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## FOREWORD

“Ludicrous”, said Suman Ghosh, director of the documentary, *The Argumentative India*; when the Censor Board of Film Certification (CBFC) ruled that the words, 'cow', 'Gujarat', 'Hindu India' and 'Hindutva' were to be muted in the film. Alankrita Shrivastava, whose film, *Lipstick Under My Burkha*, was also blocked by the CBFC earlier this year for being “lady-oriented”, challenged the decision in appeals tribunal which finally allowed the release, with some edits. When the film released, “it will be clear what the film is, and how ridiculous this drama was,” she observed.

The outrage is justified. Article 19(1) of the Constitution lists a number of freedoms, including the freedom of expression in sub-clause (a). From the outset, the Indian Constitution provided too many exceptions to this clause under Art 19(2)<sup>1</sup>.

The judiciary, in the immediate aftermath of independence, was of the view that any statute not compatible with the fundamental rights enshrined in the Constitution would be struck down. In *Amar Nath Bali v. State*, *Romesh Thapar v. State of Madras* and *Brij Bhushan v. State of Delhi*, the superior courts, in the main, held this view.

The post-independence state promptly hits back by enacting the Constitution (First Amendment) Act 1951. It allowed 'censorship' statutes which permitted the government to impose 'restrictions' on the press and other media “in the interests of security of state, friendly relations with foreign states, public order, decency, and morality or in relation to contempt of court, defamation or incitement to an offence”. In 1963, the 14th Constitutional Amendment added “sovereignty and integrity of India” to the list. Ostensibly making a concession to liberal opinion, the restrictions were to be 'reasonable' both 'substantively and procedurally'.

The statutes under Art 19(2), provided for appeal against executive orders. (*Madan Lal Kapur v. State of Rajasthan*). The grounds for prohibition were to be laid down in executive orders (*State v. Baboo Lal*). However, the courts also held that incitement or encouragement to the commission of violent crimes be held as undermining the security of the state and coming within the ambit of a law sanctioned by Art 19(2) (*State of Bihar v. Shailabala Devi*). The time and extent of restrictions to be imposed were left at the discretion of the government (*Virendra v. State of Punjab*).

The 1952 Act allowed appeals and had directives regarding imposition of restrictions. This saved it from falling foul of the judiciary.

What frightens the state was what was said in *S. Rangarajan v. P. Jagjivan Ram-*

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<sup>1</sup> “Nothing in sub-clause (a) of clause (1) shall effect the operation of any existing law insofar as it relates to, or prevents the state from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends the decency or morality or which undermines the security of, or tends to overthrow, the state”.



“Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses... The focusing of an intense light on a screen with the dramatizing of facts and opinion makes the ideas more effective. The combination of act and speech, sight and sound in semidarkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators.”

Indian public opinion has chosen to overlook the incompatibility of film censorship with the implications of Fundamental Rights enshrined in the Indian Constitution. The powers granted under the 7th Schedule of the Constitution must be subordinate to Article 13 that establishes the primacy of Fundamental Rights as enunciated in Article 19. Until then the Pahaj Nihalanis will get to play Edward Scissor hands.

The hope, however, is that film audiences – and filmmakers – will continue to nudge, push, and question.

In the light of above, one can sense the challenges which exist to dilute the freedom of speech and expression, the fundamental right which forms the bedrock of a democracy. It is in this context, I am delighted to welcome the publication of The Indian Journal of Law and Public Policy (Volume III; Issue II, 2017). I believe, the endeavours of IJLPP to carry out peer reviews of articles of contemporary importance is an effort which deserves its due acknowledgment.

It gives me immense pleasure and honour to see the young students of law and public policy being passionate about the issues related to socio-economic and political realities. The growing ethical and medico – legal complexities attached to the practice of Surrogacy to the socio – legal analysis of the practice of censorship in place of film certification hits at the centre of the debate revolving around civil liberties. Further, the dilemma regarding entry of foreign law firms into domestic legal market and the tax liability attached to it coupled with role of investor in exercising his/hers voting rights brings forth the corporate shift in the market. The Paper on cyber security provides a much needed insight to policy thinkers calling them to better the infrastructure of cyber security. I believe the contributions made to this Edition are of significance to people from all walks of life.

I hope this Journal grows by leaps and bounds in establishing itself as an impartial, fair, just and transparent platform for intellectual exchange of ideas.

**Mr. Ravi Nair**  
**Executive Director, South Asian Human Rights Documentation Centre (SAHRDC)**



## **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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# THE CONCEPT OF DECEPTIVE SIMILARITY: LAW & PUBLIC POLICY

*Prabhdeep Kaur Malhotra\**

## INTRODUCTION

A trademark<sup>1</sup> refers to the visual symbol in the form of word, a device, or a label which is applied to the articles of commerce with the sole motive to indicate to the consumers that the goods<sup>2</sup> are those manufactured by a particular person and can be very well distinguished from the goods which are manufactured or produced by others.<sup>3</sup> It applies to the services<sup>4</sup> also which are made available to the consumers. Thus, in order to qualify for protection, it is very much essential that a trademark must be distinctive in

nature and should not intend to create any kind of confusion as to the origin of goods or services. In *Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt.*,<sup>5</sup> it was held that “the difference in the style of the appearance of words on the container or packing which identifies its manufacturers by way of style, colour combination or textures or graphics is certainly significant or relevant for determining the overall imitation of the container but when a product is having distinctive colour combination, style, shape, and texture has been on the market for decades as in this case it is in the market since many years it leads to ineluctable inference of having acquired secondary meaning on account of its reputation and goodwill earned at huge cost.”

### Essential Functions of Trademark

There are varieties of functions performed by a trademark and statutory functions of trademark are different from the role which is actually played by the trademark. The first and foremost function of the trademark is the indication of goods or services to which it is applied and this can be very well understood

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<sup>1</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 2(1)(zb): “*trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include the shape of goods, their packaging and combination of colours.*”

<sup>2</sup> *Id.* §. 2(1)(j): “*goods means anything which is the subject of trade or manufacture*”.

<sup>3</sup> P. NARAYANAN, LAW OF TRADEMARKS AND PASSING OFF 1 (6<sup>th</sup> ed., Eastern Law House 2004).

<sup>4</sup> *supra note 1*, § 2(1)(z): “Service means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.”

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<sup>5</sup> 2003 (27) PTC 478 Del.

from the definition of Trademark under the Act.<sup>6</sup> In *The International Association of Lions Club v. The Association of Lions India*,<sup>7</sup> it was observed that “it was irrelevant whether or not the public was aware of the plaintiff's identity as the manufacturer or supplier of the goods in question, as long as they were identified with a particular source.”

Trademarks are the means of achieving product differentiation and the term ‘product differentiation refers to the image of a product which a buyer has in his mind with respect to a particular product which is entrenched in a particular manner or style.’<sup>8</sup> Thus, a trademark is a source of product differentiation which reduces the search cost and enables the consumer to categorise and classify goods or services according to their characteristics.

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<sup>6</sup> *Brahmos Aerospace Pvt. Ltd. v. Fiit Jee Limited*, decided on 24 Feb. 2014, it was held that ‘Brahmos’ is a well-known trademark and it was concluded that in order to understand the arguments of the parties, one has to read the definition of the “mark” and the “trademark” under §§ 2(1)(m) and 2(1)(zb) of the Trade Marks Act, 1999 together. In § 2(1)(m), the meaning of the “mark” includes the name and word and/or any combination thereof. Similarly, as per § 2(1)(zb), the “trademark” means, if the same is used in relation to goods or services for the purposes of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; *See also*, *Bloomberg Finance v. Prafull Saklecha*, 2013 (56) PTC 243 (Del) and *Rolex Sa v. Alex Jewellery Pvt Ltd.*, (2009) 41 PTC 284 (Del).

<sup>7</sup> 2006 (33) PTC 79 Bom.

<sup>8</sup> *Functions of Trademarks in India* (Jan. 26, 2017, 10:20 PM), <http://www.solubilis.in/blog/functions-of-trademark-india/>.

Trademark is a source of advertisement because it functions as an indicator. In *N.R. Dongre v. Whirlpool Corporation*,<sup>9</sup> it was held that advertisement of a trademark without existence of goods in the market is also to be considered as use of the trademark. It is not necessary however that the association of the plaintiff's marks with his goods should be known all over the country or to every person in the area where it is known best. The knowledge and awareness of the trademark in respect of goods is not limited to the population of a country wherein the goods are made available but the same knowledge also reaches in the other countries where the goods may or may not have reached. When a product is launched, people in the other countries get acquainted with it through advertisements by means of newspapers, magazines, television, cinemas etc. irrespective of the fact whether such product is made available in that country or not. This transfer and dissemination of information have been made possible only through the development of communication systems.<sup>10</sup> Thus, identification of a given source through a particularly successful and advertised trademark creates a substantial market power.<sup>11</sup> However,

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<sup>9</sup> 1996 SCR (5) SUPP 369; *See also*, *Faulder & Co. Ltd. v. O & G. Rushton*, (1903) 20 RPC 477).

<sup>10</sup> VIKAS VASHISHTH, *LAW AND PRACTICE OF INTELLECTUAL PROPERTY IN INDIA* 67 (2<sup>nd</sup> ed., Bharat Law House 2002).

<sup>11</sup> *Supra note 8*.

there may be comparative advertising by which producers in the same market may specify the differences or similarities between their and their competitors' products which may or may not be true.<sup>12</sup> But it has been made permissible to inform consumers and to enable them to make a wise decision. They have a right to make an informed decision which is not possible without advertisement. They have a right to know about the merits and demerits of a product.

Trademark can be described as a source of consumer welfare. Modern trademark highly favors consumer interest. There has to be a balance between the interest of trademark proprietor and consumer welfare. In *M/S. Hindustan Pencils Pvt. Ltd. v. M/S. India Stationery Products*,<sup>13</sup> it was observed that the distinguishing mark is solely for the benefit of the consumer and it is a representation by the owner to the consumer informing him that the goods bearing a particular trademark have been

manufactured or marketed by the owner of the mark.

Trademark guarantees continuance in the flow of quality. Trademarks are the “quality symbols” which molds the order of priority a consumer can have with regard to the purchasing things or availing of services. These marks are considered as the output of one’s intellect which he uses in producing the goods and applies to the trade in question. Hence, such form of intellectual property needs protection in order to ensure that quality goods and service are maintained for the welfare of the society. If the product is of standard quality the consumer will influence others to purchase and thereby demand of a product increases.<sup>14</sup> Neither Paris Convention for the protection of industrial property 1883 nor the TRIPS Agreement, 1994 or the Trademark Law Treaty, 1994 refers to this aspect.<sup>15</sup>

Trademark is a source of protecting the consumers from deception or confusion. The

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<sup>12</sup> Jonas H ackner and Astri Muren, *Trademark Protection and Product Differentiation*, 4 STOCKHOLM UNI. (2005).

<sup>13</sup> AIR 1990 Del 19; *See also*, *M/S. South India Beverages Pvt. v. General Mills Marketing Inc.*, FAO(OS) No. 389/2014, decided on 13 Oct. 2014, a paramount factor influencing a consumer's choice of brand is his memory of previous exposures of the brand. Distinctive brand names and packaging are highly conducive to mental associations and serve as pathways to facilitate a much more accurate recall by a consumer. It enables finer retrieval of the experience. Studies reveal that extrinsic brand cues might actually enhance the memorability of prior experiences with specific brands, thereby facilitating accurate quality discrimination and improving consumer welfare.

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<sup>14</sup> Raja Selvam, *Quality Control in Trademark - The Indian Perspective*, (Jan. 26, 2017, 12:30 PM),

<http://www.selvamandselvam.in/blog/quality-control-in-trademark-the-indian-perspective/>; *See also*, *Hyundai Corporation v. Rajmal Ganna*, 2007 (35) PTC 652 Del, the plaintiff's mark HONDA has acquired a global goodwill and reputation. Its reputation is for quality products. The name of HONDA is associated with the plaintiff's especially in the field of automobiles and power equipments on account of their superior quality and high standard.

<sup>15</sup> There are other laws to deal with quality matters like Consumer Protection Act, 1986 and the Drugs and Cosmetics Act, 1940. These laws ensure that sub-standard quality goods and services are not sold to the consumers and provide necessary remedies.

likelihood of confusion between similar marks increases with increase in passage of time and sequential consumption of the products.<sup>16</sup> In *Bloomberg Finance Lp v. Prafull Saklecha*,<sup>17</sup> the Plaintiff opposed the advertised trademark applications of the Defendants for registration of Bloomberg. It was held that the defendants have, by adopting Bloomberg as part of their corporate name, deceived the public into thinking that the services and products offered by the Defendants are that of the Plaintiff or have originated from or are associated with the Plaintiff and that the adoption of the impugned mark by the Defendants is likely to create confusion in the minds of the public that the Defendants are associated with the Plaintiff.

Trademark is a source of protecting the investment and trade or business of the manufacturer. The owner of the trademark should be able to protect his investment which he must have spent in the form of time and

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<sup>16</sup> *Sentini Bio Products Pvt. Ltd. v. M/S. Allied Blender & Distillers*, FAO (OS) 368/2014 decided on 6 July, 2015; *See also*, *Corn Products v. Shangrila Foods*, AIR 1960 SC 142, the Supreme Court held that 'Gluvita' was likely to cause confusion with the mark 'Glucovita' as both conveyed the same idea of glucose and life giving properties of vitamins.

<sup>17</sup> 2013 (56) PTC 243 (Del); *See also*, *Apple Computer Inc. v. Apple Leasing & Industries*, 1992 (1) Arb. LR 93, it was held that it was not necessary to insist that a particular plaintiff must carry on business in a jurisdiction before improper use of its name or mark can be restrained by the court. The main consideration was "the likelihood of confusion and consequential injury to the plaintiff and the need to protect the public from deception. Where such confusion is prima facie shown to exist, protection should be given by courts to the name or mark".

money in presenting a service or product to the consumer. Thus, he should prevent others from using the trademark which is determined by the strength, or goodwill, of the association between the trademark and its source, and it is the consumer who determines this value.<sup>18</sup> Trademarks can sometimes be socially harmful. Landes and Posner claim that marks should be protected when they are socially beneficial and not when they are deleterious.<sup>19</sup>

### MEANING AND SCOPE OF DECEPTIVE SIMILARITY

When a person gets his trademark registered, he acquires valuable rights to the use of the trademark in connection with the goods in respect of which it is registered. And, in the event of any invasion of his rights by any other person using a mark which is identical or deceptively similar to his trademark, he could protect his mark by an action for infringement and obtain an injunction.<sup>20</sup> Thus, the basis for protecting the trademark is that no mark shall be registered which is likely to deceive the public

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<sup>18</sup> *Trademark Legal Basis* (Jan. 27, 2017, 12:45 PM), <http://www.trademark.iastate.edu/basics>.

<sup>19</sup> William Fisher, *Theories of Intellectual property*, 3-4.

<sup>20</sup> *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories*, AIR 1965 SC 980; *See also*, *American Home Products v. Mac Laboratories*, AIR 1986 SC 137; *National Bell Co. v. Metal Goods Mfg. Co.*, AIR 1971 SC 898; *M/s Avis International Ltd. v. M/s Avi Footwear Industries and another*, AIR 1991 Delhi 22 and *Ruston and Hornby Ltd. v. Zamindara Engineering Co.*, AIR 1970 SC 1649.

or which creates confusion in the minds of the public in regard to the 'origin' or source of goods or services.

The expression 'deceptive similarity' as enshrined under § 2(1)(h) of the Trademarks Act, 1999 says that the similarity or resemblance must be such as it would be likely to deceive or cause confusion.<sup>21</sup> In order to come to a conclusion whether one mark is deceptively similar to another, the broad and essential features of the two are to be considered. They are not required to be placed side by side to determine whether there are any differences in their design.<sup>22</sup> The test of comparison of the marks side by side is not a sound one<sup>23</sup> because the question is not whether

a person, while seeing both the marks side by side is confused or not but whether the person who sees proposed trademark in the absence of other trademark is liable to be deceived for what he has general recollection.<sup>24</sup> Deception can arise with regard to the deception as to the goods, deception as to the trade origin, deception as to the trade connection.<sup>25</sup>

### **Misrepresentation**

Under the trademark, misrepresentation<sup>26</sup> occurs where the defendant says or does something which indicates either expressly or impliedly that the defendant's goods or services derive from the claimant, which is actually not. The action has become vast to include representations relating to the

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<sup>21</sup> A.V. Rajadurai Nadar v. P. Ayya Nadar, AIR 1977 Mad 237, any conclusion reasonable and proper can be arrived at by a meticulous examination of each detail and then making a comparison. At the same time, what readily strikes the eye must also be conclusive. But, when one looks at it, especially from the standpoint of a person who is most likely to use a particular brand of matches, if it appears that the difference is prominent and it cannot lead to any similarity or a deceptive similarity or confusion, then there could be no objection to the two different trademarks.

<sup>22</sup> Man Mohan Sharma v. Manjit Singh, FAO No.4739 of 2016(O&M); *See also*, Parle Products (P) Ltd. v. J.P. and Co., AIR 1972 SC 1359; Lily ICOS LLC v. Maiden Pharmaceuticals Lim, 2009 (39) PTC 666; Kirorimal Kashiram Marketing & Agencies Private Limtied v. Shree Sita Chawal Udyog Mill Tolly Vill., 2010(44) PTC 293 (Delhi) and DB Ruston and Hornby Ltd. v. Zamindara Engineering Co., AIR 1970 SC 1649.

<sup>23</sup> The Singer Manufacturing Co. v. The Registrar Of Trade Marks, AIR 1965 Cal 417; *See also*, Eno v. Dunn, (1890) 15 AC 252, deception is not proved by placing the two marks side by side and demonstrating how small is the chance of error in any customer who places his order for goods with both the marks clearly before him, tor

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orders are not placed, or are often not placed, under such conditions; Firm Koonerji Becharilal v. Firm Adam Hazi Pirmohomed Esabh , AIR 1944 Sind 21.

<sup>24</sup> Damodara Pai v. Manilal, (1972) Ker LJ 19.

<sup>25</sup> Anamika Bhandari, *Trademark: Infringement and Passing Off* 1(1) RSLR 133.

<sup>26</sup> Anheuser Busch v. Budejovicky Budvar, (1984) F.S.R. 413, it was held that the use of the same name by the defendants, however honest and however much used elsewhere, constitutes a misrepresentation if it leads people to believe that their goods are the goods of the plaintiffs; *See also*, M/S Castrol Limited v. Mr. Thakur Dassochani, AIR 2000 Delhi 60, use of word 'CASTROL' by the defendants amounted to infringement. It was held that the misrepresentation is calculated to cause damage and injury both to the plaintiffs' business and to their reputation and goodwill and the consumer and general public; and the defendants have attempted to make a deliberate misrepresentation to the purchasing public otherwise it cannot be a matter of coincidence. It is a systematic attempt by the defendants to derive unfair advantage and cause misrepresentation. The misrepresentation is bound to cause confusion and deception in the minds of the purchasing public.

good or services and representations which suggest that there is a link between the claimant and the defendant.<sup>27</sup>

The defendant's state of mind is not essential because the guiding factor is to determine the consequences of defendant's actions and their effect on the public.<sup>28</sup> A fraudulent or deceptive copying of the trademark owned by another person amounts to a false misrepresentation to the public which is required to be protected against such misrepresentation.<sup>29</sup> The courts have been very flexible in deciding whether the defendant has made the requisite misrepresentation. The misrepresentation can arise through the use of words or actions. The most common form of misrepresentation is through the use of words<sup>30</sup> which can be either oral or written. In some cases, misrepresentation can be there in the action of a defendant when defendant produces goods to look like claimant's or when it gives

rise to the misrepresentation in relation to the registration of names registered on the internet.<sup>31</sup>

Misrepresentation can be as to the source,<sup>32</sup> quality,<sup>33</sup> and control or responsibility on the goods or services. The courts have recognised that misrepresentation may occur when the conduct of defendant gives rise to the fact that the defendant has control or responsibility on the goods or services. However, the mere fact that a defendant suggests that they are connected to the claimant will not necessarily amount to passing off because the connection will be relevant only if defendant's misrepresentation suggests that claimant has some type of responsibility or control over the goods or services.<sup>34</sup> It is passing-off to represent the claimant's goods of a particular type or quality as those of another or to represent sub-standard or second-hand goods as new. It is also passing-off to misuse

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<sup>27</sup> LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW 692* (Oxford University Press 2003).

<sup>28</sup> *Id.* at 693.

<sup>29</sup> *Pfizer Products Inc. v. Vijay Shah*, decided on 29 Nov., 2010; *See also*, *M/S East African (India) v. M/S S.R. Biotech*, decided on 16 July, 2012, to Succeed in a passing off action plaintiff needs to establish that the defendant is making a misrepresentation to the public. The court is also to see the likelihood of confusion in the minds of the public being caused that the goods offered by the defendant are the goods of the plaintiff.

<sup>30</sup> *SK Sachdev v. Shri Educare Limited*, 2008 SCC OnLine Del 799; the defendants were restrained from using the words 'SHRI RAM' and from using the mark SHRI RAM GLOBAL SCHOOL and the domain name www.shreeram.in. They were held guilty of misrepresentation.

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<sup>31</sup> *Supra* note 27 at 694.

<sup>32</sup> *M/S. Sancheti Appliances Pvt. v. M/S. D.K. Electricals*, decided on 9 Feb. 2011; *See also* *Reckitt and Colman Products Ltd. v. Borden Inc and others*, [1990] 1 All ER 873, In order to bring an action for passing off, one of the elements is to prove that that he suffers or is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of his (the defendant's) goods or services is the same as the source of those offered by the plaintiff.

<sup>33</sup> *M/S. Castrol Limited v. M/S. Ramesh Rajput*, decided on 5 Aug. 2011, Defendant's malafidely adopted plaintiff's trademark to pass of their inferior quality goods as that of plaintiffs genuine goods and to make illegal profit out of it. Injunction was granted.

<sup>34</sup> *Supra* note 27 at 699.

claimant's goods to sell others, for example by refilling claimant's containers.<sup>35</sup>

**Whether misrepresentation is Deceptive or not: Comparison as a whole**

In order to ascertain whether the misrepresentation is deceptive or not, the marks should be looked at as a whole.<sup>36</sup> Thus, it has to be borne in mind that the objective is to make ultimate analysis whether the mark used by the defendant as a whole is deceptively similar to the registered mark of the plaintiff.<sup>37</sup>

While examining the question of misrepresentation or deception, a comparison has to be made between the two trademarks as a whole.<sup>38</sup> The Anti-Dissection Rule compare composites as whole conflicting composite marks are to be compared by looking at them as a whole, rather than breaking the marks up into their component parts for comparison.<sup>39</sup> The marks must be compared as a whole. It is not

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<sup>35</sup>CHRISTOPHER WADLOW, *THE LAW OF PASSING OFF: UNFAIR COMPETITION BY MISREPRESENTATION* 285 (3<sup>rd</sup> ed., Sweet & Maxwell 2004).

<sup>36</sup>*Supra note 3* at 361.

<sup>37</sup> *Cadbury India Limited v. Neeraj Food Products*, 142 (2007) DLT 724; *Kaviraj Pandit Durga Dutt Sharma v. Navratna Pharmaceutical Laboratories*, [1965] 1 SCR 737; *Ruston & Hornbi Limited v. Zamindara Engineering Co.*, AIR 1970 SC 1649.

<sup>38</sup> *Pepsico, Inc v. Psi Ganesh Marketing*, CS(OS) 157/2013, decided on 19 May, 2014.

<sup>39</sup> *Cadila Healthcare Ltd. v. Aureate Healthcare Pvt. Ltd.*, CS (OS) No.123 of 2011, decided on 30 July 2012; the defendant was restrained from using the trade mark "PANTOBLOC" or any other mark which is identical or deceptively similar to the plaintiff's registered trade mark "PANTODAC".

right to say that because the difference in the portion of a word is there of the corresponding portion, there is no sufficient similarity to cause confusion. The true test is whether the totality of proposed trademark is likely to cause confusion or not.<sup>40</sup>

**Tests to determine whether the two marks are deceptively similar or not**

As far as the similarity is concerned what is required is "a mere resemblance" or close similarity and not the close resemblance.<sup>41</sup> The 'ordinary observer' test is applied to determine if two works are substantially similar. The Court will look to the response of an 'average lay observer' to ascertain whether a copyright holder's original expression is identifiable in the allegedly infringing work.<sup>42</sup> The factors creating confusion depends upon the nature of mark itself, the class of customers, trade channel, the list is not exhaustive because there are several other factors required to be taken into conclusion to determine whether

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<sup>40</sup> *F. Hoffman – La Roche and Co. Ltd. v. Geoffrey Manners and Co. (Pvt.) Ltd*, AIR 1970 SC 2062.

<sup>41</sup> B.L. WADEHRA, *LAW RELATING TO INTELLECTUAL PROPERTY* 167 (4<sup>th</sup> ed., Universal Law Publishing Co. 2007).

