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I

RE-EVALUATING THE AUTHORITY OF HIGH COURTS AS THE FORUM FOR SECOND APPEALS[1]

ABSTRACT

Recently, on the 13th of March, 2019, the Supreme Court rose to the occasion and took the opportunity to peruse, expound, and reiterate the doctrinal canons of Section 100 of the Code of Civil Procedure, 1908, which pertains to the entertainment of Second Appeals by the High Court on the basis of any substantial question of law involved. The Apex Court by its pronouncement, reinforced the technical circumscriptions governing the scope and jurisdictional extent of Second Appeals under Section 100 of the Code, by emphasizing on the confines enshrined therein. The Court expressed concern apropos of the disregardful insouciance of the High Courts, wherewith they have on several occasions overstepped the boundary that delimits their capacity as the Second Appellate Court, and have deliberately interfered with such nuances of the Lower Court findings which they prima facie have no authority to either calibrate or adjudicate upon. Although the High Courts are commissioned to act as the greater arbiter after the First Appellate Court has cogitated on the First Appeal, its operation should not transcend the purview that deals substantially with questions of law left open for further analysis. The factual matrix of the matter at hand, namely *Gurnam Singh* v. *Lehna Singh*, has been briefly summarised in the following segment.

[1] Satyaki Mitra, University of Calcutta.

RE-EVALUATING THE AUTHORITY OF HIGH COURTS AS THE FORUM FOR SECOND APPEALS

INTRODUCTION

FACTS IN BRIEF

The original plaintiff filed a suit to obtain a permanent injunction before the Court of Sub Judge, First Class, Sangrur, with respect to the land-in-suit so as to restrain the original defendants from dispossessing him of the said land and usurping it thereafter. The original plaintiff claimed that he and his brother, Bhagwan Singh (alias Nikka Singh), were the joint owners and in rightful possession of the land-in-suit. He further claimed that on account of the expiry of Bhagwan Singh, who was unmarried and childless, he was left behind as the sole successor upon whom the said land would legally come down to be bequeathed. The original defendants, in their written statement before the Court, challenged this claim by contending that Bhagwan Singh, prior to his death, had executed a registered will of his own volition in favour of the original defendants, owing to the services that they had rendered at his instance previously. They further contended that even if it was proved that the original plaintiff was in possession of the suit land, it could be barely denied that the original defendants were entitled to jointly possess the land insofar as the share of the testator, Bhagwan Singh, is concerned; as he had willingly made the arrangements required to execute the transfer of his rights and interests unto the defendants. The original plaintiff, rebutting the foregoing contention, denied the execution of any such will on the part of Bhagwan Singh in favour of the defendants, and counterclaimed that the will in question was but a product of forgery and also that the ailing Bhagwan Singh was in no position to have made any such will, due to the deterioration of his overall health.

The Ld. Trial Court decreed the suit in favour of the original plaintiff, and refused to take cognizance of the touted veracity of the said will, on account of certain “suspicious circumstances” enveloping its demeanour. A First Appeal was preferred from this decree before the First Appellate Court, pursuant to the umpiring of which the Ld. Appellate Court quashed and set aside the decree awarded by the Trial Court and, by citing cogent reasons to such effect, reversed the findings of the Ld. Trial Court after coming to the conclusion that the evidentiary value of the disputed will was creditable and meritorious.

Aggrieved, the original plaintiff then approached the High Court and preferred a Second Appeal before it by invoking Section 100 of the Code, by the force of which it has the authority to act as the Second Appellate Court that is empowered to deliberate on a secondary appeal, that lies as a means of challenging the legal validity of a pronouncement incurred at the end of the primary appeal. In order to correctly entertain a Second Appeal, the High Court must be satisfied that the matter involves a *substantial question of law*, which calls for interpretation and conclusive adjudication so as to consummate the litigation with finality. At this stage, the High Court thus formulated the following substantial questions of law –

"*(i) Whether the appellate court can reverse the findings recorded by the trial court without adverting to the specific finding of the trial court?*

(ii) Whether the judgment passed by the lower appellate court is perverse and outcome of misreading of evidence?"

Thereafter by re-appreciating the entire evidence led by the parties on record, the High Court quashed and set aside the judgment and decree passed by the First Appellate Court and consequently restored the decree passed by the Ld. Trial Court, following which an appeal was preferred before the Supreme Court of India so as to determine the credibility of the order so passed and the reasons so ascribed.

LEGAL RATIONALE APPLIED IN *GURNAM SINGH*

To effectively critique the pronouncement of the Supreme Court with respect to the matter at hand, we have to first understand the legal rationale that was applied in order to arrive at the conclusion it so deemed fit. Let us have a look.

