org/news/2017/10/20/indias-response-rohingya-crisis-timid

62 Saman Kelegama, *Migration, Remittances and Development in South Asia*, Sage Publication 2011

63 Tulika Chakraborty, "Immigration Laws in India", *Lawyers Club of India*. 2010. Available at: <file:///C:/Users/Kumari%20Nitu/Desktop/Immigration%20Laws%20in%20India.html>, Accessed on 3 April 2017.

64 Ibid

65 United Nations Human rights, Office of the high commissioner, "Minority Rights: International Standards and Guidance for Implementation", 2010. Available at: <http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf>, accessed on 18 April 2017.

as mentioned in the bill. This is in violation of the principle of equality which India has long cherished.[66]Allowing only three countries under the umbrella of the proposed amendment is also discriminatory. There is no reason given as to why these three countries were selected and others were left out who are equally in need of such facility to be provided by the Government of India. India, which is known for its diversified culture should not confine itself to providing relief to non- Muslim minorities alone. The communities of neighboring countries who fear persecution at the hands of majority needs to be dealt with utmost care and equality. Also, the bill needs to carefully scrutinize the fact that by insertion of the word minority in the bill, it has blurred the distinction between refugees and migrants. Migrants can be both majority and minority people who migrate in search of better opportunities of life and to escape poverty and hunger, whereas refugees on the other hand are generally people from the minority community who fear persecution at the hands of majority and hence flee from their home state.

66 Lovish Garg, "If India Wants to Remain Secular, the New Citizenship Bill Isn't the Way to Go", *The Wire,* 21 September 2016. Available at: https://thewire.in/67272/citizenship-amendment-bill-2016/,Accessed on 15 May 2017

COMPARATIVE ANALYSIS OF HIGHER EDUCATION IN INDIA VIZ-A- VIZ AUSTRALIA, UNITED STATES OF AMERICA AND UNITED KINGDOM

Manish Rohatgi[1]

ABSTRACT

In India, Education is a subject of Concurrent List after 42nd Constitutional amendment in year 1976, which was earlier a State subject. India had not centralised education under federal government having been adopted democratic system of governance. The Constitution of India incorporated education as a State subject on the model of USA but to create a strong Centre with residuary powers vested with the Centre, the same is modified. Australia stands at one end of the ladder with the Central Government having the weakest role in education followed by USA and U.K in order of increasing role of Central Government. India stands somewhere between the USA and U.K.

In fact, the Indian Higher Education system is in a dismal state. In spite of mushroom growth of Universities and Higher Education Institutions, it does not serve the growing need and challenges of society and economy. The aim of this research paper is to compare the higher education system of India, an Asian country with countries in other continents i.e Australia, America and Europe for identifying the gaps in law so that suitable remedial measures can be identified for the improvement of the current Indian state of higher education.

Introduction

In India, prior to 42nd Constitutional Amendment, 1976, education was a State subject. Entry 11[2] Education including Universities subject to Entries in List I and List III, Seventh Schedule of list II of Seventh schedule to the Constitution lays down that Education including universities subject to the provisions of Entries 63[3],

1 Advocate and Research Scholar, Amity Law School, Amity University, Noida

2 Education including Universities subject to Entries in List I and List III, Seventh Schedule Constitution of India, 1950

3 The institution known at the commencement of this constitution as the BHU, the AMU and the Delhi University, University established in pursuance of Article 371E; any other institution declared by parliament by law to be an institution of national importance

64[4], 65[5], 66[6] of List I and Entry 25[7] of List III should be a state subject. The Constitution of India was being framed which was influenced by two main considerations firstly the model of USA i.e education as state subject and secondly the recommendations of Hartog Committee[8] according to which education is essentially a national service. Therefore, as in USA, a fundamental decision was taken to treat education as a state subject while making a specific enumeration of powers reserved to the Government of India in this field. Sapru Committee[9] reported in 1964 that while education is essentially a State responsibility, the Central Government also plays an important role in education and recommended that higher education should be transferred from the State List to the Concurrent List.

The Kothari Commission (1964–66)[10] constituted to advise the Government on the national pattern of education is of the view that education must increasingly become a national concern.[11] In 1964, Shri M.C.Chagla wanted education to be concurrent subject i.e joint responsibility of centre and states. Shri P.N.Kirpal and Dr. V.S.Jha two members of the Indian Education Commission, emphasized that the entire game of education should be included in the concurrent list[12]. By 42nd Constitution Amendment the education had been transferred to the concurrent list. Earlier in 1956, University Grants Commission (UGC) had been established by the Act of Parliament. UGC's function is to give financial grants to Universities and co-ordinate and maintain the standards of higher education[13].

This study is based on comparing the higher education system of India with countries of other continents. From Australian Continent, Australia is selected, from American continent, USA is selected and from European continent, United Kingdom is selected. USA is being selected because of leading education provider in its continent as well as its emergence as world leader in 1992 after dissolution of Soviet Union in December 1991[14]. United Kingdom is selected from Europe as

4 Institutions for scientific or technical education financed by Government of India wholly or in part declared by parliament by law to be an institution of national importance

5 Union Agencies and Institutions

6 Co-ordination and determination of standards in institution of higher education or research or scientific or technical education

7 Education, including Technical education, medical education and universities subject to the provisions of entries 63,64,65,66 of List I; vocational and technical training of labour.

8 J.P.Naik, Educational Planning in India, Allied Publishers, pg. 129.

9 A Committee of the Members of Parliament, the Union Ministry of Education appointed in 1963.

10 Kothari Commission appointed by Union Government in July,1964

11 R.P.Pathak, Development and Problems of Indian Education, p.17

12 Ibid p.22

13 A.B.Shah, Higher Education in India, 1967 p.74

14 www.history.com/topics/history-of-the-soviet-union (visited 2.12.2017)

Modern Indian education system got its roots and base during British regime. Australia is selected being the largest country in its continent and being world one of the leading education provider.

PROBLEM IDENTIFICATION

Indian Higher Education System is not in good shape. India is a home to many universities which are founded with the sole objective of making easy money. Regulatory authorities like University Grants Commission (UGC) and All India Council of Technical Education (AICTE) have been trying hard to cope with the menace of private universities and institutions which are running courses without any recognition and affiliation. The Government has failed to check and control these education institutions which are ruining the future of students. Many private colleges and universities do not fulfil the required criterion laid down by the Government and central bodies. In such a scenario, there is need to identify the gaps in law by comparing the higher education system of India with countries of other continents across the globe so that suitable remedial measures can be identified for the improvement of the current Indian state of higher education.

ANALYSIS AUSTRALIA

In Australia, the federal government has feeble role in Education. In 1901, the federal government was created. Prior to that the states of Australia were grown as independent colonies and each state had developed its own system of Education.

The Australian Constitution makes no mention of education. There was a feeling that Federal control of education would do harm to the system. The Australian federal government had not taken any steps for development of education for number of years from its inception[15].

In 1943, a Universities Commission was established from assisting the students of the Universities/Institutions, advise the ministers on matters related to University training or referred by minister for advice and to assist other persons for obtaining training in Universities/Institutions. However, this Commission is different from University Grants Commission (UGC) of India.

Central government has the autonomy to levy the taxes. The proceeds are distributed to the States without any consideration of scale of State's expenditures. Therefore, these financial allocations cannot be labelled as grants / assistance in real sense. However, the Central Government does give grants for educational purposes. For instance, the grants were given by Federal Government for establishment of a

15 J.P.Naik , Educational Planning in India, Allied Publishers (1965), p.138

School of Aeronautical Engineering in the University of Melbourne[16] and similarly, to a School of Public Health and Tropical Medicine at University of Sydney.

As in India, the public universities in Australia are established under the statute and acts as corporation for higher learning. But not all universities in Australia are established and incorporated by statute; in that case the student-university relationship is governed by law of contract rather than administrative law[17].

On one hand breach of contract may provide damages as relief, administrative law remedies include Writs of certiorari, mandamus or prohibition.

Although the decisions are subject to the judicial review, however its applicability on the decision of administrative character was tested in the case of *Griffith University* v. *Tang*[18], a case arising from a decision to expel a student from university for academic misconduct under an internal policy of University not by a statutory instrument.

High court held that "the student could not apply for judicial review."

However, the doctrine of contract was affirmed in case of *Harding* v. *University of New South Wales*[19]. The contract is increasingly viewed by as consumer contract and thus fall under ambit of Trade Practice Act as section 4 of the Act applies to the public universities as being considered as trading and financial corporations.

In *Quickenden* v. *O'Connor*[20], the full court held that "The University does fall within class of trading corporation as defined in section 4 of Trade Practice Act."

In *Kwan* v. *University of Sydney Foundation Programme*[21], the court held that "a student is a consumer for the purpose of consumer protection law".

Victoria and New South Wales have further enacted prohibitions on unfair and unjust terms in contracts[22]. ESOS Act, a form of consumer protection legislation, was specifically enacted for international students. The act also includes the provision of prohibition in misleading and deceiving overseas students.[23]

There was also office of Visitor for disputes resolution under internal laws of University as imported from British system.

16 J.P.Naik , Educational Planning in India (1965), Allied Publishers p.140
17 Bruce Lindsay, Complexity and Ambiguity in University Law, Australian National University
18 (2005) 221 CLR 99
19 (2001) NSWSC 301 (18)
20 (2001) 184 ALR 260
21 (2002) NSWCTTT 83
22 Fair Trading Act, 1999 (Victoria); Contract Review Act, 1980 (New South Wales)
23 Section 15, ESOS Act

UNITED KINGDOM

In U.K. ever since the Universities were set-up, they had to fight to maintain their independence and autonomous character. In 1571 Oxford and Cambridge were established by Act of Parliament. Edinburg University and University of London were incorporated by Royal Charter in sixteenth and eighteenth century respectively. University Grants Committee had been formed in 1919 to advise the government to provide grants to the Universities to meet their financial needs. Education Act was enacted by British Parliament in 1944. The Act provided for the appointment of a Minister of Education and the establishment of the Ministry of Education.

Every county and county borough was the Local Education Authority (LEA) for its area and responsible for primary education, secondary education and further (higher) education. The Act divided responsibility for education between central government, which was to set national policies and allocate resources and the Local Education Authorities (LEAs), which were to set local policies. However, Education reform Act of 1988, took the control of higher education out of Local Education Authority. Secretary of state for education under directions from parliament had given power to direct funding councils. Further and Higher Education Act, 1992 had created National Unitary Funding Council.

Until recently, there was office of Visitor with domestic jurisdiction for adjudication of disputes and grievances in the University. The jurisdiction of Visitor is exclusive of the courts as adjudicated in the dictum of *Thompson* v. *University of London*[24]. However, in *R* v. *Aston University Senate*[25], the Court held that his decisions were subject to judicial review for breach of natural justice and judicial error.

However, the Visitor's jurisdiction was ousted by U.K. Higher Education Act of 2004. It had been argued that the system was not necessarily cheap, speedy or final. The Act laid down the establishment of Office of Independent Adjudicator (OIA), a company limited by guarantee charged with investigating and ruling on complaints from students. As per Sch. II, Sub Sec 3 (2) (b) and (c) of the Act "a student must exhaust internal complaints procedure before referring to OIA and if a student takes matter to the Courts cannot subsequently seek to have heard by the OIA." However, there exists ambiguity in OIA powers as higher education is not a commodity and universities are not other forms of public services where public is consumer.

24 (1864) LJ Ch 625, 634

25 (1969) 2 QB 538

The U.S.A

In America, education is a State subject as it exclusively allotted to States in 1788 when the Constitution was framed but the most important modern trend of thinking in the USA is that the education is also a national responsibility.

During last more than 200 years, federal government has made very significant efforts to meet the demands of education in the changing times such as the federal effort for talent search in scientific studies and to improve science education when it had been appeared that Soviet Union was outshining U.S.A.

Federal grants are given for successful running of States' Educational Programmes such as scholarships/fellowships to the students, pilot projects and teacher education educational experimentation, etc. without pressing federal control over education. Rutherford. B. Hayes ex-President of U.S.A once said that "Federal aid to Public Education is one of the moral must of America".

Institutions of higher education were traditionally autonomous in governance. Courts have been hesitant to interfere with the judgments of University officials. However, the courts interference varies, private institutions enjoy more autonomy than public ones. The first such matter of private institutions resisting governmental interference came in 1819 with the case of *Trustees of Dartmouth College* v. *Woodward*[26], a dispute arose by the attempt of the State of New Hampshire taking control of Dartmouth College. The Court ruled that "private institutions have the right to govern themselves without the State interference."

In 1928, a New York court in *Anthony* v. *Syracuse University*[27] case held that "under ordinary circumstances, students entered into contracts when they enrolled in Universities."

Issues involving the rights of students have arisen since 1960s due to civil rights movement and social unrest as more students demanded greater rights (to be treated like adults) resulting in shift in student-institution relationship from loco parentis.

In case of *Dixon* v. *Alabama State Board of Education*[28], the court held that "there must be a balancing of the private interest of students and the power of the government, the college's power was not unlimited and could not be exercised in an arbitrary way, even if there were reasonable regulations guiding the decision. Officials must provide notice of the charges against students and a hearing on those charges with the opportunity for the students to refute them for satisfying the requirements of due process."

26 17 US 518 (1819)
27 224 App. Div. 487
28 294 F.2d 150

CONCLUSION

In conclusion, it can be said that, Australia stands at one end of the ladder with the Central Government having the weakest role in education, followed by USA and then U.K., in order of increasing role of Central Government. India stands somewhere between the USA and U.K. India had not centralised education under federal government having been adopted democratic system of governance. The Constitution of India incorporated education as a State subject on the model of USA but to create a strong Centre with residuary powers vested with the Centre, the same is modified. However, irrespective of the degree of control Universities do require central grants to meet their financial needs and were taken care at each jurisdictions.

Regarding the student-institution relationship there is existence of contractual relationship as depicted in number of case decisions in different countries. But student is not a consumer in real sense of term as higher education is not a commodity for purchase and services provided by University cannot be compared with other public services.

In India, Supreme Court as well as National Consumer Redressal Commission in its various decisions held that Education is not a subject of Consumer Forum.

Hon'ble Supreme Court of India in the case of *Bihar School Examination Board* v. *Suresh Prasad Sinha*[29] clearly held that:

"The Board is not a "Service Provider" and a student who takes an examination is not a "Consumer" and consequently, complaint under the Act will not be maintainable against the board".

In addition to above case, Hon'ble Supreme Court of India in the case of *Maharshi Dayanand University* v. *Surjeet Kaur*[30] *and P.T.Koshy & Anr* v. *Ellen Charitable Trust & Ors*[31] has categorically held that:

"Education is not a Commodity, Educational Institutions are not providing any kind of service, and therefore, in matter of admission, fees, etc., there cannot be question of deficiency of service. Such matters cannot be entertained by the consumer Forum under the Consumer Protection Act, 1986".

Following the same approach, National Consumer Disputes Redressal Commission (Delhi), in case of *Regional Institute of Cooperative Management* v. *Naveen Kumar Chaudhary*[32] has also held that:

32 Revision Petition No. 683,645,646,653-660 of 2014

29 (2009) 8 SCC 483

30 Civil Appeal No. 6807/2008

31 SLP (C) No. 22532/2012

"Educational Institutions are not providing any kind of service, so in the matter of admission, fees etc., there cannot be a question of deficiency of service -such matter cannot be entertained under Consumer Protection Act."

After 42nd Constitution Amendment, Education is subject of concurrent list; therefore, sometimes both Central and State Government try to take care of certain problem or issue and sometimes neither one. If everyone is responsible for anything then it is generally left out unattended. Both the Central government and the State government can make laws regarding Education. The central government's laws apply on all states but state laws apply only to the particular state. The Union laws will prevail over State law in case of any clash. Education is very vital subject but is often mishandled and not taken seriously by both Union and State instead they find the excuses and put the blame on each other. It should also be noted that India is a very diverse country and the need of different States differs. However, if every State is given individual responsibility then all the states will start experimenting. *TMA Pai Foundation* v. *State of Karnataka*[33] case decision which came on 31st October 2002 had created chaos in India's Education sector, as every State has interpreted it in its own way suited to it.

The problem of Higher Education System in India can also be understood from the words of Human Resource Development Minister Sh. Kapil Sibal while addressing the audience in 2009[34], he said that "The problem with education in our country is that there is no partnership between the Central Government and the State Government and that is the heart of why we have not been able to move forward very quickly".

Thus, there is need that the Education be put in Union List with Centre makes the law with broader view and allowing the States with necessary power to customize depending upon their requirements for the overall improvement of Indian Higher Education System. Further there is need to develop a powerful Central Regulatory Mechanics for better control over the Universities and improvement in Student Grievance Redressal System as in the current system Universities which are incorporated under the State Act, the Central Regulator University Grants Commission (UGC) needs to recognise them and with only control in sake of name is to grant financial assistance or not in absence of any other penal provision.

Acknowledgement: *The author acknowledges the contribution of his Research Supervisor Prof. (Dr.) Meenu Gupta, Professor of Law, Amity Law School, Amity University, Noida, Uttar Pradesh*

33 WRIT No. 350 of 1993

34 India Today's States of States Conclave September,2009

LAW, SCIENCE AND TECHNOLOGY: RELATIVE DEVELOPMENTS

Dr. Aditya Tomer[1]

Science in the twentieth century has turned out to be huge, complex, and costly. It has additionally turned out to be pertinent to the standard existences of men to a remarkable degree. One could state, without a lot of misrepresentation, that the course of history since the last quarter of the nineteenth century has been an account of expanding acknowledgment and joining of the logical information and researchers into the viable establishments of society, including both business and government. Science has turned out to be engaged with our household legislative issues, in worldwide relations, and for all intents and purposes which each organization imperatively influences men in the mid-twentieth century.