<sup>42</sup>*M/S. South India Beverages Pvt. v. General Mills Marketing Inc*, FAO(OS) No. 389/2014, decided on 13 Oct. 2014; *See also*, *Peter Pan Fabrics Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2nd Cir. 1960); Since it is employed to determine qualitative and quantitative similarity in visual copyright work, the said test can also be usefully applied in the domain of trademark law as well.

there is a likelihood of confusion or deception by the use of a mark.<sup>43</sup>

Whether a mark used by proprietor deceives the public or not depends upon the variety of factors and no concrete answer can be there to determine whether the impugned mark creates confusion as to the source or origin of goods. It depends on the facts and circumstances of each case. In some cases, courts have given regard to the common elements<sup>44</sup> present between the two marks while sometimes courts consider the uncommon elements. Trademarks may be considered as deceptive if they misled the public as to the quality of goods to which they attach. According to ECJ<sup>45</sup> the standard necessary for deception is that there is 'the existence of actual deceit is a sufficiently serious risk that the consumer will be deceived.'<sup>46</sup>

For determining deceptive similarity there is a requirement to examine 'whether the

essential features of the plaintiff's trade mark are to be found in that used by the defendant'.<sup>47</sup>

There is no hard and fast rule to laid down a universal test to determine the similarity between two marks. When the class of buyers is quite educated and rich the test to be applied is different from the one where the product would be purchased by villagers, illiterate and poor. The test to be applied in a country like India may be different from the test in England, United States of America or Australia.<sup>48</sup>

The correct method of resolving the issue is to independently study the design, bearing in mind the registered trademark and to ascertain whether the design would create an impression in the mind of an ordinary citizen that he was buying an article bearing the registered trademark.<sup>49</sup> Apart from the structural, visual and phonetic similarity or dissimilarity, the question has to be considered from the point of view of a man of average intelligence and imperfect recollection.

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<sup>43</sup> Sony Kabushiki Kaisha v. Shameao Markar, AIR 1985 Bom 327.

<sup>44</sup> Macleods Pharmaceuticals v. Intas Pharmaceuticals Ltd., decided on 29 May, 2013; F. Hoffmann-La Roche & Co. Ltd v. Geoffrey Manners, 1970 AIR 2062, 1970 SCR (2) 213; Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical, 1965 AIR 980, 1965 SCR (1) 737; Corn Products Refining Co. v. Shangrila Food Products, AIR 1960 SC 142.

<sup>45</sup> Consorzio per la Tutela del Formaggio Gorgonzola v. Käserei Champignon Hofmeister GmbH & Co. KG and Eduard Bracharz GmbH, C-87/97, [1999] ECR I-1301.

<sup>46</sup> TANYA APLIN & JENNIFER DAVIS, INTELLECTUAL PROPERTY LAW: TEXT, CASES AND MATERIALS 267 (1<sup>st</sup> ed., Oxford University Press 2009).

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<sup>47</sup> United Biotech Pvt. Ltd. v. Orchid Chemicals, decided on 4 July, 2011, 'FORZID' was held deceptively Similar to 'ORZID'; *See also*, Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical, 1965 AIR 980.

<sup>48</sup> M/S Mohan Meakin Limited v. A.B. Sugars Limited, CS(OS) 2335/2010, decided on 10 Oct. 2013; Khoday Distilleries Limited (Now known as Khoday India Limited) v. The Scotch Whisky Association, (2008) 10 SCC 723; *See also*, Carew Phipson Limited v. DeeJay Distilleries Pvt. Limited, AIR 1994 Bom 231, wherein interim injunction was refused on the ground that customers buying the alcoholic beverages subject matter in that case would normally be educated and discerning.

<sup>49</sup> *Supra note* 10 at 164.

Secondly, it is to be considered as a whole and thirdly it is the question of his impression.<sup>50</sup>

Whether the two marks are structurally and phonetically similar and would cause deception in the mind of the consumer is relevant.<sup>51</sup> There are different tests<sup>52</sup> evolved by the courts from time to time, such as ‘test of an ordinary memory of ordinary purchaser’,<sup>53</sup> test of essential features of the mark/label was applied,<sup>54</sup> test of the environment in which the trademark is used.<sup>55</sup>

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<sup>50</sup> *Bdh Industries Ltd. v. Croydon Chemical Works Pvt. Ltd.*, 2002 (4) BomCR 5; *National Sewing Thread Co. Ltd v. James Chadwick*, 1953 AIR 357; *Ciba Ltd. v. M. Ramalingam & S. Subramaniam*, AIR 1958 Bom 56; *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, AIR 1960 SC 142; *F. Hoffmann La Roche & Co. Ltd. v. Geoffrey Manners & Co. Pvt. Ltd.*, 1970 AIR 2062; *Astra - IDI Ltd., v. TTK Pharma Ltd.*, AIR 1992 Bom 35; *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.*, decided on 26 March 2001.

<sup>51</sup> *United Biotech Pvt. Ltd. v. Orchid Chemicals & Pharmaceuticals Ltd.*, 2012 (50) PTC 433 (Del.) (DB).

<sup>52</sup> *Anglo-Dutch Paint, Colour and Vanish Works Pvt. Ltd. v. India Trading House*, AIR 1977 Delhi 4, the tests laid down for comparing the two marks are: (i) The question whether the two marks are so similar as likely to cause confusion or deceive is one of first impression. It is for the Court to decide this question. (ii) The question has to be approached by applying the doctrine of fading memory i.e. From the point of view of a man of average intelligence having imperfect recollection. (iii) Whether the overall visual and phonetic similarity of the two marks is likely to deceive such a man or cause confusion that he may make mistake the goods of the defendant for those of the plaintiff. (iv) The other questions which arise are: (i) who are the persons who are likely to be deceived and (ii) what rules of comparison are to be adopted in judging whether such resemblance exists; *Corn Products Refining Co. v. Shangrila Food Products Ltd.*, AIR 1960 SC 142.

<sup>53</sup> *Supra note* 10 at 164.

<sup>54</sup> *Pepsico, Inc. v. Pure Water Beverages*, 2011 (47) PTC 147 (Del.); *Mumtaz Ahmad & Etc. v. Pakeeza Chemicals*, AIR 2003 All 114, in order to come to the conclusion

### **Intention to deceive is not necessary: The guiding principle**

One of the guiding factors to determine whether the mark in question deceives or creates confusion does not depend upon the intention to deceive. It is immaterial whether the intention of the person to deceive the general public is present or not. Thus, an intention to deceive need not be proved.<sup>56</sup> In *Kirloskar Diesel Recon Pvt. Ltd. v. Kirloskar Proprietary Ltd.*,<sup>57</sup> it was held that the plaintiff was not required to establish fraudulent intention on the part of the defendant and it was not necessary as such. Also, once the reputation has been established, plaintiffs need not prove fraudulent intention or misrepresentation on the part of defendants.<sup>58</sup>

### **Persons to be considered: The Factors which decide whom the mark must be calculated to deceive**

The relevant person is the average consumer who is “reasonably well informed and

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whether one mark is deceptively similar to another the broad and essential features of the two are to be considered.

<sup>55</sup> *M/S Mohan Meakin Limited v. A.B. Sugars Limited*, CS(OS) 2335/2010 decided on 10 Oct. 2013, the defendants were restrained to use ‘TOLD MOM’ mark and it was held to be deceptively similar to ‘OLD MONK’.

<sup>56</sup> *P.L. Anwar Basha v. M. Natrajan*, AIR 1980 Mad 56, defendants were restrained from using ‘Meen Mark Beedi’ because the overall similarity between the labels of plaintiff and defendant was there.

<sup>57</sup> AIR 1996 Bom 149.

<sup>58</sup> *Kirloskar Proprietary Ltd. v. Kirloskar Dimensions Pvt. Ltd.*, AIR 1997 Kant 1.

reasonably observant and circumspect”<sup>59</sup> although such a person will rarely have the opportunity to make a direct comparison but has to rely on the ‘imperfect picture of them that he has kept in his mind’.<sup>60</sup> The persons to be considered in estimating the resemblance between the marks is all those who are likely to become purchasers of the goods.<sup>61</sup> The average consumer can be the adult public at large.<sup>62</sup>

The general principle on the standard of care to be expected is that it must not be assumed that a careful examination of the mark will be made,<sup>63</sup> It is hard to say that unusually stupid people may be deceived.<sup>64</sup> If the goods are expensive, the consumers are generally the educated persons.<sup>65</sup> If the goods are cheap, the consumers are likely to be the illiterate persons.<sup>66</sup> The attentiveness of consumers is

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<sup>59</sup> C-210/96 Gut Springenheide and Tusky, [1998] ECR I-4657.

<sup>60</sup> Lloyd Schuhfabrik v. Meyer, [1999] FSR 627.

<sup>61</sup> ‘G.E.’ [1973] RPC 297 at 321-322 HL.

<sup>62</sup> Whyte and MacKay Ltd. v. Origin Wine UK Ltd, [2015] EWHC 1271 (Ch.) (06 May 2015).

<sup>63</sup> *Id.* at 591 Wotherspoon v. Currie, (1871-72) LR 5 HL 508 at 519.

<sup>64</sup> *Ibid.*, Payton v. Titus Ward, (1900) 17 RPC 58 at 67.

<sup>65</sup> KERLEY’S LAW OF TRADEMARKS & TRADE NAMES 591 (14<sup>th</sup> ed., 2007, Sweet & Maxwell); HFC v. Midland [2000] FSR 176 at 184.

<sup>66</sup> Devi Pesticides Private Ltd. Rep. v. Shiv Agro Chemicals Industries, (2006) 2 MLJ 834, defendants were restrained from using SUPER BOOM or any other mark deceptively similar to plaintiffs registered trademark BOOM PLUS and BLOOM FLOWER-n and it was held that the products were pesticides, fertilizers and other agents the channel of marking is also the same and the needy consumers are illiterate agriculturists who would not be able to distinguish between the marks BOOM

taken into account which depends upon various considerations.<sup>67</sup>

### **Types of similarity: The three factors**

The main factors to be considered are as follows:

- i. *The visual similarity of the marks:* It will include length of the respective marks, use of prefixes, suffixes, common syllables, and shared elements of shape.<sup>68</sup>
- ii. *The aural similarity of the marks:* It turns on similarity when the marks are pronounced. It depends upon the length of the marks, the number of syllables and the pronunciation of the marks.<sup>69</sup>

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PLUS, BOOM FLOWER-n and SUPER BOOM one would always believe that the same would originate from the same source.

<sup>67</sup> NICHOLAS CADDICK QC & BEN LONGSTAFF, A USER’S GUIDE TO TRADEMARKS AND PASSING OFF 77 (3<sup>rd</sup> ed., Bloomsbury Professional Ltd. 2012).

<sup>68</sup> *Id.* at 69; Cadila v. Biochem, decided on 23 May 2012, defendants were restrained from using the word "ATTOR" which was deceptively, confusingly, phonetically and visually similar to the plaintiff’s trademark "ATORVA"; *See also*, Pidlite Industries Pvt. Ltd. v. Mitters Corporation, AIR 1989 Del 157, FEVICOL and TREVICOL were held to be visually similar and identical marks.

<sup>69</sup> *Id.* at 70; *See also*, Indchem Health Specialities v. Naxpar Labs Pvt. Ltd., 2002 (2) MhLj 513, the words "Cheri" and "Cherish" they are structurally and visually similar as well as aurally similar and easily give rise to deception and confusion, AEVIS was held to be phonetically similar to the registered mark AVI’s and thus, injunction was granted; *See also*, Bengal Immunity Co. Ltd. v. Denves Chemical Mfg. Co., AIR 1959 Cal 636 the court held that there is a great resemblance of sound between the words ‘ANTIPHLOGISTINE’ and ‘B.I. PHOLGISTON’; SBL Ltd. v. Himalaya Drugs Co., AIR 1998 Del 126, it was held that the abbreviation ‘LIV’ is made out of Liver, which is an organ of human body.

Phonetic and visual similarity means the reference to the ear as well as eye.<sup>70</sup> Examples of Phonetic Similarity are WIPRO and EPRO, GLUVITA and GLUCOVITA, LAKME and LIKEME. Example of Visual Similarity is the kingfisher bird of McDowell of a mark bearing two Kingfishers.<sup>71</sup>

iii. *The conceptual similarity of the marks:*  
Certain marks may not look or sound alike but may be similar in concept. The relevant point is to see the overall message of the mark.<sup>72</sup>

#### **The role of evidence: Actual deception need not be proved**

Evidence of facts and circumstances which are relevant to decide the question of

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Nobody can claim an exclusive right to the use of Liv as a constituent of trademark. Thus, no phonetic similarity between Liv. 52 and Liv.-T; Camlin Pvt. Ltd. v. National Pencil Industries, AIR 1988 Del 393, there is no similarity or resemblance between the two marks 'CAMLIN FLORA' and 'TIGER FLORE'; Aravind Laboratories v. V.A. Samy Chemical Works, AIR 1987 Mad 265, 'EYETEX' and 'EYEVIX' are two phonetically similar marks; Bombay Oil Industries Pvt. Ltd. v. Ballarpur Industries Ltd., AIR 1989 Del 77, there is a marked degree of phonetic similarity between 'SHAPOLA' and 'SAFFOLA'; Grandlay Electricals v. Vidya Batra, 1998 PTC 646, trademark HENKY was held to be phonetically and deceptively similar to GRANDLAY.

<sup>70</sup> R.K. NAGARAJAN, INTELLECTUAL PROPERTY LAW 415 (3<sup>rd</sup> ed., Allahabad Law Agency 2007); *See also*, M/s Avis International Ltd. v. M/s Avi Footwear Industries and another, AIR 1991 Delhi 22.

<sup>71</sup> G.S. Srividhya, *Overview of Trademarks Law*, NALSAR 3.

<sup>72</sup> *Supra* note 71 at 70; *See also*, Aktiebolaget Volvo v. Hari Satya Lubricants, decided on 3 Nov., 2016, Injunction was granted on the ground of adoption of the mark VALVO by the defendants which was visually, phonetically, structurally and conceptually similar to the plaintiffs' trademark VOLVO.

similarity of marks are always admissible, however, the question whether one mark nearly resembles another as is likely to deceive or cause confusion is question of fact is purely a question for the tribunal to decide.<sup>73</sup> A judge is entitled to make a decision based on his own experience even in the absence of evidence.<sup>74</sup> Evidence of actual deception is not necessary, although weight will be given to instances of actual deception or confusion.<sup>75</sup>

#### **Deceptive Similarity in case of Pharmaceuticals**

Every medicinal preparation has an active ingredient that produces a therapeutic effect. This active ingredient has a chemical name and a generic name. The chemical name is difficult to pronounce and it describes the molecular structure. For this purpose, the drug is known by the generic name in scientific community. It has the usefulness in scientific and medical research, education and medical journals. This non-proprietary name is very important to the doctors, pharmacist and other health care providers. This non-proprietary name is in public domain and is not protected by exclusive right. The medicinal preparation containing the drug has a brand name which is

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<sup>73</sup> P. NARAYANAN, INTELLECTUAL PROPERTY LAW 182 (3<sup>rd</sup> ed., Eastern Law House 2013).

<sup>74</sup> *Supra* note 65 at 604; Spalding v. Gamage and Neutrogena, (1915) 32 R.P.C. 273.

<sup>75</sup> *Supra* note 73 at 183.

chosen by the entity marketing the medicine. The brand name is the trademark of a medicine and is a proprietary over which the trademark owner has the exclusive right to use.<sup>76</sup>

There is no provision in the Trademarks Act, 1999 in respect of drugs or medicines. The Government of India under § 23(1) of the Act has mentioned that no trademark shall be registered in respect of certain single ingredient drugs. When an application for the registration of trademarks for pharmaceuticals and medical preparations covering the listed drugs, the Registrar requires the applicant to file an affidavit to the effect that the trademark applied for is not used or proposed to be used in respect of any listed drugs.<sup>77</sup> Medicinal and pharmaceutical preparations are considered to be the goods of the same description and it is well established practice of Trade Marks Registry.<sup>78</sup> Veterinary preparations are prima facie held to be of the same description as medicinal preparations for human use.<sup>79</sup>

An unwary purchaser of average intelligence and imperfect recollection would be deceived by the overall similarity of the two names having regard to the nature of the medicine he is looking for with a somewhat

vague recollection that he had purchased a similar medicine on a previous occasion with a similar name. He would not split the name into its component parts and consider the etymological meaning thereof.<sup>80</sup>

In *Cadila Healthcare Limited v. Cadila Pharmaceuticals Limited*,<sup>81</sup> it was observed that, “Drugs are poisons, not sweets. Confusion between medicinal products may, therefore, be life threatening, not merely inconvenient. Noting the frailty of human nature and the

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<sup>80</sup>*Amritdhara Pharmacy v. Satyadeo Gupta*, 1963 AIR 449, the registration of trade name ‘LAKSHMANDHARA’ in respect of medicine which was in use since 1923 was not allowed because the appellants were having registered trade mark ‘AMRITDHARA’ in respect of similar medicinal preparation which was in use since 1903 because the former was a deceptively similar to their mark, thereby resulting in confusion among the public; *See also*, *Wockhardt Limited v. Patiala Medical Agencies*, 2003 (26) PTC 425 (IPAB), the trademark PALGON BOLUS with similar cartons and packs was held deceptively similar to ANALGON which was registered trademark for medicinal, pharmaceutical and veterinary preparations as it was sufficient to deceive.

<sup>81</sup> Decided on 26 Mar. 2001; *See also*, *Merck KgaA v. Abhinav and Ashok Trading*, decided on 27 March 2014, CARBOPHAR was held to be deceptively similar to CARBOPHAGE; *Ranbaxy Laboratories Limited v. V. Anand Prasad*, 2004 (28) PTC 438 IPAB, OSTWIN was held to be deceptively similar to FORTWIN, the later was in use since 1975, both the medicines being for the treatment of bones as they had the common suffix ‘WIN’; *Simatul Chemical Industries (P) Limited v. Cibatul Limited*, 19 GLR 315, deception between two trade marks is not only concerned with the concerned two parties but is concerned with the consumers and the interest of the general public will also have to be seen; *Vividhmarg Investment Pvt. Ltd. v. Glenmark Pharmaceuticals Ltd.*, 2003 (27) PTC 52, RIDUCLER was held deceptively similar to RELCER amounting to the dishonest adoption and use; *Apple Laboratories Ltd. v. Boots Company Plc*, 2004 (29) PTC 265 (IPAB), registration of BRUFORTE was not allowed being deceptively similar to BRUFEN.

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<sup>76</sup> Zakir Thomas, *Legal Issues in Branding Medicinal Products*, 13 JIPR 523 (2008).

<sup>77</sup> *supra note* 3 at 241.

<sup>78</sup> *Id.* at 245.

<sup>79</sup> *Id.* at 246.

pressures placed by society on doctors, there should be as many clear indicators as possible to distinguish two medicinal products from each other. It is not uncommon that in hospitals, drugs can be requested verbally and/or under critical/pressure situations. Many patients may be elderly, infirm or illiterate. They may not be in a position to differentiate between the medicine prescribed and bought which is ultimately handed over to them.”

### **DECEPTIVE SIMILARITY: AN ABSOLUTE GROUND FOR REFUSAL OF REGISTRATION**

The legislative context of defining the scope of Deceptive Similarity as a ground for the refusal of trademark can be seen from the enacted provisions which enhances the scope of the concept and determines the features which tends to deceive or confuse the public. The said provisions are enshrined in the Trademarks Act, 1999 under §§ 9 and 11. § 9 deals with the absolute grounds for the refusal of a trademark while § 11 provides the relative grounds for the refusal. The difference between the two is that the former deals with the refusal when the inherent qualities of already registered trademark are in question while in the latter, the protection of an earlier trademark when it conflicts with the rights of third parties is dealt

with.<sup>82</sup> Absolute grounds are meant to protect the interest of the public while relative grounds are meant to protect the interest of proprietors of already registered trademark. Trademark plays a dual role i.e., the identification of source and protection against confusion for the benefit of consumers. The operations of the new mark may overlap with the operations of an earlier registered trademark, which makes it liable to be rejected for registration purpose.<sup>83</sup> A mark shall not be registered as a Trademark if it is of such nature as to deceive the public or cause confusion.<sup>84</sup> In *Tata chemicals Ltd. v. Deputy Registrar*,<sup>85</sup> the registration of TATA for

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<sup>82</sup>*Absolute and relative grounds for refusal to register a trade mark*, (Feb. 03, 2017, 1:00 PM) <https://www.lexisnexis.com/uk/lexispsl/ipandit/document/393990/55YX-NS41-F18F-K0P6-00000-00/Absolute-and-relative-grounds-for-refusal-to-register-a-trade-mark>.

<sup>83</sup> ASHWANI KUMAR BANSAL, *LAW OF TRADEMARKS IN INDIA* 167 (2<sup>nd</sup> ed., 2009, Commercial Law Publishers).

<sup>84</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 9.

<sup>85</sup> 2003 (27) PTC 422 Del, “the adoption of a trade mark in the first instance are of considerable importance when one comes to consider whether the use of that mark is or has not been a common user. If the user in its inception was tainting it would be difficult in most cases to purify it subsequently”; *See also*, *Usha Rani v. Registrar Of Trade Marks*, 2004 (29) PTC 647 IPAB, application for the registration of the trade mark 'USHA' in respect of switch gears, electric switch, electric main switch, metal clad switch fuse was refused as it was opposed by the respondents having their registered trademark 'USHA' for sewing machines, electrical fans, regulators and parts thereof which has got wide reputation and good will in India as well as abroad; *Sunder Parmanand Lalwani v. Caltex Ltd.*, AIR 1969 Bom 24, the Bombay High Court held that the name 'Caltex' cannot be permitted to be registered in connection with the applicant's watches on the ground that a large number of persons if they saw or heard about the mark 'Caltex' in connection with the applicant's watches, would be left to think that watches

pressure cookers was declined as there was a likelihood of deception because TATA was a household name all over India.

### **‘Deceptive similarity’ or ‘Confusing Similarity’?**

To deceive means deceiving a person by telling him a lie or making a false representation and making him believe that a particular thing is true which in fact is false. To confuse means to cause confusion without telling lie or making false representation to a person.<sup>86</sup> Even though the expression deceptive similarity is common with the Indian Judiciary, advocates and in books but with the other concepts such as dilution, tarnishment and disparagement it is expected that any emphasis on deceitful action shall be left far behind in the times to come. The phrase ‘confusingly similar’ is used in the U.S. law to depict the concurrent use of conflicting marks due to which there is likelihood of confusion which leads to infringement.<sup>87</sup>

No provision under the Act mentions about the reasonable understanding or an

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were in some way connected with the opponents who were dealing in petrol and various oil products with the mark ‘Caltex’; Bata India Limited v. Pyare Lal & Co., 2004 (29) PTC 647 IPAB, Meerut City the Allahabad High Court held that as the trade mark ‘Bata’ was used extensively with respect to footwear, the use of the mark ‘Batafoam’ with respect to mattresses would amount to passing off.

<sup>86</sup> V.K. AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS (2<sup>nd</sup> ed., Lexis Nexis 2013).

<sup>87</sup> *Supra note* 83 at 177.

intelligent or educated person. What is important is the impact on an average kind of a person which includes illiterate and marginally literate persons in the context of India. Such persons have imperfect recollection and they are not applying their full caution while buying. In other words, it can be said that a mark is considered to be ‘deceptively similar’ if it is so similar to the protected mark that a substantial number of average consumers are likely to be confused or misled about the source of the goods which are sold under the second mark and they may also believe that such products originate from the same owners who owns the protected mark.<sup>88</sup>

### **Purpose of § 9(2)(a): Protection of Public Interest**

Only a likelihood of confusion was required to be proved under Trademarks Act, 1958 and in 1999 Act, it is a requirement to prove that the nature of mark is such that it may lead to actual deception or confusion.<sup>89</sup> The absolute grounds are meant to secure public interest and thus, a trade mark shall be refused registration when there is a proof that the mark, due to its nature shall cause confusion or deception, on the ground of public policy.<sup>90</sup> “Rolls Royce” and the “Nike” swoosh were not

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<sup>88</sup> *Ibid.*

<sup>89</sup> *supra note* 83 at 169.

<sup>90</sup> *Id.* at 171.

famous when first introduced, but become famous over time. A famous mark is one that already has been tested by time, so that seeing or hearing it now evokes thoughts of a singular source in the minds of a large proportion of the relevant public.<sup>91</sup>

### **Confusion when Goods or Services are Same, Similar or Different**

§ 9(2)(a) does not specify the determination of confusing similarity with respect to the similarity or dissimilarity of goods or services. Generally, when the goods or services are same or similar, the likelihood of confusion is more. Thus, it can be inferred that the applicability of § 9(2) will be there against the intended trade mark registrations by the prior users of similar mark irrespective of the fact whether the goods or services involved are same, similar or different.<sup>92</sup>

In *Pioneer Bakeries (P) Ltd. v. Kraft Jacobs Suchard Ltd.*,<sup>93</sup> while rejecting opposition it was held that registration of trademark shall not be refused when there is no likelihood of confusion. The mark “MILKA” was sought to be registered for bread while the same mark was already registered for

chocolates. In case the goods are different still the registrar is mandated to refuse registration if there is a likelihood of confusion.<sup>94</sup> The trademark TOSIBA was found to be deceptively similar to the registered famous trademark “TOSHIBA” but the question was relating to the similarity or difference of goods in two applications. The mark was not allowed registration even though the applicant amended the application by dropping the goods in which TOSHIBA had interest.<sup>95</sup> The registration of trademark BANZO was allowed for diesel engines, electrical motors, centrifugal pumps and parts which was opposed by the owners of trademark BENZ, MERCEDES BENZ because BANZO was in use since 1988 and was not deceptively similar to opponent’s mark. Similarly, DU PONT was allowed for whiskey even though it was similar to that of DU PONT because the opponents failed to establish trans-

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<sup>91</sup> Jacob Jacoby, *Experimental Design and the Selection of Controls in Trademark and Deceptive Advertising Surveys*, 92 TMR 947 (2002).

<sup>92</sup> *Supra note* 83 at 171.

<sup>93</sup> 1998 PTC (18) 502.

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<sup>94</sup> *Supra note* 83 at 180.

