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ARTICLES

CASE COMMENTS

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Foreword

In keeping with the professed objective of National Law School of India University, Bengaluru, which is to focus on emerging trends in the innovative areas, the Third Volume of 'Journal on Law of Public Policy,' is being released.

"When there's a vacuum of public input, lobbyists usually fill it. But when there's public input, the people usually win" – **Morgan Carroll**

The current number, which is a mosaic of articles ranging from Food Security law, Access to legal aid, Patent standardisation, Dynamic Pricing, Organ Transplantation to the Patenting of DNA Molecules, is an earnest attempt made by the Editorial Team to provide that input.

While congratulating Dr. Sairam Bhat, Chief Editor and his team for their commendable efforts, I sincerely hope that the readers of the Journal will find all the well-researched articles eminently useful.

Prof. [Dr.] R. Venkata Rao
Vice-Chancellor

Editorial

I am indeed proud and delighted once again to print and publish the Third Volume of the Journal of Law and Public Policy, third year in succession. Our attempt to publish a standard Journal has been strengthened by the ever increasing contributions we receive from our Authors. We receive contributions from Students, Researchers, Faculty and Practitioners and hence keeping the diversity we have allotted slot for each of the contributions.

As ever, I am beholden for the continued support of Prof. R Venkata Rao, Vice Chancellor, NLSIU. His Administrative and Academic leadership has always been reassuring and has contributed enormously towards all our activities, be it Certificate Courses, National Seminars, Workshops or Publications. We are also indeed thankful to Prof. O V Nandimath, Registrar, for being the pillar of strength and lending all his guidance to the current volume.

The current volume must be solely credited to the dedicated team work of Mr. Praveen Tripathi, Ms. Arpitha H C and Ms. Ashwini Arun from the Editorial team and Ms. Susheela and Mr. Lingaraj from the Administration. I wish and hope that the spirit of team work, zeal and enthusiasm of building a standard Journal on Law and Public Policy will continue in the years to come. I express my sincere appreciation to members of the team.

The first article in the current volume has been contributed in-house by Centre for Child and Law, authored by Dr. Neetu Sharma and Neenu Suresh titled Role of Delegated legislation in implementing the National Food Security Act, 2013. The Authors argue that 'Rulemaking', in many cases, provides an opportunity to plug lacunae left by the parent law and in many others the impact of the parent law can be potentially amplified. While framing aspects the rules under National Food Security Act, 2013 is challenging for States upon whom the major task of implementation rests, it also opens up opportunities to further Food Security. However, the current trend in rule-making is a matter of grave concern, not only because the process has not gathered momentum

but also because in many of the states rather than augmenting the Act, state governments are using this as an opportunity to dilute the existing benefits. Centre for Child and the Law (CCL), National Law School of India University (NLSIU), Bengaluru, got civil society, academics and grassroots functionaries involved in the process to draft state rules for Karnataka. The Centre used this as an opportunity to ensure coordination among the roles of various State Departments as envisaged in the Act and the same has also got reflected in the Draft Karnataka State Rules. It is an opportune moment to share some of the insights as well as challenges from the Karnataka process, when most of the states are once again at the threshold of another extended deadline for implementation of the Act.

The second article is authored by Dr. J S Mann, Associate Professor of Law, NLU Delhi, titled 'Access to Quality Legal Aid Services'. The author in his article states that there is no dearth of Statutory Enactments on Right to Free Legal Aid in India. Legal Aid system is not functioning effectively and not catering the requirements of the beneficiaries. Legal Aid Services provided by the empanelled Legal Practitioners are free of charges but people in majority are reluctant to approach free legal aid authorities for availing such services. The Legal Aid System, even after spending huge resources, has not been able to achieve the objectives for which the system of Legal Aid has been created, in India. The Author in this research paper has examined two prominent components in the form of Competency and Commitments of Legal Aid Counsels and their impact on the quality of Legal Aid services before various Courts in 11 Districts and High Court of Delhi.

Dr. Sandeep Desai and Aditya Mitra from Christ University have a contribution on 'Patent Standardization and Implications on Competition Law in Mobile Telecommunications Market'. In a spate of Litigations initiated by Ericson on Companies like Intex, Micromax and more recently Xiomi the issue of patent infringement with respect to the use of 2G and 3G technology in mobile communication has become major issue in both competition law as well as intellectual property rights. The major area of convergence between the two subject areas comes with the introduction of Standard Essential Patents (SEP).

These SEP's are part of a step that aims at standardizing technology which is essential in nature and concomitantly ensures that patent rights do not become a major hindrance to innovation, efficiency and technological development. Conversely however it can be argued that the extension of patent protection to standardized technology is a monopolistic move which allows major players to capitalize on the requirement of these basic technologies by emerging or relatively smaller players in the same market. Very few cases on the matter have been decided till date, fewer so in India. The matter becomes highly contextual considering the overwhelming notions of good market functioning and economy or industry as well as notions of fairness regarding the same which become the metrics to decide these matters. Such matters therefore include two categories of stake holders; the major players, who are dominant in the market and the upcoming and smaller players in the emerging market. An essential issue that must also be dealt with in conjunction, when analyzing the situation of these stakeholders is the delineation of the relevant market in which the conflict arises. From the perspective of the emerging players it is seen as a case of monopolistic abuse by major players, considering that these Patents are standard and are therefore an absolute necessity in any form of production. From the perspective of the major firms the SEP's are a product of major investments in research and development, thus from their vantage point the dominant firms, if they cannot enforce their patent rights then the investment made by them amounts to nothing.

Shri S Balasubramanya, Vice President, TCS and a MBL, PGDCLCF scholar from DED, NLSIU, has contributed on 'Effects of Dynamic Pricing models on Consumer Protection'. In today's changing environment world over, pricing of products and services are going through continuous innovation across various sectors. What was once a paid service or a product is no longer necessary to own that product to avail the same service. Many products and services are charged to customer entirely on variable models across different industries. As time and money become extremely interchangeable, providers of these products and services continuously find newer ways to price their products and services which will provide them with higher benefits and profits. Under the above

changing scenario, while one may very well appreciate and argue that the cost of these products and services have come down, it is the Consumer who is the recipient of these products and services and protected by law to ensure against exploitation. The author critically assesses the effects of such dynamic pricing models on consumer protection. Dynamic pricing could be the variation in price charged to customer based on point of sale as also time of usage of a product or service. However, it may be noted that there is no change in the cost of production of such products or services to the manufacturer. If that is so, is it justified to charge differential pricing of the same product or service to the consumer? Does it not affect consumer protection against unfair trade practices or unfair pricing?

Dr. Sanjay Rao, Senior Consultant, Pediatric Surgery and Transplantation, Mazumdar Shaw Medical Center, Narayana Hrudalaya Health City Campus, Bengaluru contributes on 'Medico-Legal and Ethical Issues in Living Donor Organ Transplantation'. The Author having a practitioner's view of the topic states in his paper that organ transplantation is the only lifesaving treatment for patients with organ failure. Kidneys and livers are the commonest organs transplanted. Cadaveric donors provide organs for transplantation. Improving success with transplantation has resulted in increasing number of patients opting for this therapy, resulting in a severe shortage of donor organs. Living donor transplantation has become a major alternative source of organs. Live donor transplants are carried out from organs donated by healthy adults. The Transplantation of Human Organs Act mandates that organ donors be first degree relatives or those "emotionally related" to the prospective recipient. Donation for consideration is illegal. Similar laws exist in most countries. However, living donor organ transplantation is controversial. The continued shortage of donor organs has resulted in a flourishing black market. Organ trade, trafficking and tourism have resulted in exploitation of poor organ sellers. Though unrelated and commercial organ donations bear the promise of sharply increasing organs supply, controversies remain. The Author in his article discusses the Legal, Ethical and Moral challenges in this complex area of live donor organ transplantation. He also attempts to evolve a just system that protects the needs of all stakeholders.

Ms. Rhyea Malik, Advocate, High Court of Delhi has authored the next article on 'Driving Innovation for Neglected Diseases'. The author argues that 'Patent' was established to drive innovation in all aspects of life, but today the system of patents has failed to promote uniformity in innovation, especially in the case of neglected diseases. Marred with monopolistic prices, supernormal profits, evergreening and duplication and wastage of resources, the existing system of patents has in effect legitimized the profiteering activities of drug companies. As there is a disturbing uneasiness in the very idea of drug companies profiteering from the sale of what are in effect indispensible means of health, there is an urgent need to take stock of the defects of the existing system and to come up with an improved system for incentivizing innovation. One mode for achieving the same is by devising new policy solutions in alignment with a more development driven agenda. The author has limited to exploring few such policy solutions for driving drug development for neglected diseases.

Akshat Agarwal, student of NLSIU has contributed on 'Section 112 of the Indian Evidence Act and Contrary Scientific Evidence'. The Supreme Court in the recent case of *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik* held that proof based on scientific advancement, which is accepted by the world community to be correct, will override conclusive proof envisaged under section 112 of the Indian Evidence Act, 1872. In this paper, the author argues that this approach is problematic since it contravenes the express statutory prohibition of adducing evidence against the presumption of legitimacy except in the instances laid down in the provision. However, this approach of the court is not sudden but is in line with a balance that the judiciary has been attempting to strike in its jurisprudence on section 112. While on one hand the question is whether the policy is rationale and on the other is the lure of the objective, scientific truth which the court considers its bounden duty to observe. The development of science has thus raised complex questions before the court which has forced it to make a choice amongst competing considerations. Notwithstanding the merit of these considerations the choice itself has resulted in judicial confusion thereby making the circumstances ripe for legislative intervention.

In the student category, the next article is on 'The Armed Forces Special Powers Act" authored by Aditi Sinha and Salona Mittal from Government Law College, Mumbai. The Armed Forces Special Powers Act, 1958, one of the smallest acts in the country with only seven sections has been at the helm of public debate, nationally and internationally. The authors analyse the circumstances in which the Act was promulgated, the controversial provisions of the Act, the judicial stance on its constitutional validity and whether only the Army is at fault. The authors take into account alleged cases of human rights violations in one hand and on the other it attempts to present the Army's perspective on the same. Should the Act be done away with solely based on the fact that the Army has been given extensive powers or is there a way forward? The authors attempt to study the various aspects of this controversial act and arrive at an impartial and feasible denouncement.

Another contribution is from Praharsh Johorey, student from NLIU Bhopal on the Enemy Property Ordinance 2016. The President promulgated an Ordinance on the 7th of January, 2016 called the Enemy Property (Amendment and Validation) Ordinance, 2016; that allowed the Government of India to seize control of, and alienate all property that belonged to 'Enemies' of the Country, even if their legal heirs were law-abiding Citizens of India. The author in this paper seeks to examine the unpredictable and oppressive law pertaining to Enemy Property in India, in the context of the Ordinance making power granted to the Executive under the Constitution as well as the power of the Legislature to invalidate Judicial Decisions retrospectively; all of which pose crucial legal questions to the Supreme Court in the inevitable challenges to the Ordinance.

The last contribution in the article section is from Bhagirath Ashiya and Abhishek Patil from Christ University on the 'Need to Regulate the Media'. In a society where millions elect a handful of representatives to make the right choices, the media has impeded the state's path towards heights of arbitrariness, as it not only vents public opinion but acts as a formidable pressure group against the actions of the State. The Indian media, which played an active role in the freedom struggle, today inherits a slightly different role of disclosing

the flaws of the State. The traditions of Pluralism and Divergent Opinion are muddled under rising Regionalism, Ideological divides, Corporatization and Sensationalism rather than Sensitization. On these lines placing media as a fourth pillar has a partial accomplishment, as the media in India is highly credited for highlighting problems but has failed in solving one. Further a question arises on its credibility in the light of allegations of paid-news and unnecessary hype creating unrest beyond boundaries. The development of a representative democracy can be expressed as a part of the democratic learning curves that the masses face, as electoral education and public knowledge is one of the essential facets in exercising the right to vote. The need for regulation of broadcast media is one of the long standing issues which require an elaborate discussion considering the balance between freedom of press and national interests affected by the unregulated media. The authors in this paper deal with the question of the need for requisite checks and balances over the Media and the resultant impact on democratic principles and constitutional ideals with media as a fourth estate.

In the case comment section we have selected two contributions. Dr. Kavitha Chalakkal, Assistant Professor from Amity Law School, Delhi has a case comment on the Measures Relating to Solar Cells and Solar Molecules. The author through her paper states that the decision of the WTO DSB Panel in the India-Certain Measures to Solar Cells and Solar Molecules is concerned with certain Policies of the Government of India with regard to the Implementation of its Jawaharlal Nehru National Solar Mission. The United States argued these measures were hampering International trade and was nullifying and impairing its Trade Benefits. The Panel after deliberations stated that the Indian DCR Measures expressly stipulate the origin of specified goods that may be used by SPD's for bidding eligibility and participation under each of the relevant batches of the Mission and can be considered as a Trade Measure. The panel found that the Indian Measures were inconsistent with its International Trade Obligations, especially those under GATT 1994 and TRIMS. The author focuses on the relevance of the rising needs of developing countries for increased use of renewable resources for energy and also the recent efforts taken by India to boost its domestic economy.

Siddhant Tripathi and Tanya Chaudhry from Amity Law School, Noida, have contributed writing a case comment on the US Supreme Court Judgement in the Association Molecular Pathology v Myriad Genetics'. The Authors in their paper state that the parties disputed the scope of what may be patented under 35 U.S.C. §101. The Association for Molecular Pathology ("AMP") argued that the form and function of isolated DNA is the same as that in nature, thus is not patentable. Myriad countered that the patent claims fall with the plain language of §101 and that the patents are for inventions-thus patentable. Since, this case has garnered significant interest in the IP community as the case has clarified the bounds of patentable subject-matter; it needs to be analyzed to determine its impact upon the Pharmaceutical, Biotechnology industries and other communities. The authors seek to scrutinize the broad aspects which determine the patentability of a subject matter with special reference to the man-made DNA structure as biotechnological inventions and the impact of the holding of Supreme Court on the future R&D endeavors in relation to Human DNA. Finally, the Authors in their paper proceed towards the various uncertainties which were left unanswered by Supreme Court in the light of earlier Judgments of Supreme Court of USA.

Indeed I thank all our patrons, readers and contributors. In response to our call for papers, we received large number of contributions from various classes of contributors, our top priority was to select papers keeping in view the Law and Public Policy issues and provide a qualitative platform for publication of intellectual writings. We hope that we will continue to receive the same patronage in the days and years to come.

Dr. Sairam Bhat
Associate Professor of Law, NLSIU
Chief Editor, JLPP

Role of Delegated Legislation in Implementing the National Food Security Act 2013: The Karnataka Experience

Dr. Neetu Sharma & Ms. Neenu Suresh[*]

Introduction

Success of the National Food Security Act, 2013 (hereinafter 'the Act') in achieving the vision as articulated in its preamble *'…to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity…'* is highly contingent on how and when the Central Government and State Governments frame rules for its implementation, as required by the Act. However, momentum for framing rules has still not caught up, despite the passing of already thrice extended deadline for implementing the Act. While many regard the executive order through which the Central Government has extended the deadline as technically illegal by virtue of Section 42 of the Act, which mandates that any order to remove difficulties for giving effect to the provisions of the Act, must be notified in the official gazette and presented before both the houses of Parliament, the process of evolution of the legal framework to ensure food security seems to have suffered a setback.

This waning enthusiasm can be attributed to a number of factors - political, administrative and others. While the change of guard at the centre and in various states seems to be the most critical one, lackadaisical attitude of the administrative machinery has also added to this lull. A mere marginal increase in food subsidy in the country's budget for 2015-16 coupled with severe cuts on Integrated Child Development Scheme (ICDS) and Mid- Day Meal (MDM) scheme, generally diminished social sector spending along with the shifting of most of the responsibility to states from the Central Government for provisioning of social sector spending,[1] and recommendations of the High

* Neetu Sharma, Fellow, Centre for Child and Law (CCL) NLSIU, Neenu Suresh, Research Associate, Centre for child and Law (CCL), NLSIU.

Level Committee (HLC) on reorienting the role and restructuring of Food Corporation of India,[2] has further debilitated the spirit in which the Act needs to be implemented and leveraged for ensuring food security. Though there has been oral reassurances from the authorities, including the prime minister himself, that recommendations of the HLC to reduce the coverage of eligible households under the Act,[3] will not be accepted, other recommendations like introducing direct cash transfers in lieu of provision of grains through Targeted Public Distribution System (PDS) seems to have found key takers within the authorities, and a set of Rules have been issued by the Central Government in this regard.[4] There are also ongoing disagreements between the centre and states on cost sharing, identification guidelines, targeting approach and so on. Apart from all this, owing to the disappointment among a significant section of civil society as regards the watered down version of the entitlements that could finally find place in the law, their much needed participation and presence to influence the rule making process seems to be missing.

With the array of unmet deadlines coupled with governments' lukewarm attitude, towards implementation of the Act, states are now being pressurised to notify rules and meet the statutory requirement of implementing the Act. In this haste, there is a danger of them missing out on many crucial aspects and including certain provisions in the rules which may prove detrimental to the food and nutritional security across the states.

This paper draws from the experience of Centre for Child and the Law (CCL), NLSIU that provided support to the state government of Karnataka in drafting the state rules under the Act. It discusses the opportunities that delegated legislation presents through the Act, which CCL NLSIU explored to strengthen, modify and expand the entitlements and other provisions under the Act. By documenting the rule making process- approach, methodology, guiding

1 Jean Drèze, *Nehruvian Budget in the Corporate Age,* The Hindu, March 5, 2015.

2 Report Of The High Level Committee On Reorienting The Role And Restructuring Of Food Corporation Of India (Fci) (2015).

3 PTI, *Food Minister Suggests Cash Transfer of Food Subsidy on Pilot Basis,* The Economic Times, March 5 2015.

4 Cash Transfer of Food Subsidy Rules (2015).

principles, challenges, achievements and major suggestions for the rules, this paper provides key design principles that have to be considered while framing the rules by other states. An attempt has also been made to share insights from the whole process for civil society organisations and research institutions that might choose to involve in the rule- making process in their respective States.

Initial Enthusiasm and Existing Pessimism

Inclusion of a commitment by the Indian National Congress (INC) in the election manifesto of 2009 General Elections,[5] to enact a law that would guarantee access to sufficient food for all people, in particular, as well as the commitment towards ensuring food security spelled out in the election manifestos of other major political parties, in general,[6] triggered enormous enthusiasm among the social movements, civil society organisations and Academic institutions Such enthusiasm manifested itself in these various groups mobilising themselves and putting together content for a legislation, even before the UPA II government could initiate the process of drafting the law. Representation from a number of fields that have ramification for food security of people, agriculture, nutrition, child rights, women's rights, indigenous peoples' rights, as well as legal experts along with the social activists drawn from these various fields participated in the discussions. The opinion among the fraternity was evolved having a common understanding, rather an aspiration, to not only convert the programmatic interventions into legal entitlements through the new law, but also, go beyond them, which is also expected of any social legislation. Magnificent contributions made by the country's judiciary towards evolution of jurisprudence on right to food, has been an exemplar for rest of the world. This could have potentially formed the basis for initial draft of the proposed law, which could have been substantiated by introducing further reforms and ironing out the existing difficulties. However, unfortunately the form in which the NFSA, 2013 was finally passed, such opportunities were

5 *See* Lok Sabha Elections 2009 Manifesto of the Indian National Congress.

6 Communist Party Of India (Marxist) Manifesto for The 15th Lok Sabha Elections, 2009 and Bharatiya Janata Party, Good Governance Development Security, Manifesto Lok Sabha Elections, 2009.

given a clear miss. Not only the entitlements that were otherwise available by virtue of the judicial decisions and interim orders and schemes and programmes, have been left out from the purview of legal entitlements, many areas such as agriculture and vulnerable groups like children in residential institutions, have also been ignored.

Delegated Legislation Under The Act and The Opportunities

In order to operationalize the legislative intent of the Act to provide food and nutritional security in a human life cycle approach, state governments and local authorities are delegated a vital task of working out the details of the Act. Thus, even when the Act mandates that tasks like determining state wise coverage, sharing of costs of various schemes, procurement of food grains to central pool and its allocation etc. to be performed by the central government,[7] it leaves the vital responsibility of implementation of a major portion of the Act to the state governments. By virtue of Section 40 of the Act, state governments have the power to frame rules on pertinent aspects such as formulation of guidelines for identification of priority households, grievance redressal mechanism, State Food Commission, conducting of social audits, composition of vigilance committees and other matters necessary for implementation and monitoring of the Act.

Delegated Legislation is undoubtedly an opportunity to improvise upon the parent legislation in as much as it is done within the larger framework of the law and does not contradict with the provisions in the parent law. While at one hand it can conveniently tap on the enabling provisions of the parent law, convenient plummeting of some regressive aspects is also possible.

Challenges In Framing of State Rules

Despite the prospects in view and the mandatory requirement for the states to implement the Act, there have been some impediments that have acted as

7 National Food Security Act, 2013, § 39.

dampener to the entire endeavour to capitalise on the available opportunities. At the onset, one is confronted with the tendency of the state governments to maintain the status quo without revisiting the existing practices in light of their relevance and utility. Guided by the convenience of notifying the existing executive orders as rules, most of the states are reluctant to introduce any changes, even though the systems need urgent overhauls.

Another unfortunate and disturbing issue is that many states are also looking at rulemaking as a chance to match up to the requirements of the Act even by diluting the scope and nature of the entitlements. As mentioned earlier, many states have already been providing greater quantity of food grains and commodities and were also covering larger number of people through PDS and other schemes like MDM, *Ksheerabhagya* scheme and ICDS. However, such states are now contemplating reducing the quantity of food grains and other commodities and also limiting the number of people covered. This threat of watering down of the benefits is looming large in most of states.

The lopsided orientation of the Act towards PDS has also percolated into the process of delegated legislation. Inclusion and coordination of ministries and departments concerned with the implementation of Act is yet to be seen in the stage of drafting of Rules under the Act. In most of the states, the Departments of Food and Civil Supplies have not been interacting with all departments involved in the implementation of MDM scheme, ICDS and provision of other benefits as part of the Act.

Another challenge that the State departments of Food and Civil Supplies are confronted with is the legislative compliance and conformity that is required to be ensured between the state rules under the Act and the Public Distribution Control Orders issued under the Essential Commodities Act. Many states are grappling with this challenge coupled with the ambiguity as to what should go into the rules and what should be retained in respective Public Distribution Control Orders, under the Essential Commodities Act, 1955.

Negligible room available for the civil society organisations to prevent such dilution is also a matter of grave concern. Not only the voices supporting

the retention and expansion of benefits are feeble, except a few cases such as Karnataka, the concerned state departments have kept organisations and institutions at bay from the process of rule- making. Such reluctance has kept this process deprived of getting fertilised from grassroots experiences, and opinions of experts in food security.

Overcoming The Challenges And Optimising The Opportunity- The Karnataka Experience

Challenges are a plenty but these are not unsurmountable. CCL NLSIU has adopted a comprehensive approach to draft State Food Security Rules in Karnataka which involved understanding the problems and challenges that plague the existing practices and systems, inclusion of best practices from some other states, resorting to international normative framework, and facilitation of consultative processes. The field visits undertaken, as part of the process, to various districts and taluks within Karnataka and other states and the interactions with the functionaries and community organisations, helped identify certain bottlenecks and discern the most suitable ways to overcome them. This endeavour was also geared towards ensuring that the systems and practices that have proven to be functioning well are included in the rules. However, these exercises also opened up doors for a number of matters that called for larger discussions and deliberations before positions were taken. Considering the complex nature of the identified issues, consultative processes were facilitated that contributed towards positions taken, based on consensus. Such consensus building is critical to the process of delegated legislation that can also be leveraged as an advocacy measure.

Clarity on conceptual issues and consensus pertaining to the provisions relating to entitlements and means to access them are important aspects of Delegated Legislation. Equally, if not more critical, is the need to ensure that the technical drafting of the rules is done in a meticulous manner. With an objective to ensure that the draft rules are legally sound too, legal experts with high level

of expertise in drafting and inclination towards social legislation as well were engaged to review the draft prepared by CCL NLSIU, after which the rules were further fine-tuned.

This exhaustive and elaborate process and methodology has reaped many benefits that are reflected in final draft of the Karnataka State Food Security Rules, submitted to the state government. Ongoing discussions with the concerned departments have been encouraging in as much that there is now a convergence between concerned departments in drafting Rules and also an acceptance at various levels on the draft.

Adopting a similar process and methodology in other states, while giving due consideration to the context and specificities of respective states, can potentially lead to progressive, comprehensive and all-encompassing rules being framed and adopted by other states as well. Below are some insights drawn from the rule- making process in Karnataka.

Defining and Utilising Legislative Competence of States

The first and foremost step in the process of rule-making is discerning the legislative competence of states with regard to rule-making under the Act. Apart from the expressly mentioned aspects under Section 40 of the Act, on which the state governments are required to frame rules, there are certain other issues on which states have the power to frame rules under the Act. These can be traced in Sections 24, 12, 10(1), 12, 25(2), 26, 31 and 32 of the Act, which pertain to several critical issues including, the obligation of state government for food security, reforms that can be introduced to the TPDS, enlisting duties and responsibilities of local authorities under the Act, provisions for advancing food security etc. Given the waning commitment, it is very likely that the states will end up overlooking these vital aspects on which rules are required to be framed. To ensure that these do not remain merely as obligations on the paper, it is necessary that these be operationalised by incorporating them in the rules and also devising appropriate mechanisms to effectuate them.

Appreciating the Spirit of the Act- Holistic Approach and Need for Convergence

In contrast to the general misconception that the Act is concerned only with PDS- an impression shared by concerned government officials themselves, it needs to be reminded that entitlements for children including malnourished children and pregnant women and lactating mothers also form part of the Act. A remarkable feature of the Act is the holistic human life cycle approach towards food and nutritional security that it envisions. To say this, is not to forget the glaring limitation of the Act in leaving out vulnerable sections like senior citizens, destitute persons and adolescent girls from the purview of enforceable entitlements. Nonetheless, for achieving this 'holistic vision', even with all imperfections of the law, there needs to be a change in the way various concerned government functionaries perceive food security. Instead of the existing piecemeal approach adopted by different government departments, the Act necessitates their convergence. Different departments such as Department of Food and Public Distribution, Department of Women and Child Development, Department of Primary Education, Health Department etc. which were until now looking at different aspects of food and nutritional security from their own perspective, are required to work together for achieving the goals set by the Act. If state rules are framed without any coordination among these departments, it is likely to reflect in the frail rules being laid down especially with regard to the aspects that are required to be dealt with coherently, for instance monitoring, vigilance and grievance redressal mechanisms, etc. While having the Department of Food and Civil Supplies as nodal department helps in ensuring the implementation of a large part of the law, it may also inevitably lead to the rules being devoid of details on delivery mechanisms and related details pertaining to other existing entitlements for women and children. One of the issues that CCL NLSIU grappled with while framing Rules, was this evident lack of coordination among the concerned departments. This necessitated multiple visits to officials from the different departments and consultations to facilitate a dialogue and coordination in order to ensure convergence, which to a great extent, has proved fruitful.

Expanding the Entitlements

As already mentioned, there are a number of concerns with the way entitlements have finally found place in the Act. Not only many crucial aspects of the schemes and programmes that are original sources of these entitlements, have been left out but many groups such as elderly people living in difficult terrains, children who are out of school, adolescent girls, etc. also have not got a fair deal. The benefits earlier available through PDS, MDM and ICDS have got a major blow through the provision of the Act, given that most of the states had already gone beyond and expanded the scope of these benefits. It is unfortunate that states are considering this as an opportunity to cut down existing benefits and number of beneficiaries. With the recent developments of central government's explicit disenchantment with social sector spending, a mere marginal increase of food subsidy and its formulation of an enlarged role for State governments, it is very likely that the existing beneficiaries are doomed to suffer. This makes it extremely vital for the rule- making process to ensure that the existing entitlements and the coverage of the beneficiaries do not get modified downwardly. It is also an opportunity to ensure the inclusion of children in various settings and locations for example, children in institutions who are also not included with the ambit of the Act. As mentioned earlier, not only Section 32 of the Act enables it, motivation is also available in the form of best practices in various states, and various interim orders of the Supreme Court of India in *Right to Food* case.[8] Expansion of MDM scheme during summer vacations in drought prone areas and inclusion of children till Class 10,[9] is an example of such benefits that deserve to be converted into legal entitlements through their explicit mention in the Rules.

Though, originally a dampener in terms of reducing efficacy of entitlements, at the present juncture, creative use of Schedule III of the Act can also help augment the entitlements and expand the scope of beneficiaries to include

8 PUCL v. Union of India and Others, Writ Petition (Civil) 196 of 2001.

9 Following the Supreme Court order in *Right to Food* case, Karnataka has extended MDM to include children studying till class 10th. *Available at* http://www.schooleducation.kar.nic.in/mms/food.html. (Last accessed on Jan. 19, 2016).

various socially disadvantaged groups and expand the scope of entitlements, in as much as they have found place in the Schedule. This Schedule read along with the Section 32 of the Act enumerates the objectives that are to be 'progressively realised'. Given that the Schedule encompasses a wide range of issues having bearing on the food security, mostly the much needed agrarian reforms, production, supply and distribution related issues that have not found much attention in the Act otherwise and that Section 32 enables creative use of the Schedule, these need to be included as tangible entitlements in state rules. Such an exercise of creative expansion also has the potential to overcome some other deficiencies of the Act and impart impetus to various aspects of right to food. Access to safe and adequate drinking water and sanitation; health care; nutritional, health and education support to adolescent. And adequate pensions for senior citizens, persons with disability and single women are inextricable components of right to food that can be built in the legal framework through rule-making at state level, using Schedule III of the Act.

Criteria for Identification of Eligible Households

San the nation-wide demand for universalisation of the entitlements through public distribution system, National Food Security Act 2013 covers only 67% of the population for the limited benefits as mentioned in Schedule II of the Act. This targeted approach demands a very careful and cautious process for defining and identifying the eligible households in order to ensure that none of the deserving households are left out of the coverage of benefits through TPDS. The delays in completion of Socio Economic Caste Census (SECC)[10] coupled with faulty criteria evolved by various States for identification and incomplete surveys which followed, has already aroused unrest among the existing beneficiaries.[11] With an objective to rule out the possibility of any erroneous exclusion, either the exclusion criteria must be kept minimal or

10 Jean Drèze, Food Insecurity and Statistical Fog, The Hindu February 25, 2015.

11 For instance, Maharashtra government's decision to cut the food subsidy for 1.77 crore people, has given rise to much unrest among the existing beneficiaries and a Public Interest Petition was filed in the Bombay High Court on Feb. 13, 2015. *See* Shramik Mukti Sanghathana v. The Tahsildar & Ors., Public Interest Litigation No. 30 of 2010 with Civil Application no. 25 of 2015.

automatic inclusion criteria should also be defined along with the exclusion criteria.

Automatic inclusion among others, must also take cognizance of the vulnerable condition of various socially and economically disadvantaged groups, and groups that are traditionally discriminated against. The identification criteria must also be differentiated based on the realities and disparities between rural and urban areas.

Setting up the Monitoring Mechanisms

Plagued by highly ineffective implementation due to the diversion of funds, poor institutional capabilities and lack of bureaucratic will, most of the social welfare legislations in the country, fall short of achieving its desired goals. More often than not, one finds the vigilance committees deteriorate to mere namesake committees, doing nothing more than conducting meetings and that too on rare occasions. Devoid of any representation from the community, these committees are usually filled up with elected representatives and ex-officio members, with a token representation from the NGOs. Often these committees end up being too bulky, as it is not merely a representation from the elected representatives at block or village level that finds place in it, but the entire lot become part of these as ex officio members. These members who are loaded with other duties and responsibilities, are constrained with the difficulty in discharging the tasks set for such committees. It is also not surprising to find the implementing agencies themselves becoming monitoring bodies, forcing one to ponder about the conflict of interests such a mechanism embodies.[12]

Rules need to be cautiously drafted, so that a similar fate is not sealed for vigilance committees that are required to be set up at four levels- fair price shop, block, district and state level respectively, under the Act. Though the Act authorizes the state governments to decide upon the composition of such committees, in clear terms, it also requires due representation to be given to local authorities, scheduled castes, scheduled tribes, women, destitute persons and persons with

12 Centre for Child and the Law, *Vigilance Committees- A Comparative Analysis, Contributing to the Legal Framework on Food Security*, (National Law school of India University, 2014).

disability. It is important to ensure that this statutory requirement is complied with. Rules should provide for vigilance committees at all levels to include adequate representation from all stakeholders, while also ensuring at least fifty percent representation from women for vigilance committees at all levels and a transparent selection procedure for the non- ex officio members. Needless to say, the function of these committees being supervision of implementation of all the schemes under the Act and not merely PDS- a deceptive impression which the usage of phrase 'fair price shop level' and the beginning words of the Section 29 may give out- the composition of committees should also not be limited to those related to the functioning of public distribution system alone. Apart from this, providing for capacity building of non- ex officio members, allocating sufficient amounts for discharging functions of the Committees and detailing its functions and powers in the rules, are some of the measures that can ensure effective functioning of the vigilance committees.

Working of the Grievance Redressal Mechanisms

The basic principle of a grievance redressal system, notes the Second Administrative Reforms Commission in its report- Citizen Centric Administration *The Heart of Governance* is that, if the promised level of service delivery is not achieved or if a right of citizen is not honoured, then the citizen should be able to take recourse to a mechanism to have the grievance redressed. This mechanism, it says, should be well publicized, easy to use, prompt and above all, citizens must have faith that they will get justice from it.[13] Interestingly, the Act provides for a comprehensive grievance redressal mechanism, but the major task of making these mechanisms work effectively, is left to the states, an opportunity which needs to be prudently utilized by the states to set up a robust grievance redressal mechanism.

Apart from providing for the necessary staff and infrastructure for operating these mechanisms, rules must clearly lay out the procedure for filing and redressal of complaints such as registration of complaints, providing of

13 Report of The Second Administrative Reforms Commission: Citizen Centric Administration -The Heart Of Governance (Government of India, 2009)

acknowledgement receipt on filing of complaint, unique complaint number for tracing the status of complaints, intimation of time expected for redressing the complaint, updating of status of complaints on the website of department and feedback mechanism. Internal grievance redressal mechanisms are already available in some of the concerned departments; however these need to be set up wherever they are not established as yet, as mandated under the Act. Interdepartmental coordination and coordination within grievance redressal mechanisms needs to be ensured for efficient grievance redressal. For instance, over and above the provisions available to aggrieved persons for directly approaching District Grievance Redressal Officer (DGRO) or State Food Commission, the monthly reports of the complaint received, its details and status should be provided by the nodal officer of each concerned department to the DGRO. The DGRO, if he/she has reasons to believe, that the grievance has not been redressed adequately, should take effective measures for its redressal, even in cases where the complainant has not approached him. This simple move will help ensure coordination within the grievance redressal mechanism and between the departments, which is indispensable in view of the holistic conception of food security that the Act entails.

District Grievance Redressal Officer

The DGRO, the Act says, can either be appointed or designated by the State Government. However, considering the immense responsibility such an officer has to discharge, it would be prudent to make a fresh appointment rather than designate an officer as DGRO. This becomes important as most of the states, citing administrative convenience and financial viability, are considering designating District Collector or Joint Collector as DGRO, which may be an excess load for an already overburdened office.[14] In addition to this, office of DGRO should not be set up by a particular department alone. This helps to ensure that the grievances arising from the non- provision of few other entitlements that do not directly fall under that particular department do not

14 This information was shared by key officials in Department of Food and Civil Supplies of various states during the discussions held with them by CCL NLSIU. In some states, notification to this effect has already been issued.

get sidelined or a particular department does not end up owning the office of DGRO, especially in view of the overwhelming importance given to targeted PDS under the Act itself. A fair and transparent selection procedure involving an independent selection panel consisting of nominees from all the concerned departments, and representatives of civil society organizations should prepare a panel of suitable persons, publicize this list and call for comments and objections from public before finally appointing the DGRO.

Equally important as the appointment of DGRO, are the powers required for such an officer to ensure an effective and impartial grievance redressal mechanism. The state governments, as expressly mentioned in the Act, should clearly specify the powers which DGRO needs to be given for effectively discharging his/her responsibilities while drafting rules. The DGRO requires to be given certain quasi- judicial powers, such as the powers to inspect, search and seizure, summon and enforce attendance of any person, receive evidence on oath, issue directions for conducting spot investigations, lodging FIRs against erring persons with the police and engaging experts for facilitating disposal of the complaint. He/ She should also have the powers to initiate action against all persons indicted in social audit and cause an inquiry to be conducted when there is a dispute in the findings of the social audit.

State Food Commission

State Food Commissions have been vested with the responsibility to monitor the implementation of the Act at the state level and have also been conferred upon certain powers to ensure their effective functioning.[15] However, the independent and effective functioning of these commissions will largely be determined by how the state rules are framed. The spirit of the independent human rights commissions in which these commissions should be established needs to be drawn from the Paris Principles.[16] For these principles to find place in the functioning of the State Food Commission, a selection committee comprised

15 National Food Security Act, 2013 §. 16.

16 Principles relating to the Status of National Institutions (The Paris Principles) adopted by UN General Assembly on December 20 1993, Assembly Resolution 48/134.

of the representatives from judiciary, executive and the legislature should be appointed and a fair, transparent and open process should be followed. Such a process, in all likelihood would ensure appointment of competent people to the commissions who have the requisite expertise in the field of food security, nutrition, as well as in the issues confronting realisation of right to food for specially marginalised and vulnerable groups.

Along with this, the mandate of the commission needs to be read in a holistic manner in order to empower it to monitor, evaluate, redress grievances and give advice on all entitlements mentioned under the Act as well as the rules and not merely to PDS. This comprehensive mandate of the commissions should also be defined to encompass the grievances pertaining to violation of issues dealt with in Schedule III of the Act. The objectives that are to be *'progressively realised'* should provide grounds for the commission to act proactively and take *suo motu* cognizance of any such violations. Finally, to ensure that State Food Commission is effective, it is important that it be provided with requisite infrastructure and that its financial and functional independence and stability are ensured.

Conducting Social Audits

Social audit - a democratic process where community monitors and evaluates the planning and implementation of a scheme/ programme, is critical in streamlining the delivery system and ensuring that transparency and accountability becomes intrinsic to governance.[17] Far from being an important monitoring tool, it has wide reaching impacts on the concepts of citizenry and democracy itself.[18] It is remarkable that the legislature, after realizing the importance social audits have in a democracy, has provided for such a mechanism in the Act. However, it is the State Governments which have to instill life to this provision by spelling out in the rules, how it has to be conducted, who has to conduct it, when it has to be conducted and the non- negotiable.

17 Yamini Aiyer et.al. *A Guide to Conducting Social Audits: Learning from the Experience of Andhra Pradesh*. *Available at* http://accountabilityindia.in/page/document-library (Last accessed on June 5, 2014).

18 N Chandoke, *Engaging with Civil Society: The Democratic Perspective* Non-Governmental Public Action Programme, Working Paper Series (2007).

For ensuring that social audits achieve its objectives, it is important that a set of principles be followed. Most importantly, an agency, independent of the implementing agencies, should be identified/ established by the state government for conducting social audits. It needs no mention, that conflict of interest is bound to happen, if the implementing agency, itself is given the mandate to conduct social audits. The implementing agencies' role should be restricted to furnishing the social audit agency with information required to facilitate conducting of social audits and taking prompt action whenever lapses and violations of the Act and rules are brought out. Relying on civil society organizations alone for conducting social audits is also not a prudent option. While there may be fair amount of authenticity attached when many such organizations conduct social audits, given that they have a limited reach they may not have bandwidth to carry out social audits in a sustained manner. Therefore, in order to institutionalize the social audit process and make it sustainable, independent agency, identified/ established by the government, whose both functional and financial- independence and stability is secured, to be assigned the task of conducting social audits. In light of the administrative and financial feasibility and keeping in mind the need for a holistic conception of food and nutritional security, it would be appropriate to have a single social audit agency to conduct social audit for all the schemes under the Act. These agencies should be staffed with resource persons and social auditors, who can be a cadre of individuals drawn from the local community itself.