Social development, organic and innovative advance, must, of need, be joined by changes in enactment, especially in reformatory law; changes in the feeling of modernization and change. Social development and logical progressions might be abridged as takes after: (1) Those in the political and legislative segment; (2) those in the financial part; (3) those in the social family segment; (4) those in the medico-organic sciences; (5) those concerning the utilization of new sorts of vitality; (6) those in the socio-social and the socio-moral division.

Science and law points of contact

The purposes of contact amongst science and the law are various. The advancement of logical hypothesis, innovative work may in any case, influence the substance of the law, since there would emerge the requirement for managing such a large number of circles of nature and the human personality which have been investigated by science.

Besides, the procedure of law may need to consider logical improvements. The descriptive word law-the law of system and confirmation is frequently felt to need adjustment in the light of logical advancements.

Thirdly, in the genuine organization by courts and different specialists depended with legal and semi legal capacities, favorable position could be taken of new logical strategies that may be helpful in court organization.

1 Professor of Law and Additional Director, Amity Law School, Amity University, Noida

An important discourse between the two orders isn't an extravagance; it has its utility, and it might soon turn into a need.

The quick development of science both as to the assortment of fields secured and the force of learning procured, might, in the not far off future, constrain a nearby thought of the subject of the between relationship of the two orders.

Francis Bacon once watched, "He that won't make a difference new cure must expect new wrongs" We could stay away from the development of new shades of malice by foreseeing them and by formulating suitable arrangements.

It would not, in any case, be right to state that the law has been absolutely careless of logical improvements. The historical backdrop of enactment in most cultivated nations, at any rate since the season of the modern upheaval, demonstrates that as and when new issues were introduced by mechanical change and by its effect on people, the law, eventually, took note of the reality and played out its part of "social designing", by advancing appropriate tenets to manage the lead of individuals in the light of those improvements. Regardless of whether this outcome was accomplished by enactment or by the legal procedure (the strategy for the precedent-based law) or by some other technique, involves detail. In any case, the reality remains that the issues came surprisingly close to the law. For instance, when creature transport are to be supplanted by rail and the inquiry emerged of the liabilities made by railroad operations, enactment directing railroads was ordered.

At customary law, where a railroad is developed and worked under statutory forces, and there is carelessness in the development or utilization of trains, there is no risk for flames caused by the escape of sparkles from trains, despite the fact that there is such obligation if the rail route isn't worked under statutory powers[2]. But this view was somewhat hard upon ranchers who had crops neighboring a rail line. In like manner, a trade off was affected by the Railway Fires Act, 1905, and 1923, which provide reason to feel ambiguous about railroads a risk not surpassing pounds 200[3], for harm caused to farming area or horticulture crops for flame emerging from the emanation of flashes or ashes from their trains, despite the fact that the train was utilized under statutory forces.

Same was the situation with innovation of the transmit, the phone, remote telecommunication and air ship and disclosure of the nuclear vitality. Each of these advancements in the logical field was taken after, if not went with, by enactment that was planned to settle issues caused in this way.

2 *Vaughan v. Taff Vale Rly.* (1860) 5 H. and H. 679; *Jones v. Festiniog Rly.*, (1868) l.r. 3 Q.B. 733; *Rylands v. Powell* (1890) 5 Q.B.D. 997; *Mansell v. Webb,* (1918) L.J.K.B. 323

3 Railway Fires Act, 1905 and Railway Fires Act 1923, 5 Edw. 7, c. 11, S. 1; 13 and 14 Geo. 5. c. 27. s. 1.

The threats inborn in the setting up of atomic establishments nuclear, vitality, radio-dynamic substances, the emanation of ionizing radiations, the utilization of radio-istopes for therapeutic and mechanical purposes, and the transfer of waste in this manner made new issues of risk to which the precedent-based law, as activities for carelessness, annoyance and the lead in Rylands v. Fletcher, gave no agreeable answer. No one but enactment could manage the issue.

Descriptive word law and Science

Descriptive word law additionally outfits delineations of the lawful way to deal with science. The way that science (in the feeling of specific collection of information in a specific teach) is essentially an issue for the specialists, has been perceived by the law for quite a while. It is exactly on this premise segment 45 of the Indian Evidence Act, 1872-an Act which is presently more than a hundred years of age enables specialists to give confirmation of their sentiments. At first, the law was hesitant to concede the feelings of "specialists", in view of the conventional decide that confirmation could be given just of realities which can be seen by the faculties, and not of assessment. Be that as it may, adherence to this strict teaching was soon observed to be doubtful, when the issues of which prove was to be given were themselves, for example, could .not be seen by the normal individual without the guide of particular mental and physical hardware.

Pace of the cutting edge advancements

Where, at that point, do we locate the impossible to miss effect of science on law in present day times? In reply to this inquiry, it might be expressed that the quirk lies in this-that the purposes of contact amongst science and the law have, in present day times, expanded in their number and force.

Every year brings a new yield of logical disclosures. Learning that was collected 10 years back ends up noticeably obsolete. Crisp fields are trodden, new roads investigated, new marvels uncovered each year. These disclosures and investigations increment not just in amount and number; they touch individual and social life at such a significant number of focuses. These are the focuses that at last turn into the purposes of contact amongst science and the law. It is in this way that logical improvements result in an expansion in the need of legitimate reaction to the different purposes of contact.

A nation would have the capacity to manage this circumstance acceptable to the degree to which its lawful apparatus that is to state, the hardware worried about the detailing, organization, understanding and re-definition of the law,- makes sufficient strides wherein the lawful reaction alluded to above discovers Its appearance in an attractive way .

Certain logical systems could be manhandled. Need to ensure indlvidua1 freedom against unjustifiable obstruction with security, which is actually conceivable, is a case of the need to make lawful assurance against manhandle of innovation. It might be rudimentary, however it merits bringing up that the law demonstrations just on people, and is concerned just with the lead of individuals. It isn't in this manner each logical improvement that may make legitimate

Moral esteem judgments

Many fields of social life are pervaded with solid moral esteem judgments, having their inception in religious foundation, verifiable custom, atmosphere and level of advancement of civilisation. These esteem judgments would change among various social orders. For instance, in German law, a gathering is at risk for harms for rupture of agreement just if there should arise an occurrence of at fault rebelliousness with the legally binding commitment, while Anglo-American law, in this specific case, forces what might be called a goal risk.

Another essential viewpoint to be seen is that actualities requiring or proposing the need of lawful direction may yet leave scope for the selection of a few conceivable choices. Every one of these components outline the trouble of confining enactment.

The domain of thoughts

Expanded logical exercises result in huge increment in ideas'. Mechanical advancements, and the expanded intricacy of business, have made thoughts more critical and significant than any other time in recent memory. In any event, individuals have been fortified to create them. Thusly, there emerges an interest for legitimate security for thoughts. The withholding of lawful acknowledgment to those people who have provided „Ideas' would, on the hand result in a mounting number of treacheries. Equity as controlled at custom-based law does, be that as it may, once in a while bear a quantitative perspective. On the off chance that, with reference to a specific sort of case, the activity of screening out the cases based on a false establishment seems troublesome or subject to conceivable blunder, the courts may not attempt that activity, on the off chance that it appears to the court - that exclusive a couple of commendable petitioners will endure. Assuming, in any case, the quantity of commendable inquirers is vast, the legal may maybe be slanted to confront the troubles and to take more risks.

Effect on regulatory law

It is a characteristic of logical improvements that in the event that they are of such a nature as to require intercession of the law in the state of enactment, at that point by and large the enactment would think about an expound authoritative set up.

Managerial law manages the power, method and liabilities of the organization; and directs the way of the activity of different experts and circumspection by those specialists, open officers and different instrumentalities of the administration. It additionally gets the regulatory procedures accord with law and tries to control the activity of authoritative discretions and directions. Along these lines regulatory law identifying with logical prompting must fret about the degree and extent of the semi authoritative and semi legal forces of the managerial offices. In case of abuse or mishandle of energy and optional the authoritative expert, it accommodates survey of managerial activity, its correction and. on the off chance that important, legal control. Inside its territory falls the topic of lawfulness of designated enactment and the legitimateness of the guidelines, control and requests of the regulatory offices.

Securing the results of the brain

At the point when learning builds, thoughts increase and the subject of their legitimate insurance emerges. There are, obviously, a few all around perceived lawful circles of security for the results of the brain, the law identifying with licenses and creations, the statutory law of copyright, and the law of abstract property. Be that as it may, the thoughts once in a while are not of such a nature or in such a shape as to bring them inside any of these classes. They may not be patentable topic, either in light of the fact that they don't fall "inside the classes identified in the significant statute, or on the grounds that they constitute just broad thoughts which, however profitable, are not adequately decreased to a physical epitome to bring them inside the idea of „Invention'. The developing acknowledgment of 'property' in thoughts either by Judge-made law or by enactment is a case of the reaction of the law to growing scholarly skylines.

Copyright is worried, obviously, just with the statement of thoughts. In the event that a thought is put forward in composing, the one to whom it is submitted might be obligated if, without assent, he duplicates the written work or makes uncalled for utilization of it in delivering another outflow of the Idea. This is dealt with by the law of copyright.

The law of copyright has, nonetheless, no application when the thought itself has essentially been put to use without there being a composed record. An inquiry that has demonstrated most dubious is, regardless of whether there ought to be assurance for any thoughts outside the customary classifications for their unapproved utilize. The more established cases are exceptionally strict in affirming that there is none. Inside the most recent twenty years, be that as it may, there has been an inclination towards progression of the law in such manner. Break of certainty and comparable heads of risk are being solicited.

This show how wide could be the ambit of conceivable lawful reactions to logical advancements and their results, and how complex could be the procedure of discovering arrangements thereto.

Science In the administration of law and society

All in innovation isn't malevolent. The law ought not be oblivious in regards to such logical improvements as could be viably and advantageously used in help of the lawful procedure. To take a simple case, the , created in 1873, is presently to be found in each office. Be that as it may, its usage by the courts has not been so brisk and widespread as it could have been. Take next, the utilization of PCs in the field of legitimate research. PCs have now come to remain in mechanical and business life, yet their utilization in the lawful circle is constrained to not very many zones. This might be somewhat because of the way that the two orders PC innovation and the law-have not yet met each different over the table and built up recognition. Their colleague, assuming any, is a gesturing one.

Such a procedure of getting profits by science require not be limited to the physical or natural sciences. There is sufficient extension for applying sociologies also. Human science, for instance, can be squeezed into benefit in investigation of the organization of criminal law-especially, in judging the viability of criminal law. By and large, wrongdoing is an unpardonable conduct; yet the issue lies in the best possible demeanor of society towards indefensible conduct. It is here that the components which are identified with the ethical judgment could be examined. For instance, is sex a material factor in moral judgment-what sorts of offenses, assuming any, are respected more extremely by man than by women? Does age have any kind of effect? Has religious conviction any effect? Shouldn't something be said about urbanization, race, level of scholarly improvement and childhood? These inquiries are the meeting purposes of brain science, humanism, human sciences and law.

This can be understood with the refine of newly advent printing. The obligation which the law owes to printing is vast. However, for the printed word, it would have been hard to safeguard the abundance of case law for the utilization of future ages of legal advisors.

It is in this manner clear that the law, at some point or another, has observed logical advancements before, and should keep on doing so later on.

At the point when future historians[4] glance back at the period in which we are presently living, they are probably going to consider it to be a period in which logical information rose up out of its, pre-adulthood to end up noticeably a central

4 James A. Shannon. Science and the development of Public Policy, (1973), page 31.

point in the issues of human social orders. They will see the issue that is postured for researchers and society alike and, with the advantage of knowledge of the past, will condemn the degree to which we took the measure of its noteworthiness. In this association, they will give careful consideration to the grip we appeared in managing another component in the circumstance that of relating logical learning to open approach and, activities talking louder than words, to the way we molded our game plans to this end.

System of study

This short blueprint of the purposes of contact between science innovation and law, demonstrates the wide territories open for consider. Since the subject of Interaction of science and law is a huge one and grasps such a large number of fields of human action, it might be savvy to choose certain vital or squeezing zones for consideration.

It is a custom in science and maybe a rule to choose from the unbounded supply of unsolved issues just those basic ones whose arrangement appears to be conceivable as far as accessible information and abilities. We are additionally prepared to subject our outcomes to the most extreme feedback. Adherence to these two standards the rule of determination and the standard of adherence - result in our knowing practically nothing, however then again, being exceptionally sure we truly know this little.

In this setting a critical device of research created by science may likewise be observed. All in all, the trading of logical data does not know about national obstructions. Essential logical research led in one nation goes to different nations inside sensible time. Tragically the same can't be anticipated of data identifying with the law. This is, obviously, incompletely because of the way that the substance of the positive law shifts from nation to nation, while the substance of logical learning does not all that differ. In any case, there is degree for receiving the similar strategy to some degree.

The tree of learning has such a significant number of roots and branches. It won't be anything but difficult to incorporate every one of them. It would, along these lines, be astute either to choose one branch of science or innovation and concentrate its between association with law. Or then again, as an option strategy, it is alluring to choose one branch of law and concentrate its between association with science.

Conclusion

It is a genuine undertaking of the law to consider the social benefits and negative marks of logical or other advancement and direct human lead.

Information influences us to free, however it can likewise be a threat for man. All things considered, it was the serpent that made man eat from the apple of information and forego heaven. We can't, in any case, turn around the advancement of learning. We can just manage the hazard made by manhandle of learning.

It is the undertaking of the law to guide and shape the world, and to manage the elements of specialized advancements and their impact on people.

NARCO-ANALYSIS AND ITS CONSTITUTIONALITY IN INDIA: A CRITICAL STUDY

Sweta Singh[1] & Dr. Arvind P. Bhanu[2]

Introduction

In order to ensure peaceful condition in society and to enable its members to enjoy all freedoms and fruits of the efforts without any hindrance the society regulates the activities of its member through court or law. As and where society feels the need to prescribe specific parameter of behaviour for any activities, it enacts a law. Any activity prohibited by society through its law is a deviant behaviour or crime. In short, crime is a wilful violation of the codes of society. Since, majority feel in line and deviance was an exception, crime was considered to be a mental aberration. To control this aberration or deviant behaviour, need arose for a law enforcement apparatus and to clothe it with power over fellow citizen. To ensure that the power was not used capriciously, a criminal justice system came into existence in all societies. Concern for Human Right in the criminal justice administration, is of recent origin. In ancient India, Vedas and scriptures provided the basis for Hindu jurisprudence and criminal justice administration. Village assemblies and the king with the assistance of selected villagers and towns folk, administered justice. People directly participated in adjudicating guilt and awarding punishments. The emphasis was on the good of the society, and the impact of punishment on the individual was of no relevance. Punishment served the purpose of retribution and as example to deter and prevent others to take to crime. On some occasions, punishment served the purpose of compensating the victim. During Muslim rule, the Islamic law formed the basis for view as a sinner against the society, who deserved to be socially deprived. Punishment was severe and cruel and was meant to be seem as warning to others. "Eye for eye" and "tooth for tooth" became the governing credo of criminal justice system at the time. The British rule in India, for the first

1 Professor, Lawyer, Delhi
2 Professor, Amity Law School Delhi,

time, introduced egalitarian principles of Anglo-Saxon jurisprudence and the criminal justice system assumed the modern day role of reformist character.[3]

Conceptually, the criminal justice system may be defined as giving the criminal his due with the probable difference to crime in the society. The National Police Commission had identified it as "catch the culprit and if found guilty in court of law punish him with imprisonment or death". Its objective is to humanize the purpose of adjudication, control arbitrariness, guarantee, equal status to all citizens-guarantee as well as translate the notion of liberty. In reality, to promote sense of security amongst the members of a given set up, ensure the rights of the victims and the accused, motivate the public to participate in the process of prevention of crime, facilitate an overall growth of human personality without fear or favour. In other words, it is needed to protect social value and procedurally ensure fair play and justice to all. That criminal justice could be a barometer ofcivilization in acolyte, and the indicator of operational pattern of Clue process against the enforcement model.[4]

To prevent arbitrariness and to hand equitable justice to one and all, the criminal justice system in India has adopted the concept of due process. Under this provision everyone is presumed to be innocent unless the guilt is proved beyond reasonable doubt in accordance with the procedure established by law. All are equal before the law and mere accusation does not attract any stigma. A citizen is given fair and reasonable opportunity to challenge the accusation and to establish innocence. In case of doubt, benefit always goes to the citizen. Since human rights are concerned with the dignity of the individual, criminal justice system provides following safeguards to ensure that citizens are protected and their human rights are not violated:

(a) All laws are tested on the touchstone of the Constitution;

(b) Enforcement takes place within four corners of law;

(c) Adjudication of guilt remain only with the judiciary; and

(d) All wings of criminal justice system strictly follow the due process and the principles of natural justice[5]

Looking at the scenario of crime in India, crime is present in various forms. Organized crime includes drug trafficking, gunrunning, money laundering, and extortion, murder for hire, fraud, human trafficking and poaching. Many criminal operations engage in black marketeering, political violence, religiously motivated

3 S. Subramanian, *Human Rights:International Challenges*, Vol. 1, New Delhi: Manas Publication 1997, pp. 219-220 and 222.

4 Aparna Singh; *Rights Against Self-Incrimination and Narco-analysis;* Vikings Publications; pg. 39

violence, terrorism, and abduction. Other crimes are homicide, robbery, assault, etc. Property crimes include burglary, theft, motor vehicle theft and arson. Corruption is a significant problem.

Meaning of Narco-Analysis

The Narco-analysis test and other scientific methods of investigation have been devised in this very context. The term Narco-analysis is derived from the Greek word *narkc* meaning "anaesthesia" or "torpor" and is used to describe a diagnostic and psychotherapeutic technique that uses psychotropic drugs, particularly Barbiturates, which act as central nervous system (CNS) depressants, and by virtue of this they produce a wide spectrum of effects-from mild sedation to anaesthesia.

