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THE INDIAN JOURNAL OF LAW AND PUBLIC POLICY

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FOREWORD

It gives me immense pleasure to write a foreword for this issue of the journal authored by brilliant students and faculty members of various law colleges. The informative compilation provides the readers with an enlightened perspective on various important burning issues.

The authors of the articles have gone in depth and analyzed the topics in detail. Further, the articles on "Corporate Social Responsibility", "Economic Analysis of Marital Rape" and "Illegitimacy" have elaborately analyzed the issue at hand without losing sight of the sensitivity involved in the matter. The other articles are also worth reading from an academic point of view.

I am extremely glad that the students and faculty members are taking this initiative to research and deliberate over these important legal and fundamental issues. It is pertinent that awareness is brought about in society and the young legal minds of our country are most adept to take on this task.

I wish them all the best and hope that they continue with their endeavors.

Justice M Y Eqbal

Former Judge, Supreme Court of India

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statement of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusively and independent. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

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CORPORATE SOCIAL RESPONSIBILITY (CSR): AN OVERVIEW OF THE INDIAN PERSPECTIVE

Dr. Kalpana Sharma[*]

INTRODUCTION

The past twenty years have seen a radical change in the relationship between business and society. Key drivers of this change have been globalization of trade, the increased size and influence of companies, the repositioning of government and the rise of strategic importance of stakeholder relationship, knowledge and brand reputation. The relationship between companies and civil society organizations has moved from paternalistic philanthropy to re-examination of the roles, rights and responsibilities of business in society. Corporate Social Responsibility, defined in terms of the responsiveness of business to stakeholders' legal, ethical, social and environmental expectations, is one outcome of these developments. Over the decades, the concept of Corporate Social Responsibility has continued to grow in importance and significance. It has been the subject of considerable debate and research all over the world. The idea that the business enterprises have some responsibilities towards the society beyond that of making profits has been around for centuries. But Corporate Social Responsibility movement all over the domain had gone through many phases and faces after its orientation in the corporate world with the history of 100 years in the developed country. The present concept of Corporate Social Responsibility appeared during the second half of the 1990s, after the Rio Conference on Environment and Sustainable Development of 1992, where the United Nations invited multinational enterprises to assume a commitment towards society and the environment by including, in their commercial agreement, provisions to protect basic human rights, workers' right and the environment. This Corporate Social Responsibility concept is also closely linked to the notion of sustainable development defined by the World Commission on the Environment and Development (Brundtland Commission) in 1987 as: *"development that meets the needs of the ability of future generation to meet their own need."*[1]

Corporate Social Responsibility, or CSR, is a shifting concept. People often talk about it

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[1] ITC-ILO, *International Instruments and Corporate Social Responsibility- A Booklet to Accompany Training on Promoting labour standards through Corporate Social Responsibility* 2012, (05 July 2016), http://www.ilo.org.

as if it was a recent phenomenon, but in reality its core is the ongoing effort to understand business as part of society and that is an effort that is as old as business endeavour.[2] Despite the growing awareness and popularity of the term Corporate Social Responsibility, there is no general consensus as to what it actually means. In fact, CSR is often used interchangeably with various other terms, such as corporate philanthropy, corporate citizenship, business sustainability, business ethics and corporate governance. Although these other terms do not all mean the same thing, there is one underlying thread that connects them all- the understanding that companies have a responsibility not just towards their shareholders but also towards other stakeholders, such as 'customers, employees, executive, non-executive board members, investors, lenders, vendors, suppliers, governments, NGOs, local communities, environmentalists, charities, indigenous people, foundations, religious groups and cultural organizations.' All of these stakeholders are equally important to a corporation, and it should therefore strive with sincerity to fulfil the varied expectations of each.[3] Corporation does not exist in isolation. Therefore, they should feel some level of responsibility for the community of which they are a part, and should work for the development and progress of that community and society at large. [4]

Recent corporate scandals and the increasingly international context within which modern business operate have raised important issues concerning the roles and responsibilities of companies. Pressures on companies to behave ethically have intensified and in consequences, firms face pressure to develop policies, standards and behaviours that demonstrate their sensitivity to stakeholder concerns.[5] The idea of being a socially responsible company means recognizing obligations and going beyond simple compliance with the law. It is absolutely essential that corporations make sincere efforts to fulfil their obligations because development based solely on economic growth paradigm is unsustainable, and not conducive to corporate success.

[2] Halina Ward & Craig Smith, *Corporate Social Responsibility at a cross road : Futures for CSR in the UK to 2015*, INTERNATIONAL INSTITUTION FOR ENVIRONMENT AND DEVELOPMENT 1 (2006).

[3] Aayush Kumar, *Mandatory Corporate Social Responsibility: An experience Vision?*, 1(3) COMPANY LAW JOURNAL 113 (March 2013).

[4] United Nations Global Compact, (05 July, 2016), http://www.unglobalcompact.org.

[5] Stephan Brammer, Geoffrey Williams & John Zinkin, *Religion and Attitudes to Corporate Social Responsibility in a Large Cross-Country Sample*, (05 July, 2016), http://ssrn.com/abstract.

CONCEPT OF CORPORATE SOCIAL RESPONSIBILITY

Social Responsibility is actually a normative theory suggesting that corporation sought to take actions which promote a role which is beneficial towards society. In simple words, the corporation ought to give "something" back to society. Although the terms used may not be the same, concepts analogous to social responsibility exist for centuries. In India, in the Vedic literature as Valmiki Ramayana, the Mahabharata [includes the Bhagavad – Gita and the Puranas and Kautilya's Arthasastra provides an inside-out approach to Corporate Social Responsibility, which is development of the individual leader's self conscience, contrary to the western approach that takes an outside – in perspective. CSR goes beyond the normal charity activities of an organization and this requires that the responsible organization take into full account of its impact on all stakeholders and on the environment when making decisions. In a nutshell, CSR requires the organization to balance the need of all stakeholders with its need to make a profit and reward shareholders adequately.[6] Despite the enormous increase in the literature, in recent years, which deals with CSR and related concepts, CSR is still not possible to simply define. First, it is due to the fact that CSR is a concept with relatively open application rules. Second, CSR is a kind of umbrella, which exceeds, or is becoming synonymous with other concepts of business-community relations. Third, CSR is still very dynamic phenomenon. There are therefore a large number of definitions, which attempt to capture the concept of CSR. There content varies, and is also often possible to see from them, whether incurred in the commercial sector, the academic sphere or the government sector.[7] Hence there seems to be an infinite number of definitions of CSR, ranging from the simplistic to the complex, and a range of associated terms and ideas (some used interchangeably), including 'corporate sustainability, corporate citizenship, corporate social investment, the triple bottom line, socially responsible investment, business sustainability and corporate governance'.[8]

A widely quoted definition by the World Business Council for Sustainable Development

[6] Balakrishnam Muniapan and Mohan Dass, *Corporate Social Responsibility: A philosophical Approach from an ancient Indian Perspective*, INTERNATIONAL JOURNAL OF INDIAN CULTURE AND BUSINESS MANAGEMENT 408, Vol. 1 No. 4 (2008).

[7] Ing. Klara Nesvadbova, *Theoretical Approach to CSR*, Brno University of Technology, (10 July, 2016), http://www.konference.fbm.vutbr.cz.

[8] Gail Thomas and Margaret Nowak, *Corporate Social Responsibility: A definition*, Working Paper Series No. 62 (Curtin University of Technology, Graduate School of Business) (December 2006), at 3.

states that:[9] *"Corporate social responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".*

Corporate Social Responsibility (CSR) can be defined as the "economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time". So the concept of corporate social responsibility means that organizations have moral, ethical, and philanthropic responsibilities in addition to their responsibilities to earn for investors and comply with the law.[10] In 1953, Howard Bowen in his book, *The Social Responsibilities of the Businessman* proposed the CSR definition as *"the obligation of business to pursue those policies, to make those decisions or to follow those lines of action which are desirable in terms of the objectives and values of our society".*[11] Milton Friedman famously proclaimed in 1970, "The *business of business is to maximize profits, to earn a good return on capital invested and to be a good corporate citizen obeying the law – no more and no less".*[12] In 1984, Edward Freeman introduced the stakeholder theory and argued that socially responsible activities helped business in building strong relationships with stakeholders rather than those that serve only to maximize shareholders' interests.[13] In 1994, John Elkington first introduced the concept of "Triple Bottom Line" to emphasize that a company's performance is best measured by the economic, social and environmental impact of its activities.[14] Triple bottom line deals with the protection of three basic elements of this universe i.e. profit, planet and plant. The European Commission has defined Corporate Social Responsibility (CSR) as *"a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"*. The European Union has now put forward a new, simpler definition of CSR as *"responsibility of enterprises for their impact on society".*[15] The International Labour Organization recognizes Corporate Social Responsibility (CSR) as *"a way in which enterprises give consideration to the*

[9] *Id.* at 412

[10] . Uma Rani and M. Sarala, *A Study on Corporate Social Responsibility in Singareni Colleries Company Limited*, INTERNATIONAL JOURNAL OF RESEARCH IN MANAGEMENT 31-32, Vol. 1 No. 3 (Jan 2013).

[11] Shafiqur Rahman, *Evaluation of Definitions : Ten Dimensions of Corporate Social Responsibility*, WORLD REVIEW OF BUSINESS RESEARCH 167, Vol. 1 No. 1 (March 2011).

[12] M. Friedman, *The Social Responsibility of Business is to increase its profits*, THE NEW YORK TIMES MAGAZINE, (13 September, 1970).

[13] Anders Akerstorm, *Corporate Governance and Social Responsibility: Johnson 7 Johnson*, GRIN VERLAG 2 (2009).

[14] Triple bottom line, (13 July 2016), http://en.wikipedia.org.

[15] Commission launches new strategy on CSR, 4 November 2011, (15 July, 2016), https://www.aristastandard.org.

impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors."[16] World Business Council for Sustainable Development (WBCSD) states that CSR is the ethical behaviour of a company towards society, management acting responsibly in its relationship with other stakeholders who have a legitimate interest in the business, and it is the commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as the local community and societal at large.[17] According to the United Industrial Development Organization (UNIDO), *"Corporate social responsibility is a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives (Triple-Bottom- Line approach), While at the same time addressing the expectations of shareholders and stakeholders. In this sense it is important to draw a distinction between CSR, which can be strategic business management concept, and charity, sponsorships or philanthropy. Even though the latter can also make a valuable contribution to poverty reduction, will directly enhance the reputation of a company and strengthen its brand, the concept of CSR clearly goes beyond that."*[18]

From the above discussion it can be concluded that the Corporate Social Responsibility (CSR) is a vehicle for discussing the obligations a business has to its immediate society, a way of proposing policy ideas on how those obligations can be met, and a tool for identifying the mutual benefits for meeting those obligations. Further above discussion also reveals that there is a wide variety of concepts and definitions associated with the term "corporate social responsibility", but no general agreement of terms. CSR is indeed concerned with establishing the capacity of responding to external pressures through appropriate 'responsive' mechanisms, procedures, arrangements and behavioural patterns.

While the definitions of CSR may differ, there is an emerging consensus on some common principles that underline CSR[19]:

1. ***CSR is a business imperative****:* Whether pursued as a voluntary corporate initiative or

[16] International Labour Oraganisation, *The ILO and Corporate Social Responsibility*, (15 July, 2016), http://www.ilo.orga.

[17] World Business Council For Sustainable Development, *Meeting Changing Expectations : Corporate Social Responsibility*, March 1999, (15 July, 2016), http://www.wbcsd.org.

[18] United Nations Industrial Development Organization, *What is Corporate Social Responsibility*, (15 July, 2016), http://www.unido.org.

[19] KMPG – ASSOCHAM, *Corporate Social Responsibility – Towards a Sustainable Future: A White Paper* (2008) at 7-8, (15 July, 2016), http://www.kpmg.com.

for legal compliance reasons, CSR will achieve its intended objectives only if businesses truly believe that CSR is beneficial to them.

2. ***CSR is a link to sustainable development***: Businesses feel that there is a need to integrate social, economic and environmental impact in their operation ; and
3. ***CSR is a way to manage business:*** CSR is not an optional add-on to business, but it is about the way in which businesses are managed.

The emerging concept of Corporate Social Responsibility (CSR) goes beyond the charity and requires the company to act beyond its legal obligations and to integrated social, environmental and ethical concerns into company's business process.

CORPORATE SOCIAL RESPONSIBILITY DEVELOPMENT IN INDIA

Corporate social Responsibility is not an imported concept. Rather it is a part of India's cultural heritage. Our Vedas emphasized quality and social responsibility in terms of social distribution of wealth, animal welfare, plant life, non-pollution and poor feeding while condemned those who enjoyed wealth ignoring social needs. *Bhagavat Gita* Professed 'poor and needy shall be duly protected and further says,

"Datayam iti yad danam diyate nupakarine! Dese kale ca patre ca tad danam saatvikam smrtam! "

-Ch. XVII, Shloka 20.

"Charity given out of duty, without expectation of return, at proper time and place, and to a worthy person is considered to be in the mode of goodness."

Thus the concept of Corporate Social Responsibility in India is not new, though the term may be. Philosophers like Kautilya from India preached and promoted ethical principles while doing business. Religion and charity have always been linked in India with business, founded on 'giving' as a good business principle.[20] The term *loksamagraha*[21] finds mention in chapter III (20) of the Gita. Business is viewed as legitimate and an integral part of society according to Vedic philosophy but essentially it should create wealth for the society through the right means of action. '*Sarva loka hitam'* in the Vedic literature referred to 'well-being of stakeholders". [22]This means an ethical and social responsibility system must be

[20] Pooja Srivastava & Surabhi Goyal, *The pre and post legislative development of CSR in India : A case illustration of Mahindrea and Mahindra*, ASIAN JOURNAL OF MANAGEMENT RESEARCH 459, Vol. 5 Issue 3, 2015.

[21] *Loksamagraha* means binding men and their communities together, regulating them in such a way that they acquire strength from mutual cooperation among the serving elements, including the corporate.

[22] *Supra* note 6, at 415.

fundamental and functional in business undertakings. Vedic literature on business profoundly states by the following quote:

"*May we together shield each other and may we not be envious towards each other. Wealth is essentially a tool and its continuous flow must serve the welfare of the society to achieve the common good of the society."*

-(Atharva-Veda 3-24-5)[23]

In India the Vedic philosophy insist that quality of work and service needs to be achieved in the business process model for long-term sustainability, besides an equitable redistribution of wealth after having acquiring it. This core principle of Corporate Social Responsibility expounded by the Vedic literature is being reengineered in the modern business models, namely, Total Quality Management (TQM), Business Process Reengineering and Triple bottom-line sustainability.[24]

Thus the concept of CSR has been imbibed in the society from the very beginning. It is a concept that is a part of India's cultural heritage which Mahatma Gandhi called "Trusteeship". For Gandhi ji, Trusteeship was a means of transforming the present capitalist order of society into an egalitarian one. His trusteeship model did not recognize any right of private ownership of property except what was permitted by society for its own welfare and this did not exclude legislative regulation of ownership and use of wealth. Giving corporate social responsibility the façade of trusteeship model of Gandhi ji is only a mechanism to provide legitimacy to a Western concept.[25]

FOUR PHASES OF CORPORATE SOCIAL RESPONSIBILITY DEVELOPMENT IN INDIA

Today, CSR in India has gone beyond 'charity and donations' and is approached in a more organized fashion. It has become an integral part of the corporate strategy. The development of corporate social responsibility (CSR) in India can be discussed in its four phases which run parallel to India's historical development and has resulted in different approaches towards corporate social responsibility.

(1) The First Phase: In the first phase charity and philanthropy were the main drivers of corporate social responsibility. Culture, religion, family values and tradition and industrialization had an influential effect on corporate social responsibility. In the pre-

[23] *Id.*
[24] *Id.*
[25] Seema Sharma, "Corporate Social Responsibility in India- Emerging Discourse & Concerns", THE INDIAN JOURNAL OF INDUSTRIAL RELATIONS, VOL. 48 NO. 4 2013 at 585-586.

industrialization period which lasted till 1850, wealthy merchants shared a part of their wealth with the wider society by way of setting up temples for a religious cause. Moreover they also provide help to the society over phases of famine and epidemics by providing food from their godowns and money and thus securing an integral position in the society. 1850s onwards with the arrival of colonial rule in India the approach towards corporate social responsibility was changed. The industrial families of the 19th century such as Tata, Godrej, Bajaj, Modi, Birla, Singhania were strongly inclined towards economic as well as social considerations. However it was observed that their efforts towards social as well as industrial development were not only driven selfless and religious motives but also influenced by caste group and political objectives.[26]

(2) The Second Phase: In the second phase, during the independence movement, there was increased stress on the Indian Industrialists to demonstrate their dedication towards the progress of the society. This was when Mahatma Gandhi introduces the notion of "trusteeship", according to which the industry leaders had to manage their wealth so as to benefit the common man. "I desire to end capitalism almost, if not quite, as much as the most advanced socialist. But our methods differ. My theory of trusteeship is no make-shift, certainly no camouflage. I am confident that it will survive all other theories." This was Gandhi's words which highlights his argument towards his concept of "trusteeship". Gandhi's influence put pressure on various Industrialists to act towards building the nation and its socio-economic development. According to Gandhi, Indian companies were supposed to be the 'temple of modern India'. Under his influence businesses established trusts for schools and colleges and also helped in setting up training and scientific institutions.[27]

(3) The Third Phase: The third phase of corporate social responsibility (1960-80) had its relation to the element of 'mixed economy', emergence of Public Sector Undertakings (PSUs) and laws relating labour and environmental standards. During this period the private sector was forced to take a backseat. The public sector was seen as the prime mover of development. Because of the stringent legal rules and regulations surrounding the activities of the private sector, the period was described as an "era of command and control". The policy of industrial licensing, high taxes and restrictions

[26] Dr. Mohad. Ashraf Ali & Azam Malik, *Corporate Social Responsibility: An Indian Perspective*, INDIAN JOURNAL OF RESEARCH 26-27, Vol. 1 Issue 9 (2012).

[27] *Id.*

on the private sector led to corporate malpractices. This led to enactment of legislation regarding corporate governance, labor and environmental issues. Public Sector Undertakings were set up by the state to ensure suitable distribution of resources (wealth, food etc.) to needy. However the public sector was effectively only to a certain limited extent. This led to shift of expectation from the public to the private sector and their active involvement in the socio-economic development of the country became absolutely necessary. In 1965 Indian academicians, politicians and businessmen set up a national workshop on corporate social responsibility aimed at reconciliation. They emphasized upon transparency, social accountability and regular stakeholder dialogues.[28]

(4) The Fourth Phase: In the fourth (1980 until the present) Indian companies started abandoning their traditional engagement with corporate social responsibility and integrated it into a sustainable business strategy. In 1990s the first initiation towards globalization and economic liberalization were undertaken. Controls and licensing system were partly done away which gave a boost to the economy the signs of which are very evident today. Increased growth momentum of the economy helped Indian companies grow rapidly and this made them more willing and able to contribute towards social cause. Globalization has transformed India into an important destination in terms of production and manufacturing bases. As Western markets are becoming more and more concerned about labor and environmental standards in the developing countries, Indian companies who export and produce goods for the developed world need to pay a close attention to compliance with the international standards. [29]

It has been argued that the roots of corporate social responsibility mainly lie in the western world. However, a careful analysis reveals that many of the popularized western management theories and concepts have been in practice in Asian countries, especially in India for centuries. There are evidences that reflects that the philosophy of corporate social responsibility has originated in the ancient India and one can find references of corporate social responsibility in Kautilaya's Arthashastra (4th Century BC).

THE LEGALITY OF CSR IN INDIA

The concept of social responsibility has emerged as a towering influence in modern corporate day activity. This concept of CSR in India is in a very nascent stage. It is still one of the least understood initiatives in the Indian development sector. A lack of understanding,

[28] *Id.*

[29] *Id.*

inadequately trained personnel, non availability of authentic data and specific information on the kinds of corporate social responsibility activities, coverage, policy etc. further adds to the reach and effectiveness of the corporate social responsibility programs. But the situation is now changing, the country recently instituted the World's first mandated CSR law, requiring all companies doing business there, with a minimum net worth of Rs.500 crore, turnover of Rs.1,000 crore and net profit of at least Rs.5,crore, spend at least two percent of their profit on CSR. [30] With a population of 1.2 billion and more than 700 million living on $1 per day, the CSR mandate under the Companies Act should stimulate strategic engagement with social issues. Corporation can comply at the very basic level of the law or use this historic moment to innovate for the betterment of India, its people and economy. The CSR is on expedition in India but companies have yet to realize its complete potential. "Individual and collaborative initiatives continue to be dominated by self-assertion rather than accountability."

In India, the Companies Act 1956 does not contain any provision regarding corporate social responsibility. The scene of CSR in India changed with the introduction of Section 135 of the Companies Act 2013. The new Companies Act has removed the weakness in the old Companies Act of 1956 in the area of corporate social responsibility activities. Of late government had a view to make it mandatory for corporate social responsibility activities and to make it funding public. With the implementation of the new company law from April 1, 2014, India has become the only country in the World with legislated corporate social responsibility (CSR) and spending threshold of up to $ 2.5 billion (Rs. 15,000 crore).[31] Corporate social responsibility (CSR) has been made mandatory under the new regulation and there are provisions of penalties, in case of failure.

CORPORATE SOCIAL RESPONSIBILITY - LEGAL FRAMEWORK IN INDIA

The unadulterated deliberate kind of Indian CSR has as of late been mixed with an obligatory component in it. Not at all like in some different nations, for example, Australia, Denmark, France, Holland, Norway, and Sweden, where just the CSR reporting is obligatory, India is currently the main nation on the planet where both reporting and spending has gotten to be obligatory. The main formal endeavour by the Government of India to put the CSR issue on the table was in the issuance

[30] India now only country with legislated CSR, (20 july, 2016), https://www.business-standard.com.

[31] *Id.*

of Corporate Social Responsibility Voluntary Guidelines in 2009 by the Ministry of Corporate Affairs. Preceding this, the significance of CSR was examined in the connection of corporate administration changes, for example, in the Report of the Task Force on Corporate Excellence by the Ministry of Corporate Affairs. While the report put forth a business defense for CSR and also highlighted the social advantages coming from it, the talk was recommendatory in nature and there were minimal significant focuses. It is in the Voluntary Guidelines of 2009 that the center components of a CSR strategy was spelt out that included tend to all partners, moral working, regard for specialists' rights and welfare, regard for human rights, regard for the earth and exercises to advance social and comprehensive improvement.

CORPORATE SOCIAL RESPONSIBILITY VOLUNTARY GUIDELINES 2009

The Ministry of Corporate Affairs has adopted the role of an enabler, facilitator and regulator for effective functioning and growth of the corporate sector. In order to assist the businesses to adopt responsible governance practices, the Ministry of Corporate Affairs has prepared a set of voluntary guidelines which indicate some of the core elements that businesses need to focus on while conducting their affairs. These guidelines have been prepared after taking onto account the governance challenges faced in our country as well as the expectations of the society. Since the guidelines are voluntary and not prepared in the nature of a prescriptive road-map, they are not intended for regulatory or contractual use. The core elements of the guidelines provide a road map for CSR initiatives, and strategic planning, which should be integral part of overall business policy and aligned with its business goals.[32] Though Corporate Social Responsibility Voluntary Guidelines, 2009 was the first formal initiative from the Government towards the promotion of corporate social responsibility in the Indian corporate sector. But these guidelines were refined and new guidelines – National Voluntary Guidelines on Social, Environmental and Economic Responsibility of Business (ESG Guidelines) – were issued in 2011 which represents a significant and substantial effort in enhancing the protection of stakeholder interests in the corporate sector.[33] These guidelines supersede the 2009 Guidelines and involve nine core principles:

1. Business should conduct and govern themselves with Ethics, Transparency and Accountability;

[32] The CSR Policy should normally cover following elements: Care of all stakeholders, Ethical functioning, Respect for workers' rights and welfare, Respect for human rights, Respect for environment and Activities for social and inclusive development.

[33] Dean Roy Nash, *CSR an Indian Perspective: A Review*, 09 March 2012, (28 July, 2016), http://ssrn.com/abstract.

2.Business should provide goods and services that are safe and contribute to sustainability throughout their life cycle;

3.Business should be promote the well-being of all employees ;

4.Business should respect the interests of , and be responsive towards all stakeholders, especially those who are disadvantaged, vulnerable and marginalized ;

5.Business should respect and promote human rights ;

6.Business should respect, protect, and make efforts to restore the environment ;

7.Businesses, when engaged in influencing public and regulatory policy, should do so in a responsible manner;

8.Business should support inclusive growth and equitable development ; and

9.Businesses should engage with and provide value to their customers and consumers in a responsible manner.[34]

By virtue of these guidelines being derived out of the unique challenges of the Indian economy and the Indian nation, it is realized that all agencies need to collaborate together, to ensure that businesses flourish, even as they contribute to the wholesome and inclusive development of the country. The Guidelines emphasize that responsible businesses alone will be able to help India meet its ambitious goal of inclusive and sustainable all round development, while becoming a powerful global economy by 2020.[35]

COMPANIES ACT 2013 AND CORPORATE SOCIAL RESPONSIBILITY – SECTION 135

The Companies Bill, 2009 and its 2011 counterpart, represents the first major effort at comprehensively overhauling corporate law in India since 1956. The Bill's Statement of Objects and Reasons' dwell on growth and international investment at some length. Its authors seem painfully eager to impress the global business community. At the same time, the Bill proceeds to in the wake of Bhopal and Dahbol, as well as more recent Satyam accounting scandal (akin to an Indian version of Enron). The rationale accompanying the Bill displays Parliament's eagerness to recruit additional foreign investment.[36] The Companies Act, 2013 ('2013 Act'), has replaced the nearly 60- years-old Companies Act, 1956 ('1956 Act').[37] The 2013 Act provides an opportunity to make our corporate regulations more

[34] Ministry of Corporate Affairs, *National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business;* (29 July, 2016), http://www.mca.gov.in.

[35] *Id.*

[36] Aayush Kumar, *Mandatory Corporate Social Responsibility: An Expansive Vision*, 1 (3) COMPANY LAW JOURNAL 115 (March 2013).

[37] The 2013 Act, enacted on 29 August 2013 with the President's assent, aims at improve corporate governance, simplify regulations, enhance the interests of minority investors and the first time legislates the role of the whistle-blower.

contemporary, and also to make our corporate regulatory framework a model to come at par with other economies with similar characteristics.[38] The 2013 Act, has introduced several provisions which would change the way Indian corporate do business and one such provision is spending on Corporate Social Responsibility (CSR) activities. Corporate Social Responsibility, which has been voluntary contribution by corporate, has now been included in law.

Sec. 135 and Schedule VII of the Companies Act as well as the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 provides the threshold limit for applicability of the CSR to a company. [39] The CSR activities must be undertaken with respect to certain areas which are listed under Schedule VII of the 2013 Act, some of which include:

- Activities to eradicate hunger, poverty and malnutrition.
- Promotion of preventive healthcare, education and gender equality.
- Setting up homes for women, orphans and the senior citizens.
- Undertaking measures for reducing social and economic inequalities.
- Ensure environmental sustainability, balance in the ecology and welfare of animals.
- Protection of national heritage, art and culture.
- Taking measures for the benefit of armed forces veterans, war widows and their dependents.
- Provide training to promote rural, nationally recognized, Paralympics sports (Olympic Sports).
- Contribute to Prime Minister's National Relief Fund or any other fund which has been set up by the Central Government for socio-economic development, relief and welfare of SC, ST, OBCs, minorities and women.[40]

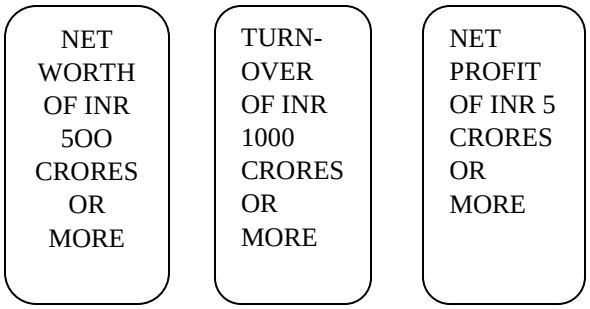
The provision also states that a company shall give preference to the local areas and those areas around which the company operates for undertaking the said CSR activities.[41] Every company having a net worth of Rs. 500 crore or more or a turnover of Rs. 1000 crore or a net profit of Rs. 5 crore, during any financial year, is required to set up a Corporate Social Responsibility Committee.

[38] The Act is a rule-based legislation containing only 470 sections, which means that the substantial part of the legislation will be in the form of rules.

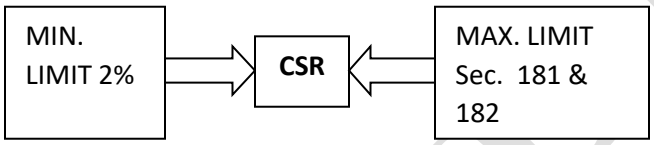
[39] The § 135, Schedule and Corporate Social Responsibility Rules will come into effect from the first day of April, 2014.

[40] The Companies Act, 2013, Schedule VII.

[41] The Companies Act, 2013, Proviso to § 135(5).



The CSR Committee shall consist of 3 or more directors, of which at least 1 director is an independent director.[42] Such a company is required to spend on CSR activities, in every financial year, at least 2% of average net profits of the company in the immediately preceding three financial years.



If the company fails to spend such amount, the board shall provide reason for the same in its report attached to the financial statements laid before the general meeting.[43] The CSR committee is further required to frame and monitor the CSR policy and recommended the amount of expenditure to be incurred.[44] The CSR policy may include activities which are mentioned in the Schedule VII of The Companies Act, 2013 few of them are discussed above. This provision is a slightly controversial one, as the main eligibility criteria do not make any distinction between public and private or domestic and foreign companies. However, here, by including the necessity of an independent director as one of the members of the CSR Committee, it is suggested that the provision would lead to even private companies appointing an independent director – a possibility not otherwise visualized under the Act.[45] So in whole the introduction of Corporate Social Responsibility clause in the Companies Act, 2013 has made India the first country to mandate Corporate Social Responsibility through a statutory provision. The Companies Act 2013 is a step forward in the direction of development and growth, with inclusion of Section 135 as Corporate Social Responsibility provision mandating every company including private companies to spend a minimum of 2% of their net profit on development activities. Many of the provisions have the potential to bring in transformative changes in the way private sector engages with national development; however certain provisions need clarification to facilitate smoother compliance as well as larger impact on society. [46] The new CSR regulations will not be a game changer in terms of enhancing overall social spending, therefore after assessing their

[42] The Companies Act, 2013, § 135(1).
[43] The Companies Act, 2013, § 135(5).
[44] The Companies Act, 2013, § 135(3).

[45] PRACHI MANEKAR, INSIGHTS INTO THE NEW COMPANY LAW 295-296 (2013).
[46] *See*, National Foundation for India, *Comment On Draft CSR Rules Under Section 135 of Companies Act 2013*, (04 August 2016), http://www.nfi.org.in.

pros and cons – it can be argues that the CSR regulations are a step in the right direction. The implementation of the new CSR regulations, however, entails certain challenges, which would require measures such as improved regulatory oversight, further clarity on what constitutes CSR spending and coordination among companies. The success of the CSR regulations would depend mainly on how well these challenges are addressed.[47]

CORPORATE SOCIAL RESPONSIBILITY IN INDIA: RISKS OPPROBRIUM

In India Corporate Social Responsibility is in developing phase and gradually the challenges that it has to be faced in the coming years will have in need to be addressed at this initial stage. The inclusion of mandatory limits of spending in the Act to achieve CSR objectives has come in for some very serious criticism. Firstly, it has been argued that at a time when most corporate are planning leaner corporate structures and eliminating layers of processes, this provision adds another committee to an already complex compliance checklist, which is unlikely to help lead to greater or better CSR.[48] Additionally, there is no clarity from the taxation angle. The law provides for a calculation of the amount to be spent. However, it does not explicitly describe its accounting treatment and eligibility for deduction for taxation purposes[49]. It also does little to dispel the notion that the CSR provisions have been introduced to make private participation essential from a legal standpoint in achieving public objectives. From a public policy perspective, The CSR provisions are tantamount to the Government trying to 'outsource' to the corporate sector its own responsibility towards the people. The Constitution of India through the Directive Principles of State Policy and Preamble tries to set up a welfare state. Directive principles contained in Part IV of the Constitution of India are concerned with the welfare of the citizen. Thus according to the Constitution, welfare is prerogative of the state and imposing it on companies is actually encroachment into the arena of working of the state.[50] Furthermore , while taxes are as it is a price being paid by corporate to enable the Government meet its public objectives, aren't there enough means already to burden corporations with not just raising money, but also spending such money.[51] So taxes could have been increased in the name of social development activities, but it should

[47] Subrata Sarkar, *Corporate Social Responsibility under Companies Act, 2013*, NSE Quarterly Briefing, July 2014/ No. 6, at 1.

[48] *Supra* note 45.

[49] *Id.*

[50] Divya Mehta & Monica Aggarwal, *Making Corporate Social Responsibility Mandatory in India : Prospects and Problems*, IMPACT : INTERNATIONAL JOURNAL OF RESEARCH IN BUSINESS MANAGEMENT 26, Vol. 3 Issue 5, (May 2015).