Social audits are already being conducted under Mahatma Gandhi National Rural Employment Guarantee Act and the rules prepared by Andhra Pradesh, one of the pioneers in social audit process, can be a useful guide to States while setting up the requisite social audit machineries under the Act.[19] Social audits should be conducted at least once a year and the rules should clearly detail the process- how collection and verification of all relevant data and information is to be done, including the details of public hearings at block levels, role of administration in this process, and actions to be taken on social audit findings.

19 National Rural Employment Guarantee Scheme- A.P Conducting of Social Audit Rules, 2008.

Call for Reforms

While the express mention of need for reforms, in the Act, is commendable, the most striking feature is the fact that it does not take cognizance of the issues that plague other food schemes, especially, ICDS and MDMS. In line with the intention and objectives of the Act, it needs to be stressed that reforms should apply to these schemes as well. Though some of the reforms mentioned are in fact important and progressive such as provisions of preference to public institutions or public bodies such as Panchayats, management of fair price shops by women or their collectives, and diversification of commodities; some other reforms mentioned can be regressive or detrimental to food security. These include proposal to leverage 'aadhar' for unique identification, introduction of cash transfers/ food coupons etc. which have been widely criticized owing to discrepancies inherent in them. While the inclusion of progressive reforms in rules is strongly suggested, more thought and dialogue with primary stakeholders is requisite on those reforms that may hamper food and nutritional security in the long run, before they are included in the rules.

Making the Law Work

One of the major issues that mires the implementation of the social legislation is India is the least importance being attached to the practical aspects of provisioning. While enlisting and substantiating the entitlements is one of the key aspects that delegated legislation can potentially facilitate, awareness generation among the beneficiaries regarding these entitlements, building the capacities of those who are required to implement the provisions, and allocating of adequate resources, are the fundamental requisites to ensure that the entitlements reach those they are meant for. There is ample scope to include such provisions in the state rules and state governments must capitalise on this opportunity.

Conclusion

Most of the states have innovated and augmented the existing schemes meant for ensuing food and nutrition security either by introducing additional benefits or by devising mechanisms for their better implementation. If such practices are not captured by the imagination of those involved in drafting of state rules, we will miss a magnanimous opportunity towards ensuring real food and nutrition security for the people. The process followed while drafting the state rules is therefore crucial. In most of the states currently there seems to be negligible engagement of the civil society organisations or academic institutions in the process of rule- making at state level. Such a process that is devoid of the participatory process renders the whole rule-making process an executive affair. Needless to say, only the collective effort, struggle and incessant demand by primary stakeholders, people's representatives, political parties, research organizations and civil society organizations can indeed prevent state and central governments from using the Act, as a shield to water down the existing entitlements and benefits.

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Access To Quality Legal Aid Services Provided By The Legal Aid Counsels In Delhi: A Critical Scrutiny

*Dr. J. S. Mann**

Introduction

Researcher has conducted An Empirical Research on the Commitments and Competency of Legal Aid Counsels (LACs) Under the UGC Research in Law 2012-14 in 11 Districts of State of Delhi and Delhi High Court. For the purpose of the said empirical research and collection of primary data, researcher have framed 05 questionnaires- beneficiaries, Legal Aid Counsels, Regulators of Legal Aid services, Juridical officers and those people (women) who were entitled to legal aid services but did not opt for the legal services.

Researcher has collected primary data as per the structured and unstructured questionnaires from the major stakeholders involved in the system of legal aid services in State of Delhi. This researcher has interviewed more 550 beneficiaries, 135 judicial officers, 12 Regulators (member Secretaries) of the Delhi Legal Services Authorities (DLSA), About 150 Legal Aid Counsels (LACs) and 750 women at family courts, who were eligible but did not opt for the legal aid services for their disputes, from 11 Districts and Delhi High Court in Delhi.

This research paper is a reflection of the practical experience of the Researcher on the quality and competency of the LACs engaged by the legal services authorities in Delhi. This research paper has also highlighted the difficulties faced by the major stake holders of the legal aid system in Delhi. Further, this research endeavour has also made some viable solutions to overcome hindrances and also to promote the quality of legal aid services. The Final Report of the

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Empirical Research on the issue will be submitted to the Ministry of Law and Justice, National Legal Services Authority (NALSA), DLSA and other concerned agencies for the purpose of promoting quality legal aid services across the States, in May 2016.

This research paper has been divided into six parts. Part First has provided a brief overview of the empirical research conducted by the research on legal aid services. Second Part deals with the constitutional paradigm of legal aid services. Third Part has critically examined the existing statutory provisions on legal aid services in India. Amplitude of legal aid services under the Legal Services Authorities Act, 1987 (LSA), Rules and Regulations on the issue framed by the DLSA and NALSA has been discussed under the Part Four. Part Fifth has critically highlighted core pitfalls of the legal aid services in Delhi. Part Sixth includes recommendations to deal with the hindrances of aces to legal aid services.

Recognition of The Free Legal AID Services Under the Constitutional Paradigm

The Supreme Court of India has been instrumental in promoting and protecting free legal aid services for underprivileged strata of society and victims of mass calamity, who have no means of access to courts in India. Subsequently, the legislature came forward and enacted various legislations, which provide free legal aids in form of various services to the eligible person, for providing free legal aid. Now let us analyse the contributions of the Indian Judiciary and the Legislature in promoting and protecting the free legal aid programmes in India.

Indian Apex Court in catena of its judicial pronouncements has laid down that right to free legal aid, for the under trial and convicted person, is a fundamental right under Article 21 and also guaranteed under Article 39A of the Constitution. In the leading decision of the Supreme Court in *Hussainara Khatoon* v. *State of Bihar*,[1] right to free legal aid services including the free services of a legal practitioner for down trodden people of the society, have been

1 AIR 1979 SC 1369.

recognized as a fundamental right under Article 21. Justice P N Bhagwati, while delivering the judgment, observed that: "*[F]ree legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer*."[2]

Nobody can ignore the contribution of Justice Krishna Iyer in promoting free legal aid and protecting weaker sections of the society. In *Madhav Hayawadanrao Hoskot* v. *State of Maharashtra,*[3] he affirmed "*If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the Court under Article 142, read with Articles 21, and 39A of the Constitution, power to assign counsel for such imprisoned individual for doing complete justice…….In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise.*"[4]

The 42nd Amendment Act, 1976 to the Constitution, inserted a new provision for free legal aid under Article 39A.[5] Further, in order to accomplish the objectives encompassed in Article 39A of the Constitution, the LSA was

2 *Id.*

3 AIR 1987 SC1548.

4 *Id.*

5 The Constitution of India, Art. 39A: "The state shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular, provide free legal aid, by suitable legislation or schemes in any other way, to ensure that opportunities for securing justice are not denied to any citizen by the reasons of economic or other disabilities".

implemented.[6] Besides the Constitutional mandate and the LSA, there are some important statutes which have also recognised legal aid services as a matter of legal right to a victim and an accused/defaulter. Now the research paper would examine the legal recognition given to free legal aid programme in India.

The Parameters of Free Legal Aid Services in India

Legal aid has been recognized as a fundamental right under articles 21 and 39-A of the Constitution Law of India. In consonance with the constitutional goal the Legal Services Authorities Act, 1987, the Order 33 of the Code of Civil Procedure, 1908, Section 304 of the Criminal Procedure Code, 1973, the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, and National Legal Services Authority (Legal Aid Clinics) Regulations, 2011, have been implemented to provide legal aids to disadvantaged group of society in certain contingencies.

It is reiterated that there is no dearth of statutory enactments on right to free legal aid in India. Legal aid system is not functioning effectively and not catering requirements of the beneficiaries. The programme of legal aid services has not been able to achieve the objectives, as to provide access to judicial system, for which huge resources have been spent by the state.

The Criminal Procedure Code, 1973

According to Section 304[7] of the Cr PC, an indict person must be provided with legal services of a legal profession at the expense of the state. It is an obligation upon the state to ensure the compliance of the provision during pendency of cases before the Court of Session. The state has the discretion to extend the

6 Act No. 39 of 1987; w e f October 11, 1987.

7 The Code of Criminal Procedure, § 304, "Legal aid to accused at state expense in certain cases: (1) where, in a trial before the court of session, the accused is not represented by a pleader, and where it appears to the court that the accused has not sufficient means to engage a pleader, the court shall assign a pleader for his defence at the expense of the state. (2) the high court may, with the previous approval of the state government make rule providing for- (a) the mode of selecting pleaders for defence under sub-section (2); (b) the facilities to be allowed to such pleaders by the courts; (c) the fee payable to such pleaders by the government, and generally, for carrying out the purposes of sub-section (1). (3) the state government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts in the state as they apply in relation to trials before the courts of session."

application of the provision to any class or trials before other courts in the State. In case of violation of the provision under Section 304, the decision, delivered by the court, shall be declared null and void. The same has been reiterated by the Supreme Court in catena of its decisions. The Supreme Court of India in *Khatri and Ors (II)* v. *State of Bihar,*[8] while examining the nature and scope of Section 304 of Cr P C, observed that:

> *"… [T]he State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigenous and whatever is necessary for his purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure… the law does not empower any Government to deprive its citizens of constitutional rights on a plea of poverty"*[9]

The Civil Procedure Code, 1908

Order 33 of the CPC enables an indigent person to institute suits, before a civil court, without requiring such a person to pay the court fees.[10] Further, where the person is unable to make such arrangements due to various reasons, civil court has the discretion to assign a legal practitioner to such indigent person.[11]

The Legal Services Authorities Act, 1987

The LSA provides for creation of some legal services authorities for the purpose of making available, free and competent services of the empaneled legal practioners, to the disadvantageous strata of the society. The basic objective of the Act is to secure social justice to those who are not in a position to approach judicial/administrative authorities due to legal, social, economic, or other

8 (1981) 1 SCC 635.

9 *Id.*

10 Order 33 Rule 17, The Code of Civil Procedure, 1908.

11 The Code of Civil Procedure, 1908, Rule 9A "Court to assign a pleader to an unrepresented indigent person (1) where a person, who is permitted to sue as an indigent person, is not represented by a pleader, the court may, if the circumstances of the case so require, assign a pleader to him. (2) the high court may, with the previous approval of the state government, make rules providing for— (a) the mode of selecting pleaders to be assigned under sub-rule (1); (b) the facilities to be provided to such pleaders by the court; (c) any other matter which is required to be or may be provided by the rules for giving effect to the provisions of sub-rule (1)."

disabilities. Free legal aid services are provided before the judicial and quasi-judicial authorities, at different levels such as tribunals, subordinate courts, high courts and the Supreme Court, by the specified agencies under the LSA.

Eligibility Criteria under the Free Legal Aid Scheme

The NALSA has been created at the national level to keep an eye on and assess the implementation of legal aid services that are provided under the LSA. According to the LSA, State Legal Services Authority (hereinafter SLSA) in each state, the Supreme Court Legal Services Committee (hereinafter SCLSC), the High Court Legal Services Committee (hereinafter HCLSC) at each high court, DLSA at district level and Taluka Legal Services Committees (hereinafter TLSC) at Taluka level have been constituted to give effect to statutory provisions, policies and directions of the NALSA.

Free legal services under the provisions of the LSA, to the eligible people, are provided for filing or defending a case.[12] These benefits are available to some specific strata of society such as, person belonging to Schedule Tribe and Schedule Caste; woman, child, victims of human trafficking, disabled person,[13] industrial workman, and person in custody in a protective home.[14] Legal aid services can also be approved in cases of public importance.[15]

According to the provisions of Section 12 of the LSA, and the Regulations, that have been framed by the Supreme Court, the pecuniary limit, for availing legal aid services, before the Supreme Court, has been fixed at rupees one lakh twenty-five thousand.[16] In case of Delhi High Court, the annual income limit for availing free legal services is fifty thousand rupees.[17] The Delhi Government has also enhanced the income-ceiling from fifty thousand rupees to one lakh

12 Legal Services Authorities Act, 1987 §12.

13 The Disabilities (Equal Opportunities, Protection of Right and full participation) Act, 1995, § 2 (1).

14 The Immoral Traffic (Prevention) Act, 1956, § 2 (2) or in a juvenile home under the meaning of Section 2 (J) of the Juvenile Justice Act, 1986, or in a psychiatric hospital or psychiatric nursing home under the Section 2 (2) of the Mental Health Act, 1987.

15 SCLSC Regulations, 1996 Reg.15.

16 The SCLSC Regulations, 2000.

17 DLSA Regulation, 2002 Reg. 13.

rupees.[18] The NALSA (Free and Competent Legal Services) Regulations, 2010[19] provides the process for claiming legal aid benefits. The Regulation stipulates that any person who fulfils all requirements, can make an application under the Regulation 3 in a specific format as prescribed[20] and should submit it to the designated authority. In case a person is not able to make an application due to some disability such as illiteracy or otherwise, the designated authorities may make some arrangement for filing of such an application before the appropriate authorities for legal aid services.[21]

Amplitude of The Free Legal Aid Services

Legal aid services have been provided to eligible people in various modes under the relevant primary and secondary legislations in India. Legal aid services under the scheme may be in the form of payment of court-fees, process fees and all other charges which may be incurred in connection with any legal proceedings and charges for drafting, preparing and filing of any legal proceedings and representation by a legal practitioner in legal proceedings.[22] The services also includes the cost of obtaining and supplying certified copies of judgments,

18 Senior Citizen with an annual income of less than Rs. 2,00,000/; Transgender with an annual income of less than Rs. 2,00,000/ Delhi Legal Services Authority *available at* http:// www. dlsa.nic.in/ legal aid. html# l legal aid_ counsel.

19 Regulations have been framed under the authority of section 29 of the LSA, 1987 (39 of 1987) and applicable to all legal services authorities established under the LSA.

20 Regulation 5: "Proof of entitlement of free legal services (1) an affidavit of the applicant that he falls under the categories of persons entitled to free legal services under section 12 shall ordinarily be sufficient. (2) the affidavit may be signed before a judge, magistrate, notary public, advocate, member of parliament, member of legislative assembly, elected representative of local bodies, gazetted officer, teacher of any school or college of central government, state government or local bodies as the case may be. (3) The affidavit may be prepared on plain paper and it shall bear the seal of the person attesting it."

21 Legal Services Authorities Act, 1987, § 13, "Entitlement to legal services (1) persons who satisfy or any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned authority is satisfied that such person has a prima-facie case to prosecute or to defend. Requests received through e-mails and interactive on-line facility also may be considered for free legal services after verification of the identity of the applicant and on ensuring that he or she owns the authorship of the grievances projected. Persons who satisfy any of the criteria shall be entitled to receive legal services. But the concerned authority should be satisfied that such person has a prim facie case to prosecute or to defend. An affidavit should be made by a person as to satisfy the requisite limit of income or other conditions, as specified in the Act. Subsequently the appropriate authority has the discretion to confirm on the aid (2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this act unless the concerned authority has reason to disbelieve such affidavit."

22 *Id.*

orders and other documents in legal proceedings and cost of preparation of paper book (including paper, printing and translation of documents) in legal proceedings.[23]

Legal Aid Services Not available in Certain Cases

There are some offences which are not covered under the ambit of free legal aid scheme. According to the Regulation 14 of the SCLSC Regulation[24] the legal aid services shall not be available to an accused, in cases of defamations, malicious prosecution, contempt of court proceedings, election related issues, offences involving a fine not exceeding fifty rupees, and economic offences and offences against social laws under the Protection of Civil Rights Act, 1955 and the Immoral Traffic (Prevention) Act, 1956. A victim is not prohibited from availing free legal aid services in above mentioned cases.[25]

It is very important to mention that legal services, provided under the Regulations[26] and the LSA, may be withdrawn in some contingencies by the designated authorities. Legal aid may be terminated in cases where „person had sufficient means, obtained services by misrepresentation or fraud, material change in the circumstances of the aided person, misconduct, misdemeanour or negligence on the part of the aided person in the course of receiving legal service, aided person not co-operating with the Committee, engaging a legal practitioner other than the one assigned by the Committee and in case of abuse of the process or legal services, under the legal aid schemes. Legal services can be terminated if the aided person dies, except when the right or liability survives in civil proceedings.[27]

23 SCLSC Regulations, 1996 Reg.13; similar provisions are also available under the DLSA Regulation, 2002, see also NALSA (Free and Competent Legal Services) Regulations, 2010

24 SCLSC Regulations, 1996; See also DHCLSC Regulations, 2002.

25 *Id.*

26 *Id.*

27 SCLSC Regulations, 1996 Reg. 18, "Legal service shall not be withdrawn without giving due notice thereof to the aided person or to his legal representatives in the event of his death, to show causes as to why the legal service should not be withdrawn. Where the legal services are withdrawn on the grounds set out above, the Committee shall be entitled to recover from the aided person the amount of legal service granted to him."

Drawbacks in the Functioning of Legal Aid System

It is reiterated that there is no dearth of statutory enactments on right to free legal aid in India. Legal aid system is not functioning effectively and not catering requirements of the beneficiaries. Legal aid services provided by the empaneled legal practitioners are free of any charges but people in majority are reluctant to approach free legal aid authorities for availing such services. The programme, even after spending huge resources, has not been able to achieve the objectives, for which the system of legal aid has been created in India.

General public is under impression that such legal practioners are not committed and sincere to the objectives of the legal aid programmes but have considered these services as the platform for cheap popularity only. It is pertinent to mention that the empaneled legal practitioners, which are the main driving force of the scheme, has lost the recognition and faith of beneficiaries due to the recklessness and incompetency.

After in-depth scrutiny of the existing literatures on the subject and prevailing ground realities, researcher has observed that the following difficulties/ constraints have affected the quality of legal aid services across the nation.

Lack of Competency and Commitments of Legal Aid Counsels

Legal Aid Counsels are the driving force of the legal aid services in India. There is direct relation between the quality of legal aid services and the quality of legal aid counsels. It is also relevant here that majority of the legal practioners join the free legal aid programmes under compulsion as a last resort for survival in the profession. If they are well placed in practice then it is rarely seen such person contributing to any legal aid program. The biggest challenge before legal aid services authorities, at any level, is to create accessibility to committed and proficient legal practioners to improve the quality of services, resulting into revival of trust or faith of a common man in the free legal aid system in India. It would be better to substantiate the argument of lack of committed and devoted legal practioners by some real life instances, which have also been vindicated by the highest judiciary of India. Let us examine the ground realities on legal aid services.

Lack of Commitments

The Supreme Court in a case[28] before the three judges bench comprising of Chief Justice S H Kapadia and Justices K S Radhakrishnan and Swatanter Kumar has highlighted the problems of beneficiaries of legal aid services due to non-committed empaneled legal practioners on legal aid services. In this case the said bench, when the empaneled legal practitioner failed to appear before the designated court at specified date and time, has directed the registry of the Supreme Court to make available an indigent person with an empaneled legal practitioner to defend her claims. The bench also took a serious cognizance of lack of seriousness exposed by the empanelled lawyers in dealing with the causes of beneficiaries of legal aid services in India. The Bench, while expressing its grave concern about the lack of commitment from these legal practioners, which has also depicted the lack of reliability and sincerity of the legal practioners empanelled by the legal aid committees, made the following observations:

"Time has come to take notice of panel advocates not appearing in cases entrusted to them. This was not the only lapse and there had been a number of complaints on this score from other benches."[29]

In another instance of similar nature, the Delhi High Court Legal Aid Committee,[30] after receiving a number of pleas from prisoners lodged in Tihar Jail, who complained of having no faith in the counsels provided by legal aid fighting their cases, has come up with a solution video-conferencing. According to the grievances of prisoners that the free legal aid counsels were not visiting the jail to discuss the case with them or inform them about any development". One of the Tihar Jail officials, while commenting about the issue of lack of faith of prisoners on counsels provided to prisoners under the free legal aid services, said that:

28 *Sack lawyers who don't show up for poor clients,* Times of India (New Delhi, Sep 14, 2010).
29 *Id.*
30 Smriti Singh , *Tihar Inmates Use Video Link To Interact With Lawyers*, Times of India (New Delhi, August 16, 2009)

"Prisoners were losing faith in their counsels as they would never come to meet them. The accused lodged in the jail had no clue about their case and since lawyers don't have enough money to pay for jail visits, they tend to skip the meetings. About 80% of the jail's population comes from lower strata of society. They cannot afford lawyers and are dependent on legal aid. These counsels don't get paid for the visits, so they don't come. And since some of the counsels are so busy that they cannot come to the jail".[31]

It is observed by the Empirical Research that more than 80 percent LACs are devoted and committed to their private practices. Around 20 percent LACs spares some times for the beneficiaries of legal aid services. LACs are not available for hearing before courts especially the Metropolitan Magistrate Courts, discussion and other issues. Most of the LACs do not meet and brief beneficiaries in their chambers. Due to this trust deficit, people lack faith over the LACs and take legal aid under compulsion.

Lack of Competency

The quality of legal services provided by the empaneled legal practioners under the free legal aid programmes are far below satisfactory standards. Majority of junior legal practioners with less exposer and low proficiency in the profession, are generally employed for these services, who can never justify their contributions. It is also evident from the eligibility conditions and practices that are being followed by various legal services authorities for empanelment of legal practioners that majority of empaneled legal practitioner, who are not good at practice due to inexperience or inability or otherwise, join the free legal aid service as a last opportunity of employment or survival. It is also observed by the higher judiciary that there is an urgent requirement to improve or enhance the worth of legal aid services provided by the empaneled legal practioners. Reiterating the same the High Court of Bombay in a case[32] has made the following observations:

31 *Id.*

32 Ramchandra Nivrutti Mulak v. The State Of Maharashtra, Criminal Appeal No. 487 of 2000 Bombay High Court

> "*Empaneling advocates who are not conversant with criminal procedure and or of Evidence Act or Indian Penal Code would be defeating the very object behind Section 304, considering the ratio of the judgments of the Supreme Court, which have held that right to free legal assistance is a right guaranteed under Article 21 of the Constitution of India."*[33]

There are numerous instances where the empaneled legal practitioners have not lived up to the expectation of the beneficiaries due to their incapacity and lack of commitment. It is seen that people still prefer a private legal practitioner instead of a legal practitioner provided under the free legal aid services. The main reason for such unwillingness to avail free legal aid is that a private legal practitioner is accountable to his client as compare to a legal practitioner empaneled under the free legal aid services as a client may approach a Consumer Fora under the Consumer Protection Act, 1986 for deficiency of service.

No Trust over the LACs by the Judicial Officers and the Beneficiaries

The Empirical Research also shows that LACs in majority to get some experience or employment opportunity or exposure, join the legal aid services. If legal practitioner at very good at practice he would not join legal aid services due to various reasons. Most of the Legal aid Counsels are not competent to protect the interests of the beneficiaries. This is evident from the fact that more than 95% of Session judges dealing with serious crimes do not engage LACs but always go for the *Amicus Curiae* to protect the interests of the accused persons. Such Senior Judicial officers dealing with serious crimes such as murder, rape, NDPS, etc do not trust the competency of LACs.

The Empirical research also observes that 100% beneficiaries/respondents were reluctant to approach legal aid services but have been compelled, due to lack of financial resources to engage a private lawyer, if they had adequate resources to engage private legal practitioners, they would never have approached the Legal aid service intuitions/authorities. Further it is also depicted that LACs are not available on scheduled date and time for hearing and engage juniors

33 *Id.*

as proxy for taking dates/adjournments. Most of the LACs provide priority to private cases over the Legal Aid case on the ground of quantum of consideration involved in private disputes. As also accepted by the LACs that private cases provides for high returns as compared to the legal aid cases.

No Accountability of Legal Aid Counsels

It is observed by the Empirical research that the Most of the LACs want to conclude the cases allotted to them, as early as possible to get the complete honorarium after conclusion of cases. Outcome of the case is also not so relevant to the LACs. Honorarium is paid to the LACs in three stages and also for per hearing with some restrictions. Outcome or winning or losing is not so relevant in claiming the consideration under the Legal Aid System. It is also pertinent that minimum standards is expected out of any professionals including the LACs. LACs even after jeopardizing the interests of the beneficiaries are not accountable to the beneficiaries or the District Authorities under the LSA 1987. There is no monitoring mechanism under the existing system to take action against the LACs for professional negligence amounting to the sufferings of beneficiaries. Therefore, the system which have been created to protect the interests of the beneficiaries has failed miserably to protect the down trodden strata of society.

Almost all LACs, in order to get the specific honorarium after framing of charges as First Instalment of the total honorarium as per the DLSA's Regulations 2015 on the LAC's Honorarium, always insists upon for framing of charges against the beneficiaries (accused person). A LAC is supposed to avoid framing of charges for the protection of beneficiaries' interest. But they do it otherwise and go for framing charges against someone who is required to be defended by him or her in proceedings before a criminal court. Therefore the system of legal aid services in that case is hostile toward the beneficiaries in custody or alleged to have committed some crimes. In practice, LACs do not care for protecting the interest of beneficiaries for framing charges.

Furthers LACs can resign or withdraw their names from the list of panel or cases transferred to them, at any point of time before the final decision has

been made. Therefore jeopardizing the interests of beneficiaries. Majority of LACs demand money from beneficiaries for the filing of case and each hearing. LACs, without any actions against them, are changed in cases of complaints by beneficiaries before the DLSA All authorities involved and regulating legal aid services are helpless to retain LACs for the stipulated tenure and ensure proper accountability for demanding money and non-commitment.

No Monitoring Over the Functioning of Legal Aid Counsels

As per the Para 10 of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, Every "Legal Services Institution" including District, and State Authorities and High Courts and Supreme Court Committees, shall set up a Monitoring Committee for close monitoring of the court based legal services rendered and the progress of the cases in legal aided matters. The Monitoring Committee shall maintain a register for legal aided cases for recording the day-to-day postings, progress of the case and the end result (success or failure) in respect of cases for which legal aid is allowed and the said register shall be scrutinized by the Chairman of the Committee every month. The Monitoring Committee shall also keep a watch of the day-to-day proceedings of the court by calling for reports from the panel lawyers, within such time as may be determined by the Committee.

The Empirical Research carried out by the Researcher, has observed that there was no Monitoring Committee in 11 District of Delhi to perform the assigned functions as per the NALSA Regulations 2010. Non-appointment of such committees have adversely affected the quality of legal aid services and accountability of LACs, thereby beneficiaries are being made to suffer. The Delhi High Court Legal Aid Services Committee and Supreme Court Legal Services Committee have appointed Monitoring Committee to ensure the availability of quality services to the beneficiaries' legal aid services.

No Feedback from the Beneficiaries and Judges Dealing with Legal Aid Cases

It is also very important that a consumer such as the beneficiaries and judicial officers dealing with legal aid cases at civil as well at criminal courts, would be

in a better positon to appreciate and assess the quality of goods and services. Till date no feedbacks from beneficiaries and judicial officers have been obtained to evaluate the services of legal counsels and thereby promoting the quality of legal services.

Lack of Support/Guidance in Case of Difficulties

As already noted that LACs without substantial understanding of law and practice join the legal aid system to get some employment opportunity or experience. Most of the LACs are not competent to effectively practice and protect the interests of beneficiaries. Whenever they need some guidance or support or to clarify some doubt regarding drafting or subject matters, there is no one to guide/advise them on their difficulties. Therefore they do it at their own, whether right or wrong, which harms the interests of beneficiaries. Further there is also no monitoring over the drafting skills of the LACs.

Empanelment of LACs: Part Time/ad hoc Arrangements only

As per the existing system of Legal Aid Services across the Nation, Legal Aid Counsels are engaged and paid as per case allocation. Legal ACs are engaged on part time basis. They also do full time private practice and have a lesser amount of time for legal aid cases. The Empirical Research on the subject shows that LACs do not meet legal aid beneficiaries regularly at their chambers. Actually they have very little time for interaction and briefing for legal aid cases. LACs give priority to private cases over legal aid cases. Due to such arrangements the beneficiaries of the legal aid services are suffering.

Improper Maintenance of Records

No monitoring of cases such as listing of cases, duration of the time taken in deciding a case, status of cases and other activities related to legal aid cases is not being performed by District Legal Authorities in Delhi. The High Court of Delhi and The Supreme Court Legal Services Committee are maintaining proper records of cases pending and decided. It is very difficult to locate the progress or out-come of a case or time consumed by a case from the public records maintained by the District Authorities in Delhi. It's very difficult to

find out the status of a case/dispute, whether case is pending or decided, if decided what is the outcome, from the record maintained by the 11 District Legal Services Authorities in Delhi.

Ineffective Grievance Mechanism

According to the NALSA Regulation 2010 on Legal Aid Counsels, Districts Legal Services Authorities have been empowered to take necessary actions in case of default by the LACs. But in practice all District Legal Services Authorities approach the DLSA, Delhi for delisting or approval of administrative actions against the legal aid counsels. Further all District Legal Services Authorities in Delhi do not maintain any records of grievances filed by the beneficiaries for change of advocate or demand of money by advocate or any other grievances against the LACs. Therefore it is very difficult to monitor the grievances and take actions against habitual defaulters. The practices of Ad-hoc arrangements have been made by the District Services Authorities in Delhi, which lacks uniformity and failure to ensure accountability of LACs for failure to perform the assigned tasks.

No Time Limit to Make Payment

Most of the LACs from 11 Distracts, Delhi HC, and Supreme Court have complained that they do not get their honorarium in time. It takes years together to get the payment of honorarium after conclusion of cases. Actually there is no time limit stipulation for making payment in the existing system. Non-payment of timely payment has also encouraged LACs to charge money at the initial stage and thereafter each hearing, from the beneficiaries for providing legal services as LACs.

LACs also try to justify their demand for money on the ground that they get payment in stages and nothing is paid to them at the initial stage or at the time of handing over the case to them. Therefore they have to pay it form their own pockets and it is not possible for them to make payment for various expenditures in many cases allotted to them as they have their financial limitations.

Final Thoughts

Taking into account the existing ground realities and the limitations of the existing legal mechanism, the researcher would like to make the following recommendations/suggestion to improve the quality of legal services thereby restoring the trust of people over legal aid services.

Restoration of Faith in the Free Legal Aid System: Committed and Proficient Legal Aid Counsels

Organizing seminars, awareness camp or any other activity will not have any greater impact as compared to the services of committed and proficient empanelled legal practioners, in restoring the trust of people on the free legal system. A system cannot be considered beneficial to the beneficiaries unless they have reliance in the system. A quality service by competent and devoted legal practioners is a condition precedent for restoration of confidence of the people in the free legal aid services. It is very difficult to restore the trust and confidence of the peoples, which is so badly shattered by low quality services by non-committed legal professionals empanelled on the free legal aid services.

The crux of the problem is that there is a dearth of devoted and committed and competent legal professionals for the legal aid services. Everything is driven by the pecuniary benefits in the acquisitive world. It is the need of the hour that committed and competent legal practioners should be encouraged, to be part of such social welfare programmes funded by the state, by providing some incentives,. It is believed that a devoted person believing in philanthropic approach, can serve the down trodden people of society better than one who is only interest in monetary benefits arising out of some professional transaction.

It is also suggested that committed legal practioners having 5 or more years of regular practice, which are proficient in criminal law and civil law, should be appointed on the panel under the scheme. It is also recommended that two specialized groups of legal practitioner such as Criminal Law Group and Civil Law Group, according to the experience of selected legal practioners, should also be formed in order to cater the need of beneficiaries in efficient manners.

Civil Law Group shall exclusively deal with civil cases and Criminal Law Group will only take care of criminal cases, pending before various courts.

Empanelment process must also include written exam to assess the understanding of fundamentals of law needed for the specific group and interview including presentation on any given case/dispute. Committed and devoted LACs must be rewarded on annual basis. The system of legal aid services should provide ambiance to train, groom and facilitate legal aid counsels for the promotion of legal aid services across the nation.

Public Accountability of the Empanelled Legal Practioners

To encourage and promote effective participation of empanelled legal practioners in the free legal aid scheme, the minimum remuneration for the free legal services must be fixed for each LAC, which may be ten thousand rupees each month, irrespective of the status of the courts. Some minimum works requirement must also be imposed for the entitlement of such remuneration. Further, in order to make the legal practioners accountable to the beneficiaries under the free legal aid services, such services should be covered under the Consumer Protection Act, 1986 so that the affected person can claim some damages from such legal professional in case of deficiency of service. Free legal aid services are not free services but the consideration on behalf of beneficiaries is paid by the state. The proposed action will not only restore the confidence of people but also ensure the accountability of such legal practioners towards the free legal aid services.

It is also recommended that some undertaking from the empaneled legal practioners indicating that they would not withdraw from legal aid service within the period of such empanelment, should be obtained. If they breach the undertaking then they would be bound to pay damages to the authorities under the scheme. The State must revamp its existing scheme on accountability of LACs in case of defaults and removal for demanding money from beneficiaries of legal aid.

Permanent Monitoring Committee

Permanent Monitoring Committee to regulate the functions of Legal aid services at Taluka, District and State levels is mandatory for controlling/advising/guiding LACs for providing quality legal aid services. The NALSA Regulations 2010 on the issue must also be enforced and appropriate returns regarding outcomes of cases, duration, and action taken against LACs by the State Legal Services Authorities across the nation, must also be submitted to the NALSA on monthly basis. The NALSA should also maintain such data online in public domain.

The Monitoring Committee should also look into screening of legal aid cases before allotting it to any LAC. Desired cases should only be allowed to take benefits of legal aid services. The Legal Aid system should believe in quality of services and not in number game. This said Committee should also be authorised to take necessary actions including depanelment or imposing penalty in case premature withdrawal or resignation from the services by legal aid counsels. It is also recommended that regular feedbacks from the major stake holders such as the beneficiaries and judicial officers, should also be obtained to improve legal aid services.

Maintenance of Proper Records: E-Governance

Maintenance of records regarding duration of case, disposal of cases, actions taken, listing of cases before courts, details of making payments, status of complaints, status of cases, etc, must be made available on the web site of the relevant legal aid services authorities. Hidden practices breed corruption and manipulation resulting in lack of trust over the services. The system of e-governance can certainly ensure transparency in the operations of legal aid services.

Employment of Legal Aid Counsels on Tenure And Full Time Basis with Proper Accountability and Monitoring

It is important to note that LACs are engaged on case basis or ad-hoc basis. Most of the LACs are devoted to full time private practices and give least priority to legal aid assignments. Therefore such professionals cannot do justice to legal

aid cases. It is recommended that LACs may be engaged on full time tenure basis or a period of three or five years. Where such LACs would be paid some guaranteed amount on monthly basis. They will not be allowed to withdraw or resign and practice during such assignment. Legal Aid Authorities at Taluka, District and State Levels can from two specialised groups headed by some senior lawyers to guide and advise empaneled legal aid counsels. The organisation structure of the proposed scheme is a matter of deliberation.

Concluding Remarks

Finally, it is very pertinent to mention that legal aid programmes are the entitlement of disadvantageous group of people under the Constitution of India and the LSA. The state cannot ignore its obligations under the law of the land in promoting and protecting these schemes. Legal aid services are not donations or gift, but are the Constitutional objectives. Financial constraints and administrative complications may occur in the effective implementation of the Free Legal Aid Scheme, but it is comparatively less important than the satisfaction and upliftment of the unprivileged part of society. It is inevitable to mention that a nation grows with its citizens not in loneliness.

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Patent Standardization and Implications on Competition in Mobile Telecommunications Market

Dr. Sandeep S. Desai & Aditya Mitra***

Introduction

Companies like Apple, Ericson, Huawei, Qualcom as well as LG etc. are large multinationals which invest massive amounts of R&D in developing their products and none more emphatically than the mobile communications market. While all these companies are multi-product firms one area where each of them has developed a major advantage is in the manufacture of mobile infrastructure, which includes GSM, CDMA and LTE technology. Each one of the above mentioned companies owns hundreds of patents in these technology categories. The importance of these technologies in fact cannot be underplayed, as these are the standard 2G, 3G and soon to be 4G technology used by every mobile handset in the world. On the other side of the spectrum are mobile handset manufacturers, while Companies like Samsung, Apple and Nokia also come under this category their R&D facilities allow them to produce the required cellular infrastructure as well. In reality it is new companies like Micromax, Lava or Intex which primarily manufacture and sell handsets and not the technology that are the most important stakeholders. Most of the major firms which possess these patents possess them in bulk, granting them an absolute advantage in the market. This poses a threat to upcoming and smaller companies which do not have the equivalent financial or technological resources. Most dominant firms possess thousands of such patents for example Ericson possess 33,000 of such patents. These patents are referred to as Standard Essential Patents. What ensues after this is a supplier-manufacturer relationship which gives the dominant players power to impose vertical restraints on smaller players which may take the form of denial or market access or monopoly pricing and other manifestations of abuse of dominant position. If these matters dealt with

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simple components or raw materials then the cases would be clear instances of an abuse of dominant position under section 4 of the Competition Act 2002. However the existence patents makes the issue more complicated and rightly so, dealing with issues concerned with complex technology is unlikely to be anything but complex. The most important facets of the these problems lay in the understanding of Standard Essential Patents and their purpose, which was initially to foster innovation in the market but of late has become a tool used by dominant firms to get maintain a monopoly by charging excessive rates. From a legal perspective the issues are two fold; what constitutes reasonable royalty rates and what factors the courts should consider when granting injunctions based on applications by such dominant firms. The paper uses both empirical data as well as the doctrinal method to identify the legal perspectives of both sides in such cases as well as the over-arching laws, principles and metrics on which such issues can or should be adjudicated upon. One therefore must identify the rationale for such SEP's and also the organizations that list and identify them.

The Rationale For Standard Essential Patents

To understand the rationale for SEP's it is important to understand certain core components and entities, and their interplay in the impugned process.

Process of Standardization

SEP's in a nutshell can be defined as components for which a non-infringing alternative is not available. They are components of tools and machines which are indispensible to the construction and creation of these machines and hence are "standard" requirements in any realm of technology.[1] The process of standardization aims to reduce the cost of technological creation and reduces the entry barriers to new market players whilst preventing the creation of monopoly in such a sector or industry. Thus the formulation of SEP's based on certain standard requirements balance both Intellectual property rights with lower cost of technological innovation. In such a scenario the standard

1 *See Generally,* M Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 California Law Review 1889 (2002).

for profitability of products is often the interoperability[2] of the component and the processes of standard setting aims at creating technological standards which pay credence to the level innovation required in a market and ensure that the same is incentivized.

Standard Setting Organizations

An essential question that arises in this regard is with respect to how these "standards" to identify SEP's are determined. In this regard an important antecedent to studying SEP's is studying SSO's[3] (standard setting organizations). In the current back drop involving Ericson the most relevant institution in that regard is the European Telecommunications Standards Institution which sets standards for cellular technology which includes 2G, 3G and 4G technology.[4] Other SSO's include 3GPP, 3GPP-2, IETF, ANSI, EIA, and TIA. The ETSI also sets IPR policy for its members, which includes companies like Ericson, Qualcomm, LG etc. [5] The members are required to not only to register their patents as per the required standards but also to license them on FRAND terms (Fair and Reasonable and Non- Discriminatory Terms). The following are the definitions provided by the ETSI in its IPR policy.

1. "**ESSENTIAL**" as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL.[6]

2 Brian Kearseyand Larry M. Goldstein, Technology Patent Licensing: An International Reference on 21st Century Patent Licensing, Patent Pools, and Patent Platforms 43, (2004).

3 *Id.*

4 Rudi Bekkers Et Al, *Intellectual property rights and standardization: the case of GSM,"* 26 Telecommunications Policy No. 3-4, at 172, https://dspace3-labs.atmire.com/bitstream/handle/123456789/6805/file14424.pdf (Last accessed on January 25, 2016).

