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Inside This Issue

CELEBRATING 25 YEARS OF EXCELLENCE IN LEGAL EDUCATION
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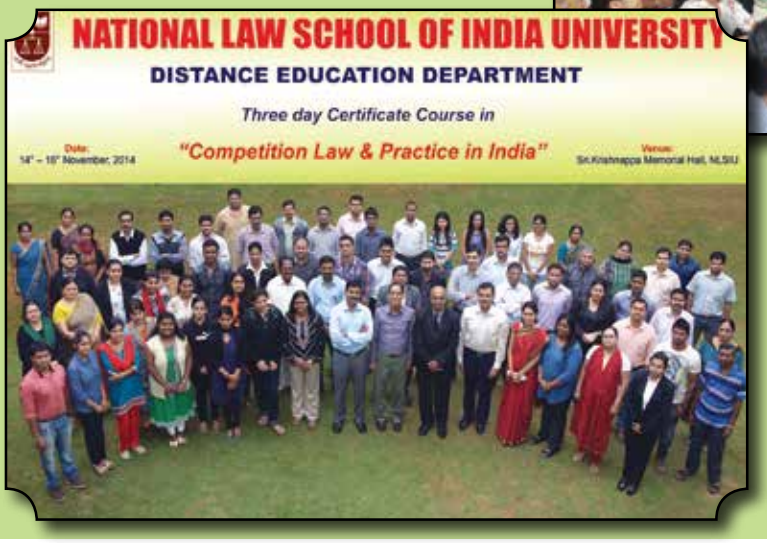
Certificate Course in Competition Law and Practice



From the Vice-Chancellor's Desk

Prof.(Dr.) R.Venkata Rao
Patron-in-Chief
Distant News In Law

It delights me to note that the Third Edition of the Distant News, consisting of a Mosaic of diverse and varied topics and their emerging contours, is being released.

The range of the topics covered, to say the least, is very impressive. The Coordinator of Distance Education Department and his team deserves to be congratulated for placing before the Distance Education fraternity such a holistic output, making the highly complex legal issues very lucid and intelligible to lawman and layman alike which is the forte of this latest version of the Distant News.

I once again congratulate Dr. Sairam Bhat and his team for this stellar effort.

From the Registrar

Prof. (Dr.) O.V. Nandimath
Patron
Distant News In Law

The motto of NLSIU is to continue its leadership in the field of legal education and create an ecosystem where research and development in the field of law are optimised. We have continued to expand, outreach and globalise the method and mode of our activities with collaborations with different Universities, Institutions and Corporate bodies. The latest feather in the law school is the Central Bureau of Investigation, Chair, which will promote training and research in the area of criminal law.

The magazine has collection of original articles, knowledge alters, case summaries, Interviews- which I feel will motivate the readers further into legal studies.

I compliment the editorial team for being consistent in publishing the magazine and hope that the readers appreciate the incremental changes brought about in the quality and content of this publication.

From the Chief Editor

Dr. Sairam Bhat
Associate Professor
& Chief Editor
Distant News In Law

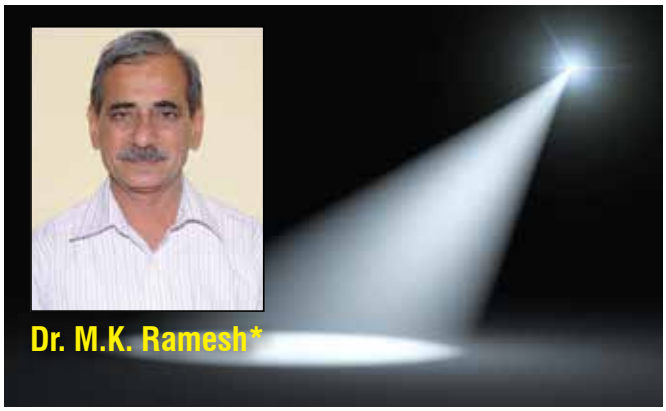
Greetings to our readers!!! We are happy to place the Third Edition of the In Law Magazine that is, a novel initiative by NLSIU, an attempt to explore the emerging areas in law and policy. This edition commences with a lead article on Competition law that makes a special reference to *'abuse of dominant position'.* Following which is a case-study/analysis of the *DLF Judgement* rendered by the CCI and COMPAT. In addition, it is comprised of short articles, case summaries and impression of the students from NLSIU.

The chieftain contribution in this edition is the views of Prof. M.K. Ramesh, a renowned environmental law expert, law teacher, policy advisor, on the emerging issues in the field of Environmental Law. There is, in addition to the above, an Interview with Mr. Aditya Sondhi, Senior Advocate and Alumnus of NLSIU, wherein he shares a few of his thoughts.

At the outset, the Magazine seeks to make a sincere effort so as to update the readers on various developments, national and international, in law. Thereby, striving to create a reliable and relatable platform for Lawyers, Academicians, Students, Researchers and Policy makers to express, interact and exchange ideas on emerging issues and challenges in the field of law and policy.

The Editorial Team is grateful to the Vice Chancellor of NLSIU, Prof. R. Venkata Rao, for his overwhelming support, enthusiasm and leadership in all our endeavours. We are thankful to Prof. O. V. Nandimath for his timely direction, guidance and supervision through the Distance Education Department that has motivated us to progressively implement innovative thought to provide an enhanced learning experience for our students.

Last, but not least, I would thank Ms. Arpitha, Ms. Anita Yadav and Ms. Deepa Menon who has extended an overwhelming assistance in bringing out this Edition; and Ms. Susheela and Mr. Lingraj, for their support in having this edition published successfully.



1. As a preeminent Environmental Law teacher, could you please share your views on how Environmental Law as a subject has transformed through the years and reached a position of such significance as it occupies presently?

As a discipline, it has "transformed" other disciplines more than itself. No single discipline, in law at the least, has found itself complete with out any reflection on Environmental Law and governance. On its own, Environmental Law, being a fairly young discipline, has been constantly evolving, acquiring a lot of content (in terms of making of new laws, both domestically and internationally) and depth (in the sense, of borrowing a lot from other disciplines like, ecology, economics, life sciences, anthropology, politics, etc.). With the result, its curricular content has expanded by leaps and bounds, year after year. Having its humble beginnings as an extension of Tort Law of Nuisance and Negligence and to a specialized area of pollution control and waste management, its transformation has been dramatic and overwhelming. It now encompasses every conceivable aspect of human activity over natural resources. Its truly trans-disciplinary content and remarkable dynamism of growth has made teaching more challenging and exciting than it ever had been.

2. What role do you think does Environmental Law play in moulding a law student as far as his legal career is concerned?

The student of Environmental Law is in a unique position, in comparison with those in other disciplines of law. Its multi-disciplinary content, the variety of approaches required to be adopted in learning the subject and the skills of practice (not merely adversarial, but that of amicus as well) one acquires, as one goes along, contribute to an all round development of the professional and the person. In my career as a teacher, if I am required to single out one subject that can make one a complete law professional and a human being with great ethical values, it is this and no other.

3. We have heard quite a lot of lawyers who have made a mark for themselves while being proactive in furthering a public cause. How far do you think Environmental Law litigation in India would attract newbies as well as seasoned practitioners?

There was hardly much scope, to start with, except in litigation, in public interest. Now, sky is the limit! The profiles of the practice and profession are changing, dramatically, to the advantage of the Environmental Law Professional. In addition to the Public Interest Route for Practice, this professional is sought after in advising Governments, offering consultancy services to developmental organisations, corporate firms and international organisations. If an young professional, with a little less than a decade of experience can be "Retained" as a "Consultant" by a governmental organisation concerning Biological Diversity, for which he/she gets paid a little over Rs.20,00,000, in a year, one can gauge the amazing array of opportunities beckoning the Environmental Law Professional. Outside the Court Practice, plenty of scope exists for him/her to get involved in negotiating between developer and regulator and even in briefing governments in international negotiations.

4. To bring about more awareness is by far the best way to protect the world from man-made environmental disasters. What role do you, as a teacher, envisage to further this cause?

More than the role of creating awareness, I have always found that the role of an Environmental Law Teacher as that of a motivator, facilitator and enabler of all those with whom he/she gets engaged, either in teaching and research or in training in Environmental Law and Governance. He/She is, indeed, a "catalyst" - initiating one to the learning, developing skills of practice, strengthening the capacity in learning and applying law in finding and securing solutions in different problem

***Prof. (Dr.) M.K. Ramesh**
Professor of Law
Chair Professor (Urban Poor and the Law)
B.Sc. (1974) LL.M. (1979) and Ph.D. (2003) all from Mysore University

He joined as Lecturer at Vidyavardhaka Law College, Mysore, during 1979-1985. Between 1985 and 1988 he had a brief stint of two and a half years as Commercial Tax Officer in Karnataka Government service. He was Lecturer at the University Law College, Dharwad during 1988-1992, and joined the Law School as Assistant Professor of Law (Senior) in June 1992. He was selected and appointed as Associate Professor in 1997 and subsequently as Additional Professor the same year. He was selected and appointed as Professor of Law in 2006.

His areas of specialization include International Law, Environmental Law, Jurisprudence and Family Law. He was the Coordinator of the Centre for Environmental Education, Research and Advocacy (CEERA) (1997-2000). He is, at present, Editor of the Indian Journal of Environmental Law published from the Law School. During 2009-2010 Academic year, by establishing the "Commons Cell" in the Law School, a new initiative is begun by him to develop Indian Jurisprudence on the subject.

He has published over 30 articles and contributed chapters to five books as well. He visited U.S.A under the International Visitors Programme and the U.K under the Faculty Exchange Programme. He was a Visiting Faculty at Dalhousie Law School, Canada in 1999. He was Senior Fulbright Fellow in the U.S. during 2005-06. He was a visiting professor at KTH, Stockholm (Feb, March, 2010) and Law Faculty, Zurich (May, 2010).

situations and in equipping a whole new breed of young law professionals to apply law to real life situations, to secure both human and environmental justice. Developing a virtual network of Environmental Law professionals, to engage in this exercise, is an idea that is taking shape. The Environmental Law Clinic, which is a knowledge hub, extension centre, a virtual network of Environmental Law professionals and a kind of a finishing school in preparing and equipping one for the profession, visualised and concretised by the members of the Faculty of NLSIU, is a major step in this direction.

5. Development or protecting the environment? A choice that has been mooted for long and a solution, in the form of a middle path, sustainable development has been agreed to by the world. Has the world been really able to attain it?

Ensuring the delicate balance between the two has always been an issue and a matter of great concern. While, "Sustainable Development", has caught the imagination of all and become the magical mantra, as the golden mean, it has failed to produce the desired results. This is precisely because of the varied interpretations attempted and diverse application of the notion that are in vogue, to justify every conceivable developmental activity. These, have made it a very poor safe guard against environmental destruction. In its true spirit, It should be used as a powerful tool to promote the "human right of development" without affecting the "integrity" of the resource. It should be applied as the tool to enable humanity to harness the benefits of "ecological surplus" (as the legendary Lester Brown, the founder of the Earth Watch Institute, had averred) by facilitating the human enterprise to its limits. It is only when such an idea informs, influences and guides the Policy, Law and its enforcement, with the State, instead of withering away under the onslaught of market forces, reclaiming its true role of "Public Trustee", can the balance between the two be achieved.

6. Best practices start at each household, it is said. Could you please name a few simple things that every citizen can do to foster environment protection?

I cannot think of a better practice than a couple of simple home-truth that Gandhiji gave us, a long time back, "waste not , want not" and the use of resources to satisfy everyone's "need" and not the "greed" of any one to the detriment of the rest. "Practicing" what one "preaches" on public platforms is, in my firm belief, the Best Practice. One should come out of the "NIMBY" (Not in My Backyard), syndrome. While endeavoring to keep one's environment clean, care should be taken to ensure that such an effort causes the least discomfort or inconvenience to the others. Short of this, any practice, would just be hypocritical.

Call for Contribution to Distant News IN LAW 4th Edition

Distant News IN LAW is a magazine published by the National Law School of India University, Bengaluru. Previous three editions of the magazine have been published and have received rare reviews as a novel attempt from a law school in India. The aim is to create a platform for law students, teachers, practitioners and researchers and the law school fraternity to exchange, collaborate and share knowledge in the field of law.

The Magazine invites contributions for the 4th edition of Distant News-IN Law Magazine. The following contributions are sought:

1. Lead article: 4,000 to 6,000 words
2. Short articles: 2,000 to 3,000 words
3. Book reviews
4. Case Comments
5. Review of documents, Committee reports and policy analysis.

Last date to receive contributions is June 30th 2015.

You may email your write up [in word doc] to bhatsairam@nls.ac.in or ded@nls.ac.in

Abuse of Dominant Position under Competition Law: Legal Subtleties

Dr. Sairam Bhat, Associate Professor of Law, National Law School of India University, Bengaluru

Introduction

Competition Act, 2002, defines competition law as synonymous with the term antitrust, antimonopoly or fair trade laws in other legal jurisdictions. It is an Act to provide, keeping in view economic development of the country, for the establishment of a Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India.[1]

The Monopolies and Restrictive Trade Practices Act, 1969, was a predecessor of new law as the Competition Act 2002.[2] The MRTP Act, 1969 has been introduced to avoid concentration of wealth in the hands of few people to the detriment of common people and to provide for control of monopolies and prohibition of monopolistic, restrictive and unfair trade practice and protect consumer interest.[3] India adopted after its independence an era of command and control over its market economy, where there was too many regulations, rules and executive orders over business activity.[4] Visible hand of government was found in every sector of economic activity. After the economic liberalization in 1991, economic reforms have led to shift from command and control economy to economy based on free market principle.[5] Need for Competition Act, 2002 arose because MRTP Act, 1969, had various loopholes. MRTP Act was largely based on command and control regime and it had become obsolete in the era of globalization, privatization and liberalization. Certain offending trade practices like abuse of dominant position, predatory pricing, boycotts and refusal to deal, cartel collusions, price fixing, bid rigging etc. were not defined in it, hence could not be dealt with.[6] One argued that general definition of Restrictive trade Practice [RTP] did enable to try offences under the Act relating to anti-competitive practices. But definition being general definition, courts gave different interpretations of same sections and spirit of law was not understood. Further anti-competitive practices were not specified. They could not be identified.[7] Enforcement of law had become difficult task to perform. Further, the orders of the MRTP Commission were restricted to passing 'cease and desist' orders which unlike the orders of the Competition Commission of India [CCI] can impose penalty.

Better law in the form of Competition Act[8] had to be enacted because anti-competitive practices had to be identified and specifically defined thereby snatching away from offenders technical grounds to escape indictment. Appeals from orders of commission under Monopolies and Restrictive Trade Practices Act, 1969 under Sec. 55 of the Act would lie to Supreme Court leading to lots of workload at higher judiciary. Need was felt to create Appellate system under the Competition Act itself -COMPAT.[9] In various judicial decisions it has been said that wordings of MRTP Act[10] have become inadequate and that it has to be redrafted to maintain spirit of law.[11]

Competition Law on Abuse of Dominant Position

Competition Act, 2002, mainly deals with three areas. It prohibits anti-competitive agreements, prohibits abuse of dominant position[12] and regulation of combinations and it undertakes competition advocacy. These components are contained in Chapter II of Competition Act, 2002. In particular,

1 Gazette of India extraordinary. Part ii, section 1 published by authority number 12, New Delhi, Tuesday Jan 14,2003.

2 Statement of object and reasons of the MRTP Act is influenced by the U.K. Restrictive Trade Practices Act, 1956 and Resale Prices Act, 1964.

3 MRTP ACT, 1969.

4 Dr S Chakravarthy; Metamorphosis from MRTP Act, 1969 to Competition Act, 2002; www.cuts-international.org/doc01.doc. Visited on 29/8/2013.

5 www.vaishlaw.com, competition law bulletin.

6 Sec. 2(0) of the Act defined Restrictive Trade Practices as trade practices which prevent, distort and restrict competition.

7 *Supra* Note 3.

8 By Sec. 66 of the Competition Act, 2002, the MRTP Act, 1969 is repealed and the matter before the MRTP Commission is transferred to CCI.

9 See Sec. 53 A of the Competition Act, 2002. Competition Appellate Tribunal is headed by a retired Supreme Court Judge. BY Sec. 53 U, the COMPAT has the power in respect of contempt as similar to High Court. Appeal from COMPAT can be taken to the Supreme Court within 60 days. [Sec. 53T].

10 The MRTP Act, stands repealed with effect from October 14, 2009. The pending cases will be disposed by the Competition Appellate Tribunal and pending investigations or proceedings relating to unfair trade practices referred to in Section 36A(1)(x) of the Monopolies Act, relating to "giving false or misleading facts disparaging the goods, services or trade of another person", stand transferred to the Competition Commission from the said date.

11 Two doctrines govern the MRTP Act namely reformist doctrine and Behavioral Doctrine Conduct of the entities / undertaking and bodies which indulge in trade practices in such a manner as to be detrimental to public interest is examined to check whether said practices constitute any monopolistic, Restrictive or unfair Trade Practices. In terms of reformist Doctrine the provisions of MRTP Act provide that if the MRTP, Commission after enquiry finds out errant undertaking has indulged in Restrictive or unfair trade practice, it can direct such undertaking to discontinue or not to repeat the undesirable trade practice. MRTP act also provides for an assurance from an errant undertaking that it has taken steps to see that prejudicial trade practice does not exist anymore. MRTP Act follows reformist or advisory approach. There was no deterrence by punishment.

12 The government notified selected portions of the Competition Act for enforcement, relating to anti-competitive agreements (Section 3) and abuse of dominant positions (Section 4) with effect from May 20, 2009.

section 4 of the Act deals with prohibition of abuse of dominant position.[13] It defines what constitutes a 'dominant position'. However, the holding of a dominant position by an enterprise or a group in itself is not prohibited. The Competition Act prohibits *abuse* of such a dominant position by an enterprise[14] or a group. The enforcement of Section 4 brings within its ambit all enterprises that enjoy a dominant position in the relevant market, including public sector enterprises or government departments[15] engaged in any trade or business activity that is not covered under the sovereign functions of the state. In an inquiry under Section 4, unlike that under Section 3, an appreciable adverse effect on competition in the relevant market need not be proved. However, any of the six prohibited business practices listed in Section 4 is sufficient to bring the dominant enterprise within the ambit of the Commission's scrutiny and instances of such prohibited activities in India are not scarce.

The Commission is empowered to enquire whether an enterprise or group has the dominant position and whether it has abused such dominant position on the basis of: (a) its own motion; (b) information received from any person, consumer or association or any trade association; or (c) on a reference received from the central government, state government or a statutory authority.[16]

Comparatively, in the UK two sets of competition rules apply in parallel. Anti-competitive behavior which may affect trade within the UK is specifically prohibited by Chapters I and II of the Competition Act, 1998 and the Enterprise Act, 2002. Where the effect of anti-competitive behavior extends beyond the UK to other EU member states, it is prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

UK and EU competition law prohibit two main types of anti-competitive activity:

- anti-competitive agreements (under the Chapter I and Article 101 prohibitions); and
- abuse of dominant market position (under the Chapter II / Article 102 prohibitions).

Both UK and EU competition law prohibits businesses with significant market shares unfairly exploiting their strong market positions.

Contravention of Article 102 or Chapter II can have serious consequences for a company:

- firms engaged in activities which breach these provisions can face fines of up to 10% of group global turnover;
- conduct in breach of Article 102 or Chapter II can be stopped by court injunction;
- firms in breach of Article 102 or Chapter II also leave themselves exposed to actions from third parties who can show they have suffered loss as a result of the anti-competitive behavior; and
- breach of Chapter II can result in individuals being disqualified from being a company director.

Type of behavior that constitutes 'Abuse':

When the business has the ability to act independently of its customers, competitors and consumers it is in a position of dominance.Various elements have to be considered for establishing if a company is dominant. But, as a general rule, if a business has a 50% market share there is a presumption that it is dominant. However, dominance has been found to exist where market share is as low as 40%.

There are two tests common to assessing whether Sec. 4 of the Competition Act applies, whether an undertaking is dominant, and if it is, whether it is abusing that dominant position. The first test raises two questions which are considered below: (i) the definition of the market in which the undertaking is alleged to be dominant (the relevant market); and (ii) whether it is dominant

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13 Sec 4. (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise.—-(a) directly or indirectly, imposes unfair or discriminatory—(i) Condition in purchase or sale of goods or service or (ii) Price in purchase or sale (including predatory price) of goods or service.

Explanation — For the purposes of this clause, the unfair or discriminatory condition in purchase Or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or (b) limits or restricts—(i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or(c) indulges in practice or practices resulting in denial of market access; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the Subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation: For the purposes of this section, the expression—

(a) "Dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—(I) Operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favor;(b) "Predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

14 Under Section 2(h) of the Competition Act, the definition of 'enterprise' includes: "a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

15 For instance, if a public sector enterprise attempts to deny market access to a private enterprise that may be its competitor in any product market, a complaint of abuse of a dominant position would be brought against such public sector enterprise before the commission.

16 See sec. 19 of the Competition Act, 2002.

within that market.[17] In addition, in determining whether Sec. 4 applies, it is necessary to consider in which territory the dominant position is held. Abusive conduct generally falls into one or both of the following categories: conduct which exploits customers or suppliers (for example, excessively high prices),[18] or conduct which amounts to exclusionary behaviour, because it removes or weakens competition from existing competitors, or establishes or strengthens entry barriers,[19] thereby removing or weakening potential competition.

Exclusionary behaviour may include excessively low prices[20] and certain discount schemes, where its (likely) effect is to foreclose a market, as well as vertical restraints or refusals to supply where these (are likely to) foreclose markets or dampen competition. However, whatever the form of the behaviour in question, its likely effect on competition will depend on the circumstances at hand and the Competition authorities will assess alleged abuses on a case-by-case basis.

In UK Article 102 requires dominance in a substantial part of the European Union, but there is no requirement under Chapter II that a dominant position must be held in a substantial part of the UK, meaning that, in theory at least, dominance could be considered to exist in a fairly small area of the UK. For example Microsoft Corporation - was found abusing its dominant position in the marketing of personal computer operating system. The European Commission[21] has imposed fine of US$612 million equivalent to 2630 crores because companies such as Novell[22] and Sun-Microsystems, who were rivals to Microsoft were refused interface information and consequently they contended that they were unable to compete in work group server operating system (WGSOS). The other allegation relates to tying of WMP with Window-2000. Microsoft's contention is it is intellectual property. European Commission felt that in view of over whelming dominance, the veil of intellectual property with Microsoft needs to be lifted and has directed Microsoft to disclose within 120 days complete and accurate documentation so as to allow non-Microsoft group server to achieve interoperability.[23]

In India, however, having a dominant position does not in itself breach competition law. The abuse of that position is prohibited. Imposing unfair trading terms, such as exclusivity; excessive, predatory or discriminatory pricing; refusal to supply or provide access to essential facilities; and tying(i.e. stipulating that a buyer wishing to purchase one product must also purchase all or some of his requirements for a second product); amounts to abuse of dominance.

Checking Abuse of Dominant Position in India: Some Reflections

It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. However, perfect market conditions are more of an economic "ideal" than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not. Secondly, dominance has significance for competition only when the relevant market has been defined. The relevant market means "the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market[24] or with reference to both the markets". The Act lays down several factors of which any one or all shall be taken into account by the Commission while defining the relevant market.[25]

In a landmark ruling the CCI held that DLF had abused its dominant position.[26] In this case DLF announced the launch of a Group Housing Complex, known as 'The Bellaire' consisting of 5 multi-storied residential buildings to be constructed in DLF City, Gurgaon, Haryana. In accordance with the initial plans/ advertisements, each of the five multi-storied buildings would consist of only 19 floors with a total of 368 apartments to be constructed within a period of 36 months. However, it imposed highly arbitrary, unfair and unreasonable conditions on the buyers, who were 'Informant' to the CCI in the current case. The Informant submitted that DLF had used its position of strength

17 See Sec. 4(2)(e) of the Competition Act, 2002.

18 Intellectual Property Rights (IPR) involve grant of exclusive rights to the right holders to exploit the results of their innovation so as to provide incentive to innovate. Competition Act, 2002 exempts the reasonable use of such rights by right holders from the provisions of Sec. 3 related to agreements.
However, the actions by enterprises that shall be treated as abuse (specified under Section 4 (2)) shall stand applicable equally to IPR holders provided such rights are considered by the Commission to render the holder a dominant player in the relevant market.

19 Barrier to entry of new enterprises into the relevant market is a major restraint on the dynamics of competition. When a dominant enterprise in the relevant market controls an infrastructure or a facility that is necessary for accessing the market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services, the enterprise may not without sound justification refuse to share it with its competitors at reasonable cost. This has come to be known as the essential facility doctrine (EFD).

20 The "predatory price" under the Act means "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors" [Explanation (b) of Section 4].

21 Art. 82 of the EU treaty provides that: 'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.'

22 It started as a complaint from Novell over Microsoft's licensing practices in 1993, and eventually resulted in the EU ordering Microsoft to divulge certain information about its server products and release a version of Microsoft Windows without Windows Media Player

23 Microsoft v. Commission of the European Communities Case T-201/04. 2007 II-03601.

24 See Sec. 2 (f) of the Competition Act, 2002.

25 See Sec. 2 (t) Ibid.

26 Belaire Owner's Association v. DLF Ltd. and HUDA2011 CompLR 0239 (CCI).

in dictating the terms of the Apartment Buyers Agreement ("Agreement') and imposed unilateral and one-sided clauses. DLF had excluded itself from any obligations and liabilities; and on the contrary has compelled the Informant to agree to all the terms of the Agreement in toto. The Informant has alleged that the various clauses of the agreement and the action of DLF pursuant thereto are prima facie unfair and discriminatory, thus attracting the provisions of Section 4 (2) (a) of the Act.