It is difficult to define the literary definition of Narco-analysis. It has been defined in different medical dictionaries according to its implications and application on human body.

Narco-analysis, Miller-Keane Encyclopaedia and Dictionary of Medicine, Nursing, and Allied Health, define it as to "a controversial method of psychotherapy that uses administration of medications to release suppressed or repressed thoughts or affect-laden and unacceptable ideas".[6]

Farlex Partner Medical Dictionary explains it as "Psychotherapeutic treatment under light anaesthesia, originally used in acute combat-related cases during World War II; also has been used in the treatment of childhood trauma."

Medical Dictionary for the Health Professions and Nursing defines it as "Psychotherapeutic treatment under light anaesthesia".

The police in India are using Narco-analysis in eliciting confession from accused under the influence of drugs, which are supposed to relax a person's defence to the point that he or she reveals the facts or truth that he / she has been trying to concealin normal circumstances. The person is not in a position to speak up at his own but can answer specific but simple questions. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers

When we go back to history, in 1922, Robert House, an obstetrician from Texas, experimented the use of Narco-analysis in the interrogation of suspected criminals.[7]He arranged to interrogate two prisoners in the Dallas county jail by using

5 S. Subramanian, *Human Rights:International Challenges*, Vol. 1, New Delhi: Manas Publication 1997, pp. 221.

6 *Miller-Keane Encyclopaedia and Dictionary of Medicine, Nursing, and Allied Health*, Seventh Edition, 2003.

7 *Rejali, Torture and Democracy*, p. 386.

scopolamine, whose guilt was almost confirmed. Under the influence of drug, both prisoners denied the crimes for which they had been detained, and upon trial were found not guilty. After the successful experimentation, House concluded that an accused under the influence of drugs cannot lie. The word "Truth Serum" is believed to have appeared first, in the news report of Robert House's experiment, and there, he came to be known as the "Father of Truth Serum." However, in the mid-1930, Narco-analysis became popular as a result of the discovery of quickly acting barbiturates with short-term effects. But the application of the technique was adopted frequently in the criminal investigation from the early 1950s[8]

The Narco-analysis test is conducted by mixing 3 grams of Sodium Pentothal or Sodium Amytal dissolved in 3000 ml of distilled water. Narco Test refers to the practice of administering barbiturates or certain other chemical substances, most often Pentothal Sodium, to lower a subject's inhibitions, in the hope that the subject will more freely share information and feelings. A person is able to lie by using his imagination. In the Narco-analysis test, the subject's inhibitions are lowered by interfering with his nervous system at the molecular level. In this state, it becomes difficult though not impossible for him to lie. In such sleep-like state efforts are made to obtain "probative truth" about the crime. Experts inject a subject with hypnotics like Sodium Pentothal or Sodium Amytal under the controlled circumstances of the laboratory. The dose is dependent on the person's sex, age, health and physical condition. The subject which is put in a state of hypnotism is not in a position to speak up on his own but can answer specific but simple questions after giving some suggestions. The answers are believed to be spontaneous as a semi-conscious person is unable to manipulate the answers.[9] Apart from Narco test there are other two kinds of tests which are popularly used on the convict for extraction of truth and they are Polygraph or lie-detector test and P300 or the Brain Mapping Test.

Modus Operandi of Narco-Analysis Test: In India, the Narco-analysis test is done by a team comprising of an anaesthesiologist, a psychiatrist, a clinical/forensic psychologist, an audio-videographer and supporting nursing staff. The forensic psychologist prepares the report about the revelations and it is accompanied by a compact-disc of audio-video recordings. The strength of the revelations, if necessary, is further verified by subjecting the person to polygraph and brain-mapping test.

Constitutional rights of the accused and Narco-analysis

Ever since the formation of State there had been a tussle between powers of State, always inclined to encroach beyond its permissive limits, and the individual.

8 *The Yale Law journal,* 62(3)1955, pp. 325-331.

9 Prof.Pramila Bajaj, *Drugs in Clinical Anaesthesia,* (1st Edition) 2003.

When the encroachment of powers are extended, not only crossing beyond threshold point but becomes almost total, that state is called 'Totalitarian State'. Development of idea of democracy and the very basic reason for its popularity was because this form of government vehemently advocated protection of individual's right via the State. Constitution is the core law where powers and its limits of the State are well defined but simultaneously a Constitution, even if existing in writing or not or for a namesake also define fundamental rights of the individuals, which the State is obliged to protect and not to be encroached upon.

The Indian Constituent Assembly had gifted to Indian people fundamental rights and also an apparatus in the form of independent judiciary to keep watch and ensure that these rights are not infringed, violated or taken away by State on pretexts, whatsoever (specially on grounds of law and order or in the name of public good). Articles 14, 20, 21 and 22 specially deal with safeguarding of dignity, liberty and saving the Indian citizens as individuals.

Cardinal principle of criminal law is that the accused is presumed to be innocent until proved guilty beyond all reasonable doubt. Three basic foundations have been determined to formulate this principle:

- In every criminal proceeding and trial, the prosecution, consisting of entire State machinery, including investigative and legal agencies has the advantage to remain in a position to dictate the proceedings. If the burden is placed on the accused, defending the charges, it would deprive him or her of a fair opportunity to answer the allegations against that person.
- The prosecution has all resources at theirdisposal, which in any case are superior to those available to the accused in most criminal cases.
- In the reverse case, if the burden of proof is placed on the accused to prove his innocence, the court will have to convict him where it is uncertain about certain facts in issue.

In the early days of legal systems accused persons themselves were viewed as best evidence which could be produced. This inquisitorial system was based on the assumption that accused is the best person to narrate or contest the alleged facts and circumstances. That procedure was adopted by ecclesiastical courts and as such followed by other courts then.

But later on it was realised that compelling a person to contest the facts of allegations on his own is not justified, because ordinary accused persons were not trained in legal methodologies and intricacies of cross examination, to which he would automatically put himself in. Such persons could be an easy trap in answering

to misleading or suggestive well framed questions put to him by prosecutors or the judge. This anomaly could expose even factually innocent person to problems because of unintentional irregularities in his statement. Secondly, in this way the burden of proving innocence is placed on the accused by deposing to refute the charges.

For these reasons, the inquisitorial conception of conceiving accused persons as best source of evidence had been dropped long ago, and, in its place 'adversarial procedure' had evolved in common law. Under this new system (with the development of democratic constitutional law) many protective rights were provided to accused charged with criminal offences. The first of these protective rights is 'presumption of innocence', besides right to be informed of charges, right to a fair trial Where a compulsory process has been adopted for proving the guilt beyond reasonable doubt etc. There are two exceptions to the rule mentioned under common law, as well as recognised under Indian law in regard to the presumption of innocence of accused person. The first exception is that only statute can shift that burden on the accused. For instance, in India "dowry death" cases have been made statutorily to presume the guilt, rather than innocence of accused by an addition of section 113B, Evidence Act. This is a reverse onus clause or in another words the statute had done away with the presumption of innocence of accused.

As to the second exception it may be said that, while the prosecution has to prove every element of the offence as had been defined by the statute, the burden of proving that part of the accused's case falling within any general or specific exceptions, lies on him. It has been held that while the prosecution is required to prove its case against the accused beyond all reasonable doubt, it is needed by the accused only to show a balance of probabilities in his favour to prove his case. This reasoning is based on the principle that accused is entitled to every reasonable doubt in his favour.

Not only in India but also in other countries the question had come up before courts, whether the right of accused, to be presumed innocent, is fundamental right? The US Supreme Court had accepted that presumption of innocence is a fundamental right by reading it into the "Due Process" clause of US Constitution. The US Supreme Court struck down laid down provisions in some penal statute; which provided some offences that could be proved on the basis preponderance of probabilities.

The Indian Constitution incorporated article 20(3) which provides that no person accused of an offence would be compelled to be a witness against himself. It was held that article 20(3) and its object is in consonance with the basic principle of

criminal law that an accused person is entitled to rely on the presumption of innocence in his favour.[10]

Article 21 of Indian Constitution provides and reads as: "No person shall be deprived of life or personal liberty except according to procedure established by law". A seven Judge Bench of Supreme Court clearly interpreted and laid down the law that the procedure contemplated by article 21 to deprive a person of personal liberty had to be "right, just, fair and reasonable"[11] Commenting on this series of judgments Krishna Iyer J, held that after Maneka Gandhi's case verdict, the due 'process clause' should be read into article 21 read with article 14 enshrined in Part III relating to fundamental rights in Indian Constitution.

Recently these findings relating to personal liberty and presumption of innocence has been confirmed in Smt. Selvi's case. These decisions clearly envisage that article 21 incorporates 'due process' clause, hence right to be presumed innocent until proved guilty beyond all reasonable doubt is certainly a fundamental right. Besides, even before Menaka Gandhi's decision, the right to fair trial had been the order of the day under article 21. It may be argued that whether a fair trial includes presumption of innocence to the accused till he is proved guilty. The established principle for interpretation of Constitution envisages that where any common law, such as municipal law is silent on a specific point or issue, International Humanitarian Law should be resorted to for the interpretation. According to this view here is what the International Humanitarian Law says about presumption of innocence of accused.

Most of the times it is advocated that either existing law should be amended or a new statute should be legislated to give legality, admissibility or at least legitimacy to Lie Detector tests results. It is argued that when it becomes beyond the capacity of police agencies (and the prosecution) to work-out cases the accused/suspect is being put to such tests. On this argument no law could be legislated on the following grounds:-

(a) The tests have no scientific ground, acceptability or recognition

(b) It would violate fundamental rights enshrined in the Indian Constitution and as such susceptible to be declared unconstitutional.

(c) The doctrine of '*res ipsa loquitor*' has no application in criminal law.

10 *K. Joseph Augusthi v. M.A. Naryanan*, AIR 1964 SC 1552: 1964 (1) SCJ 676: (1964) 7 SCR 137.

11 *Maneka Gandhi v. Union of India*, AIR 1978 SC 597: (1978) 1 SCC 248: (1978) 2 SCR 621: 1978 (2) SCJ 312; *Bachan Singh v. State*, 1980 Cr LJ 636: AIR 1980 SC 898.

Right against self-incrimination:

The doctrine of right of self-incrimination has been derived from English law and is being recognised by all courts throughout the world. In old days, the Court of Star Chamber adopted the barbaric methodsof sentencing on the basis of ex-officio oaths to the defendants due to which feeling of revulsion gained momentum among the general masses and consequently the Court of Star Chamber had to be abolished. After abolition of the said court, the outcome of the reaction was also that the doctrine of right to self-incrimination was generally accepted. Later on the principle was carried to America. The doctrine can also be traced to the Latin maxim *"Nemo teneturseipsumprodere"*, which means no one is bound to accuse himself. From there came the right to silence and consequently it became a procedural safeguard to refuse answering a question which may incriminate a person.

The doctrine was incorporated in Federal Constitution of United States of America through Amendment V of that Constitution. This Amendment provided that no person shall be compelled in any circumstances relating to a criminal case to be a witness against himself. This was also expressly held by the "Third Chamber" (SC) of US that the due process clause in Amendment XIV of US Constitution envisages that no State shall deprive any person of life, liberty or property without due process of law. This clause is wide enough to include the prohibition against compelling the defendant in a criminal case to testify, by fear or hurt, torture or exhaustion or any other type of coercion against himself.

Article 20(3) of Indian Constitution incorporated the same principle of right against self-incrimination. Article 20(3) reads as: "No person accused of an offence shall be compelled to be a witness against himself". There are four components of article 20(3),-

(a) The person should be accused of an offence;

(b) Such person must not be compelled to be a witness against himself;

(c) Such compulsion must relate to be a witness; and

(d) Such person must be compelled to incriminate himself by his evidence.

These are components and conditions of attraction and applicability of article 20(3).The underlying principle of the article is presumption of innocence of the accused person in every criminal prosecution, where the burden of proving the guilt lies on the prosecution.

260 *Dr. Ram ManoharLohia v. State of Bihar* & Ors., [1966] 1 S.C.R. 709.
261 *Arun Ghosh v. State of West Bengal*, [1970] 3 S.C.R. 288.
262 *State of Bihar v. Shailabala Devi*, [1952] S.C.R. 654.

According to this principle, it is the duty of the prosecution to discover facts and produce evidence to prove the guilt before the court. The natural inference would be that extracting information of facts from the accused person through Lie Detector devices would clearly come under and hit the principle of self-incrimination, provided under article 20(3).

In this way, besides being constitutional, the privilege against self-incrimination is a fundamental cannon of even common law in respect of criminal jurisprudence. Common law (and the Constitutional law as well) propositions of presumption of innocence of accused, duty of prosecution to establish guilt beyond reasonable doubt and the accused has no obligation or need to make any statement against his will, are embedded and sourced from this principle. These propositions emanate from an apprehension that if compulsory examination of an accused were to be permitted (which are sometimes being done at present) then torture and at least use of force is likely to be used to entrap him.

The privilege reflects a standard for remaining human privacy and a gauge of civilized standards of a society in administering criminal law and therefore the Indian Constitution has expressly incorporated it as a fundamental right under Article 20(3).

State argued before the Supreme Court on the basis of a judgement of a verdict of High Court, which was under challenge in that case (*Smt. Selvi v. State of Karnataka*), that all citizens are under an obligation to cooperate with undergoing investigations especially under sections 39, 156(1), 161(1) of Cr.P.C.

Balalkrishnan CJ observed that overall intent of the provisions mentioned ensured the cooperation of citizens during investigation but the reasoning is misplaced on two counts:

Firstly, the provisions of Cr.P.C. cannot override the Constitutional provisions and secondly the provisions of Cr.P.C. itself the guard the rights of citizens against self-incrimination. For instance, section 161(2) of Cr.P.C. provides that when a person is examined by a police-officer, he is not bound to answer such questions, the answers of which have a tendency to expose him to a criminal charge. An accused person also has the right to refuse to answer during investigation any question which may incriminate him, but section 313(3) of Cr.P.C. also provides a right to him at the trial stage that no inferences could be drawn from his silence and this provision puts a limitation to the power of the courts.

Approach of the Courts:

The matter came up before Supreme Court for the first time in 1954 when article 20(3) was interpreted by a Constitutional Bench in M.P Sharma's case.[12] It was held:

"Indeed every positive volitional act, which furnishes evidence is testimony and testimonial compulsion connotes coercion, which procures the positive volitional evidentiary acts of the person as opposed to the negative attitude of the silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires of the court room. The phrase used in. article 20(3) is to be a witness and not appear as a witness..... It is available, therefore, to a person against whom a formal accusation relating to the commission of an offence has been labelled which in the normal course may result in prosecution".

Supreme Court till 1978 reiterated that the person had to be 'formally' accused. That means, thus filing of a First Information Report, filing of a complaint or issuance of a show-cause notice under a special crime to constitute a formal accusation and to bring into play article 20(3).

In 1978, Krishna Iyer J. enlarged the scope of article 20(3) by interpreting it to also include those who were even 'suspects' under its ambit besides those who were formally accused.[13] Some authors have tried to criticise this decision on the ground that throughout the judgment Justice Iyer stated article 20(3) and section 161(2) are "substantially the same", and also asserting that section 161(2), Cr.P.C. is "the Parliamentary gloss over the Constitutional clause". The view taken by the learned Judge seems to be correct because the legislature had made its intention clear by creating section 315, Cr. P.C.

In *Nandani's* case,[14] the Apex Court defined the compelled testimony as evidence procured not merely by physical threats or violence but by Physical torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like. These are in fact the conditions created during Lie Detector tests. It looked like that the learned Judge was delivering a judgment on such tests. But lately in 1994 the Apex Court re-affirmed the position regarding article 20(3) as had been taken by it in M.P. Sharma and NandaniSatpathi's case K. Ramaswamy J. observed that the phrase used in article 20(3) is to be the Witness and "not to appear as a witness". [15]

12 *MP. Sharma v. Satish Chandra*, 1954 Cr LJ 865: AIR 1954 SC 300

13 *Nandani Satpathi V. PL. Dani*, 1978 Cr LJ 968: AIR 1978 SC 1025.

14 ibid

15 *Kartar Singh v. State of Punjab*, 1994 Cr LJ 3139: (1994) 3 SCC 569: (1994) 2 SCR 375: 1994 SCC (Cri) 899

In recent times the news channels frequently interview the accused in police custody and photograph them without their consent. No doubt general public has right to know, but it cannot be at the cost of the rights of the accused. It was held, in one of such cases, that the press is entitled to exercise its freedom of speech and expression, but it should not invade (he rights of other citizens. No such rights can be claimed by the press, unless the person interviewed is willing.[16]

A.P. High Court had gone to the extent that when the State itself cannot violate or infringe such a right of accused, neither any agency like the press nor any individual can be permitted to invade the same.[17]Apex Court confirmed the same thing in Parliament attack case.[18]

Aspect of Compulsion had been discussed in almost all the above mentioned cases. Compulsion is what in law is called 'duress', which had been defined by various English Law Dictionaries (as East Jowitt) and that definition has been accepted by the Apex Court.

Justice Iyer had given a wider connotation to compulsion, as he observed that it is not merely physical threats etc., to procure evidence but must include psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity and intimidatory methods etc. It has been expressly held that the prospect of prosecution may lead to legal tension, but then a stance of silence is running a calculated risk. On the other hand, if there is any pressure, subtle or crude, mental or physical, direct or indirect, sufficiently applied by policeman for obtaining 'information' from the accused strongly suggestive of guilt, it becomes "compelled testimony" violative of article 20(3). The learned Judge went on to assert that it is plausible to argue that Where realism prevails formalism and probability over possibility, the enquiries under criminal statutes with quasi-criminal investigations are in accusatory nature and are sure to end in prosecution, it the Offence is grave and evidence gathered is good. And to deny the protection of a Constitutional shield designed to defend a 'suspect' because the inquiry is 'Preliminary' which may possibly not reach the court is to erode the substance while paying hollow homage to the holy verbalisrn of the article.