5 Dan J. Laughhunn et al, *Risk Attitudes in the Telecommunications Industry,* 14(2) The Bell Journal of Economics 517-521, (1983).

6 E.T.S.I., IPR. Policy, Art. 15(6), 30 November 2011.

2. "**STANDARD**" shall mean any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs and including drafts of any of the foregoing, and documents made under the previous nomenclature, including ETSs, I-ETSs, parts of NETs and TBRs, the technical specifications of which are available to all MEMBERS, but not including any standards, or parts thereof, not made by ETSI.[7]

Obligations on SEP Owners

Once an SEP's are registered with the SSO's the SEP owner is under an obligation to provide licenses to those who need it. As per ETSI regulations, members are required to provide a mandatory license to any individual that requires using those IPR related products. The owners of the IPR are required to provide a mandatory license for the same within 3 months of the application. Following this process the licensor and licenses enter into a normal contract on FRAND terms. The major issue here lies in the fact that FRAND terms themselves are not codified and are determined on a case to case basis by the individual parties involved in the transactions.[8]

Primordial Concepts Essential To Appreciate The Components & System of Standard Essential Patents

The following components are essential to understand the functional aspects of SEP's and the criteria and metrics used by the courts to decide such matters.

Concept of FRAND

FRAND terms (Fair and Reasonable and Non- Discriminatory Terms) refer to a set of terms and conditions based on which SEP owner's license their technology to other companies who need it. The terms should not in any way have detrimental or discriminatory effect on the companies that use SEP's. Most cases revolving around FRAND term and SEP's licensing boil down to

7 *Id.*, Art. 15.
8 *Id.,* Art. 6.

2 questions. What constitutes reasonable terms for licensing of SEP's? And what recourse should dominant firms take in the event of infringement? The former usually is a matter of determining the royalty rate while the latter deals with the issue of legal action taken by dominant firm which generally involves obtaining an injunction against the company unwilling to license. It is worth noting that in such a scenario there always exists the threat of a "hold up" i.e. the owner of the patent is able to charge high royalty rates thereby subverting the competition in the market.[9] The cost, it must be noted is inevitably transferred to the consumers and due to complex nature of technology like Smart phones considering that each product contains multiple patents it often leads to royalty stacking.[10] In the case of Smartphones specifically, for example Ericson holds a total of 33,000 SEP's world- wide while in India they hold over 400 SEP's and in their suit against Micro-max as well as Intex they have contended that 100+ SEP's have been infringed.[11] Thus when single products use multiple SEP's royalty stacking is imminent.[12] FRAND terms therefore exist to ensure that major patent holders are not able to monopolize the market and are not able to abuse their dominance in the market. Most cases revolving around FRAND term and SEP's licensing boil down to 2 questions. What constitutes reasonable terms for licensing of SEP's? And what recourse should dominant firms take in the event of infringement? The former usually is a matter of determining the royalty rate while the latter deals with the issue of legal action taken by dominant firm which generally involves obtaining an injunction against the company unwilling to license. However even these issues themselves are not reducible to simple questions. In the *Apple* v. *Motorola* case[13] in USA as well as the Orange book case[14] in Europe several factors have been

9 Bernhard Ganglmair, *Patent Hold Up and Antitrust: How a Well Intentioned Rule Could Retard Innovation*, J. Indus. Econ. 261-62, (2012); Gregor Langus, *Standard-Essential Patents: Who Is Really Holding Up (and When)?*, 9 J. Comp. L. & Econ. 253 (2013).

10 Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, 77 Antitrust Law Journal 889, (2011).

11 JPMorgan Europe Equity Research (2008) Ericsson: Patent Proof of an Ericsson/RIM IPR Connection, 16 July 2008.

12 *Available at* http://www.3glicensing.com/Licensors.asp, (Last accessed on January 10, 2016).

13 Apple v. Motorola, No. 2012-1548,-1549 (Fed.Cir. Apr. 25, 2014), Apple Inc. v. Motorola Mobility, No. 11-CV-178-BBC, 2012 WL 5416941 (W.D. Wisc. Oct. 29, 2012).

14 Orange Book Case, Case KZR 39/06 of 6 May 2009, Huawei v. ZTE C-170/13.

identified to determine the grounds for the courts to consider while granting injunctions. Another factor relevant for determining the legitimacy of FRAND terms is whether the licensee in question, is willing or unwilling. This is highly pertinent from the perspective of legal action sought by patent holders against infringing parties.

FRAND Terms and Injunctions

In determining the link between the duty to license and right to seek legal action in case of infringement we may look at the *Apple* v. *Motorola* case[15] in the United States. In this case the fundamental act in question was the use of Injunctive relief and whether it amounted to a violation of FRAND terms, considering the firms are under an obligation to provide licenses in the first place. The fact is that it is a right of every entity to sue or attain injunctive relief for any infringement of IPR which makes the matter complicated.[16] When companies have a legal right questioning the use of it, whether done with bona-fide intent or done, maliciously is extremely difficult and must be evaluated contextually. In all the matters stated above it was alleged that there was an abuse of dominant position by the dominant firm making it highly relevant to competition law jurisprudence. The entire concept of FRAND w.r.t to competition law is for the purpose of balancing the essential faculties' doctrine[17] with Intellectual property rights under SEP's.

The issue of Injunction over FRAND terms has been dealt with extensively in the *Orange Book Case*[18] in Germany, prior to this case granting of Injunctions to patent holders was a relatively easy task. The Case[19] (C- 170/13), followed by the full European Court of Justice (ECJ), looked into the issue of injunctions and the required standard for the same. It was identified that that the status quo

15 Apple v. Motorola, No. 2012-1548,-1549 (Federal Circuit Apr. 25, 2014).

16 Robert T. Jones, *A Primer on Production and Dominant Positions Under E. E. C. Competition Law*, 7(3) The International Lawyer 612-634 (July 1973).

17 Jorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 Antitrust L.J. 47, Appendix A (2013); Hovenkamp, Herbert, IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law, 2007.

18 Pat Treacy & Helen Hopson, Rules of the Orange Book, 12 Patent World 12-13 (2009); Case KZR 39/06 of 6 May 2009.

19 Orange Book Case, Case KZR 39/06 of 6 May 2009, Huawei v. ZTE C-170/13.

allowed for exploitative practices by patent holders and in an attempt to rectify it a certain guidelines were required to be formulated. The ECJ stipulated that that an SEP holder must inform the infringer that the latter needs a license, specifying the SEPs concerned, and present the infringer with a written offer for a license on FRAND terms, including precise details of the royalty.[20] An injunction can only be issued if the infringer does not respond in a serious and diligent manner within a reasonable timeframe.[21]

In the *Motorola* v. *Apple* case[22] Judge Richard Posner made several important observations on the matter in the case; he suggested that SEP holders should only seek monetary compensation in court, i.e., damages (or past infringement and court-ordered future royalties.[23] It was noted that the problem with flexibility about injunctions is that the "mere threat of injunctive relief can already have profoundly anticompetitive effects.[24] While enforcers of SEPs may argue that "hold-up" at the threat of an injunction is only one side of the equation, the other being "hold-out"[25] which is a case where infringers of SEP's do not agree to licensing terms and continue to use SEP's based products to force the patent holder to license at extremely law or negligible rates. However the damage of "hold-out", if any occurs, is just that someone gets paid later after proving actual infringement of actually valid patents in court than he should have been. The solution is to impose litigation expenses on the losing party and to increase the amount owed for pre-judgment infringement by an interest rate above the market rate.[26] By contrast, the negative effects of hold-up are irreversible: if a company settles, there's a deal in place that can't be revisited later, and if it's put out of business, no one can bring it back. For

20 Pinar Akman, The Concept of Abuse in EU Competition Law: Law and Economic Approaches (2012).

21 *Supra* note 16.

22 *Supra* note 13.

23 *Id.*

24 Tu Thanh Nguyen, Competition Law, Technology Transfer and the TRIPS Agreement: Implications for Developing Countries (2010).

25 *Supra* note 13.

26 OECD Report on Abuse of Dominance and Monopolisation, 1996 OCDE/GD(96)131, *available at* http://www.oecd.org/dataoecd/0/61/2379408.pdf (Last accessed December 23, 2015).

hold-out, the cost of litigation (even without a "loser pays" rule) is enough of a disincentive for everyone contemplating to engage in this behavior but for hold-up, there's no disincentive, so it must be clear from the beginning that it can't and won't succeed.[27] It may however be noted that both Judge Radar and Judge Prost who heard the case when it was appealed disagreed with the no-injunction rule whilst stating that it may only be used on the fulfillment of 2 conditions i.e. the licensee must be unwilling and it must be a last resort or necessity.[28] This makes it possible to distinguish between litigations which are initiated with malafide intent and those that have a reasonable basis. Samsung, Motorala and Apple have all been penalized for such litigations, In India the concept of Sham litigation done with the express intent to harm competing firm was also recognized by the CCI in Re: *M/s Bull Machines Pvt. Ltd. and M/s JCB India Ltd.*[29]

It must also be noted that following EU jurisprudence the exercise of the right of injunction can be justified even if it amounts to an abuse of dominant position as such acts are subject to the rule of reason and may have objective justifications[30] as the ECJ has laid down in a catena of cases like *United Brands Co. & United Brands Continental BV* v. *The Commission of European Communities,*[31] *Microsoft v. Commission,*[32] *Tetra Pak International SA v. Commission.*[33] These objective justifications involve 4 criteria based on which even an abuse of dominant position may be justified owing to the fact that it is beneficial to the market. These criteria include any exclusionary practice under article 102 of the Treaty on Functioning of European Union (TEFU), the factors include a) realization of efficiency (b) Indispensability of conduct to realize that efficiencies, (c) the efficiencies would have to outweigh any negative effects (d) and the conduct

27 Keeling David T., Intellectual Property Rights in EU law: Free Movement and Competition Law, Vol. I (2003).

28 *Supra* note 13.

29 Re: M/s Bull Machines Pvt. Ltd. and M/s JCB India Ltd., Competition Commission of India, Case No. 105 of 2013

30 European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, IP/05/1626 (December 12, 2005)

31 (1978) 1 C.M.L.R. 429.

32 Case No. T-201/04, ECR II-360, (2007).

33 ECR II-360, Tetra Pak International SA v. Commission, E.C.R. II – 755, (1994).

must not eliminate all effective competition. These factors have in fact been accepted in India as well, in the *Kapoor Glass* case[34] the CCI accepted that considering Section 4 of the Competition Act[35] is similar to Article 102 of the TEFU it is also subject to the same defense of objective justification.

Willing Licensee

One of the essential factors in determining whether FRAND terms are violated or not is whether the licensee of the SEP's is willing to pay the royalty or not and the existence or nonexistence of this willingness becomes highly relevant. In its 2011 Report,[36] the FTC noted the importance of injunctions; it defines a willing licensee as one who would license at a hypothetical, ex ante rate absent the threat of an injunction and with a different risk profile than an after-the-fact infringer. In other words, the FTC's definition of willing licensee assumes a willingness to license only at a rate determined when an injunction is not available, and under the unrealistic assumption that the true value of a SEP can be known *ex ante*.[37] The court in *Ericsson Inc*. v. *D-Link Systems*, Inc.[38] provided some guidance on the meaning of a "willing licensee," holding that Intel was not a willing licensee based on the following facts: (1) Ericsson offered Intel a license prior to trial; (2) the license offer was at the same rate and on the same terms as Ericsson's offers to other defendants; (3) after trial, Ericsson amended its license offer to Intel to reflect the jury verdict; and (4) "Intel itself never meaningfully engaged in licensing talks with Ericsson after Ericsson's initial offer."[39]

34 Kapoor Glass v. Schott Glass India Pvt Ltd, Competition Commission of India, Case No. 22 of 2010.

35 Indian Competition Act, 2002 §4.

36 The Evolving IP Marketplace: Aligning Patent Notice And Remedies With Competition, A Report Of The Federal Trade Commission (2011).

37 *Available at* http://laweconcenter.org/component/content/article/98-the-price-of-closing-the-google-search-antitrust-case-questionable-precedent-on-patents.html. (Last Accessed 12th December 2015).

38 Ericsson Inc. v. D-Link Systems, 2013 W.L. 4046225, *18 (E.D. Tex. 2013).

39 Koren W. Wong-Ervin, *The European Commission's Safe Harbor Approach to the Seeking of Injunctive Relief on FRAND Encumbered SEPs*, Volume 12 No.1 (2014).

In *Apple* v. *Samsung*, the FTC found that Apple was not a willing licensee because it (1) filed patent infringement litigation (2) proposed license terms that devalued Samsung's patent value, and (3) engaged in reverse hold-up as evidenced by the fact that it did not have the intent to pay any royalties until the litigation was concluded. Conversely, it was found that Samsung did negotiate in good faith because (1) before and after filing the injunction claims, Samsung proposed various license terms to Apple and proceeded with substantial negotiations, and (2) the royalty rates proposed by Samsung were not excessive.[40] But with the *Google* case,[41] the Commission appears to back away from its seeming support for injunctions, claiming that: "Seeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the integrity and efficiency of the standard-setting process and decreases the incentives to participate in the process and implement published standards. Such conduct reduces the value of standard setting, as firms will be less likely to rely on the standard-setting process."[42] As Kobayashi and Wright make clear in discussing the N-Data case and its relationship to Supreme Court precedent set by the *NYNEX* case[43] and *Trinko.*[44] On March 21, 2013, the Düsseldorf Regional Court referred a patent dispute between Huawei Technologies Co. Ltd. and ZTE Corp popularly known as the Orange book case. to the EU's Court of Justice for guidance on a number of issues, including whether seeking injunctive relief on a FRAND-encumbered SEP against a patent infringer that is willing to negotiate a license constitutes an abuses of dominance, and what constitutes a willing licensee.[45] It was identified that that the status quo allowed for exploitative practices by patent holders and in an attempt to rectify it a certain guidelines were required to be formulated. The ECJ stipulated that that an SEP holder must inform the infringer that the latter

40 Koren W. Wong-Ervin, *Standard-Essential Patents: The International Landscape,* ABA Section of Antitrust Law (Spring, 2014).

41 Microsoft Inc. v. Motorola Inc. US District Court, 9th Circuit, 696 F.3d 872, (2012).

42 Motorola Mobility LLC v. Google Inc., FTC File No. 121-0120 January 3, 2013.

43 Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, (1984).

44 FTC file no. 121-0120 January 3, 2013, Dissenting statement of commissioner Maureen K. Ohlhausen in the matter of Motorola mobility LLC and Google Inc.

45 *Supra* note 19.

needs a license, specifying the SEPs concerned, and present the infringer with a written offer for a license on FRAND terms, including precise details of the royalty.[46] An injunction can only be issued if the infringer does not respond in a serious and diligent manner within a reasonable timeframe.[47]

Reasonable Royalty Rates

The Final component to be accounted for in dispute over the use of SEP's is the determination of royalty rates. In April 2008, Ericsson, Alcatel-Lucent, NEC, Next Wave Wireless, Nokia, Nokia Siemens Networks, and Sony Ericsson announced their "support that a reasonable maximum aggregate royalty level for LTE essential IPR in handsets is a single-digit percentage of the sales price."[48] The determination of royalty rates is generally left to the individual parties involved in the transaction. A general conflict with respect to royalty rates has been whether the rates should be charged on a component or final sale price of the phone itself. Data from the ETSI and several other SSO's indicates that most companies license at royalty rates which are based on the total sale price of the product (smartphones) and vary from 0.7 -3.5 % of it on average.[49]

In the *Micro Max* case however the CCI and the Delhi HC both held that the rate of 1.25% on the total sale price of the phone was discriminatory in nature and constituted a prima facie case of abuse of dominant position. When such conflicts arise with respect to determination of royalty rates Courts traditionally are reluctant to tackle the price issue.[50] Usually they refuse to set a ceiling for patent owners to charge a royalty. In *W.L. Gore & Assoc.* v. *Carlisle Corp*[51] the court rejected the claim that unreasonably high royalties constitute patent misuse. In *Brulotte* v. *Thys Co*.,[52] the court noted "a patent empowers the owner

46 *Supra* note 20.

47 *Supra* note 16.

48 Press Release, Ericsson, Wireless Industry Leaders Commit to Framework for LTE Technology IPR Licensing (Released -Apr. 14, 2008) *available at* http://www.ericsson.com/thecompany/press/ releases/2008/04/1209031.

49 ETSI IPR database. *Available at* http://webapp.etsi.org/IPR/ (Last accessed on December 12th, 2015).

50 United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), 332-333.

51 W.L. Gore & Assoc., Inc. v. Carlisle Corp., 3rd Circuit, 529 F.2d 614, 622-623, (1976).

52 Brulotte v. Thys Co., 379 U.S. 29 (1964), 33.

to exact royalties as high as he can negotiate with the leverage of that monopoly." U.S. courts have generally rejected the notion that charging differential royalties is a violation of law even when the licensor is a true monopolist. In USM Corp. v. SPS,[53] which involves the lawfulness of differential patent royalties under antitrust and patent-misuse principles, the Court of Appeals for Seventh Circuit held that "there is no antitrust prohibition against a patent owner's using price discrimination to maximize his income from the patent." The Federal Circuit therefore held in Laser Dynamics[54] in 2012, that, "in any case involving multi-component products, patentees may not calculate damages based on sales of the entire product, as opposed to the smallest salable patent-practicing unit, without showing that the demand for the entire product is attributable to the patented feature. However a study of US judgments on the matter have led to a formulation of rule known as the "entire market value rule" to determine whether such components should be included in the damage computation, whether for reasonable royalty purpose.[55]

Pursuant to the entire market value rule, even though a patented feature makes up only a portion of the product, the entire market value rule permits recovery of damages based on the value of the entire product containing several features if the patent-related feature is the basis for customer demand.[56] The Federal Circuit refuted the argument that "the entire market rule should have little role in reasonable royalty law."[57] The court pointed out that "such general propositions ignore the realities of patent licensing and the flexibility needed in transferring intellectual property rights. The evidence of record in the present dispute illustrates the importance the entire market value may have in reasonable royalty cases." And the court added that "there is nothing inherently wrong with using the market value of the entire product, especially when there is no established market value for the infringing component or feature, so long

53 USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir, 1982), 512-513.

54 Laser Dynamics, Inc. v. Quanta Computer, Inc., 694 F.3d 51, 68 (Fed. Cir. 2012);

55 Brian J. Love, *Patentee compensation and the Entire Market Value Rule*, 60 Stanford Law Review 280, (2007).

56 Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538 (Fed. Cir. 1995), 1549.

57 Lucent Technologies, Inc. v. Gateway, Inc., Federal Circuit, 580 F.3d 1301, 1339, (2009).

as the multiplier accounts for the proportion of the base represented by the infringing component or feature.[58] Moreover the court explained that since all running royalties have at least two variables - the royalty base and the royalty rate - the base used in a running royalty calculation can always be the value of the entire commercial embodiment, as long as the magnitude of the rate is within an acceptable range.[59]

In addition, one factor that restrains the application of the entire market value rule is that a patentee must approve that the patent-related feature is the basis for customer demand.[60] By allowing complementary or component products from different manufacturers to be combined or used together, they increase consumer choice and convenience, and reduce costs. For instance, amongst other practical benefits, they allowed the consumers to connect wirelessly to the internet from different locations in search of relevant materials. These consumer benefits can be especially important in network markets, i.e. where the value of a product or a service to a particular consumer increases with the number of consumers using the same product or service. The Factors in the Georgia Pacific case [61] laid down a fifteen factor test to determine a Reasonable royalty test. Within these, factors the commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter, the duration of the patent and the term of the license and the established profitability of the product made under the patent; its commercial success; and its current popularity are relevant to the present scenario.

Unique Challenge Posed By Sep's To Indian Legal Paradigm

Based on the unique challenge arising out of theses SEP's, one may analyze the current scenario in determining the possible shift in paradigm with respect to the issue.

58 *Id.*

59 Cf. Uniloc USA, Inc. v. Microsoft Corp., Federal Circuit, 632 F.3d 1292, 1318-1320, (2011)

60 Jason Schultz & Jennifer M. Urban, *Protecting Open Innovation: The Defensive Patent License as a New Approach to Patent Threats, Transaction Costs, and Tactical Disarmament,* 26 Harv. J. L. & Tech. 1 52, (2012) ;Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, 77 Antitrust L.J. 889 (2011)

61 Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970)

Current Scenario

In India the conflict regarding SEP's has manifested in a wave of litigations between Communications giant Ericson and companies like Xiaomi,[62] Intex,[63] Gionee[64] and Micromax[65] and more recently iBall.[66] In each case it has been alleged by Ericson that 5 to 8 Standard Essential Patents have been used by these mobile phone manufacturing companies. The pattern of litigation and dispute in each of these cases is quite similar. In each instance these mobile manufacturing companies were informed of the fact that the 2G, 3G technology that they were using in the phones they produced were violating the patent rights of Ericson. As per the existing FRAND terms these companies are required to attain licenses from the company that produces these technologies, however as per Ericson, neither of them did. This was followed by interim injunctions issued in favor of Ericson by the Delhi HC in all these cases.[67] In each case the injunctions issued, prevented the sale and import of phones by these individual companies. This resulted in each of these companies buckling down and giving in to conditions which were detrimental to their businesses. This included, agreeing to pay a percentage of the royalty rate for all phones sold, in some cases paying a fixed sum per phone sold and in other instances the entire royalty rate per phone. Subsequently paying of royalty rate resulted in prices of these phones increasing at which point the USP for most of these phones, i.e. low cost was nullified due to payment of royalty rates. Conversely the Court agreed to Ericson's view that the royalty rates were a marginal addition to the total cost of each phone. On average the royalty rate per phone is 0.8 – 1.5 % of its net sale price. However another issue raised by these companies is that

62 Telefonaktiebolaget LM Ericsson (Publ) v. Xiaomi Technology and Others, CS(OS) 3775/2014 (Delhi High Court).

63 Telefonaktiebolaget LM Ericsson (Publ) v. Intex Technologies, CS(OS) 1045/2014 (Delhi High Court).

64 Telefonaktiebolaget LM Ericsson (PUBL) v. Gionee Communication Equipment Co. Ltd, CS(OS) 2010/2013 (Delhi High Court).

65 Micromax informatics Ltd. v. Telefonaktiebolaget LM Ericsson (PUBLl), Competition Commission of India, Case No. 50/2013,

66 Telefonaktiebolaget LM Ericsson (PUBL) v. M/s Best IT World, (India) Private Limited (iBall), I.A. No. 17351/2015, CS(OS) 3775/2014 (Delhi High Court).

67 Telefonaktiebolaget LM Ericsson (PUBL) v. Competition Commission of India and Anr, W.P. (c) 5604/2105, (Delhi High Court).

the royalty rate should not be charged on the final value of the entire phone, but on the individual cost of the SEP's used per phone.[68]

Prospective Shift in Paradigm

A glance of the court's order in most of these cases seems to indicate that it is in favor of Ericson, the patent holder in all these cases. However from the perspective of competition law, when any of these matters have gone to the CCI, it has held that each instance is a prima-facie case of abuse of dominant position under section 4 of the Competition Act. Thus we have the CCI favoring small companies as it sees them as victims of abuse of dominant position, while Courts in general seem to prioritize the rights of the patent holders more. Both areas of law being dealt with, separately in isolation have led to elongated litigations between the parties. The law concerning these issues really a question of reconciliation and it is for the courts as well as the Competition Commission to complement the rationale and reasoning of one another's decisions. Currently the major problem with this matter is that the Competition Commission does not have the power to determine royalty rates and this therefore has to be decided by the Court. It is consequently reasonable to assume that there can be two possible outcomes to such a situation. The first one being that the courts continue to adopt the approach that they have been using so far in which case the decisions will continue to favor major players and allow for the setting up monopolies by them, consequently stifling market expansion and the propensity for technological innovation. The second possible scenario is that these matters in question should be determined by the Competition Commission including the issue concerning royalty rates in which case, if recent orders of the CCI are to go by, major players in the communications technology market are likely to be held liable for abusing their dominance in the market.

Conclusion

To conclude one must find a solution to reconcile the aforementioned aspects. General intervention by regulatory bodies is accepted in EU competition law

68 *Supra* note 30.

jurisprudence. In India as per the status quo, CCI can impose penalties on Companies that look to abuse their dominance not In the Ericson case the CCI held that despite provisions in the Competition Act providing for protection of IPR's which in the case concerned Ericson's SEP's, the protection provided needed to be seen in conjunction with competition law and not as an exception to it. It must also be noted that regulatory authorities provide the best solutions for a fundamental reason. Competition law generally is aimed to ensure two things; consumer benefit[69] and market efficiency[70] and considering that both terms are subjective in nature only a body that operates and understands the nuances of an economy from a technical perspective can decide these matters and should be given complete authority to adjudicate on them which isn't the case quite yet. At the same time from a policy perspective more awareness in general has to spread with respect to technology standards and patent protection standards as it is true that reverse hold ups i.e. "hold outs" are as dangerous as hold ups. The problem therefore must be dealt with from the vantage point of both stakeholders; the dominant firms as well as the new companies in order to harmonize the technology market and deal with both competition law as well intellectual property in a conjunctive manner to balance the interests of all the stakeholders involved.

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69 Raghavan Committee Report ¶ 4.4.5; Competition act, 2002 § 4, Explanation (a).

70 Commission's Notice on Relevant Market for the purposes of Community Competition law(1997) OJ C372/5; Case 27/76 United Brands (1978) ECR 207, ¶ 11 .

Effects of Dynamic Pricing on Consumer Protection – A Review

*S. Balasubramanya**

Introduction

We all, as consumers, have faced innumerable situation of differentiated pricing for the same product or service – be it products of daily necessity, like water, or products of rare usage like airline tickets. Now-a-days we even experience this type of dynamic or differentiated pricing in daily usage services like call taxi services like Uber, Ola, etc. Is this justified from a consumer perspective? While the product or service providers may have their reasoning, these type of pricing models is unfair and make consumer very vulnerable that too for items of necessity.

We have seen significant variation in prices offered which at times exceeds over 10 times of lean pricing for the same product. For example a one way flight ticket between Chennai and Bengaluru can be availed as low as Rs.1500 in lean time to as high as Rs.15,000 during peak seasons or festival seasons or the recent Chennai flood season. As can be seem the variation is extremely high and the consumer is being exploited to the hilt by these product & service providers. Let's take another example in a privately held hospital, the prices charged for same nursing service varies significantly as per the rate charged to room of the patient. For instance if a normal nursing care per day costs in a semi-private room costs Rs.200/- per day, the same service in a fully private room costs Rs.500/-. Is such a variation justified from cost perspective or is it sheer exploitation of the patient.

With recent advancement in electronic commerce, the challenge gets much more pronounced as there is no easier way to determine what is the right price for a product or service to be paid for by the consumer

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This paper attempts to review the key challenges of such pricing models on consumer protection.

Dynamic and / or Differentiated Pricing – A Brief Study

Let's analyse the possible models of dynamic and differentiated pricing to assess the impact of such pricing models. The various models fall into predominantly the following criteria:

a. Price linked to demand and supply patterns
b. Price linked to place of sale
c. Price linked to time of the day
d. Price linked to necessity
e. Price linked to obsolescence of the product
f. Price linked to newer commercial models due to technological advances
g. Price linked to complimentary nature of products or services offered

Before we progress to briefly see what each of the above involves with few examples, let's understand what is meant by dynamic pricing.

Dynamic pricing is not a new concept.[1] If the supplier (provider of products and services) is operating in a competitive market place, the supplier will charge moderately, if the supplier is playing in a monopolistic environment, then the supplier will charge as high as possible. As the economist Paul Krugman has pointed out, dynamic pricing is merely a new version of the age-old practice of price discrimination across its customer segments. Yet, what is new about today's form of price discrimination is that current technology has made dynamic pricing not only widely possible, but also commercially feasible. Yet, what is new about today's form of price discrimination is that current technology has made dynamic pricing not only widely possible, but also commercially feasible.

1 Sriram Dasu and Chunyang Tong, *Dynamic pricing when consumers are strategic: Analysis of a posted pricing scheme*, European Journal of Operational Research, 2010, vol. 204, issue 3, pages 662-671.

The dynamic pricing and revenue management is concerned with pricing perishable like airline tickets, movie tickets, food beyond expiry dates, fashion good and so on, assets that cannot be replenished. When these products are not used within that time, they become perished. For example an airline seat not occupied in a certain flight is gone forever as no revenue will accrue from that lost seat which is not occupied. Hence, many product or service providers who want to maximize their revenue may, at times, offer their products even below cost price. We assume that a single product is being sold and consumers differ only in the value they place on the product. The buyers and sellers have information about the number of units for sale, the size of the market, the number of price changes, and the distribution of valuations.

Customers of Amazon.com,[2] the behemoth e-commerce retailer, were recently startled and quite upset when they learned that the online mega-store was charging different customers different prices for the same DVD movies. Amazon, it appears, was engaging in a form of "dynamic pricing" – an innovative pricing mechanism made possible by recent advances in information technology. Even one of America's best known brick-and-mortar companies, Coca-Cola, was reported to have been recently testing vending machines that adjust the prices of soft drinks according to the surrounding temperature. If industry analysts are correct, dynamic pricing is not just a passing phase, but will soon be a vital part of all commerce in the twenty-first century.

Price discrimination may not be all that bad. Indeed, economic theory suggests price discrimination may perhaps promote an efficient use of a society's resources. In many cases, however, efficiency must be balanced against the need to achieve equitable treatment of individual consumers. In such cases, government regulation, either through existing laws or new ones, may be necessary to ensure that the logic of efficiency does not overwhelm the need for fairness. The basic assumption is supply chain shall remain flawless, I mean no one neither the supplier nor the buyer shall go for hording the goods in warehouses.

2 Robert M. Weiss, Ajay K. Mehrotra, *Online Dynamic Pricing: Efficiency, Equity and the Future of E-Commerce,* 6 Va. J.L. & Tech. 11 (2001) at 1.

Online dynamic pricing is possible today mainly because of recent advances in technology. The Internet, and the e-commerce it has spawned, not only provide e-retailers with the ability to transform list prices quickly and easily, the new technology also allows online companies to gather and analyze customer information at an unparalleled pace.

Now, let's understand briefly, each of the pricing models listed above

Price linked to demand and supply

In this model, the prices of products are services are linked directly to supply and demand. The price of the product or service may drop if the demand is less and similarly it will be increased if the demand exceeds the supply. For example airline tickets during festival season or peak time of the day increase significantly when compared to normal demand patters. There is no lower floor or upper ceiling for such price variation based on demand and supply. Customers could not determine what the right price should be.

Price linked to place of sale

The price linked to place of sale can be seen in many products and services. For example same product, for example a popcorn or a coca cola bottle of cool drink would cost differently in normal retail store, a restaurant, or a restaurant within a shopping mall, a movie theatre or airport, railway station etc. Even though the products carry a label listing the MRP – Maximum Retail Price, many shop keepers sell their products at very much differential pricing. Even normal water sold in plastic bottles attached with a brand like Bisleri, Himalaya, etc., sell for much differential pricing depending on place and purpose used for. At times, the prices are so much differential and the consumer has no real choice, say within an aircraft airborne. This is clearly violations of consumer rights and access to alternate product or service.[3] This is really a case of exploitation of the consumer and taking undue advantage of the consumers' helpless situation.

3 Brihan Mumbai Electricity Supply & transport under taking Versus Maharashtra Electricity Commission (MERC) & others Civil Appeal No. 4223 of 2012 in the Supreme Court of India.

Price linked to time of the day

We have seen this phenomenon typically in travel industry or in food industry. Example of lower price when not many people are using that facility and higher price when many people want to use that facility. We have seen special advertisement of lower airfares at middle of the day or very late night; or in restaurants for mid-week buffet or noon show of movies at lower prices. It does not necessarily mean that it costs differently for the provider of that product or service, rather it is priced differently to attract consumers when there is lean period. This again is a highly discriminatory prices for consumers.

Price linked to necessity

This is sheer exploitation of consumers. Bare essentials or necessities priced differently by customer segmentation or place of use or time of use etc. For example lifesaving drugs priced differently to patients in hospital and those who are outside the hospital. Similarly, drinking water priced very differently at different places, time of the day etc. For example the water and other cool drinks priced very high in summer day to tourists when the shop-keeper knows that the consumers would be very much in need of such necessities of life.

Price linked to obsolescence of the product

It is common scene when we see shops putting up 'Closing down Sale' boards to indicate that they are going out of business or the products that they are offering are reaching end of life or very little period is left for the expiry of the remaining life of the product or services. At times, this may be a sales gimmick by the shop keepers to attract customers to their store while in reality this is not the case. Also, we have seem similar instances in automobile manufacturers when they intend or plan to discontinue of a particular product line. Of course from a price point this may be an advantage to the consumer but soon he / she will realise that the price paid is not necessarily right as the parts and/or service required are available only for very short period or may cost significantly high. Invariably the consumers miss out on this key information. This is more prevalent in computer industry and at times the customer is forced to

change a particular technology for sheer technology obsolescence. Further, the manufacturers of products and/or services in computer industry give message to customers that a particular product (hardware or software) is reaching end-of-life and is advised to change the same as the OEM will not support the same any further after certain period of notice given. This is a very significant impact to consumers who use such products or services.

Price linked to newer commercial models due to technological advances

This type of pricing models are very much rampant in the information technology space. Due to recent advent of cloud computing, big data analytics, digital technologies like mobile phone, smart phones etc., certain products and/or services are offered by providers of such products and services in a pay per use models or pay as you use models and many complex commercial models where it is extremely difficult to compare prices offered by different providers and thus hampering consumers to gauge what is the right price to pay. Often many add on services are also included like providing additional security, email support, and so on which makes it more cumbersome to understand what a consumer is paying for. Here there is enormous scope for high level of dynamic and differentiated pricing and treating customers very differently. Examples are – small and medium companies can have their employees payroll processed on a per pay slip based costs, have email service for a corporate based on per employee email and amount of disk usage to keep archived email and so on. How do we protect consumer's interest in such a situation? All these technological advances may bring additional business models wherein consumers' rights and interests are not at all well protected.

Price linked to complimentary nature of the products or services offered

In this model, another product or service is provided in a complimentary nature. For example if an Oracle Database software system is purchased by the customer, its AMC (annual maintenance) is packaged as a complimentary product at an additional price. Many a time the OEM (original equipment manufacturer) does not permit any other third party to maintain and provide AMC. This is again an unfair trade practice and snatches any option to the

customer. This can be seen in the case of Competition Commission of India[4] in which it is evident of bundling of set-top box (STB) by the DTH provider and charging the price they think is right and not enabling customer to have his choice of sourcing the STB by any independent provider.

Effects of Dynamic Pricing

So far in previous sections, we discussed briefly of some of the forms of dynamic pricing. This is an area where significant study has been done in the economics area about the benefits of the dynamic or differentiated pricing by providers of such products and service as to how to maximize profits of such pricing to their own needs. Let's now look at some of the impacts such a pricing models will have on customers and consumers. While, many a time the consumers may be benefited by availing competitive prices in such an environment, it is debatable if the consumer benefits always. Provided below are few examples of some of the ill effects of such models on consumers benefits and rights.

i. Wide variation in prices of same products – for example same bottle of water whose normal MRP is Rs.13 sold, at times, at Rs.50 per bottle based on the place and time. In this case clearly customer is disadvantaged of such a wide price differential

ii. Airline tickets – restrictive or unfair trade practices – in case you buy a ticket in a budget airline, does not permit cancellation of such tickets and forces you to use it for future use paying a change fee and a full fare charge for any such travel. Here the consumer is constrained to his free market rights

iii. Further, when one travels in such budget airline, provision of food and beverages at their own pricing inside the aircraft – no choice for consumer to carry his own food or any other alternative

iv. Purchase of emergency medicines from their own pharmacy attached to the hospital – no transparency on what is charged and how at times

4 Competition Commission of India - Consumer Online Foundation vs Tata Sky Ltd. & Ors. Main Order, Per ... on 24 March, 2011 Competition Commission of India Case No. 2 / 2009 Date: 24.03.2011.

unused medicines are recycled back by unscrupulous providers – customer taken for a ride

v. Unduly varying price for the same travel even in trains – schemes like Tatkal (emergency quota), festive season premium for travel – no choice for customers but to pay exorbitant prices. Under some circumstances a Tatkal (emergency quota) second class ticket was costing more than air-conditioned class and one wondered why such a huge differential rather than a premium of say 50% more or so.

vi. Unwanted product or service pushed through while selling main product – examples in retail or travel insurance and similar products

vii. Differential pricing in education for the same course – in-state and out of state or in-country and out of country

viii. Essential good also charged at differential pricing – for example LPG (Liquefied Petroleum Gas) – sold by governmental authorities charging differential pricing based on economic strata of the society in the disguise of subsidy

ix. On an international basis same products are sold at very different prices in different countries. Long time back when I was involved in import of a computer equipment to one of the nationally important project in India from the USA, it was revealing to know from the equipment manufacturer that they have several price lists – USA List, International List, country specific list and added to that the India specific price list was over 3 times the USA price list. Also, at time they used to tell that third world countries was shipped used and refurbished equipment!!

x. Banking products and services offered at differential prices based on customer profile – there is no uniform models of pricing of their products and services

xi. Nursing services in a hospital for inpatient linked to the price of the room. At times the same service is priced multiple times (2 or 3 times or more) based on private, semi-private or general ward status of the patient rather than based on the cost of service offered to the patient

xii. Very high degree of differentiated and dynamic pricing on electronic channels for same products

Looking at the few examples above, it is very clear that the consumer interests are compromised in almost all situation. We can list below the problems faced by customers or consumers exposed to such high variable differentiated and dynamic pricing models by providers of such products and services.

- ✓ Unable to determine the rightful price under such variations
- ✓ Unable to determine what is being delivered and the catch, if any
- ✓ Need to spend enormous amount of time searching electronic channels – this will also an hindrance for those who are unable to use modern technology tools like Internet
- ✓ Unable to exercise their rights and privileges
- ✓ Put into a situation of helplessness but to pay the differentiated price
- ✓ Extended legal disputes to exercise the rights
- ✓ Feeling a sense of cheated or taken for a ride

In order to address the above, there is need for reforms in consumer protection legal regime to ensure justice to consumers.

Legal Context

Now let's briefly see what are the rights conferred on consumers by the Consumer Protection Act, 1986[6] (COPRA) and determine how to ensure them even in such a highly differentiated and dynamic pricing offered by providers. The rights conferred are as below:

- ✓ Right to Safety
- ✓ Right to Information
- ✓ Right to Choice
- ✓ Right to be Heard or Right to Representation
- ✓ Right to Seek Redressal
- ✓ Right to Consumer Education

Let's also see what the COPRA states for Consumer Protection. In simple terms it is stated as: "*Consumer protection is a group of laws and organizations*

designed to ensure the rights of consumers as well as fair trade, competition and accurate information in the marketplace. The laws are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors."[5]

As per the act, COPRA is defined as below:

Consumer Protection Act, 1986[6] *is an Act of the Parliament of India enacted in 1986 to protect the interests of consumers in India. It makes provision for the establishment of consumer councils and other authorities for the settlement of consumers' disputes and for matters connected therewith.*[7]

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5 Rights under consumer protection act, 1986; http://www.yourarticlelibrary.com/consumers/consumer-rights-under-the-consumer-protection-act-india/8786/.

6 Consumer Complaint Reports, available at http://consumercomplaintreports.com/ (last accessed on April 27, 2016).

7 COPRA Sec.2 (d) *"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 promised, 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 purpose]; The COPRA also defines restrictive trade practices as below:
"restrictive trade practice" means a trade practice which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include— (a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price; (b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services;
COPRA Sec.2(o):
"service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service; "spurious goods and services" mean such goods and services which are claimed to be genuine but they are actually not so;
COPRA Sec.2(r)

(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—
(1) the practice of making any statement, whether orally or in writing or by visible representation

Looking at the COPRA, 1986 and key definitions, it is clear that the law provides for comprehensive customer protection against various aspects of pricing, customer service and unfair trade practices. With increased electronic commerce, on a global scale, for almost any type of goods and services, it is imperative that there is adequate protection to consumers from vagaries of differentiated and dynamic pricing and isolate them from such unfair trade practices and provide means to protect their rights.