<sup>95</sup> *Toshiba Appliances v. Kabushiki Kaisha Toshiba*, 2002 (24) PTC 654; *See also*, *Kalyanpuri Flour Mills Pvt. Ltd. v. Jagmohan Kumar*, 2004 (29) PTC 314 (IPAB), *APPU BRAND* for flour and dalls was refused for registration because *HATHI CHAAP* for the same goods existed and *ELEPHANT BRAND* could be substituted for *HATHI CHAAP* in Hindi. It was held that there will be confusion in the minds of public because the class of purchasers were rustic and uneducated maid servants or servants with every possibility of mis-identification of goods; *Chamanlal & Sons v. Bharat Industries*, 2004 PTC (28) 676 (IPAB), the registration of mark *SUN BRAND RICE* was refused because *SURAJ* existed for the same goods. *SSUN* in English is equivalent to *SURAJ* in Hindi. Thus, the registration was refused.

border reputation for the evidence to show the use of mark.<sup>96</sup>

### **DECEPTIVE SIMILARITY: A RELATIVE GROUND FOR REFUSAL OF REGISTRATION**

A trademark shall not be registered if there exists a likelihood of confusion on the part of the public because of its identity is linked to the earlier trademark and goods or services covered by the trademark are similar. Also, when a trademark is similar to an earlier trademark and the identity or similarity of goods or services is covered by the trademark, there is a likelihood of confusion on the part of the public including the likelihood of association with the earlier trademark.<sup>97</sup>

A trademark shall not be registered if the earlier trademark is well-known trademark in India and the mark which is sought to be registered is identical or similar to an earlier trademark and is to be registered which are not similar to the goods or services for which the earlier trademark is registered in the name of a different proprietor. The use of the later mark, in such case would take unfair advantage of the

distinctive character or reputation of the earlier trademark or is detrimental to that.<sup>98</sup>

The prior trademarks are vested with the exclusive right and they enjoy legal protection for the same, the later marks which are similar to those of the earlier trademarks<sup>99</sup> can be restrained by the courts under passing off action and cannot be registered in the name of different proprietors. The parameters of this prohibition of registration of similar later marks to earlier trademarks is known as Relative grounds.<sup>100</sup> Under § 11(1) the Registrar has to *suo moto* refuse registration while under § 11(2), the proprietors of earlier trademarks have to oppose registration of new marks.<sup>101</sup> Likelihood of confusion under this section includes likelihood of association with the mark.

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<sup>96</sup> E.I. Du Pont De Nemours & Co. of USA v. Gemini Distilleries Ltd., 2004 PTC (28) 663 (IPAB).

<sup>97</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 11(1).

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<sup>98</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 11(2).

<sup>99</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999, § 11(4) Explanation: For the purposes of this section, earlier trade mark means- (a) a registered trade mark or an application under § 18 bearing an earlier date of filing or an international registration referred to in § 36E or convention application referred to in § 154 which has a date of application earlier than that of the trade mark in question, taking account, where appropriate, of the priorities claimed in respect of the trade marks; (b) a trade mark which, on the date of the application for registration of the trade mark in question, or where appropriate, of the priority claimed in respect of the application, was entitled to protection as a well-known trade mark.

<sup>100</sup> *Supra note* 83 at 201.

<sup>101</sup> *Id.* at 202.

### **Scope of § 11(1): Similarity of Goods or Services**

According to this section, a trademark, which because of its identity or similarity with an earlier trademark and the similarity of goods or services or identity or similarity of goods or services, respectively, there is a likelihood of confusion on the part of the public, shall not be registered. In order to attract this provision, it is important that the trademark in question must be identical or similar to an earlier registered trademark and the goods or services must be similar which are covered by earlier trademark.

### **Use of Identical mark for Same or Similar Goods**

The law of trade marks take care of the identity of the goods with the proprietors of the trade mark and as per the law there can be only one proprietor in respect of a mark pertaining to the same goods or description of same goods.<sup>102</sup>

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<sup>102</sup> Pee Cee Soap & Chemicals Limited v. Registrar Of Trade Marks, 2005 (30) PTC 310 IPAB, the registration of DOCTOR for cosmetics and toilet preparations was already in use by the opponent in respect of soap, detergent, toilet preparations, cosmetics.; *See also*, Charak Pharmaceuticals v. Deepharma Limited, AIR 1999 Delhi 15, the registration of trademark ULCERAX which was opposed by the proprietor of trademark ALSAREX used on medicines for same diseases. It was held that all medicines whether they may be allopathic, ayurvedic or homeopathic are goods of the same description under the Act. Thus, the defendant by using the trade mark ULCEREX has prima facie infringed the plaintiff's registered trade mark ALSAREX; Smt. Raj Wadhwa, Proprietress v. Glaxo India Limited And Heinz, 2005 (31) PTC 201 IPAB, the registration of GOLDCON-D for

The provisions of the U.K. Trademarks Act, 1994 are useful to Indian Judiciary in this regard.<sup>103</sup> In *Societe Des Produits v. V.M. Confectionery Limited*,<sup>104</sup> the registration of mark ZERO was refused because a registered trademark AERO in respect of cocoa, chocolates, confectionery and chocolate biscuits already existed.

### **Dilution or Association of later Mark with earlier Mark**

Trademark dilution usually occurs either by way of blurring or tarnishing. In case of blurring there is an erosion or watering down of the “distinctiveness”, “uniqueness”, “effectiveness” and “prestigious connotations” of the trademark is apprehended. Tarnishment happens when a third party uses the mark to besmirch or debase the mark holder.<sup>105</sup> The

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infant foods was refused because it was similar in sound to that of GLUCON-D which is very famous and reputed trade mark in respect of glucose, flour biscuits; Bhagwant Lal Chaman Lal v. Shulton Inc., 2005 (30) PTC 88 IPAB, the registration of OLDSPICE in respect of safety razors was refused as OLD SPICE for after shave already existed which has acquired worldwide reputation.; The British India Corpn. Ltd. v. Kharaiti Ram, AIR 2000 Delhi 289, DWM-DHARIWAL was opposed by the petitioners because they were well established manufacturers of shawls, blankets and they had been selling their goods from 1920 under the trade name DHARIWAL. Registration was refused.

<sup>103</sup> *Supra* note 83 at 213.

<sup>104</sup> 2004 (29) PTC 508 IPAB, The illiterate class of people may not be able to make that much of subtle distinction and select the goods. Hence, definitely there will be a confusion and deception in the minds of the consumer as well as traders. Definitely the impugned trade mark of the respondent attracts § 11(a) as well as 12(1) of the Act.

<sup>105</sup> T.G. Agitha, *Trademark Dilution: Indian Approach*, 50 (3) JILI 342 (2008).

supporters of Dilution theory believe that a person who has used his intellectual, physical or financial powers to create a commercial product should be afforded judicial relief from a competitor who seeks to “reap where he has not sown”.<sup>106</sup>

In *Caterpillar Inc. v. Mehtab Ahmed*,<sup>107</sup> the Court not only found that there was dilution in respect of identical goods, but also that such dilution was bound to confuse potential consumers. It was observed that, “Since the goods are identical it has immense affect of diluting the identification value of plaintiff’s mark. Such dilution supplements the confusion as to source, affiliation or connection. Unauthorised use of the mark on the goods in question which are competing goods itself results in dilution. Potential purchasers are

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<sup>106</sup> *Id.* at 345.

<sup>107</sup> [2002] (25) PTC 438 (Del.), CATERPILLAR, the famous trademark of Caterpillar Inc., USA was adopted by a local proprietor as CAT in Delhi for footwear; *See also*, Jolen Inc. v. Doctor & Company, 98 (2002) DLT 76, Mere advertisement in other countries is sufficient if the trademark has established its reputation and goodwill in the country of its origin and countries where it is registered; N.R. Dongre v. Whirlpool Corporation, 1996 PTC (16); I.K. Sons v. Prakash Brassware Industries, 2004 (29) PTC 493 (IPAB), the registration of PARKO for identical electrical goods was refused; Habitat UK Limited (Formerly) v. Habitat India Pvt. Ltd., 2003 (27) PTC 11 (Bom), registration of HABITAT was refused for similar goods; Green Valley Biscuits Pvt. Ltd. v. Hasmukhrai & Co., 2005 (31) PTC 521 (Reg.), the registration of word SOCIETY with the words FOURACES was rejected the trademark SOCIETY already existed in respect of cognate allied goods.

bound to be confused as to source, sponsorship, connection or license.”

In *ITC Limited v. Philip Morris Products Sa*,<sup>108</sup> while refusing the registration for the Philips Co., it was held that ITC’s major contention had been the similarity between the W-Namaste mark of the Welcomgroup and the “M” on the Marlboro pack which was alleged to appear deceptively like a “W”. The court observed that a “global” look, rather than a focus only on the common elements of the mark, is to be taken, while considering if the impugned or junior mark infringes, by dilution, an existing registered mark.

When there is dilution by way of impairing the distinctive quality of trademark which is registered earlier, it is known as dilution by tarnishment.<sup>109</sup> In *Tata Sons Limited v. Gina Kilindo*,<sup>110</sup> the applicants were

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<sup>108</sup> 2010 (42) PTC 572 (Del.); *See also*, Sumathi Chandrasekharan, *ITC loses TM dilution case against Philip Morris*, (Feb. 5, 2017, 2:00 PM), <https://spicyip.com/2010/01/itc-loses-tm-dilution-case-against.html>; Taw Manufacturing Coy. Ltd. v. Notek Engineering Co. Ltd., 68 RPC 271, the plaintiff has to establish is not actual infringement but the likelihood of confusion based on the substantial similarity or identity of the marks; P.C. Mallappa v. McDonalds Corporation, 1999 PTC 9; Daimler Benz Aktiegesellschaft v. Hybo Hindustan, 1994 PTC 287; Aktiebolaget Volvo v. A.K. Bhuva, 2006 (32) PTC 682; William Grant & Sons Limited v. McDowell & Co. Ltd., 55(1994) DLT 80.

<sup>109</sup> *Supra* note 83 at 210.

<sup>110</sup> CS(OS) No.46 of 2014, decided on 6 Jan. 2014; Mother Dairy Fruit & Vegetable v. S.K. Raheem, decided on 24 Dec 2016, the use of mark "VINAY MILK" and label/logo and packaging/trade dress which bears a striking similarity to the trade mark/logo and trade

restrained from engaging in any act whatsoever that will result in the dilution and tarnishment of the well-known trademark TATA and the "T within a circle" device mark of the plaintiff.

### **Unfair Advantage**

It contemplates the benefit accruing to the applicant through the use of mark which he has applied for. When public is confused into thinking that there is a commercial connection between the suppliers of goods or services supplied under the earlier trademark and the mark which is subject of the application, then there is an anticipation of prohibition.<sup>111</sup> The stronger is the character and distinctive reputation of earlier mark it would be easy to accept the unfair advantage that has been taken or detriment has been caused.<sup>112</sup>

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dress/packaging of the plaintiff's products amounted to tarnishment and dilution of the reputation and goodwill of registered mark MOTHER DAIRY which was adopted in 1974; Yahoo! Inc v. Sanjay Patel, decided on 1 Sep. 2016, the plaintiff claimed protection from infringement of its trademark YAHOO by defendant's YAHOO MASALA CHAKRA and YAHOO TOMATO TANGY. It was held that the continuous infringement by the Defendants 1 and 2 of the Plaintiff's well known trademark has the potential of diluting the trademark Yahoo and tarnishing the reputation attached to the said trademark. It is bound to cause confusion amongst the public, causing them to believe that AFPL is associated with the Plaintiff, which is not.

<sup>111</sup> *Supra note* 65 at 264.

<sup>112</sup> *Id.* at 265.

### **Scope of § 11(2): Similarity with earlier mark and Registration for Dissimilar goods and services**

A trade mark which is identical with or similar to an earlier trade mark and is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor shall not be registered if or to the extent the earlier trade mark is a well-known trade mark in India and the use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.<sup>113</sup>

Well known trademarks enjoy rights not in relation to same or similar goods or services for which it is registered but it should not have been used by any other person on goods or services different from such goods or services. § 11(2) enables refusal of registration of a later trade mark which is sought to be registered for different goods or services, if later mark is identical or similar to earlier trademark.<sup>114</sup>

§ 11(2) came in effect on 15 September 2003 and has emerged out of the international practice of protecting the well-known marks and gives effect to article 16.3 of TRIPS which

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<sup>113</sup> The Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India), § 11(2).

<sup>114</sup> *Supra note* 83 at 217.

came into effect for developing countries from January 2000. This provision is in line with the WTO-TRIPS Agreement.<sup>115</sup>

The provision under § 11(2) brings a notable change in the statute law, as it brings into light the general trend of judicial decisions in India in the matter of protection of well-known trademarks used for dissimilar goods.<sup>116</sup> The test provided under this section is different from confusion as under this section it is required to show that the use of latter mark is without due cause and it would take unfair advantage or would be detrimental to the distinctive character or reputation of earlier trademark.<sup>117</sup>

### **Unfair Competition**

When a person uses another person's well known trademark, he tries to take advantage of the goodwill that well known trademark enjoys and such an act constitutes an unfair competition.<sup>118</sup> Since traditional trademark law is designed to protect trademarks

for the purpose of preventing confusion, many countries provide for protection of well-known trademarks under the doctrine of dilution in unfair competition prevention law. This is because that where a person uses another person's well-known trademark or trademark similar thereto for the purpose of diluting the trademark, such use does not cause confusion among consumers but takes advantage of the goodwill of the well-known trademark, it constitutes an act of unfair competition.<sup>119</sup>

### **CONCLUSION**

It is clear that the primary function of the trademark is to indicate the source or origin of goods or services. But this function is guided by two principles. Firstly, the mark should meet all the necessary conditions as laid down under the Trademarks Act, 1999 i.e., it should be distinctive. Secondly, it should not be of such nature as to deceive or confuse the public

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<sup>115</sup> *Id.* at 219.

<sup>116</sup> K.C. KAILASAM, LAW OF TRADE MARKS 237 (3<sup>rd</sup> ed., Lexis Nexis 2013).

<sup>117</sup> *Id.* at 238.

<sup>118</sup> *Tata Sons Ltd. v. Manoj Dodia*, decided on 28 Mar. 2011, a registered trade mark is also infringed by any advertising of that trade mark if such advertising takes unfair advantage of and is contrary to honest practices in industrial or commercial matters. Also if it is detrimental to the distinctive character of the registered trade mark. Also if it against the reputation of the registered trade mark.

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<sup>119</sup> *Tata Sons Ltd. v. A.K. Chaudhary*, decided on 6 Apr. 2009; *See also*, *M/S Sohan Lal Nem Chand Jain v. Triden Group*, decided on 3 Oct. 2011, a registered trade mark is infringed by any advertising of that trade mark if such advertising takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or is detrimental to its distinctive character; or is against the reputation of the trade mark; *Sun Pharmaceutical Industries v. Anglo French Drugs & Industries*, decided on 12 Sep. 2014, in a passing-off action, the plaintiff's right is: "against the conduct of the defendant which leads to or is intended or calculated to lead to deception. Passing-off is said to be a species of unfair trade competition or of actionable unfair trading by which one person, through deception, attempts to obtain an economic benefit of the reputation which another has established for himself in a particular trade or business. The action is regarded as an action for deceit."

regarding the source or origin of goods or services. These two conditions must be fulfilled before deciding whether a mark fulfils the criteria of granting protection or not.

Deceptive Similarity as a ground for refusal of trademark registration is the most important feature of the Act, along with other supplementary provisions covered under the purview of Deceptive Similarity. As already discussed, proof of intention to show Deceptive Similarity is irrelevant. What amounts to Deceptive Similarity is a question of fact and depends upon facts and circumstances of each case. Indian Judiciary as played a very important role in determining whether a particular mark will deceive the public or not. In this paper, the Judicial Endeavour (India as well Foreign) has been discussed very thoroughly to determine the features of Deceptive Similarity and the relevant criteria to determine what amounts to Deceptive Similarity in a particular case.

In order to establish infringement with regard to a registered trademark, it is necessary to establish that the infringing mark is identical or deceptively similar to the registered mark and no further proof is required. In the case of a passing off action, proving that the marks are identical or deceptively similar alone is not sufficient. The use of the mark should be likely to deceive or cause confusion. Further, in a

passing off action it is necessary to prove that the use of the trademark by the defendant is likely to cause injury or damage to the plaintiff's goodwill, whereas, in an infringement suit, the use of the mark by the defendant need not cause any injury to the plaintiff.<sup>120</sup>

Thus, it can be concluded that a proprietor cannot use the trademark which is of another proprietor, he cannot adopt/use a mark which causes or is likely to cause confusion or deception in the minds of public, he cannot use a trademark of a Company which is a well-known trademark, and also, he cannot through the use of mark indicate that particular goods originated from him which is actually originating from another person having well-established reputation and goodwill.

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<sup>120</sup>Binita Shahi, *Trademark Protection in India*, LEGAL SERVICES INDIA, (Feb. 10, 2017, 2:00 PM), <http://www.legalserviceindia.com/article/165-Trademark-Protection-in-India.html>.

# A CONCEPTUAL AND LEGAL ANALYSIS ON HOW FILM CENSORSHIP HAMPER THE FREEDOM OF ARTISTIC EXPRESSION

*Chandana Arval*<sup>\*</sup>

## **FREEDOM OF ARTISTIC EXPRESSION**

Freedom of artistic expression is the principle that an artist should be unrestrained by law or convention in the making of his or her art. All persons enjoy the right to freedom of artistic expression and creativity, which includes the right to freely experience and contribute to artistic expressions and creations, through individual or joint practice, to have access to and enjoy the arts, and to disseminate their expressions and creations.

Artistic freedom is vital to both the cultural and political health of our society. It is essential in a democracy that values and protects the rights of the individual to espouse his or her beliefs, which is why many international human rights instruments recognize and seek to protect the right to artistic freedom of expression, for instance, artistic expression and creativity, are protected under articles 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and 19 of the International

Covenant on Civil and Political Rights (ICCPR).

## **THE CONUNDRUM CALLED 'CENSORSHIP'**

Censorship, is the anti-thesis to the freedom of speech, expression and information<sup>1</sup>. It is in fact the suppression of speech or any information that may be considered harmful, objectionable, sensitive, politically incorrect or inconvenient as determined by governments, media outlets or other figures of authority in a state. That said, it is extremely difficult to attribute one definition to censorship. The qualities of censorship are not reducible to a circumscribed and predefined set of institutions and institutional activities, but is produced within an array of constantly shifting discourses,

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<sup>1</sup> Sarkar S, *Right to Free Speech in a Censored Democracy*, (2009) 7 UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL 62, (April 28, 2016), <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/07/right.pdf>.

practices and apparatuses. It cannot, therefore, be regarded as either fixed or monolithic. It is a continuous process. This makes it difficult to have a rigid definition for censorship. Many writers argue that censorship cannot be looked at from a single lens and hence needs to have an inclusive definition that responds to the diverse experiences of censorship, and which reflects the socio-historical specificity of instances of control, conditioning or silencing.<sup>2</sup>

Primarily (but not necessarily) censorship may either be legal or extra legal. Legal censorship is imposed through means strictly authorized by law. It comprises both pre-censorship (pre-dissemination restraints) and subsequent censorship (post-dissemination sanctions), while extra-legal censorship refers to the suppression of information through means not strictly authorized by law<sup>3</sup>.

Some of the driving rationales behind the concept of censorship around the world are the interests of national security, religious peace keeping, to control obscenity and hate speech. National security, obscenity and hate speech are definitional grey areas, as they are extremely

all-encompassing and hence ambiguous, which makes it problematic to comprehend these terms in the context of censorship because, anything and everything that is even mildly offensive or threatening can and has been subject to censorship which makes it essential to address the concept of censorship in the context of freedom of speech and expression in order to see if it is possible to determine the limits of censorship.

## **FILM CENSORSHIP- THE INDIAN PERSPECTIVE**

The constitution of India, by virtue of Article 19 guarantees its citizens the fundamental right to freedom of speech and expression, such freedom however is not unrestricted and comes with reasonable restrictions. Freedom of speech and expression is the concept of being able to express oneself freely whether through words of mouth, literature, art, or any other medium of communication. It is often regarded as an integral concept in modern liberal democracies. Despite the fact that the Constitution of India does not expressly mention motion pictures as a medium of speech and expression they have been so accepted through the decision of the Supreme Court in the case of *Rangarajan v. P.*

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<sup>2</sup> Freshwater H, *Towards a Redefinition of Censorship*, in Müller Beate (ed), *Censorship & Cultural Regulation in the Modern Age* (Rodopi 2004).

<sup>3</sup> Banerjee A, *Political Censorship and Indian Cinematographic Laws: A Functionalist Liberal Analysis*, (2010) 2 DREXEL LAW REVIEW 557, (April 26, 2016), <http://ssrn.com/abstract=1672409>.

*Jagjivan Ram*<sup>4</sup>, wherein it was held that “Movie doubtless enjoys the guaranty under Article 19(1)(a). Movie motivates thought and action and assures a high degree of attention and retention. It makes its impact simultaneously arousing the visual and aural senses. The combination of act and speech, sight and sound in semi-darkness of the theatre with elimination of all distracting ideas will have an impact in the minds of spectators. In some cases, it will have a complete and immediate influence on, and appeal for every one who sees it. It can, therefore, be said that the movie has unique capacity to disturb and arouse feelings. It has as much potential for evil as it has for good. It has an equal potential to instil or cultivate violent or good behaviour. With these qualities and since it caters for mass audience who are generally not selective about what they watch, the movie cannot be equated with other modes of communication. It cannot be allowed to function in a free market, place just as does the newspapers or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary”

It is this part of the judgment, that has been conveniently severed from the rest of the judgment to act as the ‘justification of film

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<sup>4</sup> 1989 SCR (2) 204.

certification’ by the Central Board of Film Certification<sup>5</sup>.

One of the most common basis for imposing censorship on films, in India is the paternalistic idea that the Indian audience is immature<sup>6</sup>. This presumption was refuted by the Delhi High Court wherein it held that a film is a work of fantasy and watching a feature film is the conscious choice of the spectator and person offended by the content or the theme of the film is free to avoid watching the film<sup>7</sup>.

The UN ‘Report of the Special Rapporteur in the field of Cultural Rights’ recognized the concerns with censorship or unjustified restrictions of the right to freedom of artistic expression and creativity to be devastating. The report stated that censorship generates important cultural, social and economic losses, deprives artists of their means of expression and livelihood, creates an unsafe environment for all those engaged in the arts and their audiences, sterilize debates on human, social and political issues, hamper the functioning of democracy and most often also impede debates on the legitimacy of censorship.

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<sup>5</sup> (April 27, 2016), [http://cbfcindia.gov.in/html/uniquepage.aspx?unique\\_page\\_id=6](http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=6)

<sup>6</sup> Sidharth Bhatia, *Censorship in India is Based on the Paternalistic Idea that Citizens are not Mature*, THE WIRE (April 28, 2016), <http://thewire.in/2016/01/02/censorship-in-india-is-based-on-the-paternalistic-idea-that-citizens-are-not-mature-18461/>.

<sup>7</sup> W.P (C) No. 112/2015.

The fear censorship generates in artists and art institutions often leads to self-censorship, which stifles art expression and impoverishes the public sphere. Artistic creativity demands an environment free from fear and insecurity<sup>8</sup>.

Censorship in India, is not imposed and exercised only and exclusively by the Central Board of Film Certification, there have been instances of the government imposing a ban on a number of films on the ground that such films pose a potential danger to communal harmony and religion thereby potentially affecting peace and harmony of a state. Such bans are imposed by issuing government advisories or notifications<sup>9</sup>. In fact, the court has held in the case of *Rangarajan v. P. Jagjivan Ram*<sup>10</sup> that freedom of expression cannot be suppressed merely on account of threat of demonstration and processions or threats of violence. Such an act would tantamount to the negation of the rule of law and a surrender to black mail and intimidation. It is the duty of the state to protect

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<sup>8</sup> Fareeda Shaheed, *Report of the Special Rapporteur in the Field of Cultural Rights*, UNITED NATIONS GENERAL ASSEMBLY (A/HRC/23/34, March 14, 2013), (April 27, 2016), [http://www.cdc-cdd.org/IMG/pdf/The\\_right\\_to\\_freedom\\_of\\_artistic\\_expression\\_and\\_creativity.pdf](http://www.cdc-cdd.org/IMG/pdf/The_right_to_freedom_of_artistic_expression_and_creativity.pdf).

<sup>9</sup> Press Trust of India, *Ram Rahim Singh's 'Messenger of God' screening banned in Punjab, § 144 Imposed in Sirsa after Protest*, INDIAN EXPRESS, (April 28, 2016), <http://indianexpress.com/article/india/india-others/messenger-of-god-controversy-tension-in-pockets-of-sirsa-section-144-imposed-at-places/>.

<sup>10</sup> 1989 SCR (2) 204.

the freedom of expression since it is a liberty guaranteed against the State. The State cannot plead its inability to handle the hostile audience problem. It is its obligatory duty to prevent it and protect the freedom of expression. In the case of *Ajay Gautam v. Union of India*<sup>11</sup>, a case that concerned the movie 'PK' and its portrayal of god men as being demeaning to Hindus, thereby being violative of Articles 19(2) and 25 of the Constitution of India, the court held that free speech cannot be suppressed on the ground either that its audience will form harmful beliefs or may commit harmful acts as a result of such beliefs, unless the commission of harmful acts is a real close and imminent consequence of the speech in question. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression.

This paper, specifically deals with censorship that has been imposed and exercised by the The Central Board of Film Certification and how the cuts/excisions/additions ordered by the board have been, a lot of times unreasonable, unwarranted and an infringement of the right of expression thus hampering the creative process and artistic freedom.

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<sup>11</sup> Delhi High Court, W.P.(C) No.112/2015.

## THE CENTRAL BOARD OF FILM CERTIFICATION (CBFC)

The Central Board of Film Certification is a statutory body that regulates the public exhibition of films in India. It was constituted by the Ministry of Information and Broadcasting in accordance with § 3(1) of the Indian Cinematographer Act of 1952. Films in India can be exhibited publicly only upon the certification of the CBFC. The CBFC is divided into a two-tier jury system for the purpose of certification of films, these two tiers include- The Examining Committee and the Review Committee. It also includes an appellate tribunal known as the Film Certification Appellate Tribunal.