The CCI after considering the information provided by the Informant held that a prima facie case existed and directed for an investigation by the Director General ("DG"). The DG after conducting an in-depth investigation held that the Act was applicable in the instant case and delineated the relevant market on the basis of services provided by developers for construction of 'high-end buildings' in Gurgaon. The DG analyzed the dominant position of DLF by placing reliance on each of the factors as mentioned in Section 19 (4)[27] of the Act and held DLF to be abusing its dominant position.

CCI imposed penalty of Rs. 630 Crores on DLF Ltd. under section 27(b) of the Act, and directed DLF under section 27(a) of the Act:[28]

i. To cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon.
ii. To suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order.

The said order of CCI was challenged by DLF on several grounds by filing appeals before the Competition Appellate Tribunal ("COMPAT").[29]

COMPAT[30] after hearing the matter on 09.11.2011, granted stay against the orders of CCI imposed penalty under section 27(b) of the Act, subject to DLF furnishing an undertaking to pay 9% interest on the amount of penalty to be determined by COMPAT[31] for the period from the date of order by CCI till the date of payment by DLF. COMPAT ordered that the directions of CCI for modifications of terms of the Agreement shall remain in abeyance. However, the direction of CCI to "cease and desist" with the implementation of the Agreement was not stayed. On the next date of hearing i.e. on 29.03.2012, COMPAT, remanded the matter, along with the draft modified terms and conditions submitted by the parties, to CCI, for determining the manner and extent in which the Agreement needs to be modified, under section 27(d) of the Act, after considering the drafts modified Agreements submitted by the parties.

Accordingly, CCI, after prolonged hearing of the parties on the modified terms and conditions suggested by both sides, vide its order dated 03.01.2013 has modified the standard terms and conditions of the flat buyers agreement in a detailed order, which seems to have created a stir amongst the real estate sector as to whether these terms and conditions suggested by the CCI would apply to all builders of flats in respect of the respective flat buyer agreements?

In this order, CCI has tried to remove the unfair and one sided clauses in the Flat Buyer Agreement which were till now common to most of similar agreements of other builders, at least in North India.[32] The broad salient features of the modifications suggested are:

i. Making time an essence of contract for both parties, which was earlier meant only to be complied with by the buyers by making timely payment of installments to the builders or to face penalty by heavy interests etc. There was no corresponding obligation upon the builder to follow the schedule for construction of the flat.
ii. Listing out the events of defaults and consequences thereof even for the builder which was conspicuously absent in the original agreement. The list, for the first time, prescribes identifiable milestones of construction, even though, admittedly, specific timelines are not provided (and perhaps were also difficult to be provided).
iii. Rejection of the right of the company to make additional constructions.
iv. Curtailing the right of the builder to nominate either the Residents Welfare Association [RWA] or a maintenance agency "at its sole discretion" and to force a tripartite agreement upon the apartment owners or the RWA and empowering the RWA to modify and even cancel the said tripartite agreement.
v. Simplifying the extra ordinarily large clause regarding use of common areas by the flat owners and deleting the clause which excluded the ownership rights, right of usages etc. of the land areas, facilities and amenities etc. from the scope of the agreement.[33]

In another case against the BCCI, the CCI, investigated the matter with respect to the following issues:

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27 As per this section, the CCI shall take into consideration factors, like market share, size, resources, importance, economic power, vertical integration, monopoly, entry barriers etc.

28 Further under Sec. 28 of the Act, the Commission may direct division of any enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

29 The Competition Act, 2002 was amended in September 2007 to provide for, among other things, the establishment of a Competition Appellate Tribunal to be headed by a judicial member to adjudicate appeals against commission orders and to determine compensation claims arising out of commission decisions. The appellate tribunal has since been constituted and is headed by a retired Supreme Court Judge.

30 For more see Sec. 53 A of the Competition Act, 2002.

31 Among other powers, the COMPAT under Sec. 53 N can award compensation for any loss or damage caused to an applicant or Government as a result of any contravention by the enterprise in question.

32 Interesting two other cases were also filed against DLF before the CCI. For more see DLF Park Residents v. DLF Ltd Case no. 18 of 2010 and M/s Magnolia Flat Owners Association & Others. v. M/s. DLF Universal Limited & Others case 67/2010 [Decided 31.1.2012].

33 The order of the Commission has been passed in Case No. 19 of 2010. http://www.cci.gov.in/May2011/Home/DLFOrderModified.pdf.

i. Whether the Act is applicable to BCCI and whether BCCI is an 'enterprise' as defined u/s 2(h) of the Act.[34]

ii. What would be the relevant market in the said case?

iii. Whether BCCI has a dominant position in the relevant market as determined?

iv. If so, whether BCCI has abused its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act?

The DG, CCI considered the conduct of BCCI when a rival competing league ICL was formed. The promoters of ICL stated that the application of ICL for grant of recognition was rejected by ICC on the influence of BCCI. They also stated that, right from the inception of ICL, BCCI took steps to ensure that cricket stadiums are not made available to ICL and also restrained lawyers from participating in the activities of ICL. As a consequence of actions of BCCI, ICL has at present suspended its operations temporarily. On the basis of above facts as analysed, DG held that BCCI is in a position of strength, in the relevant market. Finding the BCCI to have abused its dominant position, the CCI[35] On 8 February 2013, imposed a penalty of 52.24 crore (US$9.6 million) on the Board of Control for Cricket in India (BCCI) for misusing its dominant position. The CCI found that IPL team ownership agreements were unfair and discriminatory, and that the terms of the IPL franchise agreements were loaded in favor of BCCI and franchises had no say in the terms of the contract. The CCI ordered BCCI to "cease and desist" from any practice in future denying market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities.[36]

The CCI under Sec. 28 has wide and enormous powers to check abuse of dominant position. The CCI by an order in writing directed the division of enterprise that is enjoying dominant position, to ensure that such enterprise does not abuse its dominant position. Such order of division may include transfer or vesting of property, rights, liabilities or obligations, adjustments of contract, creation, allotment, surrender or cancellation of any share or securities. Further the CCI has processes for the winding up of an enterprise or order amendment to the memorandum of association or articles of association also.

In another case, a complaint was filed by Ramakant Kini, a lawyer, against LH Hiranandani Hospital last year. Kini is a family friend of Mumbai resident Manu Jain who, according to the complaint, was refused maternity services by Hiranandani during the 38th week of her pregnancy because she declined to avail the stem cell banking services offered by Cryobanks International India, with which the hospital had an exclusive partnership. Jain wanted to use the services of Cryobanks' principal rival, Lifecell International, as she had done during the birth of her first child. Hiranandani hospital had a tie-up with cryobank, a company that provided the said service and refused the patient due to her refusal to accept the choice of the Hiranandani hospital. Kini complained to CCI that Hiranandani had abused its dominance by imposing unfair and exploitative conditions on the patient and limited her choice. The CCI held that imposing condition that stem cell banking services was to availed exclusively with Cryobank, the hospital had imposed unfair conditions on the patient and prima facie had violated Sec. 4(2)(a)(i) of the Competition Act, 2002. The CCI imposed a fine of Rs 3.81 crores [4% of the average turnover] on the hospital.[37] The majority held that 'The plea advanced by the counsel is misconceived in as much as it is not the case of OP hospital that the patients were free to avail the services of any stem cell bank. The OP hospital's only argument is that if a patient was not willing to take services of Cryobank, the patient was free to leave the hospital and avail maternity services of another hospital. In fact, this is not a mitigating factor rather it is another aggravating factor. The hospital knew the difficulty of a patient in leaving the hospital where the patient had all along been taking services of maternity consultant and had developed a bond with the consultant. In fact, most of such patients are afraid of going to another consultant and resign to the fate.'

In another case, Ajay Devgan Film Pvt Ltd alleged before CCI that Yash Raj Films abused its dominant position as it asked the exhibitors to give more screens to its upcoming release Shah Rukh Khan starrer "jab tak hain jaan" affecting ADF film "son of sardar." Release of film was on one and the same day. ADF filed complaint against six parties namely Yash Raj films, Yash Raj PP Associates, Yash Raj Puri and company, Yash Raj Pal Film Distributors Bangalore, Yash Raj Vandana Film Distributors and Yash Raj Kushgara Arts. CCI however concluded that even if distributor books theater for two of its films simultaneously, theater owners have liberty either to agree or not to agree and therefore there is no restraint on the freedom of business of theater owners. The theater owner can wait for other films and can refuse to book their theatres simultaneously for two films. If the position of the single screen theater is non – significant no adverse effect would be caused on competition. CCI has held that market means market available throughout the year. While restraint order is being issued it should keep in mind the overall exhibition of market. On the basis of just big name

34 The DG drew support from the decision of Hon'ble Delhi High Court in WP(C) 5770/2011 in the case of Hemant Sharma and Others Vs. Union of India [8th feb 2012], where while disposing the writ petition, Hon'ble High Court considered Chess Federation as an enterprise within the meaning of provisions of Section 2(h) of the Act. DG considered similarity in roles of BCCI and Chess Federation as National Associations for sport of Cricket and Chess respectively and accordingly based his findings.

35 After receiving under Section 19(1)(a) of The Competition Act, 2002, CCI, upon examination of the facts of the information, passed an order under Section 26(1), on December 09, 2010 recording its opinion that there exists a prima facie case, and directed the Director General (hereinafter "DG") to investigate into the matter.

36 Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI); CASE NO.61/2010. Decided Date: 08.02.2013. Competition commission of India.

37 Mr. Ramakant Kini vs Dr. L.H. Hiranandani Hospital, Powai, Mumbai Case no 39, 2012. Judgement 5-22014-CCI.

no enterprise can be considered dominant. Claim of ADF that opposite parties were dominant was rejected. In an appeal filed by ADF before COMPAT, COMPAT did not stay the YRFs tie up with single screen theater across the country for the release of its film Jab tak hain jaan. The COMPAT said "huge economic interests are at stake for both the parties, films and there could be economic irreparable loss, if the release is stayed". The tribunal noted that "it would not be proper on its part to freeze the agreements between YRF and the single screen film exhibitors.[38]

Conclusion

Abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. The prohibition is on the abuse of the dominant position, not the holding of the position. CCI would find an undertaking's behaviour an abuse only after detailed examination of the market concerned and the effects of the undertaking's conduct.

Thus it may be concluded that CCI plays active role in promoting competition culture in India and prohibiting anti-competitive practices. Failure to execute orders of CCI or non-adherence results in stringent financial penalties prescribed under the Competition Act along with criminal liability. It could be penalty of 10% of average turnover of past 3 years, cease and desist order, void agreements, and division of dominant enterprise, damages and third party claims, if any.

38 Ibid.

ANNOUNCEMENTS

Call for Papers

Journal of Law and Public Policy [JLPP]

Issue 2 **2015**

About the Journal

JLPP is a peer-reviewed, interdisciplinary e-journal, published by the National Law School of India University, Bengaluru. The Journal is a step in the objective of NLSIU which is to provide 'intellectually stimulating, professionally competent and social relevant legal education'. JLPP aims to be a forum that encourages and engages scholars, Academicians, Administrators, Civil servants, Practitioners and Corporate managers to come together towards contributing to continuing Legal education.

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1. Scholarly articles and research Papers (5000-8000 words, inclusive of footnotes)
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WITNESS PROTECTION IS A NEED OF THE HOUR

Ms. Saumya Uma*

The killing of Akhil Gupta - a key witness in Asaram Bapu's sexual assault case – has brought to the fore the need for a rational, transparent and comprehensive legal framework on witness protection once again. On 11 January 2015, Akhil Gupta - a cook and personal aide of Asaram Bapu - was shot dead in Muzaffarnagar, in the state of Uttar Pradesh[1]. In another related case, one of the two women – referred to as Surat-based sisters – who had accused Asaram and his son Narayan Sai of raping them, recently approached the court recently for permission to change her earlier statement, raising speculation that she was being threatened / intimidated / coerced into changing her statement, in order to exonerate the accused. Asaram Bapu's case is symptomatic of the common practice of threatening witnesses into silence or killing them in order to scuttle processes of justice, employed particularly by perpetrators with political, religious and / or socio-economic clout.

A. Context

In India, there is a growing climate of impunity for heinous offences and a rampant threatening of victims and witnesses who seek to testify regarding such violations. Threat to and intimidation of victims and witnesses prevails across a large spectrum of crimes in India, despite a 2008 amendment in the Indian Penal Code (S. 195A) that criminalizes the same. Victim-survivors of violations from marginalized communities, including Dalits, adivasis, religious minorities, women and children, are routinely threatened against accessing mechanisms for justice and accountability and giving their truthful testimonies before courts of law.

For example, during the communal violence in Muzaffarnagar in September 2013, many Muslim women and girls were targeted for rape, gang rape and heinous forms of sexual assault. Seven courageous women approached the Supreme Court with a writ petition against police inaction.[2] Their ordeal of rising above social stigma and opposition from within their community, to threats from the accused, the local leaders and the police, asking them to withdraw their cases, as well as a 'cash incentive' of Rs. 30 lakh to them to drop the charges, have been documented.[3] Thereafter, the Supreme Court directed police protection to the seven victim-survivors and their families. Naseem Ahmed - the husband of one of the women - has reportedly lodged seven complaints after receiving 16 death threats.[4]

Victim-witnesses to atrocities against Dalits too have been routinely subjected to threats and intimidation. For example, Dalits of Ramgarh village in Uttar Pradesh were threatened as they testified in court against perpetrators from the Gujjar community who had attacked them in March 2014.[5] In the Mirchpur carnage of Dalits in Haryana (2010), the perpetrators were released on bail, returned to the village to intimidate and threaten the victim-survivors and their lawyers against seeking legal recourse. This forced the Supreme Court to transfer the trial from the sessions court at Hisar, Haryana to Rohini, Delhi, following which 15 out of 97 accused persons were held guilty of various criminal acts.[6]

1. A minor girl had complained of having been raped by Asaram Bapu in his room in 2014. Asaram Bapu has since been arrested and has been denied bail by the High Court and the Supreme Court.
2. 'Muzaffarnagar Gang Rape Victims Move SC Against Police Inaction', The Times of India, January 18, 2014.
3. Neha Dixit, 'Shadow Lines', Outlook, 4 August, 2014.
4. 'The Perils of Being a Witness', NDTV, 12 January, 2015, available at http://www.ndtv.com/video/player/agenda/the-perils-of-being-a-witness/352016, accessed on 4 February 2015.
5. See 'Land Grab Case: As Court Date Nears, Dalits in Ramgarh Village Allege Fresh Threats from Gujjars', The Indian Express, 21 July, 2014.
6. Judgment in State v. Dharambir and others, Session Case No. 1238/10 Unique Case ID No. 02404R0326422010 delivered by Dr. Kamini Lau, Additional Sessions Judge II (North West) / Special Judge (SC / ST cases), Rohini courts, Delhi dated 31 October, 2011.

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Some common features of threats to witnesses in the Indian context are as follows:

- The threats are particularly severe in cases where the accused enjoys political, religious and / or socio-economic clout;
- Members of marginalized communities such as Dalits, Adivasis and religious minorities, are often at the receiving end of such threats;
- Women from such communities are more vulnerable than their male counterparts, as they are additionally threatened with rape and various forms of sexual violence;[7]
- Mild threats accompanied by enticement through monetary offers, are often followed by more severe threats, sometimes resulting in killing of the witness;
- In such cases, the acceptance of a monetary offer by the witness is often based on his / her assessment of the threat to self and family, and a serious consideration of issues of survival; and
- In almost all such cases, threatening of witnesses is practiced with near-total impunity. In recent times, there is no known instance of an accused being punished for threatening the witnesses and scuttling processes of justice.

B. Why Protect Victims and Witnesses?

Protecting victims and witnesses is important, both from the state's and the victims' perspectives.

From the victims' perspective:

- Victims and witnesses are an integral part of justice and accountability mechanisms;
- Protecting victims and witnesses provides them the assurance of safety and security from intimidation and harm which perpetrators or their supporters may cause, thereby encouraging them to participate constructively and fearlessly in processes of justice;
- Appropriate protection mechanisms facilitate effective investigation and prosecution of heinous crimes, and contribute to the victim's right to an effective remedy; and
- Such mechanisms are also essential for protecting witnesses' and victims' right to life, right to truth and closure, and recognising their invaluable contribution to processes of investigation and prosecution.

From the state's perspective:

- The state has a concurrent & fundamental responsibility to protect – Articles 14, 15, 19 and 21 of the Indian Constitution & Article 3 of the Universal Declaration of Human Rights – right to life (with dignity), liberty and security;
- From this responsibility, stems the duty of care for the witnesses and protect them from threat, intimidation, coercion and undue influence, which have the potential to scuttle processes of justice;
- State's responsibility towards promoting justice and rule of law are enhanced through victim and witness protection; and
- States have an additional obligation towards vulnerable victims and witnesses, such as Dalits, Adivasis, religious minorities, women, senior citizens, children, physically and mentally challenged persons.

The Orissa High Court reiterated the need for witness protection in the following words:

> *"It is now well settled principle of law that the State has a definite role to play in protecting the witnesses, especially in sensitive cases, involving those in power, who have political patronage and could wield muscle and money power in order to avoid the trial getting tainted and de-railed and truth becoming a casualty. The State as a protector of its citizens also has to ensure that during a trial in court, the witness could safely depose the truth without any fear of being hunted by those against whom he has deposed. This is a prime requirement of law and the criminal justice system, since the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system can come fearlessly and depose the truth in Court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interests of justice are best served and to ensure that criminal proceedings do not become mere mock trials."*[8]

C. Need to Overhaul the Criminal Justice System

It is easy for many of us, situated away from the ground realities of witnesses, to lay the blame on the witness who has turned hostile – often a poor, illiterate person from a marginalized community, who is expected to rise above all his / her concerns over physical and psychological security, ignore the family's survival needs, forego daily wages, and subject oneself to extreme inconvenience, harassment and humiliation to champion the cause of justice. However, it is important to analyze how India's criminal justice system treats a witness, and then ask ourselves if we can blame a witness turning hostile.

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7. National People's Tribunal on Kandhamal, Waiting for Justice: A Report,National Solidarity Forum, 2011, p. 177, para 23.
8. Sister Meena Lalita Borwa v. State of Orissa and Others TRP (CRL) No. 15 of 2009 and Thomas Chellan and Others v. State of Orissa and Others TRP (CRL) No. 17 of 2009, judgment passed by the Orissa High Court on 30 March, 2010, judgment delivered by Justice Indrajit Mahanty, at para 14.

In the context of communal violence in Kandhamal, Odisha, one woman who testified against an MLA who was accused of arson and murder, narrated her experience of engaging with the criminal justice system:

> *"I must have gone to the court to testify at least 20 times as there were many accused, and not all were arrested at the same time. Each time an accused surrendered or was arrested, I was re-called to court to testify to his participation in the attack. On each occasion, the court was filled with people, most of who were supporters of the accused and looked frightening… On some occasions, a supporter of the accused showed gestures in the court with his hands, indicating that my head would be cut off, and that I would be cut into pieces. He had positioned himself in such a manner that the judge could not see him but I could. I was terrified, especially because I could not see a single person in my support. My husband was made to stay outside the court. Only the PP remained and he was very quiet. Two lawyers who were in my support were frightened and left the court."*[9]

The above quotes indicate the sense of alienation and extreme fear that a witness feels during trial. Typically the court room atmosphere is vitiated during trials where the accused are influential persons. The court hall is filled with hundreds of supporters of the accused. The Public Prosecutor, his / her assistant and prosecution witnesses are only a few in numbers. The witnesses frequently receive threats by phone, through word of mouth from other persons, and through gestures in court while deposing. The court is often a mute spectator and remains unresponsive in the few instances when witnesses complain that they are being threatened.

Time delay is a major contributing factor to threatening of witnesses - delay in lodging the First Information Report (FIR), delay in arresting the perpetrators, and enormous delays during investigation and trial. For example, in the case of Sr. Meena's gang rape in Kandhamal, the first arrests were made 38 days after the lodging of the FIR. In the Muzaffarnagar rape cases, an enormous delay in arrest of accused persons forced the victims to seek a direction from the Supreme Court against the UP police. The women and their families were provided police protection as late as nine months after the lodging of the FIR. In the infamous carnage of Dalits in Laxmanpur-Bathe, Bihar, the incident took place in 1997, but the charges were framed only in 2008, the trial court convicted 26 accused in 2010, while the Patna High Court acquitted all of them in 2013.

The accused and their supporters clearly gain from such delays. However the solution does not lie in merely establishing Fast Track courts that potentially churn out speedy injustice, trampling over fair trial procedures. Realistic time limit has to be set for each stage of a case, and mechanisms established to ensure that the time limit is adhered to.

If witness protection is to be effectively integrated within the criminal justice system, the system needs an overhaul, with a high level of transparency, accountability and sensitivity of the relevant stakeholders of the system at each stage of the justice process.

D. What Does Witness Protection Entail?

Many countries have institutionalized witness protection programmes and / or have legislated on the issue. These include Argentina, Australia, Canada, Germany, Greece, Italy, Kenya, New Zealand, South Africa, Spain, the Netherlands and United States of America. Typically, international mechanisms make a distinction between witness protection measures and programmes. Witness protection measures are a set of measures addressing the physical, psychological and psycho-social well-being of witnesses taken at any stage of the proceedings, aimed at protecting the witness from threat and intimidation. A witness protection programme is a comprehensive set of measures implemented by a witness protection agency in respect of witnesses and their family members / close relatives who have been admitted to the programme.

Guiding Principles

All interventions related to witness protection are based on principles such as

- the best interests of the witness – an objective assessment by officials responsible for threat assessment;
- full and informed consent of the concerned witness;
- confidentiality;
- threat and risk assessment - through collection of information and intelligence in a systematic manner, and a baseline assessment of the threat environment and specific vulnerabilities of the witness concerned, by skilled personnel;
- proportionality of the protection measure (to the assessed risk);
- adopting measures that would be least intrusive to the life of the witness;
- protection as a consequence of the engagement of the witness with investigation and / or trial (in other words, though the humanitarian condition may require protection to all victims and witnesses, due to a resource crunch, usually no protection is accorded for those who do not engage with the justice processes); and
- balancing the rights of the accused with the rights of the witness in the interests of a fair trial.

Short Term Strategies and Immediate Measures

Some countries have implemented a series of short term strategies and immediate measures to protect witnesses in

9. Saumya Uma (2014), Breaking the Shackled Silence: Unheard Voices of Women from Kandhamal, Bhubaneswar: National Alliance for Women – Odisha chapter, pp. 48-49.

criminal trials, to complement a long-term legislative solution. This is what India should be looking to implement as well. Such measures are aimed at protecting the identity of the witness from the public, and in some situations, from the other party to the proceedings. For example, the Witness Protection Program Act of Canada provides the flexibility for a range of short-term measures as well as emergency protective measures to enable investigators and coordinators to respond promptly to potential threats.[10] Short term protective measures adopted by countries include:

- Adopting pre-emptive strategies by the police at the stage of investigation in order to reduce the risk of witness intimidation;
- Changing the infrastructure in police stations to prevent witnesses from coming into contact with the accused persons before and during the trial (unless required);
- Modifying the courtroom set up – so as to exclude the public or limit the number of persons present in the courtroom, shielding the witness from the direct view of the accused, providing witnesses with a separate entry into / exit from the courtroom to avoid contact with the accused;
- Making the courtroom set up less formal, and hence less intimidating;
- Controlling methods of questioning and cross-examination;
- Limiting disclosures of identity, identifying information or statements of witnesses between parties to the proceedings;
- Issuing specific instructions to increase confidentiality – such as on handling and storage of, and access to relevant documents, and naming specific officials as responsible for the same;
- Limiting disclosures to the public – such as removal of all information relating to identity of a witness (such as name, address, profession, place of work etc.) from documents within the public domain;
- Protecting the identity of the witness during trial – such as by assigning a pseudonym, constructing a screen to prevent public view of the witness, in camera trials, image and voice distortion techniques, use of closed circuit / video link testimonies; and
- Trial observation by independent monitors to deter threatening behaviour and hostile atmosphere in court.

Assistance to Victims and Witnesses

Witness protection, which aims at protecting the physical and psychological security of the witness and his / her family members, goes hand-in-hand with assistance to victims and witnesses to avoid secondary victimization during the criminal justice process. These are aimed at creating an enabling, emotionally safe environment where the witness will feel supported, reassured and respected while giving testimony. Assistance measures include

- Orienting witnesses with the basic aspects of a trial;
- Familiarizing them with the court room and the seating arrangement, roles and responsibilities of various court officials;
- Briefing them on what to expect during examination and cross-examination;
- Providing psychological support to minimize the stress accrued from participating in a trial, including allowing a psychologist to accompany the witness during trial;
- Providing transportation and assistance for the safe passage to and from court; and
- Assisting with accommodation and childcare facilities where required.

Though these do not strictly fall within the arena of "witness protection", these are essential elements that encourage and facilitate a witness to give a truthful and fearless testimony in court.[11] Victims and witnesses who are adversely impacted by poverty, destitution and lack of access to resources necessary for an effective engagement with the criminal justice process are quite often the beneficiaries of such forms of assistance.