[51] *Supra* note 48.

have been the task of the state. Although, the introduction of CSR provisions in the Companies Act is a welcome step, however, the current discourse of corporate philanthropy without giving any express autonomy to Companies in choosing their CSR activities may not yield desired outcome. By allowing only selected list of activities within the Schedule in a sectional manner may end up encouraging only a passive participation by corporate towards CSR activities.[52] Further the law on CSR has generated considerable debate, while the law is prima facie appealing because it mandates corporate spending on socially relevant causes, in the mean while it is difficult to implement the law, especially when the Indian social sector may not be fully ready to absorb these funds in effective manner.[53] Another issue is regarding the lack of knowledge and expertise of the companies towards societal development and needs. Endeavours by the companies towards CSR may not be fruitful as they won't be aware of the priority requirements of the society as well as the initiatives of other companies simultaneously. Thus such efforts may be lopsided.[54]

CONCLUSION

CSR holds a vital spot in the advancement situation of the World today and can act like an apparatus for reasonable improvement. As we probably are aware corporate can't remain solitary they additionally require the backing of their general public everywhere which is essential for their improvement and goodwill. Numerous organizations are finding a way to enhance their natural and social execution using intentional activities, for example, sets of accepted rules, ecological affirmation and reporting, social reviews, reasonable exchanging plans and social venture programs. The new CSR arrangements in India are not an instance of government annulling its obligation to the private part. The evaluated yearly measure of CSR spending by the corporate judged in connection of aggregate social area spending by the legislature is just around two percent of what recorded organizations would have spent in the wake of applying the criteria under Section 135. Or maybe, the new CSR arrangement ought to be taken a gander at as an exertion by the administration to make the corporate segment assume a correlative part in meeting the more

[52] Rahul Rishi, Ankit Srivastava & Dr. Miland Antani, *New Rules for Corporate Social Responsibility announced*, (12 Aug 2016), htpps://www.nisthithdesai.com.

[53] *Id.*

[54] *Supra* note 50.

extensive society objective of enveloping improvement. Under the new CSR rules, the adaptability given to the organizations in picking and checking the tasks is prone to advance productivity and viability in venture usage without the CSR rules coming into genuine clashes with the essential target of shareholder worth boost of organizations. Social and financial motivating forces appear to have been all around adjusted in the new CSR principles and one can trust that the corporate division will energetically loan some assistance to the administration in adding to the comprehensive development of the country.

CLAIMING SOVEREIGN DEFAMATION UNDER CISG AND UNCITRAL IN INTERNATIONAL COMMERCIAL ARBITRATION

*Sreeja**

INTRODUCTION

There are numerous international commercial transactions taking place all around the world, some of them taking place even now as the paper is being written. An interesting aspect of these transactions is when the sovereign is one of the parties to these transactions. The repercussions of such an entity being a party are manifold, some of them being, *firstly*, transformation of the nature of these purely commercial contracts from a private contract between the parties into a contract entailing public accountability, *secondly* ,the imbalance of power that arises between an investor and the sovereign when the sovereign allows the participation of the investor in such contracts within ones country (one need not reiterate the numerous cases of expropriation of the property of investors and investors being kicked out of the country in such contracts especially when the investor is more vulnerable without a BIT supporting his back and a mere commercial contract is all that is there to protect his interests), *thirdly*, to their attribute of reputation not being just attached to a single party to the transactions, (as in case of CISG, of buyer and seller), but being attached with the sovereign, not to mention the reputation of the whole country that is represented by him thereby magnifying the level of caution to be exercised especially when the rights of the investor are not protected by BIT as in case of international investment arbitration cases.

The paper enquires into the aspect of defamation of the sovereign or sovereign defamation solely in cases where there are no BIT's to the rescue of either the investor and the state, in such an absence the void is almost always filled by contracts of private nature between the investor and the state governed by CISG as the parent contract, governing the claims of both the state and the investor, and the UNCITRAL model for dispute resolution by way of arbitration.

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Whether claims of defamation can be made, by the sovereign, on instances where the other party was involved in corrupt activities after being given the permission to invest in the sovereign's country, which is usually the reason behind conducting expropriation and expulsion of investors in the first place, especially so if it leads to fall of business rankings, a premier document prepared by world bank, ranking all the countries of the world in terms of the ease doing business with them that serves as a checklist for any other future investors who want to engage in trade relations with the countries.

ARBITRABILITY OF THE DISPUTE OF SOVEREIGN DEFAMATION UNDER UNCITRAL AND CISG

The arbitrability of the dispute is the colossus question in international commercial arbitration that ought to be considered while dealing with the dispute of sovereign defamation, as whenever a dispute arises one of the defences taken by the parties is non arbitrability of the disputes.[1]

Some contend that sovereign defamation is a matter of public domain or touching upon the aspects of public policy and hence not arbitrable. The general line of argument which is followed is that, public policy is used to describe the imperative or mandatory rules that parties cannot exploit.[2] "It essentially refers to a system of rules and principles, including standard, norms and custom that are accepted and commonly followed by the world community. Violations of these rules and principles, then, are violations of transnational public policy."[3] The policies declared by the state that cover the state's citizens. These laws and policies allow the government to stop any action that is against the public interest. There may not be a specific policy that an action pertains to but if it is not deemed good for the public it will be quashed."[4] The defamation of the sovereign or the country definitely affects its citizens and therefore is a matter of public law or public policy.

The UNCITRAL Model Law authorizes the court to refuse the recognition and

[1]"*Arbitrability of disputes*", in Gerald Aksen,Karl Heinz Bockstiegel, Paolo Michele Patocchi, and Anne Marie Whitesell (eds.),*Global Reflections on international law Commerce and Dispute Resolution: Libe Amicorum in Honour of Robert Briner* (ICC publishing S.A.,2005).

[2]PIERRE LALIVE, TRANSNATIONAL (OR TRULY INTERNATIONAL) PUBLIC POLICY AND INTERNATIONAL ARBITRATION: COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY ARBITRATION ICCA INTERNATIONAL ARBITRATION CONGRESS 261(1987).

[3]Jay R. Sever, *The Relaxation of lnarbitrabi/ity and Public Policy Checks on Us. And Foreign Arbitration: Arbitration out of Control?,* 65 TNL. L. REV. 1661, 1664 (1991), at 1688.

[4] BLACK'S LAW DICTIONARY (2nd ed. 1901).

enforcement of an arbitral award in case the court finds that "(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of that state, and (ii) the recognition or enforcement of the award would be contrary to public policy of the state.[5]Not only can the court refuse the enforcement of the award under the UNCITRAL Model Law Article 36 (1) (b),but it can set aside the arbitral award pursuant to the UNCITRAL Model Law Article 34 (2).[6]

It flows that application of article 34 of the model law that since the courts will not enforce an arbitral award if it deals with a matter of public policy the tribunal should not arbitrate on it in the first place thereby making public policy disputes non arbitrable.

The District Court for the Southern District of New York was asked to enforce an arbitral award which had been set aside for public policy reasons in *Corporacio´n Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracio´n y Produccio´n (the Pemex case)*[7] in which an arbitration occurred in Mexico, under Mexican arbitration law while applying Mexican substantive law, between two Mexican companies, one a subsidiary of a U.S. corporation. That award was nullified in Mexican courts on the grounds that the award violated Mexican public policy and further held that "it would be 'unacceptable and contrary to the country's legal system' to allow arbitrators 'to resolve a matter of public policy and general interest.'[8]

In *Wiko* v. *Swan,*[9] the U. S. Supreme Court delineated that the claim under the U. S. securities law (a public law issue) was non-arbitrable. It was further held in a string of other cases, that an issue that contradicts public policy would make it non-arbitrable.[10] In *Soleimany* v. *Soleimany* (C.A.),[11] the English court set aside the arbitral award due to its breach of Iranian law. The Court refused to enforce the award as contrary to public policy.[12]

The other line of argument that holds ground is that, it is a wide spread notion that

[5] The UNCITRAL Model Law in International Commercial Arbitration 1985 (adopted 2006).

[6] The UNCITRAL Model Law, Article 1(5) (1985) indirectly provides that, "it is not intended to affect other laws of the state which preclude certain disputes being submitted to arbitration."

[7]Corporacio´n Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. PemexExploracio´n y Produccio´n (Pemex), No. 10 CIV. 206 AKH, 2013 WL 4517225 (S.D.N.Y. Aug. 27, 2013).

[8] Pemex, 2013 WL 4517225, at 8.

[9] Wiko v. Swan, 346 U.S. 427 (1953).

[10]BOCKSTIEGEL, BOCKSTIEGEL, K., PUBLIC POLICY AND ARBITRABILITY, COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY ARBITRATION: ICCA INTERNATIONAL ARBITRATION CONGRESS 179(1987) at 183.

[11]Soleimany v. Soleimany, (1999) Q.B. 785, 804 (K.B.).

[12] *Id.*

defamation is a part of tort law [13] According to some courts, the Convention (CISG) does not deal with tort claims;[14] The dispute of sovereign defamation is non arbitrable, and therefore shall not be dealt with the tribunals who are not empowered under this convention to do the same.

However, the other line of argument that is pro arbitration and holds that even disputes touching upon the aspects of public policy are arbitrable justify the same with the help of the following developments across emerging jurisdictions that have made provisions & laws entailing arbitrability to these matters:

If the parties to this commercial contract have agreed to be bound by UNCITRAL model laws and the CISG as governing laws for the contract and all disputes emanating there from. The dispute as to arbitrability of a public policy dispute is conclusively a by-product or a resultant of the contract signed between the parties and hence has to be governed by the above mentioned laws and should be arbitrable.

One of the above mentioned laws is UNCITRAL model law. The *travaux préparatoires of which states* that the "*words 'including any objections with respect to the existence or validity of the arbitration agreement' [found in article 16(1)] were not intended to limit the 'Kompetenz-Kompetenz' of the arbitral tribunal to those cases where a party raised an objection*."[15] the *travaux préparatoires* emphasize the arbitral tribunal's power to examine on its own motion issues of public policy bearing on its jurisdiction, including the arbitrability of the dispute.[16]

The issue of Non-arbitrability has been dealt with the UNCITRAL model law in paragraph 2*(b)*(i) which was explained with the authorities of cases**.** In *Desputeaux v. Éditions Chouette (1987) inc.* dealing with the question of jurisdiction in the Canadian Copyright Act, a court held that the mere fact that the arbitral tribunal had to apply rules forming part of public order did not make the dispute non-

[13]MARIANAEE JENNINGS, BUSINESS: ITS LEGAL, ETHICAL AND GLOBAL ENVIRONMENT, Chapter 9 at 288.

[14]Bundesgerichtshof, Germany, (23 June 2010), in Internationales Handelsrecht, 2010, 217, 221; Appellationsgericht Basel-Stadt, Switzerland, (26 September 2008), http://cisgw3.law.pace.edu/cases/080926s1.html; Oberlandesgericht Köln, Germany, (19 May 2008), Unilex; Monomeles Protodikio Thessalonikis, Greece, 2007 (docket No. 43945/2007), http://cisgw3.law.pace.edu/cases/080002gr.html; CLOUT case No. 823 [Oberlandesgericht Köln, Germany, 13 February 2006], also in Internationales Handeslrecht, 2006, 145 ff.; CLOUT case No. 908 [Handelsgericht Zürich, Switzerland, 22 December 2005];

[15]Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), annex I, para. 150.

[16]A/CN.9/264, Analytical commentary on draft text of a model law on international commercial arbitration, under article 16, paras. 3 and 10, http://www.uncitral.org/uncitral/en/commission/sessions/18th.html.

arbitrable. Equally, the fact that the decision might also have a bearing on third parties, in so far the arbitral tribunal can determine the existence of a copyright, was not considered sufficient to make the dispute non arbitrable.[17]

In consonance to the above mentioned authorities It has been stated that, investor state arbitration regularly involve public law disputes about the scope and limits of the host state's regulatory powers, including, for example, disputes concerning limits of emergency powers,[18] regulatory oversight over public utility companies and the tariff they charge,[19] the control and banning of harmful substances,[20]the protection of cultural property,[21]or the implementation of non discriminatory policy.[22] Hence the matters relating to public policy can also be very well arbitrated.

Therefore there are 2 line of arguments both logical and supported by sufficient material to justify that the matter of arbitrability can go both ways, it depends of the arbitrator to choose which argument does he favour the most or decides to side with.

CLAIMING DAMAGES FOR LOSS OF REPUTATION OR SOVEREIGN DEFAMATION UNDER CISG

Damage can only be claimed under article 74 of CISG as it is the sole article that entails remedy in cases of breach of the clauses of this convention, even if done against a sovereign.[23] The other article (example 72)sure helps to calculate the quantum of damages that can be claimed but the remedy for the same is available under the said provision only.

Time and again the notion that loss of reputation cannot be compensated under CISG in international commercial arbitration has been voiced primarily because of the fact that The loss of reputation cannot be quantified as it is only pecuniary loss resulting from the loss of such reputation that can be compensated for and not the loss of reputation itself.

[17]Desputeaux v. Éditions Chouette (1987) Inc., Supreme Court, Canada, 21 March 2003, [2003] 1 S.C.R. 178, 2003 SCC 17.

[18]CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005).

[19] Biwater G auff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case no. ARB/05/22, Award (24 July 2008); Arguas del Tunari SA v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005).

[20]Methanex Corp v. US UNCITRAL NAFTA, Final Award of the Tribunal on Jurisdiction and merits, 3 august 2005; Chemtura Corp (formerly Crompton Corp) v. Canada, NAFTA (pending).

[21]Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt ICSID, Case No ARB/84/3, Award on the Merits, 20 May 1992; Glamis Gold v. US.

[22]Piero Forest, Laurade Carli and Ors v. Republic of South Africa ICSID, Case No ARB(AF)/07/1, Award, 4 August 2010.

[23]Knapp, in Bianca-Bonell Commentary on the International Sales Law, Giuffrè: Milan (1987) 538-548. Reproduced with permission of Dott. A Giuffrè Editore, S.p.A.

Article 74 reads as *Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.*[24]

It is clear from the black letters of the law stated above that CISG under article 74 only provides for losses "*consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach"*

A damaged reputation is completely insignificant as long as it does not lead to a loss of turnover and consequently lost profits. As long as he has the necessary turnover, he can be completely indifferent towards his image"[25]

As mentioned above, loss or injury to reputation can lead to pecuniary loss in the form of loss of profit. This can be called *material manifestation* of non-material loss, and to recover a claim for lost profit under UNCCISG, a party must provide the finder of fact with sufficient evidence to estimate the amount of damages with reasonable certainty.[26] In a French case, the buyer in France placed an order with the Spanish seller for 8651 pairs of shoes.[27] The seller denied having received any orders and refused to deliver. As a consequence, the buyer was late in supplying its retailers and 2125 unsold pairs were returned to the buyer. The buyer filed a claim for the 2125 unsold pairs and for loss of company's brand image due to the retail dealers' dissatisfaction with late deliveries. In order to prove his non-material loss, the buyer had produced affidavits of two representatives who testified to the dissatisfaction of the retail dealers and the difficulties which the buyer will encounter to keep them in the future.

The final decision on the matter was that compensation for the impairment of trading image was not recoverable in itself under the CISG. According to the court, article 74 CISG does not provide recovery for deterioration of commercial image or reputation in itself if it does not entail proved pecuniary damages. The affidavits produced by the buyer were considered to be only hypothetical. In this case, the distinction was laid down between an injury

[24]CISG, Article 74.
[25]Landgericht Darmstadt, (9 May 2000), http://cisgw3.law.pace.edu/cases/000509g1.html.

[26]Delchi Carrier, SpA v. Rotorex Corp., Nos. 95-7182, 95-7186, slip op. at 5 (2d Cir. Dec. 6,1995) ; Delchi 1994 WL 495787, (04 Feb 2016), http://cisgw3.law.pace.edu/cases/940909u1.html.
[27]*Id.*

to reputation as being non-pecuniary loss and pecuniary loss flowing from such an injury. The view that reputation in itself should be recognised as a separate non-material category with its own value was not shared by the present court.[28]

Still another case involved a German seller (plaintiff) and a Swiss buyer (defendant).[29]The county court found that the defendant's claims were in general not consistent and not substantiated. In terms of the alleged damage to reputation it was held that reputation in itself does not have an own value.[30]

Another German case involved an Italian seller (a wine producer) who sued a German buyer (the owner of a wine shop).[31] The argumentation was that due to non-conforming deliveries, turnover loss was caused by the loss of customers who failed to place new orders (loss of profits). According to the judges, the alleged loss did not constitute a direct loss of wealth caused by the seller's breach of contract in the meaning of article 74. In addition, the buyer failed to submit any corresponding facts.[32]

In another dispute between a Spanish buyer and a foreign seller court stated only that the buyer did not provide any evidence to show his loss of clients or loss of reputation in his commercial field as well as the knowledge of it that the seller could have had (foreseeability).[33] Furthermore, a Swiss case has made pronouncements with relation to loss of reputation.[34] that the court stated that 'while the "good will-damage" can certainly be compensated under the CISG ... it also needs to be substantiated and explained concretely.' In *Roundhouse v. Owens-Illinois, Inc*[35] where plaintiffs are unable to show lost profits or attach any kind of goodwill value to it, the tribunal held that such damages must be denied as purely speculative. Hence it can be understood that loss of reputation cannot be compensated until and unless it is backed by

[28]CISG, Article 74; Eric C. Schneider, Chapter 2.2., Damages Awarded by the Delchi Court, Consequential Damages in the International Sale of Goods: Analysis of 2 Decisions, (Feb. 3, 2012).

[29]Video Recorders Case, Case No. 10 O 72/00, Landgericht Darmstadt, 9 May 2000, (03 Feb 2016), http://cisgw3.law.pace.edu/cases/000509g1.html.

[29]*Art Books Case*, Case No. 331, Handelsgericht Zürich, 10 February 1999, (03 Feb 2016), http://cisgw3.law.pace.edu/cases/990210s1.html.

[30] *Id.*

[31]*Wine Case*, Case No. 12 HKO 5593/01, Landgericht München, 30 August 2001, (09 Feb 2016) http://cisgw3.law.pace.edu/cases/020830g1.html.

[32] *Id.*

[33] *Dye for clothes case*, Case No 755/95-C , by Audiencia Provincial de Barcelona, sección 16a, 20 June 1997, (09 Feb 2016), http://cisgw3.law.pace.edu/cases/020830g1.html, (Last accessed on 9/2/1016).

[34]*Art books case*, Case No 331, by Handelsgericht Zürich, 10 February 1999, (09 Feb 2016) http://cisgw3.law.pace.edu/cases/020830g1.html.

[35] Roundhouse v. Owens-Illinois, Inc., 604 F.2d 990 (6th Cir. 1979).

proper figures and statistics which show monetary manifestation of the same.

However, still some academicians claim on the basis of that very same provision that indeed there is a bit of scope to compensate the loss of reputation.

Article 7 of the CISG refers to the need to promote uniformity in its application and the observance of good faith in international trade.[36] The conduct of the contracting parties has to be governed by the principle of good faith in CISG and it also applies to the interpretation of the individual contract and to contractual relationships. The terms of the contract impose a general obligation of good faith because there can be no distinction between the interpretation of CISG and the interpretation of the contract itself.[37] The duty to adhere to good faith, both in performing obligations and exercising rights may, by implication be imposed upon the parties as part of a contract.[38]

If the investor is involved in corrupt practices, such as under-reporting of coal output, lesser payment of royalty, bribing the officials of State to get extra transport permits and evasion of payment of taxes and export duties and OTT etc. These instances clearly show violation of the principles of good faith which is the breach of an implied obligation to act in good faith, since a mere breach of a contractual obligation is sufficient to trigger liability[39], the investor could be liable to pay damages to the sovereign for at least breach of that contractual obligation causing non material losses such as defamation or loss of reputation of the sovereign.

It based its decision on the following logic that was; Non-material loss can be defined as loss, flowing from an injury or damage to non-material values. Non-material values, in turn, are such values that do not have *"economic content"* and are inseparable from the personality of a bearer of these values.[40] Namely, non-material values can include the following: life, health, dignity, honour, reputation, etc. Accordingly, non-material loss is loss or harm, flowing from injury to health, physical or moral sufferings, and damage to honour and reputation, etc.[41] It has been seen that, while loss of reputation in itself cannot be

[36]CISG, Article 7(1).
[37]M.J. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACTS LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, (2d Ed.), at 84.
[38] *Id.*

[39]C.F. FARNSWORTH, FARNSWORTH ON CONTRACTS II, at 448, 449; TREITEL, LAW OF CONTRACT, at 746–57.
[40]A.P. SERGEYEV & Y.K. TOLSTOY EDS., "CIVIL LAW", Part 1, 1998, at 312 (translation of the author)/ "GRAZHDANSKOYE PRAVO", Chast 1, 1998.
[41]UNIDROIT Principles, Official Comments to Article 7.4.2. of the paragraph 5.

recovered,[42] pecuniary loss caused by loss of reputation has been held recoverable in several cases.[43]

As mentioned above, loss or injury to reputation can lead to pecuniary loss in the form of loss of profit. This can be called *material manifestation* of non-material loss. Loss of profit, in a commercial context, is, probably, the main negative consequence which can be caused by loss of reputation. Being "material manifestation," loss of profit is more likely to be claimed in cases, where reputation has been damaged.[44] As in the case with the loss of reputation in itself, the requirements of Article 74 are of *particular importance* in establishing the liability of a party in question.

There it is supported that Article 74 does not exclude losses arising from damage to non-material interests, such as the loss of an aggrieved party's reputation because of the other party's breach because there are certain court decisions that have implicitly recognized the right to recover damages for loss of reputation or goodwill like the *Plastic carpets case* or the *Art books case*.[45]

Now if a case so arises that involves a matter of corruption and bribery done by the investors which being widely reported led to "ease of business" ranking of a country that demands compensation for such defamation, then in such cases these international rankings influence investments influx in the country and the reduction of the same by a considerable magnitude reflects nascent repulsion of the investors from the state and therefore indicates a pecuniary loss to the country making it competent to claim moral damages due to loss of reputation however these pecuniary losses have to be quantifiable to be compensated .

However, U.S. courts also have found, as a matter of law, that loss of goodwill damages was no subject to proof with reasonable certainty and that evidence of such loss should be excluded.[46]

[42]Addis v. Gramophone Co Ltd, [1909] AC 488; O'Laoire v. Jackel International Ltd., (No 2) [1991] ICR 718.

[43]Aerial Advertising Co v. Batchelor's Peas Ltd, [1938] 2 All ER 788; Groom v. Crocker, [1939] 1 KB 194; Anglo-Continental Holidays Ltd v. Typaldos Lines (London) Ltd, [1967] 2 Lloyds Rep 61; GKN Centrax Gears Ltd v. Matbro Ltd, [1976] 2 Lloyds Rep 555.

[44] GKN Centrax Gears Ltd v. Matbro Ltd, [1976] 2 Lloyd's Rep 555.

[45]*Plastic carpets case*, Finland Helsingin hoviokeus ,Helsinki Court of Appeals,(26 October 2000); *Art books case* [Switzerland Handelsgericht des Kantons Zürich (10 February 1999) ; *Footwear case* France Cour d'appel, Grenoble (21 October 1999; *Dye for clothes case*, Spain Audienca Provincial Barcelona, 20 June 1997, (09 Feb 2016), http://cisgw3.law.pace.edu/cases/020830g1.html.

[46] Eric C. Schneider, *Consequential Damages in the International Sale of Goods: Analysis of Two Decisions*, http://www.cisg.law.pace.edu/cisg/wais/db/articles/schner2.html.

And even if that moral loss has no material manifestation in a very recent development, the CISG-AC, in a recent expert opinion on damages, clearly stated in black letters of the rules that an infringement of goodwill is a pecuniary loss to be compensated under Article 74 of the CISG if the prerequisites of this provision, in particular the foreseeability of such losses, are met.[47] This is in conformity with the opinion of most legal writers like *Witz; Herber & Czerwenka,* and *Von Staudinger Commentary*[48]

In *Europe Cement v. Turkey*, along with other claims, In addition, Turkey claimed USD 1 million in monetary compensation for the reputational harm done to its international standing that the fraudulent claim was deemed to have caused it during and investor state arbitration [49]. Turkey argued that 'monetary damages was an established remedy for moral damage' (i.e., including for States) and that the claimant in this case in bringing a '"jurisdictionally baseless claim asserted in bad faith and for an improper purpose" had caused the Republic of Turkey "intangible but no less real loss"'.[50] The tribunal held that any potential reputational damage suffered by Turkey was remedied by the reasoning and conclusions set out in the award and the award on costs.[51] Thereby, acknowledging that the loss of reputation is a moral damage and is liable to be compensated.

The same has been awarded in a variety of cases like the Helsinki Court of Appeals, which upheld the decision of the Court of First Instance, which had allowed damages, having resulted from loss of goodwill.[52]

Commercial arbitration cases where moral damages were claimed and awarded are two reported arbitral awards of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) in each of which three Egyptian arbitrators applying Egyptian law granted moral damages. In the first one, an African software company brought claims against two software companies, one from North America and the other from Europe, based on a contract for the marketing of computer programs via the claimant as a non-exclusive agent. Under the arbitration agreement, 'all disputes related to the interpretation of this contract, its application or any other matters related thereto' were to be referred to an arbitral tribunal. When the

[47] CISG-AC Opinion No. 6, *supra* note 5, cmt. 7 sub sec. "Opinion" No. 7.
[48] Witz/salger/lorenz, ; Herber & Czerwenka, ; von Staudinger Commentary.
[49] *Id*., para. 128.
[50] *Id*.
[51] *Id*.
[52] *Plastic carpets case*, Finland Helsinki Court of Appeal, 26 October 2000, (09 Feb 2016), http://cisgw3.law.pace.edu/cases/001026f5.html.

respondents terminated the agreement, the claimant brought a claim for damages, including for compensation of 'moral damages based on the concept of abusive use of rights'. It decided to award the claimant, inter alia, 'damages for moral prejudice'.[53]

In the other CRCICA case, an African tourism regional authority and an African tourism company had entered into a contract related to an international festival in one of the ports of an African State. The festival was to be a cultural event of the highest standards. When the respondent failed to comply with several of its contractual obligations and the festival turned out to be a failure 'which gave a very bad image of the country', the tourism authority brought damages claims for breach of contract. The tribunal held that the claimant had suffered a loss of reputation both of the city and of the country and awarded USD 2 million in moral damages.[54]

It is also important to note that loss of goodwill damages was not subject to proof with reasonable certainty and that evidence of such loss should be excluded.[55] It has also been held that infringement of goodwill is in itself a pecuniary loss that must be compensated under Article 74 of CISG if the prerequisites of this provision, in particular the foreseeability of such losses, are met with.[56] Therefore, damages for sovereign defamation are recoverable under Article 74 of CISG.

As mentioned in Gary Born put (albeit in a slightly different context) in *Biwater Gauff v. Tanzania*, 'there is no right without a remedy (*Ubi jus ibi remedium*)'[57]. In sum, where a party has suffered moral damage as a result of a breach of a rule of general international law which is relevant for the interpretation and application of a given investment treaty, moral damages should in principle be available as of right subject to basic principles of causality and remoteness.[58]

[53]Case between an African software company and two software companies; one North American and the other European, CRCICA Case No. 109/1998 (1999), reported in Alam-Eldin, 183–190.

[54]Case between an African tourism regional authority and an African tourism company, CRCICA Case No. 117/1998 (1999), reported in Alam-Eldin, 125–128.

[55]Neville Chem. Co. v. Union Carbide Corp., 422 F.2d 1205, 1225 (3d Cir. 1970).

[56]CISG, AC Opinion No. 6, para 7. "Opinion" No. 7, http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148, (Last accessed on 16/1/2016); Sapphire International Petroleums Ltd. v. National Iranian Oil Co., Arbitral Award, (15 March 1963), Reprinted in 35 I.L.R. pp. 136, 182 (1967); 3 WILLIAM S. HEIN & CO., WHITEMAN, DAMAGES IN INTERNATIONAL LAW (1943), at 1694, 1697.

[57]Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, Concurring and Dissenting Opinion of Mr Gary Born, para. 32.

[58]*Id.*

EASE OF BUSINESS RANKING AND INDICATION OF A MATERIAL LOSS

In a case of sovereign defamation parties especially the sovereign, as a way of substantiating their losses resort the fall in their ranking done by any independent organisation such as World Bank etc. One such report being the World Bank's report on ease of business ranking. In its latest report, Comparing Business Regulations for domestic firms in 189 Economies, Kaushik Basu[59] himself stated that "*Controversy has often arisen from reading more into the ranking or indicator than what it actually captures.... It has been pointed out that there are economies that do poorly on the Doing Business indicators but that nevertheless get a lot of Foreign Direct Investment (FDI) from global corporations."*

As evident the ease of business ranking is not in itself an indicative of a future loss with certainty, or with concrete claim of loss, since it is not indicative of a future loss with certainty the contention that it will eventually lead to pecuniary losses is too farfetched and even non permitted under section 74, negated on the principles of foreseeability which runs as:

"*...Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract*." The CISG, does not provide for the awarding of incidental damages: it mentions only the recovery of consequential damages,[60] which, under CISG Article 74 must be "foreseeable" to be recoverable.'[61]

Also it is held in a string of cases that damages for lost goodwill or lost profits based upon potential future sales are not awarded either because the damages are unforeseeable, not proximately caused by the breach, or without proof with reasonable certainty.[62]

In another case, the court while explaining the issue of foreseeability where the trial court properly excluded evidence of lost profits and injury to goodwill and reputation as unforeseeable when date for delivery of the goods was not certain.[63]

[59]Senior Vice President and Chief Economist, The World Bank Washington, DC.

[60]CISG art. 74, S. TREATY DOC. No. 9 at 37, I.L.M. at 688; KRITZER, at 19; MURPHEY, at 459; White & Summers, at 266.

[61]CISG art. 74, S. TREATY Doc. No. 9 at 37, 19 I.L.M. at 688.

[62]National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491 (3d Cir. 1987) (describing proximate cause and speculative damages case); Dacor Corp. v. Sierra Precision, 753 F. Supp. 731, 733 (N.D. Ill. 1991)

[63]George H. Swatek, Inc. v. North Star Graphics, Inc., 587 A.2d 629, 631-32 (N.J. Super. Ct. App. Div.1991)

It was explained by the *Schlechtriem-Commentary* that according to the purpose of the contract, the risk of non-pecuniary damages must appear so near, logical and natural that a diligent person has to anticipate them. A loss is foreseeable if the materialized risk is essentially the same as the risk which was foreseeable at the conclusion of the contract and which the promisor impliedly assumed. In this context, also the extent of the loss must have been more or less foreseeable. If the actual loss is considerably more extensive, the liable party has to cover only for the foreseeable part. [64]

The ranking does not include parameters like prevalence while awarding points to the economies and hence the claim that there was fall in ease of business ranking due to the corruption and bribery done by the subordinates itself stands defeated.

Therefore even if at the instance of the investor, involved in corrupt activities, there is fall in the business ranking, the same in no circumstances serves as an indicator of manifestation of any loss, thereby making it difficult to prove a claim of sovereign defamation in such cases and demand damages for the same.

CONCLUSION

Moral damages are recognized in most national legal systems. Still, claims for moral damages in commercial arbitration appear to be rare. Given the widespread recognition of moral damages in national laws, the *lex causae* alone cannot explain why this is so. Two other factors can be mentioned which at least in part help to provide an answer[65]. First, compensable moral damage most often arises from a violation of the personality rights of natural persons. Such moral damage cannot normally be sustained by corporations or States. Second, transnational commercial disputes mostly concern the adjudication of claims of pure economic or financial injury. These factors (together with the *lex causae*) undoubtedly contribute to substantially limiting the relevance of moral damages in typical transnational commercial disputes.[66]

Moral damages are also widely recognized in international law. Similar considerations as those just outlined above for commercial arbitration also apply to investment arbitration. Yet it is striking that these factors do not appear to have unduly limited the free

[64]Schlechtriem-Commentary, at 568-569.

[65]Simon Greenberg & Kristina Osswal, *WTO Litigation, Investment Arbitration, and Commercial Arbitration, The Arbitrator Selection Process in International Commercial Arbitration*, Chapter 4B.

[66]*Id.*

choice of parties to request moral damage in investment arbitration, at least not in recent years. Indeed, there is by now a discernible trend (perhaps even a minor revolution) according to which monetary claims for moral damage are increasingly being requested by foreign investors in investment arbitration. The clear majority of such claims have been advanced by natural persons. However, the same practice indicates that corporations (and to a lesser extent, States) are also requesting monetary compensation to remedy moral damages. In addition, States in investment arbitration are also increasingly requesting non-pecuniary relief for moral damage in the form of a declaration of wrongfulness. Aside from various personal injury claims, the head of loss or injury for such moral damages essentially relates to loss of reputation and abuse of process.[67]

As taking a note of the abovementioned factors and their explanations one is forced to view the imbalance that is created in the international commercial arbitration, the irony being that people usually believe that the balance is heavier on the side of the sovereign but in reality it is not heavy on either side. The sovereign cannot take rash steps and resort to expropriation of the property of the investor without experiencing fall in the business rankings and international condemnation, also as proved from the above factors the sovereign cannot sue for its defamation without showing a material manifestation of this non material loss thereby making a fine balance between the investors interest which are vulnerable due to non-existence of a BIT and check on the powers of the sovereign by negating it the right to sue for its defamation if caused as per the misconduct of the investor.

One can even see the balance that is played out due to sufficient arguments being present to either of the parties to protect their interests, therefore, it concluded that even when there is an absence of the BIT as usually in the case of investment arbitration to protect the rights of both the parties a commercial contract holds the ground in a manner good enough.

[67] *Id.*

GREAT RISKS BUT GREATER REWARDS

Avi Aggarwal[*]
Chhavi Kiran[**]

INTRODUCTION

Contracts form the backbone of any business deal[1]. At the very heart of a venture capital is a complex contracting structure which has two limbs: a contract between the investors and the venture capitalist, and a contract between venture capital fund and a portfolio company[2]. It will be seen how venture capital market is inherently ridden of flaws like those of uncertainty, information asymmetry and agency costs in magnified forms[3], but special contractual tools are incorporated to effectively reduce these flaws. Primarily these contracts should be successful to minimize the impact of external economic factors.