The leitmotif of the principal issues raised by the appellant-original defendants was chiefly *abuse of jurisdiction*, and most of the arguments advanced on their behalf could be categorized under this broad head. It was mainly contended on their part that the Ld. High Court had not exercised due caution while discharging its functions as the Court of Second Appeal vide Section 100, and had brazenly exceeded the statutory embargo incumbent upon it. This reasoning found resonance in the conclusion arrived at by the Ld. Apex Court, who happened to share the same opinion. It was vehemently submitted by Ms. Mansi Jain, learned advocate appearing on behalf of the appellant-original defendant, that usually when the High Court is

approached under the auspices of Section 100 of the Code to entertain a Second Appeal so preferred, its functions are automatically subject to the statutory limitations envisaged within the scope of the very Section. By virtue of such impositions, the role of the High Court in this regard is restricted and not protracted, and is limited only to the settlement of a substantial question of law involved. Therefore, re-appreciation of the evidence on record by the said Court was neither justified nor warranted, and for that itself the action was liable to incur the status of juridical abuse. Ms. Jain went on to submit further, that the Ld. First Appellate Court had exhaustively and accurately appreciated the evidence on record, pursuant to which the claim of "suspicious circumstances" clouding the personality of the impugned will was nullified, as nothing manifestly irregular or questionable about the evidentiary evaluation conducted by the Ld. First Appellate Court could otherwise be established. The deductions were plausible and no procedural obligation was compromised or circumvented, according to Ms. Jain, when the Ld. First Appellate Court discharged its functions under Section 96 of the Code while entertaining the First Appeal that lay. Owing to such reasons, the appellant-original respondent accordingly prayed for the quashing of the judgment and order passed by the Ld. High Court in this regard and simultaneously for the restoration of the decree passed by the Ld. First Appellate Court. On the other hand, Mr. Amit Sharma, learned advocate appearing on behalf of the respondent-original plaintiff, oppugned the submissions made by Ms. Jain by exhorting that the Ld. Trial Court was correct and punctilious in its finding that the will, dated 17.01.1980, was indeed factitious, inauthentic, and warped by material inconsistencies. Mr. Sharma then went on to submit that the Ld. High Court was apt to observe that the Ld. First Appellate Court "…was not justified in interfering with such findings which were recorded on appreciation of evidence." He also stated that the testator, Bhagwan Singh, was suffering from both tuberculosis and a cancerous disease, on account of which his testamentary capacity was compromised. Therefore, the contention raised by the appellant-original defendant that he was in a good state of mind while assenting to the impugned will, which was pregnant with glaring discrepancies, could not be upheld. On that score, Mr. Sharma prayed for the dismissal of the final appeal preferred before the Ld. Supreme Court.

The rationale applied by the Apex Court was in consonance with the theme of the arguments advanced on behalf of the appellant-original defendants, as it reiterated by relying on a catena of precedents that the jurisdiction of the High Court, pertaining to the entertainment of a Second Appeal under Section 100, is indeed a limited one and materially restricted to the resolution of any substantial question of law involved; something that is *sine qua non* for the exercise of

such authority. The Court went on to expatiate further on this issue, laying down that in a Second Appeal the High Court can barely "substitute its own opinion for that of the first appellate court", unless it is found that the conclusions drawn by the subordinate court were erroneous being contrary to the mandatory provisions of the applicable law, or contrary to the law pronounced by the Supreme Court, or were based unsubstantial or no evidence[2]. While dilating on the question regarding circumstances that are likely to demand an reappraisal of facts by the High Court, the Ld. Apex Court relied on *Ishwar Dass Jain*[3], wherein it was stated–

"*…There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.*"

The Ld. Court even went on to emphasize a caveat expressed to the effect that "*…If in reaching its decisions in second appeals, the High Court contravenes the express provisions of S.100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid.*"[4] At the same time, predicating on the conclusion that the High Court had indeed exceeded its prescribed jurisdiction and that the findings of the Ld. First Appellate Court regarding the matter at hand, including its assessment of the impugned will, is authentic and legally unassailable, the Court allowed the appeal and directed the setting aside of the judgment and order of the High Court, while simultaneously restoring the order so passed by the First Appellate Court.

COMMENT

The extensive reasoning and explanations put forth by the Ld. Supreme Court, in order to substantiate the legal rationale that has been applied to the instant matter, are howsoever not devoid of certain infirmities that have mostly been incurred on account of implementing an inexact strictness of construction, that ends up undermining vital precedents that have spoken

[2]Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722.
[3] Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434.
[4] Madamanchi Ramappa, AIR 1963 SC 1633, pp. 1637-38, para 12.

about demanding and exceptional circumstances that necessitate the broadening of the scope of Section 100 as and when required. Two key issues can be raised with respect to the said judgment under dissection:

I. Substantial Question of *Procedural Law* framed by the High Court

It is an imperative as well as a matter of legal necessity, that a substantial question of law is formulated for the High Court to successfully exercise its Second Appeal jurisdiction.[5] It is the duty of the High Court to primarily frame and set out substantial questions of law at the very outset prior to the hearing of the appeal, and a pronouncement passed in the absence of such questions shall be deemed as vitiated in law.[6] A "substantial question of law" is not statutorily defined in any part of the Code of Civil Procedure, 1908, and although there is no express provision laid or explanation appended to that effect; the meaning of the said expression, as it has come to be understood from the parameters outlined in and derivations gathered from a plethora of landmark judgments, seem to indicate such questions to be questions of *substantive law*. It is pertinent to note in this context that conversely, there also does not exist any such express bar or statutory preclusion either, in any part of the Code, that is likely to invalidate or nullify the consideration of substantial questions of *procedural law*. The first question that was formulated by the High Court in this case, that whether "*the appellate court can reverse the findings recorded by the trial court without adverting to the specific finding of the trial court*", is indeed a substantial question of *procedural law* that demands determinative adjudication, so as to secure the issue beyond the eventuality of repetitive, muddled, and cantankerous litigation. The aforesaid question framed by the High Court seeks to investigate the propriety of procedure, and procedure is but the machinery for carrying on suits, including pleading, process, evidence, and practice, whether in a trial court or an appellate court.[7]

The litmus test that was devised in *Syeda Rahimunnisa v. Malan Bi*,[8] to determine whether a question of law is substantial or not, was expanded in the form of two fundamental questions:

i. *Whether it is of general importance*; or

[5] K Raj v. Muthamma, AIR 2001 SC 1720 : (2001) 6 SCC 279.
[6] Biswanath Ghosh v. Gobinda Ghosh, AIR 2014 SC 1582.
[7] Brooks v. Texas Emp. Ins. Ass'n, Tex Civ App, 358 SW 2d 412, 414.
[8] AIR 2016 SC 4653.

ii. *Whether it directly and substantially affects rights of parties and if so, whether it is either an open question not being finally settled by the highest court or is not free from difficulty or calls for alternative views.*

In the light of the above, the question that whether the appellate court can reverse the findings recorded by the trial court without attending to the specific findings deduced by it, satisfied both these conditions *pro rata*, to the extent that it entailed an element of general and wider significance and at the same time directly and substantially affected the rights of the party involved, i.e., the respondent-original plaintiff. The question is essentially an *appraisal of competency* that spawned from the disputable exercise of procedure, wherewith the findings of the Ld. Trial Court were undermined by the Ld. First Appellate Court when it eventually reversed them on cursory and unconvincing grounds. Moreover, the reasoning that was applied by the Ld. First Appellate Court with the intention of overriding the factual findings of the Ld. Trial Court, seems specious and somewhat negligently dispensed. For example, the testator was admittedly suffering from a cancerous disease as well as tuberculosis at the time of purportedly assenting to the will, to which the Ld. First Appellate Court remarked that "…*Just because testator was suffering from an illness does not mean his testamentary capacity can be questioned.*" The Ld. Court therefore not only underappreciated the gravity of the malady involved, but also the impact of drugs on cognitive faculties that are administered for the treatment of such ailments. On examining the psychological side-effects of analgesics, similar to the ones that are routinely meted out to cancer patients, it has been found that moderate doses of morphine (up to 15 mg.) are said to produce euphoria, drowsiness, loss of anxiety and inhibitions, "…*and increased ease of discriminating and making decisions. There is inability to concentrate, difficulty in mentation, apathy*…"[9] To exemplify the foregoing context, David Sharpe contemplated the following situation wherein the testator is experiencing medication-induced "euphoria" at the time of discharging his testamentary liabilities –

"…*But consider the euphoric testator's appraisal of his only son, who sides with his mother in every dispute, as a proper object of his bounty; and how can the testator resist the urgings of his niece Sally, who has stood by him and comforted him, even if she did marry a Catholic? Who gets the old home place and who gets the General Motors? Decisions which would torment the testator if he were free from the influence of drugs will be far easier to make if the*

[9] Goodman and Gilman, *The Pharmacological Basis of Therapeutics*, 191 (1941).

anxiety over their normal consequences can be severed from the decisions themselves, in much the way that A can solve B's problems much more easily than he can solve his own."[10]