Every plea forwarded for putting Lie Detector tests under the compulsive testimony' must be accepted and declared as Violation Article 20(3).

16 *Prabha Dutt V. Union of India*, AIR 1982 SC 6: (1982) 1 SCC 1: (1982) 1 SCR 1184: 1982 Cr LJ 148 (SC) (Ranga and Billa were interviewed)

17 *D.N. Prasad v. Principal Secretary to the State of A.P., Hyderabad*, 2005 (2) Andh LD 451. (3) Andh LT 451: 2005 (1) Andh WR 323:2005 Cr LJ 1901 (AP).

18 *State (N.C.T of Delhi) v. Navjot Sandhu*, AIR 2005 SC 3820: 2005AIR SCW 4148: (2005) 6 SCALE 177:2005 Cr LJ 3950 (SC).

Besides this contention, it must be remembered, even if any person is said not to be 'formally accused', he may still take protection and benefit of section 161, Cr. P.C. on the ground of incriminatory nature of evidence to be divulged under the involuntary Narco-analysis test.

Earlier, following *Kathi Kalu's* case,[19] many High Courts have taken the stand and held that taking fingerprints, blood tests etc. compulsorily against the wishes of the accused was not hit by article 20(3). But luckily in 1993 Supreme Court categorically held that no one can be compelled to undergo a blood test without his or her consent,[20] which was later confirmed by Supreme Court in 2010 in Smt. Selvi's case

Now some people argue that *Gautam Kundu's* case finding is restricted to blood tests and if its scope is widened it would tantamount to conceding an unlimited rights to individuals at the cost of society (they seldom mention the police or prosecution). They should try to take a pragmatic view and not try to encroach on fundamental rights relating to silence, presumption of innocence and voluntariness. There are provisions under sections 179 IPC, 132, 125, 129, 130, 131 of Indian Evidence Act and section 53, Cr. P.C., etc., which empower authorities to carry out their tasks to bring the genuine guilty persons to book by collecting clinching and cogent evidence.

Narco-Analysis and its evidentiary value

Admissions and confessions form an imperative part of evidence whether in a civil proceeding or a in a criminal proceeding and can therefore be relied upon for proving the truth of the facts incorporated therein. Since admissions are an important piece of evidence, it is open to the person who made the admission to prove that those admissions are true. Even if proved to be true, admissions are not conclusive but, would be decisive of the matter.

These admissions can be in form of statements contained in documents, which are subject to the general rules of evidence on admissibility. In R v Daye[21], Darling J defined a document in the following terms" any written thing capable of being evidence is properly described as a document and it is immaterial on what the writing maybe inscribed." A document has also been defined as anything on which information of any description can be recorded. This definition is wide enough to cover audio tapes, photographs, films, information from computer systems and networks.

19 *State of Bombay v. Kathi Kalu Oghad*, AIR 1961 SC 1808: (1961) 2 Cr LJ 856: (1962) 3 SCR 10: 1963 (1) SCJ 195.

20 *Goutam Kundu v. State of West Bengal*, (1993) 3 SCC 418:AIR 1993 SC 2295:1993 AIR SCW 2325: (1993) 3 SCR 917.

In the present day lawyers and judges deal with digital evidence region, even if it is mainly in the form if e-mail correspondence, recorded statements or confessions on tapes, digital cameras or evidence recorded on photos etc. therefore today's equivalent of paper is often a disc, tape or film and conveys information by symbols, diagrams and pictures as well as by words and numbers. It was based on such interpretation that the court allowed admission of evidence in the form of a video recorder of the event[22].

U.S. Position

Most of state's procedural and evidence rules are derived from or to some extent reflect federal procedural and evidence rules. Therefore Federal Rules of Civil Procedure and Federal rules of Evidence are used for case law interpretation. The former applies to civil suits and latter to criminal cases.

Authentication of evidence is governed by FRE 901, which requires that the proponent to produce 'evidence sufficient to support a finding that the matter in question is what the proponent claims'. U.S. courts now recognise that there is nothing intrinsically unreliable about electronic evidence[23]. The admissibility of electronic evidence has also been welcomed by the courts which have held that such admissibility will depend upon the purpose for which the evidence is offered[24].

Indian position

The Indian Supreme Court has recognised that if law fails to respond to the needs of a changing society it will stifle the growth of society and choke its progress. The expanding horizon of science and technology has thrown new challenges to lawyers and judges dealing with proof of facts in disputes where advanced techniques in technology have been used and therefore rules relating to admissibility of electronics evidence and its proof have been incorporated into the Indian Law[25]. In India, the Information Technology Act amending the Indian Evidence Act 1872 has made electronic records admissible as evidence in a court of law. Therefore electronic evidence falls under the definition of 'document ' under section 3 of the Evidence act. Electronic evidence can be produced as primary as well as secondary evidence.

The use of technology under civil and criminal law does not restrict itself to production of evidence for admission in the courts. It can also be used to pronounce confessions from the suspects of the concerned case. With the growth in technology,

21 (1908) 2KB 333 at 340

22 *Kajala v Noble*, (1982)75 Cr App R 149, CA

23 *United States v Vela*, 673F.2d 86, 90 5th Cir.1982

24 *United States v Siddiqui*, 235,F.3d,1381 11th Cir. 2000

25 *National textile workers Union v P.R Ramakrishnan* AIR 1983 SC 75

the methods of availing such confessions expanded from using lie detectors to the using of truth-serums also called narco-analysis.

Narco-analysis or the truth serum test has become a common pry resorted to by the police these days. It is seen that contrary to their representation in popular culture, truth serums are not drugs created for the express purpose of interrogation, they are barbiturate sedatives commonly used as anaesthetics. When administered in lower doses, these drugs which include sodium Pentothal, scopolamine and more recently sodium amytal, "induces a relaxed state of mind in which the suspect becomes more talkative." The effect is similar to that of heavy dose of alcohol or cannabis: sodium Amytal "induces a mild state of hypnosis,' the primary objective of which is to make the subject more amenable to questioning.[26]

Though India is signatory to the CAT, it has not ratified it and therefore the provisions of the convention cannot be said to be enforceable in India and at best are merely persuasive. Therefore any argument against the usage of the truth serum must be primarily on a constitutional law basis.

The truth serum test can be said to be director contrary to an accused's right not to be compelled to testify against himself which is a fundamental right conferred by Article 20(3) of the Constitution which says that "No person accused of any offence shall be compelled to be a witness against himself". This is also known as the right to silence. Supreme Court has pointed out that compulsion in the present context means "Duress". It does not prohibit admission or confession which is made without any inducement, threat or promise. Any confession made under compulsion is rendered inadmissible under section 24 of the Indian Evidence Act.

In India, the present practice is that Narco-Analysis can be resorted to by the police during interrogations. However it is noticed that in most instances such a usage must be with the permission of a Judicial Magistrate[27]. It is primarily to ascertain whether a prima face case exists for such a usage. More importantly, it can be ascertained from sec 24 of the Indian Evidence Act that any confession caused by "inducement, threat or promise will be irrelevant in a criminal proceeding.

It is seen that the Bombay High court in Ramachandra Ram Reddy v State of Maharashtra[28] upholding the usage of the truth serum test, that by conducting or performing the Narco-Analysis Test would not tantamount to compulsive testimony or testimonial compulsion and the same would not amount to violation of Art

26 Ulbrick, J, Trevor, "The illegality of the United States practices in the war against terror", 4 Nw.U.J.Int'l Hum.Rts 210(2005) at 234.

27 *Santokben SharmanbhaiJadeja v State of Gujarat* 2008(2) KLT 398

28 2004 All MR (Cri) 1704m

20(3) of the Constitution of India and if statements recorded during the aforesaid test is used against the accused, enough protection exists in the Criminal Procedure and the Indian Evidence Act. It was further held that only when the statement obtained from the test is used by the investigating agency to incriminate the accused, can it be held that the accused's right under Article 20(3) of the Constitution is violated. It is observed that the sole purpose of such a stance taken by the courts is because in most instances of interrogation under this particular method, it is seen that if the accused provides information during the interrogation and this information has provided the police with prominent leads into the case under the investigation and thereby has made the investigation process more expeditious and fruitful. In the case of State of Gujarat v Shyamlal Mohanlal Choski[29], the Supreme Court upheld the validity of section 27 of the evidence act which renders the portion of the statement of the accused that leads to discovery of any fact admissible as evidence.

The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph test (Lie detector test) in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the Narco-analysis test and the Brain Electrical Activation Profile test. The guidelines are as follows:

1. "No Lie-Detector Test should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail the test.

2. If the accused volunteers for a Lie-Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

3. The consent should be recorded before a Judicial Magistrate.

4. During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by the lawyer.

5. At the hearing the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

6. The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of interrogation.

29 AIR 1965 SC 1251

7. The actual recording of the Lie-Detector Test shall be done by an independent agency (such as a hospital) and conducted in presence of a lawyer.

8. A full medical and factual narration of the manner of the information received must be taken on record."

Thus it is clear that both on national and international front that Constitutional and other rules and statutes of land have promised much for the protection of individuality of a person guarantees different types rights out of which human rights are of a greater concern and it is the bonafide intention legislature. But many times, the constitutional protection against self-incrimination and Narco-analysis test have proved to be an evil which transform boom into bane. Therefore it can be inferred and concluded that much constitutional protection have been granted against self-incrimination and Narco-analysis test is not a bad thing but a simple rider for the betterment of the legislation, and bringing a better tomorrow to upgrade human civilization.

CONSUMER EMPOWERMENT VIS-A-VIS CONSUMER AWARENESS

Chhavi Gupta[1]

ABSTRACT

As India is describing itself as developing country which is inching towards becoming developed country and in this era of transition, certain changes towards positive are bound to occur in terms of economy growth, technology, industrial growth, manufacturing units growth and definitely in terms of people's upliftment more towards their purchasing power. India is embracing competition in the market both at international and national level. The increasing unfair competition in the market has created a false need for the traders to attract consumers to buy their products for which they adopt crooked practices. Today's consumer has fastly adopted modern goods, services and techniques but still they find themselves helpless when they are duped by the unscrupulous trader mainly because of lack of awareness amongst the consumers about their general and legal rights. As such there is a great need that the buyer should be made aware about their rights and responsibilities. In this context this paper will discuss the increasing need for consumer awareness, the effective role of the government in making the consumer aware about their rights and various other means and methods which could be adopted for spreading awareness about consumer rights and legal course and thereby empowering the present consumer against crooked manufacturers, traders, suppliers and retailers.

Introduction

Consumer plays a pivotal role for the upward growth of the market. He is the buyer of goods and services. Today's market is flooded with vast variety of products being offered with luring promises, gurantees, warantees, free home services etc. to the people of the country at large. In this economic scenario, corporate houses ventures into almost each and every segment of business and that led to intense market competition amongst them. So, presently, the peoples who are in one way or the other are consumers are lucky to have much more choices of goods and services available in this competitive market but with a rider that it also becomes a cause of concern for the consumer.

1 Assistant Professor and Research Scholar, Amity Law School, Amity University, Noida

Further, it is revealed that the consumer in the rural sector of the country is the most affected section as those consumers were not aware about the profit making attitude of the big business houses .Also, they have limited sources of information. The consumers still could be termed as honest, poor, uneducated, and unaware of their rights and believes in brotherhood and tolerance. Therefore, if the goods purchased or services availed by them are not satisfactory or does not fulfil the purpose for which it is meant for the consumer either does not know what to do? or where to go? and feels completely duped and helpless. Further, e-transactions have given a wider platform to the unscrupulous suppliers to have access to a larger section of consumer.

There is an urgent need to protect the buyer from the duped and profit making attitude of the big fishes in the open as well as digital market by consumer empowerment through consumer awareness.

Problem Identification

Lack of awareness among consumers led to the exploitation of consumers by unscrupulous traders and manufacturers. The problem primarily is that despite availability of best resources to spread awareness amongst the consumers about their rights and its protection, it seems that entire consumer community are not being touched by the concerned agencies and that lead to unawareness of consumer rights among major section of consumers. This gives an opportunity to the manufacturer, retailer and the supplier to achieve their profit making motives easily.

The consumers innocent behaviour, illiteracy, poor economic conditions, lack of adequate resources has aggravated the problem. The Government is doing its bit through campaigns, radio programmes, television, seminars, conferences but it has failed to reach to the most affected sector which is rural consumer. In the present scenario, there is a great need to spread consumer awareness about their rights, duties, responsibilities towards themselves and the entire nation through innovative but easily understandable programmes or methods and the legal channel provided under Consumer Protection Act, 1986.

Objectives of the Study

For the purpose of the study following two objectives are formulated:

1. First objective is to examine the need for spreading of consumer awareness about consumer rights and legal course.
2. Second objective is to examine the role of the government towards empowering consumer by spreading awareness.

Research Methodology

The present study is of great importance in the light of technological advancements and the modernisation of goods about which only the manufacturer knows the best about their product. The increased competition in the market, the profit making attitude and the least concern about the interest and money of the consumer, the manufacturers, traders, sellers are reluctant whether or not the product is of good quality and of appropriate quantity. Ultimately, it is the buyer whose interest is affected by the unconcerned attitude of the manufacturers. The consumer should be made aware about their rights, duties and responsibilities and more over about legal course and the functioning of the consumer fora to bring them to the court against the crooked manufacturers. The rural sector of India needs to be focused as they are illiterate and repose complete trust on the seller.

For this purpose the methodology in dealing with the topic is doctrinal research based on primary sources mostly from the statues and case laws and the secondary source data mostly from the relevant texts, research articles and on-line resources. The data so derived from various sources is both on selective basis as well as on random. The analysis of the statues, texts, research articles etc. keeping in view the issue of consumer awareness is being taken care meticulously with collaboration of one with the other for arising at definite conclusions.

Consumer

A person is a consumer of either goods or services. When a person buys goods or avails services for consideration, the said person is covered by the definition of Consumer as laid down under Section 2(d)[2] of the Consumer Protection Act, 1986.Consideration plays a very important role in any transaction between the buyer and the seller. A thing purchased or service availed without paying money say

2 "consumer" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly prom-ised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes.

for example a gift given out of love and affection is not covered by the Act and hence the person does not get the benefit of the Act as a consumer.

The Consumer Protection Act, 1986

The Consumer Protection Act, 1986 provides various rights and remedies to the consumer against the unscrupulous traders. These rights are: (i) the right to be protected against the marketing of goods which are hazardous to life and property; (ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices; (iii) the right to be assured, wherever possible, access to an authority of goods at competitive prices ; (iv) right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums; (v) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumer; and (vi) right to consumer education.

The remedies available to the aggrieved consumer are: removal or replacement of defective goods and deficient services or return of price or payment of compensation or adequate cost to the aggrieved party. However, the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. The provisions of this Act give the consumer an additional remedy besides those that may be available under other existing laws[3].

The Act provides the establishment of District forum in each district of the State having pecuniary jurisdiction up to Rs. 20 lakhs, State Consumer Commission in each State having pecuniary jurisdiction from Rs. 20 lakhs to Rs. 1 crore. and National Consumer Commission in India having pecuniary jurisdiction above Rs.1 crore. The final court of appeal is the Supreme Court[4]. It is a quasi- judicial machinery and observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, in appropriate cases, compensation to consumers. Any non-compliance of the order , by the complainant or the opposite party, made by the District Forum, the State Commission or the National Commission shall be punishable with imprisonment which may extend from one month to three years, or with fine which may extend from two thousand to ten thousand rupees, or with both. The Act provides penalty for filing frivolous or vexatious complaints also. Where a complaint instituted before the fora is found to be frivolous or vexatious, the fora shall dismiss the complaint and can impose fine not exceeding ten thousand rupees[5]. In K. Jayaraman v. The Poona Hospital &

3 *The Consumer & Citizens Forum v. Karnataka Power Corporation*, 1994 (I) CPR 130.

4 Section 23 CP Act, 1986.

5 Section 26 CP Act, 1986.

Research Centre[6], it was held that where a complaint is malafied, vexatious and frivolous and the opposite party has to incur expenses for contesting the complaint, the redressal fora should saddle the complainant with costs.

Though the Act has provided rights and remedies to the consumers but due to lack of awareness amongst consumers about their rights and the available remedies has to some extent dissolves the purpose of enactment of the Act. The purpose and objective for enactment of the act was to benefit each and every consumer of India whenever and wherever their rights as protected under the act has been infringed.

Since the passing of the Act the Supreme Court has extend the nature and scope of the Act through various judgments and has strongly acted against the defaulters. There are various cases in which the Supreme Court has examined and enhanced the scope of definition of consumer and provides adequate relief to the aggrieved such as L.D.A. v. M.K. Gupta,[7] Laxmi Engg. Works v. P.S.G. Industrial Institute,[8] Indian Medical Association v. V.P.Santha & others,[9] Rajeev Hotel Workers & others v. The Mineral & Metal Trading Corporation of India Ltd.,[10] Oberai Forwarding Agency v. New Assurance Co. Ltd.,[11] The Branch Manager Margadarsi Chit Fund and Another v. The District Consumer Redressal Forum Vijayanagram District and Another[12].[13]

Need for Consumer Awareness

An enlightened consumer is an empowered consumer. An aware consumer has all the resources and information to fight against exploitation by the manufacturers, seller or service provider. They would not only protect themselves from exploitation but also induces efficacy, clearness and answerability in the entire trade sector.