Further, the resolution of consumer complaints needs to expedited to ensure timely redress of their grievances to provide necessary compensation for such violations by providers of such products and services. In addition, there should be provision to file consumer complaints for products or services obtained through electronic commerce even if the provider is in different jurisdiction. Unless this is ensured, there will not be justice to consumers who buy their products and services on the global e-commerce environment, which is gaining higher acceptance on a global basis.

Now, let us examine some of the decisions of case laws related to this area.

a. In May 2013, the National Consumer Disputes Redressal Commission (NCDRC) gave a landmark judgement when it levied a fine of Rs.50 lakh on a vendor who charged a customer Rs.75 more than the Maximum Retail Price (MRP) on an energy drink.[8] In addition, in this case, the NCDRC

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which,—

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular standard, quality or grade; (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods; (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have; (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have; (vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services; (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof:

8 *Charged beyond MRP? Move Consumer Court*, Afternoon Despatch & Courier, June 16, 2014, available at http://www.afternoondc.in/rti/charged-beyond-mrp-move-consumer-court/article_112550 (last accessed on April 22, 2016).

also berated the Airport Authority of India for 'working in cahoots' with stall-owners to obtain higher rates for licenses.

b. Overcharging can fetch penalty of Rs.5,000: According to the Legal Metrology Act, 2009, offenders can be made to pay a fee of up to Rs.5000 for the first offence and can be prosecuted and imprisoned up to six months for the second. Bringing up the issue of overcharging, Mumbai Grahak Panchayat chairperson Shirish Deshpande had once remarked , "If 35 lakh liters of milk is traded in Mumbai daily and 70 per cent (24 lakh) of it is overcharged by Rs.one, consumers are fleeced for an estimated Rs.24 lakh daily."[9] That is a huge amount of untaxed money the vendors are charging illegally causing a loss not just to consumers but also to the government.

c. Railways not spared either, fined Rs.10 Lakh: Apparently, it is not just local grocery stores, restaurants and cinema hall that charge more than the MRP. In February 2013, Indian Railway Catering and Tourism Corporation (IRCTC) was slapped a fine of Rs.10 lakh by a consumer forum in Delhi for selling soft drinks at rates above the maximum retail price (MRP) to two customers. The New Delhi District Consumer Disputes Redressal Forum levied 'punitive compensation' of Rs.5 lakh each in two different cases against IRCTC, a subsidiary of Indian Railways and said, it being a government corporation, it "is not expected to be deficient in such matters and cannot come down to level of private dealers." "We have considered the case in the perspective of unfair and restrictive trade practices, by a government company who supplies food articles to millions of rail users who in transit cannot protest and have little choice but to avail services at whatever cost. The IRCTC, being a government corporation, is not expected to be deficient in such matters and cannot come down to level of private dealers," a bench presided by C.K. Chaturvedi ruled. The forum directed IRCTC to deposit a fine of Rs.10 lakh with the Delhi State Legal Services Authority and awarded compensation of Rs.10000 to each of the two complainants. "Keeping in view, the gravity and scale of

9 Ibid.

gain by overcharging in 24x7 Railway operations all over India, we award punitive compensation of Rs.5 lakh to be deposited by IRCTC with Delhi State Legal Services Authority and we award compensation of Rs.10000 (each) to complainant(s)," the forum maintained. According to the two complainants, a retail outlet of IRCTC had sold each of them a bottle of Maaza that had a printed MRP of Rs.12 as against the Rs.15 charged.

Overcharging on edible products apart, it is a common knowledge that local merchants apply a two per cent extra charge when a consumer/ customer makes a payment through debit card or credit card. This too is illegal and the merchants can be fined for this. According to a Reserve Bank of India Notification, merchants are not allowed to levy this extra charge on customers. They are supposed bear these charge themselves and cannot pass it on to the customers.

d. Arbitrary pricing is unfair trade practice: Earlier, in another case, the Maharashtra State Commission held Kamat Hotels and Dhariwal Industries guilty of overcharging. A case was filed when the complainant, who had purchased a one-litre bottle of Oxyrich water, labelled 'specially packed for Kamat Hotels', with an MRP of Rs.25. In the market, the same bottle had an MRP of Rs.15. The Raigad District Forum ruled in favour of the consumer. Both Kamat Hotels and Dhariwal Industries appealed against the order. The state commission observed that there was no difference in terms of the quality, purity, quantity, etc., between the packed drinking water sold at Kamat Hotels and at other places; the only difference was it was packed specially for Kamat Hotels. Thus, there was no qualitative or quantitative difference which would justify the differential pricing. The labelling of the price was merely in accordance with an agreement between the hotel and the manufacturer. The commission maintained that overcharging by 'a private entity' in this manner was unconscionable. Though it didn't qualify as an offence under the Packaged Commodities Rules, discriminatory pricing to exploit consumers was an unfair trade practice. There can't be any justification for 'uncontrolled' and 'arbitrary' overcharging.

e. The Law on MRP: A 1972 Supreme Court order makes MRP applicable to retail goods. Also, The Standards of Weights and Measures Act, 1976, mandate that the price be printed on the package. According to Section 39 of the Act – No person shall: (a) make, manufacture, pack, sell, or cause to be packed or sold; or (b) distribute, deliver, or cause to be distributed or delivered; or (c) offer, expose or possess for sale, any commodity in packaged form to which this Part applies unless such package bears thereon or a label securely attached thereto a definite, plain and conspicuous declaration, as prescribed, of – (i) the identity of the commodity in the package; (ii) the net quantity, in terms of the standard unit of weight or measure, or the commodity in the package; (iii) where the commodity is packaged or sold by number, the accurate number of the commodity contained in the package; (iv) the Unit sale price of the package; (v) the sale price of the package.

f. Under the Consumer Protection Act too, one can file a complaint against retailers who sell at a price higher than the MRP. However, you must keep the receipt here. In Hotel Nyay Mandir vs Ishwar Lal Jinabhai Desai[10] the District Consumer Forum in Bharuch, Gujarat, asked a hotel, which charged more than the MRP on four bottles of a soft drink, to refund the excess amount of Rs.22 collected from the consumer. In addition, it awarded a compensation of Rs.5,000 and costs of Rs.1,000 to the consumer and also directed the hotel to deposit Rs.1,50,000 into the Consumer Welfare Fund. This was upheld by the consumer courts at the state and the national levels.

Looking at all the above case laws, it is clear that the law does not advocate any charges to be levied to customers or consumers above MRP irrespective of the merchant, place or time of the day. Under this circumstance, it is important to ensure that the consumers get adequate protection with respect to price charged and also against any unfair trade practices of merchants.

10 Hotel Nyay Mandir vs Ishwar Lal Jinabhai Desai, RP No. 550 of 2006, decided on December 14, 2010 by NCDRC.

Recommendations

Hitherto, we have seen clearly the effects of various forms of differentiated and dynamic pricing on consumers and impact it will have on their rights from price discrimination and potential unfair trade practices. It is also evident that not all discriminated and dynamic pricing is beneficial to customer or consumers while some of them may aim to provide lower prices but not necessarily protect all rights of customer and consumers.

The author wishes to highlight some of his views and recommendation to overcome these lacunae and to ensure adequate protection to consumer rights from these discriminations.

Following recommendations could be considered to ensure fair competition and also to provide comprehensive protection to consumer rights:

- Establish strong legal regimen to restrict providers of products and services from consumer unfriendly differentiated & dynamic pricing. They should clearly state the implications of such pricing in simple terms understandable by an average common consumer. Consider bringing some more products of daily and common usage under the purview of Essential Commodities Act, 1955 and its recent amendments.
- List those essentials of life like water, food etc., from any form of price variation irrespective of where they are sold and when they are sold.
- Establish really implementable upper cap for prices of these products and services above which they cannot sell those products and services and those who violate may be subjected to very heavy fines and penalties and publicize such defaulters.
- Better awareness & education to consumers of such unscrupulous pricing practices by providers of products and services.
- Ready and available remedy mechanism which is speedy in implementation and resolution.

- Develop a more comprehensive and simpler approach to fight such instances if purchase are made on e-commerce platforms in a global market place to avoid consumers being subjected to international jurisdictions as this will not be easy to understand and Implement without significant litigation costs
- In any pricing model, urge the producers of such products and services to put themselves into the shoes of the consumer and understand the difficulties that the consumers may go through to understand pricing model and avail of the same
- Even today a common man finds it very difficult to understand modern day pricing models and unable to find the right price for products and services he / she looking for due to the very wide spread electronic channels
- Publicize the resolved and settled disputes to the common public as this could act as further education to consumers to take up the cause of their rights against such unfair behavior of providers in taking customers for an unfair treatment
- Lastly, enhance significantly customer and consumer education to protect themselves from effects of differentiated and dynamic pricing and any unfair trade practices by the providers.
- Consumers and customers should adhere to BUYER BEWARE concept very effectively.

Conclusion

Through this paper, the author has made an attempt & effort to highlight the lacunae that prevails in the current differentiated and dynamic pricing offered by the providers of such products and services. Further, the author has illustrated the impacts of such pricing models through few applicable case laws. In conclusion, the author has made few recommendation to overcome such a situation from a consumer perspective.

Author wishes to conclude this paper with a hope that this area is further developed to bring in comprehensive consumer protection against such differentiated and dynamic pricing to enable them to fight any irregularities effectively and bring justice in a speedier manner.

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Medico-Legal And Ethical Issues In Living Donor Organ Transplantation

*Dr. Sanjay Rao**

Introduction

Organ Transplantation, one of the greatest marvels of modern medicine, is the only definitive and life-saving treatment for organ failure. The organs transplanted, in order of frequency include-kidneys, Liver, Intestine, Heart, Lungs, Pancreas-these are referred to as solid organ transplants. At this time the overall success of Transplantation procedures is excellent and recipients can expect long-term survival with an excellent quality of life. Kidney and Liver account for > 98% of all transplants. Current 3-year survival for kidney transplants is 90-93% and for liver transplants is 85%.

Organs are usually retrieved from Brain dead individuals. However, increasing success of Transplantation has resulted in serious shortages of donor organs. At present, less than 1/4th of all patients listed for transplants get a suitable organ.[1] Many patients die while waiting for an organ.

Living Donor Transplantation is an alternative source of donor organs. Here, a healthy, biologically compatible individual (the "donor") volunteers to undergo a major operation, with attendant risks and pain, to donate a kidney or part of their liver for Transplantation into the patient (the "recipient"). This truly is an act of supreme altruism. In Asian Countries, including India, this is the predominant form of Transplantation. However, living donor Transplantation, particularly unrelated donor Transplantation remains controversial.

The major stakeholders in Transplantation are (i) the Recipient, (ii) the Donor,

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1 US Dept. of Health, Statistics of people needing organ transplantation. Organ Procurement and Transplantation Network. Available at https://optn.transplant.hrsa.gov (last accessed on May 24, 2016).

(iii) the surgical and medical teams looking after the recipient and donor and (iv) the State – that includes the Executive and it's arms and the Judiciary.

This Article looks at the Ethical, Moral and Legal challenges faced by each of these players and potential conflicts of interest therein. Ethical and Legal arguments for and against commercialization of organ donation are discussed. An attempt is made to evolve a just system that caters to the needs of and protects all stakeholders-if in-fact such a thing is possible.

The Recipient

The recipient is suffering from a debilitating and life threatening illness. Without a transplant they are at risk of premature death (as with liver failure) or a life seriously limited by invasive treatment (such as dialysis for kidney failure patients). A successful Transplantation in these individuals is life saving and results in major improvements in their quality and duration of life. Therefore, for the recipient, the stakes are highest. For them the whole debate surrounding Transplantation and it's various controversies is not just academic-but very personal!

The potential recipient has only 2 options

i. Register with state organ sharing and allocation organisations and wait for a cadaveric organ to be available. In Karnataka, this role is carried out by the ZCCK (Zonal Coordination Committee Karnataka).[2] The ZCCK maintains a waiting list of persons needing organs and allocates cadaveric organs, whenever they become available, as per a fair and transparent process ratified by all stakeholders. However, cadaveric donations are infrequent and only a small minority receive organs. Similar arrangements exist in most states in India.

ii. Encourage one of his close relatives to donate an organ for him (kidney, liver only). Once the donor has been identified and found medically and mentally fit, donor-recipient pair approach the Authorisation Committee of their State for permission along with an elaborate set of documentation.

2 ZCCK, Purpose of Zonal Coordination Committee of Karnataka, *available at* www.zcck.in/introduction.html. ,(Last an accessed May 26, 2016).

The Committee[3] will review the documentation and interview the pair. The primary aim of the Committee is to ensure that no coercion or commercial transaction has occurred. Once the Committee is satisfied, written permission is given. The hospital and the medical team then carry out the transplant. This process, though thorough, is time consuming and has serious implications for emergency transplants.

As far as the potential donor does not use Immoral, Illegal and unfair means such as coercion and threats, he has the Moral, Ethical[4] and Legal right[5] to strive to obtain an organ for himself. However, offering incentives to prospective donors is considered unacceptable at this time.

The Donor

Live donors account for a majority of kidney and liver Transplantations carried out in India and other Asian countries.[6] Thousands of lives are saved every year by organs procured from live donors. Living donor Transplantation in India is governed by The Transplantation of Human Organs, Act. The Act defines 2 types of organ donors[7]

(i) "Near Relatives"

These are first-degree relatives of the prospective recipients. The original law recognized spouse, parent, children and siblings of the prospective recipient as 'near relatives'. Further amendments to law extended this to include grandparents and grandchildren. However, The Act requires proof of this relationship by documentary evidence and biological tests (includes HLA-B typing and HLA-DR if HLA-B is inconclusive).[8]

3 Transplantation of Human Organs Act, 1994, §9 (5).

4 United Nations, The Universal Declaration of Human Rights, Article 25 Available at http://www.un.org/en/universal-declaration-human-rights/ (Last accessed on May 24, 2016.)

5 Harnam Singh v. State of Punjab & ANR High Court of Punjab and Haryana in Chandigarh CWP 18089 of 2005.

6 De Villa VH, Lo CM, Chen CL, Rationale of Living Donor Liver Transplantation in Asia. Transplant Proc 2008 Jun,40(5), Pg.1337-40.

7 Section 2 (i) of the Transplantation of Human Organs(Amendment) Act, 2011.

8 The Transplantation of Human Organs Rules, 1995.

(ii) "Unrelated Donors":

Any pair that does not satisfy the criteria for "related donor" is unrelated. The Act permits Transplantation from unrelated donors "*by reason of affection or attachment towards the recipient or for any other special reasons*."[9] This is often referred to as donation from an "emotionally related" individual. There is no biological relationship between the pair. The Transplantation of the Human Organs Rules 1995 lays down broad guidelines about the process to be followed to ensure that there exists a demonstrable emotional bond between the pair.[10]

Therefore, in India, there is clear Legal sanction for persons to donate their organs during their life-time provided the recipient is a "near relative" or there is a demonstrable emotional relationship with the recipient, even if not a near relative. Rules in other countries such as USA[11] and UK[12] permit altruistic donations from unrelated donors. However, it is illegal in all these countries and in India, to purchase organs.

Though there is Legal sanction for live organ donation, several Ethical questions remain unanswered such as:

i. Is live organ donation Ethical?
ii. By allowing Live donation between first-degree relatives, it is assumed that it is morally okay to encourage a relative to undertake greater risk-is this justifiable?
iii. Does the related donor really have the choice of an "informed consent"-and the right to refuse?
iv. Is there a possibility of subliminal coercion?
v. Then there is the whole issue of unrelated donations.

This article is an attempt to answer these questions.

9 Transplantation of Human Organs Act, 1994. § 9 (3).
10 Transplantation of Human Organs (Amendment) Rules, 2008.
11 National Organ Transplant Act, 1984 (42 U.S.C.A. §§ 273 et seq).
12 The Human Tissue Act, 2004 and the Human Tissue (Scotland) Act, 2006.

Role of Religion

Religion play a major role in formulating Ethics and public opinion. The current Ethical concepts in organ donation are influenced by European and Judeo-Christian principles. In India and other Asian countries Hinduism, Islam and Buddhism determine public opinion. The human body, a creation of God, is thought to have intrinsic value, being of value simply by existing. Willful damage to the body, the "temple" of the soul, is frowned upon. This attitude has resulted in poor public support for cadaveric organ donation. Asian countries have amongst the lowest rates of cadaveric donations.[13] Live organ donation is thus the only option in these Countries. However none of the major religions in India have issued any explicit statement, either for or against, organ Transplantation.[14] Religious leaders have refrained from taking strong positions in this debate. Their silence is taken as tacit approval and live donor transplants continue. This is a pragmatic stand that has been accepted by all stake-holders.

Ethical Issues

There are significant Ethical and Practical objections to live organ donation such as:

(i) Pain and Risk

The donor has to undergo a major operation, one associated with significant pain, suffering and risk. The process of donation seriously impacts, often adversely, the health and well-being of the donor. There are economic consequences from loss of man-hours, restrictions on type of work he or she can do after surgery. Hence the scars and effects last long beyond the operation itself. The donor operation carries risk of mortality (0.3% for kidney donors and 1% for liver donors)[15] and morbidity (15% and 65% for kidney and liver

13 *Supra* note 6.

14 Mathiharan K , *Ethical and Legal issues in organ transplantation: Indian Scenario,* 51 Med Sci Law 134-140 (2011).

15 Kulkarni S and Cronin DC. *Ethical tensions in solid organ transplantation: The price of success*. 12(20) World J Gastroenterol 3259-3264 (2006).

donation respectively). Several of these donors may require to have transplants of their own later in life.[16] Therefore, organ donation has life-long consequences-physical, medical, social and financial.

(ii) The dilemmas of the "related donor"

By promoting live organ donation from a near relative, the act seems to have put them in an unenviable position. It is thought acceptable for the "near relative" to take on the risks and consequences of organ donation. This amounts to "positive discrimination". It has brought immense pressure to bear on the near relatives to donate for their family members. This pressure can be in many forms: from within the family, by the doctors and from society.

Expectedly, the most vulnerable in the family, usually the daughter-in-law or wife is usually expected to be the donor, putting them in a very stressful situation. On the one hand a near relative is suffering from a life-threatening problem. On the other hand, she is being asked to put herself through significant pain and suffering in order to safe his life. The psychological turmoil she goes through is personal. It is in this environment, she is expected to make a rational and informed decision about being a organ donor. Can there ever be a "rational decision" in this scenario?

An unsuccessful outcome is often blamed on the donor-implying that there was something wrong with the donor and/or the organ. This results in life long stigma from other relatives and family members. It is not unusual to see families' breakup after an unsuccessful transplant. The donor too bears guilt of an unsuccessful outcome. She blames herself for her inability to save her near relative. This guilt is carried life long and can be devastating for her. Thus despite performing a truly selfless act of organ donation, she suffers the emotional consequences all her life.

16 Gibney EM, Parikh CR, et al, *Age, Gender, Race and Association with Kidney Failure Following Living Kidney Donation*, 40(5), Transplant Proc 1337-40 (June 2008).

However, donation to a near relative does benefit the donor.[17] The positive feeling of performing a selfless humanitarian deed, of saving someone's life and being held in high esteem by members of the family and society are positives for the donor.

Hence, there are significant Ethical issues with "near relatives" becoming organ donors. The Act assumes that the "feel good factor" after organ donation is alone sufficient compensation-this is debatable!

Unrelated and Commercial Donors

The greatest debates in living donor organ Transplantation, however, are about the role of the unrelated donors. Major debates center on (i) whether an unrelated donor make a truly altruistic organ donation;(ii) exploitation and commodification;(ii) undermining the principle of free donation, (iv) autonomy and consent;(v) violation of integrity of body and certainty of risk.

The debate of receiving organs from unrelated donors for a consideration remains unresolved. Allowing unrelated, non-altruistic donation has the potential to significantly impact on the organ shortage today and improve the survival of patients with organ failure.

The World Health Organisation clearly states that sale of organs violates the Universal Declaration of Human Rights and prohibits payments for organs and advices physicians not to transplant organs if they have reason to believe that the organs concerned have been the subject of commercial transactions.[18] However, despite this, ground realities are different.

The question is of how likely is it, that someone in his right mind will subject himself to major surgical intervention that has life-long physical, psychological and social consequences, purely from altruistic intention towards an unknown

17 Spital A, Taylor JS, et al., *Living Organ Donation: Always Ethically Complex*, 2 Clin J Am Soc Nephrol 203-204 (2007).

18 WHO, Guiding Principle 7,Guiding principles on Human organ transplantation. *Available at* www.who.int/ethics/topics/transplantation_guiding_principles/ en/index1.html (Last accessed on May 24, 2016).

person. It may happen on occasion, but this is the exception rather than the rule. Harvey doubts if majority of willing, non-related potential organ donors who will give without payment.[19] Even in the case of related donors, there may be other motivations than just pure altruism.

So for all practical purposes, in India and our society, such extreme altruism is rare. To put it simply, people donate in exchange for money or financial gain.

Debates have ranged from medical (increased risk of rejections, long term donor risks), Ethical (patient autonomy, non-maleficence,), Moral (religious biases and dogma and Legal (various acts, laws). Arguments both for and against still exist. There are arguments for permitting sale of organs.[20]Such sale would increase supply of a valuable resource, save lives and simultaneously provide income for those with little else to sell. Libertarian thoughts and Autonomy advocate persons to dispose of their body parts as they deem fit.However, there are several strong objections and counter-arguments against sale of organs such as:

(i) Pain and Risk:

The organ retrieval procedure is a major surgical intervention that carries immediate and long term risk.[21] This, however, by itself is insufficient justification to ban organ sale, as society pays and revers others involved in painful and high risk activities (such as firefighters, soldiers). Both organ sale and such high-risk professions have equivalent good consequences (of saving lives)-so difference in perception seems unjustified.

(ii) Exploitation and commodification:

Usually, the relationship between organ buyer and seller is unequal and exploitative. Breecher calls it *"exploitation based on making a commodity*

19 Harvey J, *Paying Organ Donors*, 16 Journal of Medical Ethics 119 (1990)

20 Wilkinson S and Garraed E, J , *Bodily Integrity and the Sale of Human Organs*, 22 Med Ethics 334-339 (1996).

21 Kulkarni S and Cronin DC. *Ethical Tensions in Solid Organ Transplantation: The Price of Success*, 12(20) World J Gastroenterol 3259-3264 (2006).

of human beings."[22] This argument, though, is not entirely tenable. What if there is no exploitation and the price paid make it worth the effort? What if the organ seller is well educated, wealthy, rational and well informed and not paid a large sum of money? Besides, several other exploitative practices are common - such as paying less than minimum wages to workers.

(iii) Undermining Practice of free donation:

Abouna cautions that marketing of human organs will eventually destroy the present willingness for altruistic organ donation.[23] All donors would expect payment and lose opportunity to enter a "giving relationship" with another- one that has Ethical, Moral and social value. Given the high risk of pain and risk involved, Harvey opines that free donation (except by relatives who might waive payment anyways) is very unlikely.[24] However, as a counter argument, it can be said that true altruistic donor can donate and also reject payment.

(iv) Autonomy and Consent:

Autonomy, the ability to make choices for oneself, is a vital component of modern Ethical dialogue. The individual's ability to decide for themselves is emphasized in modern societies, unless the decision is damaging to someone else or the society at large. In case of the commercial donor, the choice is actually directly benefitting another individual. By not allowing commercial donation, society is acting 'paternalistic' and depriving the individual of her autonomy. The decision to sell one's organ is difficult and arises out of sheer financial desperation. By preventing these persons from doing an honorable action in donating their organ for someone else's benefit, they are being double hit-neither is the society helping them, nor are they being allowed to help themselves in the only "honorable" way available to them. This is the doctrine of Double Bind.[25]

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22 Breecher B, *The Kidney Trade: or, the Customer is Always Wrong*, 16 Journal of Medical Ethics 122 (1990).

23 Abouna G et al, *The Negative Impact of Paid Organ Donation*, 16 Journal of Medical Ethics 167 (1990)

24 Harvey J., *Paying Organ Donors*, 16 Journal of Medical Ethics.119 (1990).

25 Radin MJ, Contested Commodities (Harvard University Press, 1996).

The absence of coercion and manipulation is required for genuine consent. It is argued that the process of organ donation is so painful and unpleasant, that nobody would willingly subject himself or herself to it without a strong reason. Harvey asks if the donor really has a choice - there being major social and familial expectation- this alone can take away autonomy of choice.[26]

(v) Violation of body integrity: 'certainty and risk'

Body integrity has intrinsic value, which is violated by organ retrieval. In case of commercial organ donation, the entire process of organ retrieval makes the donor a passive object-much like an organ farm. There is no autonomous action (after the initial decision of course) on the part of the donor-he is merely a source, a commodity. Therefore, paid organ donation has 100% incidence of invasion of body integrity. The act is passive and submissive. There is nothing created or made, as opposed to "risky labour".

Commercial Organ Donation

Rate of success after commercial Transplantation is unclear. The Literature here is mixed and largely depends on the source of these publications. A Canadian experience suggests that patients who receive kidneys from commercial donors abroad do worse that those who receive organ from a related donor. Those that had procedures abroad (mostly in 3rd world countries) had number of surgical and infection related complications and required prolonged hospital stay.[27] However, these differences could be related to the technique and medical facilities in those places where the transplant was carried out, rather than something directly related to the actual process of transplant in itself. Also experience from Iran, the only country where commercial Transplantation is Legal, suggests no difference in outcomes.[28]

26 Harvey J. *Paying Organ Donors*, 16 Journal of Medical Ethics 118 (1990).

27 Prasad GV et al, *Outcomes of Commercial Renal Transplantation: A Canadian Experience*, 82(9) Transplantation 1130 (Nov 15, 2006).

28 Ghods AJ, Savaj S.Iranian, *Model of Paid and Regulated Unrelated Kidney Donation*, 1Clin J Am Soc Nephrol 1136-1145 (2006).

Allowing commerce in Human organs is a potentially dangerous problem. Even with very limited commercial dealings in organs-often on the fringes of Legality and Morality-several undesirable and at times dangerous practices have arisen. These include organ trafficking, transplant tourism, a black market for organs, forced donations as from prisoners.

Organ Commerce has major repercussions for the society as a whole. Nancy Scheper-Huges,in an article titled 'The End of the Body"-The Global Traffic in Organs for Transplant Surgery', states *" by their very nature, markets are indiscriminate, promiscuous, and inclined to reduce everything , including human beings, their labour and even their reproductive capacity to the status of commodities, to things that can be bought, sold, traded and sometimes even stolen…."*[29]

All commerce and all societies need a Moral anchor to ensure fairness and an equitable distribution of resources. Unfortunately, these Moral anchors are largely missing. The real dilemma, as per Mr. George Soros, a market proponent and self-made billionaire "*is one of uneven development. We can have a market economy but not a market society. The development of a global society has lagged behind the growth of a global economy.*"[30]

As with most ineffectively regulated commercial transactions, exploitative practices are unavoidable. The balance in the organ seller and buyer equation is sharply biased in favour of the buyer. 'The Global Traffic of Human Organ', a report submitted to the House Sub-Committee on International Operations and Human Rights, US Congress on June 27, 2001 states that *"The growth of medical tourism for transplant surgery and other advanced procedures has exacerbated older divisions between the North and South and between the haves and have-nots. In general, the flow of organs, tissues and body parts follows the modern routes of capital: from South to North, from third to first world, from poor to rich, from black and brown to white and from*

29 Nancy Scheper Hughes, *The End of the Body: the Global Traffic in Organs for Transplant Surgery*, Berekely,CA, 1998.

30 George Soros, *Towards a Global Open Society*, The Atlantic Online (Jan 1998). *Available at* http://www.theatlantic.com/past/docs/issues/98jan/opensoc.htm.

female to male bodies."[31] Hence, in the current climate, opening organ Transplantation to commerce is fraught with danger and cannot be permitted. There have, however, been arguments that these forces of commerce can be controlled through effective regulation and policing. This bears a closer look.

In an ideal world, a society in which fairness and honesty are basic foundations of human interaction, it is possible to regulate these market forces. Laws and institutions can be constituted to ensure that the interest of the organ seller is protected and there is no exploitation on the basis of socio-economic factors. Cantarovitch suggests that organ Transplantation depends on a social contract and social trust and it requires national and international law protecting the rights of both organ donors and organ recipients. [32] The ground reality, however, is that most commercial donations happen in Countries that score poorly on the Corruption Perception Index compiled by Transparency International. On a scale of 0-100 (100 being the cleanest score), India gets 38 and ranks 76th in a list of 168 countries.[33] Corruption is endemic and it is naive to believe that regulators of paid Transplantation would remain fair. There have been reports of large-scale corruption and bribes[34,35] with the current Authorisation Committees. In the Indian scenario, despite all the good intention of the policy makers, the organ donor will continue to get a raw deal and suffer both socio-economically and physically.[36] Frequent reports of kidney scams and other instances of systemic corruption in India leave no confidence amongst her citizens that things will be fair and the less privileged will be looked after. Therefore, regulation of market forces may be possible in advanced societies of the West; it is unlikely to have much impact on limiting unethical practices in India.

31 Nancy Scheper-Hughes, *The Global Traffic in Human Organs*, 14 Curr Anthropology 191 (April 2000).

32 Cantrovitch, *Persons and Their Bodies: Rights, Responsibilities and the Sale of Organs*, Philosophy and Medicine 1-32 (2002).

33 Corruption Perceptions Index 2015, Transparency International. *Available at* https://www.transparency.org/cpi2015/ (Last accessed on May20,2016).

34 Vivekananda Jha, *Paid Transplants in India; The Grim Reality*, 19 Nephrol Dial Transplant 541-43 (2004).

35 Nishtha Chugh, *Need a Kidney? Inside the World's Biggest Organ Market. Available at* http://www.aljazeera.com/indepth/features/2015/10/kidney-worlds-biggest-organ-market-151007074725022.htm), (Last accessed on May 16,2016).

36 Goyal M, Mehta RL, Schneiderman, Sehgal AR, *Economic and Health Consequences of selling a kidney in India,* 288 JAMA 1589-93 (2002) .

The Role Of The Medical Fraternity

Though Transplantation is a great innovation of modern medicine, it has not been without controversy. The medical fraternity is at the center of all these controversies. Doctors involved with Transplantation have been idolized and demonized.

Three major Ethical principles that should guide transplant professional's to living donors are beneficence to the recipient, non-maleficence regarding the donor and the donor's right to autonomy. Unique to this situation is the fact that the first two-beneficence to the recipient and non-maleficence for donor are opposing demands. The third, donor autonomy, is the balancing factor and hence much attention must go into understanding the donor's motivation and concerns.[37]

i. Duty towards the patient: The doctor has a professional responsibility towards his patient's medical care. It is the doctor's primary responsibility to preserve life and to provide his patient with options of treatment including Transplantation.

ii. Duty towards the donor: Similarly, the doctor caring for the donor has his/her best interests in mind. He has to ensure that the donor clearly understands the risks and consequences of organ donation-both short and long term. He also has to give the donor an opportunity to honorably withdraw from donation if the latter does not want to donate. This is often done by making the donor medically unsuitable for donation-thus avoiding a potential conflict within the family.

iii. The Hippocratic oath: In keeping with the time- honoured traditions of medical ethics, the medical fraternity is expected to follow the Hippocratic Oath and put the welfare of his patient uppermost in all decision making.[38]

37 Reese PP, Caplan AL, Kesselheim AS, Bloom RD, *Creating a Medical, Ethical and Legal Framework for Complex Living Kidney Donors*, 1 Clin Journal AM Soc Nephral1148-1153 (2006).

38 *Hippocratic Oath*, Available at https://en.wikipedia.org/wiki/Hippocratic_Oath , (Last accessed on May16, 2016).

iv. Primum non nocere:[39] ("first do no harm"- Latin): This basic concept of non-maleficence draws inspiration from the Hippocratic Oath ("to abstain from doing harm"). The health of the donor takes precedence over all else in the live donor transplant situation. If there is any issue with the donor-at any stage during the evaluation, surgery and treatment, there should be no hesitation to call off the whole transplant procedure.

v. Legal Duty: The medical fraternity is also required to follow all laws, guidelines and protocols that are in place at the time to govern living donor organ transplant. Careful records of all patients and donors must be maintained.[40] Results, both good and adverse, have to be audited and corrective measures taken when required. All records should be made available to a competent authority when asked for.

vi. Moral Duty: It is in everyone's interest that the whole procedure of organ donation and Transplantation be transparent, Moral and Ethical. The medical fraternity has a Moral obligation not to participate in shady practices and bring to the notice of competent authorities any irregularities that become apparent during his practice. This is the only way that society will retain confidence in the medical fraternity and the whole process of Transplantation.

vii. Code of Medical Ethics: It is obligatory for the physician involved to follow in letter and in spirit, the Code of Conduct prescribed by the Medical Council of India.[41]The following regulations are relevant to Transplantation: (i)Observe various laws, including the Transplantation of Human organs Act. (ii) Duties to physicians to their patients, (iii) Withdrawing life support. WHO unambiguously instructs physicians not to transplant organ if there is reason to believe that the organ has been subject to commercial transaction.[42]

39 Primum non nocere, Available at https://en.wikipedia.org/wiki/Primum_non_nocere, (Last accessed on May16, 2016).

40 Article 1.3, Part B of the Indian Medical Council (Professional Code, Etiquette & Ethics) Regulations, 2002.

41 Indian Medical Council (Professional Code, Etiquette & Ethics) Regulations, 2002.

42 *Supra* note 18.

The Role of The State

The State, both the Executive and the Judiciary have several responsibilities in the situation. These include:

i. Responsibility towards the recipient: State has Constitutional obligation to care for the potential recipient-either directly or by creating laws that allow him to do so for himself. As signatory to UN and WHO declarations, the State is again responsible to provide or help provide care to recipient

ii. Responsibility to donor: At same time, protecting donor and preventing his/her exploitation. Protecting the fundamental rights and health of the donor and his long term health and well being

iii. Maintaining Law and Order: It is the State's duty to prevent illegal activities such as organ trade and organ trafficking. It should decrease opportunity of state officials to immorally benefit from the desperation of the patients by simplifying processes and making them transparent. This, the State has attempted to do by enacting the Transplantation of Human Organs Act in 1994 and making amendments from time to time. The latest being in 2011.[43] As a signatory to various UN and WHO treaties, Universal Declaration of Human Rights[44] and The Declaration of Istanbul on organ trafficking and transplant tourism[45] India is committed to promoting safe and Ethical Transplantation for it's citizens. India is particularly vulnerable, as the need for donor organs is growing geometrically. Lack of clarity and vision amongst policy makers in government can make a bad situation worse for all parties involved in organ Transplantation.

Current Situation on The Ground

The current situation on the ground in India is unsatisfactory. There is a very large, unmet demand for organs. As per a 2014 report, only 3500 of amongst

43 The Transplantation of Human Organs (Amendment) Act, 2011.

44 *Supra* note (4).

45 *Organ trafficking and Transplant Tourism and Commercialism: The Declaration of Istanbul*, 372 Lancet 5-6 (2008).

21000 needing it get a renal transplant annually in India.[46] There is, hence, a large unmet demand for organs. In case of livers and in children, from our own experience, this gap is even larger.[47] Live donors account for most transplants. "Kidney scams" are frequent and have been reported in several states and cross-border too.[48] Persons involved in these scams move from state to state with impunity-repeatedly cheating law and police. They cater to Indian, NRI and foreign nationals-often using intimidation and deceit to secure organs for their clients.[49] The Act has remained unsuccessful in limiting these illegal transplants. There are examples of Authorisation Committee members themselves being involved in these rackets. Large sums of money change hands and there are widespread allegations of corruption and corrupt practices.[50]

Lacunae in the THOA

THOA lays the foundation of Transplantation by defining various essential concepts such as brain-death and putting in place a system to regulate and monitor organ transplants in India. Though a comprehensive legislation has been drafted with a focus on preventing illegal organ trade. Thus creating tortuous, ambiguous rules, open to unreasonable interpretation. Several recent cases and ruling have highlighted this fact.[51] In *Balbir Singh* v. *Authorisation Committee and Others*, Justice Sarin writes "*Stringent requirement and conditions were prescribed under the Rules to prevent unscrupulous and commercial practices. These have to be harmonized with the emergent needs of a critical patient requiring Transplantation which necessitates a quick and responsive mechanism".* Genuine related donors have to go to

46 The Hindu, Jan 18,2014, Available at http://www.thehindu.com/todays-paper/tp-national/organs-transplant-act-notified/article5588655.ece. (Last accessed on March 12, 2016).

47 Rao S, D'Cruz AJ et al, *Pediatric Liver Transplantation: A Report from a Pediatric Surgical Unit*, 16 Journal of Indian Assoc Pediatr Surg 2-7 (2011).

48 *Kidney Selling Racket Busted,* Times of India, Mar 15,2016 Available at http://timesofindia.indiatimes.com/city/vadodara/Kidney-selling-racket-busted/articleshow/51402336.cms. (Last accessed on March 15, 2016).

49 "*Gurgaon Kidney Scandal"*, Available at http://en.wikipedia.org/wiki/Gurgaon_kidney_scandal, (Last accessed on March 16, 2016).

50 Ashok Sethi, *New Rules for Kidney Donation*, The Tribune (Dec 26,2002). Available at http://www.tribuneindia.com/2002/20021226/main6.htm. (Last accessed on March 16,2016)

51 Balbir Singh v. The Authorisation Committee and Others, AIR 2004 Delhi 413.

extraordinary lengths to get permission for transplant,[52] while the unscrupulous organ traders and middlemen continue to subvert the system at will and with incredible ease.[53] Ambiguity in the Rules and inconsistent interpretation has created difficulties for the Authorisation Committees. The "emotionally related" clause has remained the major loophole. Though the spirit behind the law is clear, in practice, demonstrating emotional attachment is very difficult.

i. Methods to demonstrate "emotional attachment" have been ineffective. There is no tool that can measure or quantify objectively this attachment. Things such as old photographs, affidavits stating the bond, marriage invitations etc. are all open to manipulation. The connivance of the local government staff and their willingness to be bribed, has allowed for creation of any certificate at any time. Marriage certificates, birth certificates, affidavits have all been forged frequently. Other more absurd ruling such as "sharing of kitchen" have also been notified and then quietly removed.

ii. Even when THOA Rules have been followed faithfully by the Authorisation Committee and applications rejected on the grounds of such rules,[54] Courts have overturned these decisions'.[55] Courts have often favoured appellants even though the facts of the matter suggest that the Authorisation Committees have followed the Rules faithfully. It is very difficult, perhaps, for the Courts to deny a sick patient a good treatment and they seem to interpret the rules accordingly.[56] The same difficulty is faced by the Authorisation Committee , explaining perhaps, the low rejection rate of applications for unrelated donation.

iii. This weakness in the Law and it's implementation has been taken advantage of. Unrelated transplants, for consideration, continue unabated even after THOA was notified and implemented. In the words of Dr.Mani, a senior Nephrologist from Chennai: *"The law, which was*

52 Jha V, *Paid Transplant in India: the Grim Reality*, 19 Neprol Dial Transplant 541-543 (2004).

53 Mani MK, *Letter from Chennai*, 15 (5) Nationl Medical Journal India 295 (2002)

54 Malligava and Others v. State of Karnataka, ILR 2005 KAR 1557.

55 *Ibid.*

56 *Supra* note 51.

meant to prohibit commercial dealings in human organs, now provides protection for those very commercial dealings." [57]

iv. There is a large onus of ensuring genuineness of documents and proof of 'relationship' or 'emotional attachment' on the Authorisation Committees, hospitals and doctors involved, none of whom are competent nor have the expertise for this. This verification is an investigative process and must be carried out by competent agencies such as the police. However, the police department has claimed helplessness as they simply do not have the manpower to carry out this verification process. Their involvement will unduly delay the whole process-a year's time is what they have asked for!.

v. Regular media exposes and trial have put the entire system on the defensive. There is an element of mistrust in the system and unfortunately this is not misplaced. Transplantation has become a high risk endeavor and it's growth has been stifled. This is unfortunate, as there is truly a pressing need for more transplant centers to be set up.