The Ld. First Appellate Court also trivialised the absence of the name of Lehna Singh, the sole successor and natural heir of the deceased testator, Bhagwan Singh, in the impugned will which was said to exhibit a suspicious personality. The qualifying nature of the latter half of the query, that reads "*without adverting to the specific finding of the trial court*", is precisely what imparts a substantial quality to the question framed by the High Court; as it proposes to re-examine the ambit of the appellate authority vested in a court of first appeal, to what extent it can be exercised in an effort to trump the findings of a subordinate court, and whether on the predominant account of hierarchal superiority can its dictum be permitted to override and prevail even when the judicial analysis is shoddily performed, thus resulting in a patent miscarriage of justice. It is thus not improper to consider that there is still room for constructive judicial intervention that would aid augmentation by means of introducing both qualitative and quantitative indicators, engineered to better define the role of institutions entertaining first appeals, and at the same time would also impose stricter and more intricate obligations to be fulfilled on their part so that exhaustive application of the judicial mind can be ensured. Therefore, as the first question formulated by the High Court entails a factor of general importance, is not devoid of difficulty, is in a position to assimilate alternate translations, and is also not beyond the possibility of further explanation, it can indeed be treated as a substantial question of procedure, vis-à-vis, an inquiry into a crucial aspect of procedural law.

II. Adjustments can be made in case of underlying Perversity

The second question framed by the High Court was "*whether the judgment passed by the lower appellate court is perverse and outcome of misreading of evidence?*". This is indeed a question of fact rather than a substantial one of law, but at the same time it houses a signature element that paves the way for the making of an *exceptional circumstance,* one that warrants flexibility of amplitude. There is no embargo whatsoever on the High Court to entertain a question of fact in a second appeal, in exceptional circumstances where factual findings are found to be perverse.[11] In *Dinesh Kumar v. Yusuf Ali*[12] it was held that there is no prohibition to entertain

[10] David J. Sharpe, *Medication as a Threat to Testamentary Capacity*, North Carolina Law Review, Vol. 35 Art. 3, p. 385.
[11] Rajasthan SRTC v. Bajrang Lal, (2014) 4 SCC 693.
[12] AIR 2012 SC 2679.

a second appeal even on a question of fact, provided that the Court is satisfied that the findings of the Court below were vitiated either by non-consideration of relevant evidence or by showing erroneous approach towards the matter. The expression "perverse" is legally construed to mean a finding or a conclusion that goes "*against the weight of evidence*"[13] by outraging the guiding rationality that is supposed to preside over legal proceedings. As far as the matter at hand is concerned, the First Appellate Court underestimated the merits of the evidence on record that bore imprints of possible distortion by assessing them rather obtusely. Although the findings of the First Appellate Court are not outwardly "perverse" in this case, that would justify a full-fledged interference of the High Court majorly on the factual front, they are not infallible either and can very well be subjected to reconsideration. An ad-hoc widening of scope is often necessitated by demanding situations, so as to allow the examiner to delve further into the labyrinth of procedural mechanisms with a fine-tooth comb and help rectify the crucial irregularities prevailing therein. Therefore, the austerity with which the Ld. Apex Court proceeded to decide the present case barely gives effect to any indication whatsoever that hints towards an absolute and inelastic character as far as the amplitude of Section 100 is concerned.

[13] Gamini Bala Koteswara Rao v. State of A. P., (2009) 10 SCC 636.

II

MODIFICATION- IS IT A CRIME?[14]

ABSTRACT

Changes made to a stock vehicle to enhance the performance or alters the structure of the vehicle to increase either performance, aesthetic or cosmetic approach is known as Automobile modification/ customization. Below will be talking further about the objectives of MV Act, 1988 and shortcomings of its predecessor MV Act, 1939.

Law which has deemed modification/customization illegal has been questioned whilst considering the natural calamities that have happened in the past years and the role of these modified vehicles in mobilizing and disaster relief activities.

[14] Gautham Siju, Birla School of Law, Birla Global University, Bhubaneswar.

MODIFICATION- IS IT A CRIME?

INTRODUCTION

WHAT IS MODIFICATION?

Car Modification may be defined as any change that is made to a vehicle to enhance the performance in some way or alters the structure of the vehicle which is not part of the manufacturers' specifications. People mostly make modifications to cars to improve their aesthetics or performance.

The most common modifications made to cars include louder exhausts, tinted windows, neon lights, and enhanced sound systems.

WHY DO PEOPLE MODIFY?

People modify their cars because they want it to stand out and feel special. People change the appearance as well as increase performance with engine tuning, suspension tuning, etc. For most people car modification starts as a hobby which then turns into a passion and finally becomes an obsession.

Some people see it as a waste of money but all automobile enthusiast would disagree.

HISTORY OF MODIFICATION- THEN AND NOW

For as long as vehicles / cars have existed people had the urge to play with the changing and forging of parts.

The National Association for Stock Car Auto Racing [15](NASCAR) evolved from the criminal elements enthusiasm for building or altering vehicles into superfast sleepers for racing purpose.

1960's

If there was one major catalyst for car modifying in the 1960s, it was the Mini. We don't need to reiterate here how mould- breaking a concept the little car was (transverse engine, affordable, economical), but when people switched on to how tuneable they were, all bets came off. While the factory-modified examples were frisky enough – it was the simplicity of the Mini's mechanicals that really turned people on to pulling their cars apart and building them up as racier variants.