Though there is no single ideal approach for organising the structure in the best possible manner and though the development path of any country cannot be replicated, the outcome of this path can be[4]. The difference will essentially lie due to factors such as their respective culture, economy, legal structure, and political framework.

The most vibrant venture capital markets in the world are China, US and Singapore. However, even with India having a completely different perspective and approach has become one of the fastest growing start-up eco-system in the world. For instance, major differences are unavailability of Limited partnership and draconian regulatory regime overseeing every aspect of the Venture Capital Fund (VCF) from registration to investment conditions has caused some troubles.

In this paper, we will look at Singapore's venture capital contractual structure in Part I followed by a very different contractual structure adopted in India to cross the same hurdles intrinsic to a venture capital contract in Part II, going further by pointing out the few gaps which can be filled to maximize the impact.

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[1] *Evolution of Decision and Control Rights in Venture Capital Contracts: An Empirical Analysis*, Carsten Bienz Norwegian School of Economics and Business Administration, Financial Markets Group and Centre for Financial Studies and Uwe Walz University Frankfurt and Center for Financial Studies (December 2006).

[2] PRANAY CHANDRAN, VENTURE CAPITAL CONTRACTING IN INDIA, (July 16, 2010), thesis submitted to WHU Master of Law and Business Program.

[3] *Id.*

[4] *Id.*

PART I- SINGAPORE

CONTRACT BETWEEN VC AND INVESTORS

Nature of Contract

Venture capital firms are organized by way of a Limited Partnership (LP) which is an alternate form of business. It is pertinent to understand and delve into how such an engineering structure resolves manifold concerns of venture capital as also aid in its development.

From a legalistic point of view, the rationale behind incorporating a Limited Partnership can be explained by the following reasons, it is not a separate legal entity, and hence gives a wide scope of liberty and choice to incur unlimited liability for investors, especially for institutional investors[5]. They will also be able to shield themselves from the tax regime.

Furthermore, it is extremely favorable due to the flexibility it brings for parties by way of a partnership agreement wherein they can incorporate covenants and provisions depending on their nature of negotiations[6]. Such elasticity is important as venture capitalists (VC) need to employ restrictions to protect themselves from the high risk they get into, which is generally determined on the basis of fund size, compensation package and reputation of VC in market[7]. However, over use of contractual restrictions may become a cause for erosion of value of contract and thereby limit the flexibility to diversify risk or reduce agency costs[8]. It thus needs to be exercised sparingly for availing full benefit of such liberty.

Another unique characteristic to a LP is the relationship arising out of it between the VC (general partners) and the investors (limited partners). They share a principal-agent relationship wherein the principal takes steps to monitor and oversee the agent so as to give him least chances to act opportunistically. The limited liability of investors is definitely an added incentive for them to incorporate a LP, and for the VC's though they incur unlimited liability, it is off-set by the various protective measures they have at their rescue. Not only that, the reward is in the form of 20% share in profits against a mere 1% capital contribution from their side. Contract also enhances the attractiveness of venture capital by issuing convertible preferred stock, by which

[5] Report of the Study Team on Limited Partnerships, Summary of Recommendations on Limited Partnerships.
[6] Joseph A. McCahery & Erik P.M. Vermeulen, *Limited Partnership Reform in the United Kingdom: A Competitive, Venture Capital Oriented Business Form*, 5 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW.
[7] *Id.*
[8] *Id.*

entrepreneurs can regain their control, when IPO is conducted[9].

On an important note, in a LP limited control is extended to investors and there is an automatic seizure of limited liability if they are found to participate in the management of LP or as may be referred as the VCF. This shields the VC's from any abuse of power and any sort of unruly behavior. However, since it is clear how the balance of power keeps shifting from parties, law has provided for a "safe harbor rule" to limit or even in some cases nullify the effect of such a strict provision which might be too unfavorable and repulsive for investors as it can lead to a very intrusive control in hands of VC's. For this purpose, this rule elucidates a negative list of actions not amounting to participating in management by which investor's will be in a position to play a more vital role in the functioning of the LP.

How does it maximize efficiency?

Moving on to the real essence of how exactly the contractual arrangement breaks into these uncertainties and makes venture capital investments an attractive proposition for both venture capitalists and investors with the same effect, we will examine three main sub-heads to prove the point.

- *Control*-Though on the face of it, the structure reflects an enormously discrepant division of control and presents an extreme version of disproportionate separation of control and ownership[10] where General Partner (Venture capitalist) holds almost complete control if not the entire decision making power, such control is necessitated in order to combat issues that arise by investing in early-stage companies and high risky ventures like agency costs, uncertainty and information asymmetry[11].
- *Compensation*-The compensation paid to the VC, majorly comprises of a 20% carried interest from the overall profit the VCF makes[12]. This is strictly to align its interest with investors and keep the VC motivated to lend its expertise and skill with utmost care and caution. Thus, it can safely be concluded that VC earns returns that are proportional to those earned by investors[13]. However, to off-set another agency problem, where VC might have the inducement to realise profitable investments before any unprofitable investments, there is a trend to delay the

[9] Ronald J. Gilson & David M. Schizer, *Understanding venture capital structure : A tax explanation for convertible preferred stock*, HEINONLINE 116 HARV. L. REV. 874 (2002-2003).

[10] Ronald J. Gilson, *Engineering Venture Capital Market: Lessons from the American Perspective*, HEINONLINE -55 STAN. L. REV. 1067 (2002-2003).
[11] *Id.*
[12] *Id.*
[13] *Id.*

payment of VC until their performance can be evaluated and judged[14].

- *Mandatory distributions and fixed term*-It is understood that VC's and entrepreneurs are more likely to take riskier decisions than that would serve the investors[15]. For this, the organisation is structured such that VC's have a fixed term which assures that market at some time will assess their performance and make it more observable to showcase whether they preferred risk over expected returns[16]. Simply put, their reputation is at stake and hence they will not over exercise their discretion of using investor's money with recklessness. Such a fixed term ensures curtailing of any kind of opportunism they are liable to abuse. It functions like a contractually imposed takeover where VC has to leave it to the investors to decide whether they should continue or not[17]. In regard to mandatory distribution of proceeds, since they get a 2% management fee, they are more likely to make the effort to preserve the capital in the fund and consequently reinvest the proceeds of realised investments as long as is viable[18]. This also has a direct effect of reducing the downbeat consequences of being a part of a risky, volatile and dynamic industry such as venture capital.

CONTRACT BETWEEN VENTURE CAPITAL FUND AND ENTREPRENEURS

Nature of Contract

Such legal contracts between venture capital funds (VCF) and entrepreneurs essentially aim at the same goal of allocating risk, return, and ownership rights amongst them. Though, such distribution of rights depends on a number of factors like that of capability of the entrepreneur, the attractiveness of the portfolio company or the business plan, the stage of the company's development, negotiation skills of the parties[19] and also the overall state of the venture capital market.[20]

How does it maximize efficiency?

For this contract, essentially there are five techniques used to enhance efficacy of venture capital structures.

- *Staged financing*-The investor is given a right to discard the portfolio company after every milestone is met, which is set at certain events when performance and information can be

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*

[19] WILLIAM L MEGGINSON, TOWARDS A GLOBAL MODEL OF VENTURE CAPITAL? (Dec 31, 2001).
[20] Paul and Josh Lerner, *Money Chasing Deals? The Impact of Fund Inflows on Private Equity Valuations, Gompers*, 55 JOURNAL OF FINANCIAL ECONOMICS (Feb 2000).

judged and evaluated. This effectively deals with uncertainty problem of financing subsequent rounds. However, it is vital to point out how such a right to discard has its limits, and is balanced by the high cost it owes to the entrepreneur[21].

What it obviously aims to achieve is align interest of entrepreneur and VCF so as to provide a performance incentive to the portfolio company to meet the milestones and hence ensure their funding for subsequent rounds also. Further, it is not impossible for entrepreneurs to find new potential investors, however the contractual design is such that it makes it difficult and an unfavorable option. For instance, new investors owing to market knowledge will realize they are being solicited only because the previous ones were discontent with their performance[22]. Moreover, since the investor rights agreement gives VC a right of first refusal in refusing to finance succeeding rounds of investment, it is a huge hindrance to new investors[23].

Another agency cost that staged financing reduces is disallowing any opportunistic behavior by entrepreneur since they transfer control to VC which means they are unable to take decisions which might favor them but disfavor VCF[24]. Of course, the uncertainty it reduces is only which is within the realm and control of parties, however it increases the likelihood of expending more energy and effort on the part of entrepreneur[25].

Furthermore, it ministers in bridging the information gap between them since entrepreneur is naturally able to understand the technical nuances of its' business better than the VC, especially at the early-stage[26]. It is particularly difficult since there is no background knowledge of business or track record details to review the performance of the business. An added advantage is to bind the entrepreneur in telling the truth about the business plans as the right to abandon will become exercisable on failing to meet such pre-determined milestone plans[27].

Lastly, it also caters to the problem of VC's abusing their substantial power of discretion which they are likely to overstep, by way of negotiating a high price in the consecutive rounds of investments. There are in-built limitations/qualifications to it in the form of market forces which play the role of policing their exertion of discretion[28].This has been

[21] *Supra* note 10.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

termed as conservation of discretion principle and comes in handy to keep a check on VC's[29].

- *Allocation of control*-Control acts a lever to regulate and leash entrepreneur's responses based on uncertain and unspecified events. VCF's are given three types of controls in the form of-right to refuse funding in new rounds of investment if milestones are not met since in absence to such discretion to act in response to what it finds out, they would not exert that kind of resources and energy in the first place[30]. Secondly, VC's are given interim control by way of deciding the composition of board of directors, even to the extent of replacing the entrepreneur itself if it can justify the concerns[31]. These restrictions on the entrepreneur's role are in the form of negative covenants in their contract. However, it is obvious that such power comes with qualifications and is only a periodical control which constantly shifts between them, as regards to who is at a higher bargaining position at that time of the transactional relationship. Lastly, the VC by reserving such a right to terminate puts pressure on the entrepreneur to be honest with the viability of their project and demonstrate their belief, so as to signal to the VC that they are willing to accept the punishment in the form of complete shift of control from them.

The rationale behind having such perverse disparity in discretion is due to ever growing disparity of information which is created as the succeeding rounds complete as between the entrepreneur and the VC. Of course, this mechanism is the most effective tool to deal and diminish the fatal effects of uncertainties in the market.

- *Form of compensation*-In essence, a large chunk of compensation received by the entrepreneur is determined by the success and value created of a portfolio company. Thus, they have all the reasons to cooperate with VC in order to create maximum value from their investment. Their salary can be expanded and off-setted by the additional value generated, and thereby increase their own stake and control and issue stock options to members[32]. Such prototype of options used in the governance structure is tied to certain events where they can be triggered. This leads to greater risk for entrepreneurs if the company does not perform well since VC shares disproportionately in such events of downfall, but on the other hand, a proportionate sharing of profits in the event of a windfall[33].

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

- *Role of Exit*-The compulsion/necessity to exit from both the contracts stems from the problems inherent in both these relationships. In order to enable recycling its non-cash contributions from portfolio companies and thereby use cash contributions from such successful portfolio companies to invest in start-ups[34], there has to be an effective mechanism of exit which is provided for in the structure. From an entrepreneur's perspective, an exit allows them to get a hold of the control of their company again (eg. after IPO). On the other hand, it is clear how such recycling of investments will enable the investors to have a yardstick against which they can measure the performance of VCF and thus a successful exit will provide the necessary impetus required to persuade future potential investors in availing their expertise.
- *Reputation*-It is interesting to note how interaction of these contracts increases the efficiency of both contracts. The willingness of investors to transfer complete control on decisions of investment to VC, and passing of such discretion[35] is safeguarded by the real threat to VC reputation in the market that they are perpetually and naturally fear. A VCF is also liable to lose out on the best new entrepreneurs if it behaves opportunistically, as also it will fail to attract investors if it does not raise enough returns for them.

[34] *Id.*
[35] *Id.*

PART II- INDIA

INTRODUCTION TO VC MARKET AND REGULATORY REGIME

By the volume of transactions and investor funding in India, it can be safely said that the venture capital industry is well established, robust and vigorous[36]. There is empirical data and statistics to prove this, as provided by the Indian Venture Capital Association (IVCA) venture capital deals, increased by 28% to $15.2 billion, inching closer to 2007 peak levels of $17.1 billion. Overall deal volume in India grew by 14%, with early and growth stage deals accounting for 80% of total deals in 2014[37]. In 2016 it is expected to grow at an even faster pace and it is estimated to have an upward steep in the start-up activity [38]

The investment statistics should however be analyzed in the backdrop of only those funds which are registered and it is clear that not many VCF's have registered themselves and hence

[36] *Supra* note 2.
[37] BAIN & COMPANY, INDIA PRIVATE EQUITY REPORT (2015).
[38] Venture capital in India, Prequin funds in market statistics report (2014).

there is minimal data on them[39]. Thus, the result of scrutinizing the VC market in India is testament to the fact that it is on the right path and has been successful to create a vibrant market, though there are loopholes which can be rectified which will be elucidated in the course of this paper.

The regulatory framework throws light on the entire attitude of the government towards venture capital and hence needs to be looked at before delving into the intricacies of the contractual tools. On reading the stringent rules under these laws, it will be easier to appreciate in which respects venture capital contracts are effective and which parts need an overhaul for maximization. Firstly, the main regulators who oversee the Venture Capital funds are SEBI, RBI and Income Tax Act, with SEBI being the nodal body for registering and regulating VC's. There are separate rules governing foreign[40] and domestic venture capital fund[41], but for the purpose of this paper we will compare Singapore's venture capital contracts only to the latter part.

Before investigating into the efficacy of contracts, it will be useful to understand what qualifies as a Venture capital fund. There are three determinants to qualify which is, a dedicated pool of capital, raised in a manner provided for, and fulfillment of investment criteria. Registration is the primary step for VCF which is not found in Singapore. In India also though it does not invalidate a VCF due to non-registration, it exempts them from availing certain important benefits.[42]

CONTRACT BETWEEN INVESTORS AND VENTURE CAPITALISTS

As per the SEBI regulations, a VCF can be formed only in the form of a trust, company or body corporate. But by analyzing empirical data, a trust is formed for most of them for effectual functioning, thus we will look at other forms only restrictively and our focus will be on effectiveness of a trust.

As regards a contract between investors and VC's, the effect of incorporating a company is such that the objects clause should specify venture capital as its business, disallow invitation to public for subscribing shares, no member or officer should be involved in contentious issues in capital market and not be convicted of any offence to verify the

[39] The Advisory Committee on Venture Capital, set up under Chairmanship of Dr. Ashok Lahiri (2003); www.sebi.gov.in.
[40] SEBI (Foreign Venture Capital Investors) Regulations, 2000.
[41] SEBI (Venture Capital funds) Amendment, 2000.
[42] *Supra* note 40.

competency of such personnel's. Moreover, the funds raised cannot be used for any other purpose and the unit holders become the beneficiaries reducing the status of the company to have only fiduciary interest of the fund and therefore, no matter what form of VCF is created the essence is that of a Trust[43].

As regards a body corporate, it has to be set up under Centre or any state laws, carrying the business of venture capital, with almost similar other requirements as that mentioned for a company.

On forming a trust, a trust deed has to be entered into which has the effect of a Limited partnership agreement to the extent that it provides the much needed flexibility to the parties. The regulatory framework governing trust is stable and permits the parties to write its own standard of governance[44].

The deed has to be registered under the Registration Act, 1908 and again has the same requirements as enlisted for a company. Further, minute details of functioning of a trust explain how it has been an effective structure for VCF. We will thus examine the parties involved and their consecutive roles in the entire process.

The person who reposes confidence is the "author of the trust, the person who accepts the confidence is called the "trustee", the person for whose benefit the confidence is accepted is called the "beneficiary"[45]. For added clarification, the role played by parties is such that the investors are beneficiaries and the venture capitalists are their trustees[46] with the effect that beneficial interest lies with the investors and the legal interest lies with the managers. The trustee is in charge of the overall administration of the trust and receives a fee, which is an equivalent to a management fee under limited partnerships. They usually appoint an investment manager for managing the assets of the trust.

Moreover, the investor is called as the contributor who is required to make a capital commitment by way of entering into a commitment agreement.[47] It can be inferred that the liability a beneficiary undertakes here is negligible as compared to under Singapore structure wherein the investors is bound (though limited) up to 99% of its capital contribution.

Moving onto the effectiveness and viability of trust as compared to a company or body corporate, we can concur that it is a more

[43] VINOD KOTHARI & COMPANY, VENTURE CAPITAL FUND IN INDIA.
[44] NISHITH DESAI, GLOBAL, REGULATORY AND TAX DEVELOPMENTS IMPACTING INDIA FOCUSED FUNDS, (June 2015).
[45] *Id.*
[46] NIDHI BOTHRA,VINOD KOTHARI & COMPANY, VENTURE CAPITAL REGULATIONS- INDIA.
[47] *Supra* note 46.

tax advantageous form[48]. Though the shares held by the trust or those that can be acquired are only limited to equity shares, signifies any preferential issue might lead to losing tax incentives[49]. Equity shares are preferred only due to the high returns attached to it as also the high possibility of having an active participation in the functioning of the company. Moreover, no obligation of fixed interest arises, since the dividend is solely dependent on the quantum of profit earned[50]. On the other hand, preference shares require a fixed amount of dividend irrespective of the company's performance[51].

Further, the requirements are negligible and compliance is not very cumbersome, replicating the effect of limited partnership again. Even for the purpose of winding up, trust is a simpler process. The distribution of returns on expiry of tenure of trust is more direct without many complications[52]. In a trust, there is no problem of repatriation of capital wherein there are losses as there is no hurdle of redemption of equity shares permitted only out of profits or newly issued shares[53].

One of the few shortcomings of a trust is that it is difficult to identify where beneficiaries are non-resident and for maximizing the effect, it should be altered to that extent. There are numerous investment restrictions stipulated under SEBI regulations which hamper the smooth and free functioning of a VCF. A minimum of Rs.5 lakhs investment is essential from any investor and shall be accepted only by employees, principal officer, directors of venture capital fund or employees of fund manager or Asset Management Company[54]. Not just that, it is also bound to invest minimum of Rs.5 crores in each of such funds set up by it[55]. This calls for an amendment since it has a huge negative impact on the attractiveness for start-ups who might not be able to raise so much money at the initial stage.

There are compliances with respect to winding up as well wherein the period of the fund cycle is matured it automatically terminates. However, by taking into account the interest of trustees and investors, the fund can even be wound up pre-mature by 75% majority resolution passed by them.

As regards obligations of VCF, it is instructed to not carry out any activity but that of venture capital, and is bound to make disclosures in respect to their investment

[48] ERNST AND YOUNG, PRIVATE EQUITY: BREAKING BORDERS.
[49] *Supra* note 44.
[50] GEO JOSEPH, THE STUDY OF VENTURE CAPITAL FINANCING-THE RIGHT PROCESS OF REACHING A VENTURE CAPITALIST AND FACTORS EFFECTING THE CAPITAL DECISIONS.
[51] *Id.*
[52] *Supra* note 44.
[53] *Id.*
[54] *Id.*
[55] *Supra* note 47.

strategy and the life cycle. It receives units listed on any recognized stock exchange only after 3 years of its issuance. It is obligated to enter into a subscription agreement containing terms and conditions stipulating the proposed funds to be raised. A copy of this agreement and the money collected is placed before the Board. Lastly, VCF are also expected to maintain its books of accounts, records and documents for a period of 8 years[56]. It can be seen how stringently and closely VCF's are regulated in India which is the only aspect which makes it less feasible, even though the contractual structures and remedies for inherent flaws are battled with the same vigor and effect.

CONTRACT BETWEEN VCF AND THE PORTFOLIO COMPANY

Unlike the first contract (formation of VCF) wherein absence of a limited partnership in India has an absolute different approach, the second part of the contract in VC investments is structured in the same fashion and involves the same tools to dodge the same imperfections. Instead of dealing with abstract concepts of control and investment procedure here, we will examine real data to reflect how it effectively manages the difficulties in risky ventures in these startup firms.

The substantial chunk of stake and ownership of the portfolio company is bestowed on VC's as against the entrepreneurs which deems to be a more desirable situation. In a survey conducted, it was found out that an estimate of VC stake in companies is 32.32% (average 30%)[57]. Since voting rights correspond to the ownership in the company, they are naturally not holders of majority voting rights[58]. But what VC's are seen to do is enlarge their ownership on account of non-fulfillment of certain milestones and performance targets[59]. Thus, it can be safely concluded that control exerted by parties by way of voting changes are based on pre- determined events.[60]

Similar to staged investment custom in Singapore, agreements typically lay the contours of the development which the fund evaluates, before agreeing to provide any further financing. But one deviation from Singapore law is the subsequent financing is of a diminutive value and terms are also not negotiated very efficiently to suit the needs of that phase or round. The time between each funding is seen to be a year or less than that which has a negative impact because of limited

[56] *Supra* note 47.

[57] *Supra* note 2.
[58] *Id.*
[59] *Id.*
[60] Steven Kaplan and Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, NATIONAL BUREAU OF ECONOMIC RESEARCH, Working Paper 7660 (April 2000).

time to scrutinize and analyze their performance.

Shares issued are almost always in form of convertible preference shares with infrequent issuance of equity shares, similar to Singapore. These shares also provide for pro rata participation in the remainder after liquidation and give the investors the rights to cumulative dividends[61].

With respect to liquidation which typically includes change in control, a merger or reorganization in addition to winding up rights, the contract provides the investor with a prioritized claim over the other[62]. The quantum of claim is always equal to the investment amount, to say the least.

Automatic conversion is the rule in such contracts so as to let the entrepreneurs regain the control they lose during such financing periods. The period of conversion is prescribed in the instrument of issue of shares. Like Singapore, IPO plays a vital role as an exit mechanism acting as a triggering event for automatic conversion. Of course there are other events like that of a sale or of a pre-determined milestone which propel the conversion rights in motion. Such conversion depends a lot on negotiation between the parties since the entrepreneur runs the risk of losing his ownership and the business idea to the VC's[63].

Investors under this contract also reserve the right to call for buying back their shares and issuing options[64]. Some of them are allowed to be exercised only after expiry of specified period and others might be used as an offensive tactic to a breach of any clause. Though the investors have a strong board representation, they lack a majority of seats and are mostly below 50% of seats, as inferred from sample surveys. Such a number of seats at the board indicate the percentage of stakes they hold in the company which is consequently construed to be less as compared to those of VC's[65].

Investors hold pre-emptive rights and specifically a tag-along right wherein the investor can sell or transfer its shares with the selling shareholder to a third party on the same terms and conditions[66]. Most of them are also found to hold right of first refusal options, and many held drag-along rights whereby they can require the other shareholders to sell shares along with the investor if he so requires in order facilitating an exit through a third party sale[67]. As can be seen, this is also a protective tool

[61] *Supra* note 2.
[62] *Id.*
[63] *Supra* note 50.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

against external economic mishaps that may occur and cause losses to them.

Investors also have affirmative voting rights on issues that may have a substantial impact on them. To give effect to such a right, it is usually stipulated to necessitate their presence at the time of voting and passing resolutions or any other actions taken[68].

The agreement also enlists the detailed issues which will attract such voting rights in their favor. This entails, as in Singapore a chance to oversee and overlook the functioning of the portfolio company. Contracts provide the investors with elaborate information rights for the purpose for accounts and financial statements of the company[69]. Specifically, investors have extensive and an intrusive role to play in appointing auditors for the company, however they are required to consult their VC's.

Such features of contract in India provide for the same mechanism to effectuate a more balanced arrangement between VCF and portfolio companies, as in Singapore except that is more regulated. Thus, we look at the shortcomings which need to be overcome for India to reach where Singapore, China and US are today.

[68] *Id.*
[69] *Id.*

Tools to maximize efficiency

As seen above, India's venture capital needs reduction in regulations. This is so because it is clear how investments can be best nurtured in conditions where there is a flexible market with ample opportunities. Too many restrictions end up confusing the potential investors and dampen their spirit at the entry stage itself[70]. Although it already has the basic infrastructure for profitable investment opportunities as well as a well furbished stock market[71].Of course this has to be exercised in a phased manner.

Furthermore, initiatives in India have been primarily taken by public sector. Thus, the expectations like those of managerial support and entrepreneurial expertise is difficult to be fulfilled by them since their culture is ridden by rigid procedures and strict accountability[72]. Moreover, since the VCF is illiquid in first 1-2 years, it will take time to exhibit capital appreciation for financial reasons. The returns could be given to investors only where it has built a diversified portfolio since the rate of success will be rather dismal and low at the beginning. The management of the public sector

[70] Swati Deva, *Foreign Venture Capital Investment: The Indian Experience*, HEINONLINE: 42 INT'L LAW. 177 2008.
[71] *Id.*
[72] Sudip Bhattacharyya, *Venture Capital Financing*, ECONOMIC AND POLITICAL WEEKLY, Vol. 24, No. 47 (Nov. 25, 1989).

company ends up being caught up for losses and thus, effecting the motivation for venture capital financing tools. VCF can administer a lot better if private parties took initiative, or the public sector VCF becomes more independent and authoritative[73]. Though it is now changing and we have one of the most oldest and successful conglomerates; Tata's who have ventured into investing in early stage companies and giving the necessary impetus for them to grow by lending their well established reputation.

The rules are such that the law provides for the industries a VCF cannot invest in thereby limiting the options it has. For instance, it cannot deal in businesses of real estate, non-banking financial services, Gold financing and activities not permitted under industrial policy of Government of India. No other country provides for such a negative list of investments restricting VCF.[74]

Further, VC's seldom have a majority voting power, even in early stage companies. This is primarily due to the provisions of the Indian Companies Act whereby a shareholder's voting right can only be in proportion to his share of the paid-up equity capital of the company[75]. It is extremely important for an effective contractual structure to provide enough control to the VC's. The biggest loophole is in the form of lack of definition of control that they hold in the portfolio company. However, again the relationship between VC's and portfolio companies have transformed from "us" to "them". All the VC's have to do is demonstrate their commitment to entrepreneurs by cleverly aligning their interests to theirs, and exerting enough time to win over their loyalty and trust[76].

For the purpose of formation of VCF itself, it is ridiculous to ignore the perfect suitability of a LP. Thus, law makers should legislate on allowing a limited partnership form. It should do away with the strict requirements associated with registration with SEBI. Moreover, enhance flexibility in risk sharing and compensation payments amongst investors[77].

Further going into the intricacies of the contractual structure, the conditions pursuant to which a company can issue equity shares with differential voting rights in India are unlikely to be fulfilled by start-ups[78]. For this, there has to be steps taken to make it more start-up friendly. However, it is not as bad as it reads; a large

[73] *Id.*
[74] *Supra* note 40.
[75] Companies Act, 2013, § 87(1)(b), (India).
[76] Shailendra J. Singh, Ashok Dylan Jadeja & Shashank Singh, *Venture Investing in India? Think Twice*, THE JOURNAL OF PRIVATE EQUITY, Vol. 8, No. 4 (Fall 2005).
[77] *Supra* note 40.
[78] One such condition is distributable profits for last 3 years; see The Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001.

stake combined with other contractual clauses covers the corners for the VC to exercise considerable control if not sufficient control.

In terms of investments made by investors, it needs to be made more attractive upon achieving the required targets[79], which does not happen since the fund cycle is a short period and hence they end up remaining within the early stage making it riskier for an investor. Even in regard to compulsory conversion after a fixed term, due to strict requirements of foreign exchange regulations in India[80], it does not represent a valid option to the entrepreneur as the terms are extremely long.

Overall, there are extremely onerous burdens imposed on the entrepreneur and has a trend of heavily being inclined in favor of the investor. However, as it has been emphasized throughout, due to the very nature of venture capital financing the contract must deal with extreme forms of uncertainty, informational asymmetry and agency costs. Naturally, such uncertainties have had a magnified impact in context of an emerging economy like India where markets and industries are still developing. Also aspects like the regulatory environment and corporate governance standards being relatively lower than more mature economies. Further cultural aspects like a tendency towards closely held, family controlled companies may also contribute to some extent.

CONCLUSION

Though there is no magic potion for a perfect maximization technique, there are a few ingredients which are known for improvement[81].We know India is growing significantly since the last decade, particularly in the IT and biotechnology sectors, and there is close synergy between Indian companies in these sectors and their counterparts in the Silicon Valley. Simultaneously, the Indian regulatory and taxation regime for venture capital has also witnessed rapid development to create an enabling regime for fostering innovation through venture financing[82]

On final review, the author wants to conclude that picking up solutions directly from any other judicial system (in this case Singapore) will be an effort in vain. The amendments should be such that are not only good in theory but functional in an economy like India and hence replicating any form from other countries is not an ideal approach. This

[79] *Supra* note 9.
[80] Press Note dated 30 April 2007 in supersession of the earlier Press Note dated 31 July 1997 and, RBI Circular, dated June8 2007, A.P. (DIR Series) Circular No.73.

[81] R&A ASSOCIATES, PRIVATE EQUITY FUNDS: A CASE STUDY
[82] UMAKANTH VAROTTIL, INDIAN BUSINESS LAW NOTES..

obviates the need of a complete overhaul of the present system but mandates small steps towards a more attractive venture capital industry.

TECHNOLOGY TRANSFER

Vincent Ibe Iwunze[*]

INTRODUCTION

The availability of technology has always been a defining factor in the level of development any country may attain. Its availability has to a large extent accounted for the sustained development of Europe and America since the Industrial Revolution of the 18th and 19th Centuries. Its absence, on the other hand, has, to a large extent, perpetuated underdevelopment in Africa, a large part of Asia and Latin America.[1] Though many third world countries are blessed with an assortment of mineral resources, their developmental trajectories have consistently fallen behind those of the developed ones due to lack of technology and the concomitant technical know-how.[2] The efficient exploitation of such resources in the developing countries, therefore require, inevitably, the technology of the developed world.

If there is anything, therefore, that third world countries wish, it is to possess that element that has driven development among the developed countries – technology. Unable, however, to develop the cutting-edge technology suitable to the needs of the time, developing countries have, through national legislation/policy as well as treaty and other international agreements striven to have technology transferred to them by those who possess it.

One area where technology transfer to the Third World has received serious international attention is the exploitation of the seas. The race for the acquisition of marine technology by developing countries was actuated in the post-World War II era by the discovery of the enormity of petroleum deposits in the continental shelf of coastal countries;[3] the discovery of large quantities of metallic minerals on and below the seabed and ocean floor;[4] and an anticipation that seabed resources

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[1] Michael Blakeney, *Transfer of Technology and Developing Nations*, 11 FORDHAM INT'L L.J., 693 (1988).

[2] *Id.* at 693-694.

[3] The Truman Proclamation of 28 September 1945 marked the beginning of the rush for continental shelf hydrocarbons. Driven by the discovery of hydrocarbons in the U.S. continental shelf, the Proclamation declared that the seabed and subsoil of the U.S. continental shelf was the exclusive property of the U.S. *See* THE TRUMAN DECLARATION ON THE CONTINENTAL SHELF, (1945) 4 Whiteman 756, reproduced in D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW, 476 (6th ed., Sweet & Maxwell 2004) [Hereinafter, "Harris"]; S.J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 27 STANFORD ENVIRONMENTAL LAW JOURNAL 101,105 (2008).

[4] The Challenger Expedition of 1872-76 discovered for the first time that there existed lots of potato-sized manganese nodules scattered across large areas of the seabed especially beyond the geological continental

would, in the near future, play a significant role in world economy.[5]

Today, marine technology required among third world countries for the exploitation of the sea include equipment for deep-sea fishing; cutting-edge technology for the excavation of the seabed and ocean floor; as well as complex systems for the mining of the deep seabed and the subsoil thereof for petroleum and polymetallic minerals. For third world countries, marine technologies of this sophistication, complexity and intricacy remain closed books. These circumstances, coupled with the expectation in the 1970s and early 1980s that 'untold wealth would leap from the seabed'[6] led to a surge of interest in the developing world for direct participation in the exploitation of the deep seabed. It drove the agitation among the Group of 77 Countries (G-77)[7] at the Third UN Conference on the Law of the Sea for mandatory transfer of marine technology from the technologically advanced countries to them.

This paper examines the possibility of effective transfer of marine technology from developed to developing countries under the United Nations Convention on the Law of the Sea (UNCLOS), 1982.[8] It examines the mandatory technology transfer provisions of the Convention and evaluates what chances developing countries still have in acquiring such technologies through mandated transfers in view of subsequent alterations to the Convention, and, indeed, the international economic realities of the post-Convention years. It also makes prescriptions on the way forward for a realistic approach to the deep seabed mining controversy that ultimately benefits the developing countries of the world.

shelf. These nodules were discovered to be rich in such metals as zinc, copper, nickel, cobalt and lead. *See* ENEFIOK ESSIEN, ESSAYS ON INTERNATIONAL LAW OF THE SEA 110-111 (Golden Educational Publishers, 1994); MALCOM N. SHAW, INTERNATIONAL LAW 560-561 (5th ed, Cambridge University Press, 2003) [Hereinafter "Shaw"]; Global Ocean Commission, *Strengthening Deep Seabed Mining Regulation*, POLICY OPTIONS SERIES PAPER No. 5, Third Meeting of the Global Ocean Commission, November 2013, at 1.

[5] Doug Bandow, *Sink the Law of the Sea Treaty* (March 19, 2013), http://www.masterresources.org/publications/commentary/sink-law-sea-treaty; Jeremy Rabkin, *Law of the Sea Treaty: A Bad Deal for America*, 3 ISSUE ANALYSIS, 7 (2006) [Hereinafter, "Rabkin"].

[6] *Id.*

[7] The Group of 77 was established on 15 June 1964 by 77 developing countries which were signatories to the 'Joint Declaration of the Seventy-Seven Developing Countries' issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. It is a loose coalition of developing nations, designed to promote its members' collective economic interests and create an enhanced joint negotiating capacity in the United Nations. There were 77 founding members of the Group but the Group has expanded to 134 member countries. Despite the increase in membership, the original name has been maintained due to its historical significance.