§ 5A<sup>12</sup> of the Act, provides for the various categories of certification of films, namely:

**U-** Films suitable for unrestricted public exhibition,

**UA-** Films which contain portions considered unsuitable for children below the age of twelve, but otherwise suitable for unrestricted public exhibition.

**A-**Films considered suitable for exhibition restricted to adults only

**S-** Films restricted for exhibition to members of any profession or class of persons.

This body certifies films in accordance with § 5(B) of the Cinematograph Act<sup>13</sup>, which states that “A *film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the sovereignty and integrity of India] the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence*”. It is important to note that the Cinematograph Act, 1952 only provides regulation of films by certification or non-certification and nowhere does it have an explicit mention of the power of the Censor Board censorship of films. The CBFC derives the power to censor films from Rule 26 of The Cinematograph Rules of 1983, which provides that the regional officer can issue a certificate upon the satisfaction of the condition that a specified portion/portions be removed from the film and that the portion/portions objected to have been excised from the negative of the film and from all copies thereof<sup>14</sup>. The Act also empowers the Central Government to issue

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<sup>12</sup> The Cinematograph Act, 1952, § 5A.

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<sup>13</sup> The Cinematograph Act, 1952, § 5B.

<sup>14</sup> Cinematograph Rules, 1983, Rule 26.

directions setting out the principles will need shall guide the CBFC.<sup>1516</sup>

The Supreme Court has held that the requirement under the Cinematograph Act of 1952, relating to certification, by the censor board where the film is intended for public exhibition by applying the principles set out in § 5B is a reasonable restriction on the exercise of the said right of speech and expression contemplated under Article 19(2) and therefore, constitutional<sup>17</sup>

## **THE CENTRAL BOARD OF FILM CERTIFICATION AND ITS CENSORSHIP REGIME**

The varied courts of our country, have time and again tried to set limits to the powers of the CBFC and recognized the CBFC's constant imposition of censorship, in the form of cuts/deletions/additions as a hindrance to artistic freedom and the creative film making process

The case of *Bobby Art International v. Om Pal Singh Hoon*<sup>18</sup> is important for this purpose. The question that came up for consideration was with regards to an objection

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<sup>15</sup> The Cinematograph Act, 1952, § 5B.

<sup>16</sup> (April 28, 2016), [http://cbfcindia.gov.in/html/uniquepage.aspx?unique\\_page\\_id=1](http://cbfcindia.gov.in/html/uniquepage.aspx?unique_page_id=1).

<sup>17</sup> AIR 2007 SC 1640.

<sup>18</sup> (1996) 4 SCC 1.

on the basis of decency and morality regarding certain graphical scenes involving rape and abusive language in the movie *Bandit Queen* which was based on the life of the erstwhile dacoit Phoolan Devi. The court, asserted the importance of the guidelines issued by the Central Government to the CBFC to certify films holding that authorities concerned with film certification to be responsive to the values and standards of society and take note of social changes. They are required to ensure that *'artistic expression and creative freedom are not unduly curbed'*. The court also cited the then Chief Justice Hidayatullah's opinion in the *K.A. Abbas v. Union of India*<sup>19</sup> case to demarcate the censor's duties so as to not hamper with artistic freedom, the court opined that *"the task of the censor is extremely delicate and his duties cannot be subject of an exhaustive set of commands established by prior ratiocination but direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial*

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<sup>19</sup> (1970) 2 SCC 780.

*allowance in favour of freedom thus leaving a vast area for creative art to interpret.”*

In the case of *Anand Chintamani Dighe v. State of Maharashtra*<sup>20</sup>, the court recognized the importance of artistic freedom in a democratic society and held that the law does not have to accept the views which have been expressed by the petitioner in the play in order to respect, the rights of the petitioner as a playwright to express those views. Respect for and the tolerance of a diversity of viewpoints is what ultimately sustains a democratic society and Government. The right of the playwright, of the artist, writer and of the poet will be reduced to husk if the freedom to portray a message whether it be in canvas, prose or verse is to depend upon the popular perception of the acceptability of that message. Popular perceptions, however strong cannot override values which the constitution embodies as guarantees of freedom in what was always intended to be a free society.

In another case, *Anand Patwardhan v. Central Board of Film Certification*<sup>21</sup>, a writ petition was filed to challenge the order by the FCAT that directed two cuts and one addition in the petitioner’s documentary film titled “*War and Peace*”(Jang Aur Aman) that dealt with the

journey of peace activism the face of global militarism and war on the grounds that the scenes would affect public order and hurt the sentiments of various religious communities. The Bombay High Court, later on found that this did not affect public order in any way and the cuts were recommended merely to harass the petitioner and left it to the discretion of the petitioner as to whether he wanted to add any scenes or not. It was held that the cuts ordered by the FCAT affect the freedom of speech and expression of the petitioner under Article 19(1)(a) of the Constitution. The court in this case also recognized artistic freedom as extremely integral to the entire creative process and held that the film makes a powerful plea for peace and shows the damaging effects of war and nuclear weapons. Aside from various visuals and interviews, it makes an artistic use of songs, dances and music which have their own impact and any forced addition violates the artistic freedom of the film maker to film and edit his material and to decide what goes well with the film as a whole and what conveys the message most truthfully and effectively".

### **LACUNA IN THE LAW**

The Cinematograph Act provides that a certificate granted by the Board shall be valid

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<sup>20</sup> Bombay High Court, 2002 (1) BomCR 57.

<sup>21</sup> (2003) 5 BomCR 58.

throughout India for a period of ten years<sup>22</sup>. This provision exposes a few major lacunas in the law. Firstly, it doesn't provide for any system or scheme of what happens on the expiry of the certificate nor for the renewal of such a certificate. Does this then imply that, a filmmaker whose film was subject to the scissors of the censor board can now publicly exhibit the film retaining the cuts that were originally ordered by the censor board? Even though such footage is surrendered to the censor board, it is very likely that the film-maker will still have possession of such footage. Such a lacuna, then means that filmmakers and artists, can make more profits out of already existing films, by bringing out uncensored/uncut version of their film, years later, thereby unearthing their suppressed artistic freedom of expression. Secondly, it remains unclear as to whether feature films, documentaries and short films being released on internet video streaming sites require certification by the CBFC?

This existing information gap is primarily beneficial for small time filmmakers and documentary film-makers, who often bear the brunt of censorship by the CBFC<sup>23</sup>. This gap can enable such filmmakers to put up their

content online for unrestricted public viewing without any cuts/restrictions or direct intervention by the CBFC.

Also, the Act, at many places provides for certification only restricted to public exhibition of films in India. What remains unanswered is what happens Indian films that release over-seas, considering the huge market for such films? Does this permit a film-maker or artist to release his/her film over-seas without any cuts ordered by the CBFC, considering certification is restricted only to India.

Such gaps in the law, in fact, are beneficial for film-makers as it helps circumvent the CBFC requirements and enables them to exercise their freedom of artistic expression.

## CONCLUSION

A committee headed by filmmaker Shyam Benegal recently submitted a report to the government suggesting certain amendments to the Cinematograph Act, 1952. The committee, was constituted to lay down a holistic framework for certification of films and lay down guidelines to ensure that artistic expression and creative freedom are not unduly curbed in the process of classification of films<sup>24</sup>. The committee in its report suggested that the CBFC should only be a film certification body

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<sup>22</sup> The Cinematograph Act, 1952, § 5A (3).

<sup>23</sup> Pankaj Butalia, *Two Laws on Censorship*, INDIAN EXPRESS, (October 24, 2015), <http://indianexpress.com/article/opinion/columns/two-laws-on-censorship/>.

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<sup>24</sup> (28 April, 2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=142288>.

and its scope must be restricted only to the issuance of certificates on the basis of age and maturity. The committee also suggested a sub-division of categories for certification under the UA category as UA12+ and UA15+ and also under the Adult category as A and AC (Adult with Caution)<sup>25</sup>. Additionally, I suggest that the categories of certifications be expanded not only on a suitable for age basis but also on a content basis, for example, films that deal extensively with religious issues and have the potential of affecting communal harmony, can be certified as ‘R’ (excessive religious content) or films that lampoon political structures or parties in the country can come with a ‘P’ certification (excessive political content). Such a system would allow for the public exhibition of every kind of film and also help the audience or viewer make a rationale decision as to whether they wish to watch a film or not based on the content of the film. Such a rating system would make for an all-accommodating certification framework.

Secondly, the CBFC must act autonomously or even privately without the control or supervision of the government and lay down broader guidelines with regards to

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<sup>25</sup> A Breakdown of Everything We Know About the Shayam Bengal Committee’s Report to Reform the Censor Board, HUFFINGTON POST, (April 28, 2016), [http://www.huffingtonpost.in/2016/04/27/shyam-bengal-committee-r\\_n\\_9783646.html](http://www.huffingtonpost.in/2016/04/27/shyam-bengal-committee-r_n_9783646.html).

film content. In fact, the board must consist of people from the film industry, who could set certain common-sense based guidelines and steer clear from either regulation or censorship. A good place to derive such guidelines would be the YouTube community guidelines, that provide safeguards yet allow for the dissemination of any and all kinds of content, for instance, YouTube’s community guidelines provide that sexually explicit content like pornography and violent, graphic, or humiliating fetishes are not allowed to be shown on the website but this is not a blanket restriction, in fact, a video that contains nudity or other sexual content may be allowed if the primary purpose is educational, documentary, scientific, or artistic, and it isn’t gratuitously graphic and such videos, depending on their severity, can be age-restricted<sup>26</sup>. Such guidelines are not a direct curb of artistic freedom, one is free to show what they want and how they want it subject to it is not illegal, they do not have to cut out content, simply because it hurts certain religious sentiments, the important thing with such a guidelines structure is that content is out there, freely accessible and the choice to access such content must clearly lie with the viewer.

As film censorship hampers artistic freedom and interferes with the creative process

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<sup>26</sup> (April 27,2016), <https://support.google.com/youtube/answer/2802002>.

of film making, there must exist structures and systems that only provide for film regulation and certification and not censorship and such systems and structures must, while regulating content of films, also hold the ideals of freedom of artistic expression to its highest standard.

# POTENTIAL ROLE OF INVESTOR VOTING RIGHTS IN CORPORATE CONTROL

*Tushar Kumar*\*

## INTRODUCTION

The Securities and Exchange Board of India, acting as the gateway to the Indian Financial System, has devised a set of Substantial Acquisition of Shares and Takeover Regulations (SAST) which are triggered as soon as there is substantial acquisition of shares or voting power in a target company (company wherein acquisition is made) with a view to acquire control over it. The primary aim of these regulations is to make sure that the investor makes a public announcement of an open offer so as to provide an exit option to the existing shareholders in the target company. The need for the public announcement of an open offer becomes mandatory in two conditions – one when the trigger level is touched upon and the other when “control” has been transferred to the investor company. The trigger level limits have been explicitly mentioned in the regulations but what comes within the ambit of “control” still remains a controversy. Although the definition of control has been provided under SAST

Regulations<sup>1</sup>, but the lines of its interpretation cannot be fixed and hence the ambiguity prevails. The term “control” has been defined under SAST Regulations, 2011 as: “*The right to appoint majority of the directors or to control the management or policy decisions*”. Deciphering this definition, there comes out two major components of it – **right to appoint majority of directors** and **control the management or policy decisions**. Gower<sup>2</sup> also clarified the situation regarding the de facto control being in the hands of minority shareholders. The modern day fashion of dispersed and minority shareholding was emphasised as he went on to say that de facto control can be exercised without legal power at all. Even a small percentage of shareholding can control the enterprise or the Board by virtue of other voting rights or privileges that are granted to them.

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<sup>1</sup> S.A.S.T. Regulations, 2011 Regulation, 2(1)(e).

<sup>2</sup> GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 197-198 (3d edn.).

Although the brackets of the first component can still be defined, but defining the contours of “management or policy decisions” is a strenuous task.

### **Right to Appoint Majority of Directors**

“Director”<sup>3</sup> is a person that is appointed to the Board of Directors of a company, which is a type of nucleus selected according to the procedure prescribed in the Act and the Article of Associations, out of the entire mass of its shareholders and even non shareholders, if the Articles permit.<sup>4</sup> They shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.<sup>5</sup> Under Clause 49 of the Listing Agreement, issued by Bombay Stock Exchange, when the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent director.<sup>6</sup> Thus, there would a large number of listed companies in which at least half of the board members are independent and thereby, right to appoint majority of directors would not be applicable to such cases. An entity having the right to appoint majority of non-

independent directors, which in the case of takeovers will be nominee directors,<sup>7</sup> may be considered to be in control of the company.<sup>8</sup>

There are many circumstances where the investor doesn't have a right to appoint the majority but possesses some quorum<sup>9</sup> rights, according to which the meetings of the board could not be convened unless some minimum number of directors are present. So if the presence of nominee director is mandated in every meeting of the board, then such a provision should be a fillip of control in favour of the investor. In case of *Jet - Etihad*<sup>10</sup>, SEBI ruled that there was no presence of control in favour of Etihad (Acquirer) as there were no quorum rights regarding meetings of the board.

The right to appoint majority of directors straightaway mandates control in favour of investor. The existence of quorum rights should be an impetus towards considering control in favour of investor. The transfer of control should not be solely considered on this criterion as the mere quorum rights would not be sufficient in determining control but if they are supported by other protective provisions (veto,

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<sup>3</sup> Companies Act, 2013, §2(34).

<sup>4</sup> J.C. VERMA, *Corporate Mergers, Amalgamations & Takeovers* (5th edn., Bharat Law House 2008).

<sup>5</sup> Companies Act, 2013, §179.

<sup>6</sup> Companies Act, 2013, § 2 (47) read with § 149 (5).

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<sup>7</sup> Companies Act, 2013, §161.

<sup>8</sup> Discussion Paper on “*Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations*”, SEBI, [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1457945258522.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf).

<sup>9</sup> Companies Act, 2013, §174.

<sup>10</sup> Tailwinds Ltd., Re, 2014 SCC OnLine SEBI 283.

affirmative vote etc.), they would have a stronghold in ascertaining transfer of control.

### ***Control Management or Policy Decisions***

The *Achuthan Committee*<sup>11</sup> noted that in 2010, 8.4 per cent of the listed companies were declared to be controlled by promoters holding less than 15 per cent. This specific argument was advanced before the SEBI under the 1997 Regulations in *Ashwin Doshi v. SEBI*<sup>12</sup>, where the acquirer had only obtained 14.7 per cent of the shares of the erstwhile promoter. The contestability of the issue is regarding whether the holding of the potential voting rights are actually meant for protection of minority shareholder's interest or latently transfer control in due course, in favour of investor. Since the domain of what comes under control has not been specified in the regulations, hence it is to be interpreted rationally, on the basis of regulations and judicial precedents.

## **NEGATIVE RIGHTS AND THE NATURE OF POLICY DECISIONS**

Negative rights, governing the core part of the investor's acquisition agreement, connote those rights which are reactionary in nature and

have a primary aim to block an action. Their powers are limited to act on the action but not to initiate any action voluntarily. A nexus can be drawn to the existence of such rights in the corporate world. They majorly comprise of two rights – veto and affirmative vote. They are generally listed under the head “protective provisions” in the agreement.

Firstly, it is necessary to understand the power given under “veto” and “affirmative vote” in the Shareholders and Subscription Agreement. “Veto” is a latin term which means *I forbid / to reject*.<sup>13</sup> It is a power in the hands of the holder to unilaterally stop an action from taking place, despite the majority agreeing to do so. The ultimate authority also depends on the type of veto that is being exercised, which varies from case to case. Articles of Association<sup>14</sup> are one of the fundamental documents of the company. As per S. 5(1) of Companies Act, 2013, the articles of a company shall contain the regulations for management of the company. Hence the authority of veto should be in consonance with the articles of the company.

The corporate “veto” is generally of 3 types – Absolute, qualified and Suspensive.<sup>15</sup>

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<sup>11</sup> *Report of the Takeover Regulations Advisory Committee under the Chairmanship of Mr C. Achuthan, SEBI, (July 19, 2010),* [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1287826537018.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1287826537018.pdf).

<sup>12</sup> *Ashwin Doshi v. SEBI, (2002) 40 SCL 545.*

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<sup>13</sup> NEW WEBSTER'S DICTIONARY (1828), <http://www.merriam-webster.com/dictionary/veto>.

<sup>14</sup> Companies Act, 2013, §5.

<sup>15</sup> BLACK LAW DICTIONARY (2nd ed., 1910).

Absolute veto has the real last say in determining decisions, and hence if exercised, the decision or the action would be straightaway rejected, leaving no scope for review. Qualified veto is one which if exercised, doesn't outrightly forbid the decision to be passed. If a director has vetoed (qualified) an action in the meeting, the decision would be referred back to the Board of Directors who would then review the director's rationale for vetoing such a decision, and if found appropriate and reasonable, the decision would be forbidden from being passed and vice versa. The suspensive veto as the name suggests is the power to stop a policy decision from being passed and hence, lets it remain suspended or pending for a period of time.

The *raison d'être* for existence of vetoes is that these rights are basically for the protection of the rights of the investor, so that the investor is aware about the day to day operational activities of the business but the decisions which fall under its ambit decide the fate of transfer of control. If the voting rights (veto, affirmative action) have been given to the investor in major policy actions of the business, which are fundamental to the functioning or are the day to day operational activities of the business, then these voting rights accentuate the

position of the investor from a mere financier<sup>16</sup> to that of control holder.

When it comes to substantial investment or acquisition of shares of a company, the veto that is generally provided for in the Subscription and Shareholders Agreement, is "absolute veto". The predominant reason for the existence of absolute veto in such cases generally is the dominance character exercised by the investor. The basic purpose to invite investment from other companies is that the target company is not witnessing favourable circumstances in the market (e.g. decline of market share), so there is a need to invite investment or further issue capital through allotment of shares.<sup>17</sup> The investor company is actually investing in the target company to save it from witnessing a potential exit from the market, and hence even it being a minority shareholder, its shareholding is necessary to help survive the rest of the majority shareholding. As a result of which, the investee company has to concede to the demands of the investor which maybe the exercise of absolute veto in certain decisions because if not for absolute veto, there exists a bleak possibility that the specified decision would not be passed under the ambit of qualified or suspensive veto, thereby eradicating the possibility of protection of investor's rights. Veto is an exerting force for

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<sup>16</sup> Rhodia S.A. v. SEBI, [2001] SAT 30.

<sup>17</sup> Companies Act, 2013, § 62.

determining the transfer of control. There have been many judicial decisions in this regard. In *Rakesh Agrawal v. SEBI*<sup>18</sup>, the SAT Mumbai ruled out respondent's contention of the compensation on the ground that the appellant, in the process of Bayer's procurement of 51% stake in ABS, was well justified in not wanting to bring down his share of 26% because had the share gone below 26%, the power to veto certain major decisions of the company by defeating the special resolution proposed for such purpose would have been done away with and the appellant would have lost control in the proposed company. The power of veto should be explicitly provided for in the Shareholder's agreement as it is liable to misuse on its further application. There have been instances where, the veto has been provided in the Shareholder's agreement, but decisions have not been specified or terms like "major" or "minor" or "vital" management decisions have been mentioned. This invokes an element of ambiguity as what constitutes major/ minor/ vital management decisions have not been specified by the investee company<sup>19</sup> and hence the same is prone to be misused. The major decisions will always remain subjective, vary from one case to another and depend on facts and circumstances of each case. A decision

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<sup>18</sup> *Rakesh Agrawal v. SEBI*, 2003 SCC Online SAT 38.

<sup>19</sup> *Dr. N. Sethuraman v. S.M.I.L.E. Microfinance Ltd.*, 2013 SCC OnLine Mad. 3817.

integral to the functioning of one business may not be essential to the other, and hence the variability. There have been a plethora of judgments wherein the veto/ affirmative voting rights were allotted to the investor after the acquisition of shares, on some areas of decision making of the business which were even characterised by the courts in some decisions as "basic structural changes", and hence these rights even though reactionary rights, conferred control over to the acquirer.

For example, if veto/ affirmative vote is present with respect to the amendment of MOA/AOA then it can be very instrumental in determining the transfer of control as memorandum and Articles of Association are the founding legal documents of a company. The Hon'ble SC in *Swedish Match AB v. SEBI*<sup>20</sup> enlisted down two situations wherein the transfer of control can take place. The first one is the general acquisition of majority voting rights or shares and the second when this doesn't happen. It went on to clarify that in the latter part, some form of control over the target company can be achieved by amending the memorandum of association or any other method which mandates a resolution to be passed in the shareholder's meeting. The veto or affirmative vote is only a reactionary power and not an initiation power but it does confer control

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<sup>20</sup> *Swedish Match A.B. v. SEBI*, (2004) 11 SCC 641.

over the investor as the resolution would not be passed if not for such reaction by the investor. The main determinant of control should be the end step in it, and who is finally exercising it, such that it becomes the driving force of such a decision being passed.

In *Rhodia SA v. SEBI*<sup>21</sup>, the investor had affirmative rights like veto regarding the declaration and payment of dividends, significant investment, merger and acquisition, change in business strategy, etc. The SAT Mumbai came to a conclusion that major structural and strategic changes required the approval of Rhodia, whereas the decisions on the day to day management activities of the target company were not covered by Rhodia's rights. Still the SAT held that it was "in a predominant position to exercise control over the management and the policy decisions" because of the fact that it covered the re – organisation scheme of the target company within the domain of the "control" under SAST Regulations.

Vetoing a fundamental decision may give the investor certain power or control over the target company. These fundamental decisions are sometimes construed as day to day policy decisions but leave the basic re – organisation scheme out of its ambit. The

decisions falling under basic re – organisation scheme are amendment of Memorandum/ Articles; consolidation, subdivision or alteration of any rights attached to any share capital of the Company and any of its subsidiaries, any capital calls on shareholders; any redemption, retirement, purchase or other acquisition by the Company of any Shares of the Company; approval of annual business plans and any deviations, revisions there from; the acquisition by the Company through subscription, purchase or otherwise, of the securities of any other body corporate; any amalgamation, splitting, reorganization or consolidation of the Company; the winding up, liquidation or dissolution of the Company etc. The list of such decisions can never be an exhaustive list because of two reasons –

- There are numerous of re – organisation patterns that can be brought about in the company, and hence every such decision cannot be enlisted.
- If an exhaustive list is prepared, it is bound to be put to misuse as people will try to take advantage of the loopholes in it by circumscribing their decisions within the purview of the mentioned decisions of re – organisation scheme to establish control.

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<sup>21</sup> Rhodia S.A. v. SEBI, A.P. No. 36 of 2001.

The Brightline Test<sup>22</sup> enlisted certain decisions (like amendment of Memorandum/Articles; consolidation, subdivision or alteration of any rights attached to any share capital) under veto/ affirmative rights as protective rights for the investor but went ahead with saying that the list of decisions is an indicative list and not a mandatory one, hence the question whether the rights are participative or protective in nature or control over the target company has been transferred is to be decided on the facts and circumstances of each case.

There is a basic difference between veto and affirmative rights (positive veto). The latter one mandates an approval from the investor for the decision to be passed whereas the former gives the authority to straightaway reject the decision/ resolution and not allow it to be passed. However, the end result is more or less the same. The respective/ concerned decision would not be passed and if passed in the absence of such a nominee director or the affirmative vote is not obtained, then such an action would be ultra vires the articles of the company.<sup>23</sup> Moreover, the articles regulate the internal management of the company and define

the powers of its officers. The articles also establish a contract between the company and members and between the members *inter se*. The contract governs the ordinary rights and obligations incidental to the membership in the company.<sup>24</sup>

According to the author, the power of veto is superior to affirmative rights because there has been a general norm and policy of the companies to reconsider the decision, wherein the affirmative vote has not been granted, to the Board of Directors so that they evaluate the rationale behind the refusal of or non grant of affirmative vote. This modus operandi has been adopted so to do away with the misuse of power that comes along with such an affirmative vote power. There might be a condition wherein the investor director, just for the sake of blocking a decision might exercise this power and hence there needs to be a counter mechanism to handle it. But the same condition doesn't exist with veto. The decision/ resolution once vetoed would not at any cost be passed or come into effect. Control over the day-to-day activities of the target company is not necessary for establishing control. Instead, requirement of consent for changing business strategy and similar decisions may constitute "control".

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<sup>22</sup> Discussion Paper on "*Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations*", SEBI, (October 04, 2016), [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1457945258522.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf).

<sup>23</sup> I.L. and F.S. Trust Co. Ltd. v. Birla Perucchini Ltd., [2003] 3 BomCR 334.

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<sup>24</sup> Naresh Chandra Sanyal v. Calcutta Stock Exchange Association, AIR 422 SC 422.

## INTENTION TO ACQUIRE CONTROL

The rights that are available to minority shareholders are merely in form of investor protection rights but sometimes these voting rights effect transfer of control, even when the investor had no intention of doing so. In *Clariant International Ltd.*,<sup>25</sup> SEBI held that it is clear that the Acquirer not only intended to acquire the control over the Target Company but had actually acquired control over the Target Company pursuant to the draft stock purchase agreement.

One of the major factors emphasised upon by the SAT was the “intention to acquire control” over the target company. The Tribunal held that the intention to acquire control is irrelevant at the time of acquisition of shares. It pointed out the regulations 4 and 5<sup>26</sup> which talked about the direct and indirect acquisition of control of the target company. It drew a deduction that since both direct and indirect acquisitions are being mentioned in the regulations, intention of the acquirer is irrelevant and should not be a conclusive parameter in examining the question of transfer of control. The author hereby agrees with the above contention as the investor may not have the intention of acquiring control but the potential voting rights of certain management or

policy decisions might have played a determining role in transfer of control, although those voting rights were initially meant just for the protection of the interests of minority shareholder. Hence the investor’s role is not confined to that of a financier but that of an acquirer of the target company.