E. The Path Ahead for India

In 2006, the Law Commission of India took the suo-motu initiative of studying witness protection laws, programmes and practices across the world and prepared a comprehensive report and proposal for formulation of a law on witness protection for the consideration of the Indian government.[12] The report acknowledges that victim and witness protection is essential for all serious offences, and report recommends procedures for witness identity protection during investigation, inquiry and trial, as well as witness protection programmes which are applicable for the physical protection of witnesses outside the court. The report ought to form the foundation of any initiative in India on formulating a comprehensive law on witness protection.

There is a growing realization of the importance of witness protection for India, particularly among members of the police and the judiciary. However, there is a lack of clarity on how to formulate and implement protective measures. India certainly needs to adopt short term strategies and immediate measures while working towards a formulation of a legal framework for witness protection in the long term.

A factor that contributes to the lack of clarity is a misconception that witness protection is a resource-intensive proposition, and

10. S. 6(2) of Witness Protection Program Act, 1996 of Canada.
11. For more details, see UNODC. Good practices for the protection of witnesses in criminal proceedings involving organized crime. New York: United Nations, 2008, p. 33.
12. Law Commission of India, 198th report on Witness Identity Protection and Witness Protection Programmes, August 2006. Available at http://indiankanoon.org/doc/1093280/, accessed on 21 May, 2013.

that a developing country like India cannot afford it. On one hand, any country that is committed to justice for heinous offences cannot afford but to invest human and financial resources in witness protection. On the other hand, most of the protective measures discussed above are not resource intensive; many can be implemented with relative ease and without a substantial cost, using existing resources and frameworks. Every witness does not require a re-location to another country, cosmetic surgery to his/her face and a fresh set of identification documents – an expensive proposition - as depicted in Hindi films! Even in developed countries with sophisticated witness protection programmes, witness relocation is considered an exceptional measure that is adopted as a last resort.

It is also possible to start with protection measures at a small scale with a modest budget, and increase the same progressively. However there is a need to clearly lay down protective measures, identify officials responsible for protection at each stage of the criminal justice process, ensure coordination between them, and provide for sensitization, perspective-building and capacity-building of police personnel, judges, public prosecutors and other court officials. Above all, a political will and creativity to implement the protective measures are urgently warranted.

Impression of DED Scholar

Mr. M.K. Sateesh
II Year MBL

It was my thirst to gain more knowledge in the legal field that led me to the door steps of DED. It would come as a surprise to one and all that I am presently handling legal Department in my company, Lloyd Insulations India Ltd a construction company which is the world's largest insulation company as Additional General Manager (Credit Control) without a formal LAW background. My search for doing LLB without attending classes in Chennai was fruitless.

I came to know about NLS through my elder brother. I realised than that this was a God sent oppurtunity to fulfil my academic dreams of having a proper degree in law (minus the practicals which is a requisite for LLB) that would help me in my professional life as well as act as a tool for being a consultant post retirement in the corporate world. For instance if we take CONTRACTS LAW, CORPORATE LAW, TAXATION (BOTH DIRECT AND INDIRECT), INDUSTRIAL LAW we find that knowledge in these subjects is extremely relevant IN THE CORPORATE WORLD what with the increase in litigation in this country in all these branches of LAW.

Infact I would go to the extent of saying all the ten papers in MBL are extremely interesting and bring about tremendous awareness in law relating to these subjects which probably a LLB OR LLM course may not be able to do full justice.

The thought of attending classroom lectures excited me to a great extent. As they say in transactional analysis the exuberant child in me got activated.

Now coming to the Brass Tracks and nitty gritty of the course. I had no clue whatsoever as to how to approach the subjects. Cramming was simply out of question. It came as a big relief that i could clear Corporate Law in the very first attempt. That gave me the confidence. But still I realised that there was something lacking in my preparation.

Friends, the secret in clearing all the papers is not all that difficult to decipher. Post DEC 2014 exams I am following a system which i am confident would fetch amazing results. I am sharing the same for the benefit of one and all.

a) Following a disciplined regime by way of studying every day without fail.
b) Attending contact program without fail.
c) Taking notes for the important topics by preparing flash cards (thank you Deepa and Prof Sai Ram Bhat) for this suggestion. doing this along with relevant case laws and sections if possible will make the task that much easier. But one should avoid catch-22 situation. The focus should be to understand theory (SECTIONS AND THEIR ELABORATION) with decided case laws after doing proper analysis. Analysis of the case under study and framing issues in a given problem is the backbone of answering a question. Last but not the least how the case was decided is to be highlighted and how that decision is relevant to the problem given in the exam is to be seen and answered in a logical manner.
d) I always make it a habit to spend quality time in our NLS LIBRARY especially before exams believe me it can set your intellectual juices flowing. It gives an oppurtunity to go through decided cases in a detailed manner which helps in understanding and interpreting the Law better.
e) We have also formed a study group consisting of following Deepa from Switzerland, Vivek from Dubai, Prasad, Keerthi and Rama from India. We have some brainstorming sessions before exams and exchange notes.

I am confident of doing well and will endeavour to clear the course by JUNE, 2015.

Above all I would like to use this forum to thank Shri Venkata Rao our Vice Chancellor who has always been a guiding spirit and willing to lend a helping ear to our suggestions and also Prof Sai Ram Bhat a bundle of energy who has taken steps to revamp the entire study material and also the DED staff who are doing a stupendous job considering the volume of work they have.

BEST OF LUCK TO ONE AND ALL for the JUNE 2015 exams.

ETHICS
IN DENTAL PRACTICE

Dr. Vidyaa Hari Iyer*

The doctor is legally bound to practice his field of specialization with utmost honesty and sincerity, keeping the patients' health as the paramount interest and money as a by-product. Doctors are considered to have extended hands of God and hence treated as demi-gods in most parts of the world. Hospitals are considered as temples of healing, doctors as savior of mankind and the medical profession is considered noble. Many commercialized institutions have emerged in the past decade with a paradigm shift towards monetary gains questioning the authenticity of the doctors. Family doctors and their assistance in aiding patients have slowly faded leading to patients' going for doctor-shopping or seeking second opinion. The duties of the doctors' towards their patients, towards fellow professionals and the integrity of the practice are of utmost importance. Thus, it is the responsibility of the doctor to safeguard his integrity by following all the basics of ethics within his domain of practice.

Today's doctors do many tests and diagnostics with the use of modern technology so that no underlying problem is left undetected or from fear of improper or mistaken diagnosis. This further leads to increasing the charges of the treatment. Patients on the other hand go for dental treatment only after they have pain, swelling or are unable to eat on their teeth with both sides comfortably for a reasonable amount of time. So the delay from the patients' side and the compounded effect of the dental problems escalates to a big fat bill. This further leads patients' to suspect the integrity of the doctors and the doctor needs to substantiate the need for such tests.

The law and legalities have evolved to defend the doctor and protect the interest of patients simultaneously. Dentists have an important role in the wellbeing of the individual so as to restore the smiles, function of the mouth along with a complete psychological, esthetic and functional well being of a person. This holistic approach helps patients build the trust and confidence back into the medical profession and their provider.

Aims of teaching ethics to all the medical professionals and dentists is to aid in understanding the behavioral psychology of patients and fellow physicians, identify value responsible for decision making and recognize elements of ethical controversies in profession and their moral values. Advantages of Code of Ethics are to upheld the dignity and honour of medical profession, maintaining good standards of care to all patients, application of advanced dental material science and technology.

The Dentist's Code of Ethics regulation, 1976 came into force from August 1976 and has been revised only after over three decades in 2014. The basic ethical principles governing professional behaviour includes:

- **Autonomy -** It is defined as the respect for a person regarding medical care after fully informing the patient and includes patient's decision to judge for themselves about the treatment options available.
- **Confidentiality** - Patients have the right to expect that all communications and records pertaining to their dental care will be treated as confidential. Doctors should never gossip about the patient especially about famous personality or a neighbour. Patient's permission should be sought for, if confidentiality could be breached. Confidentiality can be only breached in court of law. When patients change dentist unlinked information can however be given.
- **Nonmaleficence -** It is the obligation of no harm or to do no harm. Cases of iatrogenic diseases, faulty restorations, failure to sterilize instruments or use of drugs which are specifically allergic to the patients have to be cross checked. The doctor should prevent risk of harm and consider the risks as well as benefits of treatment alternatives and be non-partial in his explanation for the required dental ailment.
- **Beneficence -** It is the principle of promoting what is good, kind and charitable for the patients health and to

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promote well-being. Resist being paternalistic (when authority of position, age or experience of the doctor is used to overrule the patients' sense of decision making). Paternalism occurs when the health professional insists on the treatment that he believes is best for the patient violating the patient's autonomy. The doctors at no instance should withhold information or restrict the choices or make choices for the patient.

- **Veracity -** It is the principle of truthfulness and honesty. Health professionals should be truthful, keep promises and refrain from deception.
- **Justice -** Golden Rule - "Do onto others as you would have others do unto you".Give others what is due to them.Treat patients fairly and equally. Distribute health care resources with equity.
- **Doctor - patient contract -** The legal foundation of the doctor -patient relationship is contract law. When a patient visits a dental office, the Dentist expresses professional opinion to an individual who has reason to rely on the opinion, thereafter doctor-patient relationship begins, and the doctor is burdened with implied warranties or duties.
- **Informed consent -** It is the consent taken from a patient after necessary discussion has been done with the patient and his guardian (in case of minor) who have agreed on the modality of treatment plan, date and time of visit suitable to both the dentist and the patient, the time frame of the treatment, fee structure and the mode of payment.
- **Vicarious liability -** It is the liability of master for the act of servant, or agent in the course of his employment. For instance, when a dentist appoints another dentist in his practice either during his absence or as an enrolled salaried person, the dentist is held responsible for any untoward act of the appointed dentist in case of faulty extractions or misdiagnosis of a dental ailment etc.
- **Medical negligence -** No human being is infallible and everyone can make mistakes. However a mistaken diagnosis is not negligent. The various traditional causes of dental malpractice includes extraction of wrong tooth, ill-fitting dentures, broken root tips left in the bone, infections arising after extractions and adverse reaction by administration of local anesthesia and sedatives.

The recent causes of malpractice includes failure to obtain informed consent, diagnose, refer or treat an ailment properly, faulty patient history taking (allergy responses, past and present - medical and dental history, drug incompatibilities etc), treatment beyond competence of practitioners, failure to inform patients (fractured instruments / roots, prognosis involving implant procedures or any surgeries), abandonment of patient by prematurely discontinuing care and /or not attending to the needs of patients under treatment, faulty maintenance of case sheets or medical records, unethical use of the patient's photographs etc.

In most of the cases the dis-satisfied patients don't lodge any formal complaint. However few patients go elsewhere for dental treatment which is perhaps the start of loss of income. Few of the dis-satisfied patients tell others about their dissatisfaction which leads to bad reputation and further take years to overcome.

An early apology, better listening capacity of the dentist to their patients' needs and expectations along with smooth handling of the cases, may calm the situation which otherwise would have let the situation escalate to anger or formal complaint.

The duties of a doctor include

- Being a skilled / specialized person trained in his field of profession.
- Committed to moral principle and professional duties.
- High status in community.
- Sober, courteous, sympathetic, helpful, modest and punctual.
- Morally, mentally and physically clean.
- Enroll in societies or professional associations which regulate and uphold standards of practice.
- Update in knowledge and skills periodically.
- Should not let down fellow dentists.
- Duty bound to treat family of his fellow professionals free or for a nominal fee.
- Not collect any undue fee from referrals to diagnostic services and /or drug companies.

In conclusion, the doctors in general should adopt and adapt to the care-cure model with a humane touch. Good physician's diagnostic ability, choice of right treatment, competitive cost and following all standard of care are the four major pillars to a good dentist- patient relationship.

References

- Medicolegal aid to hospitals and doctors with consumer protection law - M.S. Pandit & Shoba Pandit.
- Medical negligence case reporter - Dr. Vidya Yeravdekar and Adv. Ravi. S.B.
- Mosby comprehensive review of dental hygiene-III edition, Darby.
- Revised Dentists (Code of Ethics) - The Gazette of India, Extra Ordinary Regulation 2014 Part III – Section 4.
- Essentials of preventive and community dentistry - Soben Peters.
- P. G. D. M. L. S. Course [2001 – 2002] – Symbiosis, Pune.

"Those who spend their time looking the faults in others usually make no time to correct their own."

The Transplantation of the Human Organs (Amendment) Act, 2011. A case for legalizing sale of organs

Ms. Indiritta Singh D'mello*

It is paradoxical that even though there has been a medical breakthrough in terms of organ transplantation,people are still dying due to the non availability of vital organs. This is certainly not because of the lack of organ donors, but because the law unwittingly becomes an impediment to making organs available. Working in the area of healthcare, I routinely encounter patients who are facing death because of non availability of organs. As an NGO, we are often helpless when these patients approach us, with the hope that we will be able to give them some miracle solution.

The very reason that the Transplantation of the Human Organs Act (THOA) was passed, was to encourage altruistic donations in order to meet the demand of organs for therapeutic purposes and to curb commercial dealings. This intent has, unfortunately, been defeated. Twenty years after the original THOA was passed, and even after it was amended to include more stringent punishments, organ trafficking still continues to thrive. Case in point is the recent Odisha kidney sale racket where the medical director of a corporate hospital was arrested in June 2014. According to the World Health Organization, almost 10,000 organs are traded illegally every year globally. This means that an organ is being sold in the black market almost every hour. The trade has a few identified hubs-of which India, with its high population of poor - is one. Unofficial estimates are that almost 1,000 kidneys are sold every year in the country.[1]

"When a product is desired, a market (legal or illegal) will develop; prohibition simply drives markets further underground. ***Clamping down on unlawful organ sales without expanding the organ pool will not result in less criminal activity."***[2] Organ trafficking thrives because the organ donation story has been a virtual non starter in India.The demand for organs is high in India and the supply does not meet the demand even remotely. India is projected to be the diabetes capital of the world with 80 million people suffering from diabetes in 2025, which means the number of people who are going to have kidney failures in the near future is only going to spike exponentially. The lack of supply of organs in India is certainly not because of scarcity of population (1.21 billion according to the 2011 census). In case of cadaver donors, even if 5% to 10% of all brain dead patients became organ donors, it would mean that there would be no requirement for a living person to donate an organ.[3] However, the proportion of organ donors in India is amongst the lowest in the world. India had 0.16 donors per million population in 2012 compared to 35 for Spain, 27 for Britain and 26 for US. In India, 12 people die everyday for want of an organ. Some 2.1 lakh require a kidney transplant annually but only 3000-4000 get it.[4] In such a situation where it is a question of survival both for the patients who need the organs and for the poor who are trying to make ends meet, organ trafficking is bound to thrive. *"The choice before the poverty stricken people is whether to sell one kidney and live, or keep both kidneys and die of starvation!"*[5]

Because of illegal trafficking, the poor get exploited at the hands of the middlemen, receiving only a fraction of the funds extracted for their organs. The donors are not informed properly of the risks and at times do not even know their organ is being removed; they suffer from poor health outcomes due to the lack of medical follow ups because of the clandestine nature of the transaction; and the recipient risks contracting diseases from the poor quality of the organ received like Hepatitis and AIDS. By legalizing the sale of organs, one can regulate the market and allay the ill effects of the illegal market.

In fact, the THOA sometimes even works against willing donors who are legally allowed to donate their organs. The thrust of the Act concentrates much on curbing the sale of organs, which creates cumbersome procedures resulting in procedural delays and can cost human lives. It also deters hospitals from encouraging organ donations from donors that are not 'near relatives' for altruistic reasons, as they fear getting involved in legal entanglements. The Act says that the donor can only donate for reasons of affection and attachment. Can one really establish when a person is genuinely donating for altruistic reasons specially in cases of not 'near relatives'? The Authorization Committees want to play it safe, often falling victim to overkill, so not only in cases of those donors that are not 'near relatives' but also 'relative donors' they have rejected approval of organ transplantation.[6,7] Even if the court orders these Authorization Committees to reconsider, this delays the whole process and puts the patient and family through

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more distress than what is necessary. These delays cause deterioration in the patient's condition, often endangering their life.

However, the truth is that there is no utopian solution as far as live and cadaver donors are concerned. Live donor transplantations are sub-optimal for the donors in terms of risks of death and morbidity rates. Cadaver donor transplantations are sub-optimal for the recipient. Dr. AjitHuilgol, Transplant Surgeon states that"the success rate in cadaver donor transplantation is 15 to 20% less than live donor transplantation." If that be the case, it cannot be argued that an ideal solution is to have a cadaver donor program with less dependence on live donors or vice versa. To develop a successful cadaver donor program will have a set of its own challenges. One of the many challenges being the public outlook towards cadaver donors which is entwined with religious sentiments of keeping the sanctity of the dead body. And to be able to increase the number of organs available through living donors, altruism as the only incentive is not enough as there is pain, risk and financial loss involved in donating. Thus there is a need to legalize sale of organs in living donors, so that it can aid in meeting the demand of organs.

Even if it is assumed that a cadaver donor program is an ideal situation, then it may be argued that to legalize commercial dealing will dampen the cadaver donor program. However, the two are not mutually exclusive. "To argue that it is morally imperative to legalize the trade in human body parts is not to argue that other methods of organ procurement should be abandoned. Since one of the main reasons for advocating that such a market be legalized is to increase the supply of transplant organs, it is clear that any ethical means of achieving this should be encouraged."[8]

On ethical grounds, there is a case for legalizing sale of organs. Where human lives are concerned, no legal barrier should supersede the need to save lives provided it is done through ethical means. The law is not supposed to define ethics; on the contrary, the law is developed on ethical principles. It is these principles that define what is good for the individual as well as for society, and establishes the nature of obligations or duties on the basis of which laws are framed. "Society owes a duty to save the life of a dying man and in the event of failure to do so, it is absolutely immoral to interfere with his own arrangements by making unrealistic laws."[9] If the argument is used that we are encouraging commodification of organs, then the law makers cannot have double standards. By proposing The Assisted Reproductive Technologies Bill 2010, they have already endorsed commodification of reproductive body parts. To illustrate this point, we must consider that the risk of dying from renting out your womb is six times higher than from selling your kidney.[10] If we are all right with commodifying reproductive body parts where it is not a question of life and death and the risk to the person who is commodifying her womb is higher than the person selling the kidney, then there is no reason why selling of vital organs in order to save lives should not be endorsed.

A utopian solution does not exist and will never exist. Taking into account the cultural and economic context of India, in legalizing the sale of organs in living donors, the pros far outweigh the cons. Apart from allaying the ill effects of the illegal market, we might be successful in saving the lives of many people waiting for transplant organs, as well as improve the quality of life of the many people who would otherwise have to undergo debilitating and painful procedures to stay alive. Such a step will have other positive effects like improving the economic conditions of the poor donors. Additionally the cost effectiveness for both, the patients and the healthcare system cannot be overlooked.[11]

"Instinct often trumps logic. Sometimes that's right. But in this case, the instinct that selling bits of oneself is wrong leads to many premature deaths and much suffering. The logical answer, in this case, is the humane one."[12]

Endnotes

1. "India's great organ bazaar"; Times of India; 2nd Aug, 2013.
2. Incentives for organ donation: proposed standards for an internationally acceptable system, American Journal of Transplantation, Feb 2012.
3. Sunil Shroff; "Legal and Ethical aspects of organ donation and transplantation";Indian Journal of Urology; 2009.
4. 50% organ needs can be filled by brain-dead"; Times of India; 27 July 2013.
5. Saugata Mukherjee, S.V. Joga Rao and C.P. Ayyappa; "Organ Transplantation and the law"; Monograph; Vol-II;PGDMLE; National Law School of India University, Bangalore.
6. B.L. Nagaraj And Others vs Dr. Kantha on 12 July 1995, High Court, Karnataka, ILR 1995 Kar 2050.
7. Balbir Singh vs The Authorization committee and Others on 6 September 2004, High Court, Delhi, AIR 2004 Delhi 413.
8. James Stacey Taylor; "Stakes and Kidneys: Why Markets in Human Body Parts are Morally Imperative" Ashgate Publishers; 2005; Page No. 3.
9. R.R. Kishore; "Human organs, scarcities, and sale: morality revisited"; Journal of Medical Ethics; 2005; 31:362-365.
10. "Governments should let people trade kidneys, not convict them for it"; Economist; 16th Nov 2006.
11. Karberg I, Nyberg G; "Cost-effectiveness studies of renal transplantation"; Int J Technol Assess Health Care;1995.
12. "Governments should let people trade kidneys, not convict them for it"; Economist; 16th Nov 2006.

"Tolerance is the highest degree of strength and the desire of revenge is the first sign of weakness."

CCI and Compat at the Crossroads over Decision in DLF Case

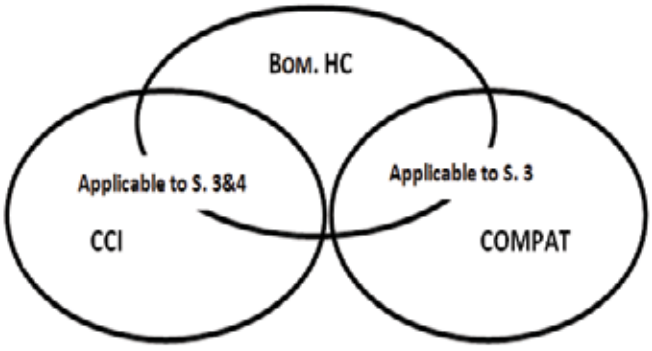
Mr. Praveen Tripathi*

Competition Appellate Tribunal ('COMPAT') in its decision in an appeal by DLF Ltd.[1] upheld the monetary liability imposed on DLF Ltd. by Competition Commission of India (CCI) but partially deviated from CCI in its approach to decide the matter. CCI while deciding a case of abuse of dominant power against DLF Ltd.[2] had made an inquiry into various clauses of Apartment Buyers Agreement ('ABA') and conduct of DLF Ltd. post such agreement. On the basis of terms of reference in ABA coupled with conduct of DLF Ltd., CCI arrived at a finding that DLF has abused its dominant position in the relevant market of *'services of developer/builder in respect of high-end residential accommodation in Gurgaon'*. In the appeal, COMPAT deviated from the CCI's approach, wherein it held that CCI is not empowered to check various clauses of the contract entered into before the commencement of the Competition Act, 2002 (hereinafter 'Act'). Further, abusive behaviour of DLF Ltd. has to be analysed on the basis of its conduct post commencement of the Act. In addition to this power of CCI to modify the terms of agreement in cases of Section 4 violations, curtailment on the power was also justified interpreting Section 27 (d) of the Act literally. This difference of approach and findings of CCI and COMPAT has put them at the crossroads and now the matter is pending before Supreme Court.

Non-Retrospectivity and CCI

CCI in its decision[3] with respect to applicability of Section 4 of the Act on agreement entered into prior to commencement of the Act, relied on decision of Bombay High Court in *Kingfisher Airline Limited* v. *Competition Commission of India*[4] and ruled in favour of its jurisdiction. In the instant case, Bombay High Court held that '…though competition Act is not retrospective, it would cover all the agreements covered by the Act though entered into prior to the commencement of the Act and sought to be acted upon.'[5] Based on the ratio of *Kingfisher case*, CCI made an inquiry into the various clauses of ABA entered into before the commencement of the Act and sought to be acted upon after the commencement of the Act. However, relying on the same case, COMPAT held otherwise and restricted the jurisdiction of CCI only to acts done post commencement of the Act and declared that CCI had no jurisdiction to make inquiry into various clauses of agreement validly entered before the birth of the Act. COMPAT's decision is based on the reading of *Kingfisher case* as applicable only to Section 3 of the Act, and thus distinguishes facts of present appeal from *Kingfisher case*, as this was the subject matter of Section 4.

Ratio of *Kingfisher Case* as understood by CCI and COMPAT



It is pertinent to note here the origin of *Kingfisher case* (supra) and ratio of its decision. Kingfisher had petitioned before Bombay High Court challenging the notices issued by CCI on finding a *prima facie* case upon information provided by Mr. M.P. Mehrotra alleging the violation of Section 3 and 4 of the Act. Notice served by CCI stated that "It is alleged by the informant that the two airlines are acting in concert to fix prices and limiting/controlling supply through route rationalisation in violation of Section 3 & 4 of the Competition Act." At this point, Kingfisher had not severed the two provisions and partially challenged the notice *only* for Section 3. Further, High Court also did not indicate anywhere in its judgment that its pronouncement is applicable only for Section 3 and with respect to Section 4, question is left open. High Court's decision, with respect to applicability of the Act, takes into account the phrase "agreement covered by the Act" which includes anti-competitive agreement as per Section 3 or any other agreement as a result of abuse of dominant power as per Section 4.

COMPAT, in its decision has observed that '…complaint in the *Kingfisher case* was for breach of Section 3 of the Act complaining of cartelisation on the part of Kingfisher and Jet Airways…'[6] and issue of abuse of dominance is consequential to this agreement. Thus, agreement itself was not envisaged as opposed to Section 4. And thus according to COMPAT the ratio of *Kingfisher case* was applicable only to matters related to anti-competitive agreement and not in cases of abuse of

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dominant position. Since DLF Ltd. case is based on Section 4 violation, it was distinguished from *Kingfisher case* and thus CCI is not empowered to go in the question of validity of agreement as such, but the jurisdiction of CCI is valid to the extent of any abusive conduct after the commencement of Section 4.