The Government has time to time realize of the importance of consumer empowerment and has taken measures in the direction of consumer education, consumer protection and consumer awareness. The main aim of the government is to inform the common man of their rights as a consumer.[14] Moreover, with the

6 1994 (1) CPR 23.
7 (1993)1 CTJ 929 (SC).
8 1995 AIR 1428.
9 (1995)3 CTJ 969 (SC).
10 1996 AIR 1083.
11 AIR 2000 SC 855.
12 AIR 2004 AP 343.
13 Prof. Rakesh Khanna, *Consumer Protection Laws,* Third Edition, Central Law Agency, Allahabad, 2005, page no. 114.
14 U.P.UPBHOKTA KALYAN PARISHAD, "CONSUMER AWARENESS", Available at<http://upukp.org/consumer-awareness/>, (viewed on 02-12-2017).

globalization and the increasing competition in the market the main aim of the present manufacturer is only to make money at any cost and to achieve this they compromise with the quality and quantity of products. They try to attract consumer at any cost to buy their products or avail their services. In the fulfilment of their interest, they forget the interests of consumers and start compromising with the quality and quantity of products leading to the exploitation of the ultimate buyer.

Overcharge of price, under weighing, selling of adulterated and poor quality goods, false advertisement, deficiency of services etc. are some of the practices being adopted by the sellers and the service providers. Thus it is necessary for a consumer to be aware to save themselves from being cheated.[15]

In this way, consumer empowerment by way of consumer awareness means consumer are made to aware of their rights, responsibilities and legal course so that no seller could take benefit of the unawareness of the consumers for their illegal benefits to the detriment of the consumers.

Recent Judicial Decisions

The various Consumer forums and the Supreme Court while adjudicating the issue related to Consumer disputes has through its judgements played pivotal role in empowering and safeguarding the interest of the consumer. The consumer redressal agencies as per their jurisdictions as specified under Consumer Protection Act, 1986 has rewarded the compensation to the complainants or aggrieved persons and has strictly dealt with the consumer disputes that are cropping in the modern society.

Recently, the National Consumer Disputes Redressal Commission (NCDRC), the country's apex consumer commission has held that if patients who are treated for free at Government hospitals are victims of Medical negligence then those aggrieved Patients could file complaints under Consumer Protection Act and the Doctors Concerned as well as Hospital if found to be Negligent, then they would also be liable to be punished as per Consumer Protection Act. Thus the NCDRC has clearly held that Doctors and Hospitals who are found to be negligent cannot escape their liability to compensate the aggrieved persons by saying that they are providing Medical treatment for Free.[16]

15 Hakimuddin Kuwakhedawala, "Consumer awareness : importance of consumer awareness and rights of consumers", India Study Channel, Learn to Earn, Earn to Learn!, 2012. Available at <http://www.indiastudychannel.com/resources/154880-Consumer-awarness-importance-consumer-awareness-rights-consumers.aspx>, (viewed on 04-12-2017).

16 "Patients treated for free also consumers, can file case against hospitals for negligence: NCDRC", New Delhi, February 3, 2018.Available at<http://www.financialexpress.com/india-news/patients-treated-for-free-also-consumers-can-file-case-against-hospitals-for-negligence-ncdrc/1049023/>,(viewed on 05-02-2018).

The NCDRC Bench comprising of President Justice D K Jain and member M Shreesha vide its order dated: 03-02-2018 has ordered the district medical officer and in-charge of Government Bangar Hospital to pay Rupees 10 lakh as penalty for being guilty of medical negligence which resulted in the death of a road accident victim Ramesh Chand Vyas in 2001.[17]

Recently, The NCDRC vide its judgment has directed the Taj Mansingh Hotel in Delhi to pay Rs. 2.8 lakh with interest at the rate 9% from 28 January, 1999 to United India Insurance Company as penalty for their negligence.

Facts of the case: One Lady namely Sapna Dhawan had gone for dinner to the hotel on 1 August, 1998 at 11 PM. He Parked his car Maruti Zen in the parking area and gave the keys to the parking man and received a parking slip. After dinner when he asked for the key, he was informed that his car was driven away by some unknown person.

The hotel argued that there was no negligence on its part and the parking clearly mentioned the vehicle was being parked at the request of the guest at his own risk. But the NCDRC observed that as per the doctrine of 'infra hospitium', the hotel's 'duty of care' towards guests' vehicle does not stop with mere parking of the vehicles. The mere mention of 'at owner's risk' on the parking tag does not release a hotel of its liability if a vehicle goes missing from its parking space. It will be construed as 'negligence'. The single-member bench of M Shreesha observed that[18]-

"...When the parking tag is issued in the name of the hotel, it can be reasonably inferred by the 'car owner' that the car would be in the 'duty of care' and custody of the hotel, which in this case, it failed to exercise and is held liable to pay damages".

In an another case, the Akola District Consumer forum has held the SBI guilty of deficiency in service for debiting money from the bank account of the complainant Pradeep Shitre despite a failed ATM withdrawal. The complainant, Pradeep Shitre, a farmer had gone to an ATM to withdraw Rs 5,000. But failed to get the cash from the machine. He then used another machine, which dispensed the cash. He immediately received a text message saying that Rs 10,000 was withdrawn from his account. He visited the bank on the matter and the bank assured him that he would

17 Supra note16.

18 Dipak K Dash,"At owner's risk? Hotel liable for car theft: Panel", Feb 6, 2018.Available athttps://timesofindia.indiatimes.com/city/delhi/at-owners-risk-hotel-liable-for-car-theft panel/articleshow/62796364.cms,(viewed on 07-02-2018).

get the refund. But he never get the refund from the bank. Later, he received a written note from the bank, saying both his transactions were successful.[19]

The forum chaired by S M Untavle and member Bharti Kethkarhas directed the bank to return Rs 5,000 wrongly debited from the complainants bank account and also ordered it to pay Rs 3,000 as compensation and Rs 2,000 towards legal expenses.

In a complaint against Amazon Seller Services Private Limited , Bengaluru Rural and Urban Additional District Consumer Disputes Redressal Forum hold Amazon Seller Services Private Limited guilty of deficiency in service and has directed it to refund Rs 2,85,284 within a month to Rohit Reddy Chintha who was duped and cheated by the Amazone, a well known online shopping company.

Facts of the complaint: The complainant placed an order for a CaratLane 50 gram 24 carat Lakshmi gold coins for Rs 2,85,284 on 25th August, 2015 at Amazon Seller Service Private Limited located in Malleswaram. He received the courier on 2nd October, 2015. When he opened the courier he was stunned as the packet contained gold coins without the information of metal, purity and BIS certification. The forum observed that[20]-

"...e-commerce business is a threat to the hard-earned money of customers like Chintha, the court opined that non-returning of the amount amounts to not only deficiency in service but also an unfair trade practice. It is the duty of online service provider to initiate action against the seller".

The Supreme Court in a significant verdict has ruled that flat buyers can jointly approach the National Consumer Disputes Redressal Commission in case of a dispute with a builder, where the aggregate value exceeds Rs 1 crore.

Facts of the case: The aggrieved 43 flat buyers of *Amrapali Sapphire* Housing Project has formed Amrapali Sapphire Flat Buyers Welfare Association. In May, 2016 they together file the complaint before the NCDRC against the real estate developer Amrapali for delay in handing over possession of their flats.

The realtor Amrapali opposed the complaint on the ground that the cost of each flat was less than Rs 1 crore and so, the buyers were individually ineligible to directly approach the NCDRC.

19 "SBI found guilty of deficiency in service by consumer court", January 27, 2018.Available at<http://www.businesstoday.in/sectors/banks/sbi-found-guilty-of-deficiency-in-service-by-consumer-court/story/268948.html>, (viewed on 05-02-2018).

20 **Gururaj B R,**"Consumer court orders Amazon to refund Rs 2.85 L", Jan 8, 2018.Available at<http://bangaloremirror.indiatimes.com/bangalore/others/bangalore/others/consumer-court-orders-amazon-to-refund-rs-2-85-l/articleshow/62405998.cms>, (viewed on 06-02-2018).

In August 2016, the NCDRC had passed the decision in favour of the 43 flat owners in Amrapali's Sapphire housing project, saying that they could form an association to achieve the pecuniary limit of Rs 1 crore, for approaching it directly. The said decision was challenged by Amrapali in Supreme Court. A bench of Supreme Court headed by Justice Dipak Misra, rejected the appeal of Amrapali Sapphire Developers Pvt Ltd and upheld the decision passed by the NCDRC. *In Amrapali Sapphire Flat Buyers Welfare Association Vs. Amrapali Sapphire* Developers Pvt. Ltd. & Anr[21].

The Supreme Court ruling comes as a respite for others caught in similar issue of delayed delivery of possession of flats by the real estate developers and those real Estate developers generally delayed the proceedings in the courts on flimsy and sham technical grounds.

Role of Government in Empowering Consumer

The government vision is to enable consumers to make informed choices; ensure fair, equitable and consistent outcomes for consumers; and facilitate timely and effective grievance redressal. The government is working on the mission to empower consumers through awareness and education; enhance consumer protection and safety through progressive legislations and prevention of unfair trade practices such as false or misleading representation that the goods are of good quality or useful for the purpose for which they are required; enable quality assurance through standards and their conformance; and to ensure access to affordable and effective grievance redressal mechanisms.[22]

1. **Prohibition of dual MRP and standard pricing mechanism:** Recently, the consumer affairs ministry has banned dual maximum retail price (MRP) system for same products. The government make it mandatory for all packaged commodities to have increased font size for "best before" date of manufacturing "name of producer" to enable users to read them easily before consumption. Also, the government make it mandatory for producers of medical devices to mention MRP on the devices as these are sold without a standard pricing mechanism. Also, the government has asked the sellers to display complete information on the goods displayed on e-commerce platforms such as name and address of the manufacturer, name of the

21 Civil Appeal No. 10882 of 2016/ Civil Appeal No. 10954 of 2016/ Civil Appeal No. 10979 of 2016 and Civil Appeal No. 11094 of 2016.

22 Government of India Ministry of Consumer Affairs, Food and Public Distribution, *3 years of Sustainable Development, Towards Food Security and Consumer Empowerment*, page no. 49, Available at <http://consumeraffairs.nic.in/writereaddata/3Years_Book.pdf>, (viewed on 23-11-2017).

commodity, net contents etc. These rules will come into effect form 1st January, 2018.[23]

2. **The Consumer Protection Bill, 2015:** The government has introduced The Consumer Protection Bill, 2015 to give more weapons to the consumer. The bill seeks to provide an executive agency in the name of the Central Consumer Protection Authority (CCPA) to promote, protect and enforce the rights of the consumers, provides product liability action against the manufacturer in case of personal injury, death, or property damage caused from any product, ensure speedy redressal of grievance of the aggrieved consumer by way of "Mediation", provision for filing of complaints electronically.[24]

3. **Advisory on Service Charges:** The government has issued an advisory, in the interest of the consumer, in December 2016 that the payment of service charges is voluntary and the consumer is free to pay the same or not.[25]

4. **National Consumer Toll Free Helpline Number**: For the effective dissemination of information to consumers a new Integrated Grievance Mechanism portal (INGRAM) (http://consumerhelpline.gov.in) was launched in August, 2016 by the government. This will also help the consumers to lodge their complaints online. Also, they can lodge their complaints on two all India Toll-free Numbers, 1800-11-4000 and 14404. The portal has proved to be beneficial to the consumers as it receives around 40000 consumer grievances per month.[26]

5. **Mobile app "Smart Consumer":** To ensure easy accessibility to the portal through smart phones a mobile app "Smart Consumer" was launched in December, 2016 by the government.[27]

6. **Web-chat facility:** A web-chat facility has also been launched by the government in March 2017.[28]

7. **Portal facility:** The government has launched a portal "Grievances Against Misleading Advertisements (GAMA)" to redress consumer grievances relating to false or misleading advertisements in March 2015.[29]

---

23 Sanjeev K Ahuja, "Dual MRP banned, product details to be bigger", Hindustan Times, New Delhi, Saturday, July 01,2017, page no.8.

24 Supra note16 at 55.

25 Id.at 56

26 Id.at 57.

27 Id.at 58.

28 Id.at 58.

29 Id.at 59.

8. **Online Consumer Mediation Centre:** For e-commerce complaints an Online Consumer Mediation Centre (OCMC) was launched in December, 2016.[30]

9. **Consumer education:** A tie up with a Social Media Network "Local Circles" provides an electronic platform for consumers to discuss consumer related issues to generate consumer awareness. In December, 2016 a microsite (https://goo.gl.8Xcyhu) was launched to educate the consumers on internet and digital safety.[31]

10. **Computerization of Consumer Fora:** Digitization of the functioning of the Consumer Fora throughout the country was done to ensure accessibility and quicker disposal of complaints.[32]

11. **Jago Grahak Jago:** The campaign deals with various issues related to consumer rights and have proved to be effective in achieving the same.

12. **Videos:** Video spots on consumer rights, Grievance Redress system, MRP, ISI, FSSAI and Hallmark are being repeatedly telecast on Doordarshan and various Satellite channels.[33]

13. **Consumer Melas:** Consumer Melas are being organized for consumer awareness and Empowerment such as Nagaur Mela in Rajasthan, Sonepur Mela and Shravani Mela in Bihar, and Suraj Kund Mela in Haryana. On 20th October, 2016 Consumer Mela and Swachhata Pakhwada was organized for consumer awareness, grievance redessal and on the spot registration of grievances.[34]

Other Effective Means And Methods To Be Adopted

1. **Workshops, Awareness Programmes etc.:** Educational Institutions especially Law students can play an important role in making the people aware of their rights and responsibilities through workshops, posters, nukkad nataks, seminars, free legal aid camps etc. on regular basis. The institutions should encourage their students in such activities by assigning a certain percentage of marks or prize for these activities.

2. **School Level:** CBSE should pass appropriate instructions and guidelines to all public and private schools to organize lecturers to acquaint their students and engage their students in activities related to legal issues such as consumer awareness programmes, women rights etc.

30 Id.at 60.
31 Id.at 60.
32 Id.at 61.
33 Id.at 62.
34 Id.at 63.

3. **Use of Media, Radio, TV etc.:** The rural sector left untouched. There is a need to reach to such people by way of radio programmes, TV channels, newspapers etc. as they are more vulnerable to exploitation by the seller.

4. The consumer should be made aware about certain facts such as the time limit within which he has to file the complaint, that he can present his case himself, no court-fees provision and disposal of the complaint within 3 months period. These facts will definitely help in bringing the aggrieved consumers to the court who despite having awareness about their rights prefer not to file complaint because of poverty.

5. **Non-Governmental Organisations, social activists etc.:** NGO's and social activists should reach to the doors of rural sector consumer and help them in filing their complaints.

Suggestions and Concluding Remarks

A much has been done by the government towards consumer empowerment through consumer awareness and updating of legislations but much has yet to be done and achieved. Weight should be given in improving awareness among the consumers. Top priority should be given to the rural or remote areas consumer.

Additional Chief Metropolitan Magistrate Gaurav Rao said that "Adulteration of food is a menace to public health".[35] Malpractices such as adulteration of food, overcharging the product and underweighting of the goods, misleading advertisements should be checked by the government authorized officers regularly and aware the consumers about such menace.

It is the duty of the consumer also to act wisely and responsibly while making a choice. At the time of purchasing the goods consumer should ask for warranty and guarantee card of the product from the seller, check ISI, AGMARK etc. on the product, study the printed details or ask for complete information about the product, check the MRP, expiry date and always take the receipt of the product from the seller. Illiteracy and ignorance of consumers, particularly of rural consumers, is the main cause for their exploitation. It is necessary that they should know their rights, responsibilities and must exercise them. Consumer empowerment against unscrupulous traders can only be achieved through consumer awareness and collective efforts of the executive, legislature, judiciary, non-governmental organizations, social activists, educational institutions and the consumer himself.

Acknowledgement: *The author acknowledges the contribution of her Research Supervisor Prof. (Dr.) Meenu Gupta, Professor of Law, Amity Law School, Amity University, Noida, Uttar Pradesh.*

35 Avantika Mehta, "Food adulteration a public menace: Court", Hindustan Times, New Delhi, Thursday, May 01,2014, page no.6.

AMARDEEP SINGH v. HARVEEN KAUR : A CASE COMMENT CIVIL APPEAL NO. 11158 OF 2017

(Arising out of Special Leave Petition (Civil)No. 20184 of 2017)decided on September 12, 2017

Prof. (Dr.) Naresh Kumar Vats[1]

Background

Marriage under Hindu Law was considered to be a sacrament, therefore, indissolubility of the Union continued. Consequently, widow re-marriage was not allowed which applied to woman only and a man could marry even during the life time of his wife. But there is an indication in old text that divorce among the Hindu also might have existed though not in every pronounced form. Vashisth says that a girl even though once given in marriage should be got re-married for the second time only if one belonged to 'Samegotra', or 'different caste' or 'suffering from disease'. But in this case also, it was not the girl who made a choice for re-marriage but the father or the guardian of the girl exercised this option.

Marriages are hard. Divorces….even harder. Nobody enters a marriage thinking about a divorce in the end. If some are unable to cope with the harsh realities of marriage, the only viable option in front of them is to approach the Court and seek legal separation by way of divorce by mutual consent.

It is obligatory upon the trial court to observe the statutory period of six months before the decree of divorce is granted. Since, the policy of the law is to protect the Institution of Marriage so every effort is made to save the marriage. The six months interregnum is provided to avoid consent in haste and give a chance to the parties to retrace the steps.

However, the Supreme Court of India has inherent power of invoking of Article 142 of the Constitution of India to do 'complete justice' to a couple who had decided to part with each other after living separately for many years, the Supreme Court found the suitable ground to invoke its inherent power to waive off the statutory cooling period of six months and grant them divorce.