The Sixties really saw two major catalysts. The second was racing. There was a clear 'Win on

[15] https://www.nascar.com/about-nascar

Sunday, sell on Monday' [16]ethos bubbling through the UK's circuits, particularly in the field of Touring Car racing (or, as it was better known then, Saloon Car racing), with the race cars people saw on TV looking exactly like stickered up versions of their own cars. So that's what people did. Take a bit of altitude out of the arches, add a bit of girth to the tyres, slam in a hot cam and some juicier carbs– you've got yourself a road-racer. Something you could easily do in your garage, without the perils of recalcitrant ECUs or nagging CANbus. The 1960s were a golden age of home tuning.

1970's

The 1970s really were a time of modifying excess. Sod the oil crisis, people wanted to go out there and extreme. Anyone who was anyone was rocking shagpile carpets, porthole windows, metal flake paint in lurid dodgem patterns, jacked-up rear ends to showcase their Jag diffs and IRS, and this was a treatment that worked on any vehicle, from the Morris Minor to the Bedford CF, the Mk1 Escort to the MGB. The era of the custom van came screaming in from leftfield, while the American influence saw whacking great V8s being shoehorned into any- and everything.

Another trend that characterised 1970s modifying was the 'South London look'. Principally this involved hot Escorts or Cortinas running Harris-tuned motors, running low on 13-inch wheels, painted in pastel shades, smooth, bumper-less and un-arched.

1980's

The Eighties were the era of the hot hatch. And how did people modify these cars? With plastic, of course. It was the 1980s, the decade that celebrated plastics more than any other. Window louvres were bang on trend but the real big business lay in bodykits. Take RGM as your prime example – they made spoilers, skirts and bumper extensions for everything. And they were just one of many – all the cool kids had an assortment of plastic addenda bolted onto their cars; all colour-coded, of course, and if the wheels were colour-coded too, all the better.

That was actually a massive deal, making everything the same colour; it was supremely to ensure that your bumpers matched your bodywork, your interior was trimmed in the same hue, and every conceivable surface was coded to match. And because it was the Eighties, the more lurid the shade the better. Colours like Neon Pink could have been seen wildly.

Your Series One RS Turbo was nothing without random blue slashes in various shades stuck all over it.

[16] https://www.autocar.co.uk/opinion/motorsport/win-sunday-sell-monday

1990's

The keenness for bodykits really amped up in the Nineties; the Ferrari Testarossa 512TR (91-94) in particular seemed to capture the public imagination, with everyone clamouring for side strakes – Rieger Tuning led the charge here, making extravagantly straked widebody kits for E30 BMWs, Escorts, Corrados, you name it. Skeete's GT Turbos were similarly broad, and Dimma just wanted to widen absolutely everything.

As the decade wore on, aesthetic treatments grew ever-more extreme, we moved from a keenness for wheels like the TSW Venom and the Smiths Twister, and three-spokes to bolder aesthetic endeavours. Headlight swaps from other cars were where it was at, along with smoothed bodywork, bad-boy bonnets, oodles of mesh, wing vents from Mercedes vans, the biggest rims possible, and people took a lot of influence from France – in particular their desire to morph mainstream hatchbacks into unrecognisable shapes.

Round the back, the Peco Big Bore 4 made way for quad 5-inch tails.. The Nineties were also the era of the outré stereo install. Double-DIN Mini-Disc units fused with astoundingly intricate fibreglass enclosures housing numerous subs, illuminated amps and arty components. You needed to match this with extravagant door builds filled with speakers too. It was all about that bass.

2000's

If there's one cultural snapshot that influenced the tuning scene of the Noughties more than any other, it's The Fast and the Furious.[17] This movie came out in 2001, and immediately captured the hearts of a modding generation. Yes, it was largely absurd in quite a lot of its details, but its influence was clear: suddenly all the cool kids wanted Skylines, S2000s, RX-7s, and anything else Japanese that they could get their hands on.

Cue a rush to slather everything in full-length Manga graphics – yes, even Vectras and Mondeos. Cars got painted bright orange, fitted with colossal aluminium spoilers, and bathed in a lurid glow of underbody neon. Everyone wanted to be Dom Toretto or Brian O'Conner. The Noughties refracted the excess of the Nineties through a Hollywood filter, and we all luxuriated in the warming majesty of it all. Great times.

2010- PRESENT

Look around you. We're fundamentally split into three distinct camps: the first is the stance scene – employing up-to-the-minute tech to get cars sitting mill metrically precisely, be it with air-ride, coil overs or hydraulics. This height adjustment is complemented by a sort of rolling

[17] https://www.imdb.com/title/tt0232500/

stock arms race, as everyone tries to outgun each other with the rarest wheels, the most extreme fitment, constant chopping and changing. And, of course, a premium interior goes without saying.