Denial of Power to Modify Agreement

COMPAT in its decision has also observed that action of CCI to modify the terms of agreement was lacking jurisdiction. As per Section 27 (d) of the Act though CCI has power 'to direct that the agreement shall stand modified to the extent and in the manner as may be specified in order by the Commission', however particular clause has to be read in context with the main provision wherein it is specifically stated that "agreement referred to in Section 3" or "Action of an enterprise in a dominant position". Reading the provision contextually, COMPAT arrived at a finding that power to modify the terms of agreement exists only with respect to cases where the findings are made regarding contravention of Section 3. With respect to Section 4, the agreement is not contemplated, and hence in such cases, CCI is not empowered to modify the agreement. This surely raises questions on the remedies that CCI can award in similar matters pending before it apart from general 'cease and desist' order and monetary penalty. It is submitted that even if interpretation of Section 27(d) limits the scope of the provision to Section 3 cases, Section 27(g) which empowers CCI to 'pass such other order or issue such directions as it deems fit' is wide in its language to modify the terms of agreement.

Concluding Remark

Though COMPAT's decision only saved the terms of agreement entered into before the commencement of Section 4, agreement entered into after the commencement of Section can still be under the wings of CCI. This is evident from recent inquiries initiated by CCI against Jai Prakash Associates and DLF Ltd.[7] in real estate industries, where one sided clauses are in question once again. However, inquiry without the power to alter terms of agreement might lead to infructuous results as CCI as a competition regulator will not be able to regulate the unprecedented abusive one-sided clause in agreement and will lead to an ex post adjudicatory body, which was not intended. It is suggested that the residuary power as envisaged in Section 27(g) should be constructively used to design a standardised agreement wherein the risk of abusive behaviour on the part of dominant enterprise can be negated and consumer can effectively realise his interest.

It is expected that Supreme Court while dealing with the issue of conflict between CCI and COMPAT, would interpret provisions of the Act in light of the goals of competition law and nature of the regulatory body. CCI has to be a dynamic agency with various tools to control and regulate competition in market, and blocking any tool will degenerate the very essence of regulatory governance i.e. intervening and controlling at the 'act stage' than to follow in 'harm stage' events.

Endnotes

1 *DLF Ltd.* v. *Competition Commission of India and Ors.* 2014 Comp LR1 (Compat).
2 *Belaire Resident Association* v. *DLF and Ors.,* 2011 Comp LR239(CCI).
3 *Belaire,* Supra ¶ 12.19.
4 (2010) 4 CompLJ 557 (Bom.).
5 Id. at ¶ 10.
6 DLF Ltd., Supra note 1.
7 *Raghuvinder Singh* v. *Jai Prakash Associates* [Case no. 45 of 2013].

"Watch your thoughts, they become words!

Watch your words, they become actions!

Watch your actions, they become habits!

Watch your habits, they become your character!

Watch your character, it becomes your destiny!"

BITCOINS

Are they indeed a new means of bypassing anti-money laundering and anti-terrorism financing controls?

Dr. Mike Kaczmarski*

What are they?

It is believed that Bitcoins have been launched by Satoshi Nakamotoin sometime in 2009.[1,2] This mysterious person (or persons) known only by the pseudonym never provided his real personal details. He collaborated with other early Bitcoin fans through online forums but never met with other members of the Bitcoin community face to face. Then, he gradually reduced his involvement in the currency's development.His last known communication came in 2011.[3]

Bitcoins are a virtual representation of value (i.e. virtual currency) that can be used as means for payments for real goods or services, but unlike e-money they are not based on a currency with legal tender status.

What is special about Bitcoin is that the network is organised in a decentralised manner. There is no central body that issues the currency units or operates the system. Transactions take place in the public network and are registered in an electronic ledger. Ownership of Bitcoins is verified by matching public and private digital keys. The network verifies the private key signature using the public key. If the private key is lost, the Bitcoin network will not recognize any other evidence of ownership. The coins are then lost and cannot be recovered. For example, in 2013 one user claimed he lost 7,500 Bitcoins, worth more than £4m at the time, when he discarded a hard drive containing his private key. It belonged to James Howells, who threw it out when he was clearing up his desk in mid-summer and discovered the part, rescued from a defunct Dell laptop. He found it in a drawer and put it in a bin.[4]

Bitcoins are created as a reward for payment processing work in which Internet users offer their computing power to verify and record payments into the public ledger. This activity is called mining and is rewarded by transaction fees and newly created Bitcoins. Miners, by solving mathematical problems confirm that the user concerned actually owns the number of Bitcoins and has not already spent them. Besides mining, Bitcoins can be obtained in exchange for money, products, and services.[5]

Various government agencies, departments, and courts have classified bitcoins differently. Both the U.S. Treasury[6] and the European Central Bank[7] classify bitcoin as a convertible decentralized virtual currency. The People's Bank of China has stated that bitcoin is a "tool for speculation"[8] and as a result in China, buying bitcoins with Yuan is subject to restrictions, and bitcoin exchanges are not allowed to hold bank accounts.[9]

Due to Bitcoin characteristics, there is quite a large population of entities trading in them all around the world. There are plenty of bitcoin trading platforms also in the Asia region. Available Bitcoin services are not only exchange into other currencies but also transaction processing, top-up of virtual money purses, cash withdrawal or provision of space for virtual trade, including auction houses. There are even Bitcoin mining devices offered in the market that can be attached to a computer via USB port. Bitcoin trade operators often promote themselves as offering anonymity to transactions executed with their intermediation. India is not an exception in this landscape.[10] Good example for that would be the company Unocoin, established in 2013 with 3000 registered users and 150,000 Bitcoin wallets.[11]

1 http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-how-does-bitcoin-work.
2 FATF Report titled: Virtual currencies – key definitions and potential AML/CFT risks, page 5 (www.fatf-gafi.org).
3 http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/19/12-questions-you-were-too-embarrassed-to-ask-about-bitcoin/.
4 http://www.theguardian.com/technology/2013/nov/27/hard-drive-bitcoin-landfill-site.
5 http://www.indiabitcoin.com/what-is-bitcoin-wikipedia/.
6 http://www.irs.gov/pub/irs-drop/n-14-21.pdf.
7 http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf.
8 http://www.wsj.com/articles/SB10001424052702304655304579547251552490962.
9 http://www.bloomberg.com/news/articles/2014-04-10/china-s-bitcoin-exchanges-say-banks-will-close-their-accounts.
10 http://en.wikipedia.org/wiki/History_of_Bitcoin.
11 http://www.business-standard.com/article/specials/the-men-behind-india-s-first-bitcoin-exchange-114100900750_1.html.

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Can Bitcoins constitute a mean for bypassing anti-money laundering and anti-terrorist financing controls?

The reasoning behind statement that Bitcoins bring threat to the existing model of preventing money laundering and terrorist financing is as follows:

- Bitcoins are not issued or authorised by any central bank hence their creation is not regulated and their legitimate source cannot be easy verified (the miners can be crooks)
- The payments in Bitcoins are not processed by any regulated financial institution, hence lack of customer due diligence requirements or transaction monitoring (transactions may be executed by crooks or they may be related to proceeds of crime)
- Authorisation of Bitcoin transactions takes place via electronic keys, which brings anonymity to transaction counterparties (crooks or terrorists can hide behind).[12]

The Reserve Bank of India in one of its press releases dated December 24, 2013 has supported the above reasoning.[13] Nonetheless, it is not entirely clear, whether and to what extent, the Foreign Exchange Management Act, the Foreign Exchange Management Rules and Draft Guidelines for issuance and operation of prepaid payment instruments in India,regulate the Bitcoin exchange and trade.[14]

The threat of Bitcoin misuse is real though. The example of such misuse could be the Silk Road portal that has been shut down in 2013 following raids by the FBI and other law enforcement agencies.[15] Launched in January 2011, Silk Road operated as a global black-market cyber bazaar that brokered anonymous criminal transactions and was used by several thousand drug dealers and other unlawful vendors to distribute unlawful goods and services to over a hundred thousand buyers, a third of whom are believed to have been in the United States. It allegedly generated total sales revenue of approximately USD 1.2 billion (more than 9.5 million Bitcoins) and approximately USD 80 million (more than 600000 Bitcoins) in commissions for Silk Road.[16]

The significance of money laundering risk resulting from lack of regulation in respect to Bitcoins and other virtual currencies has been recognised by G7's Financial Action Task Force. In 2014 the Task Force published a report titled *"Virtual Currencies: Key Definitions and Potential AML/CFT Risks"* where it indicated that despite many advantages[17], virtual currencies may also be misused for criminal purposes. Similarly to the Reserve Bank of India, the Task Force highlighted that some characteristics of virtual currencies, coupled with their global reach, present potential AML/CFT risks, such as:

- The anonymity provided by the trade in virtual currencies on the internet
- The limited identification and verification of participants
- The lack of clarity regarding the responsibility for AML/CFT compliance, supervision and enforcement for these transactions that are segmented across several countries, or
- The lack of a central oversight body.[18]

Hence, the Task Force put into consideration a recommendation on regulation of virtual currencies in order to close the existing gap in applying risk based due diligence measures in respect to virtual currency transactions. Similar to the Reserve Bank of India no firm conclusion has been raised though.

Conclusion

Despite the red flags and warning calls the Bitcoin threat has not been AML/CFT regulated yet, neither on country nor on international level. Fortunately due to massive exchange rate volatility of Bitcoins and associated high risk of losses it seems that Bitcoins did not manage to become the remedy for AML/CFT countermeasures yet. Moreover, in order to enjoy the criminal proceeds disguised in the form of Bitcoins at some point they have to be exchanged into legal tender currencies such as US dollars, euros or Swiss francs, which requires touching base with regulated sector, such as banks or other regulated financial institutions.

Nonetheless, it seems the future of Bitcoins, both as means of global trade settlement and global money laundering, heavily depends on the future stability of major tender currencies such as US dollars, euros or Swiss franc. If they fail, which in globalisation era is not impossible,then global trade may accept alternative tender currencies such as e.g. Bitcoins.

12 Despite the fact that in the Bitcoin system is believed to provide anonymity as Bitcoin users are identified by Bitcoin addresses not names, transactions can be linked to individuals and companies, it is just the matter of time and effort.

13 www.rbi.org.in; „RBI Cautions users of Virtual Currencies against Risks".

14 http://www.rbi.org.in.

15 http://www.bbc.com/news/technology-30575103.

16 FATF Report titled: Virtual currencies – key definitions and potential AML/CFT risks (www.fatf-gafi.org).

17 The legitimate use of virtual currencies offers many benefits such as increased payment efficiency, lower transaction costs or provision of payment services to populations that do not have access or limited access to regular banking services.

18 http://www.fatf-gafi.org/topics/methodsandtrends/documents/virtual-currency-definitions-aml-cft-risk.html.

STATE RESPONSIBILITY IN INTERNATIONAL LAW: A SHORT NOTE

Dr. Irfan Rasool*

Introduction

Traditionally the term State responsibility[1] was viewed in terms of injuries to aliens and their property. The International Law Commission adopted a new approach expanding the scope of the general principles of responsibility of States covering a broader field. Since World War II, the configure of international community has transformed intensely and as a result the foundation which once supported the traditional[2] law of State responsibility, has undeniably and perpetually changed.

State responsibility

State responsibility is a fundamental principle in international law.[3] The rules of 'State responsibility' indicate the circumstances in which a State will be fixed with legal responsibility for a violation of an international obligation.[4] In other words the international wrongful acts by States create new international legal relations.[5] Such responsibility[6] attaches to a State by virtue of its position as an international person and State sovereignty[7] affords it no basis for denying the responsibility.[8] The basic principle of State responsibility in international law provides that any State that violates its international obligation must be held accountable for its acts.[9] It is a settled law of international law that when a State violates an international obligation, it is immediately responsible to cease the unlawful conduct and make full reparations[10] for the injury caused.[11]

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1 The Peace of Westphalia more than 350 years ago led to the establishment of the classic system of international law, which centered exclusively on sovereign States that had defined territories and were theoretically equal. States made international law and were accountable to each other in meeting international legal obligations. The articles on State responsibility of the International Law Commission (ILC) largely reflect this traditional view of the international legal system. They focus on States and the rules they use to hold each other accountable for the substantive obligations to which they have committed themselves. For subsequent inquiry refer to James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).

2 In theory, the basis for the international responsibility of States is controversial; traditional teaching, which goes back to Grotius requires fault [to be established], whereas Anzilotti and other modern writers are satisfied with risk, and refer to an objective responsibility based on the causal nexus between the activity established and the act contrary to international law. Rousseau, Droit International Public, 359, 360, see also Verdross, Volkerrecht, 285 (2nd ed.,); see also Guggenheim, Traite De Droit International Public, II, 49.

3 Malcolm N Shaw, International Law, 694 (5th edn., 2003).

4 Martin Dixon, Textbook on International Law, 242 (6th ed., 2007).

5 The law concerning State responsibility for violation of treaty obligations has been the subject of few exercises of systemization. It is scattered throughout the practice of the States and international organizations, in some judgements and advisory opinion of Permanent Court of Justice…and the International Court of Justice…in the relevant works of International Law Commission, in the writings of the qualified publicists as well as, possibly, in general principles of law which may be drawn from the law of contracts of the principle legal system of the world. B G Ramcharan, State Responsibility in Respect of Violation of Treaty Rules in General, and of those Creating an "Objective Regime" in Particular: Specific Feature with Regard to the First, Second and Third Parameters, Vol. 26 (1, 2) Indian Journal of International Law, 1, 3 (1986).

6 Sovereignty as responsibility requires that States provide the appropriate standard of political good and services to the people to ensure their protection. See generally, Francis Deng, Protecting the Disposed 1993.

7 For a detailed account of understanding the concept of sovereignty refer to Robert H Jackson, Quasi States: Sovereign, International Relations and Third World (1990).

8 Grotius has already observed that the law of the nations, too, maleficium was an independent source of legal obligation. H Grotius, De Jure Beli Ac Pacis Libri Tres, 462.

9 International responsibility is incurred by a State if there is a failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State. Yearbook of International Law Commission 1978: Documents of the Thirtieth Session Vol. II, part one, 225 (1980).

10 Moreover, if those claims are not satisfied, the injured State can also take counter measures. For the subsequent inquiry on the sub-systems of State responsibility, refer to Kawasaki, Kyoji, Subsystems of State Responsibility in International Law, Vol. 18 Shudo Law Review, 213-244 (1996).

It may be noted that reparation may be defined as a ways in which a State can redress an international wrong and, in doing so, discharge itself from State responsibility towards injured State parties or individuals or groups of victims for a breach of an obligation. States provide victims of violations of human rights and humanitarian law the following forms of reparations: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. These general principles are laid down in the UN draft Articles on State Responsibility by the International Law Commission and are firmly embodied in other large number of international and regional human rights conventions.

11 See Malcolm, supra note 3, at 694.

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A Controversy

Whether fault of a State is necessary to generate responsibility of the State had been one of the most controversial issues.[12] There has been some dispute in international law whether or not the responsibility of States is dependent upon proof of fault or whether evidence of damage emanating from the acts or omissions of a State or its agents is enough. The ILC goes clearly down the path of the objective[13] or risk-based approach, as it declares that liability for breach of the Convention is absolute and that the intention or the motivation of a State or its agents in violating the convention are irrelevant. In other words State responsibility is established even if the perpetrator remained unknown since what is decisive is whether the violation took place with the knowledge or acquiescence of the government and whether the State has taken reasonable steps to carry out a serious investigation of the alleged violations committed. On the contrary according to some authors fault[14] is required as condition president to establish responsibility.[15]

The Beginning

When in 1948 the United Nations General Assembly established the International Law Commission as a gauge towards endorsing the progressive development of International law and its codification, 'State responsibility' was one of the fourteenth topic selected[16] and since then the international legal system has evolved significantly to reflect the changing nature of international society. In January 1956 the ILC observed that it was important to do more than codification of laws on State responsibility to tweak with the traditional principles of State responsibility.[17] The approach adopted by ILC, provisionally proposed by Roberto Ago, was not free from criticism.[18] It was contended that many of the provisions of the Draft Articles are too general and abstract, the scope and meaning of the provisions cannot be understood without leaning on the commentary attached. After several revisions and negotiations, the ILC in 2001 finally adopted the Draft Articles on State responsibility and the United Nations General Assembly in the same year adopted it through Resolution 56/83 of 12 December 2001.[19] The study of the international State responsibility encompasses of three phases, the first casing the origin of international responsibility, second the content of that responsibility and third sheathing the implementation of the State responsibility.

The basic principle of breach of international law by a State entails its international responsibility. The existence of a legal obligation and the violation of such obligation either by act or omission attract State responsibility.[20] It is pertinent to mention that there is an internationally wrongful act of a State when conduct consisting of an action or omission is attributed to the State under international law and constitutes breach of an international obligation.[21]

The Permanent Court of International Justice applied the principle set out in Article 1 of the Responsibility of States for Internationally Wrongful Acts, 2001 in number of cases. In Phosphates in Morocco, the Permanent Court affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[22] The International Court of Justice has applied the principle in the *Carfu Channel* case,[23] in the Military and Paramilitary Activities case,[24] and

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12 There are contending theories as to whether responsibility of the State for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the official concerned. See Malcolm, supra note 3, at 698.

13 The principles of the objective responsibility (the so called 'risk' theory) maintain that the liability of the State is strict. Once an unlawful act has taken place, which has caused and which has been committed by an agent of the State, that State will be responsible in international law to the State suffering the damage irrespective of good or bad faith. Id.

14 …subjective responsibility concept (the 'fault' theory)…emphasis that an element of intentional (dolus) or negligent (culpa) conduct on the part of the person concerned is necessary before his State can be rendered liable for any injury caused. Malcolm, supra note 3, at 698.

15 For a detailed inquiry for supporters of object and fault theory and their commentary refer to Yearbook Of International Law Commission 1978: Documents Of The Thirtieth Session, Vol. II, part one, 185-250 (1980).

16 For subsequent inquiry refer to A D Watts, The International Law Commission 1948-1998 Vol. I, II, III (1999). See also H W Briggs, The International Law Commission, 129-141 (1965), see also S Rosenne, Practice And Methods Of The International Law Commission, 46, 47 and 120-126 (1987), see also, The Collected Works Of Sir Hersch Lauterpacht, Vol. I, 445 (E Lauterpacht ed., 1970), see also third report on State responsibility by Roberto Ago.

17 It was necessary to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law… to bring the 'principles governing State responsibility' into line with international law at its present stage of development. F. V. García-Amador, State Responsibility, Yearbook of International Law Commission, 173, 176 (1956).

18 For subsequent details see Nisuke Ando, The Content and Problems of the Draft Articles on State Responsibility of the International Law Commission, Vol. V Asian Yearbook of International Law, 125-144 (1997).

19 In respect of the general rule of responsibility the ILC original plan of work produced a set of draft articles divided into various parts and in 1966 a complete set of Article (60 Article in three parts) was adopted on a First Reading. It soon became clear, however, that there was much in this First Reading that was controversial or did not enjoy the support of large number of States. Many States filled objections both to the content and philosophy of this initial attempt and the draft was subject to criticism in both the ILC and the 6th (legal) committee of the General Assembly of the United Nations… [finally] in 2001 a set of Draft Articles was adopted by the ILC on second Reading. Dixon, supra note 4, at 242.

20 See generally H Mosler, The International Society as a Legal Community, 157 (1980).

21 Article 2 Responsibility of States for Internationally Wrongful Acts, 2001.

22 Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74, p. 10, at p. 28.

23 Carfu Channel, Merits, I.C.J. Reports 1949, p4, at p.23.

24 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I. C. J. Reports 1986, p. 14 at pp 142, para 283, 149, para 292.

in the Gabcikovo-Nagymaros Project case.[25] The Court also referred to the Principle in the advisory opinions on Reparation for Injuries, and on the Interpretation of Peace Treaties, Second Phase, in which it stated that "refusal to fulfill a treaty obligation involves international responsibility". Arbitral tribunals have repeatedly affirmed the principle laid down in Article 1 of the Convention on State Responsibility for example in the Claims of Italian Subjects Residents in Peru cases, in the Dickson car Wheel Company case, in the International Fisheries Company case, in the British Claims in the Spanish Zone of Morocco case and in the Armstrong Cork Company case. In the Rainbow Warrior case, the Arbitral tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[26]

Other Relevant Factors

Article 60 of the Vienna Convention of Law of Treaties, 1969 (VCLT) also bears relevance to the law on State responsibility. Article 60 of VCLT traces its roots to the Fitzmaurice Report II of 1957 which proceeded from a narrow definition of a fundamental breach of treaty and confined the consequences of termination or suspension mainly to bilateral treaties.[27] Article 60 of the said Convention of 1969 sets out the substantial conditions under which treaty may be suspended or terminated in consequence of a breach. In 1966 the ICL, in the light of Waldock[28] report V, adopted draft Article 42 on the termination or suspension of treaty following upon its breach. A number of elements therein were identified as constituting lex ferenda. Para 3 of Article 60 enumerates the conditions that constitute material breach, while Subpara (3) (b) focuses more on the violation of a provision essential to the execution to the accomplishment of the object and purpose of the treaty.[29] An archetypal example of such a violation would be the non-performance of the imprecise performance of certain treaty provisions.

Conclusion

The law of State responsibility finds its ground in a breach of an obligation to which a sovereign State itself has agreed. A breach of an obligation is defined by a purely objective fact as a gap between the State's actual action(s) or omission(s) and what is required by international obligations. The States are generally allowed wide discretion as to means of fulfilling international obligations and the issues concerning State responsibility depends upon the question of 'breach of an obligation' and 'damage' required being established. The policy consideration relevant to an examination of State responsibility in respect of violation of treaty rules is the principle Pacta Sund Servanda. It is also pertinent to mention that Article 60 of the VCLT also bears relevance on the law of State responsibility in case the contracting party fails to observe the treaty obligations.[30]

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25 Gabcikovo-Nagymaros Project (Hungary/ Slovakia), I. C. J. Reports 1997, p 7, at p. 38, para. 47.

26 For a detailed enquiry on decisions by ICJ and Arbitral Tribunals on State Responsibility set out under Article 1 of the Responsibility of States for Internationally wrongful Act, 2001 refer to James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, 77-90, at 77-78 (2003) (Reld. on).

27 Mark Euger Villiger, Commentary on the 1969 Vienna Convention Of Law Of Treaties, 737 (2009).

28 Prior to 1966 Waldock, in its 1963 report II, introduced Article 20 on the termination or suspension of treaty following upon its breach and regarded that a breach did not per se terminate a treaty. He endorsed the doctrine of material breach on the basis of an object and purpose test. For subsequent inquiry refer to Yearbook of International Law Commission Vol. II (1963).

29 …subpara 3(b) does not raise the issue of minor breaches of essential provision, it only asks whether a (major or minor) breach affects the accomplishment of the object or purpose of the treaty. At any rate, there criteria depend on the subjective judgement of the innocent parties. Villiger, supra note, 27 at 743.

30 The Vienna Convention on Law of Treaties (1969) contains various provisions on the invalidity, termination and suspension of the treaties. The rules contained in some of the article, particularly article 60, may be relevant to the law of State responsibility for violation of treaty rules… Ramcharan, supra note 5, at 2.

"To be successful in life always forget the 'PROBLEMS' that you faced in life, but never forget the 'LESSONS' that those problems taught you."

"A teacher is a compass that activates the magnets of curiosity, knowledge and wisdom in the pupil. Success is the ability to go from one failure to another without loss of enthusiasm."

Have You Ever Seen A Live Tiger?

Ms. Hishitha J.*

WILDLIFE PROTECTION ACT: SCOPE & IMPLEMENTATION

The Wild Life (Protection) Act of 1972 provides the statutory framework for protecting wild animals, plants & their habitats. The Act adopts a two-prolonged conservation strategy: Specified Endangered Species are protected regardless of location, & all species are protected in designated areas, called sanctuaries & national parks.

The Wild Life Act was enacted by Parliament under Article 252, after eleven State Legislatures passed the required resolution; i.e. Pradeep Krishen v. Union of India AIR 1996b SC 2040. Article 253 (replied on to enact the Air Act in 1981 & the Environmental (Protection) Act in 1986) was not invoked by Parliament to introduce National Wild Life Legislation.

After the subject wildlife was moved to Concurrent List by the Forty-Second Constitutional Amendment in 1976. Parliament was empowered to enact laws relating to wildlife without recourse to Article 252 (1). By the 1991 amendment to the Wild Life Act, Parliament extended the Act to the whole of India expect Jammu & Kashmir, which has its own Wild Life Protection Act similar to the National Law.

The Wild Life Act provides for the establishment of wildlife advisory boards & the appointment of wildlife wardens & other staff to implement the Act. In several states, the office of the Chief Wild Life Warden & the Chief Conservator of Forests is united in a single post & the responsibilities under both statutes are discharged by the same person.

Except under specified conditions, the Act prohibits hunting the animals listed in Schedule I, II, III & IV. Under the Act, the state government may declare any area of adequate 'ecological, faunal, floral, geomorphologic, natural or zoological significance' a sanctuary or a national park. In both sanctuaries & national parks, public entry isrestricted & the destruction of any wildlife or habitat is prohibited.

In theory, national parks enjoy a higher degree of protection than sanctuaries. For example, the grazing of live-stock is prohibited within a national park but permissible in a sanctuary.