In its current form TOHA has been unable to put in place an efficient, friendly, responsive system to help those who genuinely need organ transplants. Neither has it prevented unscrupulous illegal practices such as organ trade. It has not created a environment to encourage growth of transplant programs to serve the increasing needs of the community. It is unfair, however, to put the entire onus on poorly drafted legislation. THOA is a progressive, social legislation and has codified several important issues. It has tried to bring a uniformity of process across the Country and in this has seen some success.

A large part of the problems related to THOA can be attributed to the fact that:

i. Health is a State list subject. Though THOA is a central legislation, it has been left to the States to implement. Each state has gone about it in it's own way, with varying degrees of success. States that have done very well on cadaveric donation, such at Tamil Nadu, have also seen the worst 'kidney scams'.

57 Mani MK, *Making an ass of the Law*, 19 Natl Med J India 242 (1997).

ii. There is Systemic Corruption in Society: India ranks very poorly on Corruption Indices (76th of 168 countries).[58] This general prevalence of corruption and the Society's ability to put up with it will continue to subvert even the best-written laws and the best institutions. Unfortunately, there can be no citizen friendly top-down system. Society must force good governance, Government cannot force good Society. Unfortunately, THOA tries to do the latter and fails spectacularly.

The Way Forward

The Ethically perfect way is that every person needing an organ gets an organ that is of good quality and match, whenever required by him/her, even at short notice, from a cadaveric donor. There are simply not enough cadaveric organs for this to happen. Organ trade, like other exploitative practices has a social bearing and cause. Until such inequalities and deprivation exist in society, there will always be persons who are forced, by their circumstances, to become victims, often knowingly, in these transactions. The only holistic way to remove organ trade is to do away with all inequalities in society- an utopian dream. So driving forces for organ trade to exist will remain with us in the foreseeable future. A pragmatic approach that protects the interests of all parties, especially that of the vulnerable potential organ donor, is required. Two opposite approaches that could be considered.

i. Do not allow any live donation: This approach will prevent risk to donor, do away with all Ethical dilemmas about live donation and take away, in one fell sweep, all issues related to unrelated donation, organ trade, organ trafficking. However, several patients with organ failure will die. Genuinely altruistic donations –say from within parents and their progeny-will also not be possible and many potentially good and Ethically sound donations will not happen

ii. Freely allow live donation: This approach will lead to a sudden and rapid enlargement of organ pool resulting in better survival for patients needing organs. However, the poor will probably be the exploited. Voluntary

58 *Supra* note 33.

donations will dramatically decrease. There will result in increasing commodification and commercialization of the organ donation (trade). Both these are not desirable outcomes. The trick is to find a compromise in between these two extreme positions, using the principles of "Justice"[59] . The solution could be to find a Morally just and Ethically sound way of allowing for increased live donation of organs.

The options that exist today are:

i. The THOA way: This clearly unacceptable in its current form as evidenced by the preceding discussion. A system of limited incentives for organ donors. So far, the general mood has been against paid donation. However, it is certain that staying with a cadaveric/altruistic donor model will never be able to meet the rapidly increasing demand for organs. Hence, the topic of paid donation has come up for renewed debate. A few are discussed below.

   a. **Iran Model:** Iran is the only nation that has adopted a policy of a compensated and regulated living-unrelated donor renal transplant program. The system has been in force since 1998 and is administered via an "organ-exchange" where persons who need organs and those who wish to donate register. This exchange is administered by a government appointed committee. All members of this committee are organ failure patients themselves. The system encourages both directed and non-directed donation. A corpus has been created from the recipient payments, government funding and donations from Charities to support Transplantation in the economically weaker sections. Iranian nationals are not allowed to donate to foreign nationals. Reports from Iran suggest that the system has functioned well. Iran has on waiting list for kidney Transplantation. The system is said to be fair and protective of interests of the poorer members of the Iranian society-both as donors and as recipients.[60]

59 Beauchamp T, Childress JF., Principles of Biomedical Ethics (7th edn. Oxford University Press, 2013).

60 Ghods AJ, Savaj S., *Iranian Model of Paid and Regulated Unrelated Kidney Donation*, 1 Clin Journal Am Soc Nephrol 1136-1145 (2006).

b. **USA Model:** In 2012, a National Institute of Health Working Group on Incentives for Living Donation submitted it's report. The report proposed standards for an Internationally acceptable system of incentives for organ donation. Elaborate systems have been suggested to regulate this process and ensure fairness and transparency. Interests of the less privileged have been specifically looked into and protected.[61]

c. **The ART model in India:** The Assisted Reproductive Technologies (Regulation) Bill, 2010 is currently pending before Parliament. The bill has been drafted to regulate and monitor the practice of Assisted Reproduction (including surrogacy) in India. Specific permission has been given for advertising for gamete donors and surrogates and for paying them for services rendered.[62] Steps have been defined to protect the interests of all parties involved-the surrogate, the biological parents and medical teams involved. Thus commercialization of body parts/tissues has already been initiated in India and with the passage of this Bill, will get Legal sanction. Similar provisions could be made for the paid organ donor.

d. **Adaptation of the ART model to Organ Transplantation:** The State creates a nodal agency for registrations from prospective organ donors. This has to be non-directed in case of unrelated donors. Careful donor evaluation-medical, social and economic should be done. An independent donor-advocate looks after the interest of the donor at all times. A "cooling off period" of about a month should be built into the system to allow time for the prospective donor to review her choices. This nodal agency will maintain the donor list. The waiting list of patients desiring a transplant should be maintained by an independent second agency. A donor to recipient matching program-that is computerized and not open to manipulation should be put in place. Considering the software process in India, this should be imminently possible. The recipient pays predefined charges that will cover recipient and

61 *Incentives for Organ Donation: Proposed Standards for an Internationally Acceptable System*,; 12(2) Am J Transplant 306-312 (Feb 2012).

62 Chapter 5, ART Bill 2010, Clause 26(6).

donor operation and care, donor reward, creation of a long term donor health insurance policy and of a corpus to subsidize similar transplant operations and care for poor patients. There must exist complete disconnection between the donor and recipient agencies so that the donor and recipient are not identified and privacy is maintained.

However, in a Country like ours, where corruption is high, creating institutions that are honest and not amenable to manipulation remains a challenge. But it is not impossible. We as a nation are capable of creating and fostering robust institutions-the Election Commission and the Lokayukta Institutions are two such examples. What is required is a combination of enlightened civil society, honest executive and robust public institutions.

Conclusion

Organ Transplantation has become a victim of its own success. There is severe, worldwide shortage of donor organs. Several patients die before a suitable organ to become available. Living donation has become an important source of organs. This shortage of organs has resulted in several undesirable practices such as organ trade, organ black markets, organ tourism and coerced donations. Society and it's laws have not been able to decisively curb these unethical and illegal practices. Protecting vulnerable and deprived persons from becoming unwitting victims of this market, and ensuring that deserving underprivileged patients too are not deprived of organs has been a challenge that faces all nations. Most nations have banned frank commercialization of organs-however, all have left some ambiguity in matters of payment and reimbursement to the donor. In India, the "emotionally related" donor clause in TOHA provides this loop hole.

In India too, live organ donation seems to be the only way forward. India is the diabetes capital of the world. The incidence of kidney diseases and need for organ transplant is going to skyrocket. It will be increasingly difficult to meet this demand in the current organ donation milieu. The radical step of commercialization of organ donation, offering financial incentives and long term security to donors, as in the Iran model, is one way of meeting this

shortfall. Such steps towards commercialization of donation of semen and eggs have already been incorporated in the ART bill.

However, any system relies on trust and transparency to be acceptable to society. In a country like India, where corruption is rife, faith in systems and governance is low. There is a serious risk of organ donation systems being subverted, a discriminative practice being Legalised and numerous poor organ donors continuing to suffer. Inequalities in our Society will truly make the vulnerable and poor even more so.

D.Rothman,[63] based on Goyal's and Lawrence Cohen's studies of paid kidney donors in Chennai said *"paid organ donation was less to do with raising cash towards some current or future goal, than with paying off high interest debt to local moneylenders"-those surveyed were frequently back in debt within a few years".* Rothman[64] further states *"far then from being the win-win situation which some supporters of an open market describe, the picture of organ selling which such studies illustrate is a zero-sum game in which any advantage to one participant necessarily leads to disadvantage to one or more of the others. The organ recipient is the only one who stands a chance for gain"*

In India, Cadaveric Organ Donation has the potential to provide a major number of organs required. Shroff,[65] looking at potential pool of cadaveric donors, suggests that even harvesting organs from 10% road accident victims will do away with need for live donation. He suggests promoting deceased donor organ transplants, rather than trying to unleash Legalizing commercial donation".

In more developed and open societies, a system of incentives for organ donors may work to ease the organ shortage. However, in India, the cadaveric organ donor base remains untapped. A shamefully small number of cadaveric organs

63 Rothman D, *Economic and Health Consequences of Selling a Kidney*, 288 JAMA 164 (2002).
64 *Ibid*.
65 Shroff S, *Legal and Ethical Aspects of Organ Donation and Transplantation*. Indian Journal of Urol. 348-355 (2009).

are available for donation. A systematic and massive effort from the State, NGO's, Medical fraternity and Civil Society is required to encourage cadaveric organ donation. This is an achievable goal-as has been demonstrated in case of voluntary blood donation and cornea donations. Laws and rules need to be created to facilitate cadaveric organ donation. Until an honest and all-out effort is made to encourage cadaveric donation, Legalizing commercial organ donation is not acceptable.

Eventually organs for all kidney transplants and most liver transplants should come from cadaveric donors. Live donor transplants must be reserved only for very special situations such as emergency liver transplants and liver transplants in small children.

This is a huge challenge that we as a Society will need to address.

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Driving Innovation For Neglected Diseases: A Policy Perspective

*Ms. Rhyea Malik**

Introduction

As Drug Development is Expensive and Lengthy, and does not necessarily result in a successful outcome, to make the process appealing and to push drug companies to undertake said expensive and lengthy Investment, the system of patents was conceived. Armed with a patent, a drug company can enjoy Legitimate Monopoly for its patented drug for a period of twenty years, and thereby recoup its drug development expenses and more qua monopolistic pricing. Whilst the system of patents has proven to be effective in achieving its objective of promoting Drug Development, said efficacy has been largely skewed in favour of 'global diseases'.[1] This is because for Drug Companies, where the corresponding purchasing power of their target consumers is low or diseases targeted are rare, then as against their monopolistically high prices, their drugs don't find a ready purchase in the market and considering that largely all Drug Companies are driven by profits and not public welfare said companies usually find Investments targeted at such markets to be commercially unviable, and hence are reluctant to venture thereto.[2] Thus, with its Dependence on the vagaries of market forces, the system of Patents has turned out to be grossly inadequate for incentivizing investments on diseases inflicting the economically underprivileged or rare diseases affecting a fraction of the World's Population, also otherwise aptly known as 'neglected diseases'. Such Inadequacy has in turn resulted in either stagnation or, at best, imbalanced drug development for

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1. Paul Wilson and Aarthi Rao, "*India's Role in Global Health R&D*", Centre for Global Health R&D Policy Assessment, Results for Development Institute. *Available at* http://healthresearchpolicy.org/assessments/india%E2%80%99s-role-global-health-rd (Last accessed on February 10, 2016).

2 Reji K Joseph, *The R&D Scenario in Indian Pharmaceutical Industry*, RIS Discussion Paper 176 (December, 2011). *Available at* http://www.ris.org.in/images/RIS_images/pdf/dp176_pap.pdf (last accessed on February 10, 2016.)

neglected diseases, which is an unfortunate occurrence indeed as it belies the universality of the healthcare assured under the Indian Constitution.[3]

It is for this reason that it now befalls upon our government to come up with new policy solutions for addressing the aforesaid underlying defect of the patent system and for meeting its promise of universal health coverage. Against this background, certain policy solutions for incentivizing drug development for neglected diseases have been put forth in this article, to which end, the role of drug companies, with their established infrastructure, accumulated expertise and their pivotal contribution in drug development, has been highlighted; commencing by reflecting upon the driving force of such companies.

What Makes Drug Companies Tick? - Profit Motive vs. Public Welfare

Though production costs of Drug Companies are but a fraction of the price of their patented drugs, these companies cite high R&D expenditure as a justification for making supernormal profits from sale of their patented drugs.[4] That being so, their justification doesn't cover as to then why, long after recovery of their R&D investment, do they continue to maintain high profit margins on their patented drugs and why their marketing expenditure runs equal and sometimes even more than their R&D expenses, amounting to the tune of billions of dollars.[5] The only reasonable explanation that can be imputed to said high marketing expenditure of Drug companies is their quest for sales and profit maximization. Such pursuit of profit through marketing of Drugs is deplorable because Drug Companies are unique in that their market does not comprise of willing, discerning consumers but instead of unwilling, vulnerable victims of diseases who have no choice but to turn to drugs for alleviation of their suffering in as much as the market for drugs is not one of choice but

3 The Constitution of India Article 47

4 Wayne Winegarden, "*The Economics of Pharmaceutical Pricing*", Pacific Research Institute, *Available at* https://www.pacificresearch.org/fileadmin/documents/Studies/PDFs/2013-2015/Phama Pricing F.pdf (Last accessed on February 08, 2016).

5 Tracy Staton, "*New Numbers Back Old Meme: Pharma does spend more on marketing than R&D*", Fierce Pharma (November 6, 2014). Available at http://www.fiercepharma.com/story/new-numbers-back-meme-pharma-does-spend-more-marketing-rd/2014-11-06 (Last accessed on February 8, 2016).

one of compulsion. In this context, not only the expense incurred on drug marketing is superfluous but rather the very practice of 'direct to consumers' marketing, which although not outrightly misleading tends to camouflage or undermine the adverse symptoms of the concerned drug while expounding on its virtues,[6] can result in potentially dangerous self-management of Health by the Target Audience. Even otherwise, Drug Marketing targeted at physicians, in the guise of providing selective clinical studies on the benefits and risks of the concerned drug or in the form of kickbacks, personal gifts or sponsored trips/ conferences, can seriously undermine the scientific objectivity of the concerned physicians, to the detriment of the public at large.[7] Thus, not only do the drug companies pursue profits but do so at the expense of public welfare.

Their profit motive is further evident from their practice of biased investment in favour of global diseases, focus on mass market drugs, and neglect of diseases prevalent amongst the poor such as kala azar, chagas, sleeping sickness, leprosy, HIV and tuberculosis (even amongst said neglected diseases whilst highly contagious diseases like HIV and tuberculosis still receive some attention, other diseases are more or less ignored).[8] As explained above, with an eye on the return on their investment, Drug Companies usually find drug development for poverty related diseases to be non-profitable and as such desist from investing upon the same,[9] again at a disservice to the economically underprivileged segment of the public. Thus, this evinces that despite being uniquely placed to nobly contribute to the advancement of the science of medicine and alleviate the sufferings of many, Drug Companies largely consider drug making as a 'for profit business'.

6 Benjamin Plackett, "*Study Finds Most Drug Commercials Misleading*", Inside Science (September 26, 2013). Available at https://www.insidescience.org/content/study-finds-most-drug-commercials-misleading/1418 (Last accessed on February 12, 2016).

7 Leonard J. Weber, "*Profits before People, Ethical Standards and the Marketing of Prescription Drugs*", Indiana University Press, 2006.

8 Policy Cures, "*The Role of 'TEAM INDIA' in Global Health R&D"*. Available at http://policycures.org/downloads/Indian%20Report.pdf (Last accessed on February 28, 2016).

9 *Supra* note 2.

However, this is not to say that Drug companies should entirely forgo profits.[10] Undoubtedly, Drug Companies to continue to remain in business must look at the commercials involved in drug development. Nevertheless, the same doesn't imply that drug companies should profiteer from the sale of drugs and make profits at the cost of public welfare. It then behooves the government to curb such practice of profiteering and to address the lacunae of the existing system. Especially, regarding neglected diseases, seeing that the success of patent incentivization is effectively limited to commercially viable markets, there is a need for the government to devise alternate policy solutions to drive innovation into the study of neglected diseases and encourage investment thereupon, as discussed herein below.

Alternate modes for incentivizing drug development for neglected diseases

Monetary Modes

To attract investments for drug development for neglected diseases, the Government must work towards mitigating the commercial unviableness of the project. In furtherance thereof, the government can directly address the high R&D costs associated therewith and provide economic concessions in the form of soft loans, tax rebates and subsidies to the drug companies, as previously done in the case of Lifecare Innovations, which was monetarily supported by the Small Business Innovation Research Initiative of India for development of liposomal treatment of kala azar.[11] Additionally, the government can devise a system of reward, in line with the reward theory of the esteemed scholar, Mr. Thomas Pogge, to award monetary grants to the successful developers, in proportion to their contribution in the advancement of the study of neglected diseases.[12] Nevertheless, for providing such economic concessions and monetary

10 L. Perkins, *Pharmaceutical Companies must make decisions based on profit,* Western Journal of Medicine (2001). Available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1275981/. (Last accessed on February 8, 2016).

11 *Supra* Note 8.

12 Thomas Pogge, *Could Globalization be good for health,* Global Justice: Theory Practice Rhetoric (1) 2007. Available at https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFjAAahUKEwi9vPago6DIAhUUCY

grants, the Government would first have to strengthen its funding capacity. In this regard, it is heartening to note that in the Draft National Health Policy of 2015, floated by the Ministry of Health and Family Welfare, the government has unabashedly acknowledged the inadequacy of its existing healthcare funding and has proposed some cogent measures for enhancing its ability to accumulate funds. These measures include Direct Taxation, specific commodity taxes on tobacco and alcohol, special taxation on extractive industries and development projects and imposition of health cess - a portion of which accumulated healthcare funds can be earmarked for providing rebates and awards in favour of drug development for neglected diseases.[13] Although there are concerns that an increased tax burden will adversely affect the purchasing power of the public and in turn their ability to afford healthcare,[14] but if one takes into account the complete picture, it becomes clear that special health taxes will ultimately prove to be beneficial for the public. Today, Drug Companies profiteer from the sale of their patented drugs by continuing to charge exorbitant prices for their drugs even after the recovery of their entire R&D costs, till the expiry of their patent monopoly.[15] If however, the government through taxes is to directly collect healthcare funds and employ said funds for covering R&D expenses of drug companies then by taking away the much misused monopoly justification of said companies, the government can not only keep such profiteering practices of these companies in check but can also channel the surplus R&D funds towards neglected diseases.

At the same time, now that Corporate Social responsibilities ('CSR') have been specifically acknowledged under the new Companies Act of 2013 and

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4KHTWqDUs&url=http%3A%2F%2Fwww.theglobaljusticenetwork.org%2Findex.php%2Fgjn%2Farticle%2Fdownload%2F5%2F7&usg=AFQjCNGI4IEc7B0xxDJwOhOwn_uQAy_9Eg&sig2=wg84-sjtESBf7X98ybXGNA (Last visited on February 12, 2016).

13 Ministry of Health and Family Welfare, National Health Policy 2015 Draft (December, 2014). Available at http://www.thehinducentre.com/multimedia/archive/02263/Draft_National_Hea_2263179a.pdf. (Last accessed on February 12, 2016).

14 AMCHSS The Achutha Menon Centre for Health science studies and Shree child Tiruhal Institution for Medical Sciences and SCTIMST, "Comments on the National Health Policy 2015 Draft". Available at https://www.sctimst.ac.in/RESOURCES/DNHP2015%20%20AMCHSS%20SCTIMST%20Comments%20March%2011%202015.pdf. (Last accessedd on February 12, 2016).

15 *Supra* note 4.

mandatory CSR spending by qualifying companies has been duly stipulated therein,[16] the government can set up specific policy schemes, directed in particular at drug companies, to harness such CSR flows towards furthering of the drug development programs for neglected diseases. Not that the Act does not recognize initiatives for combating HIV, AIDS, Malaria and 'other diseases' under the purview of corporate social responsibilities,[17] but considering that herein the term 'other diseases' is open to an expansive interpretation, it is quite possible that CSR spending targeted at diseases, other than neglected diseases, may also suffice for satisfying the requirements under the Act. Hence, the need for separate CSR policies aimed at neglected diseases.

Collaborative Channels

Another Inherent problem with the existing system of patents is that it pits one drug company against the other such that two or more drug companies can end up working on developing the same drug, resulting in duplication and wastage of resources. To counter this effect and to ensure a more efficacious, speedier and amicable drug development, the Government can encourage collaborations between drug companies. As collaborators, the drug companies can play to their respective strengths and offset each other's weaknesses and thereby strengthen the overall process of drug development. Further, through collaborative combining of resources, skills and knowledge base, the participating drug companies will also be able to minimize duplication and wastage of resources,[18] and cut down their heretofore considered imperative marketing efforts (and expenses), directed towards attracting their competitors' customers. This way not only the commercial viability of undertaking drug development for neglected diseases will improve but also the previously misspent funds of drug companies would free up for other endeavours, including neglected disease projects. Separately, the government can also encourage collaborations between drug companies and the research initiatives operative within the country, for enhancing the connectivity

16 Companies Act, 2013, § 135
17 Schedule VII, Companies Act, 2013.
18 *Supra* note 1.

and linkages between the participants, and reducing the overlapping and duplication in R&D efforts. Thus, collaborative initiatives are a feasible medium for achieving effective channeling of resources and improvement in the overall commercial viability of drug development. However, for such collaborative initiatives to take effect, a framework for division of return,[19] proportionate to the respective contributions of each participant, must also be devised. Should such a framework be successfully established, then surely, in a more open and collaborative atmosphere, the drug companies would be more willing to take up the case of neglected diseases.

Nonetheless, it would be short sighted for the government to leave drug development for neglected diseases entirely upon drug companies. As such, over and above policy development and implementation, the government must also play a more active role in furthering the cause of neglected diseases and share the said burden with drug companies. Further thereto, the government can enter into Public-Private Partnerships with them. Such partnerships are promising because on the one hand they enable the Drug companies to gain access to government funds and knowledge base, and on the other allow the Government to take advantage of the companies' established infrastructure and research capacity, and tap into their drug production capabilities. Here again, by pooling their resources together, the government and the drug companies can not only quicken the process of drug development but can also avoid duplication of efforts and wastage of resources, and thereby create a more commercially viable environment for coming up with new drugs for neglected diseases, collectively.[20] Whilst the government through its Drugs and Pharmaceuticals Research Program ('DRP') has successfully entered into several such public-private partnerships, as of date, very few of such initiatives specifically target neglected diseases (between 2004 and 2009 only around 16%

19 National Academy of Sciences, *Establishing Precompetitive Collaborations to Stimulate Genomics-Driven Product Development: Workshop Summary,* National Centre for Biotechnology Information *Available at* http://www.ncbi.nlm.nih.gov/books/NBK54325/#ch1.s2 (Last accessed on February 27, 2016).

20 Sudip Chaudhuri, *R & D for Development of New Drugs for Neglected Diseases: How can India contribute,* WHO. Available at http://www.who.int/intellectualproperty/studies/S.%20Chaudhuri.pdf (Last accessed on February 27, 2016).

of the DRP funding was assigned for neglected diseases)[21] which lacuna must be addressed by the government.

Lastly, the government can also facilitate collaborations between International Donors and domestic drug developers, to draw upon international funds and knowledge base, for advancement of the local neglected disease projects. A successful example of one such collaboration is that of a promising new antimalarial drug – Arterolane, developed conjointly by Ranbaxy Laboratories of India and Geneva based non-profit foundation: Medicines for Malaria Venture ('MMV').[22] Although, since the year 2007, MMV has withdrawn its support to Ranbaxy, Ranbaxy has promised to continue its efforts towards ensuring Arterolane reaches the public.[23] Other successful examples of routing of international funds to Indian scientists is that of the alliance between Wellcome Trust, UK and the Department of Biotechnology, India, which has proven to be successful in stimulating research in the field of low-cost biomedicines specific to India's public health needs;[24] the Indo-US Vaccine Action Program, whereunder US and Indian scientists carry out collaborative research projects for *inter alia* Dengue, Malaria and Tuberculosis;[25] and the Open Source Drug Discovery Initiative: a global platform for collaborative discovery of affordable and novel therapies for neglected tropical diseases.[26]

Policy Programs

On the policy front, the Government can set out clear priorities for future drug procurement for neglected diseases, and thereby bolster the confidence

21 *Supra* note 8.

22 *Ranbaxy Laboratories Limited (RLL) Collaborates with Medicines for Malaria Venture (MMV),* Asia Biotech, *Available at* http://www.asiabiotech.com/10/1001/0034_0035.pdf (Last accessed on February 15, 2016).

23 C. H. Unnikrishnan, *Blow to Ranbaxy Drug Research Plans*, Live Mint (February 21, 2007), Available at http://www.livemint.com/Companies/MxfKuYDBf474LLpEnamgMK/Blow-to-Ranbaxy-drugresearchplans.html. (Last accessed on February 27, 2016).

24 *The Wellcome Trust and India's Department of Biotechnology (DBT) Alliance*, New Indigo, *Available at* http://www.newindigo.eu/object/programme/4732.html (Last accessed February 27, 2016).

25 *Indo-U.S. Vaccine Action Program: Overview,* National Institute of Allergy and Infectious Diseases. *Available at* https://www.niaid.nih.gov/about/organization/dmid/indo/Pages/overview.aspx (Last accessed on February 27, 2016).

26 *Collaborative Innovation Platform*, Open Source Drug Discovery. *Available at* http://www.osdd.net/about-us/how-osdd-works (Last accessed on February 27, 2016).

of drug companies, undertaking drug development for neglected diseases, by assuring them of a ready market for their drugs. This way, the government can also provide guidance on neglected diseases deemed important for domestic concerns such that the drug companies, looking to invest in neglected diseases, can align their investments with the public health policies of the Government, and thus streamline their efforts with the local demand. Nevertheless, such pull of government assured demand would be inadequate to galvanize drug companies to undertake investment in neglected diseases, unless the price offered for drug purchase adequately covers their drug development costs (not counting profits but including recovery of manufacturing and R&D expenses, over an extended period of time). Yet, should such expenses be passed on to the target consumers, then keeping in mind that neglected diseases are neglected largely for the reason that said diseases mostly affect the economically underprivileged, this entire exercise may become futile if these drug prices turn out to be beyond the reach of such consumers. As such, it then befalls upon the government to offset any difference between the purchasing power of the target consumers and the prices offered for procurement of the remedial drugs, for ensuring accessibility and affordability of such drugs.

Next, the Government can also look towards revamping its prevailing drug regulatory regime not just for neglected diseases but for drug development in general. Considering that the existing approval process for new drugs is inaccurate, cumbersome, lengthy, expensive, mired with antiquated systems for evaluation of new technologies, and serves to dissuade innovation,[27] if the government undertakes policy revision and fabricates a smoother approval process, then needless to say the same would pacify the existing concerns of drug companies and ensure that they don't turn away from taking up drug development.

27 Vikram Batham, *Regulatory Framework and Challenges in Indian Pharmaceutical Sector, CUTS Centre for Competition, Investment and Economic Regulation*, CUTS International (2013). *Available at* http://www.cuts-ccier.org/pdf/Regulatory_Framework_and_Challenges_in_Indian_Pharmaceutical_Sector.pdf (Last accessed on February 27, 2016).

Infrastructure Invigoration

Finally, the Government can independently invest in neglected diseases and drug development. This would, in fact, be a guaranteed long term solution for ensuring that drug development is undertaken in accordance with the public health goals of the country, and for filling in those gaps in drug development, which are left open by private investors for reason of their commercial unattractiveness. In this regard, the government can strengthen its R&D facilities; upgrade its research institutions, knowledge base and skills to the highest level of performance; and build up its infrastructure for drug development and manufacture. It is again promising to note that the aforesaid draft National Health Policy of 2015 takes cognizance of the weaknesses of our existing pharmaceutical infrastructure and endorses revampment of the same.[28]

Conclusion

Undeniably, to comply with its right to Health obligations, the government must ensure that the actions of drug companies do not adversely affect few segments of the public[29] and in this respect, the government must actively pursue any or all of the aforesaid policy solutions, or for that matter, any other policy solutions that it deems pertinent, such that the existing landscape of drug development moves away from its current biasness in favour of the affluent towards addressing the needs of the economically underprivileged. Hopefully then, new drugs for neglected diseases will emerge and flowers of hope and life will blossom amidst the dark corners of poverty and helplessness.

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28 *Supra* note 13.

29 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to Highest Attainable Standard of health (Art. 12), CESCR Document E/C. 12/2000/4 (2000). *Available at* http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf (Last accessed on February 16, 2016).

Section 112 of the Indian Evidence Act and Contrary Scientific Evidence

*Akshat Agarwal**

Introduction

Recently the Supreme Court in *Nandlal Wasudeo Badwaik* v. *Lata Nandlal Badwaik*[1] held that proof based on scientific advancement, which is accepted by the world community to be correct, will override conclusive proof envisaged under section 112 of the Indian Evidence Act, 1872[2] (Hereinafter, IEA). This approach, which has been approved of since,[3] is problematic since it not only contravenes express statutory provisions of adducing evidence against the presumption except in the instances laid down in the provision. However, this paper argues that this approach of the court is not sudden but is in line with a balance that the judiciary has been attempting to strike in its jurisprudence on section 112. The legitimacy presumption had been enacted when scientific developments such as blood and DNA testing were unavailable. Their development has raised complex questions before the court which has forced it to make a choice amongst competing considerations. Notwithstanding the merit of these considerations the choice itself has resulted in judicial confusion thereby making the circumstances ripe for the legislature to make a policy intervention.

Section 112: Theory and Framework

The presumption as to legitimacy as embodied in Section 112 operates, owing to nature's inexplicable choice, on the universal understanding that while, "*maternity is a certainty, paternity is mere conjecture*".[4] To avoid this conjecturing

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1 (2014) 2 SCC 576 [Hereinafter, "*Badwaik*"].

2 Indian Evidence Act, 187, §112.

3 *See* Dipwanita Roy v. Ronobroto Roy, 2015 1 SCC 365.

4 *As cited in* C. Roy, *Presumption as to Legitimacy in Section 112 of Indian Evidence Act needs to be Amended*, 54(3) Journal of the Indian Law Institute, 382-389 (2012).

and the associated trauma the same may cause, the IEA provides that any person born during the continuance of a valid marriage between his mother and any man or, within two hundred and eighty days of its dissolution, provided the mother remained unmarried shall be conclusive proof of legitimacy. Thus if the facts of valid of marriage and birth during its continuance are established then the conclusion of legitimacy is inescapable. The effect of the presumption is in terms of a decreased requirement of evidence, thereby assisting the party who bears the burden of proof to prove legitimacy.[5]

The term conclusive proof as used in the provision is defined by Section 4 of the IEA.[6] The section stipulates that if certain facts are provided to be conclusive proof of a fact, then upon the proof of those facts no evidence can be adduced to disprove the conclusion. Thus section 112 effectively provides for an irrebuttable presumption of law which is only tempered by statute. The section embodies the latin maxim, "*Puter est quem nuptiae demonstrant*" which implies that he is the father whom the marriage indicates.[7] The provision seems to have the concern of illegitimatizing a child as being the primary motive behind its enactment.[8] It is submitted that this also corresponds to the judicial approach of ascertaining the best interest of the child in family law. Thus the law's concern does not seem to be truth in the objective sense but some kind of justice which ensures that a child is not subject to vulnerabilities and is always provided for. The factum of social stigma associated is also inherent in the concern to protect the child.

From the point of efficiency and administrative convenience it has also been argued that in 1872 when the provision was enacted there was no way of proving paternity and thus the provision was a necessity.[9] Modern sciences such as blood and DNA testing were not even in contemplation then. Such a scenario would have inevitably meant the washing of dirty linen in open court in terms of the

5 *Phipson on Evidence*, 135 (H. M. Malek *et al* ed., 16th ed., 2005).

6 Indian Evidence Act, 1872 § 4.

7 *C. D Field's Commentary on Law of Evidence Act, 1872*, 4780, Vol. 4 (A. Pasayat J. (Retd.) *et al* eds., 13th ed., 2011).

8 *Id*., at 4779

9 G. Bhatia, *Privacy and Bodily Integrity I: Compelled Medical Evidence under S. 112 of the Evidence Act*, (March 23, 2015) Indian Constitutional Law and Philosophy, *available at* https://indconlawphil.wordpress.com/ (Last accessed on April 5, 2015).

nature of evidence that would lead in such a proceeding.[10] Thus the legislature chose to lean towards legitimacy since it provided a safer shelter than compared to weeding through, what was then considered, rank immorality and vicenersa.

Depending on what we assume the policy behind the provision to be would immensely inform the light in which we see, or ought to see the provision today. The legislature however tempered the rigour of the provision by providing the exception of no-access in the latter half of the provision. If the party pleading that the child was not his, could prove that there had been no-access between the parties to the marriage at the time the child could have been begotten then the presumption would be rebutted.

The term no-access has been interpreted by the Privy Council to mean the non-existence of opportunities of sexual intercourse between the parties to the marriage.[11] The same interpretation has also been approved by the Supreme Court in *Venkateswarlu* v. *Venkatanarayana*[12] wherein the defendant had disputed paternity over the plaintiff, who had filed a suit for possession of certain joint family properties. Moreover, in order to secure the position of the child instead of a mere balance of probabilities, which is the standard of proof generally required for proving a fact in the IEA, keeping the policy behind the provision in mind the Supreme Court has stipulated a strong preponderance of evidence standard instead.[13]

It should be borne in mind that no access is the only statutory exception that has been provided in order to disprove a presumption of legitimacy. The usage of the term 'conclusive proof' prohibits the taking of any evidence other than for proving access or no access. Here, access was thus a rebuttable presumption which if rebutted would alter the conclusion of legitimacy. It is in light of this

10 H. D. Krause, *Scientific Evidence and the Ascertainment of Paternity*, 5, Family Law Quarterly, 252, 253 (1971).

11 Karapaya Servai v. Mayandi, 12 R 243 (Privy Council).

12 Venkateswarlu v. Venkatanarayana, 1954 AIR 176.

13 Kamti Devi v. Poshi Ram, 2001 (5) SCC 311; It is unclear by what the court means by a strong a preponderance of evidence which it considers distinct from tilting of probability. It seeks to chart a middle course between beyond reasonable doubt and balance of probabilities standards but it does not enunciate the same clearly.

statutory construction that courts had to consider the question of scientific evidence in the form of DNA and blood testing.

Judicial Interpretation: Balancing the Rope-Walk

The leading case on the question of scientific evidence till the decision in *Badwaik*[14] was *Goutam Kundu* v. *State of West Bengal*.[15] In this case the Court was petitioned to conduct a blood test in order to disprove paternity so as to defeat a claim for maintenance which had been filed against the petitioner by his wife for herself and her child. The Supreme Court conclusively held that no evidence apart from what was required to prove no-access could be adduced to rebut the presumption of legitimacy. Delving on the question of blood tests the court observed that the same could not be compelled and could not be ordered as a matter of course in order to have a 'roving' inquiry. Rather, the husband should be able to prove a strong *prima facie* case of no-access to dispel the section 112 presumption before such a test could be conducted. Thus the court allowed the blood test to a limited extent, for additional evidence, only if the husband had already been successful in proving a *prima facie* case of no-access.

The decision in *Kundu*[16] thus created an inroad into section 112 by holding that a blood test could be ordered if a *prima facie* case of no access had been established. This is in contrast to the statutory stipulation that proving no-access is the only way in which a presumption of legitimacy could be rebutted. The court was however quick to temper this observation by inexplicably holding that the consequences of ordering a blood test in terms of branding the child derogalinely and declaring the women unchaste should be considered before passing such an order.

The seeming conflict behind the above qualification points to the tight rope that the court was trying to walk in balancing the policy considerations of the provision and the allure of the objectivity of a scientific standard. The court

14 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576.

15 Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418 [Hereinafter, "*Kundu*"].

16 In this case the court thus rejected the application of the blood test on the ground that it was only to avoid maintenance.

however stopped short of holding that contrary scientific evidence would in itself disprove the presumption.

In *Kamti Devi* v. *Poshi Ram,*[17]though the court did not consider the question of scientific evidence independently it affirmed the interpretation that only through the proof of no-access could the presumption of legitimacy be rebutted. In Banarasi Das v. Teeku Datta[18] the main question was whether a direction for DNA test could be given by the court for the purpose of issuing a succession certificate. The court observed that such a direction could only be given under the satisfaction of the condition laid down in Kundu[19] but it also held that even if a DNA test proved otherwise, if the conditions under section 112 were satisfied the presumption of legitimacy would prevail.

In Bhabani Prasad Jena v. *Orissa State Commission for Women,*[20] the High Court's order stipulating the conduct of a DNA test in a writ petition, against an order of maintenance by the Orissa State Commission for Women, was challenged. The court while considering DNA tests examined the question of scientific tests in some detail. Dealing with the Art.21[21] challenge on the grounds of the right to privacy the court approved the decision in Sharda[22] holding that the right was not absolute. However the court was quick to hold that orders for such medical examinations could not be given mechanically and the decision in Kundu[23] would govern such a determination.

The court in *Bhabani*[24] *though* added another prong to the balancing act of *Kundu*[25] by incorporating the argument regarding the invasion of the right to privacy along with the child on one side and the opportunity of ascertaining

17 Kamti Devi v. Poshi Ram, 2001 (5) SCC 311[Hereinafter, "*Kamti Devi*"].

18 Banarasi Das v. Teeku Datta, 2005 4 SCC 449 [Hereinafter, "*Banarasi Das*"].

19 Here it is important to keep in mind that the holding in *Kundu* was regarding blood tests, the Court in *Banarasi Das* also extended it to DNA tests and to scientific evidence generally.

20 Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633 [Hereinafter, "*Bhabani*"].

21 Article 21, Constitution of India, 1950.

22 Sharda v. Dharampal, AIR 2003 SC 3450.

23 Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418.

24 Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633. ¶¶ 21- 22,

25 Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418.

paternity through a scientific standard on the other. Here the court, interestingly, couched the latter concern in terms of its duty to reach the truth. As a means out of this conflict it held that a DNA test (or for that matter any medical test/ evidence) could be ordered if an 'eminent need' was felt.

The circumstances that would pass this so-called 'eminent need' test were negatively defined in terms of when the court is unable to reach the truth without conducting a scientific test.[26] The approach in *Bhabani*[27] seems to be symptomatic of the judicial confusion wherein though it is held that scientific evidence cannot rebut the legitimacy presumption, judicial qualifications are carved out. The requirement of 'eminent need' is an additional qualification to the already existing *prima facie* case of no-access which *Kundu*[28] had laid down. Both the cases further temper the same by holding that the court should consider consequences of such a test in making a decision.

The above decisions clearly characterize conflicted jurisprudence where the court is torn between scientific evidence which it considers essential in its quest for truth and social policy considerations such as the right to privacy and the concern for the protection of the child. It is precisely this balance which makes it uphold a literal reading of section 112 on one hand and allow for qualification in terms of *prima facie* case and 'eminent need' on the other.

Badwaik and *Ronobroto*: The Balance Breaks

The final straw on the camel's rather overburdened back was the dilemma that the court faced in *Badwaik*.[29] The facts of this case too, unsurprisingly, revolved around a maintenance application which the wife had made for herself and her daughter. The husband denied paternity on the ground that he did not have any physical relations with his wife during the period the child was begotten. In this case the DNA test had already been conducted thus the court did not consider the question of whether an order for such a test could be given on the

26 Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633. ¶ 22.
27 Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633.
28 Goutam Kundu v. State of West Bengal, (1993) 3 SCC 418.
29 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576.

grounds of it being merely academic. Applying the above reasoning the court distinguished *Kundu, Bhabani* and *Banarsi Das* on facts.[30] The peculiar situation before the Supreme Court was that the lower courts had not recorded a finding regarding no-access and thus the only evidence before the court was the DNA test which indicated that the child did not belong to the father.