There have been cases where intention was taken into account for determining the question of control. In *Sandip Save v. SEBI*<sup>27</sup>, the issue was whether IDBI (an Indian government-owned bank) exercised control by virtue of its voting rights amounting to 17.42 per cent and the associated financial agreement. The Agreement that without the prior approval of IDBI, the company shall not undertake any new Project, diversification, modification, or substantial expansion of the Project; change capital structure, create charge on assets, give guarantees, issue debentures, raise loans, accept deposits from public except raising of loans from banks or granting as in the ordinary course of business; repay any loans availed of from any other party; undertake any scheme of amalgamation or reconstruction; carry on any general trading activity other than the sale of its own products, that unless otherwise agreed to by IDBI, the company shall maintain an accounting and cost control system satisfactory to IDBI;

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<sup>25</sup> *Clariant International Ltd, In Re*, 2002 SCC OnLine SEBI 148.

<sup>26</sup> S.A.S.T. Regulations, 2011.

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<sup>27</sup> *Sandip Save v. SEBI*, [2003] 41 SCL 47 (SAT).

provide all such information at the request of IDBI; carry out alterations to Memorandum and Articles of Association as may be required by IDBI to safeguard the interests arising out of this agreement; modify or terminate the existing selling/purchasing arrangements in such a manner as may be required by IDBI. The Agreement also specifically gave IDBI the right to appoint and remove from time to time, one director on the Board of Directors of the company and also stipulated that, no change in existing management or in terms of their appointment without IDBI's approval; in future all change in management and key persons to be made as and when required by IDBI and no such changes should be made without approval from IDBI; IDBI can appoint professionals to inspect and examine working of the company, financial and accounting systems, to carry out concurrent audit etc., - the cost of which would be borne by the company; the company to constitute such committees of the Board as required by IDBI; the company shall not recognise transfer of shares by promoters and the company shall furnish to IDBI undertaking for non-disposal of shares by Promoters; the company will offer the shares held by IDBI subscribed in terms of the agreement to the public whenever required by IDBI. Despite *the elaborative list* of matters in the Shareholder's agreement which required approval, the SAT

considered that IDBI had no intention to acquire control of the target company. It referred to the P.N. Bhagwati Committee<sup>28</sup> which mentioned about the intention to acquire control. The report made it imperative upon the investor to inform the directors of the target company about his motive to eventually take over the company, pursuant to the process of acquisition of shares.

SAT considered the general principle that lending institutions refrain from taking part in the management of the companies and interfere only when their interest is adversely affected. Also, since the IDBI considered selling back the shares it had acquired, SAT came to a conclusion that the intention to acquire control could be deduced from this fact and hence, IDBI was not in "control".

Time and again the parameter of "intention" creates a new dimension for determining control. The main reference is made to the clause (a) of Regulation 2 (1)<sup>29</sup> which defines the term "acquirer" as *any person who, directly or indirectly, acquires or agrees to acquire*. The deduction of intention is made from the term "agrees to acquire" which implies that the investor must have conveyed his

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<sup>28</sup> Report of The Reconvened Committee on Substantial Acquisitions of Shares And Takeovers Under The Chairmanship Of Justice P. N. Bhagwati, SEBI (May, 2002),

<http://www.sebi.gov.in/takeover/takeoverreport.pdf>.

<sup>29</sup> S.A.S.T. Regulations, 2011 Regulation 2.

willingness to acquire control (in form of notice as in CCI Combination Regulations<sup>30</sup>) to the target company in some form or the other. The same can be done through the addition of the clause in the Shareholder's agreement or the intimation of the same to the target company. But the main problem is in the solution itself.

Normally, in the process of acquisition of shares, the investor and investee don't add clause in the agreement because of the fact that investee wants to secure its position in the market and therefore, gives enough voting rights to the investor so that his interests are secured. The decisions which come within these voting rights, are sometimes so integral to the functioning of the business, that they confer control to the investor, despite both the parties being unaware of it. This is required when an objection is raised by the other shareholders because if control is being transferred, then a public announcement of an open offer is required under Regulation 4. The announcement of an offer is required so as to provide an exit option to the shareholders of the target company, the owners of which are someone else. The Hon'ble Supreme Court in *District Mining Officer v. Tata Iron and Steel*

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<sup>30</sup> Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

*Company*<sup>31</sup> had held that "a statute is an edict of the legislature, and in construing a statute, it is necessary, to seek the intention of its maker. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the legislature." The objective of the Regulations is to protect the interests of investors in securities. It is with the said objective that regulations have been framed providing an exit option to the existing share holders of a company under acquisition, and that exit option cannot be denied by resorting to such interpretation which might defeat the purpose of the regulations.<sup>32</sup>

## **CONTROL UNDER COMPETITION ACT**

For the purposes of combination<sup>33</sup> under Competition Act, control defined under Explanation to S. 5 has made a reference to "affairs or management" as opposed to "management or policy decisions" under SAST regulations. Under the Competition Act, control is defined as controlling the affairs or management of a group or enterprise by one or more than one enterprises, either jointly or singly. The definition under the Competition

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<sup>31</sup> *District Mining Officer v. Tata Iron and Steel Company*, (2001) 7 SCC 358.

<sup>32</sup> N.R.B. Bearings India Ltd., In re, (SEBI, May 29, 2003), <http://www.sebi.gov.in/cmorder/nrbbearings.html>.

<sup>33</sup> Competition Act, 2002, §5.

Act is *pari materia* to the one in SAST regulations.

In an order passed by the CCI, in the case of the acquisition by *Alpha TC Holdings Pte Ltd.*<sup>34</sup>, the proposed combination involved acquisition of shares by the investors, by way of subscription up to 17.36 percent of the post issue equity share capital of target company on a fully diluted basis. The Investment Agreement reserved certain matters in respect of which no action may be taken without the prior written consent of the investors. The Reserved Matters *inter-alia* included appointment and removal of the Managing Director and the Chief Financial Officer of SGSPL, increasing or decreasing the number of Directors, modifying annual business plan, amending Memorandum/ Articles. Etc. Further acquirer was entitled to appoint one director on the Board of Directors with quorum rights. The acquirers also stated in the investment agreement that the right conferred are largely investor protection rights, with no control being granted over strategic commercial decisions of the target company, indicative of the absence of intention to acquire control. It was observed that the Reserved Matters, for which consent of the Acquirers is required, included strategic commercial decisions of SGSPL and the same, therefore, cannot be

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<sup>34</sup> Alpha T.C. Holdings Pte. Ltd., [2014] CCI 129.

considered as mere minority protection rights, envisaging joint control of the acquirers over the target company. The Competition Appellate Tribunal, in *Thomas Cook (India) Limited v. CCI*,<sup>35</sup> has ruled in favour of control, when the investor company represented 22.86% of the equity share capital of SHRIL on a fully diluted basis, along with a set of affirmative voting rights, right to nominate three non-executive directors and three persons as independent directors on the board. There have been cases wherein the tribunal has held “no transfer of control” despite the affirmative/ veto rights being granted. In the case of acquisition by General Atlantic Singapore Fund Pte Ltd.<sup>36</sup>, which related to the Acquirer acquiring up to 21.61% of the equity share capital with certain rights, including affirmative veto rights, CCI held that the acquirer doesn’t have control over Indus Ind Bank.

### **Shubhkam Ventures v. SEBI<sup>37</sup> - A CASE STUDY**

Shubhkam Ventures case is one of the leading cases on “negative rights amounting to control” issue in India. It is about Shubhkam

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<sup>35</sup> *Thomas Cook (India) Limited v. CCI*, [2015] Comp AT 981.

<sup>36</sup> *General Atlantic Singapore Fund Pte. Ltd., In re*, (CCI, Dec. 16, 2015), [http://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/C-2015-11-340.pdf](http://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-11-340.pdf).

<sup>37</sup> *Shubhkam Ventures (I) Private Limited v. SEBI*, [2010] 99 SCL 159.

Ventures Pvt. Ltd. which acquired 17.9% stake in a listed company along with some veto and affirmative rights in business decisions. When the question of control arose, SEBI tribunal ruled that these rights amounted to control and gave the judgment in favour of SEBI. But when Shubhkam Ventures appealed in SAT, it stated that control in its true essence should be a proactive power and not a reactionary power, thereby pushing the negative rights (veto/affirmative) out of the ambit of control. SEBI appealed to the Apex Court which maintained an ambivalent stand on the same, stating that this question of law is still open and the SAT ruling cannot be considered as a judicial precedent as it has stayed its order.

### **Interpretation & Views On SAT's Order**

The agreement entered into between the parties had veto regarding crucial policy matters and affirmative vote on a list of decisions like amendment of the Memorandum/Articles of the Company; any acquisition by the Company of any shares of the Company; approval of annual business plans; any amalgamation, splitting, reorganization or consolidation of the Company; to alter the composition and strength of the Board; winding up of the Company; appointment of key officials such as CEO, COO etc. Justice N.K. Sodhi considered that the voting rights were merely meant for the

protection of the interests of investor because they give only a right to block certain decisions, rather initiate them in the board meetings, and hence no controlling interest in favour of investor.

The affirmative vote and veto rights are surely in form of “reactionary rights” and not “initiation rights” but the fact which is to be considered is that the decision at the end of the day will be passed only if the investor director chooses to agree with it. It is true that he cannot lay down any proposal, according to the agreement, but effective control lays with the investor director. If his assent is not recorded, then the decision cannot be passed or even if passed in his absence, will be declared ultra vires the Articles of the company. The “reactionary rights” scope doesn't confine to that of reaction but becomes a tool in the hands of the investor to exercise control over the target company. Moreover, a lot depends on the kind of decisions that are guaranteed to the investor director. The “management or policy decisions” as stated in the regulations, should not be interpreted in a narrower sense rather in a broader sense. Its scope should not be limited to just day to day operations but also the basic structural/ integral changes<sup>38</sup>, which are necessary for the survival of the business. In the

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<sup>38</sup> Rhodia S.A. v. SEBI, A.P. No. 36 of 2001.

above mentioned case, the affirmative vote was given in core operational decisions of the company. Whether it be the amending of memorandum/ articles (foundational documents of company), approval for entering into any joint venture (general transactions with affiliates as well), approval for annual financial statements (profit loss accounts), appointment of key officials (ones vested with the enormous power), alteration of composition or strength of the board and many more. The fact lies herein that although, these are just powers meant for the involvement for the investor company in the decisions of the target company, they confer control simply by virtue of the nature of the decisions that come within its ambit and not by anything else. The author hereby disagrees with the SAT order, which was ultimately stayed by SC, because the tribunal has restricted itself to the narrow interpretation of the definition of “control” and therefore has failed to take notice of various material facts, one being the true intention of the legislature to enact such regulations.

When the voting rights are being given for the protection of the interests of investor, there should be a mechanism that deals with the protection of target company’s interests. Generally, the target companies set a threshold or the minimum shareholding of the investor company, that below such a shareholding, the

rights conferred upon him will not be applicable. SEBI in its “Discussion Paper on Brightline Test for Control” had set the same limit as 10% of the entire shareholding. Still, there has been no mandatory requirement for keeping such a limit by SEBI in its regulations. So the target companies are at their discretion to exercise it. The intention behind inserting such a clause is the “misuse of power”. The investor may very smartly withdraw his shareholding/ investment from the target company and still continue to exercise his affirmative vote/ veto in the target company, which would be blatant exploitation of powers that have been conferred upon him.<sup>39</sup>

## CONCLUSION

The debate over corporate control has been a burning issue since the past decade. The domain of “control” in the corporate world is subject to a wide interpretation, decided on a case to case basis and hence the controversy persists. The Apex Court also left the question of law open to interpretation while disposing off the appeal in Shubhkam Ventures case. The main question that arises still is whether negative rights constitute control. Many other parameters have also entered the scenario such as intention to acquire control, nature of

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<sup>39</sup> Kavita Gangar v. Bialelli Industries S.P.A., 2016 SCC Online Bom 862.

decisions on which negative rights are allotted, quorum rights, etc. The ideal approach should be a broad interpretation of the term “control”, rather a limited one, and hence one or all of the dimensions should be placed concurrently to arrive at the decision of control. It is true that initiation rights are likely to have a greater stronghold than the negative rights on the management of the company but that doesn't negate the influence of negative rights. A bunch of decisions that are fundamental to the operation of business or classify under the basic re – organisation scheme will definitely accentuate the position of the investor as a controller of the company. Time and again, court has sometimes laid emphasis on “intention” to acquire control which in view of the author, should be kept out of the purview of “control” because of the fact that the SAST Regulations clearly talk about indirect acquisition taking place. Also, there have been many cases mentioned above, wherein there has been a recital in the agreement that control would not be transferred, still court has held it in favour of control. The “intention” should be considered in cases where the investor does any act pursuant to the acquisition of shares that undermines his position as a controller. For example, selling back of shares immediately after such an acquisition or withdrawing an investment etc. The author would highlight the

importance of clarity regarding the Shareholders' agreement that is entered into between the investor and investee. There should be no ambiguity as regards the decisions over which negative rights are to be exercised. Terms like major, crucial, integral decisions etc. in the agreement add to the confusion. The mere existence of quorum rights or affirmative vote or veto should not be the sole criterion for determining control, rather the concurrence of such rights should be considered. This element of subjectivity invokes a bundle of questions about the absence of a benchmark for adjudicating such questions of law. In many countries, there are objective tests to establish control. SEBI's discussion paper on Brightline test was surely a step in this direction but it is not binding. Further the exhaustive lists would invite more litigation as law evaders will find an easier way to avoid the regulations in force.

A more liberal approach should be adopted in the process of acquisition of shares. The rights should not be restricted to that of negative rights but also some initiation rights in the management. Reacting to the changes/decisions brought about in the company definitely confer control in the hands of investor but what if the existing management is satisfied with the status quo and investor wants to bring about changes. The evolution of corporate democracy has seen reservation of certain rights

for the investor but it should move positively in the direction of including the rights of initiation for the investor in the target company. This would not only expand the scope of the protection of interests of investor but also clear the air surrounding the ascertainment of control in the corporate world.

# TAX LIABILITY OF NON-RESIDENTS WITH SPECIAL REFERENCE TO FOREIGN LAW FIRMS

*Isha Kahwant Singh*<sup>\*</sup>

## INTRODUCTION

In today's world of liberalization, privatization and globalisation, it is common for businesses and individuals, who are residents in one country to make earnings, profits, etc. i.e. taxable income in another country. This leads to situations where under domestic law, they would be obliged to pay tax on the gain locally, and pay tax again in the country where they made the gains. This inequitable situation of double taxation has bolstered countries to sign bilateral treaties, known as Double Taxation Avoidance Agreements (DTAA) with each other.

DTAA may be defined as a bilateral agreement entered between two countries with the objective to promote and foster economic trade and investment between them by avoiding double taxation.<sup>1</sup> Under the scheme of DTAA's,

tax is either payable in the country of residence and exempt in the country in which the gain arises, or the country where the gain arises may deduct tax at source, and the taxpayer receives a compensatory foreign tax credit in the country of residence, reflecting the fact that tax has been paid.<sup>2</sup>

## HISTORICAL DEVELOPMENT OF DTAAs

Though DTAAs are generally regarded as instruments developed in the 20<sup>th</sup> century, the issue of double taxation was raised between France and Italy as early as the 13<sup>th</sup> century, where the question related to determining where a property would be taxed, considering the property was situated in one country, but the owner was residing in another.<sup>3</sup> The first DTAA

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<sup>1</sup> Rajkumar S. Adukia, *Double Tax Avoidance Agreements & Taxation*, TAX GURU (May 17, 2012), <http://taxguru.in/income-tax/double-tax-avoidance-agreements-taxation.html>.

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<sup>2</sup> Aayushi Jain, *A Critical Analysis of the Concept of Double Taxation Avoidance Agreement under the Income Tax Act, 1961*, 1(1) JOURNAL OF LEGAL STUDIES AND RESEARCH 45 (2015).

<sup>3</sup> HAMISH SCOTT, *THE OXFORD HANDBOOK OF EARLY MODERN EUROPEAN HISTORY* 522 (1<sup>st</sup> ed. 2015).

ever entered into was in 1899, by Prussia and the Austro-Hungarian Empire.<sup>4</sup>

In the 20<sup>th</sup> century, the general opinion was that since DTAA's are bilateral agreements, it was regarded necessary to formulate a "model agreement", which could provide a framework to countries contemplating to sign them; thus, the League of Nations produced the first Model Bilateral Convention in 1928.<sup>5</sup> Subsequently, the Model Convention of Mexico and the London Model Convention were introduced in 1943 and 1946 respectively.<sup>6</sup>

In 1956, the Organisation for Economic Co-operation and Development (OECD) established a Fiscal Committee to formulate a model convention, which was enacted in 1963 as the first draft Double Taxation Convention on Income and Capital.<sup>7</sup> The Model Convention was finally published in 1992.

Simultaneously, the United Nations (UN) also formulated the UN Model Convention and published the same in 1980 in

the form of the Model Double Taxation Convention between Developed and Developing Countries, the origin of which lies in a resolution passed by the Economic and Social Council in August 1967<sup>8</sup>.

While the UN Model emphasises more on taxation at source of income, the OECD Model gives more weight to taxation in the country of residence, which is the primary point of difference between both the model conventions.

## INDIA AND DTAAS

In India, the concept of relief from double taxation was first provided under the Income Tax (Double Tax Relief) Rules, 1939. Ever since then, India has signed DTAA's with 88 countries, out of which, currently, 85 are in force.<sup>9</sup> This implies that an agreed, fixed rate of tax would apply to specified types of income arising in India to tax residents of the countries with who DTAA's are in force. Most of India's treaties are based on the UN Model.

## CONCEPT OF TREATY OVERRIDE

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<sup>4</sup> Dr. Binoy Mathew, *A Study on Effect of Tax Treaties on Foreign Investment*, 1(10) IJBARR, 1 (2015).

<sup>5</sup> *Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion*, LEAGUE OF NATIONS, Doc. C.562M.178 1928 II (1928).

<sup>6</sup> DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *UN Model Double Taxation Convention between Developed and Developing Countries*, xvi (2001).

<sup>7</sup> Christophe Farquet, *Explaining the Failure of International Tax Regulations Throughout the 20<sup>th</sup> Century*, WORKING PAPERS OF THE PAUL BAIROCH INSTITUTE OF ECONOMIC HISTORY, No. 6. 2016, 12 (2016).

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<sup>8</sup> DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *UN Model Double Taxation Convention between Developed and Developing Countries*, 1980.

<sup>9</sup> *List of countries with whom India has Double Tax Avoidance Agreement*, GOOD RETURNS, <http://www.goodreturns.in/personal-finance/taxes/2014/06/list-countries-with-whom-india-has-double-taxation-avoidance-275892.html> (Sept. 5, 2016).

In some countries, treaties are considered to have a superior status to ordinary domestic law. “Treaty override” refers to a situation where domestic legislation of a State has an overriding effect over the provisions of either a single treaty, or all treaties having had effect in that State.<sup>10</sup>

### **Treaty Override under International Law**

Treaty override is a concept clearly condemned under international law. As evidenced by the Vienna Convention on Law of Treaties (VCLT), every treaty in force is binding on the parties to it, and must be performed by them in good faith.<sup>11</sup> Furthermore, a State cannot invoke provisions of its internal law to justify its failure to perform its international treaty obligations.<sup>12</sup> It is also the duty of a State to not defeat the object and purpose of a treaty prior to its entry into force.<sup>13</sup> Though India is not a party to the VCLT, the Supreme Court has held that the principles of interpretation contained therein provide broad guidelines for interpreting treaties in the Indian context as well.<sup>14</sup>

### **Tax Treaty Override in India**

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<sup>10</sup> R (8), Tax Treaty Override: Model Tax Convention on Income and on Capital, OECD (2012).

<sup>11</sup> Vienna Convention on the Law of Treaties, art. 26, *opened for signature* may 23, 1969, 1155 UNTS 331.

<sup>12</sup> *Id.* at art. 27.

<sup>13</sup> *Id.* at art. 18.

<sup>14</sup> Ram Jethmalani v. Union of India, W.P. (Civil) No. 176 of 2009.

Part IV of the Constitution of India envisages promoting international peace and security by fostering respect for international law and treaty obligations.<sup>15</sup> Furthermore, it is imperative to note that tax treaties are given supremacy over domestic law.<sup>16</sup> It is an established principle in India that due regard must be given to international conventions and treaties while interpreting domestic laws made by the Parliament.<sup>17</sup> It is also the duty of courts to construe legislation to be in conformity with international treaty obligations, and not in conflict with it.<sup>18</sup> Thus, the legal position in India is that when a specific provision is made in the DTAA, such provision will prevail over the general provisions of the Income Tax Act, 1961.<sup>19</sup>

Under the Income Tax Act, the Parliament has incorporated an exclusive Chapter to accommodate treaties entered into by the Government of India. The Act clearly stipulates that once the Central Government has entered into a DTAA, in relation to the assessee to whom such agreement applies, the provisions

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<sup>15</sup> INDIA CONST. art. 51(c).

<sup>16</sup> Alexander Trepelkov, Harry Tonino and Dominika Halka, *United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries*, UNITED NATIONS 262 (2013).

<sup>17</sup> *Visakha v. State of Rajasthan*, 197 SC 3011.

<sup>18</sup> *Corocraft v. Pan American Airways*, (1969) 1 All ER 82.

<sup>19</sup> *Commissioner of Income Tax v. Vishakhapatnam Port Trust*, (1983) 144 ITR 146 (AP), *CIT v. Hindustan Motor Corporation*, 2005 142 TAXMAN 177.

of the Act shall apply to the extent they are more beneficial to the assessee.<sup>20</sup> Thus, in the event of conflict between the provisions of the DTAA and the Income Tax Act, the provisions which are more beneficial to the assessee would apply. If a tax liability is imposed under the Act, the agreement may be resorted to for negating or reducing the liability.<sup>21</sup>

In *CIT v. WR.S.R.M. Firm & Ors.*<sup>22</sup>, the Madras High Court held that when there is a contrary provision in a DTAA as compared to national legislation, there is no scope of applying the law of any one of the respective Contracting States to tax the income; hence, the provisions of the DTAA would apply in respect of the assessee. Furthermore, where the Government of a State certifies that a person is a resident of that State<sup>23</sup> or has a permanent establishment in that State<sup>24</sup>, such certification is binding on the other Government.

### **TAXABILITY OF NON-RESIDENTS FOR SERVICES RENDERED IN INDIA**

The identification and classification of residence is one of the first steps to be taken in

assessing the tax liability of an individual.<sup>25</sup> Whether income accrued to an individual out of India, is taxable in India is contingent on the residential status of the individual. Since there ought to be a basis for the government to tax any income, only such income of a non-resident as is earned in India is liable to be taxed in India.<sup>26</sup>

### **TAX DEDUCTION AT SOURCE**

Any person who is responsible for paying any sum chargeable under the Act to a non-resident shall deduct income-tax thereon at the rates applicable in India.<sup>27</sup> However, if the payments are liable to tax under the Income Tax Act, one has to examine the provisions of the DTAA between India and the country of the non-resident, as the terms of the DTAA would usually determine the conditions and specifications of tax to be paid by the non-resident. The Hon'ble Delhi Tribunal has held that no tax is deducted (TDS) from payments to non-residents when their services are rendered outside India.<sup>28</sup>

### **SCOPE OF TOTAL INCOME**

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<sup>20</sup> Income Tax Act, 1961, § 90(2).

<sup>21</sup> *CIT v. Muthaiah*, 202 ITR 508; *Union of India v. Azadi Bachao Andolan*, 263 ITR 706.

<sup>22</sup> 208 ITR 400.

<sup>23</sup> *Abraham Express v. UOI*, 212 ITR 31.

<sup>24</sup> *CIT v. Lakshmi Textile*, 245 ITR 521.

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<sup>25</sup> TAXMAN, STUDENTS' GUIDE TO INCOME TAX 27 (33<sup>rd</sup> ed. 2005-2006).

<sup>26</sup> SAMPATH IYENGER, LAW OF INCOME TAX: A COMMENTARY ON INCOME TAX ACT, 1961 848 (11<sup>th</sup> ed. 2011).

<sup>27</sup> Income Tax Act, 1961, § 195.

<sup>28</sup> *DCIT, New Delhi v. Chandabh Impex (P.) Ltd.*, (2013) 40 TAXMANN 310 (Delhi-Trib.)

The income of a non-resident includes income derived from any source, that is either received or deemed to be received in India, or accrues or arises or is deemed to accrue or arise in India in that year.<sup>29</sup> Since the place of accrual or arisal of income of a non-resident would normally be outside India, the same ought not to be liable to tax in India.<sup>30</sup>

### **INCOME “DEEMED TO ACCRUE OR ARISE IN INDIA”**

As per the amendment of § 9 of the Income Tax Act pursuant to the Finance Act, 2010, all payments made to a non-resident outside India shall be deemed to accrue or arise in India i.e. shall be taxable in India, regardless of whether the services have been rendered in India or not. In the case of *Linklaters LLP v. ITO*,<sup>31</sup> it was held that in view of the retrospective amendment to the Income Tax Act vide Finance Act, 2010, the fees for professional services earned by a United Kingdom (UK) based partnership law firm was taxable in India with respect to their projects in India, even though not all such services were rendered in India.

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<sup>29</sup> Income Tax Act, 1961, § 5(2).

<sup>30</sup> H. Padamchand Khincha, *Cross border outsourcing-Tax aspects including Transfer Pricing*, BCAS INTERNATIONAL TAX AND FINANCE CONFERENCE 3 (2013).

<sup>31</sup> 42 DTR (Mumbai)(Trib) 23.