By the 1991 amendment, specified plants were brought under the protective umbrella of the Act. The amendments also envisaged establishment of a Central Zoo Authority to regulate the management & functioning of zoos. The boundaries of sanctuaries & national parks may not be altered except by a resolution of the State Legislature. The Act regulates trade & commerce in wild animals, animal articles, trophies & derivatives form certain animals. Any violations of the provisions in the Act attract imprisonment & fines. Patterned on similar provisions in the Air & Water Acts, the 1991 amendments permit citizens prosecutions after giving sixty days notice of intent to the government.

MY JOURNEY TO PROTECT WILDLIFE

Though I was not good in studies, I always had an interest in wild life. It all started when I was browsing through the internet and accidentally found that there was an opportunity to volunteer as a care taker of tigers at a Buddhist tiger temple located in Sai yok district, Kanchanburi province, Thailand. I applied online and after few communications for one year I got a reply that I can attend the volunteer program. I was excited and took permission from my parents. They agreed and let me go over to the tiger temple.

Even though the program was free, I had to bear the cost for my travelling to the temple. Fortunately, I had done my internship with NGO'S like WWF and Global Citizen for sustainable Development and as a fund raiser for Green Peace; I had some savings which was enough to attend the volunteer program at Kanchanburi, Thailand.

I started my journey and reached the Temple as scheduled by the temple authority. As recommended I had taken enough precautions to get myself vaccinated as advised by the temple authority.

Once I reached the Temple it was completely a different experience and we were totally isolated from outside world. I was not aware that I had to change from all my modern life style, habits which includes eating habits like "Just One Meal a Day" and had to lead a monk's life in the Temple. Whilst volunteering and staying inside the monastery you have to be a monk. All Volunteers staying in the monastery grounds are required to follow the 8 precepts of the Buddhist practice.

Our daily activities used to start early at 6 am in the morning. We have to visit the cages of the tigers and take them for a walk

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to allow them to perform their natural activities. After this we had to walk them to the temple where monks were conducting their morning prayer.

After the prayer got completed we had to feed the tigers with milk and have our breakfast, here I must definitely mention that we had to give first preference to the visitors and if any leftover food would be our breakfast, sometimes we would get nothing to eat and will have to wait until lunch time.

After having our lunch in the afternoon which was a bowl of noodle, we are not supposed to eat anything till the next day morning, (Monks do not eat or provide dinner at night) again next day morning waiting for the guests/visitors to finish first and wait for the left over. (This was a typical Monks life and we had to get used to it).

Next we were supposed to clean the cages, corridors of the tigers and feed food to the Tigers. Here food has to be segregated like small bits of meat without bones to the Cubs and large pieces with bones to the Large Tigers.

Next, it was playtime with the cubs. We used to stay in their cages and play with them or we used to take them outside in open area and play with them. It would be a very good exercise for us and playing with the cubs was simply fantastic and mind relieving. You would forget all the physical pain and your mind would be relaxed. You would forget the world.

Next our job was to go to the Canyon, waterfalls to control the visitors till 5.30pm. After this we were left free to get our self freshened and attend the meditation class at 6.30 pm at the temple. After 8 p.m this we would go to sleep.

"THERE IS STILL A LONG WAY TO GO…"

"I would like to thank the National Law School of India University & Environmental Law Department for Encouraging & providing me the opportunity to gain more knowledge on Environment Law. I Thank the Dearest Prof. Dr. R.Venkata Rao, Vice Chancellor I would also like to Thank Prof. Dr. Sairam Bhat, Coordinator, DED, NLSIU, Dr. M.K Ramesh & Prof. Chiradeep Basak & Prof. Manjeri Subin Sunder Raj."

Mr. Sreedhar Ramachandran

Impression of DED Scholar

It was a conscious decision of mine to become a student again – after 28 + years in the corporate IT world - and this was motivated by the need to gain conceptual and research reference to the whole sets of experiences that one adds in the career build up. Another incidental matter was to test the limits of pursuits in the manner of gaining content as one, over time, typically loses the habits of reading extensive and deeply researched works given that today's technology and the limits it imposes in the span of attention, brevity of contents through the mediums of emails, text messages, chats, blogs, podcasts,video libraries, etc. Hence one is habituated easily to read a proposal of 30 pages or a HTML page on the content website but finds it hard to, say, read a services agreement that is bulky in language and content.

NLSIU/DED MBL study was a researched and informed selection. The objective was to gain some specialization that can attach easily to the corporate profile that I had gained as global business head of services division in a leading IT company. After closely looking at business management studies, subjects in arts including languages, fine arts, etc. I choose to subscribe to business law and the default institution, being resident of Bengaluru, was NLS. MBL and the its offerings in Post Graduate Degree are right menu options for any professional who aims to induct into their work systems a sense of business law that helps develop a right strategy, operational excellence and/or a corporate direction that is right and complete. NLSIU/DED has the right objective that it seeks to address through MBL. The subjects, the contents in the subjects, the structure of the course backed by the faculty provide the right platform for any person to gain conceptual references in business law. The delivery through contact program is appropriate (it can be made virtual backed by digital content); the faculty delivering the content is eminent, deep domain (I did not snooze in any of the post lunch sessions!) and connects with the audience; the pricing of the course is right. The one thing that needs special attention for such a condensed course is the material for each subject. I am extremely pleased with my decision to associate with NLSIU/DED, MBL. It was the right choice and I have gained immensely from the course, the pursuit. I have recommended this to others and will do so in the future.

A good institute, appropriate course…please subscribe and study!

UNION BUDGET 2015 - DIRECT TAX

Mr. Karthik Ranganathan*

The Government of India has shown its sincerest efforts to establish that it is pro-business and has made several amendments to the Income-tax Act, 1961 (the Act) which are very beneficial to investors into India. It has also balanced by introducing several schemes for the poor especially, the continuation of MNREGA as just confirmed by Prime Minister Modi in Parliament yesterday. The Government has been lucky in various aspects one of which is the tumbling oil prices in the last few months and it seems to be even lucky that the oil prices are not likely to go up in the near future. Ten and billions of dollars have been saved by the Government only due to this. This has helped in not only achieving an ambitious fiscal deficit but has also encouraged the Government to further aspire to reduce the fiscal deficit to as low as 3% in the next few years. Even the opposition parties will have to accept now that this is achievable target. The inflation too has come down and the sprouts of industrial growth and foreign investments into India have started to show signs. No one seems to be pessimistic about the Indian economy and with catching phrase like 'Make in India' by the Government has only drawn more attention by the global investors.

The new Government is still young which is just nine months old but the efforts shown by it with regard to development is well heard in all corners or at least well debated. The Government is very keen in bringing back the black money into the country which will help it to further narrow down the fiscal deficit rift and may give space to it to not to be in a hurry on disinvestments of profitable public sector undertakings. Stringent provisions are being made in the Act and even new laws are to be enacted to handle black money issue. While the message to the global investors is loud and clear to invest in India but not at the cost of tax evasion.

On direct tax front, various positive changes have been made such as; GAAR has been deferred by another two years admitting that it is not the best time to introduce it when the tax department (revenue) is yet to be fully equipped. To attract fund managers to operate from India it is being clarified that they will not be treated as business connection (BC) or permanent establishment (PE) and that the offshore fund which is managed from India will also not be treated as an Indian fund though controlled from India to avoid Indian taxes. Further benefits to the sponsors of REITs and InVITS through concessional capital gains treatment have been provided. Rollback to 10% withholding tax (WHT) for royalty and fees for technical services (FTS) payments abroad to attract transfer of technology into India and to encourage small entrepreneurs. As a major breakthrough, the word 'substantially' in Explanation 5 to section 9(1)(i) has been defined in an acceptable manner including a de minimis exemption to small investors directly/ indirectly in Indian assets. Steps to make Rules to provide Foreign Tax Credit (FTC) benefits which is almost a dead letter law under the Act especially in a situation when Indian companies have global operations having significant foreign source income/ loss and payment of taxes and excess credits lying with them is a welcome move. Relief to FIIs from implication of MAT on the tax exempt capital gains earned by them (LTCG on listed securities) from being included in the book profits while computing MAT. Other forms of venture capital entities like LLPs have been included for pass through tax benefit for investors and investments in LLPs and trusts have also been acknowledged. Clarity on the interest payments made by Indian PE to its Head Office or other PEs outside country that taxes have to be withheld to enjoy tax deduction in India on the PE's income. Reduction on corporate income tax to 25% from 30% with certainty of its operation (i.e. from

***Mr. Karthik Ranganathan** is a tax and corporate lawyer practicing in Bengaluru & Chennai. He has around 11 years of experience as an advocate and has practised in various fields such as international tax, corporate tax, indirect taxes, corporate laws, civil & writ jurisdictions and arbitration matters. He has advised and represented various multinational and domestic clients including the Government of India. He has advisory experiences while working with Big Four accounting firms and a tax law firm in Chennai, Mumbai and Bengaluru. He initially practised before the Madras High Court and has also appeared before the Bombay High Court and various tax tribunals.

Karthik did his five years LL.B. from University of Mysore and LL.M. in International Tax from New York University School of Law, New York. He is also a Company Secretary and he frequently writes articles on tax and corporate laws and delivers lectures at various forums.

Karthik is a guest faculty at National Law School of India University, Bengaluru teaching tax laws.

FY 2016-17 to FY 2019-20) is a push for operations from India by global investors.

The above seems to be very welcome moves by the Government to show that it is no more a Shylock when it comes to tax collection and is even capable of forgoing its invaluable direct tax collections. Indeed, the Fin Min admitted that due to these appeasing changes the Government's coffer will lose around INR 80 billion in the next financial year, which, though will be balanced through indirect tax collections.

But the Government has not yet bitten the bullet with regard to the retrospective tax to section 9(1)(i). Though the retrospectively amended section has not yet earned even a dime for the Government, the Government is neither able to spit it nor swallow it. It wants to both have the cake and also eat it. The Fin Min conveniently pushed the ball to CBDT's court saying that it will look into it. An early settlement of the principal tax alone on the half a dozen indirect transfers and making the law prospective will look more satisfactory and laudable in the minds of the foreign investors.

The Direct Tax Code seems gradually being buried as the Fin Min stated that many of its provisions are slowly being roped into the current Act or that a better direct tax regime is required.

Overall, we cannot deny in giving credit to the Fin Min and the Government to have shown as much positivity to foreign investors to invest in India and that direct taxes will no more be a spike for them.

DIRECT TAX AMENDMENTS

All provisions amended are applicable from Assessment Year (AY) 2016-17 onwards unless otherwise mentioned. The Act means the Income-Tax Act, 1961.

INTERNATIONAL TAXATION

Place of Effective Management (POEM) of Foreign Companies in India

To start with (a) POEM, amendment has been made to section 6(3) of the Act by replacing the words 'wholly' situated in India to POEM. A company will be treated to be an Indian company for income tax purposes and its worldwide income will be liable to tax in India if it is an Indian company (i.e.) either incorporated in India or if it has its POEM in India. POEM has been defined vide an Explanation as *'a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made'.* Previously, a higher threshold was prevalent to treat a foreign company as Indian only when it was 'wholly' controlled from India has now been diluted and even if key decisions are taken from India, it will be treated to be an Indian company for tax purposes. This is in line with Direct Tax Code (DTC) proposals. Now the directors of foreign companies have to be doubly cautious before taking any decisions from India to avoid double taxation in India and in the country where such foreign company is situated.

The term 'Substantially' has been defined in Section 9

After a huge hue and cry by investors, recommendation made by the Dr. Shome committee and a recent Delhi High Court judgment reading down the term 'substantially' found in Explanation 5 to section 9(1)(i) of the Act, the Government has finally defined the term in the Act itself. The definition is a welcome one and does not seem to be adversarial to the foreign investors investing indirectly into Indian assets (shares). The key aspects of the definition of the term 'substantially' for the purpose of treating shares or interest in a foreign company to be situated in India inter alia are as follows:

- The value of the Indian assets through which such foreign shares or interests should exceed INR 100 million and such assets represent at least 50% of the value of all the assets owned by such foreign company or entity. Value of the assets means the fair market value (FMV) of such assets.
- Rules will be prescribed to determine the FMV of the Indian assets and global assets
- In any case, Indian taxes would be on proportional basis and not the entire gain will be taxed in India. That is, only to the extent the Indian assets contribute to the value of the shares or interest will be liable to tax in India.
- De minimis exemption to small shareholders along with its associated enterprises (AE) who do not have any right of control or management of the foreign company or their total voting power or share capital or interest does not exceed 5% of the total voting power, etc. of the foreign company directly holding assets in India
- The same is the case in case of indirect holding of assets in India i.e. through an intermediary holding company
- In case of group reorganizations like amalgamation or demerger among foreign companies, these indirect transfer provisions will not apply
- The Indian company through which the foreign shares and interests derive their value shall have reporting compliances of any change in shareholding pattern. Failing which, 2% of value of such transactions will be imposed as penalty on the Indian company or INR 500,000 in any other case.

These changes will come into effect from Assessment Year (AY) 2016-17 i.e. Financial Year (FY) 2015-16. Since Explanation 5 continues to be retrospective, these changes could have also been retrospective.

Reduced WHT for Royalty and FTS

In order to encourage transfer of technology and knowhow into India from foreign companies, the Government has brought back the reduced WHT rate of royalty and FTS on payments to non-residents to 10%. Finance Act, 2013 increased the rate to 25% citing that many double tax treaties (DTAAs) itself do not have such reduced rates. By these foreign companies were compelled to treaty shop to transfer technology into India via a jurisdiction which imposes less tax rates. By bringing it back

to 10% not only will there be free flow of transfer of technology but also treaty shopping vis-a-vis reduced WHT for royalty and FTS will be reduced. For example, the tax rate on royalty as per India-Mauritius treaty is 15% and that of Singapore is 10%. Now the need to set up a company in low tax jurisdiction for the purpose of lesser WHT on royalty and FTS does not arise as the Act itself has reduced the rate to 10% whether or not India has a treaty with the jurisdiction from where the transfer of technology happens.

Interest payments made to Head Office (HO) by PEs are liable to WHT and consequent deduction

While PEs are treated an extension of the foreign entities, few case laws at the Income Tax Appellate Tribunal (ITAT) level were holding whether interest payments made by such PEs on borrowed capital to their HOs situated in foreign jurisdictions should be subject WHT by treating such PEs as a separate entity for this purpose. This is more relevant to foreign banking companies as they have restrictions in setting up their subsidiaries in India as per RBI regulations. The views were divergent among ITATs where some holding that no WHT is required as it is a self payment within the same company as PE is only a branch and at the same time since DTAAs treat PEs as separate entities they are entitled for tax deduction on such interest payments against Indian tax liabilities. Others case laws held that such PEs are subject to WHT as deductions are enjoyed by them and this view was buttressed by a 1996 CBDT circular.

In order to put this issue at rest, an Explanation to section 9(1)(v) has been introduced stating that Indian PEs of foreign banks will be treated as separate entities and any payments to HO or other PEs of the group will be liable to WHT. Such PEs will also be liable to tax on their income in India as per the DTAAs and the Act albeit giving deductions on such interest payments.

Fund Managers (FM) of Offshore Funds (OSF) investing in India will not be treated as Business Connection (BC) or PEs in India nor will such Offshore Funds be treated as an Indian Fund

In order to attract offshore fund managers who are dispersed across the globe to India and to conduct their businesses from India, a new section 9A has been introduced in the Act to state that such FM will not be treated as BCs/ PEs of such OSF and the income earned by such OSF will not be liable to tax in India through such FMs on proportionate basis as per the DTAAs or the Act. Similarly, the OSF will not be treated as an Indian Fund merely because the FM is located in India which otherwise will make it an Indian Fund as per section 6(4) of the Act.

However, only eligible funds and eligible fund managers are entitled for the above benefits. The conditions to be fulfilled by them to enjoy the above benefits are:

The OSF has to fulfil:

- The OSF is not an Indian resident and it is located in a jurisdiction with which India has comprehensive or limited DTAA
- Participation in such OSF by Indian residents is not more than 5% and that such fund has at least 25 unrelated members
- No member of the fund along with other members should have controlling interest more than 10%
- Not more than 50% participation interest should devolve upon 10 or less members of the fund
- The fund shall not invest more than 20% of its corpus in an entity and the fund should have a monthly average of INR 10 million including at the time of its creation
- The fund shall not carry on any business in India and should not have a BC in India other than the FM who acts on behalf of the OSF
- The remuneration paid to the FM by the OSF for his services should be at arm's length

The FM has to fulfil:

- The FM is not an employee of the fund or its connected person
- The FM is a registered with concerned regulators or is a registered investment advisor
- The FM is acting in the ordinary course of his/ her business as FM
- The FM along with his connected persons shall not be entitled more than 20% of the OSF profits as remuneration

The OSF shall have certain reporting requirements every year within 90 days from end of FY by way of filing certain statements to the revenue containing such details as may be prescribed failing which it will attract a penalty of INR 500,000.

Changes in relation to investment by Venture Capital (VC) Funds and Companies in VC Undertakings

In order to expand the scope of investments by VC, amendment has been made to the Act that investment could be made not only into VC Undertaking which is a company but could also be trusts, LLPs. etc and at the same time the investment need not be made only by VC Company and VC Fund which is a trust it could also be made by LLPs, etc.

Beneficial tax treatment to Alternative Investment Funds (AIFs/ Investment Funds)

AIF Category-I Funds are usually angel brokers or venture capital funds which invest in early stage ventures. AIF Cat-II Funds more like Private Equities which invest in slightly grown up ventures and AIF Cat-III Funds are more complex investment strategies. In order to rationalize the tax treatment of such AIFs, a New Chapter XII-FB has been introduced in the Act among other amendments to various other sections in the Act. The AIFs/ Investment Funds can be trusts, companies or LLPs.

The taxation of the investment funds and the investors into them (Unit Holders) are as follows:

- The investment made by the fund into the underlying entities and the income earned by such UHs will be treated as if directly made by them in the underlying investee companies

- Only business income will be liable to tax in the hands of the fund and other incomes will be exempt. In the sense, any income other than business income, such as capital gains and income from other sources will be liable to tax directly in the hands of the UHs and the fund is required to pay tax only on the business income
- Business income which suffers tax in the hands of the fund when repatriated to the UHs will be exempt in their hands thereby, avoiding double tax.
- While making income from other sources like interest, dividends, etc payments to the UHs by the fund which does not suffer tax at the fund level there will be WHT at the rate of 10% by the fund
- The nature of the income in the hands of the UH will be same as received by the fund
- If the fund incurs any loss on any income, such loss cannot be passed on to the UHs. Rather the fund should carry forward the same to next year and offset against its tax liability
- Dividend Distribution Tax (DDT) and Buy Back Distribution Tax (BBDT) shall not apply to income distributed by the fund to the UHs
- Any income received by the fund will not be subject to WHT by the payers
- The fund should file its return of income and shall furnish such information to the revenue as prescribed.

Beneficial tax treatment to sponsors of REITs and pass through benefit for REITs

Vide Finance Act (No. 2), 2014 i.e. last July Budget by the same Fin Min, REITs taxation regime was introduced. In this, a sponsor who holds shares in an unlisted company (SPV) can exchange his shares in the SPV for the units of the REITs. He is not required to pay tax at the time of this exchange but is required to pay tax when the units are sold. Preferential tax treatment is not allowed at the time of transfer of such units by the sponsor i.e. he is not entitled for the 15% tax in case of short term capital gain (STCG) and exemption in case of LTCG. Whereas, if he would have held the shares in the SPV itself, at the time of exit he would have enjoyed preferential tax treatment if such SPV is listed. This denies the pass thru benefit to the sponsor which is the key factor in REITs tax regime. Therefore, an amendment is being made to give such preferential tax treatment to the sponsors while offloading (selling) the units of the REITs which were obtained by way of exchange.

The rental incomes received by the SPVs (predominant income in case of REITs) and then distributing them to the REITs as dividends or interest are exempt from tax due to DDT or specific exemption under the REIT tax regime. But if such incomes are directly earned by the REITs without the SPVs, they are subject to tax at REIT level. In order to provide similar benefits to REITs on the rental income directly received by it by holding the real estates in India, it has been amended that any rental or lease income received by REITs will be tax exempt in its hands. If such rental incomes are distributed to the unit holders (UHs) then it will be income of such UHs and will be liable to tax. The REITs shall withhold tax at the rate of 10% in case of resident UHs and at rates in force for non-resident UHs. No WHT under section 194-I shall be made by the rental income payer if it is for REITs holding assets directly.

Relief from Minimum Alternate Tax (MAT) for FIIs on exempt capital gains

The FIIs invest in securities which are listed in stock exchanges and may decide to transfer those securities on the floor of the stock exchange. This will be either liable to 15% tax in case of STCG or Nil tax in case of LTCG due to preferential tax treatments. However, the revenue was subjecting such FIIs to MAT as the gains made by them will be added to their book profits and therefore, were asked to pay MAT. The cornerstone benefit of tax exemption to FIIs was denied due to MAT levy. Therefore, in order to alleviate this problem as amendment has been made to section 115JB which deals with MAT that the capital gains earned by FIIs under preferential treatment like exempt LTCG shall not be included in the book profits and corresponding expenses in relation to such income shall not be debited from the profit and loss account. By this the FIIs will not be required to pay MAT on the exempt capital gains.

Foreign Tax Credit (FTC) Rules soon

Section 91 of the Act deals with relief from double taxation while dealing with countries with which India does not have DTAAs. Indian multinational companies (MNCs) have operations in foreign jurisdictions. They sometimes operate through branches or other types of PEs. They generate income and also pay income tax in such countries. The branches may also incur losses. Also, there may be several branches in different countries with different tax rates. There are no clear rules as to how the FTCs can be offset against Indian tax liabilities as Indian companies are liable to worldwide income taxation. Whether taxes paid in high tax jurisdiction should be offset first or vice versa or whether there can be carry forward of FTCs or whether there can be refund of excess FTCs lying in the books as is possible in the US are all issues unresolved.

In order to streamline this key outbound investment tax issue, the Government has stated that the Central Board of Direct Taxes (CBDT) will come up with clear rules to avoid these confusions. These rules are furthermore important if at all the Government introduces Controlled Foreign Corporation (CFC) Rules which is one of the regimes anticipated in the DTC.

Deferment of GAAR

As expected the Government has deferred GAAR by another two years i.e. up to FY 2017-18 which should have come into force from this April unless deferred. Unless the revenue is adequately equipped or educated, GAAR could kill many businesses in India and would allay the foreign investors which the Government is appeasing by all means. This is a welcome

and indispensable move. It is also expected that GAAR may have its natural death in the years to come as this is the third time it is being deferred.

Extension of lower WHT on interest income to FIIs and QFIs

Under section 194LD as introduced in the Finance Act, 2013 any Indian company or the Government borrows money against a rupee denominated bond, then the interest payments made to such lenders who should be FIIs and Qualified Foreign Investors (QFIs) will be liable to a lower WHT of 5%. This benefit was only for a period of two years which lapses this May 31, 2015. The Government has now extended this benefit up to June 31, 2017. This is similar to the benefits extended in July 2014 Union Budget for External Commercial Borrowings (ECB) under section 194LC.

CORPORATE TAXATION AND MERGERS AND ACQUISITIONS

Corporate Tax

Reduction of base corporate income tax (CIT) from 30% to 25%

Commencing from FY 2016-17, the CIT will be reduced from current 30% to 25% for a period up to 4 years i.e. FY 2019-20. This is in line with DTC which was meant for increasing in tax base and reducing the tax rates. As explained by the Fin Min in his speech that India is seen as a high tax jurisdiction with almost 34% tax including all surcharge and cesses. But still after all the deductions and exemptions, the effective taxes paid by the companies are around 23%. Therefore, in order to reduce the CIT rate and also to reduce various deductions and exemptions, the Government has reduced CIT to 25% from next year onwards. While this is a good move, this rate along with other deductions and exemptions is very close by to trigger MAT which means that companies cannot reduce its taxes beyond a point with lesser CIT and also the tax deductions.

100% depreciation even for assets put to use for less than 180 days for manufacturing and power sectors

In order to incentivize power and manufacturing sectors from investing in new plants and machineries, the restriction under section proviso to section 32(1) of the Act that to avail 100% depreciation benefit for new plants and machineries procured that they should be put to use more than 180 days has been amended such that even if they are not put to use more than 180 days, still 100% depreciation will be available on such assets.

Increase in threshold of domestic transfer pricing limit

In order not to trouble small businesses on compliances costs, the threshold to trigger domestic transfer pricing has been increased from the current INR 50 million to INR 200 million.

Companies being members of Association of Persons (AOP) are exempt from MAT

As per section 86 of the Act, the distribution made by the AOP to its members is exempt from tax as the AOP is liable to tax on such income. This is similar to the share in profits by partners from a partnership firm which is exempt under section 10(2A). But in case if a company is a member of AOP then even though the income is exempt from tax under section 86, such companies were required to pay MAT on such income as such income is includible in the computation of book profits as per section 115JB. In order to avoid this double tax, amendment has been made that income received by companies under section 86 will not be includible within the meaning of book profits for the purpose of MAT under section 115JB.

Special corporate tax deductions for investors in the States of Andhra Pradesh (AP) and Telengana (TG)

Any new investors in India may consider the notified backward areas in the States of AP and TG as two CIT benefits have been proposed in this Budget such as additional investment deduction to the extent of 15% of cost of specified new asset acquired by the undertaking or the enterprise investing and additional depreciation of 35% will be available against investment in new plants and machineries. There is no sunset clause for these two benefits.