Thus the court found itself in a bind, far greater than in previous cases, where on one hand the facts made the 112 presumption applicable while on the other the DNA test disproved paternity. Strictly going by legal reasoning would have resulted in the court upholding the legitimacy presumption as being applicable since the provision prohibits the taking of evidence other than for the purposes of proving no-access. However, the Court responding to the strain of the balance, as visible in previous cases, finally gave away.

It thus held that when there is a, "*conflict between conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct the latter must prevail over the former*."[31] The court seemed to be implying that presumptions would give way to situations where the truth of a fact, in the court's opinion, was known. The apex court also went around the authority in *Kamati Devi* on the ground that a DNA test had not been actually conducted in that case and thus the judgement was confined to facts and hence not binding.

This position in *Badwaik* was also recently approved of by the Supreme Court in *Dipwanita Roy* v. *Ronobroto Roy*.[32] Though the issue regarding the conduct of the DNA test in this case was concerned with establishing adultery in divorce proceedings the question of illegitimacy was incidentally involved. To defend this approach would be a Sisyphean task since a conclusive proof explicitly prohibits the taking of evidence. While the only statutory exception of no access for which evidence can be adduced was unavailable to the court in the above two cases.

30 In all these cases the main issue before the court was whether an order for a DNA test could be given.

31 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576. ¶ 17.

32 Dipwanita Roy v. Ronobroto Roy, 2015 1 SCC 365.

A possible way to justify the decision of the Supreme Court could be under its powers to do complete justice.[33] Though there is precedent[34] to suggest that statutory provisions cannot fetter constitutional provisions the same view was eventually been tempered down to the effect that such powers should not be exercised if they come in conflict with statute expressly dealing with the concerned subject.[35] Thus though the court can by-pass statute, the exercise would be extremely hesitant if there is a direct confrontation with statutory provisions on the same subject matter unless equitable considerations in a given case are compelling.[36]

Even if *Badwaik* is rationalized under the powers conferred by Article 142 the same shall be restricted to the facts of that particular case. Seen in this light the ratio should not be binding on future cases since the powers are invoked on the basis of the facts and circumstances of individual cases. The decision in *Ronobroto Roy* though seems to suggest the fact that section 112 being overridden by scientific evidence is being considered as a general proposition of law rather than determination exclusive to facts.

To thus conclude the judgement in *Badwaik* as being *per incuriam* would not be completely remiss. However, as the paper argues the approach of the court itself should not surprise legal observers. In the series of cases leading up to the decision the Supreme Court seems to have been struggling in balancing conflicting considerations. The fact situation in the immediate case were merely was of such a nature which constrained the court to make a choice.

Reflections After the Fall

This tight-rope walk between the policy objectives of individual privacy and protection of child and the court's quest of the truth in individual cases has resulted in immense judicial confusion. Resultantly the court has been forced

33 Article 142, Constitution of India, 1950; It must be noted that the court does not refer to Article 142 while rendering the decision.

34 *In re*, Vijay Chandra Mishra, (1995) 2 SCC 621.

35 Supreme Court Bas Association v. Union of India, AIR 1998 SC 1895.

36 M.P. Jain, Indian Constitutional Law, 311, Vol.1 (5th ed., 2003).

to take a view which has caused more harm than otherwise in terms of causing a clear conflict with legislative policy. The situation is thus ripe for a credible legislative intervention so that the controversy can be put to rest.

The Law Commission[37] and academics[38] seem to be of the opinion that the provision should be immediately amended in order to account for scientific evidence. The Law Commission while dealing with section 112 in its 185th report suggests that new exception for impotency, blood tests and DNA tests be carved out in the provision itself. It opines that the latter two tests should only be used for disproving and not establishing paternity and the standard of proof for the same should be beyond reasonable doubt. These recommendations are based on the veracity of these kinds of evidences themselves which though can exclude paternity but have not been found to conclusively establish the same. The paper also endorses these observations since they represent the most carefully considered view on scientific evidence. Further, since the veracity of these tests has been established across jurisdictions it is important that laws in India also respond to scientific developments.[39]

Legal commentators have also questioned the premise of conception through sexual relations which underlies the provision thereby not taking into account modern reproductive arrangements such as surrogacy and artificial insemination.[40] In such cases the presumption would raise interesting questions as the biological father may not always be the intended father. To make a policy choice in all these conflicting strands is beyond the scope of this paper but at the same it urges the legislature to consider and accordingly amend the provision to settle the controversy and judicial confusion that has arisen and threatens to persist.

37 *185th Report of the Law Commission of India*, Indian Evidence Act, 1872 (2003).

38 Roy, *supra* note 4, at 382-389.

39 For example *see* Family Law Reform Act, 1969 (U.K.). § 26.

40 *See* V. A. Deore, *Presumption as to Legitimacy: A Time to Reconsider Section 112 of the Evidence Act in the Light of Developments in Medical Science*, 3(9) Criminal Law Journal, 257-260 (2011); N. Gurnani, *Exclusion of DNA Tests under Section 112 of the Indian Evidence Act 1872: A Senseless of a Meaningful Exclusion*, 2(4) Criminal Law Journal, 114-121 (2011).

Conclusion

The Supreme Court's approach in cases involving section 112 and contrary scientific evidence seems to be symptomatic of a tight rope-walk where the court is balancing the policy considerations of legitimacy and right to privacy on one hand and objective scientific evidence, which it considers as part of its duty towards reaching the truth, on the other. The recent decisions indicate that the court has made its choice in favour of what it considers to be objective scientific truth. In the process the court has managed to violate clear statutory stipulations and created judicial confusion regarding the policy prescriptions behind the legitimacy presumption.

Even if the approach of the apex court is rationalized in terms of its powers to do complete justice there is no clear direction for the lower judiciary to follow in such cases. If the decision is considered *per incuriam* then graver questions regarding the state of the law would arise. The prevalent state of judicial confusion provides ripe circumstances for legislative intervention. The paper while not making a choice among the various policy strands available thus points to the need for meaningful amendments to settle the precarious state the law is currently in.

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The Armed Forces Special Powers Act: The Way Forward

*Aditi Sinha & Salona Mittal**

Introduction

In the backdrop of the Quit India Movement launched by Gandhi in 1942, the Viceroy of India, Lord Linlithgow, enacted the Armed Forces Special Powers (Ordinance)[1] to defeat the motive of the movement. Police offices, railway and telegraph lines were burned down by the protesters. The British responded with violence to suppress the movement. Thousands were killed and arrested.

68 years of Independence from the British, this draconian ordinance still exists as the Armed Forces Special Powers Act, 1958 (hereinafter "AFSPA"). Impious and diabolical, this Act is the colonial remainder of the 1942 Ordinance which the Parliament passed after a 3 hour[2] and 4 hour discussion in the Lok Sabha and Rajya Sabha respectively.

Alarmed by the violence and issues of internal security in 1947, the Central government brought forth four Ordinances.[3] Thereafter, the Armed Forces Special Powers Act of 1948 replaced the Ordinances. The 1948 act was in turn framed on the lines of the 1942 Ordinance. Under this Act, special powers were given to the Army for emergencies. AFSPA originated in 1958, patterned on the 1948 Act.

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1 Basharat Peer, *The Armed Forces Special Powers Act: A brief history*, Al Jazeera, (March 8, 2014), http://america.aljazeera.com/articles/2014/3/8/armed-forces-specialpowersactabriefhistory.html. (Last accessed on January 20, 2016)

2 Malem Mangal Laishram, *AFSPA, 1958- A Historical Perspective- Celebrating 60 Years of Indian Democracy and 50 Years of the AFSPA- Part 2*, (August 10, 2007), http://e-pao.net/epSubPageExtractor.asp?src=manipur.History_of_Manipur.AFSPA-A_Historical_Perspective.AFSPA-A_Historical_Perspective_2. (Last accessed on January 20, 2016)

3 Pushpita Das, *Armed Forces Special Powers Act , The Debate*, Institute for Defence Studies and Analyses in New Delhi at p. 11 (November 2012), http://www.idsa.in/system/files/Monograph7.pdf. (Last accessed on January 20, 2016)

The problem began due to the insurgency in the North Eastern States (earlier, Unified Assam),where on grounds of racial and socio-political differences with the Mainland Indians, the Nagas of the Naga Hills of Assam and Manipur were unwilling to merge with India post independence. In 1953, the Assam government responded with the enactment of the Assam Maintenance of Public Order (Autonomous District) Act[4] in the Hills, strengthening police action against rebels. Assam Rifles were positioned in the Hills.

Unfortunately, the government even with the help of the Army was unable to bring down the insurgency. At the request of the state government, the President of India on May 22, 1958 imposed the Armed Forces (Assam and Manipur) Special Powers Ordinance[5] and installed the Army to reinstate peace in the region.

The Provisions

Carnage and brutality was ubiquitous and the people of Unified Assam were on the verge of seceding from India pressurising the Government to take immediate action and restore normalcy. The Government therefore promulgated AFSPA enlarging the powers of the Army to curb the violence.

Section 3[6] empowers the government to declare an area as 'disturbed', through a notification in the Official Gazette, to the extent that deploying of armed forces in the exercise of civil powers is crucial.
Section 4[7] provides for the use of force by the Army, including lethal force.

An army official, commissioned or non-commissioned, under section 4(a)(i), in order to safeguard public order may fire upon or use force even to cause death, if in his opinion, a person has acted in breach of any law during the employment of the army in a disturbed area, where assembly of five or more persons or carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances is prohibited.

4 *Id.* at p. 12.
5 *Id.* at p. 13.
6 The Armed Forces (Special Powers) Act, No.28 of 1958.
7 *Id.* § 4.

Section 4(d) gives the Army the liberty to "enter and search without warrant any premises"[8] and to "use such force as may be necessary." Since the officials have been authorised to use force as and when needed, it leads to the possibility of committing desecration of domestic and international laws.

The Army has been authorised to "arrest, without warrant, any person who has committed a cognisable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognisable offence and may use such force as may be necessary to effect the arrest."[9] Informing the grounds of arrest is not obligatory and the person arrested only enjoys the safeguard of being handed over "to the officer–in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest", as given under Section 5.

Section 6 of the Act provides immunity to the government security forces from prosecution. It reads as, "No prosecution, suit or other legal proceedings shall be instituted, except with the previous sanction of the Central Government against any person in respect of anything done or purported to be done in exercise of powers conferred by this Act."[10]

Currently, AFSPA has been extended for another year in Nagaland and lifted from Tripura.[11]

Punjab and Chandigarh AFSPA, 1983

AFSPA was promulgated in Punjab in 1983.[12] Provisions of the Act remained the same as the '58 Act only with the exceptions of two sections. Firstly, under Section 4, sub-section (e) was inserted allowing the army to stop any vehicle, search and seize forcibly if it is alleged of carrying ammunitions[13] and offenders.

8 *Id.* § 4(d).

9 *Id.* § 4(c).

10 *Id* §. 6.

11 Sudhi Ranjan Sen, *Tripura Removes Controversial Armed Forces Special Powers Act*, NDTV, (May 28, 2015 12:45 IST), http://www.ndtv.com/india-news/tripura-lifts-armed-forces-special-powers-act-766577

12 The Armed Forces (Punjab and Chandigarh) Special Powers Act, No. 34 of 1983.

13 *Id* § 5.

Secondly, Section 5 was also added mentioning precisely that a soldier may break open any locks "if the keys have been withheld."[14] The Act was in force for 14 long years and in the year 1997 the Act was finally lifted as insurgency had curbed. The Union territory of Chandigarh[15] lifted AFSPA in 2012.

Jammu and Kashmir AFSPA, 1990

AFSPA[16] was instituted in parts Jammu & Kashmir in 1990. Since Independence this region has been a scene of ugly violence. The circumstances in Jammu and Kashmir at the time of enactment of the act in 1990 were such that it was necessary to impose the act and allow the Army to take over. Amid the precarious violence that disseminated across this State, a separatist movement began in the region following independence.

The Kashmiri insurgency and Sikh Militant campaign were reaching its height in the 1980s. Kashmir has led to four wars between India and Pakistan. The situation worsened and consequentially the Centre felt the need to impose Governor's Rule[17] in the region in 1990. Following this the region was declared as 'disturbed'. Finally, the Centre ratified AFSPA and it came into force on July 5th, 1990.

Controversy

AFSPA is a controversy laden legislation which was enacted for an initial period of one year to counter the Naga insurgency. 58 years ahead and AFSPA is still here.

14 *Id* at §. 5.

15 Sarabjit Pandher, *Chandigarh sheds its 'disturbed area' tag*, The Hindu, (September 21, 2012), *available at* http://www.thehindu.com/todays-paper/tp-national/chandigarh-sheds-its-disturbed-area-tag/article3920494.ece (last accessed on December 12, 2015).

16 The Armed Forces (Jammu and Kashmir) Special Powers Act, No. 21 of 1990, *available at* http://www.mha.nic.in/sites/upload_files/mha/files/pdf/Armedforces%20_J&K_%20Splpowersact1990.pdf.

17 Pushpita Das, *Armed Forces Special Powers Act , The Debate*, Institute for Defence Studies and Analyses in New Delhi at p. 20, (November 2012), http://www.idsa.in/system/files/Monograph7.pdf. (Last accessed on December 24, 2016)

Critics of AFSPA say that it has failed to restore peace and normalcy in the areas in which it was imposed. Human Rights violation by the Army has actually helped the insurgents to mobilize the citizens against the Government. There have been many cases of rape and torture by the army, most notably the case of Manorama Devi.[18]

Human Rights Violation

AFSPA has been under the scanner of national and international human rights agencies since its very initiation. Humans Rights Watch termed AFSPA as a "tool of state abuse, oppression and discrimination".

A perusal of AFSPA shows that it violates Articles 14, 21 and 22[19] of the Indian Constitution. It also violates International Law such as the Universal Declarations of Human Rights (UDHR), The International Covenant on Civil and Political Rights (ICCPR) etc.

One of the biggest controversies concerning AFSPA is the violation of right to life. Right to life under the ICCPR[20] and the Indian Constitution, is a right which cannot, in any situation of emergency or external aggression, be suspended.

In reply to the Human Rights Committee, 1997, the Indian Government stated that Article 4 of the ICCPR does not govern India as no emergency exists in India. AFSPA was defended as a security legislation.[21]

Amnesty International has been calling for repeal of AFSPA for years. In its report it says that the Central Government and the State Governments of

18 *Armed Forces (Special Powers) Act (AFSPA)*, Gktoday India, (2nd January, 2016), *avilable at* http://www.gktoday.in/blog/armed-forces-special-powers-act-afspa/#Criticism_of_AFSPA (Last accessed on December 25, 2016)

19 Constitution of India Art. 22 (2).

20 International Covenant on Civil and Political Rights, art. 9.

21 Devyani Srivastava, *Armed Forces Special Powers Act* , The Debate, Institute for Defence Studies and Analyses in New Delhi at p. 75, (November 2012), http://www.idsa.in/system/files/Monograph 7.pdf.(Last accessed on December 25, 2016)

Jammu and Kashmir and North Eastern states have failed to deliberate on the Act despite well documented evidence of abuses.[22]

Initially, the general viewpoint was that human rights law are not applicable in situations of external aggression and insurgencies but Right to life cannot be compromised in any manner whatsoever.

United Nation Angle

The United Nations has made it abundantly clear that India should repeal AFSPA as the Act has no role in a democratic country like India.

UN Special Rapporteur on Human Rights Defenders, Margaret Sekaggya said that she is deeply concerned about the arbitrary application of laws such as AFSPA. In her report she says that, "*The Armed Forces Special Powers Act and the Public Safety Act should be repealed and application of other security laws which adversely affect the work and safety of human rights defenders should be reviewed.*"[23]

UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Christof Heynes, in his report[24] draws our attention to Section 4 of the Act saying that the right of the army to kill any person for the maintenance of public order violates the international standards of use of force. He mentions that many international bodies have previously called for the repeal AFSPA.[25] His report says that, "...*the powers granted under AFSPA are in reality broader than that allowable under a state of emergency as the right to life may effectively be suspended under the Act*..."

22 Amnesty International India, Briefing: The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security at p. 4, (September 2013), https://www.amnestyusa.org/sites/default/files/asa200422013en.pdf. (Last accessed on November 30, 2016)

23 Statement of the Special Rapporteur *on the situation of human rights defenders*, OHCHR, (Jan. 21, 2011) (by Margaret Sekaggya), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10660&LangID=E#sthash.ERNbiU2J.dpuf. (Last accessed on November 30, 2016)

24 Report of the Special Rapporteur *on extrajudicial, summary or arbitrary executions*, OHCHR, A/HRC/23/47/Add.1 (April 26, 2013) (by Christof Heynes). (Last accessed on December 30, 2016)

25 *Id.* at p. 7, cl. 25.

UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, in her report[26] recommends the urgent repeal of AFSPA and criminal action against the accused members of the Armed Forces.

Sanction Process

As discussed above, Section 6 of AFSPA provides that prosecution shall be subject to a sanction obtained by the Central Government to prosecute the accused army official. Such sanctions are seldom granted.

An examination of the procedure to inquire about the accusations made against an army official for infringement of human rights reveals that investigation is carried out meticulously. Both the Army and the Victims perspectives are considered along with the report of the Police. After the findings, the case is processed with specific recommendations up the chain to ministry of defence (MoD) in the form of a Detailed Investigation Report (DIR). The government examines the case and takes an independent decision to allow prosecution or deny the same. In a large number of cases the sanction is denied.

A writ of Habeas Corpus is available to a citizen aggrieved of violations of his/her rights under arbitrary detention. However, in the regions where AFSPA operates, the implementation of this writ becomes uncertain and the role of the Judiciary, sceptical.

In one case,[27] an army major and his personnel were accused of raping a woman and a 16-year old girl in 1997. Following investigation, the J&K state home department forwarded the case to the Ministry of Defence for permission to file charges and prosecute the major and his personnel. The Ministry of Defence declined permission to prosecute, and also did not initiate any disciplinary or legal proceedings in a military court. In its response outlining the reasons for not granting sanction, the Ministry said to the J&K police that the husband of one of the victims was "a dreadful Hizbul Mujahideen militant" and "the

26 Report of the Special Rapporteur *on violence against women, its causes and consequences,* OHCHR, A/HRC/26/38/Add.1 (April 1, 2014) (by Rashida Manjoo).

27 *Supra* note 22

victim was forced to lodge a false allegation against the army and his unit by anti-national elements to malign the image of the security forces."

Additionally, there is inconsistency between the data presented by the Defence Ministry and the one presented by the Home Department of J&K in the years 2012 and 2013.

Subjecting the prosecution of the security officials appointed in AFSPA regions should not be fettered by the prior sanction of the Government, particularly in cases where human rights have been infringed based on the merits of each case. Due note should also be made of the fact that when offences such as rape or murder are committed by the officials, the same cannot be regarded as a discharge of their certified obligation.

Under the International Law, as a party to the ICCPR, equality before law is crucial. The Human Rights Committee[28] expands on this by stating that the right to equality before the courts and tribunals is "a key element of human rights protection and serves as a procedural means to a safeguard the rule of law." Section 6 violates India's commitment under Article 14 of the ICCPR to advocate fair trial principles. The essence of a fair trial is that proficient, unbiased and an autonomous tribunal recognised by law conducts the hearings.

Constitutional validity

The debate is whether the AFSPA is ultra vires of the Constitution or should it be allowed to exist as a constitutional Act.

The first case challenging the constitutionality of the Act was brought before the Gauhati High Court in 1983. In this case of *Indrajit Barua* v. *State of Assam and Another,*[29] Sections 2, 3, 4 and 5 were questioned in relation to Articles 14, 19 and 21 of the Constitution and the capability of the Parliament of Assam including the legislature was examined. The court held that discrepancy in the

28 ICCPR, art. 14., (UN Doc. CCPR/C/GC/32), (August 23, 2007), *available at* http://www.refworld.org/docid/478b2b2f2.html.

29 AIR (1983) Delhi 513.

definition of the term 'disturbed area' is not the concern as it depends on the assessment of the concerned officials.

Another writ petition was filed in the case of *Naga people's Movement of Human Rights* v. *Union of India,*[30] *(1997),* with respect to violations of human rights by the army. Challenged on grounds of Article 14, 19 and 21, the constitutionality of the Act was upheld. This judgement has been a milestone regarding the validity of the Act and has been quoted in various cases. The Court held that, the Act therefore has been enacted with due regard to public order and peace and in the exercise of powers granted to the Parliament under the Constitution and cannot be challenged.

In another case, *General Officer Commanding* v. *CBI and Another*[31] *(2012),* prosecution involved was with respect to fake encounters. The Army had killed few civilians. When the CBI was asked to conduct an investigation, it filed a charge-sheet against the army officials. However, the Army took the defence of Section 6 of the Act and claimed immunity from prosecution and the suit was closed. The High Court[32] affirmed the decisions of lower courts and held that the very objective of sanction is to enable the Army officers to perform their duties fearlessly by protecting them from vexatious, malafide and false prosecution for the act done in performance of their duties.

Irom Sharmila

Probably the most noticeable protest against AFPSA is the protest of the Iron Lady, Irom Sharmila. On 2nd November, 2000, ten civilians including women and children were shot down at a bus station in Malom, Manipur by the Assam Rifles. Horrified by the barbarity of the Army, 28 year old Irom Sharmila went on an indefinite hunger strike in protest of AFSPA. Shockingly, a few days later, she was arrested for attempting to commit suicide. 16 years on and her struggle still continues but so does AFSPA. Refusing to eat, she is now forcefully fed through food pipes.

30 AIR (1998) SC 431
31 AIR (2012) SC 1890.
32 *Id.* at p. 2.

Supreme Court observed in the Ram Lila Maidan incident case that a hunger strike is "*a form of protest which has been accepted, both historically and legally in our constitutional jurisprudence.*"[33]

A Manipur Court on 22nd January, 2015[34] ordered the release of Irom Sharmila and rejected the charge of attempting to commit suicide. But the very next day, she was arrested again by the police on the same charges. In an interview with Amnesty International Sharmila said that, "*My struggle is my message. I love my life very much and want to have the freedom to meet people and struggle for issues close to my heart.*"[35]

Pathribal Incident [2000]

On 25th March, 2000 five men were picked up from Anantnag area and allegedly killed by the army at Pathribal in South Kashmir. Their bodies were lacerated and one of them was even decapitated and then purportedly burned.[36] The army's stand was that the five men had taken part in Chittisingh Pora massacre of Match 20th, 2000 in which 35 Sikhs were killed.

After a huge outcry over the incident, CBI took over the case. It concluded in the chargesheet that that a Brigadier, a Lieutenant Colonel, two Majors, and a Subedar of 7 Rashtriya Rifles had orchestrated the encounter[37] and were guilty of "cold blooded murder" of five innocent civilians.

After years of legal battle in which the CBI wanted to put the accused army personnel to trial and the army claimed immunity as per AFSPA, Supreme

33 Ramlila Maidan Incident v. Home Secretary, Union of India (UOI) and Ors. (2012) 5 SCC 1.

34 *AFSPA causing hardship to Manipur's people: Irom Sharmila tells court,* Dnaindia, (October 6, 2015), http://www.dnaindia.com/india/report-afspa-causing-hardship-to-manipur-s-people-irom-sharmila-tells-court-2132130. (Last accessed on November 22, 2016)

35 Amnesty International India, *A hunger strike is not attempted suicide- Free Irom Sharmila!*, (last accessed on February 28, 2016), https://www.amnesty.org.in/action/detail/a-hunger-strike-is-not-attempted-suicide-free-irom-sharmila. (Last accessed on February 28, 2016)

36 Mirza Waheed, *Fake encounters: The expendable Kashmiri*, Al Jazeera, (February 12, 2014 13:09 GMT), http://www.aljazeera.com/indepth/opinion/2014/02/fake-encounters-expendable-kashm-20142281139146859.html. (Last accessed on November 22, 2016)

37 *Reopen the Pathribal case*, The Hindu, (January 27, 2014 00:44 IST), http://www.thehindu.com/opinion/editorial/reopen-the-pathribal-case/article5620678.ece. (Last accessed on November 30, 2016)

Court in 2012 gave the Army the option of taking up the proceeding in either a civil court or in its own Court of Inquiry. Not to the surprise of many, the army opted for the latter.

In a statement released by the army, the matter was declared as "closed". The army spokesman said "Over 50 witnesses have been examined, including a large number of civilian witnesses, state government and police officials. Forensic, documentary and other relevant evidence has also been taken on record..."[38]

Manorama incident (2004)

On the night of July 10th, 2004, a team of Assam rifles entered the home of 32 year old, Manorama Devi, and arrested her. Next morning, villagers stumbled upon her dead body, badly mutilated and ridden with bullets.[39]

She was suspected as being a member of the banned organisation, People's Liberation Army (PLA). The Assam rifles alleged that she was an expert in laying landmines and explosives.[40] According to the legal petition of the Assam Rifles, they had intended to hand over Manorama to the nearest police station, but she tried to escape and that is when bullets were fired leading to her death.[41] However forensic reports suggest that the bullets were shot from close range near her genitals and that Manorama was lying down when she was shot. The reports also suggested that Manorama was tortured and raped before her death as her body bore a number of other injuries and semen stains were found on her skirt.[42]

38 Ahmed Ai Fayyaz, *Army gives itself clean chit in Pathribal case*, The Hindu, (January 25, 2014 03:21 IST), http://www.thehindu.com/news/national/other-states/army-gives-itself-clean-chit-in-pathribal-case/article5613278.ece. (Last accessed on December 10, 2016)

39 Geeta Pandey, *Woman at the centre of Manipur storm*, BBC, (August 27, 2004 13:45 GMT), http://news.bbc.co.uk/2/hi/south_asia/3604986.stm. (Last accessed on December 11, 2016)

40 *Id.*

41 Col. Jagmohan Singh and others v. The State of Manipur & Others, Writ Petition(C) No. 5187 of 2004.

42 Meenakshi Ganguly, *These Fellows Must Be Eliminated: The Killing of Thangjam Manorama Devi,* Human rights Watch, (September 2008), https://www.hrw.org/reports/2008/india0908/3.htm#_ftn73. (Last accessed on December 15, 2016)

The death of Manorama led to massive protests in Manipur. On 15th July, 2004 around thirty women belonging to the human rights group "Meira Paibi" gathered in front of the Assam Rifles, stripped off their clothes calling the army to rape them as they had raped Manorama.[43] The entire state erupted in protest and a person died after setting himself on fire.[44]

The Special Leave Petition filed by the Union of India in 2011 against the order of the Gauhati High Court which pronounced that the Manipur Government is within its right to institute an inquiry commission is still pending.[45]

The Jeevan Reddy committee

Subsequent to the Manorama killings that occurred in 2004, a committee was constituted on November 19th, 2004 to reassess the Act. Retired Supreme Court Judge, Justice Jeevan Reddy headed the committee. The idea behind the constitution of this Committee was to bring the Act in unison with the Human rights that the government sought to protect and if need be to substitute the Act to make it more pro-humanitarian. Perspectives from different sections including the human rights groups, State government of north-east and the Army were welcomed by the Reddy Committee.

Committee was told by the Home Affairs Ministry that as soon as the State Police becomes competent enough to control the situation, the Army would be gradually phased out from the region. The report was submitted by the Committee on June 6th, 2005 to the Ministry. However this report[46] was not made public, in fact this report was leaked and is now readily available on the net.

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43 *Women give vent to naked fury in front of 17 AR at Kangla*, (July 15, 2004), http://www.e-pao.net/epRelatedNews.asp?heading=1&src=160704. (Last accessed on December 20, 2016)

44 G. Vinayak, *Self immolation: Pebam Chittaranjan dead*, Rediffnews, (August 16, 2004 17:50 IST), http://in.rediff.com/news/2004/aug/16mani1.htm. (Last accessed on December 20, 2016)

45 Esha Roy, *Manorama rape and murder: 10 years on, family hope for justice fades*, Indian Express, (July 12, 2014 03:06 IST), http://indianexpress.com/article/india/india-others/manorama-rape-and-murder-10-years-on-familys-hope-for-justice-fades/ (Last accessed on December 20, 2016)

46 http://notorture.ahrchk.net/profile/india/ArmedForcesAct1958.pdf (*Report of the Committee to Review the Armed Forces (Special Powers) Act 1958*, Government of India, Ministry of Home Affairs, 2005). (Last accessed on January 05, 2016)

Concluding its report, the Committee recommended that AFSPA be repealed and that amending the Act would be of no help. Another suggestion was to include few provisions of AFSPA under the Unlawful Activities (Prevention) Act, 1967. Separate "Grievances Cell"[47] to investigate human rights infringement and making it compulsory for the police within 24 hours of receiving a request produce the needed data. Unfortunately, the entire report submitted after carefully analysing the situation was allowed to gather dust.

Justice Hegde Commission

A three member commission headed by retired Supreme Court Judge, Santosh Hedge was constituted by the Supreme Court consequent to a PIL filed demanding inquiry of more than 1500 cases involving extra-judicial executions carried out in the State of Manipur. It was established to determine whether six cases identified by the court were encounter deaths or extrajudicial executions. It was also mandated to evaluate the role of the security forces in Manipur.

In its report the commission found that all seven deaths were extrajudicial executions, and that AFSPA was widely abused. The commission said that the continued operation of the AFSPA has made "a mockery of the law,"[48] and that security forces have been "transgressing the legal bounds for their counter-insurgency operations in the state of Manipur."

The commission described the army's list of "Do's and Don'ts", which imposed legally safeguards, as being "largely on paper" and "mostly followed in violation."[49]

47 "The proposed amendments include a provision for an independent "Grievances Cell" to inquire into complaints of human rights violations, and a requirement that the commander or local headquarters of the unit or appropriate police authorities furnish relevant information to the Grievances Cell within 24 hours of receiving a request." Meenakshi Ganguly, *These Fellows Must Be Eliminated*, Human Rights Watch, (September 2008), https://www.hrw.org/reports/2008/india0908/5.htm. (Last accessed on January 06, 2016)

48 Amnesty International India, *Briefing: The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security* at p. 3, ¶ 3, (September 2013), https://www.amnestyusa.org/sites/default/files/asa200422013en.pdf. (Last accessed on January 06, 2016)

49 http://www.hrln.org/hrln/images/stories/pdf/hedge-report-manipur.pdf (Report of the Supreme Court Appointed Commission at p. 91). (Last accessed on January 06, 2016)

AFSPA: A Necessary Evil?

A soldier deserves all the legal protection for the action he does or judgment he makes on the spot acting in the best interest of the country.[50] Counter-insurgency operations place the troops under immense stress and require the highest levels of training. The act needs to continue, however, it needs more humane provisions so that state cannot take away the right to life of the people.

Lifting of AFSPA from urban areas/large towns in J&K will result in terrorists seeking shelter in such areas and rebuilding their bases, as has been witnessed in Manipur's capital Imphal post 2004.[51]

According to the Former General Officer Commanding-in-Chief, Northern Command, Lt. General KT Parnaik, the Army might have got increased powers under the Act, but the ethos of the Army and the drill which the Army goes through trains them to have restrain on themselves.[52]

Contrary to popular belief, six army personnel involved in executing a fake encounter in the Machil sector of northern Kashmir were sentenced to life imprisonment. The army has once again emphasized that aberrant behaviour for the sake of medals or other honours will not be tolerated. A clear distinction is made between errors of judgement and errors of intent.[53]

Arun Jaitley in his blog,[54] decorously points out as to why AFSPA needs to stay, at least for the time being. He said that "Terrorism and separatist violence needs both a political and security response. It is harsh but necessary."

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50 *Armed Forces (Special Powers) Act (AFSPA):Why the Act is a necessary evil?*, Gk today India, (January 2, 2016), http://www.gktoday.in/blog/armed-forces-special-powers-actafspa/

51 Nitin A. Gokhale, *Why AFSPA can be lifted, not repealed*, Rediffnews, (November 17, 2014, 1:53 IST), http://www.rediff.com/news/column/why-afspa-can-be-lifted-not-repealed/20141117.htm. (Last accessed on January 10, 2016)

52 *Revocation of AFSPA may put peace in J&K at stake,* Ibnlive, (June 17, 2013 19:27 IST), http://www.ibnlive.com/news/india/revocation-of-afspa-may-put-peace-in-jk-at-stake-616736.html. (Last accessed on January 10, 2016)

53 Gurmeet Kanwal, *Machil Verdict: A Strong Message by Army Against Errant Behaviour*, The Quint, (September 17, 2015 12:28 IST), http://www.thequint.com/opinion/2015/09/16/machil-verdict-a-strong-message-by-army-against-errant%20behaviour. (Last accessed on December 20, 2016)

54 Shri Arun Jaitley, *Why AFSPA should continue*, (last accessed on February 28, 2016), http://www.bjp.org/index.php?option=com_content&view=article&id=7227:qwhy-afspa-should-continueq-by-shri-arun-jaitley-leader-of-opposition-rajya-sabha&catid=68:press-releases&Itemid=494. (Last accessed on December 21, 2016)

It has also been a pattern that most 'Human Right Groups' or the section of the media that investigated allegations was satisfied with only one side of the story. It has been very rare that the security forces' version of the story was even sought. The case of the alleged 'fake encounter' at Pathribal is a case in point. Though the case was still sub-judice, the media and civil rights groups had painted the army as the villain of the piece, trying to protect the guilty. The facts were quite to the contrary.[55]

The army accepts that it has made mistakes and it has learnt its lessons. There has been a marked decline in allegations—from as many as 1170 between 1990-99, to 226 during the period 2000-04, to 54 during 2005-09. Only 9 allegations were levelled in 2009, 6 in 2010 and 4 in 2011.[56]

Armed Forces need the special power and the extra protection to safeguard the country. The arguments at times have been based on past experiences and beliefs that do not take into account changed realities, like the army having refined its modus operandi.[57] Any knee jerk reactions may put the clock back.

Recommendations

The debate over AFSPA gets clouded by emotions, distrust and even lack of understanding about the circumstances under which it is applied. It is an all round failure of the Indian State. After all, it is deployed when the police and other agencies fail. Lifting the AFSPA can certainly be attempted, but the provisions of the AFSPA, as an emergency law that empowers the army must however, continue.[58]

Protection for the armed forces must be accompanied by provisions that ensure accountability within the parameters of law. The list of Do's and Don'ts

55 Umong Sethi, *Armed Forces Special Powers Act, The Debate*, Institute for Defence Studies and Analyses in New Delhi, at p. 46, (November 2012), http://www.idsa.in/system/files/Monograph7.pdf. (Last accessed on January 10, 2016)

56 Umong Sethi, *Armed Forces Special Powers Act, The Debate*, Institute for Defence Studies and Analyses in New Delhi, at p. 50, (November 2012), http://www.idsa.in/system/files/Monograph7.pdf. (Last accessed on January 10, 2016)

57 *Id.* at p. 39.

58 Nitin A. Gokhale, *AFSPA debate is clouded by emotion, distrust*, Rediffnews, (February 25, 2015, 22:02 IST), http://www.rediff.com/news/column/afspa-debate-is-clouded-by-emotion-distrust/20150225.htm. (Last accessed on January 10, 2016)

formalised by the Supreme Court in *Naga Movement Case*[59] can be incorporated in the Act. All investigations should be time bound. There is a need to keep detailed records of operations, to ensure suitable proof of conduct of forces and operational imperatives.

There are discrepancies as to who has the power to declare an area as a 'disturbed'. As per Section 3 of the Act, the State or Central Government can declare an area as a 'disturbed area' but in reality if the Centre is of the opinion that an area is disturbed, the State government has no say in it. There needs to be a clear division in the powers. A precise definition of 'Disturbed area' is required to avoid conflict.

Under section 4, there needs to be a certain rank of officers below whom the power to use lethal force cannot be authorised.

Under section 5 of AFSPA, the accused must be handed over to the nearest police station "with the least possible delay". The phrase "least possible delay" is arbitrary as "delay" is relative. Either the 24 hour rule as under the Constitution should be followed or a reasonable duration of time should be prescribed under the Act.

Under section 6, immunity needs to be given to the Army but not to an extent that they can act fearlessly. The process needs to be transparent to avoid accusations against the Army.

The police can gradually take control of the less disturbed areas. The help of the army can be taken by the police in special circumstances. As the situation improves, an exit strategy can be worked out for gradual withdrawal of armed forces, leading to a smooth transition.

When needed, it must be applied in small doses. Every country has to balance the need for a stringent law with the basic principles of ensuring human dignity and human rights. Therein lays the challenge for India's leadership.[60]

59 AIR (1998) SC 431.

60 Nitin A. Gokhale, *Why can be lifted, not repealed,* Rediffnews, (November 17, 2014, 15:53 IST), http://www.rediff.com/news/column/why-afspa-can-be-lifted-not-repealed/20141117.htm (Last accessed on January 12, 2016)

Conclusion

As mentioned in our abstract, our primary objective was to critically analyze The Armed Forces Special Powers Act and the related controversies. Although the Army has acted arbitrarily, it is of our understanding that the Act itself has certain discrepancies which need to be addressed. Hence, blaming the Army alone for the excesses committed is not justified. We may never be able to understand the plight of the residents in AFSPA-invoked regions and we need to empathize with them but that is not the way forward. A solution has to be carved out. Neither can the Army act subjectively nor can national peace and security be compromised. It is time that the government takes some concrete steps and at least consider the recommendations of committees constituted by them.

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The Enemy Property Ordinance, 2016: Examining the Constitutionality of the Legacy of the Partition

*Praharsh Johorey**

The President promulgated an Ordinance on the 7th of January, 2016 called the Enemy Property (Amendment and Validation) Ordinance, 2016; that allowed the Government of India to seize control of, and alienate all property that belonged to 'Enemies' of the Country, even if their legal heirs were law-abiding Citizens of India. This paper seeks to examine the unpredictable and oppressive law pertaining to Enemy Property in India, in the context of the Ordinance making power granted to the Executive under the Constitution as well as the power of the Legislature to invalidate Judicial Decisions retrospectively; all of which pose crucial legal questions to the Supreme Court in the inevitable challenges to the Ordinance.

The Partition's Legacy

In the year 1965, India and Pakistan fought a war that was by and large a culmination of skirmishes on the border between the two countries. With the entry of hundreds of Pakistani soldiers into Kashmir, the war began; with both sides claiming the upper-hand throughout the battle.[1] The war itself ended mutually with the adoption of the Tashkent Declaration in the year 1966;[2] but the impact of the Union's distrust of Pakistan as a result of this war would continue for far longer.

At the time of the partition, mass-migration across the border meant a large number of land-owners from India defected to Pakistan, resulting in swathes

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1 R D Pradhan, *1965 War: The Inside Story*, 48-53 (Atlantic Publishers, 2007).