The second camp rails against this almost 1990s-esque extremity by taking a more Belgian approach – OEM+, clean as a whistle, exclusively period-appropriate mods. Retro values take precedence, and 'better-than- new' is the watchword.

The third camp is all about obscene horsepower; technological advances and a blossoming aftermarket mean that building a hatchback or family saloon with supercar- baiting power has never been easier.

There's VIP, rat-look, bosozoku, murdered- out, super camber, donks, zokusha, wide bodies, grid-look, you name it. The key element today that differentiates the scene from all the preceding decades is the immediacy of it: social media fuels the one-upmanship like never before. It's no longer the case that you'd have to wait for Wheels Day to see what everyone had been working on over the winter, or that you had to wait for Fast Car to come out to check out the latest trends – Instagram, Facebook and Twitter let you see it all in real time. By the time something's registered as new, it's already played out.

And what will the rest of the decade hold? Well, you'll just have to keep reading Fast Car to see, won't you? Don't worry, we'll be right at the bleeding edge. We have been since the late Eighties.[18]

MOTOR VEHICLES ACT, 1988 : Overview

The Motor Vehicles Act, 1988 is the chief legal instrument relating to motor vehicles in India. The act provides in detail about the legislative provisions regarding licensing of drivers, registration of motor vehicles , alteration of motor vehicles, offences , insurance, penalty etc.

MV ACT, 1988 : STORY OF EXISTENCE

MV ACT, 1939

Before the MV Act, 1988[19] came into existence, the MV Act, 1939[20] governed all laws relating to motor vehicles in India. Even though the Act was amended several times to keep up with the changing transport technology, movements, developments in the country.

Committees like National Transport Policy Committee, National Police Commission, and Road

[18] https://www.fastcar.co.uk/tuning-tech-guides/a-brief-history-of-car-modifying/
[19] http://www.tn.gov.in/sta/Mvact1988.pdf
[20] http://www.commonlii.org/in/legis/cen/num_act/mva1939172/

Safety Committee have reviewed into the different aspects of road transportation and have recommended for the up-gradation, simplification and rationalization of this law. Members of the Parliament had urged for a comprehensive review for the MV Act, 1939 to find out the flaws so that it could be amended for the better in consideration with modern day requirements. Hence a working group was constituted on January, 1984, to review all the provisions of the MV Act 1939 and to submit a draft proposal for comprehensive legislation to replace the then existing act. The group took into consideration the reviews of different committees and were discussed in a specially convened meeting of Transport Ministers of all States and Union Territories. They addressed different problems such as, The fast increasing number of commercial as well as personal vehicles, Need for the adoption of newer technology in the automobile sector , The concern for road safety standards , Measures to control pollution as well as standards for transportation of hazardous and explosive materials and Liberalization of procedure for private sector operations in road transport sector.

MV ACT, 1988

The Motor Vehicles Act, 1988 has been applicable to whole India and has been amended in such a way to achieve objectives such as :

1) To accommodate the increasing number of commercial as well as personal use cars.
2) Adoption of higher technology in the automotive sector.
3) Greater flow of passengers and freight with the least impediments so that islands of isolation are not created leading to regional or local imbalances.
4) Concern for road safety standards, pollution control measures and standards for transportation of hazardous and explosive materials.
5) Simplification of procedure and liberalization in policies for easy development for private sector in the road transportation sector.
6) Need for effective ways of tracking down traffic offenders.
7) Laying down standards for parts and components used to manufacture in motor vehicles.
8) Setting standards for anti- pollution control devices used in vehicles.
9) Issuing of Fitness Certificate to vehicles after strict testing measures.
10) Enabling provision for updating the system of registration marks.

RULES ON MODIFICATION / ALTERATION

Section 52[21]under the -Motor Vehicles amendment Act 27 of 2000- Motor Vehicles Act ,1988 has been amended with the purpose to prohibit alteration of vehicles in any manner including changing of tyres of higher capacity , keeping in view road safety and protection of environment.

S.52 moreover states the following:

(1) No owner of a motor vehicle shall so alter the vehicle that the particulars contained in the certificate of registration are at variance with those originally specified by the manufacturer, Provided that where the owner of a motor vehicle makes modification of the engine, or any part thereof, of a vehicle for facilitating its operation by different type of fuel or source of energy including battery, compressed natural gas, solar power, liquid petroleum gas or any other fuel or source of energy, by fitment of a conversion kit, such modification shall be carried out subject to such conditions as may be prescribed: Provided further that the Central Government may prescribe specifications, conditions for approval, retro-fitment and other related matters for such conversion kits: Provided also that the Central Government may grant exemption for alteration of vehicles in a manner other than specified above, for any specific purpose.