[8] The Convention was the outcome of the Third United Nations Conference on the Law of the Sea convened in 1973 pursuant to General Assembly Resolution 3067 (XXVIII). The Convention was signed on 10 December, 1982 at Montego Bay, Jamaica and adopted by 130 votes to 4 with 17 abstentions. It entered into force on16 November 1994 a year after Guyana became the 60th signatory.

MEANING OF TECHNOLOGY TRANSFER AND NATURE OF MARINE TECHNOLOGY

Technology transfer is the process by which commercial technology is disseminated by way of a technology transfer transaction, which may or may not be covered by a legally binding contract but which involves the communication, by the transferor, of the relevant knowledge to the recipient.[9] It is the 'flow of applicable knowledge, skill, capability, expertise, equipment or facilities from one location to another within a specific time frame.'[10] It is also defined as the movement of know-how, technical knowledge, or technology from one organisational setting to another.[11] For the World Intellectual Property Organisation (WIPO), it is the 'transfer of technologies from universities and research institutions to parties capable of commercialisation, or ... generally, from developed to developing countries.'[12]

Marine technology transfer, therefore, refers to the transfer of technologies required for the exploration and exploitation of living and non-living resources of the oceans from one country to another. These technologies include advanced systems for deep-sea fishing and fish preservation; technologies required for the exploration and exploitation of seabed hydrocarbons; and complex equipments for the mining of deep seabed minerals.

In the area of fisheries exploitation, lack of modern technology among most developing countries has resulted in sub-optimal utilisation of their sea fisheries.[13] The abundance of such technologies in the developed countries, on the other hand, has led to destructive over-exploitation of sea fisheries in some of those countries.[14] This had resulted in a situation

[9] MICHAEL BLAKENEY, LEGAL ASPECTS OF TECHNOLOGY TRANSFER TO DEVELOPING COUNTRIES 136 (ESC Publishing, 2009); UNCTAD, TRANSFER OF TECHNOLOGY 7 (United Nations Publication, 2001).

[10] I.M. Nwaedozie, *Overview of Foreign Technology Transfer Efforts in Nigeria (2000-2010): NOTAP'S Perspective*. Paper presented at an International Workshop on Science and Diplomacy for Developing Countries organized by Center for Science and Technology of the Non-aligned and other Developing Countries (NAM S&T Center) Tehran-Iran, 13-16 May 2012, (June 6, 2014), http://www.nlipw.com/patents-vol-1-no-7.

[11] B. Bozeman, *Technology Transfer and Public Policy: A Review of Research and Theory*, 29 RESEARCH POLICY 627, 629 (2000); D.M. Haug, *The International Transfer of Technology: Lessons that East Europe can Learn from the Failed Third World Experience*, 5 HARVARD JOURNAL OF LAW AND TECHNOLOGY 209, 211 (1992) [Hereinafter, "Haug"]; K. Ramanathan, *An Overview of Technology Transfer and Technology Transfer Models*, (June 7, 2015), http://www.tto.boun.edu.tr/files1383812118_An%20of 20TT%20&%20TT%20Models.pdf.

[12] WIPO, *Technology Transfer and Licencing*, (June 7, 2014), http://www.wipo.int/.../technology.htm.

[13] Nigeria and Ghana are good examples of developing countries where fisheries under-exploitation is prominent. *See* T. KWADJOSSE, THE LAW OF THE SEA: IMPACTS ON THE CONSERVATION AND MANAGEMENT OF FISHERIES RESOURCES OF DEVELOPING COASTAL STATES – THE GHANA CASE STUDY 3 (United Nations, 2009); F. D. Sikoki, *Fishes in Nigerian Waters: No Place to Hide*, INAUGURAL LECTURE SERIES, No. 100, University of Port Harcourt, January 31, 2013.

[14] South African fisheries typify fisheries overexploitation in a developing country. *See*, Environment South

where the technologically advanced countries with their distant water fishing equipment carried out large scale, unregulated fishing in waters under the jurisdiction of developing countries.[15]

Underwater exploration of petroleum has also remained the exclusive preserve of the developed countries of the world. All offshore effort in third world countries at the exploration and exploitation of continental shelf petroleum require, of necessity, deep-water mining technology which are not available to them. This, in recent times, has precipitated the provision of a profusion of incentives by third world countries to the developed ones in a scramble for Foreign Direct Investment (FDI).[16] It is the hope of developing countries that with the influx of FDI, and through Joint-Venture petroleum development agreements they would be able to acquire foreign technology and know-how needed in the petroleum and gas industry. But as Haug has shown, the developing countries' 'frenetic attitude towards technology transfer' has not yielded desired results.[17]

More technologically daunting is the mining and recovery of polymetallic nodules and other deep seabed minerals from the seabed and ocean floor.[18] According to the International

Africa, *Methods to Help South Africa's Overfishing Problem* (February 1, 2014), http://www.environment.co.za/wildlife-endangered-species/methods-to-help-south-africas-overfishing-problem.htm.

[15] B.A. Boczek, *Ideology and the Law of the Sea: The Challenge of the New International Economic Order*, 7 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 1, 11 (1984).

[16] In Nigeria, for example, various incentives are provided for the attraction of FDI in the oil and gas industry, particularly in offshore locations. Under § 18 (1) (a) of the Oil and Gas Export Free Zone Act, Cap. O5 Laws of the Federation, 2004 (Revised Edition), all legislative provisions pertaining to taxes, levies, duties and foreign exchange regulations are not to apply to companies operating in the Oil and Gas Export Free Zone. Under § 18 (1) of the Oil and Gas Export Free Zone Act, full repatriation of foreign capital investment in the Export Free Zone at any time with capital appreciation on investment is allowed. § 3 of the Associated Gas Re-injection Act, Cap. A25 Laws of the Federation, 2004 (Revised Edition) prohibits the flaring of associated gas by companies engaged in oil or gas production after January 1, 1984 but empowers the Minister of Petroleum Resources to in his discretion allow the continued flaring of gas by oil and gas producing companies on such terms as he may impose. Under § 5(1) of the Deep Offshore and Inland Basin Production Sharing Contracts Act, Cap. D3, Laws of the Federation, 2004 (Revised Edition), payment of royalty to the Federal Government for offshore oil and gas exploration and production is graduated in such a way that the farther offshore production is carried out, the lesser the royalty payable up to a point of zero royalty in areas in excess of water depth of 1000 metres.

[17] Haug, *supra* note 10, at 216-226.

[18] It is estimated, for example, that about 175 billion dry tones of these manganese nodules are in existence, spread over about 15 percent of the seabed, by far in excess of land-based reserves of the metal: UN Department of International and Social Affairs, *Sea-bed Mineral Resource Development*, 1980, ST/ESA/107, pp. 1-2; SHAW, *supra* note 4, at 560-561. Aside from manganese nodules, Cobalt-rich Crusts (CRC), and Seafloor Massive Sulphides (SMS) are other major types of marine mineral deposits that are recognised in the world's deep seafloor environment which are the main focus of exploration and mining: M. ALLSOPP ET AL, REVIEW OF THE CURRENT STATE OF DEVELOPMENT AND THE POTENTIAL FOR ENVIRONMENTAL IMPACTS OF SEABED MINING OPERATIONS, GREENPEACE RESEARCH LABORATORIES TECHNICAL REPORT (Review) (2013) at 2.

Seabed Authority (ISA),[19] these nodules were discovered in 1873 by the *HMS Challenger* Expedition.[20] They are said to contain significant quantities of manganese, nickel, copper and cobalt.[21] Nodule mining technologies developers have had to grapple over the years with the challenge of cost-efficiently collecting nodules thousands of feet down on the ocean floor and transporting them to a ship on the ocean surface.

The ISA has shown that this requires one of three possible designs being developed over the last forty years: (1) technology capable of picking up nodules with a dredge-type collector and lifting them up through a pipe; (2) technology capable of picking up nodules with a bucket-type collector and dragging up the bucket with a cable to the surface of the ocean; and (3) technology that can pick up nodules with a dredge-type collector and let the collector ascend to the ocean surface with the force of its own buoyancy.[22] The effort of the technologically advanced countries in this regard has been described by the ISA itself as 'formidable task'.[23] If this is so, then the prospect of developing countries directly participating in the exploitation of these enormous resources of the deep seabed is more than 'formidable task'.

TRANSFER OF TECHNOLOGY UNDER UNCLOS, 1982

A major objective of the third world countries that participated in the negotiation of the UNCLOS was the direct participation of developing countries in the exploration and exploitation of the mineral resources of the international seabed area. But to participate actively and directly in deep seabed development, a state must, of necessity, possess the requisite scientific and technological know-how. These are all assets the developing states are not remarkable for. These developing states were not oblivious of their deficiencies in terms of these necessary possessions during the negotiations relating to the deep seabed area at the Third UN Conference on the Law of the Sea. They therefore made a strong case for the mandatory transfer of deep seabed mining

[19] The ISA is the authority established under article 156 of the UNCLOS for the management and regulation of the exploration and mining of minerals in the international seabed area. *See,* ISA, *Patents Issued for Deep-sea Polymetallic Nodule Exploration and Mining,* (April 12, 2015), http://www.isa.org/jm/activities.

[20] The *HMS Challenger* (a British Navy corvette converted into an oceanographic ship, with its own laboratories, microscope and other scientific equipment) was the first ship to carry out an expedition organised specifically to gather data on a wide range of ocean features, including ocean temperatures, seawater chemistry, currents, marine life, and the geology of the sea floor.

[21] ISA, note 18 above.

[22] *Id.*

[23] *Id.*

technology from the technologically advanced states to the developing, less technologically advanced states.

They realised that if they must participate directly in the development of the international seabed area (then thought by them to be imminent), they must be at technological parity with their developed counterparts. The developing countries conceived the issue of technology as one of the key ingredients of the New International Economic Order (NIEO).[24] For them, if the international seabed area was accepted as the common heritage of mankind, then the technology for exploiting it must also be seen in the same light.[25] They considered that the wealth of the world is unequally distributed, and therefore sought to correct the inequality via a political process, of which marine technology transfer was part of the agenda. They saw the mandatory transfer of marine technology to them as 'part of their opportunity to share in the wealth, prosperity, and property that has accrued to the West.'[26] The developing countries believed also that being the victims of exploitation by the Western powers throughout the period of colonialism, they were due their share in global mineral wealth and advanced technology in return for decades of exploitation by the industrialised colonial powers.[27]

In fact, an author from a developing country has taken the issue of technology transfer to a new level by arguing that technology may be considered a common heritage of mankind from which the developing world should benefit.[28] He buttresses this point by explaining that the developed nations of today had also in the past acquired scientific and technical knowledge free-of-charge from Islamic scientists from today's developing world. Additionally, according to him, the developed countries also 'attract millions of intellectuals of the developing world, who represent a brain drain of enormous scale to the great material advantage of the West'.[29] The author, therefore, finds no reason why the technology of the West should not be made available to the developing world.

The unity of the developing countries at the Third UN Conference and their insistence on mandatory technology transfer to them did not go unrewarded. Like many other things they wanted at the Conference, agreement was reached that deep seabed mining technology would be mandatorily transferred to them.

[24] J. Stavridis, *Marine Technology and the Law of the Sea*, 68 NAVAL WAR COLLEGE REVIEW 147, 152-153 (1978-1984) [Hereinafter, "Stavridis"].
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] M.A. Sayar, *Is Technology a Common Heritage of Mankind?,* (February 12, 2015), http://www.fountainmagazine.com/issue/details-technology-a-common-heritage-of-mankind.
[29] *Id.*

Article 144 of the original UNCLOS therefore provided that the ISA 'shall take measures in accordance with this Convention: (a) to acquire technology and scientific knowledge relating to activities in the Area;[30] and (b) to promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom.' The Convention thus provided for the mandatory transfer of the technology of the industrialised nations to developing countries in facilitation of the latter's participation in the development of the international seabed area.

As a way of keeping a tab on all available mining technology at every time, every applicant for a mining site in the Area is required when submitting a plan of work, to make available to the ISA a general description of the equipment and methods to be used in carrying out activities in the Area, and other relevant non-proprietary information about the characteristics of such technology and information as to where such technology is available.[31] In the event of any revisions in the technology after operation had commenced, every operator shall inform the ISA of such revisions, descriptions and information about the technology earlier made whenever a substantial technological change or innovation is introduced.[32]

The implication is that deep seabed mining technologies developed at any time by the developed countries and deployed to the mining of the international seabed area must be made available to the ISA. The ISA in turn may transfer such technologies to the Enterprise[33] and the developing countries without regard to the protection of intellectual property rights in such inventions. Aside from this, the Convention also requires every contractor operating in the Area to undertake to make available to the Enterprise on fair and reasonable commercial terms and conditions, whenever the Authority so requests, the technology which he uses in carrying out activities in the Area under any contract, which the contractor is legally entitled to transfer. Where the contractor is not the owner of a technology it uses, and the technology is not available in the open market, such contractor must, as a condition for approval of its mining application give assurance that the owner of the technology will make it available to the Enterprise whenever requested by the ISA.[34]

[30] The 'Area' is used in the UNCLOS to refer to the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. See Article 1 of the Convention.

[31] UNCLOS, Annex III, article 5(1).

[32] *Id*., article 5(2).

[33] The Enterprise is the operating arm of the ISA. It is the agency through which the ISA is to carry out exploration and exploitation activities in the Area. *See*, article 170, UNCLOS.

[34] UNCLOS, Annex II, article (5) (3) (b).

Failure to give such assurance would prevent the contractor from using the technology in its operations in the Area![35] The same obligations were owed to every developing country that had applied for deep seabed development by any contractor from which the ISA had not previously acquired a technology.[36] Provided, however, that such technology would not be transferred by the developing country to a third state or a national of such third state.[37]

THE DEVELOPED COUNTRIES' OPPOSITION

The developed, technologically advanced countries of the world disagreed. For them, the developing countries must not be indulged to have for nothing that which they ought to pay for. In support of the developed-country position various reasons have been advanced, especially by American scholars and politicians.

Silverstein argues that with existing marine technology in the hands, not of States Parties to the UNCLOS, but private corporations, it is left to see how realistic it is to have such technology transferred to developing countries by the developed States Parties.[38] The author therefore posits that since the technologies involved are developed at tremendous expense, the best a state can do to acquire the right to transfer them would be to pay private industry 'just' compensation at the cost of millions of dollars to taxpayers.[39] He therefore concludes that any obligation under UNCLOS for the mandatory transfer of marine technology from developed to third world countries is one 'difficult or impossible to fulfil.'[40]

It has also been argued that a mandatory transfer of technology as originally outlined in UNCLOS will only act as a major obstacle to the development and utilisation of technology for the exploitation of offshore minerals and hydrocarbons. Such mandatory transfer, those who hold this view contend, would prove adverse to technological progress as no inventor will continue to invent if what he events is given to the whole world, gratis. Reasoning along this line, George Witney, President of the American Patent Law Association had this to say before the U.S Senate Committee on Foreign Relations:

"High Technology Products, Machines, And Processes Are Assets Acquired At High Costs And Considerable Risks. Their Development Requires Long Expenditures Of Money And

[35] *Id.*
[36] *Id.*, article (5) (3) (e).
[37] *Id.*
[38] David Silverstein, *Proprietary Protection for Deep Sea Mining in Return for Technology Transfer: New Approach to the Seabed Controversy*, 2 FLETCHER FORUM 21 [Hereinafter, "Silverstein"]
[39] *Id.*
[40] *Id.*

Manpower. To Efficiently Mine The Sea, Not Only Will Existing Technology But Whole New Technologies Will Have To Be Developed. We Cannot Conceive That Any American Industry Will Undertake This Major Endeavor, Knowing That What It Invents And Brings Into Being Will Immediately Be Transferred To Its Competitors. We As Their Advisors Could Not In Good Faith Recommend Such Action."[41]

This writer cannot agree more with Witney. The incentive for invention in the developed world will be gone if high and complex inventions as those required for mining minerals thousands of feet below the sea surface are transferred to competitors without any limited right of monopoly for the inventors. As though in response to Sayar's argument that technology is common heritage of mankind,[42] Witney maintains, with particular reference to the U.S., that 'Privately owned technology in this country is not the common heritage of mankind.'[43]

Another serious objection ranged against the mandatory technology transfer of UNCLOS is the absence of protection under the Convention in form of limited monopoly over deep sea mining inventions.[44] Different from national patent law, the UNCLOS offers no protection for patent owners in respect of technologies applicable in the deep seabed which were, under the Convention, liable to be transferred to developing countries. There is no provision under the Convention as to the period of time over which the patent owner may enjoy monopoly over his invention before it can become available for transfer. For this reason, Egede has expressed strong pessimism concerning the practicability of the transfer of marine technology under UNCLOS and the effectiveness of such transfer mandated by treaty.[45] This lacuna in the Convention, as one writer has observed, is made more problematic by the fact that a 'patent confers only national rights and has no extraterritorial application.'[46]

It has also been argued by critics of the technology transfer provisions of the Convention that mandatory transfer of marine technology could become a pretext for acquiring and developing military technology.[47] They

[41] G.W. Witney, *Position Paper on Technology Transfer and Technology Transfer Task Force*, U.S. CHAMBER OF COMMERCE, WASHINGTON D.C., 5 August 1981, 5-6. [Hereinafter, "Witney"]

[42] Sayar, *supra* note 27.

[43] Witney, *supra* note 40, at 23.

[44] Silverstein, *supra* note 37, at 23.

[45] EDWIN EGEDE, AFRICA AND THE DEEP SEA REGIME: POLITICS AND INTERNATIONAL LAW OF THE COMMON HERITAGE OF MANKIND 94 (Springer, 2011).

[46] Silverstein, *supra* note 37, at 23. In the U.S. case of Deepsea Packing Co. v. Laitram Corp., 406 U.S. 518 (1972) for instance, the U.S. Supreme Court held that a U.S. patent on a shrimp-cleaning device was not infringed when a U.S. company manufactured kits containing all of the necessary components of the device for sale and assembly abroad.

[47] J. Wallace, *The Creature from the Ocean's Floor – The Law of the Sea Treaty*, (May 15, 2015),

entertain the fear that technologies like underwater vehicles which ordinarily have civilian application could be acquired under UNCLOS and easily developed into military technology, with dire implications for national security.[48] In this regard, Rabkin[49] relates a case in which the transfer of harmless marine technology became a source of apprehension to the U.S. of possible use of the technology for military purposes. This, according to the author, involved the fear among Pentagon officials that microbathymetry equipment and advanced sonar technology acquired by China from the U.S. in the 1990s ostensibly for prospecting for minerals beneath the deep seas could be converted and applied to anti-submarine warfare.

Above other reasons for vilifying the marine technology transfer provisions of the UNCLOS is the mandatory nature of such transfer under the original Convention. Traducers of the transfer provisions do not see any reason why the Convention did not leave the issue of technology transfer to negotiation between transferors and recipients, devoid of any form of compulsion. The developed countries have always emphasised the importance of contractual technology transfers, leaving the parties free to negotiate the provisions.[50] Addressing the U.S. House Committee on Merchant Marine and Fisheries in 1982, Ambassador James Malone, echoed this thinking. He said:

"There is a deeply held view in our congress that one of America's greatest assets is its capacity for innovation and invention and its ability to produce advanced technology. It is therefore understandable, that a treaty would be unacceptable to many Americans if it required the United States, or more particularly private companies, to transfer that asset in a forced sale."[51]

It is imperative to point out that the industrialised countries of the world do not quarrel the transfer of marine technology since they accept it as a political and philosophical idea, but they are unwilling to see technology transferred via the mandatory controls of the Authority.[52] Stavridis argues that rather than the mandatory transfers, joint-ventures in which industrial corporations owning technology would hold same for some specified period of time and gradually transfer them to the

http://www.libertynewsonline.com/article_323_31836.php; Rabkin, *supra* note 5, at 8.

[48] Human Events, *Law of the Sea Treaty: Tunnel Vision on the Oceans*, (February 28, 2015), http://www.humanevents.com/2008/02/28/law-of-the-sea-treaty-tunnel-vision-on-the-ocean.

[49] Rabkin, *supra* note 5.

[50] Haug, *supra* note 10, at 220.

[51] J. Malone, *Statement before the United States House Merchant Marine and Fisheries Committee*, Washington D.C., 23 February 1982, at 1. (Emphasis added).

[52] Stavridis, *supra* note 23, at 151.

developing countries is more realistic and preferable.[53]

Having rejected the UNCLOS on account of its Part XI provisions, the developed states took steps to enact legislation that would enable their corporations to mine the deep seabed for minerals outside the Convention arrangement. The United States, France, Italy, Japan, the United Kingdom, and West Germany enacted domestic seabed mining legislation during 1981–1983 under which they planned to unilaterally mine in the deep seabed area. As reciprocating nations, in September 1982, the United States, France, West Germany, and the United Kingdom adopted an agreement 'to facilitate the identification and resolution of conflicts' that may arise between the four nations with respect to overlapping claims to the seabed.[54] In August 1984, the four parties to the September 1982 agreement entered into another agreement with Belgium, Italy, Japan, and the Netherlands that further elaborated on mutual cooperation regarding the exploitation of the deep seabed.[55]

This gave rise to a controversy whether states could unilaterally mine the deep seabed outside the UN arrangement. For their part, third world countries maintained that 'any unilateral measures, legislation, or agreement restricted to a limited number of states on seabed mining, are unlawful and violate well-established and imperative rules of international law.'[56] For Groves, however, a state can legally mine the deep seabed outside the U.N. framework so long as it does not infringe upon the rights of others to also do so.[57] For the author, the right to mine the deep seabed is recognised under customary international law as part of freedom of the high seas. He further argues that nations cannot by their own agreement take away the rights of third parties who are not parties to such agreement. According to the author, the U.S., through domestic law and bilateral agreements has established a legal framework for mining the deep seabed without the necessity of ratifying the UNCLOS.

[53] *Id.*

[54] 1982 Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules on the Deep Sea Bed Between France, the Federal Republic of Germany, the United Kingdom, and the United States, 2 September 1982.

[55] Provisional Understanding Regarding Deep Seabed Matters (with appendices and memorandum of application), August 3, 1984.

[56] See Resolution of the Group of 77 Countries at the Third UN Conference on the Law of the Sea signed by Ambassador Mario Carias of Honduras, Chairman of G-77, titled: 'The Question of Unilateral Legislation on Seabed Mining.' U.N. Doc. A/CONF.622/94.

[57] Steven Groves, *The U.S. Can Mine the Deep Seabed Without Joining the United Nations Convention on the Law of the Sea*, (May 15, 2015), http://www.heritage.org/research/reports/2012/12/the-us-can-mine-the-deep-seabed-without-joining-the-un-convention-on-the-law-of-the-sea.

CHANGES UNDER THE 1994 IMPLEMENTATION AGREEMENT

The requirement of mandatory transfer of technology among other provisions of Part XI of the UNCLOS repelled the U.S. and the other industrialised countries from the Convention and was contributory to their initial aversion to sign it. In the refusal of those countries to be part of the Convention system, it was left for the countries that had given their consent to the Convention (majority of them developing countries), to make it work. But it was not long before it became clear that the third world countries who rallied to bring the Convention into force in 1994[58] 'lacked the financial capacity to fund both the Convention and the institutions created by the Convention'.59 Serious efforts were, as a matter of necessity, made by the U.N.60 to 'ensure the universality of the Convention system.'[61] These efforts resulted, according to Anderson,[62] in greater flexibility in the attitude of the developing countries to the Convention. The developing countries which were insistent on mandatory technology transfer later realised the inutility of a continued expectation of wealth from the deep seabed without the co-operation of the industrialised nations of the world which owned the technology needed to exploit that wealth.

The efforts of the UN to bring back the industrialised nations into the Convention system culminated in the adoption of the 1994 Agreement Relating to the Implementation of Part XI of the Law of the Sea Convention, 1982.63 Under article 2 of the Implementation Agreement, Part XI of UNCLOS and the Agreement are to be interpreted and applied as a single document, and in the event of an inconsistency, the provisions of the Agreement are to prevail. It is unanimously accepted among scholars that the agreement effectively watered down the mandatory technology transfer provisions of UNCLOS.[64] Under the Agreement, if developing countries must acquire deep sea mining technology, they are to do so in the open market on commercial terms or through joint ventures.[65]

[58] The Convention entered into force on 16 November 1994, twelve months after the required 60 ratifications, in accordance with article 308 thereof.

[59] Harris, *supra* note 3, at 493.

[60] In 1990 the Secretary-General of the UN, Javier Perez de Cuellar, launched informal consultations to see what could be done to bring the dissatisfied industrialised states within the framework of the UNCLOS.

[61] Shaw, *supra* note 4, at 565.

[62] D.H. Anderson, *Further Efforts to Ensure Participation in the United Nations Convention on the Law of the Sea*, 43 INT. COMP. LAW Q. 886-893 (1993).

[63] The Agreement was adopted on 29 July 1994 in New York (hereinafter 'Implementation Agreement').

[64] *See*, for example, Doug Bandow, *Sink the Law of the Sea Treaty* (August 15, 2015), http://www.cato.org/publications/commentary/sink-law-sea-treaty; Christopher Garrison, *Beneath the Surface: The Common Heritage of Mankind,* 1 KE STUDIES 1, 49-52 (2007).

[65] § 5, Annex, Implementation Agreement.

While the other developed countries signed and ratified the Convention in consideration of the modifications introduced by the Implementation Agreement,[66] the U.S. has refused to ratify it.[67] There is a polarity of opinion among law of the sea experts in the U.S. whether or not the Agreement should calm nerves frayed by the technology transfer provisions of UNCLOS. While some hold the view in the U.S. that the Agreement has completely done away with the requirement of mandatory technology transfer, others still think that it falls short of completely taking away every possibility that the ISA may still find legal support in the Convention for meddling with forced technology transfer.

In the aftermath of the adoption of the Implementation Agreement in 1994, U.S. ambassador Madeleine Albright speaking before the UN General Assembly on 27 July 1994 praised the revised Convention for providing for the application of free market principles to the development of the deep seabed.[68] It was her thinking, and indeed the thinking of the Clinton Administration, that the changes made to the Convention sufficiently addressed the issue of mandatory technology transfer.[69] Also approving the revised Convention, former U.S. Secretary of State, Warren Christopher stated: 'It's an extremely important treaty, and I think it's very desirable that we have been able to obtain from the other members *satisfactory amendments* to the seabed mining provisions that enable us to approve the treaty as a whole.'[70] The Clinton administration insisted that it had 'been successful in fixing all the major problems raised by the Reagan administration' over UNCLOS, and had 'converted the seabed part of the agreement into a market-based regime.'[71]

Agreeing with the Clinton administration, Borgerson[72] and Schachte[73] have

[66] Germany, Italy and Greece ratified the Convention in 1995 following the adoption of the Implementation Agreement, while the whole European Union states followed suit over the next few years.

[67] President Reagan refused to sign the UNCLOS upon its completion in 1982, criticizing particularly, provisions therein that establish a complex scheme of international controls on deep seabed mining. Despite efforts during the Bush Administration and later the Clinton administration, the U.S. has yet to ratify the Convention.

[68] Magdalene Albright, Statement to the 48th Session of the United Nations General Assembly, (July 27, 1994), at 2.

[69] Two days later Albright formally affixed her signature to the Convention for the U.S. and it was forwarded to the U.S. Senate for ratification. The Convention was, however, not ratified till date.

[70] Quoted in S. Greenhouse, *U.S. Having Won Congress, is Set to Sign Law of the Sea*, N.Y. TIMES, (July 1, 1994), at A2 (Emphasis added).

[71] *Id*., at 1A.

[72] Scott G. Borgerson, *The National Interest and the Law of the Sea*, Address to the U.S. Council on Foreign Relations, Washington D.C., May 2009, at 43-44 (Council Special Report No. 46).

[73] William L. Schachte, *The Unvarnished Truth: The Debate on the Law of the Sea Convention*, 62:2 U.S. NAVAL WAR COLLEGE REVIEW 119, 120 (2008).

contended that the Implementation Agreement succeeded in doing away with the mandatory aspect of marine technology transfer under the Convention. The authors think that with the commercialisation of technology transfer under the Agreement, transfer of technology should no more be a basis for U.S. refusal to ratify or accede to the Convention.

Contrariwise, Rabkin is of the view that the Implementation Agreement cannot still completely allay the fear of the U.S. with regard to the technology transfer provisions of UNCLOS.[74] The writer argues that notwithstanding the Agreement, the ISA may still be able to 'assert claims to impose technology transfers... .'[75] This, according to him, is because the ISA can make such transfer 'a condition for approving permits for exploration or recovery by Western firms since all such activity [still] requires approval of the Authority.'[76] Rabkin is not solitary in this line of thought. Gaffney[77] and Bandow[78] take the view that since article 1[44] of UNCLOS still mandates the ISA and States Parties to 'cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area' to the Enterprise and other States Parties, the Implementation Agreement 'leaves intact a separate, open-ended mandate for coerced cooperation' by the ISA.

For Leitner, although the modifications of the Implementation Agreement have 'toned down some of the most direct mandatory technology transfer requirements, the treaty still places at risk some very sensitive, and militarily useful technology which may readily be misused by the navies of ocean mining states'.[79] Alluding to the Chinese acquisition of microbathymetry equipment and advanced sonar technology (which are civilian technologies alterable to military use) from the U.S. in the 1990s, Rabkin still fears that a harmless marine technology can still be acquired under the Convention and developed into military capability despite the Implementation Agreement.[80] With respect to the bathymetry and sonar technologies acquired from the U.S. from China, the author fears that the fact that China is self-sufficient in the domestic production of the principal metals derived from

[74] Rabkin, *supra* note 5, at 8.
[75] *Id.*
[76] *Id.*
[77] Frank J. Gaffney, *Ronald Reagan Was Right: Law of the Sea Treaty Was and Remains Unacceptable*, Statement before U.S. Senate Foreign Relations Committee, (October 4, 2007). [Hereinafter, "Gaffney"]
[78] Doug Bandow, *Faulty Repairs: The Law of the Sea Treaty is Unacceptable*, Cato Foreign Policy Briefing No. 32, (March 15, 2015), http://www.cato.org/pubs/fpbriefs/fpb-032.html. [Hereinafter, "Bandow"]
[79] Peter Leitner, *A Bad Treaty Returns: The Case of the Law of the Sea*, Statement before the U.S. Senate Committee on Environment and Public Works, Washington D. C., (February 3, 2004). [Hereinafter, "Leitner"]
[80] Rabkin, *supra* note 5, at 8.

manganese nodules, it could have acquired those technologies possibly for military purposes.

While conceding that the Implementation Agreement watered down the mandatory transfer of deep seabed mining technology, Bandow argues, however, that under the Convention 'sponsoring states (that is, governments of nations where mining companies are located) would have to facilitate such transfers if the Enterprise and the Third World competitors are unable to obtain necessary equipment commercially.'[81] Depending on the whims of the ISA, Bandow asserts, ensuring the 'cooperation' of private miners could look very much like mandatory transfer. He therefore concludes that the Implementation Agreement only turned 'a disastrous accord into a merely bad one.'[82]

Taking a rather technical perspective on the matter, Gaffney has argued that the Implementation Agreement which is often referred to as an amendment of UNCLOS is after all no amendment at all.[83] He contends that since under article 312 of UNCLOS the Convention is only available for amendment ten years after its entry into force, the Implementation Agreement which was adopted before the Convention entered into force in 1994 cannot be an amendment.[84] The implication is that, legally speaking, UNCLOS has not been altered and Part XI can be argued to be intact in its original form. This approach, Gaffney reasons, does not give confidence to prospective investors in ocean mining.

This writer cannot agree more with this view. A convention that stipulates that it would not be open to amendment until 10 years after its entry into force cannot, by any means, be said to have been amended on a day that antedates its date of entry into force. While this may be so, it will be wrong to argue that the Convention remained unaltered by the Implementation Agreement. The better approach, it is submitted, is to consider the Implementation Agreement as a renegotiated Part XI of the Convention so that both documents entered into force as a single document on 16 November 1994. This approach is lent credence by article 2 of the Implementation Agreement which provides that the Agreement and Part XI of UNCLOS shall be interpreted and applied together as a single instrument. In fact, it was in consideration of the legal difficulties in amending the Convention once in force that 'it was thought greatly

[81] Doug Bandow, *Sink the Law of the Sea Treaty,* (March 11, 2015), http://www.cato.org/publications/commentary/sink-law-sea-treaty.

[82] Bandow, *supra* note 77.

[83] Gaffney, *supra* note 76.

[84] The Implementation Agreement was adopted by the General Assembly of the United Nations on 28 July 1994 while the Convention entered into force on 16 November 1994.

advantageous to reach an agreement on amendment by other means before its entry into force.'[85]

This writer is very much in the company of many who think that mandatory transfer of technology under UNCLOS will stultify the development of the international seabed. The nature of technology needed for deep sea mining makes it impracticable that the developers will hand them over to potential competitors on terms to be influenced by a supranational leviathan created by the UN at a time when *laissez faire* is the creed of a supremely capitalist world. In the absence of any effort on the part of third world countries at developing their own technologies, delivering ready-made technology to them will put the lid on the coffin of R & D in those countries.

Aside from this, transfer of technology does not mean automatic success in the use of such technology. The recipient must possess the technical know-how requisite for the beneficial use of the technology. It must understand both the technology and the transfer process. The history of technology transfer to third world countries show that this has not been so, as a result of which only little technology was actually transferred to them, and they failed to develop an indigenous technological capacity for such technology.[86] This has resulted in a situation in which developing countries have fallen victim to what Silverstein has called 'technological colonialism.'[87] It is, therefore, submitted, that mere transfer of technology to third world countries under UNCLOS without an accompanying development of capacity among them will leave their circumstances unchanged, in the long-run.