1 Professor of Law, Head of the Department, Chairman-Center for Postgraduate Legal Studies and Head-Center for Intellectual Property Rights, Maharashtra National Law University, Nagpur; e-mail-vatsnk2006kurkshetra@gmail.com.

Facts in case

Factual matrix giving rise to this appeal is that marriage between the parties took place on 16th January, 1994 at Delhi. Two children were born in 1995 and 2003 respectively. Since 2008 the parties are living separately. Disputes between the parties gave rise to civil and criminal proceedings. Finally, on 28th April, 2017 a settlement was arrived at to resolve all the disputes and seeks divorce by mutual consent. The appellant husband has also handed over two cheques of Rs.50,00,000/- which have been duly honoured, towards part payment of permanent alimony as was agreed. Custody of the children is to be with the appellant.

The parties have been living separately for last more than eight years and there was no possibility of their re-union. The Supreme Court further observed that further delay will affect the chances of their resettlement and further leading to their mental agony. The parties have moved the Supreme Court for pleading to waive off the cooling period of six months under Article 142, which the Supreme Court has its power to do complete justice.

The Apex Court relied on decision of *Nikhil Kumar v. Rupali Kumar*[2], and the statutory period of six months was waived off by invoking its power vested under Article 142 of the Constitution and the marriage was dissolved. In this case the Court observed that since, both the parties have not been able to work out their marriage as husband and wife, since day one, inspite of that they are well educated and have realized consequence of their decision which they have taken out of their free will and without any undue influence or coercion.

Issue

The Apex Court in the case of *Amardeep Singh v. Harveen Kaur*, considered the question 'whether the minimum period of six months stipulated under Section 13B (2) of the Hindu Marriage Act for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situations.

Scheme, objects and reasons

Hindu Marriage (Amendment) Act 1976 incorporated new section of 13-B with the policy of liberalizing divorce which states under Section 13-B titled as 'Divorce by mutual consent'—

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after

2 (2016) 13 SCC 383.

the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

Special Marriage Act, 1954 was first legislation which provided 'Divorce by Mutual Consent' from the very inception. However, the other provisions with slight various are also introduced in Parsi Marriage and Divorce Act in 1988[3] and Indian Divorce Act in 2001.[4] The Marriage Laws (Amendment) Bill, 2010 proposes to amend sub-section (2) of Section 13-B by deleting the waiting period of six months after filing the petition and the court shall pass the decree of divorce on the filing of petition under this section. The Bill was passed by the Rajya Sabha in 2013 but could not be taken up for discussion in the Lok Sabha and died there itself.

There is conflict of decisions of Supreme Court on the question whether exercise of power under Article 142 is to waive the statutory period under Section 13-B of the Act was appropriate. In *Manish Goel v. Rohini Goel*[5] , a Bench of two-Judges of Supreme Court held that jurisdiction of the Court under Article 142 could not be used to waive the statutory period of six months for filing the second motion under Section 13B, and doing so will be passing an order in contravention of a statutory provision. The Court further observed-"14. Generally, no court has competence to issue a direction contrary to law nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law. (Vide State of Punjab v. Renuka Singla[6], State of U.P. v. Harish Chandra[7], Union of India v. Kirloskar Pneumatic Co. Ltd.[8],

3 Section 22-B, Parsi Marriage and Divorce Act, 1936.

4 Section 10-A, Indian Divorce Act, 1869.

5 (2010) 4 SCC 393.

6 *[(1994) 1 SCC 175].*

7 *[(1996) 9 SCC 309].*

8 *[(1996) 4 SCC 453].*

9 *[(1997) 10 SCC 264].*

University of Allahabad v. Dr. Anand Prakash Mishra[9] and Karnataka SRTC v. Ashrafulla Khan[10]. A Constitution Bench of this Court in Prem Chand Garg v. Excise Commr.[11] held as under: (AIR p. 1002, para 12) "12. … An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws." (emphasis supplied) The Constitution Benches of this Court in Supreme Court Bar Assn. v. Union of India[12] and E.S.P. Rajaram v. Union of India[13] held that under Article 142 of the Constitution, this Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. It is not to be exercised in a case where there is no basis in law which can form an edifice for building up a superstructure".

This Court noted that power under Article 142of the Constitution of India which states-

"*Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.*

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself".

The same power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably.

The Apex Court should also have appreciated *Anjana Kisore v. Puneet Kishore*[14]case as decided by three Judge Bench referred as "…[*A*]*greed to by learned counsel for the parties, a joint petition shall be filed by the parties before the Family Court at Bandra, Mumbai for grant of divorce by mutual consent. Terms of compromise as filed before us shall also*

10 *[(2002) 2 SC 560] 15.*
11 *[AIR 1963 SCC 996].*
12 *[(1998) 4 SCC 409].*
13 *[(2001) 2 SCC 186].*
14 (2002) 10 SCC 194.

accompany the joint petition. An application for curtailment of time for grant of divorce shall also be filed along with the joint petition. On such application being moved the Family Court may, dispensing with the need of waiting for six months, which is required otherwise by sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955, pass final order on the petition within such time as it may deem fit".

This power was also exercised to put quietus to all litigations and to save the parties from further agony[15]. This view was reiterated in *Poonam v. Sumit Tanwar*[16].

Conflicting decision for invoking Article 142 of Constitution

Supreme Court observed in *Neeti Malviya v. Rakesh Malviya*[17], case that there was conflict of decisions in *Manish Goel* (supra). The matter was referred to bench of three-Judges, However, recently in *Manish Goel* (supra) and *Smt. Poonam* (supra), the court while taking note of the decisions in *Anjana Kishore* (supra) and *Anil Kumar Jain* (supra) has also referred to various other judgments of Supreme Court taking a contrary view and has observed that under Article 142 of the Constitution, the Supreme Court cannot altogether ignore the substantive provisions of the statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in a statute. The Court has also observed that power under Article 142 of the Constitution is not to be exercised in a case where there is no basis in law which can form a structure. Reference has also been made to the decision of the Constitution Bench in *Prem Chand Garg v. Excise Commissioner*[18], wherein it was held that an order which the Supreme Court can make in order to do complete justice between the parties, cannot be inconsistent with the substantive provisions of the relevant statutory laws. However, no court has competence either to issue a direction contrary to law or to direct an authority to act in contravention of the statutory provisions, the Court finally summarized the law on the issue to the effect that in exercise of power under Article 142 of the Constitution, the Supreme Court 'generally' does not pass an order either in contravention of or ignoring the statutory provisions or exercise power merely on sympathetic grounds.

15 Para 11 *Ibid*, noting earlier decisions in *Romesh Chander v. Savitri* (1995) 2 SCC 7; *Kanchan Devi v. Promod Kumar Mittal* (1996) 8 SCC 90; *Anita Sabharwal v. Anil Sabharwal* (1997) 11 SCC 490; *Ashok Hurra v. Rupa Bipin Zaveri* (1997) 4 SCC 226; *Kiran v. SharadDutt* (2000)10 SCC 243*; Swati Verma v. Rajan Verma* (2004) 1 SCC 123*; Harpit Singh Anand v. State of W.B.* (2004) 10 SCC 505; *Jimmy Sudarshan Purohit v. Sudarshan Sharad Purohit* (2005) 13 SCC 410; *Durga Prasanna Tripathy v. Arundhati Tripathy* (2005) 7 SCC 353; *Naveen Kohli v. Neelu Kohli* (2006) 4 SCC 558; *Sanghamitra Ghosh v. Kajal Kumar Ghosh* (2007) 2 SCC 220; *Rishikesh Sharma v. Saroj Sharma* (2007) 2 SCC 263; *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511 and *Satish Sitole v. Ganga* (2008) 7 SCC 734

16 (2010) 4 SCC 460.

17 (2010) 6 SCC 413.

18 1963 AIR 996.

Although it can be gathered from the use of the word 'generally' in the last paragraph of the judgment where the Court did not find the case before it to be a fit case for exercise of its extra-ordinary jurisdiction under Article 142 of the Constitution, that both the said decisions do not altogether rule out the exercise of extraordinary jurisdiction by this Court under Article 142 of the Constitution, yet we feel that in the light of certain observations in the said decisions, particularly in *Manish Goel* (supra), coupled with the fact that the decision in *Anjana Kishore* (supra) was rendered by a Bench of three learned Judges of this Court, it would be appropriate to refer the matter to a Bench of three Judges in order to have a clear ruling on the issue for future guidance.

Accordingly, the Apex Court referred the question "*Whether the period prescribed in sub-section (2) of Section 13-B of the Hindu Marriage Act, 1955 can be waived or reduced by this Court in exercise of its jurisdiction under Article 142 of the Constitution?"* to the three Judges Bench.

The Bench directed the Registry to place the papers of this case before the Hon'ble Chief Justice of India for appropriate orders. Division Bench of Justice DK Jain and Justice CK Prasad of Supreme Court further referred the case of *Neeti Malviya v. Rakesh Malviya*[19] on 12 May, 2010 to Hon'ble Chief Justice for appropriate order. this seems to be incorrect and unfilled major gap that Supreme Court Registry was to place the case to the third Judge to clear the ruling for future guidance which has received no guidance. Or else the inference can be drawn that the judgment of *Neeti Malvia* (supra) case has been concurred by Hon'ble Chief Justice and upheld the majority judgment as which shall be the precedent. The matter as held in *Neeti Maliviya* (supra)cannot became infructuous as held on account of grant of divorce.[20] The parties were given direction in para 15 that *"parties will file a joint petition under Section 13-B of the Act for grant of divorce by mutual consent*".

Precedence

Without any reference to the judgment in *Manish Goel* (supra), the power Supreme Court under Article 142 of the Constitution has been exercised by the Court in number of cases[21] even after this judgment.

19 (2010) 6 SCC 413.

20 Order dated 23rd August, 2011 in Transfer Petition (Civil)No. 899 of 2007.

21 *Priyanka Singh v. Jayant Singh*(2010) 15 SCC 390; *Sarita Singh v. Rajeshwar Singh* (2010) 15 SCC 374; *Harpreet Singh Popli v. Manmeet Kaur Popli* (2010) 15 SCC 316; *Hitesh Bhatnagar v. Deepa Bhatnagar* (2011) 5 SCC 234; *Veena v. State (Govt. of NCT of Delhi)* (2011) 14 SCC 614; *Priyanka Khanna v. Amit Khanna* (2011) 15 SCC 612; *Devinder Singh Narula v. Meenakshi Nangia* (2012) 8 SCC 580; *Vimi Vinod Chopra v. Vinod Gulshan Chpra* (2013) 15 SCC 547; *Priyanka Chawla v. Amit Chawla* (2016) 3 SCC 126; *Nikhil Kumar v. Rupali Kumar* (2016) 13 SCC 383.

The Court observed that *Anjana Kishore (supra*), was dealing with a transfer petition and the parties reached a settlement. The Supreme Court has also waived the six months period under Article 142 in the facts and circumstances of the case. In *Anil Kumar Jain v. Maya Jain*[22], one of the parties withdrew the consent. This Court held that marriage had irretrievably been broken down, though the civil courts and the High Court could not exercise any power contrary to the statutory provisions, but the Supreme Court under Article 142 could exercise such power in the interests of justice. Accordingly, the decree for divorce was granted.

After considering the above decisions, the Court is of the view that since *Manish Goel*(supra) holds the field, in absence of contrary decisions by a larger Bench and power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before the Supreme Court and the Court is approached only for the purpose of waiver of the statutory period.

However, the Supreme Court found that the question whether Section 13-B(2) is to be read as mandatory or discretionary needs to be gone into. In *Manish Goel (supra*), this question was not gone into as it was not raised. This Court observed "*The learned counsel for the petitioner is not able to advance arguments on the issue as to whether, statutory period prescribed under Section 13-B(1) of the Act is mandatory or directory and if directory, whether could be dispensed with even by the High Court in exercise of its writ/appellate jurisdiction".*

Accordingly, the Supreme Court passed the order on 18th August, 2017 as *"List the matter on 23rd August, 2017 to consider the question whether provision of Section 13B of the Hindu Marriage, Act, 1955 laying down cooling off period of six months is a mandatory requirement or it is open to the Family Court to waive the same having regard to the interest of justice in an individual case. Mr. K.V. Vishwanathan, senior counsel is appointed as Amicus to assist the Court. Registry to furnish copy of necessary papers to learned Amicus".*

Arguments

The Supreme Court recorded its gratitude for the valuable assistance rendered by learned amicus who has been ably assisted by S/Shri Abhishek Kaushik, Vrinda Bhandari and Mukunda Rao Angara, Advocates.

Learned amicus submitted that waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the

22 (2009) 10 SCC 415.

23 AIR 1986 AP 167 (DB).

Andhra Pradesh High Court in *K. Omprakash v. K. Nalini*[23]; Karnataka High Court in *Roopa Reddy v. Prabhakar Reddy*[24]; Delhi High Court in *Dhanjit Vadra v. Smt. Beena Vadra*[25] and Madhya Pradesh High Court in *Dinesh Kumar Shukla v. Smt. Neeta*[26]. Contrary view has been taken by Kerala High Court in *M. Krishna Preetha v. Dr. Jayan Moorkkanatt*[27]. It was submitted that Section 13-B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they have not been able to live together and have agreed that the marriage be dissolved. Section 13-B (2) is procedural. Further it is submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13-B(2). Thus, the Court should consider the questions:

(i) How long parties have been married?

(ii) How long litigation is pending?

(iii) How long they have been staying apart?

(iv) Are there any other proceedings between the parties?

(v) Have the parties attended mediation/conciliation?

(vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

Rational

The object of invoking Article 142 of the Constitution is to enable the parties to dissolve a marriage by Mutual Consent if the marriage has irretrievably broken down and to enable them to rehabilitate as per their available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners does not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was

24 AIR 1994 Kar 12 (DB).
25 AIR 1990 Del 146.
26 AIR 2005 MP 106 (DB).
27 AIR 2010 Ker 157.

otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option. It is the sanctity of marriage as institution which could not or cannot be allowed to be undermined by the whims and emotions of the one of the annoying spouses.[28] The Trial courts shall observe the pre-requisites mentioned in the instant case for deciding the case at their level and reduce the mental agony of the parties as well as not to force the Supreme Court to invoke its inherent power vested in Article 142 of the Constitution.

In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's[29] has been cited with approval in *Kailash v. Nanhku and ors.*[30]as follows:

"The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: 'No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' " 'For ascertaining the real intention of the legislature', points out Subbarao, J. 'the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as

28 Vijender Kumar, '*Divorce by Mutual Consent among Hindus : Law, Practice and Procedure',* 1CLR2017, p.15.

29 GP Singh, PRINCIPLES OF STATUTORY INTERPRETATION (9thEdn., 2004).

30 (2005) 4 SCC 480

mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

Guiding Principle

The Courts shall award the future decree of divorce after applying the above rule as done in the present situation. While pronouncing the Hon'ble Supreme Court viewed that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B (2), it can do so after considering the following :

(i) the statutory period of six months specified in Section 13-B (2), in addition to the statutory period of one year under Section 13-B (1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

Conclusion

In the instant case the Hon'ble Apex Court concluded that the waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court. This discretion will be applied where parties have settled their claims of alimony, custody of children etc. and not to prolong their mental agony.

The Hon'ble Court also opined that the period mentioned in Section 13-B(2) is not mandatory but directory which will be open to the Court to exercise its discretionary power after study of the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

Needless to say that in conducting such proceedings the Court can also use the medium of video conferencing and also permit genuine representation of the parties through close relations such as parents or siblings where the parties are

unable to appear in person for any just and valid reason as may satisfy the Court, to advance the interest of justice.

Evaluation

The researcher has taken the minute study of the Judgment and able to made evaluation of the case that inspite of the existing gapes in the previous similar judgment(s) of *Manish Goel* (Supra), *Neeti Malviya* (Supra) wherein the Division Bench(s) has referred the matter to the third Judge to clear the future guidelines, the matter was kept silent and judgment could not become the precedent. In the instant case the Hon'ble Court has incorrectly referred the *Anjana Kishore (Supra)* case as conflicting decision of three Judges Bench. The inference has been drawn that in support of the instant case, *Anil Kumar Jain(Supra)* case was also an irretrievably broken down case to grant decree of divorce.

The author analyzed that in future the courts while invoking its power under Article 142 of the Constitution shall ensure that statutory period under Section 13-B(2) may be considered to waive if the parties have been living separately more than one year as under section 13-B(1) and all possible efforts of mediation/conciliation have failed to reunite the parties.

The Hon'ble Supreme Court has mentioned the word 'generally' which specifically indicates that Article 142 can be invoked only in exceptional circumstances to do 'Complete Justice' and not in ordinary circumstances.

However, the judgment in the instant case is a landmark judgment and will remain precedent in terms of the guiding principle for the lower courts. Still, the Hon'ble Apex Court could also have given the necessary directions to the Government to initiate the necessary amendment in Section 13-B along with a ground of divorce 'Irretrievable breakdown of marriage' under Hindu Marriage Act and reconsider the Bill of 2010 which was passed by Rajya Sabha.

CASE COMMENT: INDEPENDENT THOUGHT V. UNION OF INDIA

Marital Rape of Child Brides V. Prevention of Child Marriage

Richa Krishan*

Introduction

A huge irregularity and inconsistency has been pertinent from time immemorial in the Indian criminal law provisions on prohibition and restraint on child marriage and rape and other forms of sexual intercourse which child brides face. One of the major legislations in controversy for long in this regard is Section 375 Exception 2[1] of The Indian Penal Code[2]. The validity of The Provision has been brought to question in the year 2013 by a writ petition filed by a Non Government Organization named Independent Thought[3] which works for the rights of children and women. The main contention of the petitioners was that The Provision stands in internal contradiction with Section 375 IPC itself and does not stand in consonance to the Indian Constitution by specifically violating Articles 14, 15 and 21 of the Indian Constitution. It was also contended that it is in contravention to the other Indian laws in force as well like Juvenile Justice (Care and Protection of Children) Act, 2012, the Protection of Children from Sexual Offences Act, 2012[4] and Prohibition of Child Marriage Act, 2006[5]. The anomaly between The Provision and the International Conventions on Women and Children to which India is a signatory like Convention on the Rights of the Child[6] and the Convention for the Elimination of all forms of Discrimination against Women[7] was also highlighted in this case.