Taxation of Mergers & Acquisitions

Tax neutrality on merger of Mutual Fund schemes

In order to promote the idea of the SEBI which encourages consolidation of schemes of Mutual Funds (MF) and in order not to make such consolidation or merger a tax burden in the hands of the unit holders of MFs, amendment has been made to sections 47 (tax free transfers) and 49 (mode of computation of capital gains) that in case of merger of schemes by a MF there shall not be any tax in the hands of the unit holders on transfer of underlying schemes held by them and what consolidated scheme that they get in return. Also, the cost of acquisition and the holding period shall be the same as before the consolidation upon the new schemes granted by the MFs to the unit holders.

Cost of Acquisition (CoA) in the hands of the resulting company is the same as CoA of the demerged company

Section 49 deals with CoA which is the reduction against the computation of capital gains on transfer of capital asset. Section 49(1) includes various transfers where the CoA of the previous owner will be passed to the transferee. However, demerger has been left out in this subsection. In case of tax free transfers like demerger which is covered under section 47 of the Act, the CoA of the previous owner of the transferred assets i.e. the demerged company in this case shall be passed on to the transferee i.e. the resulting company. This is just a tax deferral and wider capital gains will be recaptured at the time of sale of such assets by the transferee in a subsequent taxable transfer. Amendment has been made to this effect to section 49(1)(iii) of the Act by including sub-clause (e).

TAX PROCEDURE

Waiver of TAN requirement by tax deductors

Section 203A of the Act requires persons to obtain Tax Deduction and Collection Account Number (TAN) whenever they are required to withhold tax on any payments made to other persons. In case of one-time transactions like purchase of immovable properties, etc. the purchaser individual may not have a TAN. In such cases he could quote his Permanent Account Number (PAN). This facility was available only in case of resident transferor (resident owner of immovable property). Now this benefit has been extended even to non-resident transferors of immovable properties where the resident transferee can mention only his PAN and need not obtain a TAN only for this purpose. This reduces compliance burden to individuals.

Period of stay determination in case of ship crew members in a foreign bound ship

There has been confusion or adversarial tax treatment in case of residential status calculation for crew members who are in a foreign bound ship. As the ship though starts from an Indian port may go to another Indian port and then may ultimately leave the borders of India. The immigration law treats that once the ship leaves the first port the Indian citizen crew members have to fulfil immigration law requirements as they are treated as travelling abroad. But the revenue does not give this beneficial treatment and continues to treat them as staying in India even though immigration law treats them as persons leaving India. Now CBDT will look into this and may come with a favourable regime to such crew members.

Reassessment notice approval by Assessing Officer simplified

In order to simply the approval that is required to be obtained by the Assessing Officer (AO) before issuing reassessment notice from various authorities under various circumstances failing which or obtaining wrong approval could render the notice itself as invalid as per law, the approval has now be simplified that for reassessment upto four years the Joint Commissioner is to approve and for reassessments beyond four years the approval from Chief Commissioner or Commissioner or Principal Commissioner may be obtained.

Revisional powers under section 263

In order to widen the scope for Commissioners to invoke revision powers under section 263 in situations where the order passed by the AO is prejudicial and erroneous to the interest of the revenue, additional reasons to invoke revisionary powers have been mentioned such as orders passed without proper inquiry, allowing claim of taxpayer without inquiry, order passed without following of CBDT or jurisdictional High Court and Supreme Court.

Raising the pecuniary limit of single member of ITAT

Section 255(3) of the Act authorizes the President of the ITAT to constitute a single member Bench of an ITAT to dispose of cases of a taxpayer whose income is not more than INR 500,000 for any given FY. This is to avoid having a Bench of two members for matters involving insignificant total income. In order to raise this pecuniary limit, amendment has been made to this section to increase the monetary limit from INR 500,000 to INR 1.5 million. This will help quick disposal of small pending matters at various ITATs.

Penalty on tax sought to be evaded even under section 115JB and 115JC

Certain ITATs have held that penalty for concealment of income under section 271(1)(c) of the Act is applicable only in case of computation of income under regular provisions of the Act and not in a case where both regular provisions and the MAT provisions (sections 115JB and 115JC) are applicable. In order to eliminate this problem, amendment has been made to section 271(1)(c) that in case of any tax evaded which is computed under regular provisions and section 115JB will also be liable to concealment penalty.

PERSONAL INCOME TAXATION

Basic exemption limits for Individuals

There is no change in the basic exemption limit for individuals as the Fin Min admitted that he had already provided more than what he can in the July 2014 Budget last year. However, investment related benefits in case of health insurance and employee provident fund contributions has been made.

Abolition of Wealth Tax

The Fin Min admitted today that the average wealth tax collected in a year was around INR 8 billion which is less than the administrative costs to collect such taxes. This is similar in lines with the Estate Duty taxes and the Gift taxes where the admin costs were more than the tax collected and also involved significant compliance by the taxpayers leading to distortions. Therefore, Wealth Tax which was in existence since 1957 is being abolished. In order to achieve the goal of what wealth tax was doing, the high net-worth individuals whose income is more than INR 10 million a year will have to pay an additional surcharge of 2% over and above the current 10%. Currently, the total tax paid by such HNIs is 33.99% (30% of base tax + 10% on 30% (i.e. 3%) of surcharge + 3% of cess on 33%). Now they have pay 34.60% (30% of base rate + 12% on 30% (i.e. 3.6%) of surcharge + 3% of cess on 33.6%).

"Integrity without knowledge is weak and useless,
and knowledge without integrity is dangerous and dreadful."

CORRUPTION

How Does India Measure Up?

Ms. Deepa Menon
II Year MBL Student

Corruption is a complex phenomenon. Its roots lie deep in bureaucratic and political institutions, and its effect on development varies with country conditions. But while costs may vary and systemic corruption may coexist with strong economic performance, experience suggests that corruption is bad for development. It leads governments to intervene where they need not, and it undermines their ability to enact and implement policies in areas in which government intervention is clearly needed- in for instance environmental regulation, health and safety regulation, social safety nets, macroeconomic stabilization, or contract enforcement.[1] Corruption is a significant challenge to global businesses, especially in emerging markets.

Corruption indexes published recently by the 2 global organizations namely Trace International (Trace Matrix – BBI Index) and Transparency International (Corruption Perception Index) paint an alarming picture: no one country is completely corruption free. Corruption is thus an issue for the developed and the developing world.

Corruption is defined by the World bank as *"the abuse of public office for private gain".*

Corruption of government or public officials have therefore been of great concern for all countries as this acts as a gateway to a systemic failure in governance and creates a cascading effect.

Forms of corruption concerning government officials include bribery, self-dealing, embezzlement, kickbacks, extortion, fraud, money laundering, cronyism, nepotism, and patronage.[2] For example, if an official owns shares in a company and directs contracts to the company because of his interest in it, he is self-dealing.[3] If he directs contracts to the companyafter inflating his company's prices, he probably is self-dealing and embezzling.[4] If heencourages government contractors to buy from his company, he is negotiating a bribe and, if he threatens those who refuse to buy from his company, he is guilty of extortion.[5]

Anti-Corruption Laws – An Overview

US Scenario:

The U.S. Congress enacted the FCPA in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace. The U.S. Senate stated in 1977:

> *Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service.*
>
> *Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business*

The type of corruption that creates business risk for U.S. companies under the FCPA, as explained in *A Resource Guide to the U.S. Foreign Corrupt Practices Act,* pertains to "offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business."

U.K and other International Scenarios:

In addition to the FCPA, the Organisation for Economic Co-operation and Development

(OECD) Convention on Combating Bribery of Foreign Public Officials in International BusinessTransactions (1997) and the United Kingdom's Bribery Act of 2010 address both the supplyand demand side of the corruption equation. The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.The OECD's 2009 Anti-Bribery Recommendation and its Annex II, Good Practice Guidance onInternal Controls, Ethics, and Compliance, published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery.

1 Helping Countries Combat Corruption: The Role of the World Bank.
2 Alexandra Addison Wrage, Bribery and Extortion: Undermining Business, Governments and Security, Westport,Conn.: Praeger Security International, 2007, pp. 11–18.
3 Wrage, 2007, p. 12.
4 Wrage, 2007, p. 12.
5 Wrage, 2007, p. 12.

Indian Scenario:

India's principal anti-corruption legislation is the Prevention of Corruption Act, 1988 (PCA), which criminalizes the bribery of public servants. The PCA operates in conjunction with numerous other anti-corruption regulations and rules applicable to corporate entities operating in India, but not limited to the various Conduct Rules for Public Servants, provisions of Indian Company law, administrative regulations, and binding integrity pacts for public procurement.

Corruption Assessments and Indexes:

Expanding a business to a foreign country can be difficult and complicated. Countries scores and ranking in terms of corruption throws light not only on the maturity and transparency of governance of a particular country but also helps identify cultures and societies where bribery is prevalent and where there is lack of punishment for corruption and exposing public institutions that don't respond to citizen's need.

The Corruption indexes published by Trace International and Transparency International provide businesses with a tool to assess the level of bribery and corruption risk in the countries where they operate.

These indices thus:

- Help promote good governance, accelerate economic growth and development and eradicate poverty (by ensuring that the grants reach the deserving)
- Help companies assess the propensity for public-sector bribery and its associated business risk, while providing actionable intelligence to inform a company's compliance process
- Helps investors in their investment decisions (there is a negative correlation between level of corruption and level of investment in an economy)

Trace Matrix International Business Bribery Index:

The TRACE Matrix provides a quick and useful guide to global businesses, drawing on data relevant to business activity that is organized around a conceptual framework of bribery risk factors. It helps firms assess the propensity for public-sector bribery and its associated business risk and to provide data to inform compliance processes.

The Trace Matrix calculates a composite score for each of the 197 countries around the globe with a range from 1 to 100. The higher the score, the greater the business bribery risk.

"Corruption is a habit and not a culture. Together we can change it!"

The TRACE Matrix provides 14 dimensions of business bribery risk: an overall score, four domain scores, and nine subdomain scores.

1.0 Business Interactions with Government	1.1 Contact with Government 1.2 Expectation of Paying Bribes 1.3 Regulatory Burden
2.0 Anti-Bribery Laws and Enforcement	2.1 De Jure Anti-Bribery Laws 2.2 De Facto Anti-Bribery Enforcement
3.0 Government and Civil Service Transparency	3.1 Transparency of Government Regulatory Functions 3.2 Transparency and Health of the Civil Service Sector
4.0 Capacity for Civil Society Oversight	4.1 Quality and Freedom of Media 4.2 Human Capital and Social Development

The four domains are meant to capture groups of similar risk factors that drive the risk that a firm will encounter a bribe transaction. Although the domains are distinct, risks across domains may be correlated. The point of having distinct domains (and subdomains) is that certain risks may be more important for certain firms, whether because of their line of business or their previous experience managing risk. The first domain reflects the frequency and nature of how businesses interact with the government. This domain has three subdomains that measure risk associated with "touches" with the government, the likelihood of a bribe transaction arising through those interactions, and the overall regulatory burden. All other things equal, firms face higher risk when they have more interactions with the government, a higher the risk of bribery per interaction, and a higher risk the greater the overall regulatory burden.

The second domain captures a country's legal infrastructure related to combatting bribery and corruption. Subdomain 2.1 is a de jure measure of anti-bribery laws, while 2.2 provides information about enforcement, recognizing that laws without enforcement mechanisms are unlikely to be effective.

Domain 3 recognizes that the quality of a country's government and civil service play an important role in mitigating bribery risk for firms. This domain includes two components. The first addresses the overall quality of government administration, relying in particular on measures of government budget transparency. The quality of a government's budgeting process and whether it is open to scrutiny is likely to be negatively correlated with corruption risk: the more transparent, the less opportunity there is to hide unscrupulous transactions. Subdomain 3.2 focuses on government employees. The rationale is that a high-quality workforce, with government workers who are held to high standards and subject to oversight, is likely to lead to fewer bribery transactions. A country may have factors putting downward pressure on risk (e.g., a high-quality civil service or strong non-governmental oversight), in which case it may not need an abundance of legal mechanisms to control corruption.

The fourth domain captures the role played by extra-governmental actors in monitoring and controlling corruption. Subdomain 4.1 focuses on the critical role of the media. A strong, independent media that is free from government influence can help check corrupt practices by scrutinizing public and private actors alike. We also include a subdomain that measures broadbased capacity of a country's population, recognizing recent research that shows that a healthy, economically stable, and more educated populace will put downward pressure on corruption.

Trace Matrix Business Bribery Index - India's Position:

While India presents a wealth of business opportunities, it also presents a number of anti-corruption compliance challenges. India has developed a reputation for corruption, scoring relatively poorly both in Trace Matrix ratings and Transparency International's Corruption Perception Index.

According to the index, titled the TRACE Matrix and released on November 11 2014, Ireland, Canada, New Zealand, Hong Kong and Sweden ranked as the top 5 least corrupt countries. India is the 13th most at risk country for business bribery out of 197 countries. India ranked better than only Nigeria, Yemen, Angola, Uzbekistan and Combodia, to name a few. Vietnam and Cambodia were the only other Southeast Asian nation in TRACE's top 10 most at risk nations of business bribery.

Least corrupt countries: An Overview

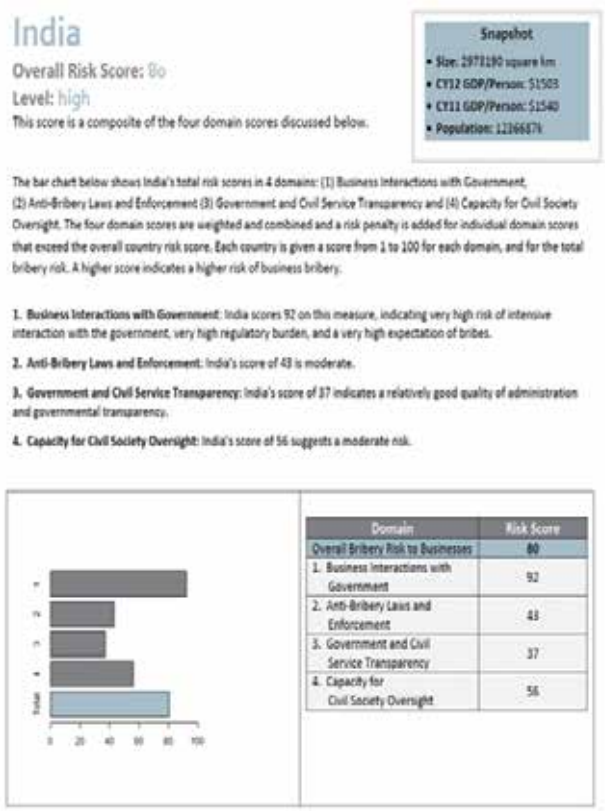
Rank	Country	Risk Score	Domain 1: Interactions with Government	Domain 2: Anti-Bribery Laws and Enforcement	Domain 3: Governmental and Civil Service Transparency	Domain 4: Capacity for Civil Society Oversight
1	Ireland	20	15	24	30	4
2	Canada	22	25	22	20	9
3	New Zealand	23	13	48	23	18
4	Hong Kong	23	4	51	27	30
5	Sweden	23	9	53	25	20
6	Finland	24	11	52	26	23
7	Singapore	26	1	54	37	35
8	Japan	26	33	17	6	10
9	Germany	27	28	31	33	1
10	United States	27	35	23	1	7
11	Georgia	27	17	24	19	39
12	Norway	28	21	52	32	16
13	Netherlands	29	20	55	29	21
14	France	29	32	38	27	14
15	Chile	30	33	30	20	25
16	Switzerland	31	22	52	37	19
17	South Korea	31	36	1	7	35
18	Lithuania	32	34	31	31	18
19	United Kingdom	32	27	47	33	26
20	Austria	32	29	49	30	23
21	Denmark	33	24	52	39	30
22	Estonia	33	20	50	39	26
23	Luxembourg	34	28	54	38	20
24	Iceland	35	23	52	47	22
25	Latvia	35	41	38	12	26
26	Belgium	36	31	47	46	18

Most corrupt countries: An Overview

Rank	Country	Risk Score	Domain 1: Interactions with Government	Domain 2: Anti-Bribery Laws and Enforcement	Domain 3: Governmental and Civil Service Transparency	Domain 4: Capacity for Civil Society Oversight
177	Kuwait	77	88	49	55	37
178	Venezuela	77	90	40	73	56
179	Liberia	77	82	19	62	57
180	Dem. Rep. Congo	47	56	24	32	14
181	Mauritania	79	83	48	69	62
182	Tajikistan	79	80	11	72	66
183	Algeria	79	82	30	79	49
184	Central African Republic	80	83	51	68	70
185	India	80	92	43	37	56
186	Eritrea	81	78	53	66	89
187	Cameroon	82	77	32	91	62
188	Viet Nam	82	91	31	100	82
189	South Sudan	83	92	43	62	56
190	Chad	84	86	55	76	76
191	Burundi	85	83	57	89	71
192	Guinea	86	93	50	64	69
193	Cambodia	89	84	61	98	77
194	Uzbekistan	92	100	51	72	63
195	Angola	94	93	61	99	73
196	Yemen	94	88	100	91	100
197	Nigeria	97	99	25	97	57

Measured on a scale of one to 100-100 meaning high risk-India received a weighted average business bribery risk score of 80.

India's Trace Matrix score is higher primarily because of a high score of 92 in its business interactions with government. This domain measures risk associated with the number of 'touches' with the government, the likelihood of a bribe transaction arising through these interactions and the overall regulatory burden.



India

Overall Risk Score: 80

Level: high

This score is a composite of the four domain scores discussed below.

Snapshot
- Size: 2973190 square km
- CY12 GDP/Person: $1503
- CY11 GDP/Person: $1540
- Population: 1236687k

The bar chart below shows India's total risk scores in 4 domains: (1) Business Interactions with Government, (2) Anti-Bribery Laws and Enforcement (3) Government and Civil Service Transparency and (4) Capacity for Civil Society Oversight. The four domain scores are weighted and combined and a risk penalty is added for individual domain scores that exceed the overall country risk score. Each country is given a score from 1 to 100 for each domain, and for the total bribery risk. A higher score indicates a higher risk of business bribery.

1. **Business Interactions with Government:** India scores 92 on this measure, indicating very high risk of intensive interaction with the government, very high regulatory burden, and a very high expectation of bribes.
2. **Anti-Bribery Laws and Enforcement:** India's score of 43 is moderate.
3. **Government and Civil Service Transparency:** India's score of 37 indicates a relatively good quality of administration and governmental transparency.
4. **Capacity for Civil Society Oversight:** India's score of 56 suggests a moderate risk.

Corruption Perception Index (CPI):

The Transparency International's Corruption Perception Index is based on perceptions gathered either from experts or the general population.

The index rates the 175 countries on a scale from 0 (perceived to be highly corrupt) to 100 (perceived to be highly clean).

Denmark has come out as the least corrupt country with a score of 92 while North Korea and Somalia are indicated as the most corrupt countries with a score of 8.

The index's recent ratings published on 3rd December 2014, indicates that more than two-thirds of the 175 countries ranked in CPI Index score below 50. This reflects a global lack of transparency amongst public institutions and lack of accountability amongst government officials and politicians.

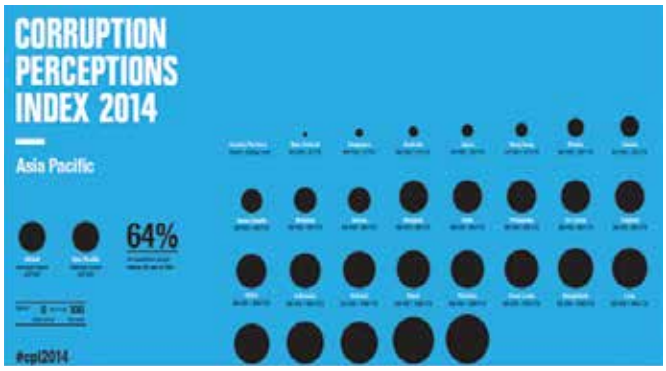
CPI - India's Position:

India's ranking has shown slight improvement - In 2014 it stands at the 85th position out of the 175 countries against its score of 94 out of the 177 countries in 2013.

The CPI score for India has increased by 2 points in 2014. A 2 point increase was driven primarily by 2 data sources: a score increase in World Economic Forum and a score increase in World Justice Project's Index. The 2 data sources measure different perspectives of public sector corruption perceptions.

The Word Economic Forum (WEF) score captures perceptions of business executives on how it is for firms to make undocumented payments connected with: imports/exports, public utilities, tax payments, public contracts/licenses, and obtaining favorable judicial decisions. In addition, it also asks the executives their perception on how common it is in India to divert public funds to companies, individuals or groups due to corruption. A score increase on WEF suggests businesses in India are viewing the environment favorably with regards to their perception of corruption and bribery in the country.

The WJP rule of law index asks both experts and ordinary people for their perceptions of the integrity of public officials or authorities in the country in the following branches, especially if they use their public office for private gain: executive branch, judicial branch, police/military, and the legislature. So in line with WEF's score change, the WJP score also goes up reflecting the perceptions of public sector corruption coming down slightly in India. In other words, if more government officials don't exploit their positions of power then businesses would perceive less corruption or bribery taking place in the system.



CPI Score of South Asian Countries

Country Rank	Country/Territory	CPI 2014 Score
30	Bhutan	65
85	Sri Lanka	38
85	India	38
126	Nepal	29
126	Pakistan	29
145	Bangladesh	25
100	China	36

How can we fare better?

Our scorecard of 13th most corrupted country (Trace Matrix) or 94th position out of 177 countries (CPI) is a reflection of the systemic corruption prevalent in India.

India's vibrant democracy reveals the flip side of the coin. Despite the engagement, innovation and participation of vibrant civil society, media and people at large, corruption continues to be one of the country's biggest challenges.

It reveals India's bitter reality of political corruption: the inadequacy of structures of accountability and transparency to deter the corrupt and the access to such mechanisms by the people. The problem urges the conversion of political commitment to concrete action at the highest level of government.

The below extract from an article of the World Bank sounds like an extract of the Indian scenario and helps identity the root of the issue:

> *The normal motivation of public sector employees to work productively may be undermined by many factors, including low and declining civil service salaries and promotion unconnected to performance. Dysfunctional government budgets, inadequate supplies and equipment, delays in the release of budget funds (including pay), and a loss of organizational purpose also may demoralize staff. The motivation to remain honest may be further weakened if senior officials and political leaders use public office for private gain or if those who resist corruption lack protection. Or the public service may have long been dominated by patron-client relationships, in which the sharing of bribes and favors has become entrenched. In some countries pay levels may always have been low, with the informal understanding that staff will find their own ways to supplement inadequate pay. Sometimes these conditions are exacerbated by closed political systems dominated by narrow vested interests and by international sources of corruption associated with major projects or equipment purchases.*

A change in the above scenario may well be a good start into a clean-up drive. Apart from this India can improve its scoring by overhauling its anti-bribery strategy namely:

- implement stronger law enforcement
- define an anti-corruption action plan
- engage corruption watchdogs
- enact laws towards protection of whistleblowers
- create public registers that would make clear who really controls, every company and make it harder for criminals to hide behind other names
- increase in transparency and accountability of accounts of political parties
- tackle issue of black-money generated and/or stashed away within India and outside India
- Electoral reforms to bar corrupt politicians from contesting the elections.

Five developments in ENVIRONMENTAL LAW to follow for the year 2015


Mr. Manjeri Subin Sunder Raj


Mr. Chiradeep Basak


Ms. Srividya Sastry


Ms. Shibu Sweta

The five important developments in the area of Environmental Law in the year 2015 would be the following:

1. Climate Change

Conference on Climate Change to be held in 2015 in Paris can be considered as one of the major developments in the area of Environmental Law in the coming year. It is regarded as a forum to bring people together throughout the world for the post carbon world and also reassure them that it won't be a cut-price world where they would be required to set aside the aspirations for prosperity, quality of life and good living. The main objective of this conference is to conceive a new world on the lines of sustainable development with shared objectives but different ways of achieving them. In this Conference the nations aim to reach a new global climate change agreement. These international negotiations offer governments a critical opportunity to craft a broad, balanced and durable agreement strengthening the international climate effort. The talks are taking place under the U.N. Framework Convention on Climate Change, a treaty adopted in 1992 that includes virtually every nation on earth. The negotiations are mainly aiming to have a legal force to the agreement. These talks on climate change took birth in Durban Platform launched in 2011 in Durban, South Africa. India being a major contributor in this conference and a fast developing nation, her take on climate change is something that needs to be looked out for. India not being a major contributor in carbon emissions and industrial pollutions, can ask for concessions in the amount of carbon emissions or ask the developed countries to provide financial assistance or transfer of technology or for capacity building in controlling carbon emissions and an agreement or protocol on climate change which would have legal force and is not legally binding.