Again, technical knowledge is incremental and celebrated breakthroughs in technology are soon rendered obsolete by new efforts which prove to be more cost efficient. There is a real possibility of developing countries acquiring technology at a high cost only to realise the obsolescence of such technology even before it is put to use. It is the view of this writer that in such situation third world countries will have to go to the technology transfer negotiation table more often than they think and for little or no value. Moreover, the narrative of technology-transfer in areas other than marine technology over the years from developed to developing countries is not laced with successes.[88]

[85] YUWEN LI, TRANSFER OF TECHNOLOGY FOR DEEP SEABED MINING 242 (Nijhoff Publisbers, 1994); Garrison, *supra* note 63, at 50.

[86] A.F. Ewing, *UNCTAD and Transfer of Technology*, 10 JOURNAL OF WORLD TRADE L. 197, 198 (1976).

[87] David Silverstein, *Sharing United States Energy Technology with Less-Developed Countries: A Model for International Transfer of Technology*, 12 J. INT'L L. & ECON. 363, 388 (1978).

[88] K.E. Maskus, *Encouraging International Transfer of Technology*, ICTSD-UNCTAD, Issue Paper No. 7, at 15; Haug, *supra* note 10, at 216-226.

This writer finds no basis for the continued discomfort of the developed countries, especially the U.S. with transfer of marine technology in the aftermath of the Implementation Agreement. Under section 5 of the Annex to the Agreement, developing countries are to acquire marine technology on 'fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements.' The implication is that a developing country can only acquire technology if it can pay the price of the technology. If it cannot, it will never acquire that technology. It is doubted that there is anything the ISA can do about that considering that the Agreement does not obligate it to stand over a developed country to transfer technology to a developing country in the absence of mutual agreement.

WHAT ARE THE HOPES FOR DEVELOPING COUNTRIES?

Among developing countries, expectation was high regarding the incomes they were to earn from deep seabed mineral resources through the ISA. It was thought by those countries in the 1970s and the 1980s that they would soon launch into the path of economic recovery on account of the enormous revenues it was thought would leap from the bottom of the seas. The idea that complex deep sea mining technologies which were once closed books to them were soon to be made available to them through mandatory technology transfer arrangements was hope-rising and portended an imminent reversal in the dynamics of world economics and trade.

However, with the lull that followed years after the adoption of UNCLOS with respect to the development of the international seabed area, developing nations began to realise the impossibility of exploiting the deep seabed without the West. They found out that the market price of deep seabed minerals continued to go down vis-à-vis the exorbitant cost of underwater mining. This economic reality greatly attenuated the prospects of such mining even in the foreseeable future.[89] Expressing this concern, Bandow observed that *'[a]lthough many people thought untold wealth would leap from the seabed, land-based resources have remained cheaper than expected, and scooping manganese nodules and other resources from the ocean floor is logistically daunting. There is no guarantee that seabed mining will ever be commercially viable.'*[90]

It was, therefore, not long before the hopes of developing countries which were roof-high began to dissipate. As they continued to experiment with market economics, they backed away from the collectivist New International

[89] Harris, *supra* note 3, at 492.
[90] Bandow, *supra* note 5; RABKIN, *supra* note 5.

Economic Order (NIEO), of which transfer of technology was an integral part. It was, in fact, said that by 'the early 1990s some Third World diplomats were privately admitting to U.S. officials that the Reagan administration had been right to reject the treaty.'[91] This remained the state of affairs till 1994 when the Implementation Agreement was opened for signature on 29 July 1994. The preamble to the Agreement states that the alterations it made to UNCLOS became necessary noting the political and economic changes, (including market-oriented approaches) affecting the implementation of the Convention.[92]

The willingness with which developing countries embraced the Implementation Agreement is a pointer to their acceptance of the impracticability of the mandatory technology transfer provisions and other provisions of Part XI of UNCLOS. The Agreement was signed by about seventy countries upon being opened for signature,[93] majority of the signatory States being developing ones. This shows that developing nations were not oblivious of the need to bring back the developed nations, particularly the U.S. back to the Convention system if the international seabed would ever become a source of revenue to them.

Unfortunately, the Implementation Agreement has failed to allay fears in the U.S. over Part XI of UNCLOS. Although the U.S. signed the Agreement (alongside other developed countries like the United Kingdom, France, Germany and Japan which have all ratified the Convention), it has refused to ratify the Convention. While developing countries continue to hope that the U.S. will ratify the Convention and commit to the development of the deep seabed, American scholars and politicians alike continue to find more and more reasons why the U.S. should avoid it, one of such reasons being transfer of marine technology.

Even before UNCLOS was adopted in 1982 four American companies had already developed seabed mining technologies,[94] and were rearing to take off but for the fear that the technologies would immediately be transferred to their competitors. The fact that till date the U.S. has refused to deploy such technologies to the international seabed only shows that it will never share it with other nations. It shows also that only a seabed mining regime that sufficiently affords protection for patent rights to such inventions will suffice for the U.S.

[91] Bandow, *id*.
[92] Preambular paragraph 2.
[93] Garrison, *supra* note 63, at 51.
[94] *See* Proceedings of the Third International Ocean Symposium, Tokyo, Japan, 1976, at 28; T. Beuttler, *The Composite Text and Nodule Mining - Over-regulation as a Threat to the Common Heritage of Mankind*, 1 HASTINGS INT'L AND COMP. L. R, 167, 171 (1977).

There is nothing to suggest that such seabed mining technology that will put developed countries at parity with developing countries in the exploitation of the deep seabed area will never be transferred to developing countries. If experiences in technology transfers in areas other than seabed mining are anything to go by, only obsolete marine technology can be transferred to developing countries by their developed counterparts. The problem with such technology being that it will be cost-inefficient, more cost-efficient ways of doing the same things having been invented and available to competitors. The history of technology transfer from the developed to the developing countries has, after all, not been a story of successes.[95]

THE WAY FORWARD

As already shown, the opposition of the developed countries of the world to transfer of marine technology to developing countries other than through the operation of market forces has been vehement. The same has been the case with respect to transfer of technology in other areas other than marine technology. In fact all efforts made by the UN in the past to facilitate technology transfer between the North and the South failed as a result of stiff opposition from the former.[96] It was actually in recognition of the fact that extant international patent systems limit their access to technology, and that all existing mechanisms for technology transfer had failed them that the developing nations turned to the UN seeking the restructuration of existing technological relations.[97] This attitude of the developed countries to technology transfer has not changed and shows no prospects of changing in the future. With particular regard to transfer of marine technology, the developed countries, particularly the U.S., are rather finding more and more reasons why technology transfer must not be moderated by an international authority.

If the developing countries must therefore acquire marine technology, then they must prioritise the development of indigenous technology. They must begin to look inwards rather than outwards for their technological needs. If there is anything that has hampered technological development in the developing world, it is the excessive dependence on the technology of the developed world. The

[95] Haug, *supra* note 10, at 216-226.

[96] The most significant effort made by the UN in this regard was the drafting of the International Code of Conduct for the Transfer of Technology. When in 1977 the world body resolved to convene a conference on the Code to negotiate measures necessary for its adoption, the developed countries opposed Chapter Four thereof which required parties to avoid certain practices related to transactions involving technology transfer.

[97] Haug, *supra* note 10, at 219

development of indigenous technology will require co-operation among developing nations, well articulated national policies on technology, sober-sided implementation institutions, and budgetary allocation policies that adequately cater to the bourgeoning financial needs of modern R & D.

Like in the West, universities in the developing nations must strengthen to embrace research; they must become problem-solving institutions. Both governments and private enterprises must begin to partner universities in the area of R & D. Universities should be commissioned to develop needed technologies. Aside from universities, government laboratories need to be established in developing countries where they are presently non-existent and made the hub of R & D.

But the acquisition of marine technology by developing countries through indigenous effort is undoubtedly a herculean task requiring long gestation periods. While this is so, third world economies remain in dire need of income from seabed minerals which they hoped, right from the 1970s, were by the corner. They expected to get their economies going, reduce poverty and hit the path of prosperity once the dollars from seabed minerals began to flow. Thus, as between the developed nations and the developing ones, the development of the international seabed area is a matter of greater urgency for the latter than the former. This state of affairs partly necessitated the re-visitation of the controversial Part XI of UNCLOS in the mould of the 1994 Implementation Agreement. The Agreement, as already shown, did away with the mandatory aspect of technology transfer under the Convention with the hope among third world countries that this would make the Convention more agreeable to the developed nations and thus expedite the mining of the deep seabed.

Unfortunately the concessions allowed under the Implementation Agreement did not still allay U.S. fears that the ISA will not interfere with the process of marine technology transfer. There is no gainsaying the fact that if any country could attain the technological efficiency required to profitably mine the deep seabed, it is the U.S. This can be analogised to shale oil which was for a long time unexploited due to the unavailability of the technology required to do so cost efficiently. Today, technology has been developed by the U.S. that has brought oil in the shale of subsoil America to the top.[98] Without the developed countries, especially the U.S. committing wholeheartedly to the development of the resources of the deep-sea, the great economic expectations of the

[98] *See* D. Denning, *Oil Shale Reserves: Stinky Water, Sweet Oil*, (November 14, 2014), http://www.dailyreckoning.com/oil-shale-reserves.

developing countries therefrom will remain illusory as it has been over three decades since the adoption of UNCLOS. It is for this reason that it has become imperative to find ways to bring the technologically developed countries back to talks and possibly make further allowable concessions to them on the matter of marine technology transfer. The ISA may be made not to play any part whatsoever in technology transfer transactions between States Parties to the Convention so long as developing countries get their due from mining activities in the Area. If they cannot participate directly in deep seabed mining, they should be able to share in the proceeds of such mining in accordance with the common heritage of mankind principle.

Since the U.S. and the other developed countries will take greater responsibility in the development of the Area, it is only proper that they should have more voice in decision-making, particularly as regards marine technology transfer. The numerical superiority of the developing countries in the UN and the ISA may mean more votes for them in matters of the law of the sea but it will never mine the deep seabed. Only technology, risk capital and technical know-how will. The developing countries should therefore be more magnanimous with a view to the instauration of a seabed and ocean floor regime that actually works. This, it is submitted, is a more realistic approach to achieving any real economic benefits by them under UNCLOS.

There are not few people who will regard further concessions to the developed countries as giving more to those who already have as against those who do not. But it has always been so and will continue to be so. Even the scriptures in all their holiness do not repudiate this fact: 'For to everyone who has, more will be given, and he will have abundance; but from him who does not have, even what he has will be taken away.'[99]

CONCLUSION

The adoption of UNCLOS in 1992 was welcomed by the developing nations of the world as one of their greatest achievements at the UN. They were said to have struck a gainful bargain under the Convention in view of the various advantages they were expected to enjoy under the Convention. Prominent among these advantages was the provision for mandatory transfer of marine technology to the developing nations who were parties to UNCLOS. A successful transfer of marine technology to these countries would enable them to directly participate in the exploration and exploitation of the enormous mineral resources of the

[99] The Holy Bible – Mt 25:29 (NKJ).

international seabed area, an area globally accepted as the common heritage of mankind.

For various reasons advanced by the industrialised countries of the world led by the U.S.A., however, the mandatory nature of marine technology transfer under the Convention was vehemently opposed. The industrialised countries preferred the transfer of such technology only in the open market under the regulation of market forces rather than the ISA. This created a logjam in the development of the international seabed area since the dissatisfied industrialised nations owned the advanced technology needed to mine the deep seabed.

The adoption of the Implementation Agreement in 1994 with the inevitable acquiescence of the developing countries was expected to fully placate the developed countries, especially the U.S. and bring them to commit to deep seabed development. Despite, however, concessions made by the developing countries under the Agreement, including the removal of the mandatory element in the original Convention's technology transfer provisions, the U.S. still remains hesitant to join the Convention system. The absence of the U.S. in the Convention system has occasioned delay in the commencement of production operations in the international seabed area, depriving developing nations of the long expected riches of the deep seabed. As the U.S. finds more and more reasons to avoid UNCLOS, the fear has been expressed in this paper that the prospect of U.S. ratification of the Convention will continue to recede.

It has been argued in this paper that so long as the developing nations of the world do not possess their own technology, and lack the know-how to embark on deep seabed mining independently of the developed nations, the most realistic approach to the deep seabed controversy would be to make further concessions developed nations. Such concessions would include stripping the ISA of all powers relating to the regulation of marine technology transfer between countries so that such transfers would be purely market-oriented. This, in this writer's view, remains the shortest route to achieving any real economic benefits from deep seabed resources, in the near future, among developing countries.

ECONOMIC ANALYSIS OF MARITAL RAPE

Cheta Sheth and Bedanta Chakraborty[*]

INTRODUCTION

"Marriage is the only actual bondage known to our law. There remain no legal slaves, except the mistress of every house...However brutal a tyrant she may be unfortunately chained to ... [her husband] can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations."[1]

Since the late of the 20th century, most of the developed world has criminalised marital rape. India has still not. In a recent press release, the Minister of Women and Child Development stated that the social structure, poor economic conditions and low literacy rate are some of the many reasons why marital rape has not yet been criminalised in the country. A similar stance was taken by the Lok Sabha in response to the recommendations put forth by the Justice Verma report, 'The Committee deliberated the amendments to section 375 of IPC including the issue of marital rape and observed that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice.'[2]

Statistics reveal that married women are more likely to experience physical or sexual violence by husbands than by anyone else. Nearly two in five (37 percent) married women have experienced some form of physical or sexual violence by their husband. One in four married women has experienced physical or sexual violence by their husband in the 12 months preceding the survey.[3]

In his History of the Pleas of the Crown (1736), Sir Matthew Hale made the following pronouncement: But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.[4]

However, in 1991, in a landmark judgement, the House of Lords held, 'It may be taken that the proposition was generally regarded as an accurate statement of the

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[1] JOHN STUART MILL, THE SUBJECTION OF WOMEN (1st ed. 1869).

[2] MINISTRY OF HOME AFFAIRS, LS.US.Q.NO.2872 (2016).

[3] MINISTRY OF HEALTH AND FAMILY WELFARE, DOMESTIC VIOLENCE (2006).

[4] 2 MATTHEW HALE et. al., HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN (1847).

common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.'[5]

What is more, contrary to what most men would suppose, the long-term emotional and psychological effects of marital rape appear to be more rather than less serious than those of rape by a stranger because of the element of betrayal and breach of trust that is present when a woman is raped by her husband.[6]

The transition from providing marital immunity for rape to criminalising the act shows the progress in the common law nations. Despite deplorable statistics and conditions rampant in India, marital rape yet remains to be categorised as a punishable offence.

WHY SHOULD MARRIAGE BE A DEFENCE TO A CHARGE OF RAPE?

Besides the obvious one of difficulty of proof or the evidentiary problems as rape is an underreported crime, there are a number of other problems as regards the marital immunity for rape[7]. In a society that prizes premarital virginity and marital chastity, the cardinal harm from rape is the destruction of those goods and is not inflicted by marital rape. We should not be surprised that in these societies the seduction of a married woman is a more serious crime than rape[8], as it is more likely to produce children, and they will not be the husband's. In such societies, moreover, the main service that a wife contributes to the marriage are sexual and procreative, and to deprive her husband of these services is to strike at the heart of the marriage. A right to demand something does not entail a

[5] R v. R, (1991) 3 WLR 767.

[6] Irene Hanson Frieze & Angela Browne, *Violence in Marriage*, 11 CRIME AND JUSTICE 163 (1989).

[7] RICHARD A POSNER, SEX AND REASON (1992).

[8] ROGER JUST, WOMEN IN ATHENIAN LAW AND LIFE (1989).

right to take it by force, but it can dilute the felt impropriety of force. The difficulty of providing satisfactory proof of lack of consent in an "acquaintance rape" case is one reason for law's traditional refuse to make marital rape a crime.[9] In general, the lower the rate of divorce rate, the fewer separations there are; and the problem of proving lack of consent is reduced if the married couple is separated. The exception to the negative correlation between divorce and separation is where, as in Catholic countries until recently, divorce was forbidden but formal separations, often permanently, took their place. Marital rape may be uncommon since few wives will refuse their husband's demand for sexual intercourse. So may be where marital rape is criminalised the main effect is simply to increase the wife's bargaining position in a divorce proceeding. The nature of the harm to the wife raped by her husband is a little obscure. If she is beaten or threatened, these, of course, are real harms, but they are the harms inflicted by an ordinary assault and battery. Especially since the goods of virginity and of chastity are not endangered, the fact of her having intercourse many times before seems peripheral to the harm actually inflicted but is critical to making the offence rape.

CHILD MARRIAGE AND ANTI-RAPE LAWS

Worldwide, more than 700 million women alive today were married before their 18th birthday. More than one in three (about 250 million) entered into the union before age 15. India alone accounts for a third of the global total.[10] Girls married young are more vulnerable to intimate partner violence and sexual abuse than those who marry later.[11]

The direct corollary of child marriage is marital rape. Husbands are able to steer their young brides as per their whims. Pregnancy can be incidental to rape or forced with the intention of permanently trapping the child in wedlock. Motives differ, meanings change, methods vary, but the impact is always damaging. Young wives are unaware of the changes their body will undergo. Still recovering from the tremors of repeated rape, they are subconsciously pushed towards a dead end. The excruciating pain due to the intolerable force remains subdued under blankets of male dominance.[12]

[9] Michael DA Freeman, *But if you can' rape your wife, who can you rape?: The Marital Rape Exemption Re-Examined* [1981], 15(1) FAMILY LAW QUARTERLY 8 (1981); Sonya A Adamo, *The Injustice of Marital Rape Exemption: A Survey of Common Law Countries*, 4(55) AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY (1989).

[10] ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS, UNICEF (2014), (Aug 11, 2016), http://www.unicef.org/media/files/child_marriage_report_7_17_lr..pdf.

[11] Sarah Crowe & Peter Smerdon, CHILD MARRIAGES: 39,000 EVERY DAY, UNICEF (2016), (Aug 14, 2016), http://www.unicef.org/media/media_68114.html.

[12] Ria Dalwani, CHILD MARRIAGE, RAPE AND THE LOOPHOLES OF THE LAW HUFFINGTON POST INDIA

Additionally, the young girls 'had made their husbands aware of their unwillingness to have sex or of pain during sex, but in 80 percent of these cases the rapes continued.'[13]

Exception 2 to Section 375 of the Indian Penal Code, 1860 is abundant with loopholes which need to be plugged. These lacunae in laws can be simply illustrated as – firstly, The Criminal Law (Amendment) Act, 2013 provides that, the age to legally consent to sexual intercourse is 18 years for girls. Secondly, the Prohibition of Child Marriage Act, 2006 sets the minimum age of marriage for a girl at 18 years. However, the marriage of a girl below 18 years is voidable, not void-ab-initio. Thirdly, the Protection of Children from Sexual Offences Act, 2012 provides that a girl below 18 years of age is defined as a child and a child does not have the physical or mental capacity to enter into a sexual relationship. Lastly, section 375 of the Indian Penal Code, 1860 (amended) states that a man is said to have committed rape, if he does any of the intrusive sexual acts as enlisted in Section 375, with a girl below 18 years of age, with or without her consent. However, Exception 2 of the same Section provides that sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

So, a girl below 18 years is a child. Such a girl is neither physically nor mentally ready to have sexual intercourse. She cannot legally consent to have sex and is also not eligible to get married. Sexual intercourse with a girl below 18 years, with or without her consent, amounts to rape.

But if this girl is his wife? A man can have sexual intercourse with his child wife, the wife being above 15 years of age, with/without her consent and it will not amount to rape.[14]

The apparent glitch in this law renders the law inefficient and extremely arbitrary. Several Law Commission Reports and Public Interest Litigations have been filed; however, no improvement has been made so far. The relevant sections are violative of Article 14, 15 and 21 for the provision discriminates between a girl of 15 years and 18 years without a rational nexus. Also, the classification made is arbitrary and in violation of essential fundamental rights.

An efficient rule or law can be elucidated as: 'First, a rule is efficient if it has actually been chosen by rational actors under conditions in which they presumptively behave

(2015), (Aug 17, 2016), http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-_b_7903582.html.

[13] Mariam Ouattara et al., *Forced Marriage, Forced Sex: The Perils Of Childhood For Girls*, 6 GENDER & DEVELOPMENT (1998).

[14] Ria Dalwani, *Child Marriage, Rape And The Loopholes Of The Law Huffington Post India* (2015), (Aug 17, 2016), http://www.huffingtonpost.in/ria-dalwani/child-marriage-a-gateway-_b_7903582.html.

in a manner that maximises social wealth (the choice test). Second, a rule is efficient if it would survive the competition of other rules in an evolutionary process that can be shown to produce efficient equilibria (the evolutionary test). Third, a rule is efficient if it seems consistent with a model of economically efficient behaviour (the behavioural test).'[15]

The inconsistency in child marriage and rape laws cannot be called an efficient rule; it does not maximise social welfare as it extremely injurious for the girl child; it fails to satisfy the evolutionary test on comparing the current legal scenario to existing laws in other nations; it does not satisfy the behavioural test as the contradiction proves to be favourable for the husband and incentivises him to commit the crime again.

Also, the private costs incurred by the girl child are astronomical, and tends to spill over into social costs, thereby affecting a number of stakeholders in the society. Similarly, there are a number of negative externalities attached to this offence which is detrimental to the well-being of the girl child.

The loss of adolescence, forced sexual relations and denial of freedom and personal development associated with an early marriage have perpetual psychosocial and emotional consequences. Hence, the paradox in child marriage and anti-rape laws are economically inefficient and need to be amended.

BARGAINING IN MARRIAGE AND APPLICATION OF COASE THEOREM

In his seminal work, 'The Problem of Social Cost,' Ronald Coase held that in cases of private property right disputes involving what have been called externalities, 'with costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.'[16]

The Coase theorem can be simply stated as 'when parties can bargain together and settle their disagreements by cooperation, their behaviour will be efficient regardless of the underlying rule of law.'[17]

Coase dealt with a number of important issues such as the problem of joint social cost and externality, the efficient allocation of property rights and resources between bargaining parties; assuming zero transaction costs and complete information.

In Coase's view, it takes at least two to create an external cost: someone to produce it

[15] Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1697 (1996).

[16] Walter Block, *Coase and Demestz on Private Property Rights*, 1 JOURNAL OF LIBERTAN STUDIES 111 (1977).

[17] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed. 2007).

and someone else to bear it. The externality is bilateral in another sense, not only do the two parties combine to produce the harm, one of them is bound to suffer the harm as a result of the conflicting preferences. This raises the inherent problem of joint or social cost situations: Who gets to impose harm on whom? From an economic point of view, Coase argues that the goal should be to minimise the total harm because that way the social product is maximised. It should be evident that the total social cost- the sum of private costs to all parties will be affected by the allocation of the legal right or entitlement to either party.[18]

The assumption of zero transaction costs also has crucial implications for law. Simply put, in a world of zero transaction costs, the law is irrelevant. Whatever, the initial allocation of property rights (or entitlements), and whatever the legal rules governing resource use, parties will costlessly contract to the most efficient allocation of resources.[19] Coase argued that, from an economic perspective, the goal of the legal system should be to establish a pattern of rights such that economic efficiency is attained. The legal system affects transactions costs and the goal of such a system is to minimise harm or costs, broadly conceived.[20]

The meaning of 'property rights' is this: individuals or associations represented by individuals possess a legal right to prevent others from stealing, invading, destroying, or otherwise interfering with their property. Owners therefore possess a legal right to exclude others from the use of specified property.[21]

To further simplify the notion of allocation of property rights, let us take an illustration. In Coase's example, a baker and a dentist share a wall. The baker uses loud machinery which disturbs the dentist and interferes with his medical practice. There are two solution to this problem, (i) the baker can buy a less noisy machine; assuming it costs Rs. 50 or, (ii) the dentist can sound proof his walls; assuming it costs Rs. 100.

Prima facie, it appears that the fault lies in the noise created by the loud machines used by the baker and therefore he should buy the less noisy machines for Rs. 50. However, one could argue that the dentist was imposing an externality on the baker to bake in silence. It becomes crucial to decide who is entitled to the

[18] DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW AND ECONOMICS (2011).
[19] *Id.*

[20] STEVE MEDEMA & RICHARD ZERBE, THE COASE THEOREM (2000).
[21] Gary North, *Undermining Property Rights: Coase and Becker*, 16 JOURNAL OF LIBERTARIAN STUDIES 75 (2002).

'sound' or property rights. This is when either party can approach the legal system to adjudge and decide who has the 'sound rights'. Assuming that the 'sound rights' are with the dentist: this implies that the dentist is entitled to a noise free environment and he can insist the baker on buying less noisy machines. However, if the Court rules in favour of the baker, it means that he is entitled to use his noisy machinery. It would also imply that the dentist cannot force the baker to use less noisy machine and he would have to sound proof his walls. However, since the dentist and the baker are rational, they would resort to the least cost option available: the dentist would simply pay the baker Rs. 50 to buy less noisy machine instead of spending Rs. 100 for sound proofing his walls. This is the most efficient and cost minimising outcome. Coase contends that the initial allocation of property rights does not affect the final result as both the parties will bargain and come to the most efficient outcome which will also be the least cost result. To further strengthen his stance, Coase also assumes that both the parties have complete information, i.e. they have complete knowledge of the costs incurred and who is entitled to the property rights. Therefore, with zero transaction costs, the outcome of bargaining between two parties will be the most efficient and cost minimising.

When we connect the understanding of property rights to a marital relationship, we can reasonably infer that a wife enjoys the right to her private property i.e. her body. She is entitled to the right to prevent anyone from exercising undue authority and cause harm to her private property.

At this stage, it becomes extremely pertinent to understand the scope and extent of conjugal rights. Conjugal rights can be defined as rights and privileges arising from the marriage relationship, including the mutual rights of companionship, support, and sexual relations.[22]

For the sake of simplicity and better understanding, let us consider a conjugal fact case scenario. The man and wife enjoy a legal right to their own private property. They also enjoy certain conjugal rights which allow them the companionship and sexual intimacy allowed in a marriage. In the case of marital rape, because there is a lack of consent on the part of the wife, there is a conflict of preferences between the two parties exercising their own individual rights. The man, exercising his conjugal rights to sexual intercourse and the wife, her right to her private property. Using the Coase theorem, we attempt to come to the most

[22] Bryan A. Garner, Garner's Dictionary of Legal Usage (3rd ed. 2011).

efficient allocation of rights between the two parties involved in the conflict.

With reference to the problem of joint social costs, we can infer two things (i) the husband's right to sex interfered with private property rights of the wife (ii) the wife's right to private property is disturbed by the husband's right to sexual intimacy. There is an evident conflict of rights which can be resolved by using the Coase theorem.

On drawing a comparison between the given example and a marital rape scenario, we can observe that the husband and the wife have a conflict of rights. On applying the Coase theorem and arguing for criminalisation of marital rape in tandem, we can deduce that fulfilling the objective of the paper is the most efficient outcome with the aid of the following relevant points:

1) On Assuming That Marital Rape is a Crime

This implies that initial property rights lie with the wife, i.e. her right to private property has an over-riding effect on the husband's conjugal right to sex. If the husband exceeds his conjugal right and demands for sex without the consent of his wife, he commits the crime of marital rape. Therefore, the husband will be punished and he will suffer a series of consequences and costs. Whereas, if the husband exceeds his right but the wife does not consent, he suffers a relatively lower cost. In the first instance, the husband suffers a high cost of being punished and compensating his wife. We can validly assume that this imposition entails a higher cost to the husband in comparison to not raping his wife. Hence, the commission of marital rape is not efficient.

2) On Assuming That No Legal Framework Exists Which Criminalises Marital Rape

This implies that the parties are not aware of the initial allocation of property rights, i.e. who has the over-riding right. On assuming that the property right lies with the husband. In such a case, if the husband exercises his conjugal right to sex without the consent of his wife, it is highly possible and likely that she will suffer a series of private and social costs which will injuriously affect her private property. Also, the mental agony and the lack of sense of security on being raped by a close acquaintance will cause insurmountable damage and social costs. Therefore, the commission of rape leads to a high social cost. However, if the husband exercises his conjugal right to sex and not without the consent of the wife, we can infer that he suffers a lesser cost. On comparing the cost borne by the wife and cost of the husband not being able to gratify his lust, we can soundly infer that the cost borne by the wife would be higher. On the other hand, if the initial property rights are with the wife, it implies that she has

the right to consent to sex. In such a case, if there is a lack of consent on the part of the wife, the cost of not being able to gratify his lust will be borne by the husband. However, we can validly deduce that such a private cost will be comparatively less to the cost incurred by the wife in the first case. Therefore, the least cost option would be not allowing the husband to rape his wife or criminalising marital rape. Hence, irrespective of the legal framework and initial allocation of property rights, we observe that the commission of marital rape is not efficient or cost minimising. For that reason, marital rape should be criminalised.

Therefore, we can conclude that using the Coase theorem, the most efficient allocation of property rights would lie with the wife. Also, the most efficient outcome would be criminalising marital rape.

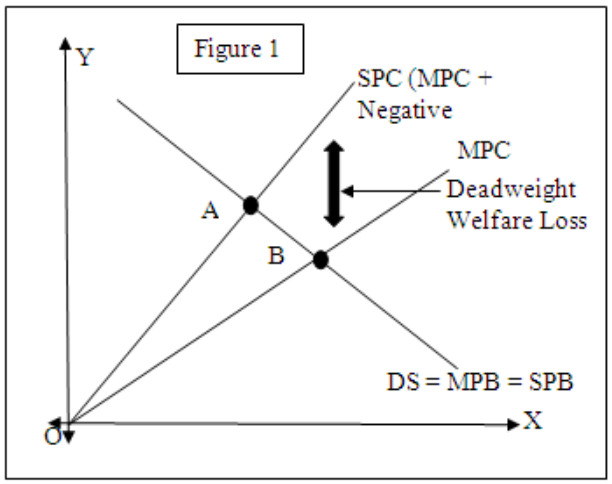
NEED TO CRIMINALISE MARITAL RAPE

There are a number of reasons for making marital rape a punishable offence. It is pertinent here to note the different types of cost as associated to this topic: 1. Private Cost, and 2. Social Cost.

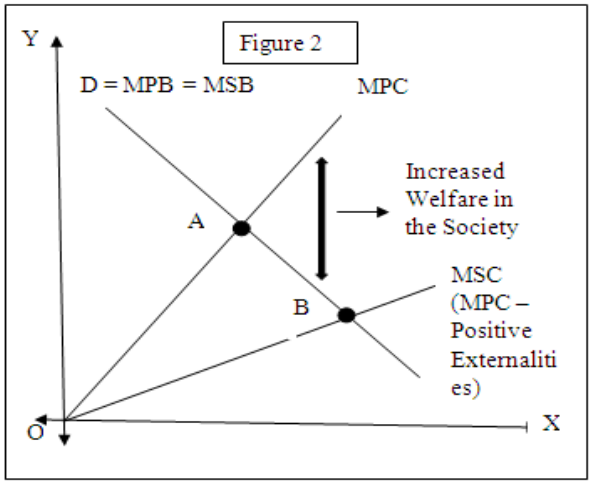
- *Private Cost*- Private cost is a cost which affects an individual exclusively with no bothering to the society whatsoever. It can be seen as something which can diminish an individual's purchasing power, but without affecting the society.
- *Social Cost*[23]- Social cost is the total cost to society. It includes both private cost plus any external costs. For example, for a person who smokes, the private cost is, say, £6 for a packet of 20 cigarettes. But, there are external costs to a society- air pollution and risks of passive smoking. A social cost diminishes the wealth of the society, a private cost rearranges that wealth.[24] Now if we apply this to the case of marital rape. The effect of the abuses as inflicted by the husband on the wife may have severe repercussions on the wife, but not on the society, initially. This happens as the costs are private. It affects the wife, without having any consequences in the society. And this continues as there are no laws to control or regulate the same. It is at this point when externalities come into the picture. (Externalities are costs or benefits involved in a transaction which does not accrue to the individual or firm which is carrying out the transaction. External costs (or external diseconomies) might include damage to the environment from a mining industry while external benefits (external economies) could be the pleasure incurred in an artificial lake

[23] Tejvan Pettinger, *Social Cost Economics Help*, (Aug 25, 2016), http://www.economicshelp.org/blog/glossary/social-cost.
[24] RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

created by hydroelectric works.[25]) In the case of marital rape, externalities (most of which are negative in nature) can be many. For example, a sense of insecurity in the wife can dampen her so much so to force her into committing suicide, or negative impact or setback on children. So the private cost when coupled with externalities leads to social cost, which now affects the society in large.



In the Figure 1, when only the private costs are taken into consideration the cost so incurred is very less, but when these private costs accumulate it leads to negative externalities, which when added to the private cost, forms the Social Cost, and hence now the cost incurred is high (A) and so are the atrocities as faced by the wife, in a whole, the social welfare of the society would diminish. (Figure 1) However, if in the same situation we are to put laws and regulations then the negative externalities would not make any difference as the laws also being along in the concept of positive externality. Due to the presence of laws criminalising marital rape the husband would be restrictive in his actions and at the same time the wife would feel safe, this sense of security instils more love and respect in the family and hence all of this together reduces the cost (B). (Figure 2)



We can also use the concept of Sunk Cost to show as why criminalising of Marital Rape is required. Sunk Costs are expenditure on factors which cannot be used for another purpose or cannot be recovered if the firm is shut down. Such expenditure might include advertisement costs or building costs.[26] Sunk costs do not affect a rational actor's decision on price and quantity. Suppose that a life-sized porcelain white elephant cost $1,000 to build but that the most anyone will pay for it is $10. The fact that $1,000 was sunk in making it will

[25] P. H COLLIN, DICTIONARY OF ECONOMICS (2006).