2 The Tashkent Declaration was signed between India and Pakistan on January 10, 1966. The full text of the Declaration is available at http://peacemaker.un.org/sites/peacemaker.un.org/files/IN%20PK_660110_TashkentDeclaration.pdf.

of land owned by now-Pakistanis being left behind in India. In the year 1968, the Government of India enacted the Enemy Property Act, 1968[3] ("The Act"); as part of the sweeping policy changes directed at Pakistan, which through the purport of this Act, affected the aforementioned Pakistani civilians. To ensure that these Pakistanis could not continue to control land and operate businesses in India through property owned by them; the Government enacted the Act which mandated that all properties owned by 'Enemy Subjects' in Indian Territory were to vest with a Government appointed Custodian, who would be responsible for the possession and management of the Property.[4]

The stated aims of the Act were not to disentitle the 'Enemy' from his/her property, but to transfer all rights of maintenance to the Government, to ensure that no benefits, monetary or otherwise may accrue to citizens of an Enemy state. While the wording of the term 'Enemy Subjects' betrays the Act's overtly ominous nature, the class of people falling under this definition has been clearly defined, as a person or country who or which was an enemy, an enemy subject or an enemy firm, as the case may be, under the Defence of India Act, 1962 read with the Defence of India Rules, 1962, but does not include a citizen of India.[5]

The definition while broad, is not all-encompassing, in that notifications issued by the Central Government to declare a class of people as 'Enemies' are a pre-requisite. It however renders futile the attempts of declared Enemy Subjects to become Indian citizens after being declared so; as the Act is applicable to those who are, as well as those who were, enemies. It was pursuant to the Enemy Property (Custody and Registration) Order, 1965[6] ("The Order") that was issued by Government of India where-under all immovable properties in India belonging to or held by or managed on behalf of Pakistani nationals vested in the Custodian of Enemy Property with immediate effect; mandating that all Pakistanis were to be classified as 'Enemy Subjects.'

3 Enemy Property Act, 1968 came into force on August 20, 1968.
4 *Id.* § 5.
5 *Id.* § 2 (b).
6 Enemy Property (Custody and Registration) Order (11th September, 1965).

What is important to note however is that under the Act, Indian Citizens have been excluded from the purport of the definition; indicating that irrespective of one's lineage, a Custodian may not seek declaration that property of an undisputed Indian Citizen shall vest in him under the Act. It was this legal question that was contented by the Government, as shall be seen from the tumultuous legal battle fought by the Raja of Mahmudabad; a battle spanning decades.

The Raja's Battle

Mohammed Amir Mohammad Khan**,** (hereinafter, "The Raja") was born on 30th November, 1943 at Mahmudabad, in the state of Uttar Pradesh in India; to the royal family of the region, who had ruled Mahmudabad for generations. His father migrated to Pakistan in the year 1957, and became a Pakistani citizen; while the Raja and his mother (since deceased) continued to reside in India as Indian citizens. In 1962 the Defence of India Act was brought into force[7] with a view to preserve Enemy Property; which authorised the Central Government to appoint a custodian of the Enemy Property in India.

It was under the Order that the custody of all Immovable Property in India belonging to the Raja's father was vested in the Custodian for the purpose of the 'Management, Administration and Preservation' of the property. Thereafter, the Enemy Property Ordinance, 1968 was promulgated that was immediately replaced by the Act, which validated and continued such vesting.

After the death of the Raja's father, under the applicable Islamic succession laws, the Raja exclusively inherited the said properties as sole heir. He made several representations to the Government for the return of the properties from the Custodian, on the grounds that it could not be said to be Enemy Property, as he was and always had been an Indian Citizen, and therefore exempt from the operation of the Act.

In response thereto, the Government did not relinquish control of such property, initially promising a return of only 25% of the properties without valid legal

7 The Defence of India Act came into force on December 12, 1962.

reason.[8] The Raja filed petitions before the Civil Judge seeking declaration of the status of the said properties. The said suit was decreed in favour of the petitioner as sole heir and successor of his father and held that he was entitled to the 25% of the properties, or any such percentage as determined. However, the Raja received none of his properties in execution of such decree, and complained of the said properties being 'Misappropriated and mismanaged' during such period, and filed suit for execution before the High Court of Bombay.[9]

The Bombay High Court[10]

In response to the suit filed for the return of his property from the Government, J. Lodha (as he then was) declared that a reading of the term 'Enemy Subject' under Section 2(b)[11] of the Act could not be reasonably applied to an Indian Citizen (i.e. The Raja), and that such property therefore could not be said to be enemy property.'[12] The High Court affirmed that a reading of Sections 6[13], 8[14] and 18[15] of the Act states that the Enemy Subject does not become

8 Communication dated September 24, 1981 received by the Raja from the Director, Vigilance, Ministry of Commerce.

9 Raja Mohammad Amir Mohammad Khan v. Union of India (UOI) and Anr : 2002 (2) BomCR 663.

10 Writ Petition No.1524 of 1997.

11 Enemy Property Act 1968 § 2: '*enemy or "enemy subject" or "enemy firm" means a person or country who or which was an enemy, an enemy subject or an enemy firm, as the case may be, under the Defence of India Act, 1962, and the Defence of India Rules, 1962, but does not include a citizen of India;*

12 *Id.*

13 *Id.* § 6:
Where any property vested in the Custodian under this Act has been transferred, whether before or after the commencement of this Act, by an enemy or an enemy subject or an enemy firm and where it appears to the Central Government that such transfer is injurious to the public interest or was made with a view to evading or defeating the vesting of the property in the Custodian, then the Central Government may, after giving a reasonable opportunity to the transferee to be heard in the matter, by order, declare such transfer to be void and on the making of such order the property shall continue to vest or be deemed to vest in the Custodian.

14 *Id.* § 8 (1)
With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property and where such property belongs to an individual enemy subject, may incur such expenditure out of the property as he considers necessary or expedient for the maintenance of that individual or of his family in India.

15 *Id.* § 18
The Central Government may, by general or special order, direct that any enemy property vested in the Custodian under this Act and remaining with him shall be divested from him and be returned, in such manner as may be prescribed, to the owner thereof or to such other person as may be specified in the direction and thereupon such property shall cease to vest in the Custodian and shall re-vest in such owner or other person.

divested of his right in the property; as the Custodian does not gain right, title or interest in such due to the vesting. The Custodian is only responsible for the possession, management and control of such property, and does not gain any title over such.

In consequence, the High Court declared that all property that had been vested in the Custodian was to be returned to the Petitioner, as his property was outside the purport of the Act. As conceded by the Government, the Raja had always been a citizen of India; and so the Court concluded that no reasonable reading of the term 'Enemy' under the Act could permit him to be declared so, and that the property must therefore vest with him.

The Supreme Court[16]

However, the Raja was brought to the Supreme Court to defend the decision of the Bombay High Court in an appeal filed by the Government in what was the final, (or what was assumed to be so), step in a tedious and seemingly unending legal battle. Here, in the appeal filed by the Union of India against the High Court directing return of possession to the Raja; the Supreme Court was faced with an undeniably symbolic question: Could an Indian Citizen, born and raised of India who chose not to accept his father's defection to Pakistan, be legally considered an 'Enemy'?

The Court divided its analysis of the Raja's case into two parts:

1. With what objective was the Enemy Property Act enacted, and in that context, what powers vest with the Custodian?
2. Can an Indian Citizen be considered an Enemy under the Act, and therefore can his properties vest with a Custodian?

In response to the first question, J.Bhan (as he then was) undertook a conjoined reading of Sections 6, 8 and 18 of the Act. The Object of the Act, as stated by the Court was to *'prevent an enemy State from carrying on business and*

16 UOI v. Raja Mohd. Amir Mohd. Khan : (2005) 8 SCC 696.

trading in the property situated in India.'[17] Therefore, the vesting of property in the Custodian could not have been said to divest the enemy subject of his right, title and interest in the property; but was limited to the extent of *'possession, management and control over the property temporarily.'*[18] This view, as enunciated by the Supreme Court was in consonance with the views of the Calcutta High Court,[19] as well as of the Bombay High Court[20] judgement, that was the subject of appeal in the present case.

The question that therefore fell for determination was whether 'Enemy Property' that was inherited by a Citizen of India could be said to be Enemy Property or not. The Supreme Court having to Interpret Section 2(b)[21] and (c)[22] of the Act, stated unequivocally that the scope of the Act could '*by no stretch of the imagination'*[23] extend to an undisputed Citizen of India, and that by extension, property inherited by him cannot be said to be enemy property. Thus, once the property ceased to be enemy property, it ceased to belong to an enemy;[24] and therefore could not vest in the Custodian.

The Supreme Court therefore granted the relief that the Raja was seeking, an unequivocal declaration that he could not be said to be an 'Enemy' under the Act, and was therefore due the return of his properties from the Government.

We may therefore conclude on the following questions of law in relation to the Enemy Property Act, 1968:

1. The Acts original purpose was in the prevention of profiteering from properties held by 'Enemy Subjects' and located in India; and not simply to deny the right to such property to all those related to such Enemy.

17 *Id* at 10.

18 *Id.* at 13.

19 Sudhendu Nath Banerjee v. Bhupati Charan Chakrabarty AIR 1976 Cal 267; Mumtaz Begum v. Union of India AIR 1991 Cal 241.

20 *Supra* note 11.

21 *Supra* note 5.

22 Enemy Property Act, 1968 § 2 (c) 'Enemy property' means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm;

23 *Supra* note 16 at 21.

24 *Id* at 23.

2. The Original Act was meant only to grant possession, management and control of the properties to the Custodian, and in no reading sought to transfer title of such property.

3. A thorough reading of the Original Act excluded Indian Citizens from the definition of 'Enemy Subjects', and therefore allowed them to legally succeed to property held by an Enemy.

In the immediate aftermath of the judgement, the number of people who laid claim to 'Enemy Property' was staggering.[25] In light of the Supreme Court judgement, nearly 550 petitioners[26] approached the Court for the return of their property. As per Custodian records, the market value of shareholding in Indian Companies by Pakistani nationals was close to 400 million dollars,[27] in nearly 109 public companies, and 478 unlisted private companies. Further, the total number of properties that have been seized under this Act are close to 16,000,[28] with a combined value of such was no less than thousands of crores; the related litigations of which proved cumbersome, expensive and ultimately, a step too far for the Central Government.

Ordinances

Due to the extraordinary number of the litigations the Government was now facing, along with the potential divestment of a large number of valuable properties from it, they sought to exercise their authority under Article 123 of the Constitution of India to nullify the operation of the 2005 judgement.

25 Kiran Kabtta & Krishna Kant, *Pakistani-owned shares worth crores locked up with govt of India*, Economic Times, May 21, 2008, available at http://articles.economictimes.indiatimes.com/2008-05-21/news/27718393_1_custodian-of-enemy-property-shareholders-three-companies (last accessed on February 8, 2016).

26 Office of the Custodian of Enemy Property in India.

27 Sachin P. Mampatta, *The Pakistani stake in over 100 listed Indian companies*, Livemint, January 26, 2016 available at http://www.livemint.com/Opinion/KlJZFxGDmtWiKqlz8z2ijN/The-Pakistani-stake-in-over-100-listed-Indian-companies.html (last accessed on February 8, 2016).

28 Times News Network, *16,000 'enemy properties' worth crores in India, several in city*, Times of India, January 14, 2016, available at http://timesofindia.indiatimes.com/city/mumbai/16000-enemy-properties-worth-crores-in-India-several-in-city/articleshow/50582909.cms (Last accessed on February 8, 2016).

A. 2010

In the year 2010, five years after the Supreme Court had granted the Raja firm title and right of possession over his properties, the Government enacted the Enemy Property (Amendment and Validation) Ordinance[29] that was replaced by the Enemy Property (Amendment and Validation) Bill, 2010:[30] that effectively sought to nullify the aforementioned orders of the Court. Here, the Bill amended the operative Section 5 of the Act, which inserted (3) into the Section, which was to read as:

Section 5(3): 'The enemy property vested in the Custodian shall, notwithstanding that the enemy or the enemy subject or the enemy firm has ceased to be an enemy due to death, extinction, winding up of business or change of nationality or that the legal heir and successor is a citizen of India or the citizen of a country which is not an enemy, continue to remain vested in the Custodian till it is divested by the Central Government.'

The Bill also sought to protect itself from numerous litigants who sought the return of their property by introducing Section 18B:

'Section 18B. No court shall have jurisdiction to order divestment from the Custodian of enemy property vested in him under this Act or direct the Central Government to divest such property from the Custodian.'

Immediately after the Ordinance was promulgated, Government-appointed Custodians seized several properties that had earlier been divested from them; rendering all previous litigations concerning such property frustrated. The Bill however, was not introduced in Parliament due to the pressure the Government was put under, for what the Opposition and certain members of the Government viewed as being a 'mala-fide' use of executive power under Article 123 of the Constitution,[31] with the UPA Government consequently

29 Enemy Property (Amendment and Validation) Ordinance (2nd July, 2010).

30 Enemy Property (Amendment and Validation) Bill, 2010 (Bill no. 75 of 2010).

31 Express News Service, *Raja of Mahmoodabad won 32-yr legal battle — only to lose all*, Indian Express Archive, August 5, 2010 available at http://archive.indianexpress.com/news/raja-of-mahmoodabad-won-32yr-legal-battle----only-to-lose-all/656305/ (last accessed on January 27, 2016).

allowing the Ordinance to lapse. The battle against the 2005 judgement however, continued well into the next decade, causing greater frustration to those who were seeking the return of their property under the law of the land.

B. 2016

Five years after the lapse of the 2010 Ordinance, the Government sought once again to suspend the operation of the 2005 judgement, and appropriately amend the law on Enemy Property. On the 7th of January, 2016 the President promulgated the Enemy Property (Amendment and Validation) Ordinance, 2016[32] (hereinafter "The Ordinance") that made significant changes to the scope and one can argue, the very basis of the Enemy Property Act, 1968. Amid the raging controversy pertaining to the effects of the Ordinance upon those now subject to it, several crucial legal questions arise from the promulgation that are required to be answered by the Court in the inevitable litigations that it will now face. Prior to a discussion about the nature of the amendments themselves, it is important to understand the scope of the Ordinance making power of the Executive, and whether the circumstances validated the usage of Article 123 in the instant matter.

1. Article 123 and the President's Satisfaction

Under the Constitutional scheme, the President is competent to issue Ordinances under Article 123[33] under the following circumstances:

32 Enemy Property (Amendment and Validation) Ordinance, 2016 (No.1 of 2016)

33 Article 123: Constitution of India, 1949: (1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require;
(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance.
(a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
(b) may be withdrawn at any time by the President Explanation Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause;
(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

a. The Ordinance must be issued at such time when neither house of the Parliament is in session.

b. The President must be satisfied that circumstances exist which render it necessary for him to take immediate action. This 'satisfaction' has been read to be the satisfaction of the Council of Ministers, and not the individual prerogative of the President.[34]

c. Every Ordinance must be laid before both Houses of Parliament; and ceases to operate at the expiration of six weeks from the date of re-assembly of Parliament, or earlier if resolutions disapproving the Ordinance are passed.

Seeing as the Ordinance has yet to be tabled before Parliament, the discussion here will focus upon the justiciability of 'the satisfaction of the President', and whether a prospective Petitioner may question that adequate circumstances did not exist for the promulgation of such Ordinance in the first place, and that the promulgation was therefore unconstitutional.

The earlier position of the Judiciary was that the sole judge of whether circumstances which call for the legislation are so imminent and serious that no delay can be tolerated, is the President himself.[35] It was stated by the Supreme Court that where it is alleged that the power of the President was not exercised in good faith, the Court cannot inquire into the propriety of the satisfaction.[36]

In the case of *D.C. Wadhwa v. State of Bihar*[37] the Supreme Court held that the re-promulgation of Ordinances by the Governor of a State is an unconstitutional exercise of the power under the Constitution, but held *'The court cannot examine the question of satisfaction of the Governor in issuing an Ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor.'*

34 Samsher Singh v. State of Punjab (1974) 2 SCC 831.
35 Lakhinarayan v. State of Bihar AIR 1950 FC59.
36 State of Punjab v. Satya Pal AIR 1969 SC 903.
37 AIR 1987 SC 579.

However, in the case of *A.K Roy* v. *Union of India*[38] the Court stated in the context of the Emergency Powers of the President that *'judicial review is not totally excluded in regard to the question relating to the President's satisfaction'*, opening the door to questions pertaining to the propriety of such satisfaction. This dictum was furthered in the case of *S.R Bommai,*[39] the Court concluded that in relation to a declaration of Emergency under Article 356, the proclamation therein may be challenged on grounds of 'mala fides', or that it is on wholly extraneous and irrelevant grounds. The law as it currently stands was enunciated in the case of *Rameshwar Prasad* v. *Union of India:*[40]

'Thus, it is open to the Court, in exercise of judicial review, to examine the question of whether a Governor's Report is based upon relevant material or not; whether it is mala fide or not; and whether the facts have been verified or not.'

In light of the circumstances surrounding the promulgation of the Ordinance in the instant matter, it is stated that the application of Judicial Review to President/Governor's satisfaction under Article 356 should therefore be extended to the circumstances prior to promulgation under Article 123 and 213[41] of the Constitution; in that powers under Article 123 and 356 are 'extra-ordinary powers' only to be exercised when there is an emergent need to bring a law.[42] Further, the President acts upon the advice of the Council of Ministers under both Articles,[43] and is only allowed to refuse such advice once, after which he is bound to accept such.[44]

Further, it is argued that such satisfaction must be justiciable to prevent executive excesses, which goes against the fundamentals of the Parliamentary

38 AIR 1982 SC 710.
39 S.R Bommai v. Union of India (1994) 3 SCC 1.
40 (2006) 2 SCC 1.
41 Article 213 covers the Power of Governor to promulgate Ordinances during recess of Legislature**.** *See* note 34.
42 Lokendra Malik, *The Power of Raisina Hill* 153 (LexisNexis, 2015).
43 Article 74(1), Constitution of India, 1949.
44 Proviso to Article 74(1).

Government system as envisaged by the Constitution.[45] In the context of the previously discussed 2010 Ordinance, the Government provided a Statement detailing reasons for the enactment of the Ordinance,[46] which included reasons such as; '*of late there have been various judgements by different High Courts and the Supreme Court that have adversely affected the powers of the Custodian and the Government of India.'*[47] 'Situations' such as these cannot be said to fall under the test of it being necessary for the Executive to take 'immediate action', as envisaged by the Constitution Drafters.[48] In the year 2016, there were no extenuating circumstances that required imminent legislation, and no indication of such from the Government. The need for 'immediate action' must be a result of grave adversity if the Government does not act, or a situation that requires swift consideration; and not simply to circumvent the constitutionally established law-making procedure.

Therefore, when the satisfaction of the President is not based upon relevant material that suggest the need for immediacy, or seriousness; **such satisfaction must be the subject of Judicial Review.**

2. A Citizen, an Enemy

It would now be pertinent to discuss the new provisions of the Enemy Property Act, 1968 as amended by the Ordinance. The discussion in this regard will be limited to two points; amendments made to Section 2(b) and the introduction of Section 22-A.

I. The definition of the term 'Enemy Subject', now reads as hereunder:
Section 2(b): "enemy" or "enemy subject" or "enemy firm" *means a person or country who or which was an enemy,* ***an enemy subject including his legal heir and successor whether or not a citizen of India*** *or the citizen of a country which is not an enemy or the enemy, enemy subject or*

45 Samsher Singh and Anr. v. State of Punjab 1974 AIR SC 2192.
46 Under Rule 66(1) of the Rajya Sabha Rules.
47 *Supra* note 42 at para 2.
48 C.A.D., Vol. III, p. 213.

his legal heir and successor who has changed his nationality or an enemy firm including its succeeding firm whether or not partners or members of such succeeding firm are citizen of India or the citizen of a country which is not an enemy or such firm which has changed its nationality, as the case may be, under the Defence of India Act, 1962 (51 of 1962), and the Defence of India Rules, 1962 2[or the Defence of India Act,1971 (12 of 1971) and the Defence of India Rules, 1971], but does not include a citizen of India other than those citizens of India, being the legal heir and successor of the "enemy" or "enemy subject" or "enemy firm";

Explanation 1**: For the purposes of this clause, the expression "does not include a citizen of India" shall exclude and shall always be deemed to have been excluded those citizens of India, who are or have been the legal heir and successor of an "enemy" or an "enemy subject" or an "enemy firm" which or who has ceased to be an enemy due to death, extinction, winding up of business or change of nationality* ***or that the legal heir and successor is a citizen of India *or the citizen of a country which is not an enemy.*

***Explanation 2**: For the purpose of this clause, it is hereby clarified that nothing contained in this Act shall affect any right of the legal heir and successor referred to in this clause* ***(not being inconsistent to the provision of this Act**) which has been conferred upon him under any law for the time being in force.*

II. Further, the Act also seeks to nullify any previous judgements of any Court/ Tribunal concerning Enemy Property, as well as retrospectively apply the new provisions of the Act:

***Section 22A**: Notwithstanding anything contained in any judgment decree or order of any court, tribunal or other authority,-*

***(a)** the provisions of this Act, as amended by the Enemy Property (Amendment and Valuation) Ordinance, 2016, shall have and shall always be deemed to have effect for all purposes as if the provisions of this Act, as amended by the said Ordinance, had been in force at all material times;*

The effect of the Ordinance is two-fold:

1. It nullifies the previous Supreme Court declaration[49] by altering the very basis of the judgement itself. The Court had earlier stated that if the legal successor to Enemy Property is an Indian Citizen, he/she is outside the scope of the definition of 'Enemy Subject', and by necessary implication, cannot be subject to it. However, the 2016 amendment changes the legal question entirely, by squarely including such legal successors within the definition as amended; thereby frustrating the dictum of the earlier pronouncement.

2. Secondly, the definition includes expressly Citizens of India as falling within the definition, and does so entirely on the basis of their lineage; with their undisputed citizenship having no effect upon their status as 'Enemy Subjects.'

3. The law operates retrospectively, and therefore operates against all those whose properties were subjects of dispute even prior to this amendment, while expressly nullifying all previous judgements of any court concerning Enemy Property.

We are therefore lead to examine the constitutionality of the Amending Ordinance with two crucial questions:

1. Can an Act of Parliament retrospectively invalidate the dictum of a Court of India?

2. Is the classification, and consequent differentiation between Citizens of India to inherit property solely on the basis of their lineage in violation of Article 14 of the Constitution?

49 2005.

A. Question 1

Seeing as the effect of the Ordinance was to expressly nullify the judgement of the Supreme Court pertaining to Enemy Property and validate itself against all previous judgments of any Court; we must examine the ability of, as well as the circumstances in which the Legislature can do so.

In *S. T Sadiq* v. *State of Kerala*[50] Supreme Court interpreted Amendments made to the Kerala Cashew Factories Acquisition) Act, 1974 ("The 1974 Act"). Under Section 3 of this Act, the Government could acquire factories under certain circumstances. Through the exercise of power under this provision, the Government issued identical notices to 10 cashew factories in 1974, and to 36 more in 1988. The 36 factories approached the Supreme Court under Article 32 of Constitution, on the grounds that the notices issued to the factories were not in compliance with the requirements in Section 3(1) of the Act. The SC declared these notices to be null and void, and directed the State Government to return possession of these factories to the owners. For the remaining 10 factories, the appeal was dismissed on grounds that the State had fulfilled the conditions established under Section 3.

In the year 1995, the State Government passed the Kerala Cashew Factories Acquisition (Amendment) Act, which was brought into force retrospectively to cover all 46 acquisitions that had been made under the Principal Act. Section 6 of the Act stated, *'The Cashew Factories notwithstanding anything contained in any judgement, decree or order of any Court, Tribunal or other authority and notwithstanding contained in any other law agreement or other instrument for the time being in force, stand transferred to and vest in the Government.'*

At the outset, we must note the similarity between the phraseology of Section 22A of the Ordinance and Section 6 of the Amendment Act as reproduced above, and the consequent importance of the discussion of the Sadiq judgement. In respect of maintaining the Balance of Powers between the Legislature and

50 (2015) 4 SCC 400.

the Judiciary, J. Nariman while upholding a series of judgement of the Apex Court stated:

'It is settled law by a catena of decisions of this Court that the legislature cannot directly annul a judgment of a court. The legislative function consists in "making" law and not in "declaring" what the law shall be. It is for this reason that our Constitution permits a legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. ***It is in this limited circumstance that a legislature may alter the very basis of a decision given by a court****, and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then* ***change the very basis of the earlier decision so that it would no longer hold good****. However, if such is not the case then legislation which trenches upon the judicial power must necessarily be declared to be unconstitutional.'*[51]

Further, the Supreme Court concluded its discussion on this particular point of law by stating that a Provision of law enacted by the legislature that is '*aimed only at directly upsetting a final judgment of a final court (the Supreme Court of India), and* ***which directly seeks to upset a final judgment inter-parties is bad on this count*** *and is thus declared unconstitutional.'*[52]

Further analysis of the law pertaining to Retrospective Validation has been laid down in the case of *State of Haryana v. Karnal Coop. Farmers' Society Ltd*[53]*: 'A legislature while having the legislative power to render ineffective the earlier judicial decisions,* ***by removing or altering or neutralising the legal basis in the un-amended law on which such decisions were founded, even retrospectively****, it does not have the power to render ineffective the earlier judicial decisions by making a law which simply declares the earlier judicial decisions as invalid or not binding.'*

In light of these judgements, the law is clear; in that, to nullify a judgement of a Court, the legislature **must remove** or **alter the law that formed the**

51 *Id.* at 14.
52 *Id.* at 21.
53 (1993) 2 SCC 363.

legal basis of that judgement, and cannot simply declare such judgment invalid, or not binding upon parties.[54] The Ordinance in question by explicitly including legal successors who are Indian Citizens within the definition of 'Enemy Subjects' clearly alters the very basis of the law as laid down in the 2005 judgement.[55] The basis of the judgement can be clearly found in paragraph 21; wherein the Court states:

'*The Respondent who was born in India and whose Indian Citizenship was not in question could not be held to be an enemy or an enemy subject under Section 2(b).* [Un-amended] *Similarly under Section 2(c) the property belonging to an Indian could not be termed as an Enemy Property'*

Thus the basis of the judgement lay in the differentiation between Enemy Subjects and Indian Citizens, upon a reading of Section 2(b) and (c). However, the amendment clearly nullifies this reading of the law, and renders the judgement nugatory. The Government has thus worded the amendment to the Act carefully, and with the clear aim to ensure the non-applicability of the 2005 judgement to the present matter; despite the parties being the same.

B. Question 2

While the Government has amended the Act in line with the Supreme Court dictum of 'altering the basis of a judgement', it is under Article 14 that the Ordinance fails the test of Constitutionality.[56] The clear mandate of Article 14 has been laid down by the Court, wherein a State Action has to be '*fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism and nepotism, in pursuit of promotion of healthy competition and equitable treatment'*.[57]

Therefore, for a law to be struck down under Part III of the Constitution, it must not only be on the ground of 'arbitrariness', but also on the grounds

54 Re Cauvery Water Disputes Tribunal 1993 Supp (1) SCC 96.

55 *Supra* note 17, at 17.

56 Article 14: Right to Equality: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

57 Natural Resources Allocation, In Re, Special Reference No.1 of 2012, (2012) 10 SCC 1, Para 97.

of constitutional infirmity.[58] The present law, it can be argued, is both discriminatory, and unequal in its application; and therefore must be struck down.

Upon analysis of the Ordinance, we can see that despite being a Citizen of India, who inherits property legally through applicable succession laws, one can be denied the right to such property on the grounds of one's ancestry. This is plainly discriminatory. Two Indian Citizens, cannot be treated differently in the eyes of the law, as they are both granted the same protection of their Fundamental Rights under the Constitution.[59] The direct result of such state action is to create an unreasonable classification between equal citizens of India.

In explaining the law on classification under Article 14, J. Das (as he then was) explained that for there to exist 'reasonable classification', two conditions must be fulfilled:[60]

1. That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group;

2. That the differentia must have a rational relation to the object sought to be achieved by the statute in question.

It is argued that neither of these criteria are fulfilled in the present matter. The classification imposed by the Ordinance is to create a class of citizenry that are not allowed access and title over their property on grounds of their lineage, with no further qualifications. Operation of the Ordinance would therefore imply that a law-abiding Indian Citizen who legally succeeds to ancestral property would not be allowed any right of possession over such property, because of the chosen nationality of his ancestor. At the same time however, an equal citizen whose ancestor who was not an 'Enemy Subject' would have full rights over the

58 McDowell and Co. (1996) 3 SCC 709.
59 Preamble, Constitution of India, 1950.
60 Ram Krishna Dalmia v. Justice S.R Tendolkar AIR 1958 SC 538.

same property that devolved in an identical manner. Therefore, the classification cannot be said to be founded on an intelligible differentia between Citizens.

Further, even if such differentia exists; it cannot be said to be in furtherance of the objective of the Original Act. As mentioned earlier, the Act sought to prevent Enemy Subjects from controlling business, or profiting in any way from property held in India, and therefore vested such property temporarily in the hands of a Government appointed Custodian. There is therefore no reasonable nexus between the established objective of the Act, and the effects of the Ordinance, leading to such classification being unreasonable, and hit by Article 14. In light of this stated objective, no interest would be served from denying the right to property to Indian Citizens, particularly those who reside and work in India; who form a large part of those affected by this Ordinance. Denying such people the Right to Property would not only be in derogation of Article 300-A of the Constitution,[61] but the stated aim of the Constitution drafters to ensure that the Right to Property was a fundamental right of all Citizens.

Conclusion

The Right to Property has been given express recognition as a legal right, provisions being made that no person shall be deprived of his property save in accordance with the law.[62] The entirety of the previous discussion has demonstrated a situation in which the Government has sought to actively deny the Right to Property to a group of individuals, in complete derogation of Constitutional principles. The departure from the Constitutional scheme can be surmised under the following heads:

1. The exercise of power under Article 123, with there being no demonstration of the 'imminent need' for such promulgation;
2. The widened scope of the definition of 'Enemy Subject' to include Indian Citizens, and the creation of an unreasonable classification between Citizens;

61 Article 300A- No person shall be deprived of his property save by authority of law.
62 Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. (2007) 8 SCC 70, at 11.

3. The express validation of the Ordinance against all previous judgements of any Court, thereby seeking to exempt the Ordinance from Judicial Review;

4. The Retrospective validation of the Act, from the time when the Original Act came into force,[63] when the Right to Property was included as a Fundamental Right in the Constitution.

As per the requirements of Article 123, the Ordinance must be discussed by the Parliament within six weeks of the reconvening,[64] wherein it must be passed by the Parliament to continue in force; or lapse after the expiry of such period. While it remains to be seen what response the Ordinance will receive in the Parliament; the legal implications of the Ordinance must be understood, and the legality of such measures must be determined. The Partition continues to influence the lives of Ordinary citizens in extraordinary ways, and its legacy will only be determined by how we continue to react to the event. On this evidence, the wounds have yet to heal.

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63 1968.

64 The Budget Session of the Parliament is schedule to being on the 23rd of February, 2016.

The Need, the Greed and the Media : Regulating the Unregulated

*Abhishek K. C. Patil & Bhgirath Ashiya**

Introduction

> *"A free press is the unsleeping guardian of every other right that free men prize; it is the most dangerous foe of tyranny. Where men have the habit of liberty, the press will continue to be the vigilant guardian of the rights of the ordinary citizens".*[1]
>
> ***- Winston Churchill***

The eastern part of the world has in olden times always found a conducive atmosphere in realisation of free speech in comparison to the west. As noted by Dow, 'the historians of the east wrote with more freedom concerning persons and things than writers have even dared to do in the west.'[2] Therefore today's vigilant nature of the Indian media is not an uncommon phenomenon. With times the role of media has evolved from a mere transmitter of information to a regulator of information. As noted by Karl Bucher "*Newspaper (print media) changed from mere institutions for the publication of news into bearers of public opinion – weapons of party politics.*"[3]

The Leveson report in the aftermath of the phone hacking scandal in U.K. reconciled that media need not always pursue serious stories in public interest. In its endeavour to inform, educate and entertain, the media incidentally can be unruly, irreverent and opinionated.[4] But the broader theme of the report

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1 Julian Petley, *Shouldn't freedom be good for all?* 24 British Journalism Review, 33, No. 3 (2013).

2 C.L. Anand, Constitutional Law and History of Government in India, 188 (8th ed. Universal law Publication company, 2008).

3 Chris Greer, Crime and Media - A Reader 15 (Routledge Taylor and Francis Group, London: 2009).

4 Lord Justice Leveson, An Enquiry into the Culture, Practices and ethics of the Press, Executive Summary, 6 (Nov. 2012).

has been the distinction between individual free speech and expression and commercial mass media expression. The primary duty of the media houses has to be a platform to facilitate adequate communication with the public.[5] In such a scenario, even when sensationalism cannot be zeroed down, primacy should be given to educate individuals in making right choices. This paper analyses the contours of the media and need and form of regulation required so as to make it compatible with the democratic ideals.

The 1920's Lippman-Dewey debate on the role of media, wherein Lippman's version is that the media should evaluate the policies of the state and present well-formed conclusions. In contrast Dewey states that the media is to educate the public about various issues and let the public draw conclusions from the same. Analysing these propositions it is also a matter of concern as to how these roles would be fulfilled in the era of "Digital Walmartization".[6]

By virtue of the vigilant roles of transparency and accountability, media is considered by default as a fourth estate. According to the three-sided model of Johan Galtung, the pillars of the society are the State, Capital or market forces and the civil society. Further as per this model in antiquity of many countries, the media have initially found place close to the state, then moved towards the civil society and in the modern times it has attained proximity to the capital or market forces.[7] In this scenario, according to Galtung, the media could assume the status of a fourth pillar of a democracy only if it succeeds in attaining a strong and independent position in the aforementioned triangular setup.[8] But in its endeavour to transform as a fourth estate the media has always found an impediment through the actions of the state. The *Bennett Coleman case*[9] is a fine example of the state trying to sabotage the media through indirect means.

5 Lord Justice Leveson, An Enquiry into the Culture, Practices and ethics of the Press, Report, Vol. 1, 76 (Nov. 2012).

6 Dell P. Champlin and Janet T. Knoedler, *The Media, the News, and Democracy: Revisiting the Dewey-Lippman Debate*, 40 Journal of Economic Issues, No. 1,135-152 (March. 2006).

7 Kaarle S Nordenstreng, *The Structural Context of Media Ethics: How Media are regulated in Democratic Society* in Media Ethics Opening Social Dialogue 72 (ed. B. Pattyn Peeters 2000).

8 *Id*. at 73

9 Bennett Coleman v. Union of India, AIR 1973 SC 106.

The role of media in electoral democracy is also significant considering the new crafted agendas set up for the purpose of contesting elections. Gone are the days of voting in the awe of a personality or on mere ideology. Today the conduct of the government in terms of development and growth act as a deciding factor. Most decisions are weighed through cost-benefit analysis. In such a situation the public needs to be informed so as to make right democratic choices. The media has evolved from a purposive role of pointing out the social evils, flaws and reforming Indian society, to that of shaping the fate of a country's political scenario.[10] The recently concluded General election in 2014 in India is an example of media narrowing the gap between politicians and voters.[11] But the disturbing factor is the scope to misuse the influence of media to set political agendas[12] and thereby create sensational material for commercial benefits. Here comes the Lippman-Dewey debate over whether the media should formulate conclusions for the public or allow them to formulate on their own. Apprehending such a possibility, soon after independence, it was sensed that the media was transforming itself from a mission to business and this transformation invited the appointment of First Press commission in 1952. The commission noted some important findings, which included escalating yellow journalism and writings creating unrest within boundaries. The prominent recommendation of the commission included the setting up of statutory press commission at the national level, which would act as a body to which the print media would be held accountable.[13] As a result the Press council of India was established on July 4th, 1966 as an autonomous statutory and quasi-judicial body.

10 Matthew A. Baum and Phil Gussin, *Issue Bias: How issue coverage and media bias affect voter perceptions of elections*, http://www.hks.harvard.edu/fs/mbaum/documents/IssueBias_APSA05.pdf (Last accessed on November 10, 2015).

11 Zoya Hasan, *Manufacturing Dissent: The media and the 2014 General election,* The Hindu Centre for Politics and Public Policy, http://www.thehinducentre.com/verdict/commentary/article5843621.ece. (Last accessed on November 20, 2015).

12 *Id.*

13 Kundra S, Media laws and Indian Constitution 42-43 (Anmol Publications Pvt. Ltd., 2005).

The Impact on Democratic Principles

Freedom of Press and electronic media, which is implicit from the fundamental right of free speech and expression,[14] is one of the cherished rights, which strengthen the idea of democracy. As noted by socialist thinker Sachchidanand Sinha, "the press and the demand for press freedom was a necessary concomitant of the widening area of democratic process and institutions".[15] Though this freedom is not explicitly enshrined in the constitution, but it facilitates the realisation of democratic principles of transparency and accountability. By virtue of the same, the role of the media has been glorified by the notion that it is the fourth estate in a democracy. The reason for such a development was expressed in the Finnish discussion among constitutional lawyers which led a proposal that the classic doctrine of the typical three pillars comprising of legislature, executive and judiciary is no longer valid and therefore should be complemented with contemporary branches like trade unions, mass media and market forces.[16]

But in recent times media has been off the track and moving away from issues in public interest towards creating an interest compatible to their commercial needs. As Justice Brooke stated in *Greene* v. *Associated Press*[17] 'Our press is free to get things right and it is free to get things wrong'. In a similar manner the rational delimitation of the boundaries of media's exercise of its powers requires reconsideration to balance the needs of democracy and freedom of the press. Democracy demands a free press, but the extent of curbing its ever-increasing power has remained blurred due to the moral hazard of State control and intervention. The difference in understanding of the media of its democratic role has deluded to the point where 'what is interesting to the public and what is in the public interest'[18] being diluted.

14 DD Basu, Introduction to the Constitution of India, 110 (21st ed., Lexis Nexis, 2013).

15 Uday Sahay, Oxford Making News – Handbook of the media in contemporary India, (Oxford University Press, 2009).

16 Sanjay Kumar Singh, Press Laws and Ethics of Journalism 185 (1st ed. Anmol Publications Pvt. Ltd. 2013).

17 2004 EWCA 1462, ¶ 1.

18 Lion Laboratories v. Evans 1984 2 All E.R. 423.

In recent times by virtue of commercialization, media has moved away from the ideals of democracy. The glamour news, the celebrity coverage, the newsroom shows with the elite and intellectual, do not represent the quintessential function of the media in a democracy. Furthermore the dangerous trend of sting operations without legitimacy annihilates the right to privacy. The sales and ratings for advertisers have become the main drivers of media houses, which hamper investigative reporting[19] and dampen the quality of the news analysis. The result is dumbed down entertainment, the triumph of banality[20] and sensationalism over sensitization.

The Corporatization of the Media

In the era of globalization and privatization, the Indian media has had to face the wrath of the invisible hand in cohesion with market forces bringing forth cutthroat competition. The eventual result has been the growing shift of the media towards monopolistic tendencies.[21] Apprehending such a development the first Press Commission of India in 1952 noted that yellow journalism was on the increase in the country whilst not being confined to any particular area or language.[22] This similar situation persists as the media tries to adopt itself to the profit-oriented culture, thus being forced to vitiate the core journalistic principles under corporate hegemony. The owners of the mass media have parallel financial interests in the industrial sector. This development leads to the media forfeiting its claim to be an independent estate by selling its soul to the market[23] and allowing dubious advertisements of unchecked products. The preferential access provided to certain media houses as gratuitous acts

19 Pradip Kumar Panday, *Role of media in democracy: does globalization affect media's role in the context of Bangladesh?* 2 Global Media Journal (Spring 2009).

20 JürgenKrönig, *Politics and the Media - The Tyranny of the Fourth Estate*, December 5, 2013 available at http://www.policy- network.net/uploadedFiles/Publications/Publications/Kronig_pn3.2%20p56-63.pdf (Last accessed on April 1, 2016).

21 Ram N, *The Changing Role of the News Media in Contemporary India*, 6, The Hindu, November 25, 2013, available at http://www.thehindu.com/multimedia/archive/00863/Contemporary_India__863821a.pdf (Last accessed on April 1, 2016).