In the case of *Ashapura Minichem Ltd. v. Assistant Director of Income Tax*,<sup>32</sup> a resident Indian company entered into an agreement with a Chinese company for providing various services in its laboratory situated in China. All the services performed by the Chinese company in China were handed over to the Indian company. When rendering payments for the same to the Chinese company, the Assessing Officer (AO) contended that the income of the Chinese company was liable to TDS under § 195(2) of the Income Tax Act as the same was in the nature of “fees for technical services” under § 9(1)(vii) of the Act. The Indian company contended that the Chinese company, being a non-resident, can only be taxed under the DTAA, which being more beneficial, ought to override the provisions of the Act. However, disregarding the provisions of the DTAA as well as the Act, the Income Tax Appellate Tribunal (ITAT), Mumbai held that there is no need for the services to be rendered in India for income on the same to be chargeable in India.

### **FEES FOR TECHNICAL SERVICES - TERRITORIAL NEXUS**

If the income is taxable as per Indian law, the non-resident can opt for the provisions of the DTAA for the extinction or marginalisation of tax liability. The literal

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<sup>32</sup> ITA No. 2508/Mumbai/08.

interpretation of § 9(1)(vii) leads to the conclusion that if the technical services are utilised in India, the fees payable for the same would be liable to tax in India, irrespective of whether the services are rendered outside India. However, in the landmark case of *Ishikawajima-Harima Heavy Industries Ltd. v. DIT*<sup>33</sup>, the Apex Court established the rule of territorial nexus i.e. for charges under § 9(1)(vii) to be taxable in India, two conditions in respect of the services ought to be fulfilled:

1. The services should be utilised in India, and
2. The services should be rendered in India.

Both these conditions have to be satisfied simultaneously.

The Court held that the provisions of § 9(1)(vii) relating to fees for technical service ought to be read with § 5, which establishes territorial nexus on the basis whereof tax is required to be levied, namely, a resident and the receipt or accrual of income. Interpretation with reference to nexus to tax assumes great significance; thus, territorial nexus for determining tax liability is a widely accepted principle.

It further held that whatever is payable by a resident to a non-resident by way of fees for technical services may not necessarily fall

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<sup>33</sup> DIT (2007) 288 ITR 408.

under the purview of § 9(1)(vii); it ought to have sufficient territorial nexus with India so as to furnish a basis for imposing tax. There must be a direct link between the services rendered in India and services utilised in India. When such link is established, the same may again be subject to relief under the DTAA.

### **RULE OF ‘FORCE OF ATTRACTION’**

The origin of the rule of ‘force of attraction’ lies in the concept of permanent establishments under DTAA’s. Neither the UN Model nor the OECD Model provides a single exhaustive definition of “permanent establishment”.

India has incorporated the force of attraction rule in a number of its DTAA’s.<sup>34</sup> The Andhra Pradesh High Court<sup>35</sup> has attempted to define the same by postulating the existence of “a substantial element of an enduring or permanent nature of a foreign enterprise in another country, which can be attributed to a fixed place of business in that country”. It has further held that the existence of the foreign entity should be such that it indicates concrete presence of the foreign entity in the other country.

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<sup>34</sup> India’s DTAA’s with Australia, Turkey, Belarus, Thailand, Belgium, Tanzania, Bulgaria, Sri Lanka, Canada, Spain, Cyprus, Romania, Denmark, Portugal, Finland, Poland, Germany, Norway, Indonesia, Kenya.

<sup>35</sup> CIT v. Vishakhapatnam Port Trust, 144 ITR 146.

The UN Model, and recently, the OECD Model have recognised the concept of service permanent establishments, which occurs when employees or personnel are deployed from the country of residence to another country for a particular period of time, as dictated by the DTAA.<sup>36</sup>

The rule of force of attraction is based on the concept of source-based taxation, and developing countries have, for a long time, supported this rule as it attempts to disincentivise enterprises from taking undue advantage of their residential status and permanent establishment by routing transactions directly from their country of residence.<sup>37</sup>

## **TAXABILITY OF FOREIGN LAW FIRMS IN INDIA**

Foreign law firms often, either provide services from their country of residence to enterprises located in India, or visit India for a stipulated period of time to render services to their Indian clients, without having any permanent establishment in India.

Under the provisions of the Income Tax Act, the fees rendered for legal services would

be considered as “fees for technical services”,<sup>38</sup> i.e. consideration for rendering managerial, technical or consultancy services<sup>39</sup>.

### ***Clifford Chance v. DCIT***

The *Clifford Chance*<sup>40</sup> case is one of the landmark judgments under Indian taxation law, determining the taxability of foreign law firms in India, for services rendered by them to their Indian clients, from within the territory of India as well as outside the territory of India. The case upholds the principle of territorial nexus by ruling that professional fees charged by foreign law firms for services provided by them are not taxable in India unless the legal opinions are rendered in India and utilised in India.

In this case, Clifford Chance was appointed as the law advisor to four joint venture projects for construction of power plants in India. For rendering legal advice, the firm’s partners and employees visited India, for a period aggregating more than 90 days in the relevant financial year, and also provided their services from their UK office. Based on billing hours spent in India, the firm attributed a fixed share of the professional fee to be taxed in India. However, the AO contended that all legal

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<sup>36</sup> SKAAR, ARVID, PERMANENT ESTABLISHMENT EROSION OF TAX TREATY PRINCIPLE (Kluwer Law ed., 1995).

<sup>37</sup> AVI YONAH, REUVEN, INTERNATIONAL TAX AS INTERNATIONAL LAW: AN ANALYSIS OF THE INTERNATIONAL TAX REGIME (Cambridge University Press ed., 2007).

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<sup>38</sup> Pawan Sehrawat, *TDS on Legal Service received from outside India*, TAXGURU (Feb. 12, 2014), <http://taxguru.in/income-tax/tds-legal-service-received-india.html>.

<sup>39</sup> Income Tax Act, 1961, Explanation 2, § 9(1)(vii).

<sup>40</sup> Clifford Chance v. DCIT, 2002 82 ITD 106 Mum.

advices, whether rendered in India or outside India, pertained to projects situated in India; hence, the entire sum of professional fee was taxable in India. The Commissioner of Income Tax and ITAT also upheld these findings.

The law firm then filed an appeal before the Bombay High Court, contending that legal services provided by partners in the UK ought to be considered to be rendered in the UK, falling beyond the scope of § 9(1)(vii) of the Act, and only that portion of income which can be attributed to services performed in India should be taxed in India.

The Bombay High Court was of the opinion that § 9(1)(vii)(c) envisages two conditions for charging tax on services; firstly, the source of income sought to be taxed must be utilised in India, and secondly, the services must be rendered in India, thus upholding the principle of territorial nexus.

#### **Provisions of UK-India DTAA**

UK-India DTAA defines “professional services”, which includes services rendered by lawyers.<sup>41</sup> As per Article 15(1) of the UK-India DTAA, income derived by a firm of individuals, which is a resident of UK, for the performance

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<sup>41</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 15(3).

of professional services or other independent activities of similar character in India shall be taxable only in UK. However, such income may be taxed in India only if:

1. The firm has a fixed base regularly available to it in India for performing its activities, or
2. If the firm stays in India for a period exceeding an aggregate of 90 days.

If, while furnishing services in India, the partners or employees of foreign entities remain in India for an aggregate period exceeding 90 days, it would also be considered to have a permanent establishment in India.<sup>42</sup>

In this case, since Clifford Chance was furnishing services in India for a period exceeding 90 days, they were deemed to have a permanent establishment in India and were required to pay tax for the services rendered in India.

An analysis of the provisions of the DTAA provides that had the firm rendered services in India, but not stayed in India for a period exceeding 90 days, it would not have been required to pay any tax in India, even for the services rendered and utilized in India.

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<sup>42</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 5(2)(k).

**Effect of Amendment vide Finance Act, 2010  
on *Clifford Chance* Case**

Subsequent to the decision of the Bombay High Court, the Finance Act, 2010 amended § 9(1)(vii) to the effect that for the purpose of taxation, the place of rendering the services would be irrelevant. The controversy was whether under the force of attraction rule, the law firm would be liable to tax in India for the entire income, irrespective of the rendition of services in India or abroad.

In 2013, the Special Bench of the ITAT<sup>43</sup> held that the amendment vide Finance Act, 2010 is irrelevant for the purpose of taxation of foreign law firms i.e. foreign law firms are only required to pay tax on income earned from services rendered in India, and are not liable to taxation for income in relation to services rendered outside India, as concluded by interpreting the provisions of the DTAA.

**CHANGE OF TIDE IN *LINKLATERS LLP V. ITO***

In this case, Linklaters LLP, a resident of the UK rendered legal advisory services to certain clients in the UK, whose operations extended to India, and such services were performed from outside as well as within India.

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<sup>43</sup> ITA Nos. 5034/Mumbai/2004.

Linklaters contended that it was not taxable in India under the Income Tax Act or the UK-India DTAA; however, the Mumbai bench of the ITAT, determined that the consultancy services provided by the law firm amounted to ‘technical services’ under § 9(1)(vii). As per the amendment to the § vide Finance Act, 2010, which had retrospective effect, such services need not be rendered in India, but ought to be utilised in India for the taxation of technical services, thus eliminating the need for any physical presence in India.

Attracting the force of attraction rule it further held that the activities of the firm constituted a service permanent establishment in India as the DTAA uses the words “profits directly or indirectly attributable to”<sup>44</sup>, the term “indirectly” inviting the application of the “force of attraction” principle, thereby making liable to tax, not only profits attributable to the permanent establishment, but also the profit earned by the firm in its Indian operations.

Hence, the Tribunal held that Linklaters was required to pay tax for all services rendered by the firm in respect of projects in India, irrespective of whether the services were

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<sup>44</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 7(1).

rendered in India or outside India, thus deviating from the principle of territorial nexus established in the *Ishikawajima-Harima Heavy Industries Ltd.* case.

### **CRITICAL ANALYSIS**

Though the researcher agrees that the Tribunal has correctly determined Linklaters to have constituted a service permanent establishment in India by satisfying the conditions under Article 5(2)(k), the researcher humbly submits that the Tribunal has made an error in determining that the services rendered outside India with respect to Indian projects would be taxable in India. This is because the definition of “permanent establishment” clearly states that the services ought to be rendered “*within* a Contracting State by an enterprise through employees or other personnel”<sup>45</sup>, the use of the word “within” implying that the services must be rendered by the foreign entry in the territory of the country where it is a non-resident.

Furthermore, the Tribunal erred in holding that the use of the words “profits indirectly attributable to” makes the profits earned by the firm on its Indian operations

attributable to tax even if the services were not rendered in India. This is because Article 7(2) of the UK-India DTAA contemplates that a permanent establishment be treated as a separate and distinct enterprise with respect to the profits it might be expected to make in another country. Thus Article 7(2) is based on the hypothesis that the profits earned by the permanent establishment of an enterprise in a Contracting State is only attributable to the services rendered by the permanent establishment in such State, and is treated as independent of the enterprise of which it is a permanent establishment. Hence, the profits earned by a part of the enterprise rendering services outside India cannot be treated as profits directly attributable to the permanent establishment of the assessee as per Article 7(2) of the UK-India DTAA.

Furthermore Article 7(3) clearly stipulates that “Where a permanent establishment takes an active part in negotiating, concluding or fulfilling contracts entered into by the enterprise, then, notwithstanding that other parts of the enterprise have also participated in those transactions, that proportion of profits of the enterprise arising out of those contracts which the contribution of the permanent establishment to those transactions bears to that of the enterprise as a whole shall be treated as being the profits indirectly attributable to that permanent establishment”, thus providing a

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<sup>45</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 5(2)(k).

clear definition of what constitutes “profits indirectly attributable to that permanent establishment”. Thus, it was erroneous of the Tribunal to widen the scope of the term “indirectly attributable” when the DTAA clearly provides an exhaustive definition of the same.

In the opinion of the researcher, the provisions of a DTAA, with special reference to the UK-India DTAA, imbibe in it, the rule of territorial nexus. For example, in order to be considered to have a permanent establishment, the non-resident needs to furnish services in the other Contracting State through its employees, for a period of over 90 days in a year.<sup>46</sup> For the income derived from services, such as legal services, by entities who are non-residents, to be taxed in the other Contracting State, the services *need to be performed in the other State* by the entity or its representative, personally present in the State for a total period of over 90 days, or through a fixed base regularly available to the entity.<sup>47</sup> Thus use of the words “need to be performed in the other State” itself implies that

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<sup>46</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 5(2)(k)(i).

<sup>47</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains, 1993, art. 15(1).

the service needs to be performed within the territory of the other State.

## CONCLUSION AND RECOMMENDATIONS

The regime of taxation of non-residents is envisaged under bilateral tax treaties based on model treaties, developed by organisations such as UN and OECD. The basic purpose for the establishment of such a regime is to provide a mechanism for eliminating double taxation.

In India, the primary concern arising in the interpretation of DTAA’s is the position where there is a conflict between the provisions of the Act and the provisions of the DTAA. In respect of this, the Indian courts have, in a number of cases given supremacy to the provisions of DTAA, upholding the Government’s constitutional duty to honour its international obligations. Furthermore, § 90(2) of the Income Tax Act makes it explicitly clear that where a DTAA has been entered into, the provisions of the DTAA would have to be applied as compared to the provisions of the Act to the extent they are more beneficial to the assessee. Hence, before imposing any tax liability on non-residents, it is imperative to examine the provisions of the DTAA between India and the country of residence of the non-resident, in order to ascertain any relief that may be available to the foreign entity under the DTAA, and then deduct the tax at source.

Though DTAA's are essential in order to avoid double taxation of an entity, the entire system has witnessed massive abuse of such treaties in the form of treaty shopping, conversion of Indian black money into white money, manipulation of stock market, etc. However, the same does not reduce the importance of DTAA's, as held by the various courts and under the letter of the law. Hence, it is essential that before signing a treaty, the Government of India should make sure that the provisions of the treaty do not aid the commission of such illegal activities, and if after enforcement, it is found that treaties are being misused, they should be amended from time to time depending on the required needs.

What has been found by the researcher during the course of the study is that the courts and income tax authorities fail to apply the tax laws in a manner that is more beneficial to the assessee. The law does not require for the provisions of the Income Tax Act to prevail over the provisions of the DTAA's or vice-versa; it requires the law that is more beneficial to the assessee to be applied for determining its tax liability. Since provisions of DTAA's clearly establish the principle of territorial nexus, the courts ought to have due regard to § 90(2) of the Income Tax Act in deciding whether income derived for services rendered

by the non-resident assessee would be taxable in India.

In the opinion of the researcher, the courts and tribunals have passed erroneous decisions in the *Ashapura* case and the *Linklaters* case. No retrospective amendment has been made to the Income Tax Act whereby supremacy has been given to the provisions of the Act over those of the DTAA's. Thus, for tribunals and courts to conclude that under § 9(1)(vii), the income deemed to accrue or arise in India shall be taxable in India irrespective of whether the services have been rendered in India, without even considering the implications of the provisions of the DTAA is absolutely erroneous.

The fact that *Linklaters* and *Ashapura* completely departs from the rule of territorial nexus needs to be thought over as the effect of the same has been that consultancy firms and other service providers have terminated assignments in India in order to not constitute service permanent establishments. The same has a direct impact on globalisation i.e. the influx and efflux of knowledge and information, which will cause detriment to India's economic progress.

Hence, the researcher is of the opinion that India's courts and tribunals ought to have due regard to the constitutional international

obligations and uphold the principle of territorial nexus in order to ascertain the taxability of non-residents in India.

# WOMBS FOR RENT- AN ADDITION TO THE BAN-WAGON

Vaidehi G. Balvally\*

## INTRODUCTION

Religions all over the world have been a bystander to the notion of surrogacy. From one of the most oldest religions, Hinduism embracing this concept in the Bhagvata Purana where Balaram was conceived in Devaki's womb but was transferred to the womb of Rohini, another wife of Vasudeva<sup>1</sup>, to one of the newest formed religions, Christianity testifying to this in two instances in Genesis 16 (Sarai asking her husband Abram to fertilise her maid, Hagar, in order for them to have children) and Genesis 30 (Rachel asking her husband, Jacob, of the same with her servant, Bilhah)<sup>2</sup>, the moral fibre of the society questioning surrogacy is nothing less than astonishing.

Even in the modern times, literature has, time and again, mirrored this in writings like *The Handmaid's Tale* in 1985 by Margaret Atwood. Closely contemporaneous to this was the birth of the world's second and India's first baby born through In Vitro Fertilisation (IVF) named Kanupriya alias Durga<sup>3</sup>. Innovations in reproductive medicine and relentless reinforcement to prime centres such as The Indian Council of Medical Research led to the development of transformational methods such as gestational surrogacy. It differs from traditional surrogacy in the sense that gestational surrogacy comprises the fertilisation of the embryo outside of the housing uterus by a woman's ovum other than the host's whereas traditional surrogacy in the contemporary sense would be artificial insemination of the sperm aimed at fertilisation of the host's ovum<sup>4</sup>.

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<sup>1</sup> K. Dutta, *Surrogacy and Hindu mythology*, HER ENCYCLOPEDIA, (June 06, 2016), <https://herencyclopedia.com/2016/06/06/surrogacy-and-hindu-mythology/>.

<sup>2</sup> Anonymous, *Issue Analysis: Surrogacy*. THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, (July 10, 2014), <http://erlc.com/resource-library/articles/issue-analysis-surrogacy>.

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<sup>3</sup> Sadaguru Pandit & Ashish Rane, *Mumbai's first test-tube baby ties the knot at 25*, MID-DAY, (May 15, 2015), <http://www.mid-day.com/articles/mumbais-first-test-tube-baby-ties-the-knot-at-25/16211183>.

<sup>4</sup> Pritam Nagrale, *A Complete Guide for Surrogate Mother to Make Money from Surrogacy*, MONEY CONNEXION (Aug. 30, 2016),

It was not long before this practically untapped territory caught the eye of the Indian medical fraternity and a structured system emerged to provide a solution to infertile couples. What started off as a remedial measure for marital worryment was then seen as a plausible solution by people of age, who wanted the contentment of having their own progeny without involving themselves in state-institutionalized marriage, or even by ones who could not fall under the ambit of parents according to the social definition.

### BUILDING OF A MARKET IN INDIA

A high level of education in a universally comprehensible language and advanced medical facilities that dug a relatively small hole in the pockets of foreign nationals led to India taking the centre stage in the “baby-boom”. A close to “laissez faire” policy of the government and a fairly unregularized market was magnetic in taking this industry of \$400 million to \$2.3 billion<sup>5</sup> in merely a decade. To see just how significant the difference between the price of materializing surrogacy in India is for foreign residents in comparison to the

<http://moneyconnexion.com/make-money-surrogate-mother.htm>.

<sup>5</sup> Ritika Mukherjee, *The Baby Business: A Study on Indian Market of Commercial Surrogacy and Its Implications*, INTERNATIONAL INSTITUTE FOR POPULATION SCIENCES, (May 02, 2015), <http://paa2015.princeton.edu/uploads/152404>.

United States, in this instance, the following table may be referred.

INDEX	COST (in USD)
Cost of Travelling to and from the USA to India (for two) <sup>7</sup>	2,300
Visa Cost to travel to India (for two) <sup>8</sup>	300
Cumulative cost of medical procedure in India <sup>9</sup>	20,000
Miscellaneous costs (Food, Rent, and Travel expenses, citizenship charges for the baby, et al.)	2,400
<b>Total Cost of Surrogacy in India</b>	<b>25,000</b>
<b>Cost of medical procedure in USA<sup>10</sup></b>	<b>1,00,000</b>

(exchange rate when accessed: USD 1= INR 66.37)

The fact that the medical procedure for becoming a surrogate in the United States itself costs 4 times as much as the total cost of having the baby in India goes on to show the economic persuasion provided by our country for this procedure. The disincentive of our conservative society towards smoking, drinking and other forms of substance usage injurious to the health of the surrogate and the baby combined with furtherance of marriages at an early age for women act as natural advertising agents.<sup>6</sup>

Although, most of the attention garnered is welcome for this conceptualization, negative generalizations and media-driven stereotypes

<sup>6</sup> *Ibid.*

have led the otherwise politically, socially and economically vigilant denizens of this country to overlook the constructive aspects of it.

This paper, thus, seeks to break new ground and bring surrogacy under the framework of labour and present a critical appraisal of the recently formed Surrogacy Bill, 2016.

## PERCEPTIONS OF SURROGACY

Surrogacy is placed at extreme end of the spectrum either tagging surrogates as “altruistic angels” who complete a family and bring happiness or “abject victims” who require rescue. With statements like ‘What was started for convenience has become a luxury’<sup>7</sup> being made by prominent politicians, the need for rescue is certain. But what must be rescued is the image of surrogate women as damsels in distress. Feminists have denounced surrogacy as the ultimate form of medicalization, technological colonization, and commodification of the female body. For those construing surrogacy as a primarily materialistic transaction, there is a cause for anxiety due to a presumable commercialization of a woman’s reproductive abilities and the product of her labour - the child. On the other hand, there are those that recognize the woman’s part in the

decision of surrogacy and the economic benefits she reaps from these capabilities. A more global standpoint raises the issue of commercial surrogacy holding predominance over altruistic surrogacy.

These Eurocentric portrayals of white embryos growing in young women from third world countries and speculations about baby farms cannot encapsulate the reality in India, where commercial surrogacy has become not just a temporary occupation but also a survival strategy for some poor rural women, where women are systematically inducted by fertility clinics and matched with clients from India and abroad. In the case of a developing country like India, where surrogacy is fast emerging as a survival strategy, it makes little analytical sense to battle with the moralities of surrogacy. By analysing surrogacy as a new form of labour, we can grasp the proficiencies of the complex realities of women’s experience. Further, by identifying commercial surrogacy as labour, susceptible to exploitation like most other forms of labour, and by simultaneously identifying the women as critical agents, we can deconstruct the image of the victim that is unavoidably evoked whenever the bodies of third-world women are in focus.

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<sup>7</sup> Anonymous, *Cabinet approves bill to prohibit commercial surrogacy, Sushma Swaraj slams celebrities for misusing practice*, INDIAN EXPRESS, (Aug. 25, 2016), at 13.

## A COMPARATIVE STUDY WITH OTHER FORMS OF LABOUR

Sufficient literature has been published criticising the commerce of surrogacy on ethical and moral high grounds. But, the truth of the matter remains that surrogacy, like other types of medical tourism, brings significant funds into the countries that serve as providers. Most forms of medical tourism embody labour markets that are exploitative in nature for the supply side like organ donation which was first standardized by the 1994 regulation<sup>8</sup> and now by the Transplantation of Human Organs and Tissues Rules, 2014<sup>9</sup>.

Firstly, a complete ban on the donation of organs by other living persons, other than close relatives, while its illegal commercialization is highly prevalent underground goes on to show that a blanket ban on surrogacy will make it similarly susceptible. Secondly, while organ transplants from a healthy living person may be seen as an encroachment on their right to lead an unimpaired life, surrogacy merely employs the reproductive dexterity of a woman that does not

incapacitate her in the long run the way organ removal might.

In the business of surrogacy, a surrogate's complete fee is not handed over to her until the pregnancy terminates. Healthcare and living expenses may be looked after by the commissioning couple during the term, but a sizable quantum is handed over to the surrogate after surrendering the baby to the intended parents. The ultimate objective is the delivery of the baby through commodified service of the woman's reproductive capabilities in exchange for a payment. Thus, calling it baby-selling may sound morally blasphemous but is the essence of commercialized surrogacy.

In the sphere of adoption, payments to birth mothers are explicitly disallowed and hence, the activity is not viewed as commercial. However, other intermediaries in the chain of adoption may command sizeable fees, including the state. The birthmother ends up with no monetary incentive even though she is severing her parental ties while brokers, adoption agencies and even the state, which is relatively uninvolved, seeks remuneration. This argument displays how surrogacy becomes unfairly tainted as morally impermissible when the monetary surplus is rightly awarded to the most important element of the chain- the birth giver.

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<sup>8</sup> S. Shroff, *Legal and Ethical Aspects of Organ Donation and Transplantation* 25(3), INDIAN JOURNAL OF UROLOGY 348, 348-355 (2009).

<sup>9</sup> THE GAZZETE OF INDIA, Authority, Part II, § 3(i), (Mar. 27, 2014), <http://notto.nic.in/WriteReadData/Portal/images/THOA-Rules-2014.pdf>.

The parallels between commercial surrogacy and sex work in the Indian public make surrogacy a highly stigmatized labour option. Although surrogacy as a process is an ethical quagmire in almost all countries, surrogates are not usually stigmatized. In India, however, the surrogates face a high degree of stigma. The role of women as gestators has been evacuated of dignity to an extent that women are seen as mere incubators for babies. The commodification of women's bodies as purveyors of raw material in the form of eggs and men in case of sale of sperm to sperm banks is rampant in the Indian social context.

The argument put forth here is that the act in itself is not denigrating. However, when viewed under the social, philosophical and moral glasses the Indian society, the work is evidently commodified in perverse ways that lead to regulations disenfranchising women rather than enhancing their autonomy. In spite of a careful separation of contract pregnancies from prostitution, the opposition, seeking a ban, sounds very much like sex work abolitionists. That contract pregnancy was the last resort has been used as a basis for arguing against the faction that is pro-ban. Irrespective, nuanced literature in the recent past has recognized differences between voluntary migration for sex work and involuntary sex trafficking and servitude.

One can envision a wide spectrum of gendered activity being marketed and outsourced in the present social scenario, from childrearing and housekeeping to sex work and now child-bearing. Most of the traditional activities of a wife can be found in the market and the fact that her activities are not economically appreciated has been contested by equalists all over. This being the case, what are the viable arguments that formally paying a nanny a market wage is justifiable but not a surrogate? On what ethical basis should the compensation for housework movement from the compensation for reproduction claims be separated? At what point is the line drawn between acceptable marketization of particular kinds of gendered and embodied labour and others? If domestic work and sex work can be chosen by women as a form of labour recognizing that the structures of governance, which is heavily biased against women, prevent alternative choices for economic independence and advancement, then why not surrogacy?