* Assistant Professor, Amity Law School Delhi,

1 Section 375, Exception 2, The Indian Penal Code, read as: "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." (Hereinafter The Provision)

2 Indian Penal Code, 1860 (Hereinafter IPC)

3 Hereinafter The Petitioner

4 Hereinafter PCSOA

5 Hereinafter read as PCMA

6 Hereinafter CRC

7 Hereinafter CEDAW

Section 375 IPC deals with rape, and in detail elaborates what sexual act would amount to rape if done against the will, or without the consent or with the consent of the women. Section 375 Clause Sixthly[8] IPC talks about rape with a woman who is less then eighteen years of age. The wordings of the provision demarcates that if the sexual act defined as rape is done with a women of less than eighteen years of age, the consent of the women does not matter, and the man would be liable for rape even if the women has consented for such an activity. This provision is also referred as Statutory Rape in general parlance without any specific legislation[9]. At the same time The Provision is itself rebutting and challenging the main section[10] as when at one place 375 says that sexual intercourse with a consenting women less then eighteen years would still lead to rape at the same time the second exception points out the situation of a married women less than eighteen years. The visible anomaly in the section is that sexual intercourse with the wife who is not less than fifteen years of age is not rape i.e. if a husband has sexual intercourse with his own wife who is falling in the age group from fifteen to eighteen that would be very much valid irrespective of it being forceful or done with consensual act. This peculiar confusion was clarified and decided upon in the present case.

The division bench of Madan B. Lokur Justice and Deepak Gupta Justice finally decided the case *Independent Thought v. Union of India*[11]coincidentally on the International Day of the Girl Child i.e., on 11 October, 2017 by giving separate but concurring judgments. The court actually read down the provision and held that at the place of "fifteen years", "eighteen years" would be read i.e. The Provision to be now read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." The actual intent of social justice to the child bride and the constitutional vision of the framers of our Constitution could be preserved and protected only through this change brought in The Provision.[12]

As per Article 15 Clause 3[13] of the Indian Constitution, State can make reasonable classification in reference to women and children but that has to be made with a specific end i.e., there should be a reasonable nexus with the aimed objective. The state tried to defend its point of maintaining the different age limit for a child

8 Section 375 Sixthly, Indian Penal Code, 1860 read as: "With or without her consent, when she is under eighteen years of age."

9 *Infra Note* 11, Para 28

10 Section 375, Indian Penal Code

11 *Independent Thought v. Union of India*, W.P. (Civil) No. 382 of 2013, (11 October, 2017) (Madan B. Lokur and Deepak Gupta JJ) Hereinafter Independent Thought

12 *Independent Thought,* Para 105

13 Article 15 (3), The Constitution of India read as: "Nothing in this article shall prevent the State from making any special provision for women and children."

bride. Two major reasons given by state herein are maintaining the sanctity of marriage as an institution and that it did not want to punish people merely for consummating marriage. Whereas the actual intention behind it: is to provide the discriminatory behavior a garb of social justice to child brides. In reference to this the provision was held to be violative of Article 14 of the Constitution also because there was no rationale or reasonable ground for fixing the age at fifteen years in the provision rather it is a form of arbitrary discrimination as the age does not have any linkage to the so called object sought to be achieved i.e. maintaining the sanctity of marriage.

Keeping rights of children in focus a huge range of social justice laws have also been enacted by the Parliament in our country but their implementation had not been fully in consonance with such enactments and one such major enactments is PCMA. Talking about who actually is a child, Section 2 (a)[14] of PCMA gives the age of 18 for a women to be a child and Section 2 (b)[15] deals with child marriage which concludes that if a women is married before she attains the age of 18 that marriage would be taken to be a child marriage which is not a legal marriage which means even the consummation of that marriage is not legal as per law. Whereas at the same time the anomaly strikes in The Provision i.e. "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." Section 13 of the PCMA indicates about mass child marriages performed wherein young girls are subjected to sexual intercourse regardless of their health, their ability to bear children and other adverse social, economic and psychological consequences.[16] Though as per law such a marriage is not legal, still it is not void ab initio and is only and merely voidable[17] at the option of the women. The very next question that flashes in the mind is whether this right of the women does away with the sexual criminal offence of rape done with the married women who is less than 18 years of age and the answer is certainly not.[18] There is certainly an imbibed confusion about marriage of a girl less than 18, as committing child marriage is an offence and at the same time to maintain sanctity of marriage age of consent be 15 i.e., a totally discriminatory classification under Article 14.

14 Section 2, Prohibition of Child Marriage Act, 2006 read as: "In this Act, unless the context otherwise requires, (a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age; (b) "child marriage" means a marriage to which either of the contracting parties is a child."

15 *Ibid.*

16 *Independent Thought*, Para 104

17 Section 3 (1), Prohibition of Child Marriage Act, 2006 read as: "Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage."

18 *Independent Thought*, Para 183

It was further noted by the Supreme Court that there has been a range of penal provisions that prosecute a man for offences, specifically sexual offences done against a women and a husband has never been an exception to them. One such provision is Section 3(a)[19] of the Protection of Women from Domestic Violence Act, 2005[20], which defines the "domestic abuse", and "sexual abuse" being one of the forms of the same means *"any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman"*.[21] Though PWDVA deals with married women of all ages therefore child brides are also influenced by the law, and certainly exemption to marital rape with minor girls in The Provision is in contravention to this law as well.

It is only for the offence of rape i.e. in The Provision that the husband is kept immune from penalty for an offence against the wife in a specific situation, and that specific situation is decided upon very unreasonable and unbalanced factors. The Judgment gives this as another major ground for considering The Provision discriminatory in nature. In The Judgment it is clearly brought to notice that a husband can be charged with the sexual offences which are not as grave as the offence of rape for example offence of assault or use of criminal force against a woman with intent to outrage her modesty[22]; sexual harassment and punishment for sexual harassment[23]; assault or use of criminal force to woman with intent to disrobe[24]; voyeurism[25]; and stalking[26]. At the same time the husband cannot be charged with the offence of rape with his own wife who is not less than 15 years of age. "It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the "victim wife" is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse."[27]There is actually no proper reasoning found behind this discrimination.

The inconsistency of The Provision with the women's bodily integrity and reproduction rights makes it fall into violation of Article 21[28] which was also clearly

19 Section 3(a), Protection of Women from Domestic Violence Act, 2005 read as: "Causing physical abuse, **sexual abuse**, verbal and emotional abuse and economic abuse".

20 Hereinafter, PWDVA

21 Section 3, Explanation I (ii), Protection of Women from Domestic Violence Act, 2005

22 Sections 354, Indian Penal Code, 1860

23 354 A, Indian Penal Code, 1860

24 354 B, Indian Penal Code, 1860

25 354 C, Indian Penal Code, 1860

26 354 D, Indian Penal Code, 1860

27 *Independent Thought*, Para 184

28 Article 21, The Constitution of India, read as: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

highlighted and has been done away with in The Judgment. One of the major contentions of the petitioner in the judgment was that, "almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away in The Provision."[29] Can we say that just because a girl child is married before a valid age of majority she would cease to be a child any more or she would become mentally or physically capable of having sexual intercourse?.The Judgment has actually brilliantly surfaced the major two issues i.e. the persistently practiced culture of child marriages in India and its impact and consequences on the age of consent of a women. Child marriage as a social evil inadvertently affects both the physical and mental health of children, and to control it POSCO act criminalizes even a consensual sexual activity among children who have not come off age. The Judgment has actually concluded that under the garb of age old customs committing marriage ceremony cannot be taken as a license to have a sexual intercourse with a minor girl because she is a child[30] and would remain so even if she is married before she attains the age of 18.

It is not that the menace of child marriage is only restricted to the girls more than 15 years of age whereas "almost 1 in every 3 marriage takes place in violation of the PCMA. Many of these relate to child brides aged less than 15 years".[31]On this point Justice Deepak Gupta actually questioned the basic reason behind fixing 15 years in The Provision which is eventually not in consonance to PCMA and other laws. He concluded that the reason dates back to 1940, when the age of consent for a girl was 16, the age of marriage 15 and the age under the exception clause 15. In 1975, the age of consent was 16, the age of marriage 18, and the age under exception 15. Today, when the age of consent and marriage of a girl are 18, the age under The Provision is still 15 which should not be so as fixing a lower age under Exception 2 is totally irrational. The figure of 15 is probably there still because it has been existing for long and there is no rational reason behind it.[32]It was concluded that the law should change with the change in time, as per the latest situations and when changes have been brought up in all other relevant provisions keeping The Provision untouched is not fair and just.

29 *Independent Thought*, Para 4

30 *Ibid.*, Para 11

31 National Plan of Action for Children, 2016, Ministry of Women and Child Development, Government of India

32 *Independent Thought*, Para 180

Conclusion

The Judgment is a bold and good step on the part of the bench. It has been aimed to harmonize the age provided in the various laws of majority, consensual sexual activity, and sexual intercourse punishable as rape for child brides as well. Before this judgment, though at one hand child marriage was taken to be an indisputable social evil of the society at another a child bride was made to suffer emotional and physical trauma resultant of sex abuse at the hands of her own husband under The Provision.

The Judgment has efficiently brought down marriage as an institution for those who are below 18 in age, under the garb of criminalizing both consensual and forceful sexual activity of children. As a child less than 18 would be prosecuted under the POCSO for sexual offence today even a husband of a child bride either major or minor can be prosecuted for rape under THE PROVISION. The age of consent under Section 375 was raised from 16 to 18 by the 2013 Amendment[33]bringing it in consonance to POCSO. However, the age above which marriage is an exception to rape was retained at 15 which were done away with in The Judgment. This judgment would certainly have a deterrent effect on the parents and guardians of minors who intend to marry theirs young girls as after the verdict every husband of a minor girl would directly be exposed to criminal prosecution of rape.

As of now The Judgment is no doubt a welcome decision for eradicating the discriminatory behavior in reference to child brides for the offence of rape under Section 375 but it is not enough in the long run. There have been a range of multifarious perspectives and circumstances which led to the prevalence of child marriages in our society even after the coming into force of the PCMA. Therefore we still have a lot more to do to actually fulfill the aim of eradicating the menace of child marriage and child sexual abuse. Simply a judgment would not be of much benefit until and unless there is proper education imparted to women and the society on the whole about women's rights and the legal provisions as remedies to their correlative rights.

An important consideration which is still required to be worked upon is when in today's fast moving world where a child as small as 8 is aware of end number of things through social media and others, whether treating 18 as the proper age for consent for sexual activities is practically correct. 18 might be good an age for children's care and protection but rest is yet to be thought over.

33 Criminal Law Amendment Act, 2013, No. 13 of 2013 (2 April, 2013)

BOOK REVIEW

NEELAM AND SHEKHAR KRISHNAMOORTHY, TRIAL BY FIRE

Subhradipta Sarkar*

What is Justice?

John Rawls, in his famous work, *A Theory of Justice*,[1] asserted that justice is that which prevails in a just society. Through hypothetical "original position", he further explained that justice is that ordering of things which would be agreed by persons in a just society – one that they would agree to be members of it, if they had the choice.[2] Further Robert Nozick, in *Anarchy, State and Utopia*,[3] describes that in a just society the rights of an individual are accorded their due respect. For him, the protection of those rights is fundamental and role of the state is to act as a "night-watchman" to ensure that nothing wrong is done.[4] Such a state has two fold functions. It must obtain compensation for a person whose rights have been infringed from the person who has done the damage and, in order to prevent possible future damage, it may prohibit certain forms of potentially dangerous conduct.[5] Armed with such classical understanding of justice, any student of law would be left disenchanted while turning the pages of *Trial by Fire*,[6] authored by two victims of (in)justice.

Disaster Strikes

Trial by Fire is a personal account of a parent-couple who lost their teenaged son and daughter in a devastating fire emanating from a transformer at *Uphaar* cinema hall, owned by the wealthy Ansal brothers, on June 13, 1997, in New Delhi. The

* Assistant Professor, School of Law, The NorthCap University, Gurgaon (formerly ITM University, Gurgaon), subhradipta.sarkar@gmail.com or +91-8826609980.

1 JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999)

2 *See id* at 13

3 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (2d ed. 2013)

4 *See generally id.* at ch. 3

5 *See generally id.* at ch. 4

6 NEELAM & SHEKHAR KRISHNAMOORTHY, TRIAL BY FIRE (2016)

7 *See supra* note 6, at 30

incident resulted in the loss of fifty-nine lives, aged between one-month and seventy-two years, and injured over a hundred.[7] What followed was a nineteen year judicial ordeal experienced by the bereaving parents (read as 'victims') in securing justice for their dead kids. The book begins in novel-style with a tale of a happy family ripped apart by the disaster. While it helps the readers to settle down with the facts, it also offers an opportunity to a grieving mother (Ms. Neelam Krishnamoorthy is the actual author) to ease her pain by sharing her sorrows.[8] Although overwhelmed by their personal loss, the authors haven't glossed over the agony of other fellow-victims.[9]

Legal Crusade Ensues

Then onwards, it's getting into real 'legal' business. The authors provide nuanced details of the disaster and infrastructure of the cinema hall;[10] owners hoodwinking the law in collusion with authorities and making illegal structural changes;[11] their endeavour in convincing other victims' families to come together and form Association of the Victims of Uphaar Tragedy (AVUT) in the pursuit of justice;[12] Naresh Kumar committee report and police investigation.[13] Notwithstanding the melancholy tone of a bereaving mother, objectivity of the tale, *i.e.* to demonstrate the extreme step-motherly treatment meted out towards the victims in the justice delivery process is not lost.

An Endless Legal Journey

Judicial delay is arguably the major impediment in dispensing justice by the Indian courts; and quite naturally it has not spared *Uphaar* either. Be it committal of the criminal trial in the sessions court after thirty hearings, or the Special Leave Petition in the civil matter pending before the Supreme Court for almost six years[14] – chain of delays and hurdles plagued the legal journey from the very beginning. Adjournments were granted quite liberally by the courts to the defence counsel on flimsy grounds, *e.g.* he was busy in another court or photographs produced were not clear, etc. Quite contrary to such usual trend, once the accused were incarcerated briefly, the counsel never sought adjournments and completed his arguments with extreme alacrity.[15]

8 *See generally id.* at 1 – 24
9 *See generally id.* at ch. 5: *Those Who Suffered*
10 *See generally id.* at 25 – 29
11 *See generally id.* at 43 – 46
12 *See generally id.* at 35 – 42
13 *See generally id.* at 51 – 66
14 *See generally id.* at 88 – 89
15 *See id.* at 158

The situation reminds the reviewer of *Legal Confidential*[16] written by Ranjeev C. Dubey, where he frankly declares that the judicial system is designed to promote litigation which could go on forever.[17] He asserts that it serves everybody except the litigators, who is the proposed "customer" of the justice delivery system.[18] *Trial by Fire* is a clear testimony of the same trend.

A Judicial Tragedy

Despite all odds, the victims put up a valiant fight. Besides making umpteen trips to the courts for almost two decades, the victims didn't leave any stone unturned in accomplishment of their mission – from paying the costs for the court-appointed commission to contacting architects for understanding the infrastructural details of *Uphaar* building to consulting electrical engineers for learning about transformers. The authors, themselves, were drained physically, emotionally and economically. No amount of intimidation, insult, trauma, humiliation and even offers and bargains could deter them.[19] On the contrary, the accused were often treated with sympathy and dignity. They were allowed to sit in the bar library, allowed to be served with cold drinks inside the courtroom, granted personal exemption to attend an official dinner party hosted in honour of former US President Bill Clinton.[20] The reviewer has elsewhere argued that victims' justice in India is a questionable proposition.[21] Unfortunately, *Uphaar* case reaffirms the view. It demonstrates as to how the criminal trials are skewed in favour of the accused and the victims, basically in whose interest the entire process is designed, suffer the most. So much so that a section of lawyers led by the president of the bar abused and assaulted Neelam Krishnamoorthy inside the court premises for seeking justice! Yet no action was taken against the culprits.[22]

Nevertheless, the victims endured all adversities in a hope that the Supreme Court would eventually give exemplary punishment to the accused and deliver justice. Alas! The Hon'ble Court failed them miserably on August 19, 2015.[23] Not only did the Court allow the Ansals to walk away with a lenient punishment through jurisprudentially unfathomable reasoning, it created a dubious precedent for any

16 RANJEEV C. DUBEY, LEGAL CONFIDENTIAL: ADVENTURES OF AN INDIAN LAWYER (2015)

17 *See id.* at 4

18 *See id.* at 16, 36

19 *See generally supra* note 6, at 202 – 05, 234 – 41

20 *See id.* at 145

21 *See generally* Subhradipta Sarkar, *In the Quest for Victims' Justice*, 17(2) HUM. RTS. BRIEF 16 – 20 (2010)

22 *See supra* note 6, at 138 – 41

23 *See generally id.* at 152 – 93

future manmade disaster case. For the victims, justice became "a mirage, a mockery or mere tokenism".[24] The authors hold no qualms that the judgment was indeed a judicial betrayal. The anguish of the mother is apparent as she vents her frustration:[25]

"I regret having pursued the Uphaar case so vigorously for nineteen years. I should have just shot those responsible for the deaths of my children and the fifty-seven others. I would have pleaded insanity . . . By now, I would have finished serving my sentence as well."

Is there any silver lining?