2. Reviewing of Environmental Laws

The new Ministry of Environment, Forests and Climate Change of Government of India on August 29, 2014 proposed to constitute high level committee headed by former Cabinet Secretary T S R Subramanian to review various Acts including the Environment (Protection) Act, 1986, Forest (Conservation) Act, 1980, Wildlife (Protection) Act, 1972, the Water (Prevention and Control of Pollution) Act, 1974, and the Air (Prevention and Control of Pollution) Act, 1981. The committee aims to propose a legal framework which has compliance and transparency as its main purpose and also has purposed to impose stricter punishment for the defaulters; the first time defaulters shall be imposed with fine and repeat offence would straightaway invite closure of the unit or project. The committee in its report has suggested for the creation of new institutions - National Environment Management Agency (NEMA) and State Environment Management Agencies (SEMA), a new "All India Environment Service", a "national laboratory" that will host a databank of all environmental parameters, and introduction of digital and "non-tamperable" methods of

1 An Interview by Mr. Madhur, Bloomberg BNA of the CEERA Team consisting of Dr.Sairam Bhat, Mr. Manjeri Subin Sunder Raj, Mr. Chiradeep Basak, Ms. Srividya Sastry and Ms. Shibu Sweta. For more details see http://www.bna.com/

monitoring compliance. Further, it has also suggested that granting approval and compliance mechanism shall be based on the principle of "Utmost good faith." The industries under this mechanism are allowed to certify its own assessment of the environmental impact and propose to mitigate these by way of an affidavit. But after awarding clearance if the industry is found to be violating its own affidavit or any other rule or law, the industries shall be imposed with heavy fines. In order to achieve this aforesaid objective the committee has called for additional capacities in terms of man power as well as technology. With the new government of India mandate being Pro-industry, how it will manage to meet its target of 33% increase in forest cover across India is something that needs to be looked into in the coming years.

3. Genetically modified crops a boon or a bane for India

The GM crops have been debated for a long time since the previous UPA government to the present Modi led NDA government. The Modi government presently has allowed 21 GM crops for field trials after the Genetic Engineering Approval Committee (GEAC) gave its decision to proceed with the field trials. But the field trials of GM crops have received strong opposition from the previously led Gujarat Government by Modi. Also the Swadeshi Jagaran Manch has been opposing the Modi Government's move on approving field trials for the GM crops. Considering the internal disturbances in the government and the PIL filed before the Supreme Court by Aruna Rodrigues that the country did not have the wherewithal to deal with the science behind GM crops and field trials should not happen till a proper regulatory mechanism was in place, the government before approving the GM crops for trial must make sure that the Regulatory Mechanism in relation to GM crops are in place. Since the farmers are not that technologically advanced and educated in India and if by chance anything goes wrong the government or the company from whom the GM seeds are bought are to be made liable.

4. Food security, inclusive growth and sustainable development

The National Food Security Act (NFSA) was enacted by Parliament in September 2013. The NFSA seeks to make the right to food a legal entitlement by providing subsidised food grains to nearly two-thirds of the population. The Act relies on the existing Targeted Public Distribution System (TPDS) mechanism to deliver these entitlements. Also, TPDS is administered under the Public Distribution System (Control) Order 2001 notified under the Essential Commodities Act, 1955 (ECA).The ECA is responsible to regulate the production, supply, and distribution of essential commodities including edible oils, food crops such as wheat, rice, and sugar, among others. It regulates prices, cultivation and distribution of essential commodities.

With India missing the mark of Millennium Development Goals 2015 to secure food security to its vulnerable poverty stricken population; the new NDA government aims to adopt stronger measures to tackle the issue. The following working idea on TPDS would be helpful in understanding the challenges faced to ensure food security in the country. Presently, TPDS operates through a multi-level process in which the centre and states share responsibilities. The centre is responsible for procuring or buying food grains, such as wheat and rice, from farmers at a minimum support price. It also allocates the grains to each state on the basis of a formula. Within the total number of poor in each state, state governments are responsible for identifying eligible households. The centre transports the grains to the central depots in each state. After that, each state government is responsible for delivering the allocated food grains from these depots to each ration shop. The ration shop is the end point at which beneficiaries buy their food grains entitlement. However, the implementation process has revealed some critical gaps in the system, namely –

- Inaccurate identification of beneficiary households and leakage in delivery system of food grains during transportation to ration shops and from ration shops itself to the open market.
- Public Distribution System suffers from approximately 61% error of exclusion and 25% inclusion of beneficiaries.
- At a greater level, NFSA has been criticised for its trends in procurement vis-à-vis production of food grains. In order to meet the large demand of food entitlements the government is expected to increase its food production, thereby raising concern over the sustainability of food delivery mechanism. The financial burden arising due to food subsidy and the other related costs on generation and procurement of food, definitely raises concern on management of food security and increase in sale price of food grains to mitigate the huge loss. In fact, a performance audit by Comptroller & Auditor General has also revealed serious shortfall in government's storage capacity, thereby increasing the concern.

The World Trade Organisation (WTO) has been highly critical of India's food security policy and has been trying to make India ratify the Trade Facilitation Agreement (TFA). However, in October 2014, India had cleared its stand before the UN General Assembly that it's committed as a sovereign guardian to protect the interest of its poor and hence, developing countries must have the freedom to use food reserves to feed the poor without the threat of sanctions, and a permanent solution on food security with necessary changes in WTO rules is absolutely essential.

The issue of food security being fundamental to poverty eradication and sustainable development, and with diplomatic dialogues on facilitation of trade through Bali's decisions, it becomes absolutely essential for India to monitor its performance in assuring food entitlements to its poorer sections while simultaneously honouring its commitment to trade and sustainable development to environment at the global level.

5. Coal Mining

The future of black diamond industry remains hauled up after the Sept 25, SC judgment that cancelled 214 coal blocks allocated to companies since 1993. With directions to the cancelled entities to continue extraction of coal only till 31 March 2015 along with imposition of heavy fine of INR 295/ metric ton on the coal extracted till date by 31 Dec 2014, the future of India's coal mining activity and economy is bound to see radical changes by next year. The judgment shall affect in coming days- coal production, coal supplies/imports and financial economy in particular, besides forcing the legislature to come up with strategic policies to review the coal reform sector. In fact, the government bears the responsibility to decide the operational changeover from 1st April 2015 in 37 blocks that are still in existence. This close monitoring of the blocks is important because present allottes of the captive blocks may try to remove the "Over Burden "and extract all exposed coal in opencast mines, thereby posing serious threats to the coal industry by March 31, 2015. In cases of underground mines, the allottees would try to extract easy coal from favourable mining districts and leave the mines with difficult patches to work after March 2015.

Another serious concern arises from the fact of Coal India (government enterprise) being entrusted with the responsibility to take over the affairs of coal mining in the country. However, the production of the company is itself stagnant for last four years and is shifting from departmental operation to outsourcing options. Additional discharge of coal business from sick enterprise may not be a good option in future for Indian economy. Alternatively, the option of going for "swift" bidding process to reallocate 37 operating blocks may also cause inordinate delay of coal business thus hampering the economy. In such circumstances, the government has to draw up competitive rules and regulations and strict monitoring to reform the future of this most essential raw material of Indian industry. This in addition to not to raise the prices for consumers and industries like cement which are essential elements of the Indian business circle!

CASE COMMENT

Darga Ram v. State of Rajasthan (2015) 2 SCC 775

Mr. Gigimon, Assistant Professor of Law (Ad hoc), NLSIU

The case pertains to IPC Sections 376 and 302 for rape and murder of an 8 year child. The appellant was convicted to undergo an imprisonment for a term of 10 years besides a fine of Rs.1000 and default sentence of one month rigorous imprisonment as punishment for rape and for the crime of murder, life imprisonment and fine of Rs.3000 and default sentence of three months rigorous imprisonment. The case was proved on the basis of circumstantial evidence, recovery of the blood stained clothes and injuries found on the appellant's body to which the appellant did not offer any explanation.

The issue before the court was again regarding the age of the convict. The convict did not have any school document to prove his age hence the court have to rely upon the Rule 12 of the Juvenile Justice Rules 2007 to direct the Govt. Medical College, Jodhpur to constitute a Board of Doctors for medical examination and to determine the age of the convict/ appellant. The Medical Board gave a report stating the age range of the appellant as between 30-36 years and placed it on about 33 years. Adv. Vijay Panjwani who was the amicus curie contended that if the appellant is 30 years of age he would be 14 years on the date of occurrence of crime, and if he is 36 years the age would be 20 years and if his age is taken as 33 years then he would be a minor under the JJ Act 2000 as his age would be 17 years 2 months.

The court deciding through T S Thakur and R Banumathi JJ agreed to go by the age fixed by the Board and adjudicated that the appellant as a Juvenile and set aside his conviction even though he has undergone 14 years imprisonment. The court though decided in favour the appellant but expressed their concern for the heinous crime of rape and murder of an innocent young child. The question again provoked here is the age of a convict which is determined by the JJ Act. This turns out to be a critical area of law which needs further consideration of the court of law and legislators. The Medical Board decided the age of the convict on the basis of various scientific studies and decided the age based on the logic of between the two ages of 30 to 36 years. The court mentioned in its judgement that the benefit of variation needed to be given in the case, which it should not have given when it's a heinous crime. If we can rely on the scientific evidences to find out the age of the convict why not rely on the same science to understand the maturity of the convict in case of Juveniles. According to the NCRB, the number of crimes committed by the age group of 16 to 18 has increased by 26 percent compared to last decade. If these crimes are accidental or coincidental, immature act of a juvenile we need not rethink on the juvenile age. Else we have to try these on case-to-case basis allowing a degree of flexibility in the way a juvenile can be tried, depending upon the severity of the crime.

LEGAL MAXIMS and their meaning and use: Series[1]

Ms. Anita Yadav*

1. Ab initio

'From the very beginning'

The etymology of this Maxim is derived from the Latin, meaning *ab* (from) and *initio* (beginning). *Ab initio* is a maxim which is used quite often in many fields of research and studies. However, in law, its contractual derivation would be in terms of extortion, minor agreements etc. It leads us to believe that the validity of agreements can be decided in the very beginning itself.

For example, a boy, aged 17, without disclosing his age, enters into an agreement with a money lender. According to the conditions (Section 10 & 11) of Indian contract Act, 1872, a contract with a minor is void (not in existence from the very beginning). However, before the Case of *Mohiri Bibi v. Dharmodas Ghose*[2], the contract could be voidable at the option of the minor. The court, in that case, held that agreements entered into by minors are void *ab initio.*

2. Audi alteram partem

'Hear the other side too'

This principle is most often used to show that no person shall be condemned without being heard. Each party will be given an opportunity to defend themselves against the evidences provided by the opposition. It is a principle of fundamental justice.

Let us take the example of Habeas Corpus (You have the body, Latin). It is one of the five main writs (court orders) issued by the court. The writ of Habeas Corpus is issed by court to the custodian of detained person to test the legality of the detention. The court also hears the prisoner's side of the story and decides whether he is guilty or not. Habeas Corpus is a perfect example of audi alteram partem.

3. Actoriincumbit onus probandi

'The burden of proof lies with the plaintiff'

The burden of proof is an essential requisite to a party in a trial to produce evidence that will shift the blame or conclusion away from the current defaulting position to one's own position. We can consider the examples of reasonable suspicion, reasons to believe otherwise, probable cause for arrest, credible evidences, etc are necessary for determining the guilt of a person. For example in Criminal cases, the burden of proof always lies on prosecution subject to certain exception whereas, in civil cases plaintiff has the burden of proving his case by preponderance of evidence.

Every plaintiff at law or complainant at equity must show a good title or claim before he can prevail in his suit, conformably to the maxim, "actoriincumbit onus probandi."[3]

Notable case for this maxim: Dahyabhai Chhaganbhai Thakkar V. State of Gujarat.[4]

4. Actus non facit reum nisi mens sit rea

'for an act to be illegal, the person should do it with a guilty mind'

This Latin maxim is a lucid explanation for criminal intention. An act is intentional if it exists in idea before it exists as a fact. Therefore, mens rea (guilty mind) is one of the essential elements of a crime.

For example, A and B work on a construction site. A is hammering away at plywood with a machete and the head flies off hitting B on the head and killing him instantly. Although A's action killed B, he cannot be held guilty as there was no intention to kill B. Notable case for this maxim: DPP v. Morgan.[5]

5. Actus reus

'Guilty act'

Actus reus with means rea (guilty mind) together when proved beyond all reasonable doubt produces criminal liability. Actus reus can be considered as the objective element for the commission of the crime. Therefore, in order for an *actus reus* to be committed there has to be an act.

For example- One night, A and B went drinking. A had a few too many drinks and in an inebriated state, pulled a knife on B and killed him. A cannot be held guilty of committing murder as he was not competent to understand what he was doing.

It must be noted that voluntary reflexes or self defence does not fall under this category. The act being committed must be foreseen by the offender of being guilty.

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1 This is the first of the series on Legal maxims, the next editions of the Distant News will carry the remaining legal maxims.

2 [1903] 30 Cal. 539

3 [Murfree's Lessee v. Logan, 2 Tenn. 220, 224 (Tenn. 1814)].

4 A.I.R. 1964 S.C. 1563 (1566)

5 [1975] 2 WLR 913

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6. Bona fide

'Sincere, in goodfaith'

This legal maxim refers to an act being made or carried out in good faith that is, one which lacks an intention to deceive. A bona fide purchaser pays in good faith, full value of the object.

For example, A agrees to sell his bike to B. B, after looking into the bona fide credentials of both the seller and the object, agrees to buy it from A.

7. Boni judicis est ampliare jurisdictionem

'It is the part of a good judge to enlarge his jurisdiction.'

A Judge is duty bound to prevent litigation, in the interest public. A good judge always tries to prevent the litigation, since the interest of the society at large lies with the same i.e. every litigation must come to an end. Therefore, disputes should be encouraged to be resolved by ways of arbitration, mediation and conciliation.

8. Boni judicis lites dirimere est

'Duty of a good judge to prevent litigation'

Illustration – In a case before the court, the judges should give their judgments and put an endto the case and try to make sure that another suit may not grow out of the present suit. It concerns the welfare of a state that an end must be put to litigation. The court handling the case is duty bound to put an end to litigation as soon as possible.

9. Boni judicis est judicium sine dilatione mandare executioni

'It is the duty of a good judge to cause execution to issue on a judgment without delay.'

The judge assigned a case should give his decision without any delay which is under his control and within the jurisdiction of the court he is in-charge of. A good judge does not delay justice rather he implements justice with zeal and clarity.

10. Bona vacantia

'Goods that do not have an owner'

Bona vacantia is a Latin legal term for instances in which properties are left without anyowner. The precise handling of such property varies depending on the jurisdiction. In simpler words, common situations where property can become abandoned are when a person dies with no known heirs or next of kin or when the owner of the property leaves a jurisdiction without leaving any contact information or forwarding address. It exists in various jurisdictions, with consequently varying applications like in England and Wales, the Bona Vacantia Division of the Treasury Solicitor's Department of the UK Government is responsible for dealing with bona vacantia assets or in The United States of America where Bona Vacantia continues in the form of lost, mislaid, and abandoned property. The states do not take permanent possession, but act as the custodian of the property in perpetuity on behalf of the rightful owner.

11. Consensus ad idem

'Meeting of the minds'

Meeting of the minds if literally translated in the laws of contracts, would mean that two or more parties to an agreement have the same understanding of the terms and conditions of the agreement in the same sense. The terms of the agreement have to be express or implied and must be clearly understood by all parties to the agreement.

A and B enter into a contract with C. Since A and B are friends, they already know the terms of the contract, but the contract with C does not become valid till C understands all the terms of the contract.

12. Communis error facit jus

'Common error makes law'

'Common opinion' is another expression for the maxim. In ancient Rome, when the community or society as a whole took to a common understanding of a generally accepted belief or a legal issue, that issue would become law. Some philosophers and judges have pointed out that a universal belief can be a universal error. Unless and until the error in the belief is found and rectified, it will continue to remain a law. The concept of communis opinio is not particularly favored by the contemporary U.S. courts.

13. Corpus delicti

'Body of crime'

Corpus delicti is a Latin term taken from the jurisprudence of the West which means that before the conviction of a person accused of a committing a crime, the criminal act in itself must be proved. The criminal act must be proven to have taken place before holding the accused guilty.

For example, in order for a person to be tried for arson, it must be proven beyond reasonable doubt that a criminal act resulted in the burning of that property. All Corpus delicti requires at minimum the occurrence of the specific injury and some intentional, knowing/foreseeable act as the source of the injury.

14. Consensus

'General consent or unanimous'

Consensus is the general consent that is required to be given by all parties to a contract before entering into it. Consensus can be presumed to exist until voiced disagreement becomes evident.

A, B and C enter into a contract adhering to all the terms and conditions. There is a consensual understanding between the three till any or all of them show their disagreement.

15. Contra bonos mores

'Against good principles'

It can also be translated as a thing or act which is against moral conscience and social justice.

Example: All contracts contra bonos mores are illegal and have no value in the eyes of law.

16. Coram non judice

'before one who is not a judge'

This Latin phrase describes a trial brought before a court which does not have jurisdiction over the matter. Any judgment or verdict passed by the court which does not have jurisdiction over the matter will be void.

6 [1857] 61 U.S. (20 How.) 65

In the landmark case of *Dynes v. Hoover*[6], the proceedings of the court martial were rendered coram non judice, and the officer who executed the judgement was made liable for action.

17. Cursus curiae estlex curiae

'The practise of the court is the law of the court'

This maxim establishes the rules of the court. The rules of the court have to be followed strictly. For example, in a recent hearing in the Supreme Court, a highly respected advocate entered the chamber of the CJI of India in an orange robe. The CJI was displeased with this behaviour and immediately issued a notice stating that the dress code has to be followed strictly. The dress code, here, is the practise and rule of the court, and hence, is a law of the court.

Interview with
Mr. Aditya Sondhi

Mr. Aditya Sondhi*

CORNER
PRACTITIONER'S

1. How important is Professional Ethics to a Legal Practitioner?

Critical. A Counsel's ethical standards determine his/her standing in the profession and credibility at the Bar. And these become examples for others to follow. Often, ethics are treated lightly in the course curriculum at law colleges. This creates an impression in young minds that the subject is not important in practice. However, the reality is otherwise as the observance of the Code of Conduct is more difficult than any theoretical subject that can be studied and understood.

2. How does a Law Student bridge the gap between Theory and Practice of Law?

By vigorously pursuing internships with practising Counsel and by being exposed to lectures by such persons. More importantly, the faculty in law colleges must sustain an interest for their students in the practice of law by conveying the positive aspects thereof.

3. In Your view, What are the Challenges a Law Student would face if he/she opts for a career in 'Litigation'?

Primarily, finding one's feet in a new and complex system. The courts can be intimidating for youngsters, and one has to stay extremely focussed and diligent to move forward with clarity. Equally, the temptation to take short-cuts must be avoided, especially in matters of ethics.

4. In light of your experience as a Senior Advocate, What changes would you expect to be brought in the Justice Dispensation System?

The Indian legal system, by and large, delivers though under very difficult circumstances. An immediate structural reform that is needed is the appointment of more judges at all levels, at the very least, to fill in the sanctioned strength of all courts. Besides, continuous exposure to developments in the law and also to the human aspects of justice are crucial. The success of justice dispensation also depends heavily on the legal fraternity, and the system requires a greater inflow of committed young professionals.

5. What are you currently reading?

Two books. One is the biography of the poet-philosopher-politician Allama Sir Mohd Iqbal. The other is Rohini Mohan's "The Seasons of Trouble" on post-war Sri Lanka.

***Dr. Aditya Sondhi,** Graduated from NLSIU in 1998 was designated as Senior Advocate in 2014. He has a Doctorate from University of Mysore.

SUPREME COURT JUDGEMENTS

Environmental Law

1. Animal Welfare Board of India v. A. Nagaraja and Ors. [Civil Appeal No. 5387 of 2014 (SLP (Civil) No. 11686 of 2007]

In a landmark judgement, the Supreme Court of India has imposed an absolute ban on the practise of Jallikattu or bullock cart races carried out especially in Tamil Nadu and Maharashtra, among other states. The apex court while observing that the case involved a vital issue relating to protection of animal rights under the principles and legal rules of the Constitution, Indian culture and tradition, ruled that the Animal Welfare Board of India (that is the Petitioner) was correct in its stand that the holding of the above mentioned events amounts to inflicting extreme cruelty and pain on the animals and hence results in violation of Sections 3,11(1)(a), 11(1)(m)(ii) as well as Section 22 of the Prevention of Cruelty to Animals Act ,1960. The judgement dictates that the five freedoms recognized by the World Health Organization of Animal Health (OIE) be read into the PCA Act, 1960, and the same should be protected and safeguarded by the central, state and union territory governments, and AWBI. The rights of these animals being protected under Section 3 and 11 of the Act, the animal should not be subjected to unnecessary pain and suffering and the person- in-charge should take reasonable measures for the care of the bulls to ensure that the provisions of the PCA Act are properly implemented. The Court further observed that the AWBI as well as the Government should take appropriate steps to further public education regarding humane treatment of animals inculcating the spirit of Article 51(A) (g) and (h) of the Constitution. It also imposes a duty on the Government to oversee the implementation of the PCA Act as well as the guidelines of the Court herein and to punish the erring officers wherever required in order to achieve the purpose and aim of the Act.

2. Manohar Lal Sharma v. The Principal Secretary and Ors. [Writ Petition (CRL) No. 120 of 2012]

The writ petitions filed in the nature of Public Interest Litigations firstly by Manohar Lal Sharma and the other by the Common Cause allege that the allocation of coal blocks made between the period 1993 to 2010 is illegal and unconstitutional on several grounds as mentioned in the petition. The Court while agreeing with the allegations made by the petitioners cancelled 214 out of the 218 licenses granted during the said period as they were not allocated in a fair and transparent manner and without competitive bidding; the four units which are allowed to continue are related to major state power projects. The Supreme Court further held that on those 168 fields wherein no work had begun, they would be shut immediately. In case of the remaining 46 fields where some preliminary work had been conducted prior to the mining, a notice of six months had been given by the Court to wind up their operations. The Court further ruled that after the notice period of six months ran out, the government would be free to conduct new auctions for all the cancelled coal field permits.

Ms. Arpitha H.C.*

Family Law

3. Shabnam Hashmi v. Union of India and Ors [Writ Petition (Civil) No. 470 of 2005.]

The petition had been filed way back in 2005 by a Muslim lady, Shabnam Hashmi after being informed that she had only guardianship rights over the child she had adopted. The Hindu Adoption and Maintenance Act of 1956 covers adoption of children by Hindus, Buddhists and Sikhs only. The rest of the communities viz, the Muslim, Parsi, and Jewish communities are incorporated in the Guardians and Wards Act of 1890. The concept of adoption and guardianship carries inherently crucial differences. Adopted children are treated at par with biological children in all aspects of law, on the other hand guardians are merely individuals who look after the physical, mental and other needs of the child but the biological parents do not surrender their rights over the child. The Supreme Court accordingly declared in the above case that all persons, irrespective of their religion, caste, and creed have the choice to adopt a child under the Juvenile Justice Act (Care and Protection of Children) Act 2000 after the prescribed formalities. However if a person so wishes he/she could continue to submit to their personal laws and not conform to the ruling given herein. An additional plea of the recognition of the right to adopt and to be adopted as a fundamental right under Part-III of the Constitution was rejected by the three Judge Bench which cited "conflicting thought processes in this sphere of practices and belief prevailing in this country." as a reason for the same.

***Arpitha H.C.,** Assistant Professor & Assistant Co-ordinator, DED, NLSIU, Bengaluru.

4. Vishwa Lochan Madan v. Union of India and Ors. [Writ Petition (Civil) No. 386 of 2005]

In the above case, a petition was filed by Vishwa Lochan Madan to seek a declaration from the Court that the rulings issued by the Shariat Courts or the Dar-ul-Qazas are illegal and unconstitutional as it is an attempt by the All India Muslim Personal Board to set up a parallel judicial system in India. The petitioner further pleaded that the rulings of the same are unconstitutional and hence should be held to be void ab initio. The Supreme Court while disposing off the petition held that a Shariat Court has no legal sanction and the clerics do not have the right to enforce the sanction by coercive means; the person who attempts to do the same shall be dealt with in accordance with law. The Court further observed that such courts or by any other name referred do not have the right to issue fatwas or rulings infringing on the fundamental rights of an individual, unless and until the person concerned submits himself to the same. In case of incapacity of a person, the person who is interested in his welfare may be permitted to represent his cause.

Constitutional Law

5. Safai Karamchari Andolan and Ors. v. Union of India and Ors.[Contempt Petition (C) No. 132 of 2012 in Writ Petition (Civil) No 583. of 2003]

The Supreme Court in a milestone judgement ordered for the abolition of manual scavenging as well as strict implementation of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. The petition had been filed by the Safai Karamchari Andolan seeking a mandamus to be issued against the respondents in this case viz. the Union of India as well as other State Governments and Union Territories for stringent implementation of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993. Although the Act was brought into force it was noted that "it was not being implemented effectively and further noted that the estimated number of dry latrines in the country is 96 lakhs and the estimated number of manual scavengers identified is 5, 77,228." Hence to throw light on the large-scale violation of the fundamental rights of the manual scavengers under Article 14, 17, 21 and 23 of the Constitution, a petition in the form of a Public Interest Litigation under Article 32 had been filed by the aforementioned organization. While this case was pending before the court, the Government had enacted the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. The Court in this case observed the 2013 Act covered all facets of this field and therefore there was no further need for monitoring of the same by the Court. They further observed that it was the duty of the Central and State Governments to ensure that the provisions of the Act were adhered to and also implement the directions given herein by the Court for rehabilitation of manual scavengers in the form of cash assistance, education and other social welfare schemes to put a stop to this inhuman and degrading practise in the present and future.