## **COMMERCIAL SURROGACY AS AGAINST ALTRUISTIC SURROGACY**

The proponents who valorise the choice of becoming a surrogate tend to downplay the commercial nature of the arrangement. They tend to give less weight to the role of money and

remuneration in the decision to become a surrogate while highlighting the advantages to couples who cannot have children without the help of third parties. While altruism may be part of the reason for entering into surrogacy, it is an undeniable fact that without the material remuneration most women would not enter into surrogacy in India.

Giving a green light to only altruistic surrogacy might artificially depress the market rate of reimbursement for the services provided by surrogates alone while allowing everyone else, including lawyers, doctors, and surrogacy agencies, to be compensated fairly. Redefining commercial surrogacy as altruistic surrogacy in India might simply shift the distribution of payments without consequently changing the nature of the transactions that occur. It is entirely conceivable that agreements and payments could be structured to masquerade the surplus compensation in ways that are more palatable to anti-commercial-surrogacy advocates, without consequently effecting any real change to the practices. Or, it could curtail the ability of surrogates to bargain fairly for their portion, even while they are shouldering the biggest risks and doing the actual work.

Surrogacy that is altruistic in nature, allowed in certain states in the USA, costs almost just as much as commercialized

surrogacy in other states that allow it. The payment is characterized as health care stipends, living expenses, and other benefits that are not direct investments in the child. This raises the question of whether remuneration is being hidden through sleights of hands. It also questions if the cost of surrogacy would increase once widely available and under a protected legal ambit. If it does happen it will let surrogates resolve issues like inequitable payment for each pregnancy, direct payment of brokers and middlemen by commissioning parents instead of surrogates being asked to pay them as is the status quo, and unionizing for resolution of conflicts such as agency-determined rates for surrogacy. Limiting remittance to medical facilities will disallow surrogate workers from demanding for wage-loss remuneration, and even post-partum requirements.

### **SURROGACY-A PARADIGM OF EXPLOITATION?**

In this discourse, innumerable parallelisms have been made to outsourcing, factory work and globalizing motherhood. The primary problem with the perpetuated design is that it fails to capture any real benefits that contract pregnancy workers reap from engaging in this field of work. It is true that conditions and the status of surrogate women can be

improved, but they do not suffer the kind of wage exploitation that their counterparts do in spheres ranging from prostitution<sup>10</sup> to garment work. This frame is helpful in highlighting the fact that surrogates face problems as a subsection of the highly globalized economic system, that of bargaining power and autonomy. However, the fact that these women are paid highly as compared to those who work in manufacturing or in other service industries undercuts the seamless narrative of exploitation.

### **SURROGACY HOSTELS- BOON OR BANE?**

The paradigm of a surrogacy hostel conjures up visions of women in factory-like conditions producing children under perilous conditions with no labour and or social protection. It paints an image of easily replaceable, young, docile South Asian women whose ability to negotiate for improved working conditions and remuneration is undercut by their gender attributes. From societal expectations of gendered behaviour, to illiteracy, these are what supposedly prevent them from taking stands against the factory owners. This is the perception of surrogates put forth by the media<sup>11</sup>. While clinics may require surveillance to ensure a safe and healthy birth, some hostels

are overly “Dickensian”<sup>12</sup>, with no privacy, lines of cots, and round-the-clock supervision of adult women.

However, we fail to recognize that these very hostels may become a space for resistance and networking. These gendered spaces where women live together for the entire length of their pregnancies build kin ties between the surrogates, based on shared company and shared residence, often crossing borders of religion and caste. The hostel constitutes a place which generates emotional links and sisterhood among the women. The ties with other surrogates serve as resources and networks for future employment. These ties and coalitions also serve as a powerful tool against the brokers.<sup>13</sup> If brought under the paradigm of labour, unionizing for better conditions becomes easier.

In the words of a surrogate, “We get to watch TV, follow a healthy schedule, take medicines on time, learn English and computers to communicate better with the clientele. Basically, be a good worker in a good work environment and also get trained for the real world outside of our homes. Going home would

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<sup>10</sup> Suhrith Parthasarathy, *Republic of Unreason*, THE HINDU, Sept. 01, 2016, at 16.

<sup>11</sup> Julie Bindel. *Outsourcing Pregnancy: A Visit to India’s Surrogacy Clinics*, THE GUARDIAN, (April 01, 2016), <https://www.theguardian.com>.

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<sup>12</sup> **Dickensian**: *Of or reminiscent of the novels of Charles Dickens, especially in suggesting the poor social conditions or comically repulsive characters that they portray*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/Dickensian>.

<sup>13</sup> Amrita Pande, *Commercial Surrogacy in India: Manufacturing a perfect Mother-Worker*, 35(4) SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY, 970, 970-990 (2010).

mean doing housework and such exertion is automatically avoided here<sup>14</sup>.” This only goes on to show how instead of being just repressive, surrogacy hostels become an avenue for resistance.

### AN ECONOMICALLY AND SOCIALLY CONTEXTUALISED STUDY

During the 1975 Emergency, a suspension of civil liberties permitted Sanjay Gandhi, son of the former Prime Minister Indira Gandhi, to commence what can only be described as a gruesome campaign, to sterilise poor men. There were reports of police cordoning off villagers and virtually dragging men to surgery. An astonishing 6.2 million Indian men were sterilised in just a year, which was 15 times the number of people sterilised by the Nazis<sup>15</sup>. This demonstrates India’s dark history of state-sponsored population control, often with eugenic aims, targeting the poor and underprivileged. Since the 1970s, various disincentives have been provided like prevention from holding public office for those who have more than two children<sup>16</sup>. Poor communities have juvenily blamed women for

irrepressible increase in the size of the family. While on one hand a woman’s reproductive capacity has been tied negatively to social and economic justice as enshrined in the Directive Principles of State Policy<sup>17</sup>, surrogacy makes the same an important means of revenue as long as surrogate children are not a part of the surrogate birth giver’s family. Thus, these women, denigrated for having more than two progenies of her own, are lauded for using same ability to reproduce for others, acting as a far-fetched controller of population.

This study effectively proves that surrogacy, though relatively dangerous and even exploitative, is an economically rational pick. Majority of women who work in homes are not considered “lucratively productive” members of the family because occupying traditional homemaker’s roles proscribe them from waged labour. Women living in extended families may be subordinated to the husband and in-laws. They are expected to supplement the household income through home crafts and the like. Because of proportionately less contribution to the takings, women lack control over household income or decision making about its distribution. Whatever is earned is often aggregated into the income of the male, and its allocation is then decided by the head of the household, leading to the element of altruism

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<sup>14</sup> Amrita Pande, *At Least I Am Not Sleeping with Anyone: Resisting the Stigma of Commercial Surrogacy in India*, 36 (2) FEMINIST STUDIES 292, 292- 312 (2010).

<sup>15</sup> S. Biswas, *India's dark history of sterilisation*, BRITISH BROADCASTING COMPANY (BBC), (Nov. 14, 2014), <http://www.bbc.com/news/world-asia-india-30040790>.

<sup>16</sup> Javed & Ors v. State of Haryana & Ors., AIR 2003 S.C. 3057.

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<sup>17</sup> INDIA CONST. art. 38.

being attached to the contribution of women. There are well-documented compositions that showcase how women contributing to wages or property in a family receive better opportunities in household decision making and power than women who are entirely dependent on their family or spouses<sup>18</sup>. Work that has a market-determined value helps in elevating women's statuses in their households by giving them access to money that can be controlled and allocated by them. Secondly, women who are able to acquire property of their own exercise greater power in the household<sup>19</sup>. Finally, women who earn wages or have property in their own right have greater decision-making power also over the lives of their children. In the business of surrogacy, the field is populated by women whose access to meaningful and well-compensated work is severely limited or non-existent. In such disagreeable conditions, surrogacy is suggestive of empowerment that is economic and social, paying the surrogates an amount, that would have taken them 5 years to

earn through other means of labour, in just 9 short months.<sup>20</sup>

## JUDICIAL VIEW OF SURROGACY

The lacunae in Indian legislation are addressed directly by the judiciary through the mechanism of public interest litigation. But in the domain of surrogacy, even the courts have declined to enter into the fray by opining on the validity of surrogacy agreements. In 2007, a public interest litigation filed by Namita Roy, a cognizant Delhi resident, refused to be adjudicated by the Delhi High Court, and was subsequently asked to raise these issues in relevant branches of the Executive. A decade later, the business continues to operate in a regulatory no man's land.

However, the following cases, that are direct precursors, show the judiciary's general stand in the matter at hand.

*Baby Manji Yamada v. Union of India and Another*<sup>21</sup> was one of the first decisions given by the Apex Court of India with regard to the existing surrogacy industry. Baby Manji was born on 25<sup>th</sup> of July, 2008, through the process

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<sup>18</sup> Bipasha Baruah, WOMEN AND PROPERTY IN URBAN INDIA 6-11 (2011).

<sup>19</sup> Jayoti Gupta, *Property Ownership of Women as Protection for Domestic Violence: The West Bengal Experience*, INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, (2006), <https://www.icrw.org/wp-content/uploads/2016/10/Property-Ownership-and-Inheritance-Rights-of-Women-for-Social-Protection-The-South-Asia-Experience.pdf>.

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<sup>20</sup> S. Singh, *Business of renting out wombs to end soon as Indian Parliament gets ready to ban commercial surrogacy*, MERINEWS, (Jan. 20, 2017), <http://www.merineews.com/article/business-of-renting-out-wombs-to-end-soon-as-indian-parliament-gets-ready-to-ban-commercial-surrogacy/15922422.shtml>.

<sup>21</sup> *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84.

of surrogacy to a Pritiben Mehta in Anand, Gujarat, where this practice was pioneered. The baby's intended parents, Dr. Ikufumi and Yuki Yamada, travelled to India in 2007 to have their baby through a surrogate who was then fertilised by Ikufumi's sperm and an anonymous Indian egg donor. Upon the divorce of the Yamadas, the father wanted to raise the child but the mother refused to. Neither did the surrogacy contract cover a situation such as this nor did the existing laws clarify the matter leading to a long drawn legal battle for determination of citizenship of Baby Manji due to impossibility of determining the same under prevalent laws.<sup>22</sup> The baby was finally handed over to the grandmother on filing of a writ petition. Additionally, it was momentarily declared by Supreme Court in this case that single men and women as well as homosexuals may have a baby through surrogacy, thus upholding the Right to Equality acknowledged by the Indian Constitution<sup>23</sup>.

Surrogacy arrangements increase the chances of having more than one baby at a time. In a 2012 case that reeks of insensitivity, an Australian couple, having abandoned a healthy baby boy while taking the twin baby girl back home, which "completed their family", was

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<sup>22</sup> Kari Points, *Commercial Surrogacy and Fertility Tourism in India*, CASE STUDIES IN ETHICS (2009), <https://web.duke.edu/kenanethics/casestudies/babymanji.pdf>.

<sup>23</sup> INDIA CONST. art. 14.

accused to have not adopted available methods of foetal reduction.<sup>24</sup> This assured the inclusion of the clause forbidding abandonment of any children, irrespective of their number or condition of their mental and physical faculties, in the proposed Act.

Cases like *Jan Balaz v. Anand Municipality & Others*<sup>25</sup> focus their light on international legal conundrums that surrogacy brings with it. A German heterosexual couple who bore twin boys in Anand, Gujarat had to undergo a 2 year long legal melee before they could take their toddlers home through inter-country adoption process. It was because of Germany disaffirmation of parenthood through surrogacy, coupled with India's stern refusal of visas to babies born via surrogacy, that lead to the inclusion of a proviso requiring compulsory declaration of the commissioning parents' country accepting the baby.

## **CRITICAL APPRAISAL OF SURROGACY BILL, 2016**

The rate of advancement of surrogacy providers in India has far outpaced its

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<sup>24</sup> S. Hawley & S. Smith & M. McKinnon, *India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings*, ABC NEWS, (Apr. 13, 2015), <http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>.

<sup>25</sup> *Jan Balaz v. Anand Municipality & Ors*, AIR 2010 Guj 21.

regulation. The surrogacy agreement based on meeting of the minds of both the parties towards a particular outcome and free consent has been held to be valid and, hence, is interpreted in light of the provisions of The Indian Contract Act, 1872. What makes a surrogacy agreement distinctive from other agreements is that it directly deals with the exchange of a human child for consideration. Surrogacy is under the ambit of a grey area, where the market by itself does not work, like telecommunications, and needs a certain measure of monopolization in order to succeed by virtue of a separate legislation. We can see how surrogacy is similar because there are too many collateral costs that remain unaccounted for in the Indian Contract Act. It seems that the Indian Contract Act is not able to cover or be of any assistance regarding the multitudinous issues, questions and problems that the issue of surrogacy puts forth because the Indian Contract Act is used for economic regulation.<sup>26</sup> This goes on to show the dire need for a separate legislation to regulate the practice of surrogacy.

The Surrogacy Bill, 2016, the introduction of which was much needed, comes a year after the United Nations Committee on the Rights termed commercial surrogacy as sale

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<sup>26</sup> S. Mishra, *Commercial Surrogacy - The Need for Regulation*, LEGAL SERVICES INDIA, (June 22, 2012), [http://www.legalservicesindia.com/article/print.php?art\\_id=1188](http://www.legalservicesindia.com/article/print.php?art_id=1188).

of babies if not regulated<sup>27</sup>. The structure, however, has been viewed with a critical taste. While the globe is reaching the epitome of westernisation with glorification of its idea of enforced “liberty”, following a pattern of the western world, much like India has done in the past, the Bill aims to recognize only altruistic surrogacy, criminalising commercial surrogacy with a jail term up to 10 years.

For a start, the ban violates women’s fundamental right to livelihood through surrogacy, as guaranteed under Article 21 of the constitution. Acknowledging surrogacy as work is one means of achieving some measure of protection for surrogates.

Due to lack of marketable skills, this ban may coerce women to turn to more exploitative forms of embodied labour, like prostitution, for a meagre livelihood. It disregards the formation of underground/black markets that would then arise inevitably; even if those markets are smaller than the legal one. The prospect of the industry being dragged underground, making women more vulnerable to violence and economic exploitation, is horrifying. Bans simply make the work more dangerous for the worker.

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<sup>27</sup> S. Chakravorty, *Which countries allow commercial surrogacy? 7 things to know*, INDIA TODAY, (Jan. 19, 2017), <http://indiatoday.intoday.in/story/surrogacy-india-ban-altruistic-surrogacy-commercial-surrogacy/1/861017.html>.

The reframing of surrogacy also makes sense when one takes into account that, not every attempt at this form of reproduction results in a child. Over half the women who undertake surrogacy do not produce a child because the success rate is 50%. However, surrogates take time out of their daily lives to receive hormone treatments along with in-vitro fertilisation and undergo various medical procedures for which they must be compensated. These costs ought not to be internalized by the surrogate. Emphasizing on the child and the outcome, will lead to these costs being overlooked.

The proposed legislation permits a woman to be a surrogate only once in her lifetime. This makes unionizing more challenging. Since the career span of the woman becomes limited, collective bargaining is of little value to such short-term, individualized workers.

There are wide variations in the same clinic, between how much the surrogates are getting paid, for doing exactly the same labour. Class, race, and discrimination on the basis of nationality comes into play which makes no economic sense but reinforces archaic societal prejudices that plague the commercial fibre too. Perks received by surrogates also differ, including how much monthly support they

receive, their accommodations, and the quality of their care may be different.

The Bill consents married couples with mentally or physically disabled children to go for surrogacy. This may, conceivably, result in the neglect of the first child who, in actuality, requires more attention.<sup>28</sup> The Bill is also silent about the issue of a breach of terms and conditions of surrogacy by surrogate or intending couple during the surrogacy process, or afterwards.<sup>29</sup>

This Bill falters heavily in championing the interest of the surrogate child. It neither addresses the matter of breast feeding of the child, nor whether the surrogate child is entitled to any information regarding his or her parentage. It fails to envisage a screening process of the couples before going ahead with surrogacy. The bill prescribes insurance for the surrogate mother whereas it is silent on the same provision for the child. The Bill has neglected situations where the couple may suffer from sickness, disability or may die during the process of surrogacy, leaving the child parentless. It does not consider situations where

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<sup>28</sup> DJS Chahal, *Critical Analysis of the Surrogacy (Regulation) Bill-2016*, OLIVE GREENS, (Sept. 18, 2016), <http://www.olivegreens.co.in/blog/is-ban-on-commercial-surrogacy-justified>.

<sup>29</sup> Dr. A. Pillai, *The Surrogacy (Regulation) Bill, 2016: A Critical Appraisal*, LIVE LAW, (Jan. 22, 2017), <http://www.livelaw.in/surrogacy-regulation-bill-2016-critical-appraisal/>.

the couple may be unable to take immediate custody of the child. In more ways than one, the bill turns a deaf ear to crucial child concerns. In the presently pending enactment, there is a crying need to reevaluate the Bill and safeguard as well as endorse the child's interests. Issuing a blanket ban in a sensitive matter such as this, lowers chances of successful implementation<sup>30</sup>.

The issue of maternity leave has also been disregarded in the Bill. However, the judiciary in this case, has actively taken the responsibility to fill the vacuum in this realm. Starting with the judgment of the Kerala High Court<sup>31</sup>, the High Courts of Delhi<sup>32</sup>, Bombay<sup>33</sup> and most recently Chhattisgarh,<sup>34</sup> have, progressively, taken similar stances granting maternity leave to women who became mothers, through contracting with another woman to have her baby. However, the Bill is conveniently silent about maternity leave for surrogate mothers who should be the target receivers of this leeway.

A further provision of the Bill allows surrogacy only to legally-married

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<sup>30</sup> A. Rai, *A Pregnant Pause and Child Rights*, LIVE LAW, (Jan. 13, 2017), <http://www.livelaw.in/pregnant-pause-child-rights/>.

<sup>31</sup> P.Geetha v. The Kerala Livestock Development, 2015 (1) KHC 165.

<sup>32</sup> Rama Pandey v. Union of India & Ors, 221(2015) DLT756.

<sup>33</sup> Dr. Mrs. Hema Vijay Menon v. State of Maharashtra, AIR 2015 Bom 231.

<sup>34</sup> Smt. Sadhana Agrawal & Ors. v. Indore Development Authority, AIR 1986 MP 88.

infertile Indian couples, who have been married for at least five years. This is an antiquated provision that is reflective of the patriarchal Indian mindset that a woman, if fertile, should bear a child herself rather than resort to medical marvels that are otherwise available. This, ostensibly, violates the 'right to reproductive autonomy' as laid down in *B.K. Parthasarathi v. Government of Andhra Pradesh*<sup>35</sup>.

Irrespective of the portrayal of the ideal Indian family being tight-knit, considering the social mindset and norms in India, surrogacy within the family is next to impossible, unlike in the West. Biological parents, often, give up their third or fourth child for adoption to a relative within the extended family. But, surrogacy within the family is still unheard of, making finding of a surrogate a herculean task for intending parents. The patriarchal nature of familial relations in India will coerce subjugated and oppressed women in marital homes to bear a child for their relative. Contrastingly, she may not be allowed the space to exercise this agency for her side of the family if she wants to, due to disagreement with her in-laws, may even be ostracised for exercising it. It is natural for her, in the absence of right counselling, to form an intimate bond being known and reachable to the

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<sup>35</sup> B.K. Parthasarathi v. Government of A.P. & Ors, AIR 2000 AP 156.

child. While, on the other hand, adequate privacy demands and complete non-disclosure is unattainable. In a recently conducted survey, only two out of the total 80 respondents said that they would support surrogacy in the family.<sup>36</sup>

The bill mandates that a certificate of eligibility, proving the age of the couple and certifying that they have been married and are, either childless, or have a child, who suffers from a life-threatening disorder or is specially abled, mentally or physically, must be issued to them by appropriate authority. However, further in the bill, it is mentioned that further regulations can be made to provide for the fulfilment of any other condition under which the eligibility certificate for intending couples may be issued. Leaving the delegation of the same to such an authority may lead to increased corruption and red-tapism.

It is retrograde to keep single men and women, LGBTs, divorced and judicially separated couples, as well as live-in couples out of the gamut of the draft Bill. While the more recent Juvenile Justice (Care and Protection of Children) Act, 2015 together with the half-a-century old Hindu Adoptions and Maintenance

Act warrants conditional adoption for divorced and single persons, it is highly imprudent to permit single people to adopt while constraining them from opting for surrogacy. By virtue of the fact that being LGBT or being in a live-in relationship is not illegal *per se*, impeding their right to choice vis-à-vis surrogacy is an unmitigated violation of their right to equality guaranteed under Article 14<sup>37</sup>.

Another aspect of the Bill is that to enter into a surrogacy arrangement, it is a prerequisite for the commissioning couple to not have any mentally and physically fit biological or adopted children. This provision appears as an imposition by a police state on the rights of a couple to procreate through the means of their choice.

Specification in the Bill seems to prohibit women careerists, who find pregnancy an impediment, from opting for surrogacy. Meanwhile, even with NRIs being at par with resident Indians in terms of priority for adoption under the Central Adoption Resource Authority, whether these provisions in the draft Bill will qualify the twin test of reasonableness under

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<sup>36</sup> Amrita Mukherjee, *Why altruistic surrogacy is impossible in India*, ASIAN TIMES, (Nov. 4, 2016), <http://www.atimes.com/altruistic-surrogacy-impossible-india/>.

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<sup>37</sup> A. Malhotra, *Draft surrogacy bill violates fundamental right of people to choose modes of parenthood*, INDIAN EXPRESS, Nov. 4, 2016, at 17.

Article 14 of the constitution is viewed with much scepticism.<sup>38</sup>

Even the most educated and socially uplifted families in India have had a dark history of promoting social crimes like sex determination. In a country where infertility is a social stigma, what is to say that surrogates won't be impregnated in India and shifted to permissible jurisdictions? More unsettling is the fact there the Bill excludes the definition of a "close relative". What is to stop people from generating relatives, giving impetus to the rise of another underground industry of falsified documentation showing familial relations?

### CONCLUSION

In a scheme of things where our law enforcement agencies are seen in disrepute for their inability to check underground practices of organ donation and sex determination, are they proficient enough and well-equipped to implement this law effectively? The hypocrisy of the situation, where the rampant outsourcing that we have been pinning on the Global North is now being practised by our indigenous agencies in countries like Nepal and Cambodia, is discernible. In the future, will we not be held

accountable for facilitating the genesis of 'surrogacy havens' on foreign land<sup>39</sup>?

Calls for a ban would foreclose an avenue for development. An active interest by the state in the business of surrogacy may prevent the discourse of "dirty work" being used to extract partisan contracts. Bargaining in the shadow of the law does prevent some of the abuses that may result from no regulation at all, even if the parties never avail themselves of the formal legal system.

This Article has argued above that Indian women have been choosing surrogacy even if it is an exploitative form of labour and that they ought to be allowed to do so. In a society where women are engaging in a number of embodied exploitative industries, such as hazardous manual labour, wearisome and long hours of factory work, and sex work, and are being paid very insubstantially for it, it does not make sense to foreclose one industry that pays massively better only because of its ethical or moral ambiguity. The ban approach is overly patronizing, infantilizing to women, and deprives them of the agency they might exercise in deciding to enter into such dangerous work.

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<sup>38</sup> P.C. George, *The Government Must Rethink the Surrogacy Bill*, THE WIRE, (Sept. 8, 2016), <https://thewire.in/64656/why-the-government-needs-to-rethink-the-surrogacy-bill/>.

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<sup>39</sup> N. Bhowmik, *After Nepal, Indian surrogacy clinics move to Cambodia*, AL-JAZEERA, (June 28, 2016), <http://www.aljazeera.com/indepth/features/2016/06/nepal-indian-surrogacy-clinics-move-cambodia-160614112517994.html>.

# CYBERSECURITY- ITS EFFECTS ON NATIONAL SECURITY AND INTERNATIONAL RELATIONS

*B. Venkatraman & Karun Gupta\**

## INTRODUCTION

### Development of Cyber Policy

The concept of Information and Communication Technologies (ICTs) and cyber laws all over the world is relatively new in comparison to the rest of the laws that are legislated. With 1990s seeing its infancy with only a handful of people being able to access the internet compared to over 40% of the world population as on 2014, one can see how ICTs have grown rapidly on a daily basis over a short span of time.

As this aforementioned concept is relatively new one, legislating laws in order to regulate activity in this vast borderless space is a challenge since traditional legal systems and laws are not modern enough to keep pace with this rapidly progressing mode of communication. The unchecked incidences of cyber-crime has led to hindrance to the daily activities of people, both commercial and personal, as well as pose a threat to the securities of nations at national or international

level. Taking the example of India- a nation heavily dependent on this technology, a notification issued by the Ministry of Communications and Information Technology (Department of Electronics and Information Technology) in one of its paragraphs states that: *“Information Technology is one of the critical sectors that rides on and resides in cyberspace. It has emerged as one of the most significant growth catalysts for the Indian economy. In addition to fuelling India’s economy this sector is also positively influencing the lives of its people through direct and indirect contribution to the various socio-economic parameters such as employment, standard of living and diversity among others. The sector has played a significant role in transforming India’s image to that of a global player in providing world class technology solutions and IT business services. The government has been a key driver for increased adoption of IT-based products and IT enabled services in Public services (government to citizen services, citizen identification, and public distribution systems), Healthcare*

*(telemedicine, remote consultation, and mobile clinics), Education (e-learning, virtual classrooms, etc) and Financial services (mobile banking/payment gateways), etc. Such initiatives have enabled increased IT adoption the country through sectoral reforms and National programmes which have led to creation of large scale IT infrastructure with corporate/private participation”.*<sup>1</sup>

Up until the last 10 years Cyber policies remained more or less in the background of policy making. Even before 9/11, a number of exercises identified apparent vulnerabilities in the computer networks of the U.S. military and energy sectors. After 9/11, the security and terrorism discourse soon featured cyber-terrorism prominently, promoted by interested actors from the political, business, and security circles.<sup>2</sup> This brought cyber policies into the limelight as it then became one of the most key issues in politics. The global, often non-transparent interconnections afforded by cyberspace have challenged the traditional understanding of leverage and influence, international relations and power politics, national security, borders, and boundaries — as

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<sup>1</sup>Notification on NATIONAL CYBER SECURITY POLICY-2013(NCSP-2013),File No. 2(35)/2011-CERT-In, [http://meity.gov.in/sites/upload\\_files/dit/files/National%20Cyber%20Security%20Policy%20\(1\).pdf](http://meity.gov.in/sites/upload_files/dit/files/National%20Cyber%20Security%20Policy%20(1).pdf).