(2) Notwithstanding anything contained in sub-section (1), a State Government may, by notification in the Official Gazette, authorise, subject to such conditions as may be specified in the notification, and permit any person owning not less than ten transport vehicles to alter any vehicle owned by him so as to replace the engine thereof with engine of the same make and type, without the approval of registering authority.

(3) Where any alteration has been made in motor vehicle without the approval of registering authority or by reason of replacement of its engine without such approval under sub-section (2), the owner of the vehicle shall, within fourteen days of the making of the alteration, report the alteration to the registering authority within whose jurisdiction he resides and shall forward the certificate of registration to that authority together with the prescribed fee in order that particulars of registration may be entered therein.

(4) A registering authority other than the original registering authority making any such entry shall communicate the details of the entry to the original registering authority.

[21] https://indiankanoon.org/doc/771836/

(5) Subject to the provisions made under sub-sections (1), (2), (3) and (4), no person holding a vehicle under a hire-purchase agreement shall make any alteration to the vehicle except with the written consent of the registered owner. Explanation.—For the purposes of this section, "alteration" means a change in the structure of a vehicle which results in a change in its basic feature.[22]

KERALA FLOODS

Last year during the month of August, Kerala which is located in the southern part of India was affected by severe flood due to unusually high rainfall during the monsoon season. It was the worst flood faced by Kerala after the great flood of 99 that took place in 1994. 14 districts were placed on red alert and 35 out of 54 dams within the state was opened for the first time in history. The Idukki dam has 5 overflow gates which were opened at the same time and for the first time in 26 years the 5 gates of Malampuzha dam were opened. Around 483 people were dead and 140 went missing.

During the rescue missions carried out by the National Disaster Response Force , there was an incredible display of people coming out together and helping each other out. There came a number of SUV owners who rescued people from flood stricken areas and ferried supplies to places that were hard to access. An announcement was put out by the state government requesting all SUV's and 4x4 vehicle owners to step forward and assist with the relief situation. Many of these SUVs in Kerala have raised suspension, are fitted with snorkels for deep water wading and other such upgrades. It was thanks to these upgrades, in fact, that these vehicles could drive through the flooded streets in Kerala to provide support. The off roading community was also facilitated by the State Chief Secretary for their efforts and gathered a lot of appreciation across the state and country. In fact, after the flood, the Chief Minister of Kerala posted a request on Facebook asking 4X4 vehicle owners to come out and join the rescue and relief efforts in the state.

SUPREME COURT JUDGEMENT

The judgment by a bench of Justices Arun Mishra and Vineet Saran said in its verdict - "No vehicle can be altered so as to change original specification made by the manufacturer. Such particulars cannot be altered, which have been specified by the manufacturer for the purpose of entry in the certificate of registration." According to the provision of the Act, 'alteration'

[22] https://indiankanoon.org/docfragment/22832301/?formInput=alteration%20in%20motor%20vehicle

means a change in the structure of a vehicle.

The apex court actually sets aside a judgment of a division bench of the Kerala High Court, which earlier said that the structural alteration was permissible as per the provisions of the Kerala Motor Vehicle Rules, 1989. Kerala is known to have a large number of modified vehicles on the road. Here's what the Supreme Court's judgment that overturns the Kerala High Court judgment says-

"In our considered opinion the Division Bench in the impugned judgment of the High Court of Kerala has failed to give effect to the provisions contained in section 52(1) and has emphasized only on the Rules. As such, the decision rendered by the Division Bench cannot be said to be laying down the law correctly. The Rules are subservient to the provisions of the Act and particulars in certificate of registration can also be changed except to the extent of the entries made in the same as per the specifications originally made by the manufacturer. Circular No.7/2006 is also to be read in that spirit. Authorities to act accordingly."[23]

PRESENT SCENARIO

Kerala off-roading community has started urging the government to not consider their vehicles as modified. Tisson Tharappel, an off-roader, has sent an open letter to the Chief Minister of the state, Pinarayi Vijayan, reminding him that the 4X4 community of the state helped rescue people from very difficult situations and their modified vehicles made it possible. The letter also says that the 4X4 community in the state hopes that people of the state would come together and help them to save their vehicles from the predicament. The letter requests the Kerala government to consider the situation leniently and to find a solution to the problem. In the letter, Tisson and the off-roading community of Kerala has urged the government to not consider their SUVs as modified vehicles. Instead, they are asking to label these SUVs as upgraded vehicles. The community is seeking legal advice and exploring legal routes to make it happen. They have asked the government to appoint a committee who can scientifically study the vehicles and suggest new norms to the government. They also said that such modified vehicles are treated in many states including Meghalaya, where the terrains are very rough and people modify their vehicles to suit the conditions.