Thumped by injustice, the authors disrobed judicial system with scathing criticism. Nevertheless, they acknowledged the contribution of many lawyers including Senior Advocates K.T.S. Tulsi and Harish N. Salve, without which this legal crusade couldn't have been possible. In particular, they have showed utmost gratitude to Tulsi throughout for taking up the case *pro bono* and fighting tooth and nail till the end. In sum, *Trial by Fire* is a tale of audacious hope and extreme perseverance. It is an incredible story of how a "group of ordinary people could stand against the powerful Ansals and refused to back down even after a decade of prolonged legal battle".[26] They busted the myth of "*Kuch nehi hoga*" attitude to a large extent.[27] Failure in sending the Ansals to the gallows has not blunted the spirit of the AVUT in carrying on with the fight. In fact, a review petition from the judgment is pending before the Supreme Court.

A Pragmatic Legal Chronicle

If this courageous struggle will not make the readers pause and ponder over the future of victim's justice in the country, perhaps nothing will. The authors, despite being non-lawyers and novice to judicial process, have demonstrated admirable flair in telling a legal tale. They have maintained a reasonable balance between getting into the nuance of law and narrating the story passionately. To familiarize readers, they have explained legal provisions and analysed judgments with utmost sincerity. The book is highly recommended for anybody, be it student of law or otherwise interested in law, willing to understand the administration of justice in reality.

24 *See id.* at 169
25 *See id.* at 188
26 *See id.* at 157
27 *See generally id.* at 243 – 44

BACK ISSUES OF ALR

The following are the details of all the back issues of Amity Law Review. We would be happy to send you a copy of the desired issues, on request.

List of Contents of Vol.1 Part 1 Jan 2000-June 2000:

Title	Author
Torture as a challenge to Civil Society and the Administration of Justice	*Justice Markandey Katju*
Animal Cruelty and Protection Laws	*Maneka Gandhi*
The American Experience in the Field Of ADR	*Dana H. Freyer*
International Meditation- The U.K Experience	*Karl Mackie and Edward Lightburn*
Speeding up the wheels of Justice- Changes Needed for Court's Effective functioning	*Dr. A.M. Singhvi*
Mode of Search & Seizure under the Narcotic Drugs & Psychotropic Substances Act	*J.N. Barowalia*
Internet & The Copyright Law	*Manish Arora*
Legal Education & Legal Profession in India: How to Bridge the Gap?	*Dr. Surat Singh*
Interim relief under Consumer Protection Act	*Rajesh Gupta and Gunjan Gupta*
Justice for millions Half Clad- Half Hungry	*Dr. Janak Raj Jai*
India and the Geneva Convention	*Brig. Nilendra Kumar*
Whether the dishonor of a cheque can have a penal effect in case of Stop Payment	*S.N. Gupta*
The Debate on Capital Account Convertibility: The Indian Scenario	*Prof. A. Jayagovind*
Leading Questions in a Criminal Proceeding	*Vinay Reddy and Prakash N.*
Virtual Courts	*Rajesh Gupta*
The Executive Powers of the President	*Poornima Sampath*

List of Contents of Vol.1 Part 2, Vol.2 Part I; July 2000- June 2001:

List of contents of Part 2, Vol. 2 July- Dec, 2001:

List of Contents of Jan- June 2002, Part I Vol.3

List of Contents of Vol. 5 Part 2, Vol.6 Part 1 2004- June 2005

List of Contents of Vol. 7 No(s) (1 &2) Jan- December 2011

List of Contents of Vol.8 January- June 2012

List of Contents of Vol. 8 No.(2) July- December 2012

List of Contents of Vol. Jan-Dec. 9 2013

List of Contents of Volume 10 2014

List of Contents of Volume 10 2015

List of Contents of Volume 12 2016

FEEDBACK FORM

Would you take a moment to evaluate this issue of the "Amity Law Review"? Your valuable comments will help shape future issues. Thank you!

	Highly Appreciable	*Somewhat Appreciable*	*Not Appreciable*	*Did not Read*
Articles	☐	☐	☐	☐
Legal Watch	☐	☐	☐	☐
Book Review	☐	☐	☐	☐

We'd appreciate your comments and suggestions about this issue of the "Amity Law Review" in general:

_____

_____

_____

_____

Name: Mr./Ms. _____

Designation: _____ Ph.: _____

Organisation: _____

Address: _____

_____

SUBSCRIPTION/MEMBERSHIP FORM

I wish to subscribe to Amity Law Review for 1/2/3 year(s)/Life Membership. A bank draft/cheque bearing No. _____ dated _____ for Rs._____ drawn in favour of Amity Law School, Delhi, Towards Subscription/Membership for 1/2/3 Year(s)/ Life Membership is enclosed.

Name: _____

Designation: _____

Address: _____

_____

_____ Pin: _____

City: _____ Country: _____

Phone: _____ Fax: _____

E-mail: _____

Date : Signature

SUBSCRIPTION RATES

Category Group	Amount (in Rs.)			
	1 yr.	2 Yrs.	3 Yrs.	Life Membership
Institution/Individual	200	300	400	1000
Alumni	100	200	300	800
Student	75	150	225	500

Please send the amount by DD/Crossed Account Payee Cheque Favouring **"Amity Law School, Delhi"** for the timely receipt of the journal.

SUBMISSION GUIDELINES

ABSTRACT: All submissions should be accompanied by an abstract of about 200 words outlining the central argument(s) of the paper.

COPYRIGHT: Authors shall warrant that the papers submitted for publication do not infringe the copyright of any other person. Except agreed otherwise, the copyright of the articles published shall vest with the publisher, viz., the Amity Law School, Delhi. However, Amity Law School shall not be liable for any copyright infringement by the authors.

COVER PAGE: In order to facilitate anonymity, authors must mention their names, contact details and affiliations only on the cover page of the manuscript.

ENGLISH: Follow British spellings and punctuation conventions.

FONT SIZE AND STYLE: Kindly use Times New Roman, 12 point, for the main text and 10 point for footnotes.

HEADINGS: The headings should be used as per the followingstyle:

- First heading: 12pt, bold, centre
- Second heading: 12pt, bold, left-aligned
- Third heading: 12pt, italics, centre

LENGTH: Articles should generally be between 8,000 and 10,000 words (including footnotes. Notes, Case Comments and Book Reviews should be between 3,000 and 5,000 words. The Editors may, however, accept longer submissions in appropriate cases.

LINE SPACING: The line spacing of main text of paper should be 1.5.

REFERENCES: Footnotes should be used and not endnotes.

FOOTNOTING STYLE FOR BOOKS AND ARTICLES: Books: Name of the author, Title of the book (in italics), Edition (if any), Name of the Publisher, Place of publication, Year, Page no. **Articles:** Name of the author, Title (in double quotes), Name of the journal, Volume, Year, Page No. (otherwise the mode of citation provided in the journal itself).

REVIEW PROCESS: All papers will be reviewed anonymously by the Editorial Board. Authors will be notified within 4-6 weeks about the status of their papers. Request for expedited review may not be entertained.

SUBSTANCE: Papers should contain an original contribution to scholarship by making a cohesive argument supported with appropriate authorities.

QUOTATIONS/QUOTATION MARK: Quotations over 50 words should be indented. Double quotation marks should be used; single quotation marks should be used only for quotes within a quotation.

COMPLEMENTARY COPIES: All authors will be provided 3 complementary copies of the issue in which their paper appears.

NOTE: Kindly send your Articles through:

E-mail : alsdpublications@amity.edu

LIFE MEMBERS - AMITY LAW REVIEW

S.No.	Name	Designation	E-mail ID	Present Address
1	Prof (Dr) B P Singh Sehgal	Director	bpssehgal@amity.edu	O-215, Vivek Vihar, Sector - 82, Noida
2	Prof M K Balachandran	Chair Professor	mkbalachandran @amity.edu	
3	Prof (Dr) Alok Mishra	Professor	amishra3@amity.edu	107, Sector-2C,Vasundhara, Ghaziabad
4	Prof.(Dr.) Mona Sharma	Professor	msharma6@amity.edu	18, Ishwar Nagar,Mathura Road, New Delhi
5	Prof.(Dr.) Isheeta Rutabhasini	Professor	irutabhasini@amity.edu	Flat No. 2/502, East End Apartment, Mayur Vihar, Phase-I,N.D
6	Prof.(Dr.) Ashok Kr. Kantroo	Professor	akantroo@amity.edu	704, Sector-8, Karnal, Haryana
7	Dr. Bhavish Gupta	Associate Professor	bgupta1@amity.edu	B-72,Sector-50, Noida, U.P.
8	Dr. Susmitha P. Mallaya	Assistant Professor	spmallaya@amity.edu	54-C, Pocket A-12, Kalkaji DDA Extension,N.D-19
9	Mr. Ashutosh Raj Anand	Asst. Professor (GR I)	aranand@amity.edu ashutoshrajanand @gmail.com	C-111, Nirman Vihar, Delhi-92
10	Ms. Nisha Dhanraj	Asst. Professor (GR I)	ndhanraj@amity.edu	D-757, M.P. Colony, Paschim Vihar, N.D
11	Mr. Shaharyar Asaf Khan	Asst. Professor (GR I)	sakhan@amity.edu	F-28/B, 4th Floor, Abul Fazal Enclave, Jamia Nagar, New Delhi.
12	Dr. Neelam Tyagi	Asst. Professor (GR I)	ntyagi@amity.edu n.neelamtyagi @gmail.com	108, Milano, Mahagun Mosaic Phase-II, Sector-4, Vaishali, Ghaziabad
13	Dr. Tapan Kumar Chandola	Asst. Professor (GR I)	tkchandola@amity.edu tapanchandola90 @gmail.com	29,Chauhan Mohalla, Madanpur, Khadar, New Delhi
14	Ms. Rubina Grewal Nagra	Asst. Professor (GR I)	rgnagra@amity.edu rubinagrewal @yahoo.com	B-4/118,3rd Floor, Safdarjung Enclave, New Delhi-29
15	Dr. Alok Gupta	Asst. Professor (GR I)	agupta11@amity.edu alok.idrm@gmail.com	16/17,SF-2,Adharshila Appts, Sect-3, Rajendra Nagar, Sahibabad-201005(U.P)
16	Mr. Manish Sharma	Asst. Professor	msharma20@amity.edu msharma28@gmail.com	A-22,Sector-47, Noida, U.P.

S.No.	Name	Designation	E-mail ID	Present Address
17	Mr. Debajit K. Sarmah	Asst. Professor (GR I)	dksarmah@amty.edu dksarmah@gmail.com	207,Hari nagar, Ashram, New Delhi-110014
18	Dr. Reeta Garg	Asst. Professor (GR I)	rgarg2@amity.edu garg_reeeta@yahoo.com	1528,G.F-2,Sector-5, Vasundhra, Ghaziabad.
19	Dr. Aparna Sharma	Asst. Professor (GR I)	asharma23@amity.edu	16D, MIG flats, Sector-10C, Noida
20	Ms. Gurpreet K. Johal	Asst. Professor (GR I)	gkaur@amity.edu	C-21, UHW Chatra Marg, Delhi University, New Delhi-110007
21	Ms. Titasha Banerjee	Asst. Professor (GR I)	tbanerjee@amity.edu	40/155, Chittranjan Park, Top Floor, Pkt-40, Near Market no.1, New Delhi-19
22	Ms. Venu Parnami	Asst. Professor (GR I)	vparnami@amity.edu renuparnami@gmail.com	C-94,1st Floor, Mansarover Garden, New Delhi
23	Dr. Sanjana Sharma	Asst. Professor (GR I)	ssharma37@amity.edu	E-801,Ranjit Vihar-I, Sector-23, Dwarka, New Delhi
24	Ms. Manjula Raghav	Asst. Professor (GR I)	mraghav@amity.edu	Flat no. 202, H2/20F, Mahavir Enclave, Delhi-110045
25	Ms. Vandana Sehgal	Asst. Professor (GR I)	vsehgal@aity.edu vandana09@gmail.com	H.No.167/A, Sector-20, 1st Floor, Noida.
26	Dr. Rakesh Rai	Asst. Professor (GR I)	rrai@amity.edu rakesh.rai33014 @gmail.com	189 Bhai Parmanand Colony, Near Hospital, Mukherjee Nagar, Delhi-110009.
27	Dr. Sudha Jha Pathak	Asst. Professor (GR I)	sjpathak@amity.edu dr.sudhapathak @gmail.com	6064/4, D-6, Vasant Kunj, New Delhi-70
28	Ms. Deepti Thomas	Asst. Professor	dthomas@amity.edu	Mayur Vihar
29	Dr Gaurav Varshney	Assistant Professor	gauravmani1 @gmail.com	99-D, Akhil Mani Kunjf, Bank Colony, Premier Nagar, Aligarh-202001, U.P.
30	Mr. Ashutosh Hajela	Assistant Professor (Grade II)	ahajela@amity.edu	C-96, Pocket-6, Kendriya Vihar-II, Sector - 82, Noida - 201 304
31	Mr. Ashish Kaushik	Asst. Professor	akaushik98@amity.edu ashishkaushiklaw @gmail.com	Beta-2, SF Enclave, 203 Appt. no., greater noida, Gautam budha nagar, noida, U.P
32	Dr Soumaiya Musharraf	Assistant Professor	smusharraf@amity.edu	504, Sabha Apartment, D-3, Sector - 44, Noida (U.P.)
33	Prof. R. L. Koul	Professor	rlkoul@yahoo.com	Amity Law School, Noida
34	Dr Vijay Saigal	Assistant Professor	vijsag76@gmail.com; vij_sag@rediffmail.com	Department of Law, University of Jammu, Jammu

S.No.	Name	Designation	E-mail ID	Present Address
35	Dr Sanjay Gupta	Associate Professor	sanjaytutu08@yahoo.in	Department of Law, University of Jammu, Jammu
36	Dr Anshuman Mishra	Assistant Professor (University of Allahabad)	anshumanmishra73 @gmail.com	4-D, Bank Road, Teacher s Colony, Allahabad - 211002
37	Mr. J. Ravindran	Assistant Professor	ravindran_vips @yahoo.com	Sector - 3, Plot - 3, Flat No. 1101, Astha Kunj Apartments, Dwarka, New Delhi - 110 078
38	Mr. Shyam Krishan Kaushik	Associate Professor	krishanshyam @yahoo.com	GH Lower, National Law University, Jodhpur - 342 304, Rajasthan
39	Prof. Subash C. Raina	Professor	scrainaclc@gmail.com	C-4 (29-31), Chhatra Marg, University of Delhi, Delhi
40	Dr Kanwal D P Singh	Professor	kanwal.als@gmail.com	B-55, Sector - 48, Noida
41	Dr V P Tiwari	Associate Professor-VIPS	tiwarivp@gmail.com	B-12/S-6, DLF, Sahibabad, Ghaziabad - 201005
42	Dr (Mrs.) Ashish Virk	Assistant Professor(Laws)	ashishkaur@yahoo.com	115, Sant Nagar, Civil Lines, Near Government College for Men, Ludhiana - 141 001
43	Dr Aman Amrit Cheema	Assistant Professor	aamanamrit@gmail.com	University Institute of Law, Punjab University, Regional Centre, Ludhiana (Punjab)
44	Dr Monika Bhardwaj	Assistant Professor	bhardmona @rediffmail.com	House No. 23, Resham Ghar Colony, Opposite Ambedkar Hall, Jammu - 180 001
45	Mr. Jitesh Kumar Dudani	Student	jitesh.roxx@gmail.com	
46	Ms. Garima Sharma	Student	garima9124@gmail.com	A-275/6, Gulabi Bagh, Near Nabeda Metro Station, Uttam Nagar, New Delhi-110059
47	Ms. Akshita Bansal	Student	bansalaakshu @gmail.com	
48	Mr. Sunil Gupta	Student	sunil.gupta@gmail.com	26,Margath Road, Ist Cross Road, Bangalore -560025
49	Ms. Nivedita Nair	Student	niveditanair1991 @gmail.com	

S.No.	Name	Designation	E-mail ID	Present Address
50	Ms. Ekta Saini	Student	ekta.saini009 @gmail.com	E-32, Srteet No. 16, Sadhu Nagar, Palam Colony, New Delhi - 110 045
51	Director	Institute of Law		Kurukshetra University, Kurukshetra, Haryana
52	Dr. V Gopi	Associate Professor	ranganathvg @gmail.com	A-002/599,Padma Colony, Nalakunta,Hydrabad
53	Ms, Upasana Sharma	Assistant Professor	harshvphe@gmail.com	H.N.81 Sector-81, Sector-1,Behind Holnut Factory,Sanjay Nagar,Jammu(J&K)
53	Dr. Kavitha Chalakkall	Assistant Professor	kavithachalakkal @gmail.com	Amity Law School,Delhi
54	Dr Simmi Virk	Assistant Professor	svirk@amity.edu	Amity Law School,Delhi
55	Ms Richa Gupta	Assistant Professor	rchgupta28@gmail.com	Amity Law School,Delhi
56	Ms Ankana Bal	Assistant Professor	abal@amity.edu	Amity Law School,Delhi
57	Dr Chandreswari Minhas	Assistant Professor	cminhas@amity.edu	Amity Law School,Delhi

About Amity Law School

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY NIELSON SURVEY), the National Magazine, Amity Law School Delhi(ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi(ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL.B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi-disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect to its course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

AMITY LAW SCHOOL (DELHI)
(An Institution of Ritnand Balved Education Foundation,
Affiliated to Guru Gobind Singh Indraprastha University, Delhi)
F-1 Block, Amity University Campus, Sector-125, Noida-201313 (Uttar Pradesh)
Tel: 0120-4392681 E-mail : alsdelhi@amity.edu Website: www.amity.edu/als
Printed at : K. S. Enterprises, Delhi