<sup>2</sup>GABRIEL WEIMANN, CYBER-TERRORISM-HOW REAL IS THE THREAT?

well as a host of other concepts and their corresponding realities.<sup>3</sup>

Owing to all the powers and responsibilities that are offered by ICTs and the cyberspace, it leads to a speculation on the vast scope that is there for policy making regarding this field. This gets fuelled by all the activities that encompass the field of international politics i.e. legislation, negotiation between parties with regard to rights, responsibilities and procedures, creates new opportunities for states to engage with each other more often, communicate their needs and concerns and also work together. This on the larger scale brings about a change in the nature and needs of a state as a caretaker of its people.

For example, the need of a state and its population has been talked about in Adolf Hitler's *Mein Kampf*. It says that for a state to grow as a world power it will need to bring more land within its control which would allow it to produce and export more. However, with the advancement of technology especially the ICTs, it resulted in capital becoming more and more mobile thus making it possible for production and transactions to be done abroad. As a consequence this went on to increase the importance of knowledge, technology and capital and reduce the importance of land.

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<sup>3</sup>NAZLI CHOUCRI, CYBERPOLITICS IN INTERNATIONAL RELATIONS 3 (2012).

The state no longer commands resources as it did in mercantilist yesteryear; rather, it negotiates with foreign and domestic capital and labour to lure them into its own economic sphere and stimulate its growth. The virtual state also locates production overseas so that it can concentrate home efforts on high-level services: research and development, product design, financing, marketing, and transport.<sup>4</sup>

### **CYBER-POLICIES IN ASIA**

As aforementioned, it is the internal policy of the state that dictates its relations with other states and the international community at large. Keeping this in mind some of the policies of states with regard to ICTs, their use and to prevent misuse are examined with emphasises on how these states utilise the technology.

#### **China**

A recent giant in the ICT sector China since 1997 has prioritised ICT development which has made the state one of the largest players in the telecommunications market. Its IT industry has been an engine of economic growth - growing two to three times faster than GDP over the past 10 years<sup>5</sup>. In order to

simplify, China has been referred to as a homogenous entity.

In order to fight criminals and counter terrorism the government drafted several laws in the year 2015. These laws mostly involve security checks over systems and data storage within the country. One such example is the example of the National Security Law which was passed on July 1<sup>st</sup>, 2015. As per Article 1 of this statute, the statute itself had been enacted in accordance with the constitution so as to *maintain national security, to defend the people's democratic dictatorship and the socialist system with Chinese characteristics, to defend the fundamental interests of the people, to ensure the smooth implementation of the reform and opening up and establishment of socialist modernization and to realize the great revival of the Chinese nationality*. The rules for combating defaulters are framed in such a way that the body tasked with this responsibility is able to track them even before the crimes are committed. For example section 3 of the aforementioned statute comprising of articles 55 to 58 allow governing bodies even at the county level to investigate and report to the people's government of any threat to national security that might occur. Section 4 grants enormous powers to the national security review boards to scrutinise foreign commercial investment, special items and technologies, internet

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<sup>4</sup>Richard Rosecrance, "A New Kind of Nation" in *The Rise of the Virtual State* 5 (Barnes & Noble, 1999).

<sup>5</sup> CHRISTINE ZHEN-WEI QIANG, CHINA'S INFORMATION REVOLUTION: MANAGING THE ECONOMIC AND SOCIAL TRANSFORMATION 35 (2007).

information and technology that might pose a threat to the national security of the nation. The act grants enormous powers to the authorities by leaving most of the procedure undefined and largely leaving decision making to the authorities and inadequately defining the remedies.

However, Chinese officials say the measures are necessary for national security, allowing them to verify that critical equipment isn't vulnerable to hacking and to help them track down criminals and fight terrorism. But the rules have been criticized by foreign governments and trade groups as onerous and a possible way to discriminate against non-Chinese vendors.<sup>6</sup>

## **Pakistan**

Despite strides taken in the cyberspace world and the advantages it offers Pakistan still lags behind in the field of cybersecurity. Due to various lapses in procedural and legal mechanisms to prevent cyber-terrorists, cyber terrorism has become rampant in the nation. Hacktivism is unchecked in Pakistan, and in present time period there are number of Pakistan's government official sites that are being defaced by hackers and the government is totally helpless in countering them, because of not having advanced technology to prevent

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<sup>6</sup>Eva Dou, *Untangling China's Cyber security laws*, WALL STREET JOURNAL, (Jun 03, 2016), <http://blogs.wsj.com/chinarealtime/2016/06/03/untangling-chinas-cybersecurity-laws/>.

these cyber-attacks<sup>7</sup>. However, in April 2016 the nation saw the passing of the Prevention of Electronic Crimes Bill in order to combat threats to national security. This act involves the designation of a Federal Investigation Agency that shall have powers defined in the act itself for the procedure to conduct investigation and present it to the authorities. The bill in chapter II grants powers to the specialised investigation agency officers regarding search and seizure of information stored in servers which if the officer feels is required for the purpose of a criminal investigation or that which may have been lost, modified or rendered inaccessible later on and may issue a notice to the holder of such data to protect integrity of such data. The bill has been criticized by the IT industry and the civil society for 'curbing human rights and giving overreaching powers to law enforcement agencies'.

According to the bill, hacking as well as interference with data and information systems, specialized cyber related electronic forgery and electronic fraud, cyber terrorism (electronic or cyber-attack on the critical information infrastructure), unauthorized interception conducted by civilians, use of malicious code viruses, glorification of an offence, hate speech, identity theft etc. have been declared punishable

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<sup>7</sup>SADIA RASOOL, *CYBER SECURITY THREAT IN PAKISTAN: CAUSES CHALLENGES AND WAY FORWARD* 4 (2015).

offences. According to clause 10 about cyber terrorism, anyone advancing religious, ethnic or sectarian discord or involved in creating a sense of fear, panic or insecurity in the government or the public shall be punished with imprisonment of either description for a term which may extend to fourteen years or with fine up to fifty million rupees or with both<sup>8</sup>. The bill also authorises the government to cooperate with a foreign state entity with regards to investigations regarding offences related to ICTs and collection of electronic evidence.

### **Afghanistan**

The development of ICTs in Afghanistan was able to start only after the establishment of the interim government in 2001. However, considerable progress has been made between the years 2002 -2012, starting from an almost total absence of internet in 2002 in the country to almost 44 internet service providers with an internet subscription population of nearly one million and Mobile telephone penetration in the country surpassing 80 per cent of the population<sup>9</sup>. In 2009 The Ministry of Communications and Information Technology (MCIT) established the first Cyber Emergency

Response Team which was officially named as AFCERT. Its duty was to fight against cyber threats and crimes and provide awareness and solutions on cyber security to the government and private sector. In its first two years of operation, the team reported an increase in cyber and electronic related crimes to its parental department in the country. Based on a report it had prepared, the MCIT and the ICT council established a committee whose purpose was to fight the aforementioned crimes. It is expected that by 2020 MCIT will become an independent entity within the government so as to prevent unwarranted influence on it from other entities. Analogous to the international cooperation policies in Pakistan the MCIT also has the power to aid other states in the tracking down of cyber criminals. However it does not have as much authority as the former with respect to sharing information with the international community.

### **India**

Despite having IT laws enacted way back in 2000. This IT act of India, amended subsequently in 2008, barely had a few sections which classified offences into the civil offences and penal offences only. This however was not enough for the private companies which had to resort to self-regulation and entering into contracts with cyber-security providers. Cyber-

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<sup>8</sup> Zahid Chaudhary, *NA approves cybercrime bill*, PAKISTAN OBSERVER, (Apr. 14, 2016), <http://pakobserver.net/na-approves-cybercrime-bill/>.

<sup>9</sup>DRAFT NATIONAL ICT POLICY (AFGHANISTAN), <http://mcit.gov.af/Content/files/Draft%ICT%20Policy%20Document.pdf>.

security in India was not developed until the aftermath of 2009 which can be attributed to the infamous cyber-espionage operation brought to light by the Information Warfare monitor named “GhostNet”. It emerged that computer systems belonging to ministries, embassies and other government offices of India, among others, were infiltrated and sensitive documents were exfiltrated<sup>10</sup>. No substantial changes in the IT act have occurred. The IT Act itself has been riddled with a controversy, specially section 66A which aimed at punishing those who electronically posted “objectionable” content. This objectionable word was never defined thus turning into something which was always abused by the authorities giving them autocratic powers, not unlike China, until it was repealed a year ago.

When it comes to cyber-attacks, India unlike all the above described countries does not have a body that is dedicated to combating these attacks. Seeing this as a problem, the National Cyber Coordination Centre was created under the directions of the National Cyber Security Policy 2013. This centre is supposed to work by scanning information metadata and acts as a coordinating body for other intelligence agencies like IB, RAW, CBI.

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<sup>10</sup>SRIJITH K NAIR, THE CASE FOR AN INDIA-US PARTNERSHIP IN CYBER-SECURITY.

## **Democratic People’s Republic of Korea**

One of the most significant actors in the field of ICTs and cyber-securities is North Korea. Their activity can be attributed to both its military and intelligence organisations, having gained the abilities to conduct cyber operations testimony to which is the 2014 attack on Sony pictures. DRPK cyber strategies and operations are managed by the Reconnaissance General Bureau and the General Staff Department of the Korean People’s Army. It is difficult to pinpoint exactly how advanced North Korea’s technical capabilities are given the paucity of available open source analysis. Certainly, they have evolved beyond rudimentary DDoS attacks against websites they have often resorted to in the past decade, into more targeted, complex, and well-organized operations involving several stages of exploitation of a target system or network. They are capable of social engineering, extended advanced persistent threat campaigns, and employment of less sophisticated but sufficiently effective malware such as the Jokra wiper tool observed on March 20, 2013. South Korean media reports that North Korea has started to target smartphones as well. Contrary to popular assumptions, North Korea maintains a fairly competent computer technology base including the Korea Computing Center (KCC) and the Pyongyang Informatics Center (PIC) as

well as several universities such as Kim Chaek University of Technology and Kim Il Sung University's School of Computer Science. They allegedly have additional military-related institutions to specifically train individuals for cyber operations.<sup>11</sup>

### **Republic of Korea**

Ever since ICTs came into mass usage in South Korea the nation has been subject to many cyber threats and attacks from North Korea thus most cyber security measures that were taken up were a reaction to either a threat that came from North Korea or from the fear of an internal governmental department. South Korea established two main agencies to unify its cyber-security efforts: the National Cyber Security Center (NCSC) led by the National Intelligence Service (NIS), and the National Cyber Command (NCC) led by the South Korean military. The South Korean military and NIS played key roles in supporting authoritarian regimes in South Korea's past. Consequently, South Koreans are worried about the concentration of authority in the NCSC and NCC. Moreover, a few agents in the NIS and NCC have been suspected and accused of engaging in intervention in domestic politics

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<sup>11</sup>JENNY JUN, WHAT DO WE KNOW ABOUT PAST NORTH KOREAN CYBER ATTACKS AND THEIR CAPABILITIES?

during the last South Korean presidential race in 2012.<sup>12</sup>

Thus, this combination of fear and pressure is increasing the distance between the government and various civil societies in that nation which later goes on to slow down the progress which the nation is capable of making in the field of cyber-security which can not only make it easier to trace and prevent the hacks that are happening on their society but also can go on to take measures wherein the government may be able to increase the transparency thus allowing their general public to trust them more.

### **CYBER TECHNOLOGY VIS A VIS NATIONAL SECURITY**

As the economy of the world becomes more and more dependent on the use of the internet space for purposes such as banking, online transactions, storage of information both private and governmental a certain risk is created at the same time which threatens this "cyber" way of life. Problems such as cyber-terrorism, hacktivism (Anonymous) and governmental cyber-espionage operations (Stuxnet) have increased over this decade owing to this very dependence on cyber technologies. Naturally, states would react by taking up

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<sup>12</sup> *Cyber Security Spotlight: South Korea*, JACKSON SCHOOL OF INTERNATIONAL STUDIES, (July 23, 2016), <https://jsis.washington.edu/news/cybersecurity-spotlight-south-korea/>.

various measures that increase security in this sphere. In order to go about this a state naturally would first and foremost consider in which sphere of the cyber-world the stakes are the highest. Once this is found it will have to conduct an analysis of the nature of this sphere by finding out from where and whom these threats lie, how that particular entity could cause damage to that sector, etc. On the discovery of such information it will have to see where all of these threats call for the formation of a specialised intelligence agency or whether the general intelligence agency is capable enough to handle this security. Once these plans are in place implementation becomes a whole new task for the nation. To achieve this, ideally a state then forms public private partnerships with corporations that specialise in such services; they may also achieve this by spending more on Research and Development (R&D) in technology that aide in bolstering cyber-security. All of this, which has to be done keeping in mind the basic fundamental values a nation stands for be it the safety of people(at the cost of liberty itself) or the liberty of the people or both but the goal of the state remains the same in the end i.e. the safety of the people.

Before coming to the various needs and intricacies of the current cyber-security policies and how it is linked to both national security and international relations a question comes up

as to how could a completely new sphere in laws and policies develop in such a short span of time? The answer to that is the fact that the usage of a resource and the evolution of the laws that regulate its use go hand in hand. For example when the laws governing air rights only became substantial when the world realised its true potential as a public resource and how vital it is for the economy. Similarly, as the usage of the cyberspace grew from catering to the needs of just a few elite people and entities the need for that hour was just to prevent any kind of injury that could be caused to these people by the misuse of this resource. But as the internet and all the benefits that came along with it grew and also went on to cater to the needs of the common man it became imperative for the state to take measures that protect this cyber-dependant society as a whole and not merely protect the few individuals. Taking an example, the Computer Fraud and Abuse Act 1986 which in its infancy merely aimed at punishing hackers was something which was deemed suitable to that era but certainly would not have been enough after 2003 due to which enforcement bodies such as the National Cyber Security Division of the Department of Homeland Security which were dedicated to prevent the misuse of this cyberspace which the common man became reliant on.

Keeping in mind what was said earlier, this change in the role which this cyberspace plays and how the policies regulating its usage have also changed it becomes imperative for a state whose infrastructural development is heavily subjected to the use of ICTs to also make that transition from a method of fragmented policy making to a policy making on a more extensive level i.e. the method of restricting laws and usage related to the cyberspace merely at a military level is a thing of the past. Therefore in order to develop as a whole the state will have to make use of the economic advantages the ICTs have to offer, this is because most of the cyberspace is owned and operated by the private sector and time and again it has been shown that it is this private sector that improves the standard of living of the people thus it means that the states will have to make policies that favour these businesses, civil societies, the Internet technical communities, etc which goes on to strengthen the economy. Now, as the economy of this nation grows owing to the use of the cyberspace this means that there would also be a rise of malicious agencies like hackers, online frauds, cyber-terrorists, other hostile states which seek to jeopardise the development of that state and its people for its own purposes by targeting its infrastructure. This calls for the state to now make use of the law enforcement and military

intelligence aspects which the cyberspace has the potential to provide which means the state will have to allocate a significantly large portion of its budget to increasing its cyber-security. This however is a perfectionistic assumption, it is so because most states are reluctant to implement measures that increase their national security at the cyber level because:

- **Complacency** – It is only seeing the recent mass attacks by various entities that states have decided to work on their cyber-security. Following the rise of the internet and post 9/11 attacks, despite knowing that the cyberspace is one strategic front which also needs to be defended just like the airspace and territorial waters states still fail to recognise the importance or take up half measures either by enacting vague cyber laws or delegating powers of enforcement to a body without analysing its consequences on the body itself and the people. It is only a mass cyber-attack which usually serves as a wakeup call for nations to finally do something about their cyber-security. *“South Korea on Monday outlined a nationwide cyber security strategy following a series of recent online attacks on state-run and corporate websites, including net offensives allegedly launched by North Korea. The country’s move comes as the latest incidents of cyber-attacks and online*

*data theft around the world pose greater threats to both the private and the public spheres, prompting global state actors, including the United States, to devise a new government-led strategy to beef up their net security.*"<sup>13</sup> Clearly it can be seen here that the move to increase cyber-security was the result of an attack done and not the result of preparedness by the state.

- **Volatility-** Volatility can be in the form of instability which is in the state itself i.e. due to war, unrest, etc. when this happens the question of cyber-preparedness becomes a moot point. But in other cases this volatility is something that exists in the government especially in one of a multi-party democracy. Seeing the case of India, which is an apt example of a volatile nation with a volatile government, the fact that there is a change every 5 years means that there will be governments which are more liberal in nature and governments which are more pro security. This hinders the creation of a policy which creates definite set of cyber-security norms and rules with political power plays being the reason for the formation of a hasty policy and not the benefit of the people. A state with a volatile

government, in order to put into effect a cyber-defence which is strong enough to keep up with the current hacking trend must delegate to a body consisting of people with specialised knowledge in the subject in order to propose an effective defence policy and judicial officers so that these policies are not contravening to the constitution of the nation.

- **Effectiveness Gap** –One of the most disturbing trends seen in nearly every cyber-security defence system is the gap between the defences and the attacks. *“The modern cyber-security architecture of secured networks, firewall protection and anti-virus on endpoints does not seem to be holding up well against cyber-attacks consisting of protocol tunnelling, spear phishing and zero day attacks on endpoints and servers alike. Infact, given the complexity of modern devices, exploding size of modern IT enterprises, interconnections between vendors, partners and customers even maintaining the defence of 10 years ago is a surprisingly daunting task for professionals.”*<sup>14</sup> This leads to a conclusion that the cyberspace is an area that is evolving at a far

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<sup>13</sup> S. Korea charts out national cyber security strategy, ANTARA NEWS, (July 24, 2016), <http://www.antaranews.com/en/news/74600/s-korea-charts-out-national-cyber-security-strategy>.

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<sup>14</sup> ABDUL ASLAM, CHRIS K. WILLIAMS, SCOTT E. DONALDSON & STANLEY G. SIEGEL, ENTERPRISE CYBER-SECURITY: HOW TO BUILD A SUCCESSFUL CYBER-DEFENCE PROGRAM 21-22 (Apress 2015).

more rapid pace than other spheres which means that the state defending its cyberspace cannot simply enact a defence and security policy and sit back. In order to be able to withstand the countless attacks that happen the state will have to keep checking and updating its security defence systems on a regular basis.

A caveat to all the states seeking to protect its cyber-defences is that the laws, rules, and procedures it will mandate in order to protect the same must be in accordance with the constitution of that nation. Nations such as India only recently amended their laws to promote free speech in the case of *Shreya Singhal v. Union Of India*<sup>15</sup>. Although the case was relating to posting offensive content on electronic media since the particular statute was against the principles of the Constitution of India it had to be amended. Similarly the state enacting laws to protect its cyber defences must ensure that this protection does not turn out to be repressive in nature as such repressive laws will only go on to increase the distrust between the public and the government which will in turn call for more repressive laws thus the state will no longer be doing the role of a welfare state but that of a police state. Taking the example of one of the earlier mentioned states South Korea is a nation that faces constant

threat of cyber-security attacks from North Korea and as a result the NIS and the South Korean military had to take charge over defending the nation's cyberspace but a problem that arises in this is that due to the past of these organisations with the authoritarian regimes there a fear is created in the minds of the general public of the possibility of such a situation repeating itself. This puts the government on thin ice regarding the framing of laws regarding this front thus emphasising on the point on how the rules regarding control of such devices should be so that they not only offer adequate protection but are not in such a way that they encroach on the rights of the people *"Self-defence" provisions in current law already authorize communications companies to share incident information with the government in order to gain assistance in responding to a cyber-attack. Instead of empowering the government to seize such information from companies or monitor private networks for attacks, incentives should be developed to encourage companies to share this information*<sup>16</sup>.

Thus making the cyber-security program more transparent will built the confidence and trust that is essential for this industry and for a government to ensure stability in the state.

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<sup>15</sup> (2013) 12 SCC 73.

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<sup>16</sup>GREGORY T. NOJEIM, CYBER-SECURITY AND FREEDOM ON THE INTERNET.

## CYBER-SECURITY AND INTERNATIONAL RELATIONS

Coming to the more extensive aspect of cyber-security is, how it affects international relations. The effect use of cyberspace has on the relations between states is far more than other internal policies can have. This can be attributed to what was said earlier i.e. the present role of this cyberspace. Cyberspace being a medium has always existed to connect to entities thus making any interaction between them progress at a much faster rate thus when the access to cyberspace arrived at the doorstep of the common man the internet itself became a device of mass communication that too which can occur between people across the borders as well. Owing to the aforementioned reason cyberspace and its protection became something which is capable of affecting states and their relations with each other.

As cyber offense and defence capabilities continue to develop rapidly, the complexity of maintaining international relations will go on increasing but some challenges which this aspect of cyber-security faces is firstly how owing to the recentness of this concept there are no set guidelines governing the use of this medium unlike the guidelines for the use of the seas and the air there exist none for cyberspace. Arising from

the first is the second challenge i.e. owing to the lack of guidelines it becomes easy for nations to involve themselves in cyber-attacks against their fellow nations as it is difficult to bring direct conclusive evidence against that.

*“A powerful example to illustrate this is the Stuxnet virus, which was programmed to damage Iran's centrifuges at the Natanz nuclear site (Rid, 2012). While Israel and the U.S. have been blamed as creators of the virus, the nature of the cyberspace makes it impossible to trace the actual origin of the software<sup>17</sup>.”*

Thirdly, owing to this particular nature of the cyberspace where it becomes a cumbersome process to track an offender, nations tend to attack more via this medium than the others. An example of which can be seen through the attack on Sony pictures in 2014 the suspicion of which is on North Korea. Furthermore, the actions of John Snowden and Julian Assange where they have acted as a whistle-blower exposing several acts by the US government has triggered a game of politics between nations such as USA and its rivals China & Russia where on one hand Snowden has been declared as a traitor but has been praised by and granted asylum by the others. This goes on to complicate the already complicated relations between the three nations

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<sup>17</sup>NirKshetri, *Cybersecurity and International Relations: The U.S. Engagement with China and Russia* (Paper Presented at the FLACSO-ISA 2014 Buenos Aires, Argentina, July 23-25, 2014)

all of which is owing to the use of this cyberspace.

Despite its hindrances there have been several occasions where treaties have been formed owing to the purposes of cyber-security for example the partnership between United States Secret Service, Italian Ministry of Internal Affairs and Poste Italiane established in 2009 which consists of both public and private organisations that aims at preventing crimes in the EU. On another occasion China in partnership with the FBI has been able to shut down a website dealing with child pornography in 2011. Seeing these examples one may note that the cooperation regarding cyber-security only comes when there arises a conflict of interests between some states and another entity. Thus, for a state which seeks to better its relations with another state without having to compromise much on its own interests it may do so by extending cooperation in the form of providing defensive measures in the cyberspace and helping with tracking down cybercriminals. In light of all of this it can be concluded that the international ramifications of cyber-security is still at a fledgling stage. It can be seen that for international relations to develop a state will have to hand a certain degree of cooperation and to do so it will have to frame its cyber-defence rules accordingly but while doing so it must fathom whether in doing so is it compromising

on its critical national interests, its national security or any other sphere which is vital to its development? After this is seen naturally, in most cases the cooperation will be a cold one where nations would be wary of each other and it is at this stage where working together can prove to be a do or die effort for the relations between the states.

### **CYBER-SECURITY: CONCLUDING REMARKS AND THE WAY AHEAD**

As emphasised upon earlier, ICTs in the cyberspace have been one of the most rapidly advancing technologies in the past few decades, this paves the way for an increased number of opportunities in both economic, military and social spheres of development and where there is road for development there is always an entity seeking to work for its own benefit at the cost of that of others. The Global State of Information Security Survey 2015 was conducted by PwC, gathering responses from more than 9,700 security, IT, and business executives in 154 countries.

“The research found that the number of detected information security incidents has risen 66% year over year since 2009. In the 2014 survey, the total number of security incidents detected by respondents grew to 42.8 million

around the world, up 48% from 2013—an average of 117,339 per day.”<sup>18</sup>

Making matters worse the most threats that occur are by the state backed entities which seek to disturb the critical infrastructure such as oil and gas, energy, military and telecommunication sectors. Since most critical information is stored there the attacks will begin there which will go on to steal all this information making the nation’s defences predictable. Thus, a requirement is created to allocate more funds for defence on the cyber-security front.

The state defending its cyberspace can no longer afford to prepare for action after the damage is done rather it will have to focus on preparing its defences in such a way that the attacker is delayed and so that it can cooperate with other states if necessary.

Cyber technology is a double edged sword which needs to be handled carefully. If at such an early stage it is proven to bring economies at a standstill then the possibilities of it causing far more damage develops as it more and more becomes a part of our lives.

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<sup>18</sup> *Cyber-attacks upto 48% in 2014*, CGMA MAGAZINE, (July 30, 2016), <http://www.cgma.org/magazine/news/pages/201411089.aspx>.