Criminal Law

6. Shatrughan Chauhan and Anr. v. Union of India and Ors. [Writ Petition (Criminal) No. 55 of 2013]

The Court in a benchmark judgement held that the death sentence of a condemned prisoner can be commuted to imprisonment for life in case of "unreasonable, unexplained and exorbitant" delay by the government in deciding on a mercy petition; thereby overruling its own judgement in the Devinderpal Singh Bhullar's case. The petition which had been filed by convicts facing a death sentence, their family members or by certain public-spirited organizations on behalf of them, is related to the rejection of the mercy petitions of the 15 concerned convicts. The primary concern of the petitioners is regarding the issuance of a writ of declaration declaring that execution of sentence of death pursuant to the rejection of the mercy petitions by the President of India is unconstitutional and to set aside the death sentence imposed upon them by commuting the same to imprisonment for life. Further, it is also prayed for declaring the order passed by the Governor/ President of India rejecting their respective mercy petitions as illegal and unenforceable. The issue as observed by the Court relates to the application of Article 21 which states that no person can be deprived of his life and liberty except according to procedure established by law. Consequently as stated by the court, the crucial question here relates to whether the supervening circumstances in case of each of the accused amounts to violation of Article 21 in order to annul the execution of the death sentence of the accused. The Court remarked that although the constitutional validity of death sentence in India has been upheld by courts over the years, the same should not be executed without following the due procedure of law. The Court further observed that the right to seek mercy petition is guaranteed under the Constitution and the Articles 72/161 impose a constitutional obligation on the executive to fulfil it with due care and diligence.

Medical Law

7. Dr. Balram Prasad v. Dr. Kunal Saha and Ors. [Civil Appeal No. 2867 of 2012]

The Supreme Court in a ruling given in the above case enhanced the compensation from Rs.1.73 crore to Rs. 5.96 crore to be payable to the husband of the deceased due to the death of the wife

from gross dereliction of duty by the doctors at Kolkata's Advanced Medicare Research Institute, making it a milestone point in the history of India's medical jurisprudence. The claimant husband was aggrieved by the decision and compensation decided upon by the National Consumer Disputes Redressal Commission in the given circumstances and sought for enhanced compensation in his plea. The Court while giving its judgement remarked upon the increasing number of medical negligence cases being filed and the need to ensure that hospitals, doctors and the like treat patients with utmost care and caution keeping in mind that right to health is a fundamental right assured under Article 21 of the Constitution; a fact already stated by this very court in the case of Paschim Banga Khet Mazdoor Samity v. State of West Bengal. The Court called for hospitals, nursing homes etc to treat patients irrespective of their economic, social, cultural background with respect and dignity instead of looting them for their money; in the absence of which they would be dealt with strictly. The Court passed this judgement stating that they did so in the hope that the enhanced compensation and decision given would serve as both a reminder and deterrent to those medical institutions and doctors who treated their patients negligently and did not take their responsibility seriously.

Intellectual Property Rights

8. Novartis v. Union Of India (Civil Appeal Nos. 2706-2716 of 2013)

This is a breakthrough case in the field of Intellectual Property Rights wherein the Supreme Court upheld the decision of the Intellectual Property Appellate Board to deny patent protection to Novartis's anti-cancer drug Glivic. The facts of the case to put it simply are as follows. Novartis had applied for a patent in the Madras Patent Office in 1998 for Imanitib Mesylate in Beta crystalline form. The Indian Patent regime was in a transitional phase during 1995 to 2005, as per the TRIPS Agreement. Therefore, the Patent application filed by Novartis remained dormant in the "Mailbox Procedure". It was taken up for consideration only after amendments in compliance with the TRIPS Agreement which were made in 2005.But the application was rejected on the grounds of 'novelty' and the patentability of the product was hit. The Supreme Court also rejected Novartis' application for patent as it failed the test of invention under Section 2 (j), 2(ja) and 2 (1) and test of patentability under Section 3(d) of the Indian Patents Act of 1970. The Court interpreted Section 3(d) in accordance with the text of the statute and context of the legislation or the legislative intent, to mean that it was meant to deal with pharmaceutical products and chemical substances only. The Court observed that the main aim behind this section was to prevent "Evergreening" and thus discourage monopoly of certain players in the market. Therefore, a second tier, or a higher threshold of qualifying standards was set up for pharmaceutical products. The decision is an attempt to prevent the practice of abuse of patents through Evergreening, thus preventing anti - competitive practices in the market. The Court also laid down a very strict and high standard for the qualification of a product as an "invention", thereby upholding the principle of social welfare.

Contract Law

Dr. Sairam Bhat*

Bharat Petroleum Corporation Ltd. v. The Great Eastern Shipping Co. Ltd.[1]

This case dealt with the matter of Acceptance sub silentio or acceptance by conduct.

Facts:

The Appellant Company was engaged in the business of refining, selling and distribution of petroleum products and the Respondent Company was engaged in the business of shipping and allied activities. The Appellant and Respondent Company entered into an Agreement. The Agreement contained an arbitration clause which was valid up to 31st August 1998. The Appellant invoked the arbitration clause after 31st August 1998. The question arose as to whether the Arbitral Tribunal had jurisdiction to adjudicate upon the dispute for the period beyond 31st August 1998. The Tribunal held that it had no jurisdiction to adjudicate upon the reference, for the period subsequent to 31st August 1998. On Appeal, the High Court held that Arbitral Tribunal had the jurisdiction to adjudicate on the disputes between the parties, as the vessel continued to be hired by the Appellant Company for the period subsequent to 31st August 1998 on same terms and conditions. Hence, the present Appeal was preferred.

Held:

The Court held that the general rule is that an offer is not accepted by mere silence on the part of the Offerree, yet it does not mean that an acceptance always has to be given in

1 AIR 2008 SC 357: (2008)1 SCC 503.

***Dr. Sairam Bhat,** Associate Professor of Law, NLSIU, Bengaluru

so many words. Under certain circumstances, the offerree's silence, coupled with his conduct which takes the form of a positive act, may constitute an acceptance i.e. an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.

The Respondent pointed out to the Appellant that the usual practice is that pending finalization of the new Charter, the existing terms and conditions of the Charter continue to apply and, therefore, they were willing to sign the Agreement as contemplated by Appellant based on the existing terms and conditions. On these considerations, the Court concluded that the principles of sub silentio was applicable as the parties continued to bind themselves by other terms and conditions contained in the earlier charter which obviously included the arbitration clause. Thus the Court found no reason to interfere with the decision of High Court and dismissed Appeal.

Pimpri Chinchwad Municipal Corporation and Ors. v. Gayatri Construction Company and Anr.[2]

The Court held that it is settled law that disputes relating to contracts cannot be agitated under Article 226 of the Constitution of India.[3] The contract between the parties, in the instant case, is a contract in the realm of private law and not a statutory contract and would thus be governed by the provisions of the Indian Contract Act, 1872 or, may be, also by certain provisions of the Sale of Goods Act, 1930. The Court further held that a contract would not become statutory simply because it is for construction of a public utility and that it has been awarded by a statutory body or merely because a contract is entered into in exercise of an enabling power conferred by a Statute. If entering into a contract containing the prescribed terms and conditions is a must under the Statute then that contract becomes a statutory contract. If a contract incorporates certain terms and conditions in it, which are statutory then the said contract to that extent is statutory.[4]

Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engg. Coop. Ltd. and Anr.[5]

The Court held that if the period of Agreement was extended due to Force Majeure or due to the sellers not fulfilling their obligations under the Agreement, the sellers should have got such bank guarantees extended up to the corresponding extended period. The failure of the sellers to do so would amount to breach of contract and in no case the extension of the period of the contract would be construed as waiver of the right of the purchasers to enforce the bank guarantee. The Courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. This is only subject to two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. If there is a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.[6]

Bharat Sanchar Nigam Ltd. and Anr. v. BPL Mobile Cellular Ltd. and Ors.[7]

The DOT had circulated a booklet "commercial information on leased circuits" clearly providing that the rent and guarantee charges for leased circuits would be on capital cost basis and only after the guarantee period has expired, it would be on capital cost or flat rate basis whichever is higher. The core question involved in this case is the effect of the application of internal circulars issued by the Department of Telecommunications (DOT) on the contracts entered into by and between the parties hereto in respect of inter-connection links provided by it.

Held:

The Court held that the circular letters cannot ipso facto be given effect to unless they become part of the contract. In the instant case, as the said circular letters were not within the knowledge of the Respondents herein, even assuming that they were so, they would not prevail over the public documents which are the brochures, commercial information and the tariffs.

Siddhivinayak Realities Pvt. Ltd. v. Tulip Hospitality Services Ltd. and Ors.[8]

The Court held that the circumstances showed subtle possibility of bias on part of the escrow agents as they were also representing the parties to dispute and thus accordingly, the matter could not be decided by the escrow agents and Arbitrator rightly appointed for resolution of dispute. The

2 2008 (11) SCALE 142: (2008) 8 SCC 172.

3 Case Referred: National Highways Authority of India v. Ganga Enterprises AIR 2003 SC 3823. See also Kerala SEB v. Kurien E. Kalathil AIR 2000 SC 2573; State of U.P. v. Bridge & Roof Co. (India) Ltd. AIR 1996 SC 3515 and Bareilly Development Authority v. Ajai Pal Singh [1989]1 SCR 743.

4 Case Referred: India Thermal Power Ltd. v. State of M.P. and Ors. [2000]1SCR925.

5 AIR 2007 SC 2716: (2007) 6 SCC 470.

6 Case Referred: U.P. State Sugar Corporation v. Sumac International Ltd. AIR 1997 SC 1644.

7 2008 (8) SCALE 106.

8 AIR 2007 SC 1457: 2007(4) SCALE 494.

Court held that the possibility of conscious or unconscious bias cannot be ruled out when the parties adjudicating in the dispute are also representing the parties to the dispute and that a person cannot be a judge in his own cause ('Nemo debet esse judex in propria causa') and that the deciding authority must be impartial and without bias which could take the form of an apprehend bias even though such bias had not in fact taken place.[9]

DHV BV v. Tahal Consulting Engineers Ltd. and Ors.[10]

The Court further held that an arbitral clause would be enforceable even after the expiry of the contract on completion of the services and on the payments having been made. In the given case, the arbitration clause (Clause 8.2) of the agreement is enforceable even after the expiry of the contract on completion of the services and on the payments having been made. It was the performance of the contract that had come to an end, but the contract was still in existence in so far as the dispute arising under Clause 1.10 of said contract thereof was concerned. On these considerations, the Court concluded that the claim made by Petitioner was not barred by limitation and allowed the Petition.

9 Case Referred: Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and Ors. (1993) IILLJ 549 SC.
10 AIR 2007 SC 3113: (2007) 8 SCC 321.

IPR CASE ALERT

Microsoft Corporation and Anr v. Kurapati Venkata Jagdeesh Babu and Anr. [2014 (57) PTC 601 (Del)]

In this case Plaintiff No.1 is a company incorporated in the USA since 1975 engaged in the Business of Development, manufacture, licensing and support of a range of software products for various computing devices and its products include Microsoft Windows, Microsoft Office amongst others. Plaintiff No. 2 is the subsidiary of Plaintiff No.1 in India.

Defendant No.1 filed an application for registration of the trademark 'MICROSOFT MULTIMEDIA' in class 41 for services in relation to educational and training and also registered the domain name www.microsoftmultimedia.com. Defendants have been alleged to have illegally using the trademark belonging to the plaintiffs causing it loss of reputation and goodwill in the market. Aggrieved by the same the Plaintiffs filed suit in the Delhi High Court.

The trademark 'MICROSOFT' is well known around the world so much so that use of this trademark will be clearly associated by the relevant section of the public as goods/services belonging to the plaintiffs and no else. The brand MICROSOFT is recognised as the second most valuable brand in the world by Forbes in 2013 and therefore enjoys immense goodwill in the eyes of the public.

The trademark 'MICROSOFT' has been extensively used for goods and services which have been used for advertising, publicity and presentation at fairs or exhibitions around the country. Notwithstanding common law rights, Plaintiffs are the registered proprietors of the trademarks in India. The plaintiffs have successfully obtained more than 150 ex parte ad interim injunctions for the protection of the intellectual property rights of the plaintiffs including the trademark 'MICROSOFT'.

Illegal use of the trademark 'MICROSOFT' by Defendant No.1 has adversely affected the goodwill and reputation of the plaintiffs which has been extensively used for a long period of time over a wide geographical area and has been well recognised by the trade and public.

Hence prayed for declaration of the trademark as a well-known trademark and permanent injunction against Defendants.

Section 29(4) is distinct from other subsections under Section 29 as the element of likelihood of confusion is absent. Section 29(5) is applicable only where the infringer uses the registered trademark as his trade name or business concern which is in the same goods/services as the registered trademark. In cases where the goods/services are different remedy under section 29(4) is not precluded and an action against passing off is maintainable.

Use of a mark as part of the corporate name will also amount to infringement if the registered trademark has a reputation in India and the use by the infringer is without due cause. The plaintiffs have been able to establish that the defendants were infringing the registered trademark 'MICROSOFT' which is also a well-known trademark.

As defendants did not contest the case a decree of permanent injunction was passed in favour of the plaintiffs. Defendants were directed to pay to the plaintiffs a sum of Rs two lakhs as compensatory damages and Rs three lakhs as punitive damages.

Khanapuram Gandaiah[1] - Interpreting what constitutes "Information" under the RTI Act

Mr. Y. Shiva Santhosh Kumar*

This brief judgment was delivered by the apex court ("SC") in a special leave petition filed against the judgment of the Andhra Pradesh HC ("AP HC"). Agreeing with the AP HC in its conclusion, the SC answered the singular question of what constitutes 'information' under the RTI Act. This question was set in the context of an RTI application which sought to know why a delivered judgment decided the way it did.

To briefly recount the facts, a civil suit was pending against the petitioner. The relief sought in that civil suit was a perpetual injunction against the petitioner from entering the suit land. Interim relief pending disposal of this suit was denied to the petitioner, both at the first instance and on appeal. They were a couple of other matters pertaining to the same suit land, in one of which, an interim injunction was granted against the petitioner. Grant of interim injunction against the petitioner was upheld on appeal.

In this factual framework, the aggrieved petitioner filed an RTI application under S. 6(1) of the RTI Act, 2005 ["RTI Act"]. He sought reasons as to why his appeal against grant of interim injunction was dismissed by characterizing such reasons as 'information' under S. 2(f) of the RTI Act. To briefly describe the nature of queries under the petitioner's RTI application, he asked why the judge had ignored his written arguments and additional written arguments.Inter alia, he also raised a query on how the judge considered 'fabricated' documents submitted by the other side. The RTI application was rejected and upon exhaustion of appeals as provided under the RTI Act, the petitioner filed a writ before the AP HC. The AP HC decided that the writ was not maintainable as the queries raised in the RTI application did not point towards any 'information' under the RTI Act.

At the SC, the argument of the petitioner was as follows. The right to information is a guaranteed right to citizens and the RTI Act does not provide any special protection to judges. The petitioner argued that the *sequitur* to this assertion was that he had a right to know why his appeal was decided in a particular manner. It is notable to mention that the petitioner chose to file an RTI application instead of appealing in the proper forum against the alleged infirmities of the decision.

The SC considered the definition of information under the RTI Act and interpreted it as referring to *"information which is already in existenceand accessible to the public authority under law"* (emphasis supplied). It said that while the RTI can be used to obtain orders, circulars, etc., RTI cannot be used to ask *why* those orders or circulars have been passed. Since the present queries did not ask for existing information or information that could be obtained under law, the SC dismissed the SLP. In the context of adjudication, it noted that any judge *speaks* through his judgment or order. An aggrieved party can appeal against or challenge the judgment through a legally permissible mode. However, one cannot use the RTI to question the judge and ask for reasons independent of what is contained in the delivered judgment. The SC noted that if such a course of action was permitted, it will affect the independence of judiciary. It would do so as every judge would be in fear of inquiry as to malice or litigation with those individuals offended by their decisions. Hence, forcing judges to give reasons independent of what is contained in the judgments under the RTI Act exposes the administration of justice to grave peril.

In conclusion, this judgment is an important interpretation on the scope of 'information' under the RTI Act. It will prevent frivolous abuse of the RTI Act. In addition, its specific application in a judicial setting makes two notable points. First, that RTI cannot be used to extract reasons on why a judge decided in a particular manner. Secondly, that extending RTI in such a manner would affect judicial independence.

[1] Khanapuram Gandaiah v. Administrative Officer and Others., (2012) 2 SCC 1 (hereinafter, Khanapuram Gandaiah).

***Mr. Y. Shiva Santhosh Kumar,** Student, 5th Year LLB, NLSIU, Bengaluru.

"Instead of worrying about what people say of you, why not spend time trying to accomplish something they will admire."

'ONLINE CONSUMER MEDIATION CENTRE' (OCMC)

Introduction

The Indian judicial system is marred by delays. Businesses suffer because disputes are not resolved in areasonable time. Even with the use of methods of alternative disputere solution afair number of high value disputes endupina court. Thus, court shardly have any time for taking up disputes of lower value. Also, in a country of continental dimensions, every disputant cannot afford to travel and contest in a court of law. Online Dispute Resolution (ODR) has emerged as a new method which may be beneficial in a geographically large country and also where alarge number of B2C disputes are significantly of low value. The ODR is the best available method for resolving such business disputes.

The Online Mediation Centers are already started in the developed countries like US, Singapore, Australia and European countries. As the legal profession has begun to modernize its working practices with the aid of several technological advances in computing and telecommunications, one may wonder whether the utilization of offline mechanisms will eventually be replaced by the employment of the so-called ODR mechanisms.

The United Nations Committee for Trade and Development (UNCTAD) has embarked on the revision of the UN Guidelines for Consumer Protection (UNGCP) with a view to bring them up to date in light of new developments in technology, business practices and new consumer concerns.

NLSIU Online Dispute Resolution Mediation Centre is an initiative of Chair on Consumer Law and Practice (CLAP) of National Law School of India University. It has been conceived as a project for giving effect to Section 89 of the Code of Civil Procedure, which provides for Mediation as an Online Dispute Resolution mechanism. In M/S Afcons Infra Ltd Vs. M/S Cherian Varkey Construction case (Civil Appeal No.6000 of 2010) the Supreme Court held that even Consumer Forum, State Commissions and National Commission can follow section 89 of CPC. Hence this pilot project is very important and need of the hour. This project shall be implemented by CLAP Chair, NLSIU with the support of the academicians, judges, subject experts and advocates, etc.

Online Consumer Mediation Center

Mediation, as used in law, is a form of Alternative Dispute Resolution (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator assists the parties to negotiate a settlement. Disputants may mediate disputes in a variety of consumer welfare legislations.

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process.

Prof.Dr. Ashok R Patil*

Mediation is one of the Alternative Dispute Resolution Methods contemplated under Section 89 of the Code of Civil Procedure. Mediation leaves the decision making power with the parties. A Mediator does not decide what is fair or right but acts as a catalyst to bring the disputing parties together by defining the issues and eliminating obstacles for communication and settlement.

In addition to dispute resolution, mediation can function as a means of dispute prevention, such as facilitating the process of contract negotiation. Governments can use mediation to inform and to seek input from stakeholders in formulation or fact-seeking aspects of policy-making. Mediation is applicable to Consumer related issues.

Online mediation could be carried out by two methods; text-based and video-based. In text based method mediation it is done through exchange of text either by way of email or chat rooms (CORE and NCH). However text based mediations not so successful, as in mediation the mediator act as a pacifier between two parties. As a result mediator and the parties seeing each other had a greater impact on success of mediation. Video mediation would minimize risks of ambiguity in texting and ensure voluntariness of the offers made by the parties.

Online Mediation has a distinct advantage particularly dealing with cases of e-commerce where geographical barriers could be minimized in settling the disputes. The rationale behind such an assumption is looking at the increased e-transactions particularly at consumer level be in goods or insurance policies which bring myriad issues of jurisdiction, costs and geographical impediments. Further many of the consumer e-transactions have minimal value and the dispute to be redressed through Consumer Forums not only time consuming but also not cost effective. Many of these disputes could be effectively getting settled with the assistance of e-mediator.

Various benefits of Online Mediation given below

Various benefits of Online Mediation are: No geographical boundaries; It is convenient as not necessarily on working day and working hours; Cost effective; Less times as there is no travel required; Opportunity to choose the mediator; No time pressure; Informal; Protects the confidentiality of the parties.

***Prof. (Dr.) Ashok R. Patil,** Chair Professor, Chair on Consumer Law and Practice, NLSIU, Bengaluru.

Justification

Ministry of Civil Supplies... proposed an amendment to the existing Consumer Protection Act by way of proposed Amendment to Consumer Protection Act, 1986. The amendment seeks to introduce the concept of Mediation at District, State and National level in resolving consumer disputes. According to this Bill, in suitable cases parties would be encouraged to mediation. Therefore in appropriate cases such cases could also be mediated through online at NLSIU Bangalore. The success of National Internet Exchange of India (NIXI) has given a shot in the arm to the advocates of ODR in India.

Further increased use of online transactions and availability of internet makes online mediation more suitable for dispute resolutions particularly in e-transactions. Good quality justice at a low cost is possible through online mediation. However a change in attitude is required for the judicial fraternity in general and lawyers in particular.

Further, transferring the power to the people to resolve their disputes amicably would result in more peace, development and prosperity. And, India is no exception. For this, proper education and training is essential for a committed, knowledgeable workforce which can work with confidence for the resolution of business disputes using ODR methods.

Mammoth Educational Convention Facilitated by CCL-NLSIU

A mammoth educational convention was organized by the Centre for Child and the Law, NLSIU and School Development and Monitoring Committee Coordination Forum with the support of the Karnataka State Primary School Teachers Association and Midday Meal Workers Organization on 11th January 2015. The thematic slogan of the convention was 'to oppose all forms of Privatisation, Commoditisation, Corporatisation and Public Private Partnership for profit in the field of Public Education and to Save, Strengthen and Transform Government Schools into genuine Neighbourhood Schools to ensure Equitable Quality Education to all children'.

Well known writer Prof. Kalegowda Nagavara; Commissioner of Public Instruction Mr. Mohammad Mohasin; Joint Director of Midday Meals Programme Shri. Bellashetty; Tecahers Association President Shri. Basavaraj Gurikar; Joint Director of Students Benefit Fund Shri. Prahaladgowda; Hon'ble Justice Civil Judge (Senior Division) and Judicial Magistrate of First Class Mr. Kiran Kini and Fellow and Programme Head of Education at CCL Dr. Niranjanradhya and other senior officials of the education department participated in the convention.

The convention deliberate on issues related government schools with respect to infrastructure, teachers, quality of teaching learning process. These discussions resulted in the submission of certain demands to the State with a view to achieve the objective of the convention.

The following demands were placed by the community before the State Authorities may be summarized as follows:

1. An expert committee comprising of primary stakeholders is to be constituted to bring out the much required School Education Policy in the State.
2. The medium of instruction for classes from Preprimary to X should be the mother tongue of the child. However, at the same time necessary steps are to be taken to teach English as subject to the mastery level.
3. The basic facilities and required learning materials necessary for the education of children with physical or mental disabilities or children with special needs are to be provided in order to realize and protect the right to education of such children.
4. The right to education of the children in need of care and protection and the children in conflict with law coming under the purview of the juvenile justice system is to be safeguarded and these children are to be provided with quality education.

Violence – free education is a child's fundamental right!

This right must be enforced in a way the child's dignity is not lowered

The following are banned under the RTE Act! Do you know this!

No capitation fee and screening procedure for admission of children. (Section 13)

No school is to take a capitation fee while admitting a child.
If capitation fee is collected, a fine ten times the capitation fee will be imposed.
No child or parents of the child will be made to undergo a screening procedure.
If the child or the child's parents are made to undergo a screening procedure, a fine of twenty five thousand rupees will be imposed.

For the purposes of admission, Birth Certificate or a Government issued certificate will be used as proof of age. (Section 14)

No child shall be denied admission for lack of age of proof.

No child shall be denied admission if the admission is sought after the extended period. (Section 15)

A child shall be admitted to school at the commencement of the academic year or within the extended period.
A child admitted after the extended period shall complete his studies in a manner prescribed by the Government.

It is prohibited to hold back a child in the same class till the completion of primary education. (Section 16)

Expelling a child is against the principle of 'fundamental right'. It is unimaginable for a civil society to bring out a child from a school.

It is prohibited to physically punish or mentally harass a child. (Section 17)

One who violates the law will be punished according to his/ her service rules.

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Certificate Course in Arbitration

Three Day Certificate Course in Health Law and Medical Negligence

June 12th - 14th 2015
[Friday, Saturday and Sunday]

Who can attend?

The Course is designed for Medical professionals, Hospital administrator, Chief Medical Officers, Doctors, para medical professionals, Professors in medical institutions, medico-legal practitioners who are familiar with legal issues and challenges facing the medical fraternity. The aim of the course is to equip the participants with the concepts, principles of Medical law and ethics and to examine issues and challenges on 'medical negligence'. Those interested in gaining knowledge, skill and expertise in medicine and law must attend. Attendance is compulsory. On Completion of the course, the participant will be awarded with a Certificate from NLSIU. No accommodation shall be provided by NLSIU.

Course Design

Day 1: Introduction to law and legal system, interface between law and Medicine, Medical ethics and Law, public health and law, right to health.

Day 2: Privacy and confidentiality, medical negligence, defences in negligence, medical records.

Day 3: Ethical Code and Hospital administration, emerging areas in health law, role of non-state actors, Ethical Committee, Clinical trial and Law.

Course Fee

15,000/- INR (rupees fifteen thousand only) Mode of payment: DD in favour of The Registrar, NLSIU, payable at Bengaluru. Write Name, Email ID and Contact number on the reverse side of the DD.

Admission

Limited seats are available. Interested candidates can register by sending an email to ded@nls.ac.in/bhatsairam@nls.ac.in or contact: 080-23160524/29.

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