[26] *Id.*

not affect the price at which it is sold, provided the seller is rational. For if he takes the position that he must not sell it for less than it cost him to make it, the only result will be that instead of losing $990 he will lose $1,000.[27] Now applying this our situation, the MPC a wife faces when raped is very high, if complained then the Marginal benefit so received might be very less, but it will be higher than the situation when not complained. For if she takes the position that she should not complain as the benefit received would be very less, or in other words the MPC will only decrease marginally; the only result will be instead of decreasing MPC, the MPC will increase geometrically and the incentive the husband would get would only increase thus leading to high MPC for the woman and at some point this increasing MPC might leak out to join the social cost. But for all these to function, there should be existing laws for the same.

PUNISHMENT FOR MARITAL RAPE

In India, marital rape finds insignificant recognition under Section 3 (d)(iii), Protection of Women from Domestic Violence Act, 2005 which defines sexual abuse: '*sexual abuse includes any conduct of a sexual nature that abuses, humiliates degrades or otherwise violates the dignity of the woman'*.[28] However, the Protection of Women from Domestic Violence Act, 2005 is a civil law, meant for protection orders and not to penalise criminally.[29]

Section 498A (a) of the Indian Penal Code, 1860 provides for cruelty in the following words: *'any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;'* However, this provision does not rescue the wife in claiming a right against the husband for any form of sexual abuse. Also, prosecution under this section attracts a punishment of imprisonment of three years and fine. Section 357A of the Code of Criminal Procedure, 1973[30] provides for Victim Compensation Scheme as follows: *'(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.'*; this section is based on the premise that the victim has suffered injury as a result of a crime. The current legal position does not criminalise

[27] RICHARD A POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

[28] The Protection of Women from Domestic Violence Act, § 3(d)(iii) (2005).

[29] The Protection of Women from Domestic Violence Act, § 20 (2005).

[30] The Code of Criminal Procedure, § 357A (1973).

marital rape, which is a prerequisite to approach the Court under this provision, hence, rendering this section of no use for the wife.

The question of whether marital rape is a criminal or civil liability is persistent; and for coming to the best solution, this paper explores both the possibilities.

A criminal wrong can be further elucidated in the following relevant points:

- *Criminal Intent- Mens rea* is the legal term for criminal intent. It is fairly evident that in the case of marital rape, the husband's act of forced sexual relations without the wife's consent and use of physical strength is not *bona fide*. This depicts the presence of a guilty mind which is an essential requirement for an act to be categorised as a criminal wrong.
- *Public harm*- In criminal law, as opposed to tort, contract or property laws, harm is not limited to the victim alone. The extent of harm suffered by a wife who is raped is not limited to her; there is a spill over of the private costs incurred by the wife into social costs; which has an adverse effect on the society. Hence, there is a humongous amount of injury experienced further strengthens the cause of criminalising marital rape.
- *Standard of proof*: Another important characteristic of criminal law is the high standard of proving the crime which is imposed on the prosecution. In common law countries, like India, the prosecutor, to secure conviction must prove the case beyond reasonable doubt. This is associated with the wide evidentiary problems associated with proving marital rape. However, the difficulty of proof is not justification alone for not punishing a heinous crime like marital rape.
- *Punishment*: Punishment in criminal law differs from compensation in civil law. In economic terms, the objective of compensation under civil law is to restore the injured back to the original position at the expense of the injurer. This helps in cost internalisation. Since this is not possible for criminal offences, punishment under criminal law aims to make the injurer worse off without affecting the injured. Further, punishment under criminal law aims to deter future offenders. The difference lies in the motivation for committing the act, along with the impact of the act; civil wrongs strictly affect private individuals and are committed without the intention of causing harm as opposed to a criminal wrong which has a wider impact and is committed with a guilty mind. Devising an appropriate remedy for marital rape is extremely pertinent; since the victim has suffered from private costs which must be compensated together with punishing the guilty intention of the husband.

Because marital rape is an offence which consists elements of both civil and criminal wrongs, it can be reasonably inferred that an effective solution would be a combination of both compensations in tandem with imprisonment. This is because of the following reasons:

- *For punishment under criminal law:* imprisonment under criminal law has a deterrent effect on the future delinquents. If convicted, there is a social stigma attached to the offender. Also, the imprisonment is effective in punishing the psychological commitment of the culprit.
- *For punishment under civil law*: perfect compensation helps in overcoming the injury suffered by the wife. The physical force advanced in extracting sexual intercourse puts the wife under great stress and trauma, shaking her trust and faith in her husband. Further, compensation aids in rehabilitating the wife with an aim to restore her back to the original position. Compensation also helps in internalising the costs sustained by the wife.

Therefore, we can reasonably conclude that the most efficient remedy for marital rape would be the perfect combination of imprisonment of the husband and compensation to the wife.

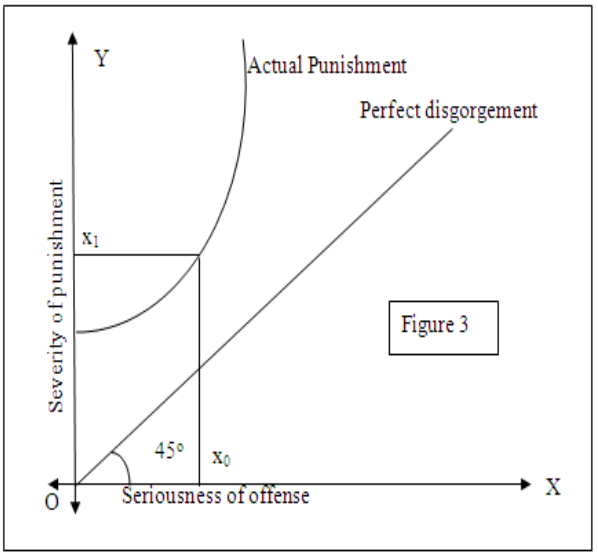


Figure 3

This can be further elucidated as follows:

As the basic assumption of Economics run, '…every man is rational', so is a criminal or perpetrator of marital rape. Rational criminals compare their expected punishment as against their expected gains, and if their answers are favourable they go on to replicate their acts. By a rational, amoral person, it can be understood as someone who carefully determines the means to achieve illegal ends, without restraint by guilt or internalised morality.[31] Crimes can be ranked by seriousness, and punishments by severity. We measure the seriousness of the crime along the horizontal X-axis and the severity of the punishment along the vertical Y-axis. The more severe punishments typically are attached to the more serious crimes. In case of marital rape, even though the crime is serious in nature, the

[31] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (4th ed. 2007).

punishment (or in more appropriate words, prosecution) attached to it is extremely feeble or insufficient in nature, for at most, any sort of relief the woman can get is monetary, as a result of which the husband gets incentivised to commit the act again. We can illustrate the severity of the punishment as a function of the seriousness of the offence.

The curved line represents actual punishment and shows the severity of the punishment as a function of the seriousness of the crime. The punishment curve slopes upwards to indicate that the punishment becomes more severe as the crime becomes more serious. When the severity of punishment equals the seriousness of the offence, punishment causes perfect disgorgement.

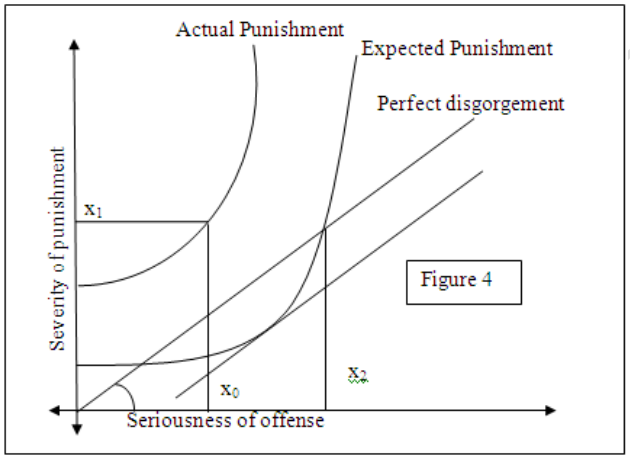


Figure 4

Now, we consider the situation of martial rape. In this case, under the existing laws, for every act of marital rape, the remedy awarded is monetary compensation. And, as every case under Domestic Violence Act, 2005 does not attract separation or divorce, the money so given by the accused to the victim completes a circle and comes back to the accused again. So the relief is nothing but equal to or even less than perfect disgorgement, hence this cannot deter the husband from committing the offence again.

The probability of getting caught is also very important when it comes to deciding whether to commit the crime or not. Every offender calculates the expected value of the crime, which is equal to the gain minus the punishment multiplied by the probability of getting caught.[32] Often, the expected punishment curve will be lower than the actual punishment because of the sole reason that gathering evidence for an act of marital rape is extremely difficult. As long as the expected punishment curve is more than the 45^{o} line the offender will be deterred to commit any act, but the moment the expected punishment curve slips under the 45^{o} line (as seen in Figure 4) the offender continues to commit the crime. Once, the expected punishment dips below perfect disgorgement, the offender gets the incentive to further commit the crime. In the range below the 45^{o} line, the offender gains more than he expects to lose, so crime pays and hence under these

[32] *Id.*

circumstances an amoral person would commit the act of question.

Criminalising and punishing marital rape is difficult, primarily due to the fact that it is fraught with evidentiary problems. Since it is tough to prove the act, the probability of getting caught drastically falls, seriously affecting the expected punishment and the gain accrued to the accused. Furthermore, the lack of information and patriarchal nature of the Indian society shrinks the chances of punishing the accused. However, this argument is weak, for the simple reason that evidentiary problems cannot be cited as an excuse for letting marital rape go unchecked. Also, in economic terms, by increasing the punishment, the cumulative total of expected function shifts the balance towards the victim from the accused as it results in an upward shift of the expected punishment line; making it more costly for the accused to commit the offence. Due to the underlying assumption of rationality, the accused would do a simple cost-benefit analysis; implying that costs exceeding gains which would discourage him from committing the offence and vice versa.

Consequently, the actual punishment for marital rape must exceed perfect disgorgement. Above the 45^{o} line is the actual punishment line, and this line should ideally represent the punishment for the offence of marital rape.

We can read off the graph how serious the offence is. The expected profit from the offences equals the difference between the perfect disgorgement line and the expected punishment line. So we can conclude that the marginal benefit received by the offender by a small amount is given by the perfect disgorgement curve's slope. The marginal expected cost to the criminal is equal to the expected increase in punishment from increasing the seriousness of the offence which is given by the slope of the tangent to the expected punishment line. For values of x below x_2, the marginal benefit keeps on increasing and exceeds marginal expected cost and so the criminal would increase the seriousness of the offence and if it's more than x_2 then the offender will decrease the seriousness as the marginal expected cost is now less than the marginal benefit so received by the criminal for his act.

But how do we determine this x_2?

For x_2 to be extremely deterrent to the offender, we suggest that a combination of both perfect compensation and efficient punishment be made liable to the offender, for it is only then the amoral person would be restricted to further commit the act. Only compensation would act as the line of perfect disgorgement and may not be as influential as the same may be when coupled with efficient punishment. Also, only efficient punishment may be efficient because, even

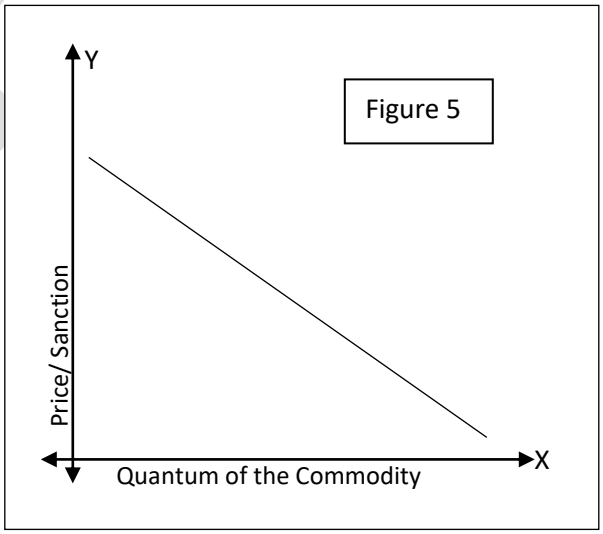
though the punishment may deter the husband from further committing his abusive acts, it may not be truly beneficial to the wife. As compared to other victims of crime say rape or assault victims, in the case of marital rape, the victim need to further stay or spend her life with the husband, and while being prosecuted the wife would need financial assistance to run her family; and therefore, the efficient punishment should be coupled with compensation. Another problem lies in the fact that in the case of intra-marriage rape, perfect compensation might be difficult to be ascertained, and hence compensation should be such that a) it is enough for her to run the family b) the monetary relief would be able to let her continue enjoying her existing living standards. Hence, it can be concluded that a combination of perfect compensation and imprisonment can be an economically efficient remedy for the offence of marital rape.

The need to make marital rape a punishable is crucial. On applying the Law of Demand to a marital rape scenario, we can understand and validly deduce the effect of punishment on the demand for non-consensual sex, which in turn, directly affects the rate at which the husband rapes his wife.

In a microeconomic perspective, the Law of Demand can be simply stated as, '*other things being equal, if price of a commodity falls, the quantity demanded of it will rise, and if the price of the commodity rises, its quantity demanded will decline.'*

The law of demand expresses the functional relationship between price and quantity demanded. Thus, there is an inverse relationship between price and quantity demanded, *ceteris paribus.*

On connecting the Law of Demand to a conjugal scenario, we can draw an analogy between the consumer and the husband, the commodity demanded being non-consensual sexual intercourse and the price as the cost which the husband has to pay. Therefore, the consumer is the husband, the commodity is sexual intercourse and the price is the cost incurred by the husband when he wants to engage in such an activity. The independent variable is the price or the cost which is plotted across the Y-axis and the dependent variable is



the quantity of commodity demanded which is measured across the X-axis.

Quite simply, the Law of Demand means that with an increase in price, the quantity demanded will reduce and with a decrease in price, the quantity demanded will increase. When marital rape is not a punishable offence, the cost of non-consensual sex is very low. This is owing to the fact that the husband is physically more powerful and can use force. Also, there is no cost with regard to sanctions which could deter the husband from committing the offence. However, when marital rape is a crime, the price of non-consensual sexual intercourse increases. This is due to the increase in the costs which the husband will have to pay due to the sanctions imposed by law. This effectively reduces the demand for non-consensual sexual intercourse, fulfilling the objective of criminalising marital rape. Further, this has the required deterrent effect, discouraging future offenders from committing the offence.

Alternatively, the Law of Demand is a downward sloping demand curve because of two reasons:

- Income effect- this means that due to a fall in the price of a commodity, the real income or purchasing power of the consumer increases and vice versa. On criminalising marital rape, the husband would have to pay a higher price, effectively reducing his purchasing power or real income. This leads to a reduction in the quantity demanded.
- Substitution effect- this induces the consumer to demand a cheaper substitute of the commodity demanded when the price increases. When marital rape is criminalised, the price of non-consensual sex increases inducing the husband to reduce demand for the same and shift towards cheaper substitutes like consensual sexual intercourse.

Hence, the demand curve for a commodity demanded is downward sloping. Therefore, we can validly conclude that making marital rape a punishable offence, due to the rise in the cost, the quantity demanded for non-consensual sex will fall.

Owing to the complexity of the nature of this offence together with the series of social norms and backdrop of the society, immunity for marital rape has not been abolished. However, due to the growing awareness and grievous repercussions of this act, we argue that marital rape is a gross violation of fundamental human rights and should be contained by devising an economically efficient law which protects the rights and interests of the victim.

ILLEGITIMACY: AN ILLEGITIMATE CONCEPT

Radhika Yadav[*]

INTRODUCTION

Illegitimacy is a status acquired at birth which characterises a child born to parents who are not legally married to each other. An illegitimate child faces many legal and social disabilities. Such children are often referred to as 'bastards' and are placed in the category of "irreputable social types" alongside thieves, beggars and prostitutes.[1] Illegitimacy is characterised as a major social "problem" associated with cultural and moral decay. As out-of-wedlock births increase both in India and globally, a parallel discourse about the fundamental importance of 'conventional' heterosexual marriage to the stability and well-being of society has also grown. In this paper, I will demonstrate that the concept of illegitimacy is fundamentally unjust to the child and its parents (primarily the mother). This is done by deconstructing marriage and its supposed inherent value to society. Illegitimacy is also challenged on constitutional grounds as being opposed to the rights of privacy and equality before the law.

LEGAL STATUS OF AN ILLEGITIMATE CHILD

At the common law, an illegitimate child was a *filius nullius*, having no legal relationship with the father, mother or any relatives. Thus, the child had no right to maintenance, succession or to any other benefits derived from the relationship between a parent and child. Illegitimate children were also barred from occupying positions of responsibility and social visibility.[2] But, in the present day a majority of the glaring legal disabilities facing illegitimate children have been abandoned in most common law jurisdictions such as Australia, the United States, and the United Kingdom.[3]

However, the status of illegitimate children in India remains a throwback of

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[1] Harry D. Krause, *Equal Protection for the Illegitimate*, 65(3) MICHIGAN LAW REVIEW 477, 480 (1967).

[2] John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOCIETY: THE INTERNATIONAL JOURNAL OF PENOLOGY 327, 334 (2003). In the early 20th Century, most common law and civil law countries began to treat children who were born out of wedlock but whose parents later married as legitimate.

[3] Even here, while the glaring disabilities that exist in India have been abolished, discrimination still continues and the concept of illegitimacy hasn't all together been discarded. For instance, laws relating to intestate succession, child support and citizenship in the United States discriminate against children born out of wedlock. Moreover, the social stigma and stereotyping attached to illegitimacy still remains. The persistent employment of the term "illegitimate" and "bastard", its characterisation as a "major societal problem" are evidence of the same.

medieval times. Illegitimate children are severely disabled under all systems of personal law. Under Hindu law, by virtue of the Hindu Succession Act, 1956, an illegitimate child has the right to succeed to the property of only his/her mother since they are deemed to be related to their mother. The relationship of the child with the father is not recognised.[4] Sec. 16 of the Hindu Marriage Act, 1956, was inserted by an amendment in 1976 to protect the rights of children born out of void and voidable marriages. In *Revanasiddappa.* v. *Mallikarjun*[5], the Supreme Court noted that the section also served the important purpose of preventing such children from the stigma of bastardisation. Thus, though the amendment is noteworthy, it's interpretation in such express and degrading terms is a recognition of the inferior status of illegitimate children at law and in society. Under Muslim Law, in the *Ithna-Ashari* school, an illegitimate is treated as a *filius nullius*. This position has been moderated in the *Hanafi* school, which gives the mother legal rights over the child for the purposes of feeding and nourishment. Furthermore, the mother and child also have mutual inheritance rights.[6] The Indian Succession Act, 1925, which governs intestate succession for Christians[7] and Parsis[8], doesn't contain any express provisions excluding illegitimate children from inheritance. Taking advantage of this, some courts have tried to further the rights of such children.[9] Sec. 100 of the Indian Succession Act, 1925, which governs testamentary succession for all personal laws expect Muslim law, states that if the intention of the testator to give the property to the illegitimate children is not clearly mentioned in the will, then the term "child" will mean only a legitimate child.[10] However, under Sec. 125 of the Code of Criminal Procedure, 1973, illegitimate children are entitled to claim maintenance from both biological parents if he/she is unable to maintain himself/herself. Furthermore, by virtue of Sec. 114 of the Indian Evidence Act, children born to parents who have cohabited for a long time, held themselves out as husband and wife and also recognised by society as being so, are treated as legitimate.[11] However, such a relationship must not be "*walk-in and walk-out relationship*"[12]

In the next part of the paper, legal and sociological arguments have been presented to

[4] Hindu Succession Act, 1956, § 3(1)(j).
[5] Revanasiddappa & Anr. v. Mallikarjun & Ors, (2011) 5 MLJ 392 (SC).
[6] *Asaf A. A. Fyzee*, OUTLINES OF MUHAMMADAN LAW, 34 (5th ed., Tahir Mahmood ed., 2009).
[7] Indian Succession Act, 1925, § 31-49.
[8] Indian Succession Act, 1925, § 50-56.
[9] See, the decision of the Kerala High Court in Jane Antony, Wife of Antony v. V.M. Siyath Vellooparambil, 2008 (4) KLT 1002. It is discussed in some detail later in the paper.
[10] Indian Succession Act, 1925, § 100.
[11] SPS Balasubramanyam v. Sruttayan, AIR 1992 SC 756.
[12] Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

demonstrate that illegitimacy is an unjust and illogical concept.

ILLEGITIMACY, CULTURAL DECLINE AND POOR SOCIAL OUTCOMES

In many countries, such as the United States, that have witnessed a surge in births outside of wedlock, the issue of illegitimate children has generated major debates that touch upon questions of sex, race and gender.[13] Many social commentators lament the demise of traditional family forms. The diversity in family structures consisting of single, unmarried parents, homosexual couples, non-romantic domestic partnerships, cohabitees, transgender couples, polygamous and polyandrous relationships and the illegitimate children of such unions are blamed for damaging the moral fabric of society and also contributing to poverty and crime.[14] Statistical evidence is cited to show that being a product of the "sins" committed by their parents, illegitimate children are more likely to drop out of college and be poorer than children born out of a marriage.[15] This is buttressed with evidence to show that a heterosexual marriage produces happier, more stable and successful adults and children. However, those who cite this statistical evidence are unable to explain the reasons for the same.

In actuality, this is a case of mistaking correlation for causality. Out-of-wedlock births are more likely to occur among the poorer and less-educated strata of society.[16] It has been shown that men from the lowest strata of society, isolated from the rest and with scant hope of getting a stable, well-paying jobs seek to demonstrate their manhood through an exercise of their sexual prowess. For the same reasons, young women are also attracted to early sexual encounters resulting in pregnancies and childbirth. Not possessing the economic means to enter into a long-term union, most fathers refuse to take responsibility for the child. Thus, the entire burden of childrearing is placed on young mothers, who, often lack the financial means, maturity and emotional support to perform the daunting task of raising a child.

Additionally, due to the various legal impairments placed upon them, illegitimate children also have access to fewer resources. For instance, they are less likely than even children born to divorced parents to receive maintenance from the non-custodial parent. Since illegitimate children are less likely to have access to property and education, their life chances and outcomes are also lower than their

[13] Arlene Skolnik, *The Politics of Family Structure*, 36(2) SANTA CARLA LAW REVIEW 417, 422 (1996).
[14] *Id.* at 417.
[15] Steven L. Nock, *Marriage as a Public Issue: The Future of Children*, 15(2) MARRIAGE AND CHILD WELLBEING 13, 28 (2005).
[16] Skolnik, *supra* note 13, at 420.

marital counterparts.[17] The Supreme Court of Massachusetts acknowledged this factor in *Goodridge* v. *Department of Public Health*[18] when it observed that since many of the benefits available to married couples are not available to newer and unconventional family forms, children born in these homes are likely to fare worse than marital ones.

Finally, these statistics are not universal. Data from other industrialised nations in Continental Europe that have completely discarded the discrimination between legitimate and illegitimate children and have better welfare support programmes is different. Here, the correlations are weaker or absent. [19]

But, unfortunately, this misplaced correlation works to further disadvantage illegitimate children. The societal stigma imposed by illegitimacy unites with other negative characterisations such as violence, behavioural problems and sexual irresponsibility.

ILLEGITIMACY: NOT A GENDER NEUTRAL CONCEPT

Laws dealing with illegitimate children in various jurisdictions, including India, discriminate against the mother. For example, the rules of intestate succession under the Hindu Succession Act, 1956 don't recognise the biological relationship between father and child. These practices seek to establish a link with childbearing and childcare, vesting the entire responsibility for the child with the mother.[20] Such gendered conceptions are a form of sex-based discrimination that have been subject to intense criticism. [21] Thus, the mandate of the law has been to dismantle such practices. This takes the form of a Constitutional guarantee in Art. 15 that expressly prohibits discrimination on the basis of sex and provides for making special provisions for women. The persistence of discrimination in laws relating to illegitimacy is contrary to the constitutional mandate.

Furthermore, such laws encourage sexual arrogance and irresponsibility among men. It also signals to them that their relationship with their illegitimate children is less valuable than with their legitimate ones, disincentivising paternal involvement with non-

[17] Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Non-Marital Children*, 63(2) FLORIDA LAW REVIEW 345, 350 (2013).
[18] Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).
[19] Maldonado, *supra* note 17, at 370.
[20] Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS LAW REVIEW 73, 76 (2003).
[21] *Id.*

marital children.[22] Lastly, such laws reflect the view that it is the mother's 'immorality' that leads to births out-of-wedlock. Needless to say, such a view is irrational and classic of the patriarchal characterisation of women as having uncontrolled sexuality (that needed be controlled through marriage). It is responsible for the continued stigmatisation of unwed mothers in society.[23]

THE DECONSTRUCTION OF MARRIAGE

Illegitimacy is a status that derives from marriage and since it is disabling in nature, it privileges marriage over other intimate/non-intimate unions that result in childbirth and childrearing. Most jurisprudence that deals with the rights of illegitimate children rests on the assumption that marriage is superior to other unions and attaches an inherent value to it that needs to be protected.

However, marriage has been forcefully deconstructed by many feminist and queer theorists, who regard it as another "meta-narrative" that exists in the post-modern world. Thus, the institution has been subject to much scrutiny and criticism. Much of this critique has centred around marriage as a means for the subordination of some family members to others.[24] This is possible because of marital privacy, which has facilitated abuses of power in the relationship.[25] Historically, marriage was a means to ensure the dependency of the wife on the husband, which was supported by legal doctrines such as coverture, due to which the husband and wife became one entity in the eyes of the law, resulting in the 'civil death' of the wife. Even though the law has attempted to achieve gender equality within marriage, the institution still reinforces gender hierarchy because of the social practices that are associated with it.[26] Instances of this are the practice of women adopting the last name of their husbands and gendered division of care work that exists in most marriages, especially in a majority of the segments of Indian society.

It has also been pointed out that marriage is essentially a means of state-regulation of the private lives of individuals. This has been consistently affirmed through various Supreme Court decisions that recognise the state as the third party in the relationship. It curtails the liberty of the spouses in various spheres. For example, they are prohibited from pursuing sexual relations with others and exit from the

[22] BROMLEY'S FAMILY LAW, 379 (4th ed.)

[23] Mary E. Becker, *The Rights of Unwed Parents: Feminist Approaches*, 63(4) THE SOCIAL SERVICE REVIEW 496, 500 (1989).

[24] Suzzane A. Kim, *Skeptical Marriage Equality*, 34 HARVARD JOURNAL OF LAW AND GENDER 37, 42 (2010) [*See* Katharine T. Bartlett, *Feminism and Family Law*, 33 FAMILY LAW QUARTERLY 475, 475 (1999)].

[25] An ideal example is marital rape, which is not punishable as a criminal offence.

[26] Kim, *supra* note 24 at 43.

union is possible only upon the fulfilment of certain pre-determined conditions.

Some have also explained the central foci occupied by marriage in social life by reasoning that the institution was a means of regulating births. Till there were no methods of contraception, marriage was regarded as the only proper venue for sex. Only through marriage could responsibility for children be allocated. Thus, the birth of children outside of wedlock was automatically discouraged. However, with the development of reproductive technology, the link between marriage and childbearing has been decoupled. The decline in 'shotgun marriages' and corresponding increase in births outside of wedlock in the entire Western World is evidence of the same.[27]

When viewed in this manner, it is no longer possible to characterise marriage as fundamentally important to well-being in social and familial life. Thus, the status illegitimacy, which gives preference to births within marriage is very unfair and discriminatory. This is particularly so when it is possible that women and children may fare better in a union outside marriage that is not accompanied by many of the social, cultural and legal stereotypes that characterise marriage. Therefore, in the next part of the project, it is argued that the status of illegitimacy against some fundamental rights granted by the Indian Constitution.

ILLEGITIMACY AND THE CONSTITUTIONAL CHALLENGE

In *Levy* v. *Louisiana*[28] , a landmark decision of the US Supreme Court, a Louisiana statute that denied illegitimate children the right to recover damages in the event of the wrongful death of their mother was struck down as discriminatory. It was held that the basis of the classification was completely unrelated to the "*purpose*" and the "*subject matter of the statute*." This reasoning set into motion a series of judicial decisions that resulted in discarding most of the glaring substantive inequalities between legitimate and illegitimate children.[29]

The jurisprudence that has evolved in the United States has centred around the notion that illegitimacy, like other discriminatory markers like race or gender is something which the individual cannot control and in no way affects their contribution towards society. Additionally, another line of reasoning that has found favour with courts is that illegitimacy imposes vicarious liability upon children for something beyond their control. Thus, children being

[27] Kim, *supra* note 24, at 45.

[28] Levy v. Louisiana, 391 U.S. 68 (1968).
[29] Maldonado, *supra* note 17, at 355.

innocent cannot be penalised for the "sins" committed by their parents.[30]

In *Jane Antony, Wife Of Antony* v. *V.M .Siyath, Vellooparambil* [31] the same reasoning was adopted by the Kerela High Court when it called for reform in India's illegitimacy laws. India's obligations under the Universal Declaration of Human Rights and the Convention on the Rights of Child also mandate that such discriminations be dismantled.[32] However, in the opinion of the researcher, this line of argumentation while noteworthy remains incomplete.

The equal protection logic (or the doctrine of legitimate classification) must also be extended to bring equality between different intimate relationships pursued in the private sphere. This is also supported by the jurisprudence relating to the right to privacy. This includes the right to make fundamental decisions about one's personal life without penalisation.[33] Decisions relating to marriage and family life fall within this "private space" and only a compelling "state interest" and not the enforcement of "public morality" can justify interference.[34] In light of the critique of marriage articulated by feminist theorists, the absence of a definite link between marriage and social policy objectives and the lack of evidence of any serious harm caused by such relationships, the distinction between legitimates and illegitimates is arbitrary and unreasonable and thus liable to be struck down under Art. 14 of the Constitution.[35]

Evaluated from the perspective of illegitimate children and their parents, the adoption of this logic can result in the complete eradication of discrimination and stigma. When only the first level of argumentation is used, illegitimacy remains a "problem", illegitimate children are an unfortunate reality that must be accepted and the policy of the law is directed towards reducing their presence. In such circumstance, subtle forms of discrimination

[30] Rose Wijeyesekera, *Punishing the Innocent Victim: The Concept of Illegitimacy: A case for Law Reform*, 20(1) SRI LANKA JOURNAL OF INTERNATIONAL LAW 125, 125 (2008).

[31] Jane Antony, Wife of Antony v. V.M. Siyath Vellooparambil, 2008 (4) KLT 1002.

[32] Universal Declaration of Human Rights, Art. 25(2) "Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection."
Convention on the Rights of the Child, Art. 2(2) "Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions..."

[33] Naz Foundation v. Government of NCT of Delhi, WP(C) No.7455/2001 (2 July 2009).

[34] This test was laid down in the Naz Foundation case by the Delhi High Court while invalidating § 377 of the IPC in sofar as it criminalised consensual homosexual sex between two consenting adults on account of violation of the right to privacy enshrined in Art. 21 of the Constitution.

[35] Art. 14 prohibits class legislation but allows for reasonable classification. A reasonable classification is one that is based on an intelligible differentia and has a rational nexus with the object sought to be achieved by the statute.

seep in and true social equality would remain an impossibility.

MORALITY, RELIGION AND THE LAW

There is one line of argument that is continually invoked in illegitimacy lawsuits in the United States and continues to be the dominant stream of thought in India. This is that the pursuit of sexual relations outside marriage is grossly immoral and irreligious (the penalisation of illegitimacy by many personal law systems lends credence to this argument[36]). This is tied with the conception of marriage as a sacramental life-long union. From this flows the reasoning that if the law treats illegitimate children equal to those born from marriage, the sanctity of marriage and its place in society will be severely undermined. However, if the policy of the law were to be constrained by the appeal made to tradition and dominant morality then it would have been impossible to eradicate many appalling, unjust and discriminatory practices such as Untouchability, Sati and Child Marriage. All three have now been prohibited by secular legislation but find support in personal laws and have the sanction of religion.

[36]Classical Hindu Law, Muslim Personal Law and Cannon Law are some of the systems that treat illegitimate children as *filius nullius*.

CONCLUSION

In this paper, I have argued that the concept of illegitimacy that discriminates between children born out of wedlock is unfair and unjust on a variety of legal and sociological grounds.

It is seen that feminist and queer theorists have presented compelling critiques of marriage. Thus, the conception of marriage as being fundamental to morality and the fabric of society is fast eroding and it isn't possible to place value on one form of intimate relationships or forms of childbearing over the other. The feminist critique of marriage, has, in particular identified marriage as a sight for the subordination of women and children. But, the status of illegitimacy which gives primacy to marriage as the avenue for sexual relations and childbearing, is a deterrent for the pursuit of such relations outside of marriage. When pursued divorced from the cultural, societal and legal expectations and stereotypes attached to marriage it is possible that there will be more equality and freedom in such relations.

Moreover, from a policy perspective, the reason marriage continues to be regarded as a desirable objective is because it is commonly conceived to be in the best interest of the adults and the children born out of the relationship. These objectives can also be furthered by the

legal recognition and regulation of unions outside of marriage. For instance, the elimination of the sex-bias in illegitimacy laws to enable the acknowledgement of the child's relationship with the father would be beneficial since it would enable the child to claim the fathers' resources, which will improve the life chances of such children. Custody would also be determined based on the best interests of the child.

Finally, I acknowledge that many of the suggestions made by me here are quite radical and the social bias and stigma faced by illegitimate children is unlikely to be eradicated anytime soon. However, the removal of legal disabilities will undoubtedly usher this process. This is especially because many a times the stigma associated with illegitimacy becomes more virulent because of its association with other negative markers such as poverty, crime and delinquency. In many cases, this can be avoided by giving illegitimate children greater access to the resources of their parents by removing legal barriers.