22 Sahay, *supra* note 15.

23 *Fourth Estate on Sale*, 44 No. 50, Economic and Political Weekly, 5-6 (December 18, 2009).

without defined privileges,[24] results in a form of quid pro quo, which denies equal treatment to other media entities. Therefore the on-going corporatization of the media where competing interests dilute the ends of journalism, require regulation,[25] so as to uphold journalistic ethics and responsibilities. In the time when corporate-political nexus is at its heights, allowing media to be a catalyst agent for such a nexus is a threat to free flow of information. A solution here would be to impose restrictions upon corporate houses in holding stakes in the media industry. Further cross media ownership is another threat to free speech and expression[26] which was outlined by TRAI consultation paper, wherein it was noted that Corporates can use media to influence policy making and promote their vested interests. This has led to large conglomerates having presence across different media segments.[27] Therefore amendments to the Competition law is essential to regulate cross media ownership in the country.

Further the increasing foreign control over the Indian media is a modern cause of concern. As noted by V. R. Krishna Iyer "Neither the reporting nor the editorials of foreign media tycoons can be relied on, when national interests clash with multinational corporate profits, truth will be a casualty".[28] Therefore corporatisation coupled with foreign control is a threat to Indian sovereignty.

Opinion polls and their unpredictability

Every time in the run up to the elections in India, speculation takes limelight, replacing reason with sensationalism. These speculations are fuelled by Opinion/ Exit polls conducted by several agencies. In recent times with the escalating competition among the media houses, opinion polls have been the biggest factor in the surge of TRP (Television Rating Points). As discussed above there cannot be a compromise on the freedom of the press for the purpose of

24 David A. Anderson, *Freedom of the Press*, 80 Texas Law Review, 429, 448 (2002).

25 Eric Barendt, Freedom of the Press, 2-3 (1st ed. Ashgate Publishing Limited, London, 2009).

26 Secretary v. Cricket Association of Bengal, (1995) 2 SCC 161.

27 Consultation Paper on issues relating to media ownership, No. 01/2013 TRAI, (Feb. 15, 2013), available at http://www.trai.gov.in/WriteReadData/ConsultationPaper/Document/CP_on_Cross_media_%2015-02-2013.pdf (Last accessed on January 10, 2016)

28 V.R Krishna Iyer, *Foreign Print Media Incarnating as Indian Fourth Estate?* 29, Economic and Political Weekly, 3082-3085, (1994).

sustaining the largest democracy. Therefore conducting and broadcasting an opinion poll can be read into the freedom of the press. But the question arises whether these opinion polls are detrimental to the liberty of citizens to choose their candidate in an election?

The answer to the above question is subjective. The uneducated or the politically unaware masses do need the help of such opinion polls to construct their perception about the contenders.[29] But an educated or politically aware citizenry will be least affected. But since the former category being in larger number, the question of compatibility of opinion polls in a democracy arises.[30] In recent times it is also alleged that there is a significant manipulation of results of opinion polls to suit the interests of a particular political organisation. A sting operation by a news channel revealed that financial strength could act as a catalyst to turn the tables of opinion polls towards a particular interest.[31]

Media trial

The recent significant threat posed by the media in the guise of its messiah of the people is the picturing of the judicial proceedings irrespective of the judicial procedure. The confession before the police though is an unacceptable evidence it is a dressed as a genuine confession[32] and the verdict of guilty is boomed around the nation by the media with its well-crafted expert panel. Thereafter even though the accused is acquitted his image is tarnished and is very difficult to rebuild it.[33] These ill-conceived practices impede the ends of justice. Moreover the Law Commission of India in its 200th report has rightly apprehended that this growing trend towards the temptation to sell stories,

29 Ravi M. Khanna, *First, paid news and now, paid opinion polls! What next?*, available at http://www.impactonnet.com/First,-paid-news-and-now,-paid-opinion-polls!-What-next%3F (Last accessed Feb. 15, 2016).

30 Rajeeva Karandikar, *Power an Limitations of Opinion Polls: My Experiences*, The Hindu Centre for Politics and Public Policy http://www.thehinducentre.com/verdict/commentary/article5739722.ece (Last accessed Feb. 19, 2016).

31 *Sting operation reveals massive manipulation by opinion poll agencies*, The Economic Times, Feb. 26, 2014.

32 Law Commission 200th report, *Trial by media free speech and fair trial under criminal procedure code,* 14 (1973).

33 *Id.*

which the 'public is interested in' rather than 'what is in public interest',[34] hinders the right to fair trial.[35]

Media Regulation

In recent times, with escalating numbers of media houses and enhancing competition, the actions of the fourth pillar are in question. The conduct of the media is difficult to judge upon, because it is the media which largely influences in the construction of the perception of the masses. Most prominently the broadcast media has remained a major concern (as print media is regulated by a statutory body, the Press Council of India) for its untrammelled growth and allegation of corruption, paid news, violations of privacy and urge for sensationalising on sensitive matters. Further the undisclosed issues of ownership, foreign control, working conditions and the gravity of proximity between the newsroom and boardroom have fuelled to the urge for media regulation.[36]

There have been numerous attempts by the government to regulate the broadcast media but has miserably failed due to media lobbying and their urge for self-regulation. In July, 2007 the government took an initiative to regulate the powerful broadcast media through the Broadcasting Media Regulation Bill, 2007 which was accompanied by self-regulation guidelines. But this move of the government was vehemently opposed by the media industry. Later a compromise was reached wherein the two major television channel organisations – The Indian Broadcasting Foundation and the News Broadcasters Association – agreeing to draft their own self-regulating guidelines.[37] Throughout the period the public was kept in a loop with least concern for public debate. Though the media covered this issue to a significant extent, it made no efforts to contextualise developments and make a comprehensive presentation to the public at large.[38]

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34 Law Commission, *supra* note 32.

35 Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, 1988 SCR Supl. (3) 212.

36 P. G. Thakurta, *Line Between Boardroom, Newsroom blurred*, The Hoot, (17th Aug. 2012)

37 Sanjay Kumar Singh, Press Laws and Ethics of Journalism 185 (1st ed. Anmol Publications Pvt. Ltd. 2013).

38 *Id.*

In the government's endeavour to bring the media under its clutches, an Electronic Media Monitoring Centre (EMMC) was established. The objective of this centre was to monitor the content of all news channels and FM radio stations. This action of the government was seen as detrimental to the urge for self-regulation over state regulation. The EMMC was meant to facilitate the functioning of the broadcast regulatory agency but ironically there were no efforts made towards the establishment of such an agency.[39] Meanwhile, following its undertaking in 2007 to draft guidelines for self-regulation, the News Broadcasters' Association (NBA) submitted documents pertaining to draft code of ethics and draft regulations for a setting up of a News Broadcasting Standards Disputes redressal authority to the government. This move yielded fruit when the redressal authority and code came into effect on October 2, 2008.[40]

However, the Mumbai attacks of 2008 pulled back the media in its old track of insensitivity. Moreover the coverage of the attacks itself became a news and drew a lot of criticism from all quarters. In spite of being at fault the media blatantly stated that they would not accept any guidelines/regulations imposed on them. With many reprimands from the government the broadcasters consented to create an emergency protocol, which could be read into their self-regulatory guidelines.[41]

The Kind of Regulation needed?

With self-regulations failing to define the contours of the media, there is a strong urge for media regulation by a statutory body. Further emulation of certain provisions as introduced in USA – which include equal time rule, fairness doctrine and right of rebuttal – is essential to realise the true spirit of democracy.

Further on the lines Federal Communications Commission in the USA, there is a need for an independent regulatory agency with its own sets of rules and regulations. It is ironic when USA being one of the leading liberal societies has

39 *Id*. at 186.
40 *Id*. at 187.
41 *Id*. at 188.

opted for a regulatory body for the broadcast media but India with discounted degrees of tolerance towards free speech has refrained from establishing any regulatory agency for the broadcast media. However it is significant that the government should have no role to play in the conduct of the regulatory body so as to shun the long standing allegation of state diluting media freedom. Therefore realising the global scenario, the need for an independent statutory regulatory body is inevitable considering the failures of self-regulation.

Recommendations

1. Establishing a single independent regulatory body to take cognizance of the misdeeds of the media (both print and electronic).
2. The body should be independent of the government as well as the media.
3. Multi-dimensional corporations should be restricted from having stakes in news media (both print and electronic).
4. Opinion polls before being made public should be scrutinized by the regulatory authority, to curb the abuse of power bestowed in the form of a fiduciary relationship between democracy and the Media.
5. Media trial should be regulated by appropriate amendment to the Criminal Procedure Code, so as to strike a balance between the freedom of the press and the right to life and dignity.
6. The contours of sting operations should be defined within the Indian legal system and thereby uphold the basic fundamental right to privacy.
7. Paid news should be made as a poll offence leading to the disqualification of candidate.

Conclusion

The power of the media to trigger revolutions and demands of quick recourse of the law, lead to situations in which the picture painted by the media, shapes public opinion. The role of the media is not only to voice the public opinion but also desist from putting forth pre-conceived judgmental ideas of justice,

requiring sensitization rather than sensationalism. The power of the media must be exercised with self-caution rather than bearing the brunt of loss of credibility and its essence in democracy. The media has over the years not only influenced the policies of the government but also enhanced public participation inclusive of the marginalized sections in the governance mechanism. The role of the media is to report events and information as it is and not as they should be, and this methodology of functioning has dire consequences that do not serve the purposes or aspirations of a democratic society.

As Gurcharan Das rightly notes, "*Greed is the sin of capitalism, envy is the vice of socialism*",[42] and in order to balance this juxtaposition of Indian ideological evolution, one needs to resort to legal regulation of the media. The requirement of the media and its continued impact on democracy lies in its protection from the arbitrary powers of the government and the vices inherent in complete commercialization. The balancing of these competing interests must be judged from the net benefits accruing to society, out of a free and fearless media, without being tamed by the forces of the market. There exists the possibility of a non-state as well as non- market oriented approach from the media, which would lend validity to the protection accorded to the media. Under the prevailing circumstances the atonement lies in devising such a role of the media that it does not shy away from scrutiny and regulation under the garb of freedom of the press. The present form of self-regulation through guidelines suffers from ineffectual enforcement and non-compliance, with recurring issues of sting operations, corporate control and competition law issues.

The regulatory mechanism must consist of a hierarchical structure, which integrates the best practices of self-regulation and regulation through an independent body. An individual would be entitled to appeal to the national body if the internal complaints redressal mechanism is ineffective. The national body with the powers of imposing monetary penalties and sanctions should consist of retired Supreme Court judges and journalists**,** with a transparent appointment mechanism based on merit without executive control.

42 Gurcharan Das, The Difficulty of Being Good, 28 (Penguin Books India, 2009).

In the United States, the Federal Communications Commission[43] has reasonably performed the role of regulating issues of media ownership, essential for the freedom of the press. Therefore a national regulator can address the issues of corporate and foreign control of media houses, with the application of the fairness doctrine[44] in the form of obligatory guidelines ensuring the public interest. Therefore the regulatory fears of governmental intervention and dilution of the freedom of the press can be alleviated, to balance societal and media rights. As the fourth estate, the media must recognize not only its rights but also its obligations towards the society, which has vested it with powers, to be exercised with caution. As credibility is the currency, without which it cannot claim its rights and privileges in a democratic society, the media must self-actualize that it is not the tyranny or the growing monopoly that has empowered it, but it's perceived axiomatic role in democracy.

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43 Adam Candeub, *Media Ownership Regulation, the First Amendment,and Democracy's Future*, 41 U.C. Davis L. Rev. 1547 (2007-2008).

44 Gregory P. Magarian, *Substantive Media Regulation in Three Dimensions*, 76 Geo. Wash. L. Rev. 845, 895 (2007-2008).

Case Comments

1

India – Certain Measures Relating to Solar Cells and Solar Modules (WT/DS/456)[1]

*Dr Kavitha Chalakkal**

The Dispute Settlement Body (DSB) Panel report in the *India – Certain Measures Relating to Solar Cells and Solar Modules*[1] *(shortly known as India-Solar Cells)*[2] concerned with certain policies of the Government of India with regard to the implementation of its Jawaharlal Nehru National Solar Mission (NSM)[3] was circulated to WTO members on 26 February, 2016.

The key issues discussed in the report were the Indian measures that were allegedly inconsistent with its international obligations under Article III: 4 of the GATT 1994 and Article 2.1 and Para 1(a) of the Illustrative List in the Annex of the TRIMs Agreement, and their coverage under Article III: 8 (a) of the GATT 1994, and/or their justification under Articles XX(j) and XX(d) of the GATT 1994. The most notable element in the dispute was the

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1 WT/DS/456 available at https://www.wto.org/english/tratop_e/dispu_e/cases_eds456_e.htm#bkmk456r

2 The issue was brought to the Panel by the United States, after the failure of its bilateral consultations with India on the matter. The Panel its first substantive meeting with the parties on 3-4 February 2015; session with the third parties took place on 4 February 2015 and the second substantive meeting with the parties on 28-29 April 2015. On 9 June 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 July 2015. The Panel issued its Final Report to the parties on 28 August 2015.

3 The objective of the National Solar Mission is stated as being "to establish India as a global leader in solar energy, by creating the policy conditions for its diffusion across the country as quickly as possible". It was launched by the Government of India in 2010, with the aim of generating 20,000 megawatts (MW) of grid-connected solar power capacity by 2022. The target was later increased to 100,000 MW in 2014. Resolution, Jawaharlal Nehru National Solar Mission, Ministry of New and Renewable Energy Government of India (11 January 2010).

Domestic Content Requirements (DCR) measures imposed by India in the implementation of NSM. The United States (US), the major exporter of the products (solar cells and modules) in question, claimed that DCR measures accord less favourable treatment to foreign products than that accorded to like domestic ones, resulting in nullification and impairment of its benefits. The DCR had to be satisfied under Phase I (Batch 1 and 2), and Phase II (Batch 1) of the NSM. These measures were incorporated or reflected in various documents within each Batch, including the mission guidelines and request for selection documents, the model power purchase agreement, and the individually executed power purchase agreements between Indian government agencies and solar power developers (SPD).

The US requested consultations with India on 6 February, 2013 and 10 February, 2014.[4] The pursuant consultations on the measures and claims were held on 20 March, 2013 and 20 March, 2014. As the consultations could not reach a mutually acceptable solution, the US requested for the constitution of panel on 14 April, 2014. The DSB constituted a panel on 29 September, 2014 and the final panel report was circulated by WTO on 24 February, 2016.[5]

The NSM is India's ambitious mission to realize its energy needs and reduce its dependence on fossil fuels. To achieve the overall target of 100,000 MW of grid-connected solar-power capacity, the country enters into long-term power purchase agreements (PPA's) with SPD's. Under a PPA, India purchases solar power generated by a particular SPD. Each PPA provides a guaranteed rate[6] for a 25-year term at which the electricity generated by the SPD is bought by India, which resells this electricity to downstream distribution utilities

4 The request was made according to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII GATT 1994, and Article 8 of TRIMs Agreement.

5 Third parties to the dispute were Brazil; Canada; China; European Union; Japan; Korea, Republic of; Malaysia; Norway; Russian Federation; Turkey; Ecuador; Kingdom of Saudi Arabia; Chinese Taipei.

6 The rates guaranteed under PPAs are determined by two Indian electricity regulatory commissions, the Central Electricity Regulatory Commission at the national level, and the State Electricity Regulatory Commissions at the state level.

(Discoms)[7], which in turn resell it to the ultimate consumer, e.g. household, industrial, or governmental entities. The NSM is being implemented in several successive "Phases",[8] with each Phase initiated thus far being further divided into "Batches". As each PPA remains in force for 25 years, the total number of PPA's in place has increased as new Batches are concurrently implemented. India's Central Ministry of New and Renewable Energy (MNRE) is responsible for "all matters relating to renewable energy". MNRE issued the guidelines setting forth the terms and conditions governing each of the three Batches. Under the first two Batches, i.e. Phase I (Batches 1 and 2), MNRE selected the NTPC Vidyut Vyapar Nigam Limited (NVVN)[9] to act as the agency responsible for implementing the solar power project selection process, including, but not limited to, issuing the *Request for Selection* document governing selection of solar power projects. NVVN served as the government party in the individually executed PPA's. For Phase II (Batch 1), MNRE selected the Solar Energy Corporation of India (SECI) to perform the same functions that NVVN performed in respect of Phase I.[10]

The terms and conditions governing each Batch are set out in several documents, including: (a) the *Guidelines* document governing each Batch (setting out the requirements concerning solar power project eligibility, the bid submission process for SPD's, technical specifications, and contract issuance); (b) the *Request for Selection* document governing the selection process (which incorporates provisions of the *Guidelines* and sets out further details regarding the application process, standard terms and conditions applicable to solar power projects, and technical specifications); (c) the "model PPA" (which incorporates provisions of the *Guidelines* and *Request for Selection* documents by reference,

7 "Distribution Utilities", also termed "Discoms", are entities that sell electricity directly to commercial and retail end users in India. There are currently 61 distribution utilities in India.

8 Phase I was from 2010-12 and phase II is 2013-17.

9 NVVN is a wholly-owned subsidiary of the state-owned National Thermal Power Corporation and SECI is a "Government of India enterprise" under the administrative control of the MNRE.

10 Both NVVN and SECI were specifically designated and characterized as "governmental agencies" and as the implementing agencies on behalf of Government of India.

and which forms the basis for each individually executed PPA); and (d) the individually executed PPA's (based on the model PPA).[11]

The current issue arose as to the mandatory DCR's imposed on SPD's participating in Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1). For each Batch, the applicable DCR was initially set forth in the *Guidelines* document and reproduced in the *Request for Selection* document. The applicable DCR was then reaffirmed in the model PPA and all of the individually executed PPA's in each Batch, and further implemented through a "specific plan" that SPD's had to submit after entering into the PPA, specifying how they would meet the requirements of the applicable DCR measure. The scope and coverage of the applicable DCR measure differed across the three Batches. For example, under Phase I (Batch 1), it was mandatory for all projects based on crystalline silicon (c-Si) technology to use c-Si modules manufactured in India, while the use of foreign c-Si cells and foreign thin-film modules or concentrator photovoltaic (PV) cells was permitted and a specific plan was to be submitted. Under Phase I (Batch 2), it was mandatory for all projects based on c-Si technology to use c-Si cells and modules manufactured in India, while the use of domestic or foreign modules made from thin-film technologies or concentrator PV cells was permitted. Phase II (Batch 1) is divided into two parts, Part A and B, the DCR measure was applicable only to Part A. Separate biddings were allowed and the scope of the United States' challenge under Phase II (Batch 1) is confined to the DCR measure imposed under Part A. Under Phase II (Batch 1-A), i.e., any solar cells and modules used by the SPD's must be made in India, irrespective of the type of technology used. In the model PPA for Phase II (Batch 1) refers to the requirements of the Request for Selection and expressly states that SECI shall have the right to terminate the Agreement if an SPD fails to specify their plan for meeting the requirement for domestic content. The Guidelines and Request for Selection documents for each Batch

11 See respectively, *Guidelines for Selection of New Grid Connected Solar Power Projects*, MNRE(July 2010) ("Phase I (Batch 1) *Guidelines"*); *Guidelines for Selection of New Grid Connected Solar Power Projects*, *Batch II*, MNRE (24 August 2011) ("Phase I (Batch 2) *Guidelines"*), (Exhibit USA-6); and *Guidelines for Implementation of Scheme for Setting up of 750 MW Grid-Connected Solar PV Power Projects Under Batch-1, Jawaharlal Nehru National Solar Mission*, MNRE (October 2013) ("Phase II (Batch 1) *Guidelines*).

make clear that the DCR measure for that Batch is "mandatory". The concern was that while the DCR measure for each Batch is mandatory in nature, the scope and coverage of the applicable DCR measure did not extend to all types of cells, modules, and/or projects.[12]

India, during the proceedings, informed the Panel that many of the SPD's that entered into PPA's are in fact using foreign cells and/or modules. It also stated that the DCR was placed is in the context of energy security, for ensuring ecologically sustainable growth and development. It also urged the panel to consider India's overall energy scenario and the challenges like rising energy deficit as well as its dependence on fossil fuels and imported materials for its energy requirements. Indian stand was that there is a power of "review and amendment", and to "remove difficulties", but also stated that it has not been used to date in respect of the applicable DCR's. India sustained that its measures do not result in treatment less favourable for imported solar cells and modules than for solar cells and modules of Indian origin. On this basis, India contended that the DCR measures are not inconsistent with Article III:4 of the GATT 1994, and that consequently there is no violation of Article 2.1 of the TRIMs Agreement. It also argued that the purpose of Article 2.2 and the Illustrative List is only to provide examples of measures that are subject to the obligation under Article 2.1 and does not create any substantive legal obligations in itself.[13] The country also ascertained the Article III: 8 (a) of GATT 1994 defense to an Article III:4 claim would also provide a defense to claims under Article 2.1 of the TRIMs Agreement. India extensively leaned on the *Canada –Renewable Energy / Feed-In Tariff Program*[14] to convince its points to the panel. India argued that the DCR measures are justified under the general exception in Article XX(j) of the GATT 1994, on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, makes these "products in general or local short supply"

12 *Supra* note 1 at p 33-6.

13 *Supra* note 1 at p 43.

14 Appellate Body Reports, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, *Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) (*adopted* May 24, 2013) [hereinafter jointly referred to as Appellate Body Report, *Canada—Renewable Energy*].

within the meaning of that provision. It also argued that the DCR measures are also justified under Article XX(d) of the GATT 1994, on the grounds that they secure India's compliance with "laws or regulations" requiring it to take steps to promote sustainable development including its climate change goals.

In its submissions, the US noted that support and promotes the environmental and developmental aims and objectives of the NSM and also that "it does not question that the acquisition and distribution of solar cells and modules to Indian SPD's, and ensuring domestic resilience against supply-side disruptions, are important" and that it "raises no objection to India's aspiration to increase the local manufacture of solar cells and modules".[15] However, it argued that the mandatory DCR measures "make the purchase of domestic products (solar cells and modules) a requirement to obtain an advantage (opportunities to bid for and enter into contracts to supply electricity under the [National Solar Mission]), thus falling squarely under paragraph 1(a) of the Annex to the TRIMs Agreement".[16]

Panel Holdings and Findings

The panel looked into the DCR measures on the understanding that it is the WTO consistency of those measures, and not the legitimacy of the policy objectives pursued through the National Solar Mission, that is in dispute in this case. The panel cited the *Canada – Renewable Energy / Feed-in Tariff Program*[17] that the panel in that dispute did not err in declining to rule on a "stand-alone Article III:4 claim" after having reached its finding under Article 2.1 and the Illustrative List of the TRIMs Agreement and accepted its view that in the interplay between the two provisions the *fulfilment of the elements in paragraph 1(a) of the Illustrative List of TRIMs* results in a finding of inconsistency with Article III:4 of the GATT 1994.[18]

15 *Supra* note 1 at p 36.
16 *Ibid* .
17 *India- Solar Cells* at p.14.
18 *Id* p 43.

The Panel found that the DCR measures expressly stipulate the origin of specified goods that may be used by SPD's for bidding eligibility and participation under each of the relevant Batches of the NSM. Inasmuch as this necessarily pertains to the use of goods based on their origin, we are of the view that the DCR measures are "trade related" in the sense identified by previous panels. It decided that the DCR measures constitute "TRIMs" within the meaning of Article 1 of the TRIMs Agreement and requirement that the purchase or use by an enterprise of products of domestic origin falls within the meaning of paragraph 1(a) of the TRIMs Illustrative List.[19] Accordingly, the DCR measures "are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994" and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.[20]

On the government procurement derogation in Article III:8(a) of the GATT 1994, the Panel found that the current DCR measures are not distinguishable in any relevant respect from the domestic content requirements previously examined under this provision by the AB in *Canada –Renewable Energy*. The panel took a similar interpretation and found that the discrimination relating to solar cells and modules under the DCR measures is not covered by the government procurement derogation in Article III: 8 (a) of the GATT 1994. In particular, the Panel found that the electricity purchased by the government is not in a "competitive relationship" with the solar cells and modules subject to discrimination under the DCR measures. It also stated that India has failed to demonstrate that the DCR measures fall within the scope of Articles XX(j) or XX(d) of GATT 1994.[21] It recommended that India bring its measures into conformity with its obligations under the TRIMs Agreement and the GATT 1994.[22]

19 *Id* p 49.
20 *Id* p.139.
21 *Id* p.138.
22 *Id* p.140.

Broader Implications

The US is also reportedly using DCR's and subsidies to promote solar and other renewable energy within the country, for example the use of feed-in tariff programs with local content requirements in numerous American cities. India could also have raised a dispute at WTO, against the US government's actions that is incompatible with the latter's global trade obligations; however, despite showing clear awareness of such inconsistencies during the debates on the case that resulted in the current ruling, India chose not to do so, much to the surprise of many observers.

In the first place, India could not have expected a different ruling. It had little chance to win; Japan had gained a favourable WTO ruling against Canada in a similar *Canada –Renewable Energy* in 2014 where the same defences were used and failed to convince the panel and AB. This indicates that India failed to do adequate homework before using protectionist measures aimed only to boost local industries. Going by media reports, the country also lacks needed political will to question the US back for the latter's using of DCR against international trade obligations. Many experts point at the fact that while trying to protect local industries, India could have also been keeping the domestic consumer away from cheaper options of foreign origin. The ruling forces the Indian government to treat local and foreign solar-panel makers equally. It also, in a way, ensures that Indian customers are provided with the opportunity to have the choice of possibly cheaper foreign panels. By allowing more such options in the market, this ruling could drive innovation in clean-energy technologies and prevent the customers from bearing the additional cost of the state's protectionist measures. Some experts state that DCR, despite its immediate political gains, have a tendency to restrict competition.

Moreover, the ruling does not force the country to compromise on its ability to tap solar energy; India's climate-change related obligations and work would not be adversely affected by the panel report. According to Indian government sources, quoted by the media, as only a fraction of NSM's power-generation target was meant to be routed using DCR, the ruling might not have a serious

impact even on the Mission. However, the decision will force certain domestic manufactures attracted by the government subsidies and other cushions into increasing production of local solar cells and modules, to review their expansion plans.

As far as Indian government is concerned, the decision forewarns it to be more diligent regarding its domestic schemes and programmes, especially, initiatives like the 'Make in India.'[23] Although, unless challenged, similar schemes could continue, the agencies should not be tempted to adopt protectionist measures or disguised trade barriers such as DCR's.

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23 *Make in India* is a flagship Government-of-India initiative (started in 2014) to encourage domestic and foreign companies to manufacture their products in the country.

2

An Analysis of the US Supreme Court Judgment, 'Association Molecular Pathology, et al. v. Myriad Genetics Inc., et al'

*Siddhant Tripathi & Tanya Chaudhry**

Introduction

With the advent of modern biotechnology, the human community is standing on the threshold of an extraordinary revolution having profound effects for man and his relationship the environment. While biotechnology has been part of our heritage since the dawn of civilization it has only been of special concern since the novel use of biodiversity in the context of DNA structure was discovered. The case of *Association Molecular Pathology, et al.* v. *Myriad Genetics Inc., et al*,[1] involves the question of whether the DNA molecules fall within the scope of patent-eligible subject matter. At issue are Myriad's patent claims for the isolated sequences of two human genes that have been linked to an increased risk for breast cancer. AMP argued that DNA molecules that have been isolated in the lab are not substantially different from DNA as they are found in nature, and therefore are not patentable. Myriad counters that the action of isolating DNA molecules requires human intellect and with different properties, making it appropriate subject matter for a patent. The US Supreme Court has observed that,

> "A naturally occurring DNA segment is a product of nature and not patentable merely because it has been isolated, but cDNA is patentable because it is not naturally occurring."

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1 569 U.S. 133 S. Ct. 2107 (2013).

As the SC has recognized before, patent protection strikes a delicate balance between creating "incentives that lead to invention, and discovery" and "impeding the flow of information that might permit, further invention."[2] The SC applied this well-established standard to determine Myriad's patents claim any "new and useful composition of matter," ornatural phenomena.

Thus, while it was said that *"anything under the sun that is made by man is patentable"*[3], there are limits to patentable subject-matter which was decided by the US Supreme Court in this path-breaking judgment.

Brief Facts

Each human gene is encoded as deoxyribonucleic acid (DNA), having a shape of a "double helix." Each "cross-bar" in that helix consists of two chemically joined Nucleotides. Nucleotide Sequences contain the information necessary to create strings of amino acids used to build proteins in the body. Nucleotides that code for amino acids are "*Exons*," and those that don't are "*Introns*." Scientists can extract DNA from cells to isolate specific segments for study. They can also synthetically create exons-only strands of nucleotides known as Complimentary DNA (cDNA).

Myriad, discovered the precise location and sequence of two human genes, what are now known as the BRCA1 and BRCA2 genes, mutations of which can substantially increase the risks of breast and ovarian cancer. Before Myriad's discovery of these genes, scientists knew that heredity played a role in establishing a woman's risk of developing breast and ovarian cancer, but they were unaware about cancer associated genes. Myriad obtained a number of patents based upon its discovery. This case involved claims from three such patents, and required to resolve whether a naturally occurring segment of deoxyribonucleic acid (DNA) is patentable under §101 by virtue of its isolation from the rest of the human genome.

2 Bilski v. Kappos, 561 U.S. 130 S. Ct. 3218 (2010); Mayo Collaborative Services v. Prometheus Laboratories, Inc. 566 U. S. 132 S. Ct. 1289, 1301 (2012); Alice Corp. Pty. v. CLS Bank International, 573 U.S. 134 S. Ct. 2347, 2354 (2014).

3 Diamond v. Chakraboraty, 447 U.S. 100 S. Ct. 2204 (1980).

This information enabled Myriad to develop medical tests that are useful for detecting mutations in a patient's genes and thereby assessing whether the patient has an increased risk of cancer. Once it found the location and sequence of these genes, Myriad obtained a number of patents. Nine composition claims from three of those patents are at issue in this case.

Petitioner, along with medical patients, advocacy groups, and other doctors, filed this lawsuit seeking a declaration that Myriad's patents are invalid under 35 U.S.C. §101[4] as DNA molecules isolated in the lab are not different from DNA found in nature, and therefore are not patentable. Also, patents would also give Myriad, the exclusive right to manipulate BRCA DNA that would trigger its "right to exclude others from making"[5] on its patented composition of matter which would deter further R&D on this essential natural product.

Myriad countered that cDNA differs from natural DNA as it does not contain *Introns* anymore. They contended the researcher unquestionably creates something new when cDNA is made. cDNA retains the naturally occurring exons of DNA, but it is distinct from the DNA from which it was derived. As a result, cDNA is not a "product of nature" and thus patentable.

The District Court denied Myriad's motion to dismiss for lack of standing and granted summary judgment[6] to petitioners on the composition claims at issue in this case based on conclusion that Myriad's claims, including claims related to cDNA, were invalid because they covered products of nature.

The Federal Circuit reversed this judgment and this Court granted the petition for **Certiorari**, vacated the judgment,[7] and remanded the case in light of *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc*.[8]

4 Inventions Patentable.

5 35 U. S. C. §154(a) (1).

6 *Association for Molecular Pathology* v. *United States Patent and Trademark Office,* 669 F. Supp. 2d 365, 385–392 (SDNY 2009).

7 *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 653 F. 3d 1329 (2011).

8 566 U. S. 132 S. Ct. 1289 (2012).

On remand, the Federal Circuit affirmed it in part and reversed in part, with each member of the panel writing separately. With respect to the merits, the court held that both isolated DNA and cDNA were patentable under §101. The central dispute among the panel members was whether the act of *isolating* DNA—separating a specific gene or sequence of nucleotides from the rest of the chromosome—is an inventive act and is patentable.

Although the judges expressed different views concerning the patentability of isolated DNA, all three agreed that patent claims relating to cDNA met the patent eligibility requirements of §101.

On June 13, 2013, Thomas J, delivered the opinion of the US Supreme Court, in which Roberts C., Kennedy J, Ginsburg J, Breyer J, Alito J, Sotomayor J, and Kagan J, joined, and in which Scalia J, joined in part. Scalia J, filed an opinion concurring in part. It was held that,

> "A naturally occurring DNA segment is a product of nature and not patentable merely because it has been isolated, but cDNA is patentable because it is not naturally occurring."[9]

The court went on to hold that,

> "…Myriad's principal contribution of separating BRCA1 and BRCA2 genes from its surrounding genetic material is not an act of invention……However, cDNA does not present the same obstacles to patentability as naturally occurring, isolated DNA segments and thus are a subject matter of Patents…"

Therefore, the Supreme Court affirmed in part and reversed in part the decision of the US Court of Appeals for the Federal Circuit. The Court merely held that genes and the information they encode are not patentable under §101 because they have been simply isolated from the surrounding genetic material.

Analysis of The Judgment

This case involves the question of whether DNA molecules fall within the scope of patentability. Myriad's patent claimed for the isolated sequences of two

9 *Supra* note 5.

human genes that have been linked to an increased risk for breast cancer. In deciding this case, the SC addressed the extent to which products, similar to or copied from those in nature, may be patented. In this case, the SC determined whether a patent may be granted for a human gene.

Although the case appeared revolutionary in scope, the practical impact is unclear. There were certain issues, relating to the difference between purifying substances and making something synthetically, left unanswered. For example, the Court denied patentability for isolated DNA and allowed patentability for cDNA, which they stated as synthetically created DNA. However, they completely ignored the fact that DNA itself can be made synthetically, rather than being just isolated, and did not determine the issue for these synthetic DNA. Nor did the court clarify whether isolation resulting in a different substance might qualify.

A single patent can have many separate claims. To fully understand the implications of the decision, one also has to understand the *Myriad claims that were not even part of the Supreme Court decision.* Some of these were decided by the Federal Circuit and not appealed by either party but the fact is that all of them are important for the case.

First are the Diagnostic Claims. Specifically, Myriad claimed as part of its patent the method of determining whether a person is predisposed to the relevant form of breast cancer by comparing the person's gene sequence to the sequence in nature that codes for either BRCA1 or BRCA2. The Federal Circuit rejected those claims, and Myriad did not appeal.[10] The company's decision of not preferring an appeal of these claims was related to the Mayo decision[11] in which the Supreme Court had rejected a somewhat similar set of diagnostic claims and therefore it seems fairly clear that patent rights cannot be accrued for these kinds of claims under existing framework.

10 Association for Molecular Pathology v. United States Patent and Trademark Office, 653 F. 3d 1329, 1355 (2011); Association Molecular Pathology, et al. v. Myriad Genetics Inc., et al, 569 U.S. 133 S. Ct. 2107 (2013).

11 *Supra* note 10.

However, in lower court's Myriad decision,[12] the Research Claims were fairly discussed and adjudicated. The Federal Circuit upheld those claims, and the parties did not appeal, therefore, SC is yet to comment on that.[13] Myriad essentially claimed the method of determining the effectiveness of a cancer therapeutic. This method includes growing cells carrying the mutation, both in the presence of and in the absence of the therapeutic agent, and comparing to see whether former has a slower growth rate.

These claims however are troubling in nature and are known to many in the patent community.[14] Critics of these patents argue that the patent holder is trying to hamper potential therapeutic R&D without having identified a single one. The implication of upholding these kinds of claims is ambiguous.

It is doubtful that Myriad will ask for license from researchers or ask them to refrain from such R&D. However, in the case where researchers are successful in developing effective therapeutics, it is most likely that Myriad will argue that such development of the therapeutic has have infringed the patent, and demanding a percentage in the take as their composition for the "Apparent" injury to their Intellectual property.

Finally, there are a number of other claims that were never challenged but the future of similar claims remains quite uncertain in the abstinence of the SC to review them. These will form the basis of claims drafting that others will use to get around the Myriad decision and therefore needs to be made clear by the Judicial Authorities.

For example, there is no denying that one can no longer claim a simple DNA sequence. However, much of laboratory activity related to a particular DNA sequence involves a vector, such as bacterial DNA that has been altered in the lab to contain the desired sequence. This vector does not exist in nature and

12 *Supra* note 8.

13 *Supra* note 9 at 1334.

14 *Lawrence O Gostin, Who Owns Human Genes? Is DNA Patentable?* J. AM. MED. ASSOCIATION, August 28, 2013, at 791-92.

thus, a patent claim to such a vector would not directly contravene the Myriad decision.[15] These are the kind of ambiguities which needs to be addressed and adjudicated by the SC.

The burning query that remains unanswered is how patent holders can succeed in upholding patents rights on the product whose Raw Sequence is still out of their control. And Supreme Court's Myriad decision gives birth to this ambiguity in footnote nine. This footnote simply states that, "*[w]e express no opinion whether cDNA satisfies the other statutory requirements of patentability.*"[16]

In other words, just because cDNA differs from nature, are within the realm of things that are considered patentable, this does not mean that any particular one will meet the full demands of patentability. This fact left examiners baffled that now section 101 is not the sole test for determining patentability.[17]

But this holding[18] contradicts the holding of SC in the *Mayo Case*,[19] where SC said that if it is established that the correlation identified was no more than a law of nature, then, everything else done was just routine, well-understood, conventional activity.

In the light of the above holding, one can easily construe that if the DNA sequence is unpatentable because it is a natural product, everything else that was created from it like cDNA, the vectors, etc., are simply obvious in light of routine, well-understood, conventional activity and that would lead cDNA, vectors etc., to fail the test of patentability as being obvious to one of ordinary skill in the art.[20]

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15 Robin Feldman, *Gene Patenting After the U.S. Supreme Court Decision–Does Myriad Matter?* 26 Stanford Law & Policy Review 16 (November 2, 2014.)

16 *Supra* note *3* at 2119 n.9.

17 U.S. Patent and Trademark Office, Guidance for determining Subject Matter Eligibility of Claims reciting or involving Laws of Nature, Natural Phenomena & Natural Products, March 4, 2014 at 3-5.

20 Brad Sherman, *Patent Law in a Time of Change: Non-Obviousness and Biotechnology*, Vol. 10, Oxford Journal of Legal Studies 278-287 (1990)

Thus, where on one hand *Myriad and Mayo contradict each other*; on the other hand, Pharmaceutical and Biotech Companies and their researchers are left baffled with this unanswered issue and acute uncertainty.

But on the brighter side, almost everyone seemed to be contended with the Myriad decision. The life sciences industry is happy because many claims remained untouched and survived. Doctors and patients are enthusiastic with the fact that more breast cancer tests will develop now and possibly a cure. Even the critics of patent system which tag it being out of control are satisfied as the SC has slapped down the Federal Circuit and narrowed down the scope of patents. The only clear losers seem to be the holders of diagnostic patents like those of Myriad.[21]

But the impact of the Myriad decision remains unclear, as the Court's opinion was more relied on result but had narrow outlook on broadly applicable reasoning. As a result, any real impact from Myriad will depend on interpretation of the USPTO and Courts as what should be considered routine, conventional activity.

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21 UVA Law Professors analyze Supreme Court Decision in Gene Patenting Case, June 13, 2013; available at https://www.law.virginia.edu/html/news/2013_sum/gene_patenting/ (last accessed on March 31, 2016).

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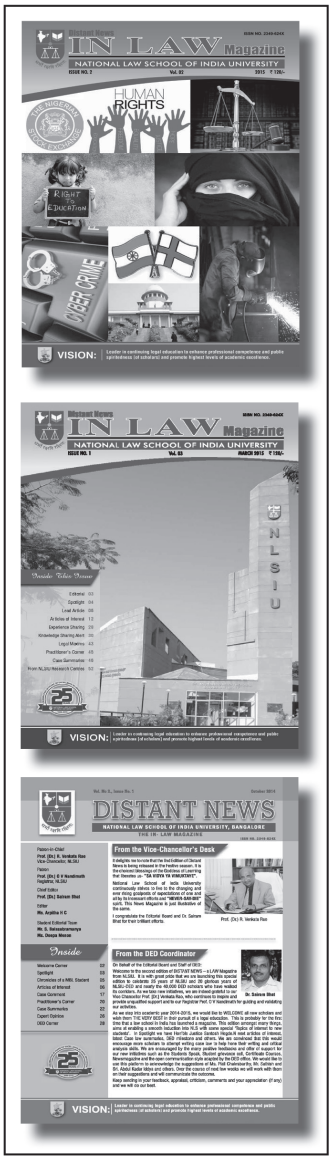

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