'SCANDALIZING THE FALLIBLE INSTITUTION': A CRITICAL ANALYSIS OF THE VARIED JUDICIAL APPROACH ON CRIMINAL CONTEMPT

Rupesh Aggarwal[*]

INTRODUCTION

"Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men"[1]

"To charge the judiciary as an instrument of oppression…. is to draw a very distorted and poor picture of the judiciary. It is clear that it is an attack upon judges which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions. It weakens the authority of law and law Court"[2]

These two quotes from two separate judgments are the testimony of the fact that law on contempt has been eclectically interpreted so as to maintain the balance between the constitutional guarantee of free speech and the concept of court authority being a necessary precursor for a civilized society. Though prima facie, these two statements can seem to be innocuous, a close look will show the incongruity in the courts approach and interpretations towards the law on criminal contempt. This dichotomy can make it difficult for normal citizens to discern the kind of acts, which are punishable as contempt. Contradiction like this becomes amplified when the authority of courts on record to punish for criminal contempt is juxtaposed with the freedom of speech and expression guaranteed by the Constitution of India.

Before moving further, the author will like to clarify from the outset that this paper doesn't challenge the constitutionality or lawfulness of the contempt jurisdiction of the higher courts. With utmost respect to the judicial institutions, the main theme of the paper concerns with the confusion that terms like 'scandalising or lowering the authority of the court'[3] can have on normal citizenry which in turn has led to judiciary interpreting the law in a contradictory way. By this contradiction, the author wants to point out towards the ambiguity

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[1] Ambard v. A.G., AIR 1936 PC 141. These words spoken by Lord Atkin were adopted in P.N. Duda v. P. Shiv Shankar, AIR 1988 SC 1212; Perspective Publications vs. Maharashtra, AIR 1971 SC 221.

[2] E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar, AIR 1970 SC 2015.

[3] Contempt of Court Act, 1971, § 2(c)(i).

in one of the themes of 'criminal contempt' and tries to question the kind of judicial symbols that it seeks to protect.

LAW ON CRIMINAL CONTEMPT VIS-À-VIS ARTICLE 19

For a clear and constructive evaluation of various judgments pronounced by our judiciary on its contempt jurisdiction, it is pivotal to *firstly* understand what the law on contempt of court is in India, and *secondly* to draw a synthesis between this and the right to free speech and expression under Article 19 of the Constitution.

Understanding the general law on criminal contempt:

Contempt of court is either characterized as either civil or criminal. Civil contempt arises when the power of the court is invoked or exercised to enforce obedience to court orders.[4] Criminal contempt, on the other hand, is quasi-criminal in nature.[5] The purpose of criminal contempt is to safeguard the judiciary from any inappropriate verbal attack, which can lead to prejudice to the whole image of the judicial institutions.[6] Formerly, it was regarded as inherent in the powers of a Court of Record[7] and now by virtue of Article 129 and 215 of the Constitution, both Supreme Court and High Court have powers to punish for both their own contempt and contempt of lower judiciary.[8] A contempt proceeding, unlike conventional adversarial litigation, is between the court and the contemnor.[9] The actual proceedings for contempt are summary in essence.[10] There are three ways in which a contempt proceeding can be initiated:[11]

- Suo Motu action taken by High Court and Supreme Court independently or on the presentation of an application to it by a private person.
- Action taken by Attorney general (or solicitor general) on his own motion wherein he requests the court to initiate contempt proceeding against the contemnor.
- Action taken by the courts on an application filed by a third person after getting the

[4] Delhi Development Authority v. Skipper Construction, (1995) 3 SCC 507.
[5] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 207, 208 (7th ed., Lexis Nexis Publiction); Sahdeo Singh v. State of Uttar Pradesh & Ors., (2010) 3 SCC 705.
[6] K. BALASANKARAN NAIR, LAW OF CONTEMPT OF COURT IN INDIA 41 (1st ed., Atlantis Publication).
[7] Ganga Bhishan v. Jai Narain, AIR 1986 SC 441; E.M. Sankaran Namboodiripad v. T. Narayanan Nambiar, AIR 1970 SC 2015.
[8] In re: Vinay Chandra Mishra, (1995) 2 SCC 603.
[9] Jaipur Municipal Corp. v. C.L. Mishra, (2005) 8 SCC 423.
[10] Narmada Bachao Andolan v. Union of India, AIR 1999 SC 3345.
[11] The Contempt of Court Act, 1971, § 15.

permission of the Attorney General (or solicitor general).[12]

In 1971, Parliament enacted the Contempt of Courts Act, with a purported view of defining the powers of courts in punishing acts of contempt.[13] Section 2(c)(i) of the Act defines criminal contempt as:

The publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court.[14]

Contempt of Courts Act cannot be interpreted in any way so as to whittle down the power and authority derived by courts from Article 129 and 215 of the constitution.[15] 'Supreme Court of India Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975' formulated by Supreme Court in the exercise of its powers under Section 23 of the Contempt of Courts Act read with Article 145 of the Constitution of India[16] regulates its power concerning contempt.[17] Apart from this Section 228 of the Indian Penal Code also makes the act of contempt of court punishable.[18]

Harmonizing principles of criminal contempt and free speech:

Article 19(2) of the constitution ensures that freedom of speech and expression is not exercised so as to prejudice the authority of the court.[19] It talks about 'reasonable restrictions'.[20]This means that while the fundamental rights are supreme and people can make the final decision on the exercise of their free speech and expression, its limit has to be established and regulated by the legislature for the 'benefit of the society'.[21] This goes on to show that if a restriction is unreasonable then it is not in the interest of the larger society and hence violates the basic feature of the constitution.[22] Freedom of speech and expression has been kept on a higher pedestal than the law on contempt of court by the judiciary in other jurisdictions.[23] In India, the approach has been a little different and an effort has been made to have a balance

[12] 1 D.D. BASU, THE SHORTER CONSTITUTION OF INDIA 762 (14th ed., Lexis Nexis Publication).
[13] Suhrith Parthasarathy, *The basics for free speech*, THE HINDU (Jan 30, 2016).
[14] Contempt of Court Act, 1971, § 2(c)(i).
[15] T. Sudhakar Prasad v. Govt. of A.P., (2001) 1 SCC 516.
[16] S.K. Sundaram v. Unknown, 2000 (8) SCALE 345.
[17] In Re: Vinay Chandra Mishra, (1995) 2 SCC 603.
[18] § 228, IPC.
[19] INDIA CONST. art. 19, cl. (2).
[20] *Id.*
[21] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1043 (7th Ed., Lexis Nexis Publiction); Bennet Coleman v. Union of India, AIR 1973 SC 106.
[22]See Soli. J. Sorabjee, '*Constitution, Courts, and freedom of the Press and Media'* in SUPREME BUT NOT INFALLIBLE 338 (Oxford University Press).
[23] R. v. Police Commissioner, [1968] 2 QB 118; Garrison vs. Lousina, 379 U.S. 64, 77.

between them. In the *Narmada Bachao Andolan v. Union of India*[24], the court held that:

"We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule. Indeed, freedom of speech and expression is "lifeblood of democracy" but this freedom is subject to certain qualifications."

Commenting upon the complex field of law on contempt, Justice V. Krishna Iyer in *Shri Baradakanta Mishra v. The Registrar of Orissa High Court & Anr*[25] observed that the dilemma of the law of contempt arises because of the constitutional need to balance two great but occasionally conflicting principles - freedom of expression and fair and fearless justice.[26] He further opined that:

"Vicious criticism of personal and administrative acts of Judges may indirectly mar their image and weaken the confidence of the public in the judiciary but the counter-vailing good, not merely of free speech but also of greater faith generated by exposure to the actinic light of bona fide, even if marginally over-zealous, criticism cannot be overlooked."

The two different approaches by the Apex court shows the intricacies attached with the implementation of the contempt procedures. The relationship between free speech and the contempt powers of the court is a perfect example of this. While the courts have the sacrosanct duty to protect civil rights and freedom of speech against judicial umbrage through the exercise of tolerance and detachment[27], media has the duty to make institutions more accountable by establishing linkages between them and the citizenry[28]. The wielding of contempt powers on the press whose *'liberty is subordinate to the proper administration of justice'*[29] shows the permeating relationship between free speech and justice rendering mechanism. In the subsequent part of the paper, a careful analysis of the court's act of walking on this tightrope and grappling with this vexed problem is presented. It is asserted that although the higher courts have infused in every effort to maintain the attitude of objectivity, they haven't interpreted the law on this issue in a coherent or a singular fashion.

[24] AIR 1999 SC 3345.
[25] AIR 1974 SC 710.
[26] *See*, In Re: Arundhati Roy, AIR 2002 SC 1375.
[27] Baradakanta Mishra v. The Registrar of Orissa High Court & Anr, AIR 1974 SC 710.
[28] *Supra* note 22.
[29] Rao Hrnarain v. Gumori Ram, AIR 1958 Punj. 273.

PROBLEMS AND ISSUES WITH CRIMINAL CONTEMPT CONCERNING SCANDALIZING OF COURT

The interpretation concerning law on contempt involves a lot of complexities since it is difficult to find what this offence actually consists of.[30] This paper specifically focuses on courts interpretation with regards to the term 'scandalizing and lowering of the court authority' since the author feels them to be vague, arbitrary and prone to be misused.

An arena of uncertainty and vagueness

The judiciary time and again has given its interpretation of what all acts amount to lowering the authority of courts. In *DC Saxena vs. Hon'ble The Chief Justice of India*[31], the court held that scandalizing a judge or the court would include acts such as defamatory publication[32], imputing partiality and lack of fairness against a judge or judicial institutions[33]. Further from these judgments various objectives of criminal contempt concerning this theme can be made out such as:

- Contempt jurisdiction keeps the administration of justice unpolluted.[34]
- The confidence in the courts of justice, which the people possess, cannot, in any way, be allowed to be tarnished, diminished or wiped out by the contumacious behavior of any person.[35]
- The dignity of the courts needs to be maintained at all cost so as to preserve people confidence in courts.[36]
- The contempt proceeding is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.[37]
- Public confidence in the administration of justice would be undermined if scurrilous attacks on judges, in respect of past judgement or public conduct is made leading to greater mischief than imagined.[38]

From these, five main broad objectives can be discerned. An effort has been made to critically understand the themes underlying these objectives in the subsequent sub-sections:

[30] Mriganka Shekhar Dutta & Amba Uttara Kak, *'Contempt of Court: Finding the limit'* 56, 2 NUJS L. REV. (2009).
[31] AIR 1996 SC 2481.
[32] C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132.
[33] In re: Ajay Kumar Pandey, AIR 1997 SC 260.
[34] Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895.
[35] In Re: Arundhati Roy, AIR 2002 SC 1375.
[36] C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132.
[37] Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.
[38] C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; P.N. Duda v. P. Shiv Shankar, AIR 1988 SC 1212.

a) Keeping the administration of justice unpolluted

In 1943, Lord Atkin, while delivering the judgment of the Privy Council in *Devi Prasad v. King Emperor* [39], observed that cases of contempt, which consist of scandalising the court itself, are fortunately rare and require to be treated with much discretion. Proceedings for this species of contempt should be used sparingly and always with reference to the administration of justice.[40] He asserted that:

"If a judge is defamed in such a way as not to affect the administration of justice, he has the ordinary remedies for defamation if he should feel impelled to use them."

In various subsequent cases, the court has opined that it shouldn't use its power to punish for contempt unless there is 'real prejudice' which can be regarded as 'substantial interference' with the due course of justice.[41] It is extremely difficult to identify in what all cases the administration of justice is being polluted or there is substantial interference caused by a statement of a particular individual. There have been instances wherein judges have been able to initiate contempt proceedings even when the administration of justice is not being sullied. A contrary view was given in the *E.M. Sankaran Namboodiripad vs. T. Narayanan Nambiar*[42] case wherein it was observed that:

"The law punishes not only acts which do in fact interfere with the courts and administration of justice but also those which have that tendency, that is to say, likely to produce a particular result."

This particular result that the judgment talks about is related to the image of the judiciary in the minds of people.[43] The court jettisons any statement, which has the tendency to tarnish or bring the image of the judiciary down in the eyes of the public on the premise that if the judiciary is not respected than rule of law cannot be upheld by the judges in a fearless manner[44]. The court has further stated that even if 'proper administration of justice' is hampered with by a statement then it will be considered as contemptuous irrespective of whether it leads to actual interference in the process of justice.[45] Actual damage is not considered being the important consideration in deciding upon contempt cases.[46] This leads to a pivotal

[39] 70 I.A. 216.
[40] Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.
[41] Rizwan-ul-Hasan v. State of Uttar Pradesh, AIR 1953 SC 185.
[42] AIR 1970 SC 2015.
[43] *See*, In Re: Roshan Lal Ahuja, 1992 (3) SCALE 237.
[44] Rajendra Sail v. Madhya Pradesh High Court Bar Association and Ors., AIR 2005 SC 2473.
[45] Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.
[46] In Re: Arundhati Roy, AIR 2002 SC 1375.

question – Does interference in the actual administration of justice constitutes the constructive part in contempt proceedings? The route taken by the judiciary presents a dubious picture wherein the court has itself not been able to determine the true objective and direction of the contempt provisions.

b) Real source of Confidence

In a democracy, people assume the center stage and are the focus of the institutional administration. People are the masters and judges, legislators, ministers; bureaucrats are servants of the people.[47] The purpose of contempt of court hence should be geared towards ensuring that public interest is not hurt due to hinderance in the administration of justice. *In Re: S. Mulgaokar*[48], while the court held the accused to be guilty of contempt, Justice Krishna Iyer observed that:

"Justice if not hubris; power is not petulance and prudence is not pusillanimity, especially when Judges are themselves prospectors and mercy is a mark of strength, not whimper of weakness. Christ and Gandhi shall not be lost on the Judges at a critical time when courts are on trial and the people ("We, the People of India") pronounce the final verdict on all national institutions".

Justice Krishna Iyer through this observation upheld that the court should harmonise the constitutional values of free criticism and the need for a fearless curial process and its presiding functionary, the Judge.[49] The focus of this observation was to emphasise that administration of justice and criticism can go hand in hand[50] since people are the final judges of the way national institutions function. Maintaining this balance can be tough. For e.g. in *Rajendra Singh vs. Madhya Pradesh High Court Bar*[51] the Supreme Court reiterated that:

"The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets eroded."

This line of connection between people's confidence in judiciary's ability to deliver justice and disaffection affecting the foundation

[47] Markandey Katju, *Contempt of Court: need for a second look*, THE HINDU, (Jan, 2007), http://www.thehindu.com/todays-paper/tp-opinion/contempt-of-court-need-for-a-second-look/article1785785.ece.
[48] (1978) 3 SCR 162.
[49] *Id.*
[50] In Re: Roshan Lal Ahuja, 1992 (3) SCALE 237.
[51] AIR 2005 SC 2473.

of the judiciary is flawed. Confidence can never be controlled, manipulated and juxtaposed according to whims and fancies of an institution. Enforcing confidence by initiating contempt proceedings too often can be counterproductive as it can lead to an increase in resentment and people losing respect in court for safeguarding their interests.[52] Further, what amounts to a decrease in confidence or not can be decided in a multitude of ways based on the facts of the case, leading to abuse of law rather than the court upholding the rule of law.

c) Evaluating the concept of free market of ideas

In the case of *Shreya Singhal vs. Union of India*[53] the concept of '*free market place of ideas'* was discussed and Justice Holmes was quoted to explain the concept of free speech and expression in the world of Internet:

"The ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[54]

The argument that bad ideas will be replaced by good ideas eventually has a lot of relevance in cases of criminal contempt too. In the case of *P.N. Duda vs. P. Shiv Shankar*[55] the court brought in this concept of free place of ideas by stating that;

"In the free market place of ideas criticisms about the judicial system or the judges should be welcomed, so long as the criticisms do not impair or hamper the administration of justice."

This concept in the law governing contempt of court basically asserts for freedom of expressing bad ideas against the judiciary. The objective is not to give immunity to these verbal attacks but is to ensure that people respect judges and the institution of judiciary for correct reasons. Retired Hon'ble Justice Markandey Katju very succinctly puts that;

"In a democracy, there is no need for judges to vindicate their authority or display majesty or pomp. Their authority will come from the public confidence, and this, in turn, will be an outcome of their own conduct, their integrity, impartiality, learning, and simplicity."[56]

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[52] *See*, Bridges v. California, 314 U.S., 252, 268 (1941).
[53] AIR 2015 SC 1523.
[54] Justice Holmes Dissent in Abrams v. United States, 250 US 616 (1919). Quoted in approval by Justice R.F. Nariman in Shreya Singal v. Union of India, AIR 2015 SC 1523.
[55] AIR 1988 SC 1212.
[56] Markandey Katju, *Contempt of Court: need for a second look*, THE HINDU, (Jan, 2007), http://www.thehindu.com/todays-paper/tp-opinion/contempt-of-court-need-for-a-second-look/article1785785.ece.

The rationale of this argument is simple. The Court should garner authority and admiration by their own up bright acts and integrity and not by the use of the sword of contempt proceedings. This instills real reverence in the minds of the people and creates an environment of security amongst the citizenry. Citizens are not supposed to weigh their criticisms of an institution on golden scales. There will be bad criticisms, scurrilous attacks, public indignation of the institution, but ultimately, through the process of dispensing of justice, the courts have the full opportunity to commit themselves to public service and gain their respect. The confluence of outspoken statements and substantial justice will ensure achievement of twin objectives that of increase in respect for judiciary and attainment of rightful freedom of expression.

d) Lowering the authority of court

A general question that arises from the Court's views on the law on contempt is with regards to the authority that the court enjoys under our constitutional fabric. Can a handful of statements be dangerous enough to belittle our court's authority? Are our images of judicial institutions so weak so as to collapse at the mere insinuation of its shortcomings? Can an institution be ridiculed by mere unguarded chants of a few beings? It is a mistake, to try to establish and maintain, through ignorance, public esteem for our courts.[57] Authority of the court as mentioned above should arise from the real source – people. If a statement which presents the truth about a particular judge or the judiciary should not be taken as contempt and it is extremely necessary for the Courts to show empiricism, tolerance and dignified indifference to these statements.[58]

In the case of *Court on its Own Motion v. M.K. Tayal and Ors.*,[59] the Mid-Day daily was charged for contempt for publishing a statement against the then Chief Justice of India, wherein it was alleged that biased judgments were passed by him in commercial property cases so that his sons could get pecuniary benefit out of it. The court held that the statements had lowered the authority/image of the court since the person imputed for corruption was none other than the Chief Justice of India. Contemnors plea to bring in pieces of evidence so as to prove the truthfulness of the report were dismissed at the threshold itself since Section13 (b) of the Contempt of Court Act which talks about truth being a valid defense in contempt cases provides room for

[57] DAVID PANNICK, JUDGES, 45 (1st ed. Oxford University Press).
[58] In Re: S Mulgaokar, AIR 1978 SC 727.
[59] 2007 (98) DRJ 41.

court's discretion.[60] In another attempt to vindicate the importance of maintaining the authority of the courts, the Delhi High Court in *Shri Surya Prakash Khatri & Anr. vs. Smt. Madhu Trehan and Others*[61] took serious notice of a magazines attempt to rate the judges of the High Court on parameters such as integrity and knowledge. These cases question the very genesis of contempt laws, as authority cannot be protected at the cost of public accountability, transparency and propriety. Muzzling of the free flow of information is pernicious to the idea of institutional checks and balances and detrimental to public interest[62], hence showing that Contempt proceedings are meant to protect the sham authority and not the real one. It seems from the above evaluation that the focus of court has been on maintaining a favorable public perception rather than ensuring compliance with court's order.[63]

e) Drawing the line between defamation and contempt

In our country, the line between charging a person for defaming a particular judge and for court contempt has become dotted and foggy. It becomes increasingly difficult to ascribe an act to be defamatory since the court has in cases given all-encompassing powers to the judges for initiating contempt proceedings. In *Aswini Kumar Ghose And Anr. vs Arabinda Bose And Anr.*[64] one of the first cases of contempt of court after our constitution came to force, the court had devised a yardstick of determining when contempt could have said to be there:

"No objection could have been taken to the article had it merely preached to the Courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and bona fide criticism but had a clear tendency to affect the dignity and prestige of this Court."

Protecting the prestige of the judges as an end objective of contempt proceedings was a devious tendency that this judgment had started. Making personal criticism against a judge punishable can be termed as a deathblow to the idea of promoting free speech.[65] In *C.K. Daphtary vs. O.P. Gupta*[66] the court vindicated the stand taken in Arabinda Ghose's judgment and observed that:

[60] Contempt of Court Act, 1971, § 13(b) reads as, 'The court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide.'
[61] 2001 Cri.L.J. 3476.
[62] Garrison v. Louisinia, 379 U.S. 64, 77 (1964).
[63] GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER INDIAN CONSTITUTION 238 (Oxford University Press).
[64] AIR 1953 SC 75.
[65] *See*, R. v. Kopyto, 1987 CanLII 176 (ON CA).
[66] AIR 1971 SC 1132.

"We are unable to agree that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the Judiciary. If confidence in the Judiciary goes, the due administration of justice definitely suffers."

The court in *J. R. Parashar, Advocate & Ors vs Prasant Bhushan, Advocate & Ors*[67] reiterated this stand and pointed out that:

"To ascribe motives to a Judge is to sow the seed of distrust in the minds of the public about the administration of justice as a whole and nothing is more pernicious in its consequences than to prejudice the mind of the public against judges of the Court who are responsible for implementing the law."

This link between criticizing a particular judge and hindrance in the administration of justice is a bit tenuous. To bring out the true nature of problem, Court's further observation in the same judgment has to be placed wherein they have said that:

"Holding a dharna by itself may not amount to contempt. But if by holding a dharna access to the courts is hindered and the officers of court and members of the public are not allowed free ingress and egress, or the proceedings in Court are otherwise disrupted, disturbed or hampered, the dharna may amount to contempt because the administration of justice would be obstructed."

Comparing the two observations through analogies, holding a *dharna* can be termed as equivalent to criticising judge or the institution of judiciary. On the other hand, holding a *dharna* which obstructs the free entry and exit from the court premise can be termed as equivalent to creating obstruction in the administration of justice. Holding *dharna* which doesn't create hinderance in the movement of litigators and public but involves some other illicit activities punishable by law such as creating nuisance, can be punished under other laws of the country and not necessary through the contempt provisions. Going by this comparison, criticising of judges shouldn't per se be a ground to initiate contempt proceedings as defamation proceedings can be initiated by the particular judge against the person so accused of making such statements.[68] In this regard it becomes necessary to go through the observation of the Hon'ble Supreme Court in the case of *Perspective Publication vs Maharashtra*[69], wherein it held that:

[67] AIR 2001 SC 3315.

[68] Rustom Corwasjee Cooper v. Union of India, AIR 1970 C 1318.

[69] AIR 1971 SC 221.

"There is a distinction between a mere libel or defamation of a judge and what amounts to contempt of court. The tests are: (i) Is the impugned publication a mere defamatory attack on the Judge or is it calculated to interfere with the due course of Justice or the proper administration of law by his court? and (ii) Is the wrong done to the Judge personally or is it done to the public?"

Keeping in mind this observation, it can be said that mere defamation of a judge doesn't amount to sullying the process of justice.[70] In all practical terms, this distinction cannot be contained in watertight compartments and hence has led to heterogeneous observations from the judiciary's side. *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*[71] is a perfect illustration of this tendency. The court, in this case, had stated that:

"It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, ***or*** *if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties."*

Punishing a statement for the 'likely embarrassment it can cause to a judge' presents whole scope of the problem in a nutshell. 'Embarassment' means to make someone feel awkward or ashamed.[72] The level of subjectivity attached with this word makes the abovesaid statement all the more scary and repugnant. A judge through the power of contempt has the ultimate unbridled authority to punish someone for contempt even if he feels awkward by a particular statement. This linkage between defamation and contempt as pruned out in the abovesaid case and the subsequent cases[73] is based on the premise that individuals in our country are very gullible and they on a mere libelous or defamatory statement can refuse to respect an institution which derives its authority from the constitution. The difference between constructive criticism of the court, abuse of the administration of justice, interference in the administration of law, defamation against a judge[74] and scurrilous attack on the judicial institution is still not clear.[75] This can be clearly seen in the case of *Re S.K. Sundaram Suo Motu*

[70] Bathina Ramakrishna Reddy v. State of Madras, AIR 1952 SC 149.
[71] AIR 1954 SC 10.

[72] POCKET OXFORD ENGLISH DICTIONARY, (10th ed., 2012, OUP).
[73] Jaswant Singh v. Virender Singh, AIR 1995 SC 520; In Re Roshan Lal Ahuja, 1992 (3) SCALE 237.
[74] *See*, Abhinav Chandrachud, '*The insulation of India's Constitutional Judiciary'*, ECONOMIC AND POLITICAL WEEKLY, Vol. 45, No. 13 (March 27-April 2, 2010), at 39.
[75] *See*, In Re: Sham Lal, AIR 1978 SC 489.

Contempt Petition[76], wherein the court observed that:

"Scandalising the court, therefore, would mean hostile criticism of Judges as Judges or judiciary. Any personal attack upon a Judge in connection with the office he holds is dealt with under law of libel or slander. Yet defamatory publication concerning the Judge as a Judge brings the court or Judges into contempt, a serious impediment to justice and an inroad on the majesty of justice."

It is very difficult to draw a coherent difference between hostile criticism and constructive criticism. In this case, the contemnor was charged with criminal contempt for challenging the Chief Justice of India's holding of his post even after reaching the age of superannuation. It is not easy to determine whether this is a fair criticism, personal attack against a judge or a statement which effects the administration of justice. A connected problem to this confusion is the fact that a judge has the power to invoke his contempt jurisdiction Suo Motu.[77] In effect, a judge himself has the authority to decide whether a particular act of the contemnor is defamatory to him or is contempt of court. Under the garb of contempt provisions, a judge can easily take out his personal vengeance against the person accused[78] since the natural principle of *Nemo in propria causa judex, esse debet*[79] isn't applicable when the offence alleged is criminal contempt which in effect consists of proceedings between the institution of court and the contemnor[80]. The quintessential question that arises is that how can a judge be assumed to remain impartial in deciding a case where his own reputation is at stake?

QUESTIONING AUXILIARY CONSIDERATIONS

After talking about the main elements that constitute part of 'scandalization' of court under criminal contempt, the focus has been brought in the subsequent sub-sections to some of the fringe elements that the court took into consideration. Issues and some questions with regards to these two components are pruned out:

a) 'Appropriate Audience': Who consumes the statement?

The Andhra Pradesh High Court court in the case of *Puskuru Kishore Rao vs. N. Janardhana Reddy*[81] had developed this test of audience in front of which outrageous

[76] 2000 Supp. 5 SCR 677.
[77] Contempt of Courts Act, 1971, § 15.
[78] *See*, Bathina Ramakrishna Reddy v. State of Madras, AIR 1952 SC 149; In Re: Times of India, AIR 1953 SC 149.
[79] '*No one shall be a judge in his own case*'.
[80] Jaipur Municipal Corp. v. C.L. Mishra, (2005) 8 SCC 423.
[81] 1993 Cri LJ 115 (AP) (DB).

statements have been spoken. According to this judgement, if the audience to which a speech or a statement is referred to comprises of a person whose confidence in the integrity of the judiciary is not likely to be shaken except on weighty standards, then prospects of committal will be remote.[82] In this case, the alleged contemnor was not held guilty for contempt wherein he had accused the judiciary for creating roadblocks in the implementation of pro-poor reforms. Since the function was attended by special invitees, like judges and senior advocates, the contemnor's speech wasn't held to be contemptuous. Related to this in the case of *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*[83] the fact that the statement by the alleged contemnor (a senior advocate) criticizing judiciary for not being able to control corruption in their own arena and receiving monetary benefits for judicial pronounced was given in front of lawyers and judges who had come to attend a function in the court premises was held to be relevant for not holding the contemnor guilty of contempt. In *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*[84], a resolution accusing two judicial officers of impropriety was held to be contempt of court, but the contemnors weren't convicted for it since the statement in the resolution was meant to remain within the four walls of the bar association.

In both of these cases, the distinction between normal citizens and people in the legal field is flawed. This creates a presumption that people from legal background have a greater degree of immunity and resistance to the court procedures. What stops a scandalizing statement to erode the confidence of the legal fraternity for the judiciary? General dissatisfaction[85] can occur within the walls of courtrooms and there is not stopping that such statement cannot reach the general populace.[86]

b) Person committing the contempt: Is there a difference between the type of contemnors?

Higher Judiciary has further differentiated between an advocate or a judge committing a contempt and a person from a non-legal background vilifying the authority of the court. Surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved are held to be relevant in contempt proceedings.[87] In the case of *Vishwanath vs E.S. Venkatramaih And Others*[88], contempt

[82] SMARDITYA PAL, CONTEMPT OF COURT 79 (3rd ed., Wadhwa Nagpur Publishers).
[83] (2010) 7 SCC 502.
[84] AIR 1954 SC 10.
[85] Advocate General v. Seshagiri Rao, AIR 1966 AP 167.
[86] Hari Singh Nagra and Ors. v. Kapil Sibal and Ors., (2010) 7 SCC 502.
[87] In Re: Arundhati Roy, AIR 2002 SC 1375.
[88] 1990 Cri LJ 2179.

proceeding against the former Chief Justice of India for making a statement in an interview that, *"The judiciary in India has deteriorated in its standards because such Judges are appointed, as are willing to be "influenced" by lavish parties and whisky bottles."* The court cited a Chinese proverb –"*As long as you are up-right, do not care if your shadow is crooked"* and dismissed the contempt petition and held that the statement was just a way by which the former Chief Justice expressed his sadness over the condition of some of the judges.[89] The emphasis, in this case, seems to be on the fact that allegations of contempt were made by an officer of the court. Similarly in the *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*[90], the fact that the alleged contemnor was a senior advocate was given a lot of wieght age in not holding him guilty of criminal contempt.

Moving to *'common citizens contempt',* in the case of *Rajendra Sail vs. Madhya Pradesh High Court Bar Association and Ors.*[91], the Supreme court was of the view that appellant being a law graduate should have known the limits upto which he could go while criticising judgment of the High court. On an another occasion, Arundhati Roy was charged with criminal contempt as her statements were found to be scandalous even though her statement were very similar to the statements spoken by the former Chief Justice of India and the Senior Advocate.[92] This can amount to unreasonable classification[93] since no person can be placed on a higher pedestal when attributing the offence of contempt to him. In *Re Arundhati Roy*[94], the court commenting upon the proposition that actual damage of a statement is not important had held that, "*the well-known proposition of law is that it punishes the archer as soon as the arrow is shot no matter if it misses to hit the target."* Taking this into account, how does it matter who the archer is? The rationale behind this classification between *archers* can be that some of them are experienced and their *arrow* would be in the direction of improving upon the administration of judicial mechanism in the country. From a different lens of view, a criticism by a person from a legal field can be more prejudicial to the whole image of the judiciary and in turn sow *'more'* seeds of distrust with regards to the judicial institution in minds of the public. Public confidence in the judiciary can get affected to a greater extent by the words of legal experts compared to the statements made by normal citizens.

[89] *Supra* note 82.
[90] (2010) 7 SCC 502.
[91] AIR 2005 SC 2473.
[92] In Re: Arundhati Roy, AIR 2002 SC 1375.
[93] *See,* State of W.B. v. Anwar Ali Sarkar, AIR 1952 SC 75; Budhan Chowdry v. State of Bihar, AIR 1955 SC 191.
[94] AIR 2002 SC 1375.

THE 'INFALLIBLE INSTITUTION' AMONG THE LOT

The judicial institutions in this country are in a premium position wherein they are excluded from the range of other public institutions and organs of state. A simple question arises from this situation: If the authority of the Legislative organ can be challenged and criticized; if the executive organ of the state can be ridiculed upon; then why is judicial organ kept aloof of all this?[95] In *Re: Vinay Chandra Mishra* the Apex court opined that the judiciary is not only the guardian of the rule of law and the third pillar of any democracy but in fact is the central pillar of a democratic State, which warrants the existence of law on contempt.[96] In the English case of *R. vs. Almon*[97], considered to be the genesis of the law on contempt attributed the need for the court to have the power of contempt of court is to maintain the edifice of impartiality of the judiciary. The idea of judges being the soul of the judicial institution whose criticism can bring the court into disrepute has far-reaching consequences, wherein attribute of non-partisanism is attached with the judgment rendering process. Judges according to this view are mechanical beings who can do no wrong and hence any attempt to analyze their work is equivalent to causing a disturbance in the whole mechanics of a machine. This observation assumes judges to be infallible humans having the power to objectively decide upon cases on contempt. There is no doubt with regards to the importance of judiciary as one of the central pillars in the whole institutional setup of our country, but it has to be accepted that judges are normal human beings made up of flesh and emotions.[98] They can make mistakes, can be impartial and falter in their judicial approach at times and hence in no way can they claim infallibility.[99] The famous quote of Justice Jackson in Brown vs. Allen stating *"We are not final because we are infallible, but we are infallible only because we are final"*[100] encapsulates this position very well. The respect and authority of judiciary cannot be equated as a spear which can protect the dubious image of the higher courts' infallibility. If people haven't lost faith in the other branches of state namely- executive and legislature who are criticized, caricatured and ridiculed upon on a daily basis, how can we assume so easily that courts will

[95] *See*, Landmarks Communications v. Virginia, 435 U.S. 829, 842 (1978). In this case U.S. Supreme Court upheld that same standard of criticisms for both the government officials and the judges should be applied.
[96] AIR 1995 SC 2348.
[97] (1765) Wilm.243, 254.
[98] S.P. Gupta v. President Of India And Ors., AIR 1982 SC 149.
[99] Ram Dhayal Markarha v. State of Madhya Pradesh, AIR 1978 SC 921.
[100] BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 91 (Oxford University Press).

lose their authority if their mechanism gets scandalized in the minds of the same people? Law on contempt is surely a necessity, but unwarranted use of criminal contempt for protecting the symbols of justice away from public glare is marred by overreaching generalizations, dubious assumptions and feeble sense of insecurity.

In *Nambooripad's* case, the court stated that the case of *Kedarnath Singh vs. State of Bihar* in connection with sedition cannot render much assistance since it deals with an altogether different matter.[101] The court, in this case, couldn't have taken notice of the future development that took place in U.K. concerning this field, wherein 2012, Law commission of U.K. linked the term 'scandalizing of court' and the offence of sedition.[102] Abiding by the recommendation of the law commission, British parliament abolished the offence of scandalizing the court by implementing the Crimes and Court Act, 2013.[103]

In Kedarnath's judgment, the court restricted the scope of sedition and held that until the time there is no incitement of violence, tendency to create public disorder or disturbance of public peace, no charge of sedition can be brought in.[104] Preaching overthrow of the government in a violent manner doesn't amount to sedition till the time these necessary ingredients are established.[105] The court also through series of judgments have mentioned that a statement to be classified as contemptuous must be prejudicial to the administration of justice. In contrast to this, the vagueness attached to the law on sedition[106] can be very much found in this concept of criminal contempt (as mentioned above). In *D.C. Saxena vs. CJI*[107], the courts distinguished the concept of criticism against a judge and creating hindrance in administration of justice by observing that:

"*Any criticism about judicial system or the judges which hampers the administration of justice or which erodes the faith in the objective approach of the judges and brings administration of justice to ridicule must be prevented.*"

From the above statement, it can be made out that the real intention of the judiciary is to protect the 'faith' in the minds of people, even though the administration of justice is not hampered with but only being ridiculed upon.

[101] AIR 1970 SC 2015.
[102] THE LAW COMMISSION (2012).
[103] § 33.
[104] AIR 1962 SC 955; *See*, Romesh Thappar v. The State of Madras, AIR 1950 SC124.
[105] *See*, Balwant Singh v. State of Punjab, AIR 1995 SC 1785.
[106] Nivedita Saksena & Siddhartha Srivastava, *An analysis of the modern offence of sedition*, 7 NUJS L.REV. 121 (2014).
[107] (1995) 2 SCC 216.

This is equivalent to saying that if statements against an official of the government are spoken then the speaker should be charged for sedition since he has interfered in the objective working of the particular officer and has made a mockery out of legislative corridors which in turn prejudices the government's image in front of the public. Since this is not the case according to the established law on sedition, protection of judge's image and connecting it to the symbols of judicial institutions shouldn't be given so much of importance under contempt of court laws. As the law on sedition has been misused by the government to stifle criticisms against itself[108], the law on criminal contempt can be used for self-serving purposes[109] so as to maintain the mysticism around judicial entities. The rationale behind both these forms of laws is the same – that is to preserve the imagery of the institutions in the mind of the public. This tendency of institutional self preservation is to be looked critically since the scope of misuse is high.

PURPORTED OBJECTIVE VS. THE REALITY

As stated above, the judiciary in many of the judgments has carefully delineated the difference between defaming a particular judge personally and contempt of court.[110] The test devised for punishing a person for contempt is to see whether by particular act, harm is done to the administration of justice and consequently to the public at large.[111] Even after asserting the same principle in subsequent judgments, there have been cases, where contempt jurisdiction was brought on to effect even though the administration of justice wasn't being hindered. To understand this contrast and anomaly, it is important to compare cases which had same facts but were decided differently. These cases display the void between the intended objective of the laws on contempt and the ground reality.

E.M.S. NAMBOODIRIPAD'S CASE VS. SHIVSHANKAR'S CASE & CHANDRAKANT TRIPATHI'S CASE

The facts of these three cases are very similar. In *P.N. Duda vs. Shivshankar case*[112], It was alleged that the contemnor, Shivshankar (he was the Minister of Law, Justice and Company affairs at that point in time), by attributing to

[108] *See*, Manish Chiiber, *Sedition: SC's shown the way, but govts have refused to see*, (Feb 17, 2016), http://indianexpress.com/article/explained/sedition-scs-shown-the-way-but-govts-have-refused-to-see/#sthash.ZSmjUc4h.dpuf.

[109] *See*, GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB: FREE SPEECH UNDER INDIAN CONSTITUTION 244 (Oxford University Press).

[110] Rustom Caswajee Cooper v. Union of India, AIR 1970 SC 1318.

[111] Perspective Publications v. Maharashtra, AIR 1971 SC 221.

[112] AIR 1988 SC 1212.

the Court partiality towards affluent people and using extremely intemperate and undignified language have made certain statements which were derogatory to the dignity of the supreme court in a speech delivered before the Bar Council of Hyderabad. In its judgement, the supreme court denied to initiate contempt proceeding against the alleged contemnor by stating that his statement was an expression of opinion about an institutional pattern and analysed judges as a class which was permissible. The court observed that:

"It has to be admitted frankly and fairly that there has been erosion of faith in the dignity of the Court and in the majesty of law and that has been caused not so much by scandalising remarks made by politicians or ministers but the inability of the courts of law to deliver quick and substantial justice to the needy."

On the similar facts, *E.M. Sankaran Namboodripad v. T. Narayanan Nambiar*[113] Namboodiripad (who was the Chief Minister of Kerala at the time) was duly convicted for contempt of court. He was alleged to have made remarks relating to the judiciary referring to it inter alia as "an instrument of oppression" and the Judges as "dominated by class hatred, class prejudices","instinctively" favoring the rich against the poor during a press conference. In his defence, the contemnor pleaded that his statement should be seen from a Marxist theoretical viewpoint. Upholding the conviction for contempt of court, the Hon'ble Supreme Court observed that:

"It was clear that the appellant bore an attack upon judges - which was calculated to raise in the minds of the people a general dissatisfaction with, and distrust of all judicial decisions. It weakened the authority of law and law courts."

In the case of *State of Maharashtra vs. Chandrakant Tripathi*[114], a minister was alleged to have committed criminal contempt by saying the following statement:

"under the present judicial system even criminals are given benefit of doubt and are acquitted if there are no witnesses or if they turn hostile. The innocent are sentenced. Courts grant stay orders frequently due to which it becomes impossible for the Government to carry out works of public benefit in time"

The court in this case after citing *Re. S Mulgaokar* case didn't bring in contempt charges against the alleged contemnor stating 'charitable reasons'.

The accusations levelled against the Court in these three cases were similar, but the decisions of the Court were different. The court instead of focusing on the aspect of the

[113] AIR 1970 SC 2015.

[114] 1983 Bom LR 562.

administration of justice emphasised more on the likely effect of the contemnor's words in lowering the prestige of judges and courts in the eyes of the people. The question hence arises – How can the Court interpret upon a law so differently even after the same facts being presented to it? The disparity in these two decisions in effect is the disparity between the objective law laid down by the Courts with regards to the law on contempt on one hand and the reality on the other. The law on criminal contempt is so nebulous, vague and arbitrary that the decision in such cases hinges heavily on the discretion of the court and less on provisions and precedents.

ARUNDHATI ROY'S CASE VS. BRAHMA PRAKASH SHARMA'S CASE & KAPIL SIBAL'S CASE

In the case of *J. R. Parashar, Advocate & Ors vs Prashant Bhushan, Advocate & Ors*[115], Allegations of contempt of court were levelled against Prashant Bhushan, Medha Patekar and Arundhati Roy for holding a dharna in front of this Court and shouting abusive slogans against this Court including slogans ascribing lack of integrity and dishonesty to the judicial institution. While due to the technical defect in the petition, Prashant Bhushan and Medha Patekar were acquitted for the offence, Arundhati Roy was asked to show cause as to why contempt proceedings shouldn't be initiated against her. The court took serious note of statements in her affidavit in which she had criticized the Supreme Court severely for invoking its contempt jurisdiction against three respondents while not initiating a judicial inquiry in the more important Tehelka case. From a purely analytical and objective viewpoint, these comments at the most seem to be trifling and outspoken criticisms of the apex court. In *Re S. Mulgaokar*[116] Justice V.K. Iyer, had opined that court should ignore trifling and venial offences in the context that *"the dogs may bark, the caravan will pass"*. In *Jaswant Singh vs. Virender Singh*[117], the court had opined that:

> *"Fair comments, even if, out-spoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court."*

It is hard to discern as to why the court had asked Arundhati Roy to show cause even after the famous writer denied any ill will or malice against the judiciary. Neither comments in the affidavit impute any personal motives to a particular judge, nor does Arundhati Roy in her

[115] AIR 2001 SC 3315.

[116] AIR 1978 SC 727.
[117] AIR 1995 SC 520.

defense cast aspersions on the Court or the integrity of the Judges.[118]

In contrast to this, in the case of *Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh*[119], the contemnors were not held to be guilty of contempt of court even after passing a resolution wherein it was alleged that the two Judicial Officers were thoroughly incompetent in law, did not inspire confidence in their judicial work, were given to stating wrong facts when passing orders and were over-bearing and discourteous to the litigant public and the lawyers alike. The court opined that:

"In the first place, the reflection on the conduct or character of a judge in reference to the discharge of his judicial duties would not be contempt if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. It is not by stifling criticism that confidence in courts can be created. "The path of criticism", said Lord Atkin [Ambard vs. Attorney-General for Trinidad and Tobago, 1936 A.C. 335], "is a public way."

The court took many factors into account, in this case, one of them being the intention of the contemnors[120], while according to other decided cases; intention is not taken as a relevant circumstance in such an offence[121] and was not taken as a relevant factor in the Arundhati Roy's case. The argument that the objective of the contemnors was not intended to interfere with the administration of justice but to improve upon it[122] could have been used in the 2001 case also. Another factor, which was found to be relevant in the Brahma Prakash Sharma's case, was the extent of publication and degree of publicity given to the libelous resolution. In Arundhati Roy's case, the fact that the statements were made in an affidavit which although are accessible to the public but aren't accessed in all practical terms was not taken into account and the court after receiving her reply to the show cause notice, launched Suo Motu contempt proceeding against her.[123]

Taking another case which will show the ambiguity in this field is that of *Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors.*[124], a senior advocate was alleged to have committed

[118] J. R. Parashar, Advocate & Ors v. Prasant Bhushan, Advocate & Ors,, AIR 1954 SC 10. The case against Ms. Arundhati Roy was followed up in the subsequent case of In Re: Arundhati Roy, AIR 2002 SC 1375.
[119] AIR 1954 SC 10.
[120] Court on its own motion v. Arminder Singh, 1999 Cri LJ 4210.
[121] C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; E.M. Sankaran Namboodiripad v. T. Narayanan Nambia, AIR 1970 SC 2015; Hiralal Dixit v. State of U.P., AIR 1954 SC 743.
[122] Brahma Prakash Sharma and Ors., v. The State of Uttar Pradesh, AIR 1954 SC 10 (High court of Allahabad order while it held six members of the district bar association at Muzzafarnagar guilty of contempt).
[123] In Re: Arundhati Roy, AIR 2002 SC 1375.
[124] (2010) 7 SCC 502.

criminal contempt by sending a message which was published in souvenir of a Mehfil and later in Times of India (a daily newspaper). In the message, the contemnor had expressed his concerns about the falling standards in Indian judiciary. Quoting from his message:

"Judiciary had failed in its efforts to eradicate the phenomenon of corruption which included receiving monetary benefits for judicial pronouncements, rendering blatantly dishonest, judgments, kowtowing with political personalities and favouring the Government and thereby losing the sense of objectivity."

The court didn't hold the alleged contemnor guilty of criminal contempt since according to the law established a fair and reasonable criticism of a judgment which was a public document or '*which was a public act of a Judge concerned with administration of justice would not constitute contempt.'*[125] In this case, a different view was taken. Criticising a public act of a judge according to earlier decided cases does amount to contempt of court since it brings into disrepute the institution of court by prejudicing its authority in the eyes of the normal citizenry.[126] Making a mockery of the judiciary amounts to criminal contempt.[127] The criticism by the contemnor, in this case, could be said to exceed 'condonable limits'.[128] The difference between the case of Arundhati Roy and Kapil Sibal seem to be pernicious and tenuous. This tendency of subjectively deciding contempt cases[129] can have a disastrous effect on the conscience of general public leading to the development of a civil society getting retarded.

CONCLUSION

The varied observations, orders and judgments of the higher judiciary is clearly indicative of the fact that it wants to have 'one foot stand on two boats'. One boat is indicative of judiciary's effort in promoting free speech and forwarding the idea of undisturbed administration of law. The other boat is indicative of courts apprehension and self-doubt regarding its own image in front of the people wherein they have many times linked symbols of the judicial system with the administration of justice. This multitasking isn't good for the development of a civil society, institutional frameworks and rule of law. The terms such as 'scandalizing' judiciary, lowering court's authority, sowing the seeds of distrust in the

[125] Hari Singh Nagra and Ors. vs. Kapil Sibal and Ors., (2010) 7 SCC 502.
[126] In Re: S. Mulgaokar, (1978) 3 SCR 162; C.K. Daphtary v. O.P. Gupta, AIR 1971 SC 1132; Brahma Prakash Sharma and Ors. v. The State of Uttar Pradesh, AIR 1954 SC 10.
[127] Advocate General Bihar v. M.P. Khair Industries, 1980 (3) SCC 3111.
[128] In Re: S. Mulgaokar, (1978) 3 SCR 162.
[129] *See*, Gobind Ram v. State of Maharashtra, AIR 1972 SC 289.

minds of the public don't espouse the real objective of the law on criminal contempt. The very ambiguity of these words has led the judiciary to follow two different paths leading to the blurring of lines between the right to free speech and contemptuous acts. Myriad of controversies have arisen due to this and hence it is absolutely necessary that the judiciary and legislature do a re-examination on the viability of these terms. It is pivotal for the judiciary to lay coherent guidelines bereft of subjectivity with regards to the nebulous field of criminal contempt. It is accepted that contemptuous acts are varied and complex, but certain broad guidelines pointing towards the same direction can help in connecting the important elements of this field. Judiciary needs to have a broader perspective when it comes to judging the ability of our people to differentiate between bad criticism and good criticism. It is only then will there be respect towards our judicial institutions grow manifold. Law on criminal contempt is pivotal, but when it compromises the basic tenets of public life and constitution, then elements going in contravention to these principles have to be amputated from the general statutory corpus as has been done by the legislatures of other jurisdictions.

TRADE SECRETS LAW AND INNOVATION POLICY IN INDIA

Faizanur Rahman[*]

INTRODUCTION

Innovation is a key driver for growth and expansion in a knowledge based economy. The industrial applicability of innovation helps to identify solutions for business and encourage further advancement. Innovation policies are required for science and technological research to maintain competitiveness in the global village. The dynamic nature of science and technological disciplines calls for creative ideas flowing from diverse and robust research base. An adequate infrastructure to foster innovation thus becomes essential to keep pace with currents needs as well as provide a platform for future technology.[1]

Indian Government has taken a step ahead by releasing a draft National Innovation Act (NI Act), 2008 to boost research and innovation. The legislation is released by the Department of Science and technology and aims at building a comprehensive framework to encourage innovation. Promotion of innovation was one of the policy objectives of the Science and Technology Policy, 2003 which intended a comprehensive national system of innovation covering science and technology as also legal, financial and other related aspects. The proposed National Innovation Act if passed by the Parliament will become a realization of the policy objective. The proposed legislation will be effective in promoting excellence in technology, education and science as it boost research and innovation with specific safeguards to protect confidential information, trade secret and innovation The broad objectives of the draft legislation are: facilitating public, private, or a consortium of public-private initiatives to build an innovation support system, evolving a National Integrated Science and Technology Plan and Codifying and consolidating the law of confidentiality to protect Confidential Information, Trade Secrets and Innovation. But title of the draft Act indicates that, it is primarily concerned with development and encouragement of innovation in India. Therefore, in this work an attempt has been made to critically examine the provisions of the

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[1] Tanushree Sangal, *Unfurling the Proposed National Innovation Act*, 3(3) MANUPATRA INTELLECTUAL PROPERTY REPORTS 29 (2007).

Act whether they would really stand as supporting aid in protecting confidential information and interest of proprietors along with present mechanism to protect trade secrets in India.

AMERICA COMPETES ACT, 2007

The draft National Innovation Act is framed on the lines of America's COMPETES Act (America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education and Science Act), which was enacted to create opportunities to meaningfully promote excellence in technology, education and science. The America Act contains provisions for industry, academic and government participation to harness and magnify intellectual capital and enhance legal and regulatory framework for these efforts. It has a long-term perspective to reap the benefits of innovation in science, technology, industry and academics as the nation has built up its economic and industrial superstructure on these pillars. Accordingly, the policy framework outlined here relates to research funding, taxation benefits, immigration, international trade, incentive and support programmes for higher education and collaborative activity between industry and federal and private corporations, universities, associations and research organisations. It speaks of allocation of Federal resources in education, job training, technology research and development, considering global trends in competitiveness and innovation.[2]

The Preamble of the COMPETES Act puts the objective of the law as to invest in innovation through research and development, and to improve the competitiveness of the United States.[3] It focuses on three primary areas of importance of maintaining and improving United States' innovation in the 21st Century: (1) increasing research investment; (2) strengthening educational opportunities in science, technology, engineering and mathematics from elementary through graduates school; and (3) developing an innovation infrastructure.

NATIONAL INNOVATION LAWS

It might be useful in this connection to look at the US position. In the US, laws protecting trade secrets are enacted by the states, but most such laws are based on the model Uniform Trade Secrets Act, 1970. Under this model US draft (only New York and Massachusetts have not yet adopted the UTSA), a "trade secret" is defined as "information,

[2] *Id*., at 30.

[3] Kamakhya Srivastava, *Indian Innovation Act: Trade Secrets and Confidentiality*, (March, 2015) http://ipfrontline.com/2008/10/indian-innovation-act-trade-secrets-and-confidentiality/.

including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]"

This might very well be compared with the rather similar Section 2 (3) of the Indian Innovation Bill which defines "confidential information":

Confidential Information means information, including a formula, pattern, compilation, program device, method, technique or process, that: (a) is secret, in that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within circles that normally deal with the kind of information in question; (b) has commercial value because it is secret and (c) has been subject to responsible steps under the circumstances by the person lawfully in control of the information, to keep it secret.

It is debatable whether "information" is to be treated as property. In the US, in addition to the model Trade Secrets Act, trade secrets are protected under the Economic Espionage Act, 1996 which, under some circumstances, makes "theft" of confidential information a crime. This might lend credence to the view that confidential information is "property". Under (English) common law principles, the protection of confidential information is looked at as an equitable right rather than a property right. In such circumstances, it might be necessary to be cautious before borrowing straight from the US position.[5]

However, the definition in the Innovation Bill also appears to be based (more than the US model law) on Article 39.2 of the TRIPS Agreement. It may be recalled that under the TRIPS Agreement 'trade secrets' are referred as 'Undisclosed Information'.[6] A commentary note on Article 39.2 on the WTO official website states, *"The Agreement does not require undisclosed information to be treated as a form of property, but it does require that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner*

[4] Uniform Trade Secrets Act, § 1 (1970).

[5] Zafar Mahfooz Nomani & Faizanur Rahman, *Intellection of Trade Secret and Innovation Laws in India*, 16(4) J. INTELL. PROP. RTS. 341-347 (July 2011).

[6] *Protection of trade secrets, undisclosed information*, THE HINDU (March, 2015), http://www.thehindu.com/thehindu/biz/2001/11/22/stories/2001112200060100.htm .

contrary to honest commercial practices." For the purpose of this provision *"Manner contrary to honest commercial practices"* includes breach of contract, breach of confidence and inducement to breach, as well as the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition." The definition in the Bill is thus consistent with the nature of the right sought to be protected.

The draft NI Act through codification and consolidation of the law of confidentiality demonstrates the significance of trade secrets and confidential information within the realm of innovation. Innovative ideas, products and business practices help enterprises to maintain competitive superiority in the market alongside furthering their economic interests.[7] It is for this reason that there is a need to prevent others from taking advantage of the breakthrough ideas and knowledge or in ordinary parlance the confidential information or trade secrets.[8]

SYNERGISING TRADE SECRET

In India, protection of trade secret is governed under Common Law remedy as evident under Section 27 of the Indian Contract Act 1872. Under the draft NI Act, trade secret and confidential information are elucidated in Chapter VI titled as "Confidential and Confidential Information and Remedies and Offences". The chapter explicates on Obligations of Confidentiality and remedies to protect and preserve confidentiality. The obligations to maintain confidential information under the draft statute rest on the contractual terms and conditions, government recommendation and on any right arising in equity. The draft NI Act casts an obligation of confidentiality to parties contractually set out the terms and conditions governing rights and obligations in respect of confidential information and prevents misappropriation.[9]The confidentiality arising from non-contractual relationships such as equitable considerations may also create rights to maintain and obligation as to preserve confidentiality and rights to prevent disclosure into public domain.[10]

The remedies to protect and preserve confidentiality and misappropriation include granting mandatory protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the confidential information including confidential filings or

[7] Malathi Lkshamikumaran et al., *Utility Models: Protection for Small Innovations*, 46 (2) JOURNAL OF INDIAN LAW INSTITUTE 322-332 (2004).

[8] R. Shah, *Management of IPR in Small Scale Industries*, a paper presented in TRIPS Congress, 2002 held at New Delhi on 6-8 October, 2002.

[9] Draft NI Act, Art. 8.

[10] *Id.*, Article 9.

records of the action, and ordering any person.[11] The exception to misappropriation of confidential information enumerates that confidential information shall not have been misappropriated if available in the public domain and held to be in public interest by a court of law.[12]The remedy under the draft NI Act include preventive or mandatory injunction restraining misappropriation of confidential information[13] besides the mandatory damages[14].

DISAMBIGUATION OF DRAFT NATIONAL INNOVATION ACT

Chapter VI of the draft NI Act titled as "Confidential and Confidential Information and Remedied and Offences containing sections from 8 to14 and deals extensively with confidentiality, confidential information and its allied issues.[15] Initial sections of the chapter lays down obligations on the party received the confidential information.

Confidentiality and Confidential Information

Specifically, section 8[16] of the draft NI Act casts an obligation of confidentiality to parties contractually set out the terms and conditions governing rights and obligations in respect of confidential information and prevents misappropriation.

The section states that parties are at liberty to contractually set out the terms and conditions governing rights and obligations in respect of maintenance of confidentiality and to prevent misappropriation of confidential Information.

The confidentiality arising from non-contractual relationships such as equitable considerations may also create rights to maintain and obligation as to preserve confidentiality and rights to prevent disclosure into public domain.[17]

[11] *Id*., Article 10.
[12] *Id*., Article 11.
[13] *Id*., Article 12.
[14] *Id*., Article 13.
[15] http://www.dst.gov.in/draftinnovationlaw.pdf (March, 2014).
[16] *Id*., § 8 read as: Obligations of Confidentiality:
(1) Parties may contractually set out the terms and conditions governing rights and obligations in respect of Confidential Information, including with a view to maintain confidentiality and prevent Misappropriation.
(2) Subject to any terms and conditions agreed to between parties, the respective rights and obligations in relation to the said Confidential Information shall be governed by such terms and conditions as may be prescribed by the Appropriate Government pursuant to Section 15(d).
(3) Notwithstanding anything contained in sub-section (1), parties may nevertheless enforce any rights in Confidential Information arising in equity or as a result of circumstances imparting an obligation of confidence.
[17] *Id*., § 9 read as- Confidentiality Arising from Non-Contractual Relationships: Obligations of confidentiality and equitable considerations may also create rights to maintain and obligation as to preserve confidentiality and rights to prevent disclosure or release into the public domain of Confidential Information by any third party who has received such information other than with the consent of a complainant.

Section 9 imposes an obligation of confidentiality even in the absence of contractual obligation on party who received confidential information to preserve confidentiality and not to disclose or release it in the public domain or third party without the consent of a proprietor of information on the basis of equity principles.

Remedies and Offences

The remedies to protect and preserve confidentiality and misappropriation include granting mandatory protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the confidential information including confidential filings or records of the action and ordering any person.

Section 10[18] of the Act deals with remedies to protect and preserve confidentiality and orders to prevent threatened or apprehended misappropriation of information. It prescribes certain guidelines to preserve and protect confidential information from being misused during court proceedings. Guidelines include:

(i) grant of mandatory protective orders

(ii) holding proceedings in-camera

(iii) filings or recording confidentially of the information, and

(iv) ordering any person or class of persons impleaded in an action not to disclose the confidential information without prior orders of the court.

The exception to misappropriation of confidential information enumerates that confidential information shall not have been misappropriated if available in the public domain and held to be in public interest by a court of law[19]. According to the section followings shall not be considered as misappropriation of confidential information under the Act:

(i) if the information is available in the public domain; or

(ii) if it has been independently developed by the alleged Misappropriator, or by any third party or;

(iii) where disclosure of information is considered by court of law in the interest of the public.

[18] *Id.*, § 10 reads as: In relation to any proceeding concerning actual or apprehended Misappropriation of Confidential Information, the court shall preserve the secrecy of the subject matter of the dispute claimed as Confidential Information by reasonable means, which may include granting mandatory protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the Confidential Information including confidential filings or records of the action, and ordering any person or class of persons impleaded in an action not to disclose the Confidential Information referred to in the claim without prior orders of the court.

[19] *Id.*, § 11.

The remedy under the draft NI Act include preventive or mandatory injunction restraining misappropriation of confidential information[20] besides the mandatory damages. Significantly, Section 12 is an extensive section providing for preventive or mandatory injunctions restraining the misappropriation of confidential information. An injunction, being an equitable remedy, is generally only issued when other remedy at law (such as damages) is inadequate. Mandatory damages on proof of breach of confidentiality are also provided for in Section 13.

According to section 12 of the Act, court is authorized to grant interim, ad interim or final injunctions, as it may be necessary to restrain actual, threatened or even apprehended misappropriation of confidential information. Further, if the court have already granted an injunction, may vary or vacate it, if is found that, information in question will under fall under any of exceptions mentioned in preceding section. The Section speaks about preventive or mandatory injunction restraining misappropriation of Confidential Information**:**

(1) A court shall grant such injunctions, including interim, ad interim or final injunctions, as may be necessary to restrain actual, threatened or apprehended Misappropriation of Confidential Information.

(2) A court may vary or vacate an injunction granted under sub-section (1) in the event that the Confidential Information in question is found to fall under any of the categories described in clause (a) to (c) of Section 11.

(3) In the event a complainant secures an interim injunction against an alleged or apprehended Misappropriation and is later found not to have been entitled to such relief for failure to establish any of the grounds essential to securing interim relief, or where the issue relating to which interim relief was initially secured, is eventually decided against the complainant, then such complainant shall be liable to compensate the defendant for actual losses arising as a direct result of the interim relief earlier secured.

(4) In exceptional circumstances, an injunction may stipulate conditions for future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited.

(5) The Appropriate Government shall provide its machinery, including police and local administration, to aid and assist in

[20] *Id.,* § 12.

implementation/enforcement of any injunction granted or other direction passed by a court under sub-section (1).

In addition to this, section imposes an obligation on the complainant who secured an interim injunction against defendant and is later found by the court that the complainant is not entitled to such relief for failure to establish any of the grounds essential to securing interim relief, then such complainant shall be liable to compensate the defendant for actual losses arising as a direct result of the interim relief earlier secured. In addition to this, the provision asks the appropriate Government to provide machinery including police and local administration to aid and assist in implementation/enforcement of any injunction granted section.

Section 13 speaks about mandatory damages on proof of breach of confidentiality. The section read as follow:

(1) Where a Misappropriator has utilized Confidential Information or is directly or indirectly responsible for Confidential Information falling into the hands of a third party or into the public domain, the complainant shall be entitled to elect to receive anyone of the following:

a. such mandatory damages not exceeding the limit as may have been notified by the Appropriate Government from time to time as under Section 15 (c), which sum shall be recoverable as a contract debt; or

b. such damages as may have been agreed upon by contract between the parties; or

c. actual damages as may be demonstrated, including consequential losses;

(2) In addition to damages provided for in sub-section (1), where a Misappropriator is found to have acted with wilful or malicious intent, the complainant shall be entitled to not more than three times the mandatory damages provided for in Section 15 (1) (a) and costs including attorney fees.

(3) Subject to the requirements for securing grant of interim relief, a court may require an alleged Misappropriator to pre-deposit upto 10 percent of the damages claimed by the complainant as under sub-section (1), as a pre-condition to a continued right to defend the suit.

According to the section where a misappropriator has misappropriated confidential information either directly or indirectly or made it to fall into the hands of a

third party or into the public domain without consent and knowledge of the complainant, he shall be bound to give damages, hence the complainant is entitled to elect and receive anyone of the following damages:

(i) such mandatory damages not exceeding the limit as may have been notified by the appropriate Government from time to time;

(ii) such damages as may have been agreed upon by contract between the parties; or

(iii) actual damages as may be demonstrated including consequential losses.

In addition to damages, the complainant is entitled to receive but not more than three times the mandatory damages as prescribed by the appropriate Government including attorney fees, if it is found that the misappropriator have acted with wilful or malicious intent to incur loss to complainant in pursuance of this the defendant is required to deposit upto 10 percent of the damages claimed by the complainant in order to defend his right in the suit.

The final section of the chapter, i.e. Section 14 provides immunity for acts done in good faith, or purporting to do so. Section states that:

No legal proceedings or any other claim or action, shall lie against any person for anything done in good faith under this Act or the Rules and Regulations made thereunder.

Section 14 immunes all persons who come under the ambit of the Act from taking up any judicial proceedings against them for acts done in good faith or purporting to be so done under this Act or the Rules and Regulations made under the Act.

CRITICAL ANALYSIS OF THE NI ACT

The draft Act does not stands as piece of legislation to codify and consolidate the law of confidential information because it does not address the issue of confidential information in proper manner to be a successful law relating to confidential information. Since, the Act does not deal with subject matters ideally but also includes other allied areas such encouragement and development of innovation, marketing of results of innovation, therefore, it can be stated that it is the first time in the history of India that Government has proposed to enact legislation which combines allied subject matters each other.[21]

Chapter VI containing sections from 8 to 14 exclusively discusses on allied issues concerning to confidential information. Section 9 deals with obligation of confidentiality on the person who received the confidential

[21] Gouramma Patil, *Critical Analysis of 'The National Innovation (Draft) Act, 2008*, (Retrieved on March, 2015), http://ssrn.com/abstract=2239718 or http://dx.doi.org/10.2139/ssrn.2239718 .

information on contractual terms to maintain secrecy or not to disclose to the public or third party without the consent and knowledge of the person who conveyed the information. In addition to this, it further states that the respective rights and obligations of parties in relation to the confidential information shall be governed by such terms and conditions as may be prescribed by the appropriate Government. Generally it would be reasonable that if the parties have contractual agreements to govern their rights and obligations in relation to confidential information but it is irrational and unjust that such power has been conferred on Government to direct and govern rights and obligations of parties because if such absolute power has been bestowed on Government to oversee right and duties of parties it would lead to irrationality, unfairness and unjustness.

The draft Act recommends common law remedies such as injunctions and damages etc. in case of misappropriation of confidential information which already exist in India in case of misuse or infringement of confidential information; so the Act again fell short in providing any new remedies in case of misappropriation of confidential information. In addition, to this the Act has failed to lay down any penalty provisions in case of misappropriation of confidential information which is regarded as grave offence in relation to confidential information.

Section 11 provides an exception to the offence of breaching trade secrets. It says that disclosure of the confidential information can be held to be in public interest by a court of law. The ground for criticism is the term "public interest" which in the Act is too vague.[22] Moreover Section 12(4) is also controversial. This says that an injunction restraining uses of confidential information "may stipulate conditions for future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited." This proposed exception from infringement tantamount to introduce a compulsory license in trade secrets.

Apart from bunch of flaws just discussed above another fault of the Act which joins the same group lies in section 14 of the Act because section absolutely immunes person for acts done in good faith or purporting to be so done under the Act, rules or regulations made there under, this provision can be misused by any person who might come under the ambit of the Act like complainant, defendant and authorities who acts under provisions of the Act.

[22] Peter Ollier, *Managing Intellectual Property: India trade secrets law dubbed "absurd"*, (March, 2015), https://www.tradesecretsblog.info/2008/10/managing_intellectual_property.html .

CONCLUSION

In this era of globalization, multinational corporations want assurances that the national law will protect their trade secrets in order to invest in India; and legislation in this regard may also specify how a court must conduct its proceedings because litigation in this aspect is a delicate which might either kill the plaintiff's economic benefits derived from the secret or his prospects of competition if the information is leaked even by mistake to some other person. Further, by encoding substantive provisions in relation to protection of trade secrets, the Draft Act will go a long way in creating an effective trade secrets regime in India.[23]

The draft Act has suitably identified the performance metrics for building up an innovation-based competitive economy, but the parameters and roadmap for their execution has to be designed. The Draft is open to public suggestions and debate following which it shall become a final legislative enactment. The final Act should reflect the plans and measures to be undertaken in furtherance of the broad goals, the corpus to be set aside to realize them and should also identify the various governments and authorities responsible for clearances, infrastructural support, participation and benefit sharing. It needs to be furnished with sound provisions for different sectors for execution of the goals have to be put down. The enforcement mechanisms and the infrastructural set up to effectuate the substantive provisions have to be stated clearly. There is a need to integrate planning with building linkages across different sectors to spur innovative activity. A well-prepared trade secret programme will then complement a company's other IP protection strategies to reward innovation.[24]

[23] Gaurav Wahie, *Evaluating Trade Secret under the IPR Paradigm: The Hypothesis of Trade Secrets as Rights Analyzed in the Pure Hohfeldian Sense*, (April, 2016), http://www.legalservicesindia.com/articles/tradesecrets.htm .

[24] Anirudh Hariani, *The Draft National Innovation Act, 2008: Breaking the Shackles of Indian Innovation*, (February, 2015), http://indialawjournal.com/volume3/issue_1/article_by_anirudh.html.