CONCLUSION

[23] https://www.news18.com/news/auto/supreme-court-bans-vehicle-modification-in-india-a-detailed-analysis-2004365.html

S.52 which prohibits any alteration in motor vehicles was formed around nearly 30 years ago and has not underwent any amendments till date. We live in a progressive society where technology is upgrading and scenarios are changing day by day and hence it is necessary for existing rules and laws to be updated and changed accordingly. Recently the MV Amendment Act, 2019 was enacted whose main objective was revising on the amount of fines and penalties which remained as long as 30 years , there's still a long way to go and just revising fines and penalties won't do much until and unless they are implemented in an efficient manner and roads are maintained in good condition. Considering the situation at Kerala in hand and how the judgement of the Apex court overturned the decision of Kerala HC and is affecting livelihood of people as well as their vehicles.

I myself worked for the Kerala Flood Relief and have personal experience and can tell that the 4x4 community of off-roaders had a huge role to play, they took great risks on driving these cars through waterlogged streets transporting relief materials and transporting people which resulted in a lot of damages to their vehicles which they never asked any damages from the government. The modified vehicles are not used for long drives nor are they used to drive fast on the roads. Such vehicles are only used for recreational purposes and the government should reconsider the new ruling and exempt the community from the ban. Most of these vehicles get aftermarket tyres, better brakes, extra lights, snorkel, and bumpers to protect them from the rough terrain they regularly go to. Many people usually poke them for the snorkel air-intakes and other upgrades that have been built into these SUV's but it came very handy during the floods and allowed the vehicles to go into deep water without any problem.

The SC verdict on criminalising modifications and alterations should be reconsidered and given leniency as upgrades that does not harm the environment and can be used to help should be encouraged. But until then the question remains, if the present rule is implemented strictly, will it be applicable to only new vehicles or existing vehicles too?

III

REGULATING GAMBLING IN INDIA[24]

ABSTRACT

This academic paper highlights the current scenario and gives a brief outline of the lacuna of Indian laws in gambling and betting. It discusses the Indian Public Gambling Act, relevant sections of Indian Information technology Act and Indian Contract Act. It underlines how the current legislation in India vaguely covers the domain of gambling and issues pertaining to pertaining to regulating such activities. Furthermore, it provides a comparative analysis of Indian laws to the Australian gambling act while also suggesting certain amendments in the legal structure. This paper also explains briefly some policy suggestions from various sources with regards to establishing and functioning of a revised structured system gambling regulation.

[24] Shashwat Sarin, Jindal Global University.

REGULATING GAMBLING IN INDIA

INTRODUCTION

"*The question whether a particular game is a game of skill or chance is to be decided on the facts and circumstances of each case. As and when proceedings are; initiated against the appellant in accordance with law, the appellant shall always have the right to question the same or challenge the action of the respondents if it is not in accordance with law*."

A wager is placing of stakes on the contingency of an uncertain outcome. Under Section 4 of the Indian Public Gambling Act, whoever is found in any such house, walled enclosure, room or place playing or gaining with cards, dice, counters, money or other instrument of gaming or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine. Yet despite this explicit regulation, cricket betting and Satta bazaar are perhaps the most common and thriving areas of gambling in the country.

There have been numerous concerns raised against legalising and regulating gambling in India. Gambling industry promotes large transaction in unregulated cash currency. This in turn bolsters corruption within society. This addictive habit decreases income savings substantially. These contributing factors also increase the crime rate within a state permitting gambling. Therefore the general perception is that the perils of legalising gambling industry out way the benefits that it may have and in totality it is considered against public policy. But let us analyse this issue in a greater detail. Let's discuss the economic implications. According to gambling commission of the British government, the total gross gambling yield of Great Britain is 13.7 billion pound. The gambling industry has employed 106,236 people. These large denominations of revenue was contributed to a pre-determined cause such as education sector. The United Kingdom funds public schools through national lottery. So it helps if you specify the direction of proceeds from this industry and thereby prevent corruption as well. Otherwise in case of not permitting betting and gambling and regulating such practices yields very little which is again against the purpose of banning it in the first place. According to report published by the Federation of Indian Chambers of Commerce and Industry, a rough estimation of the betting market is of around Rs.300,000 crores. Although substantial resources have been invested to stop the underground betting racket however it still continues to persist. This is independent from the gambling market. With a tax rate of 20%, the estimated generation of revenue is minimum of Rs.12,000 crores to Rs.19,000 crores. These figures only stand true in

case this industry is regulated. However if this industry is not regulated then the revenue goes unaccounted for which increases the crime rate significantly more compared to a situation that regulates the revenue generation of this industry. Betting and gambling are prevalent and common in India despite being banned in all states except 3 territories. This has also bolstered match fixing in various sports in particular cricket. 74% participants in a survey conducted by FICCI suggest that if betting on sports is legalised, it will significantly help prevent match fixing. The illegal betting market generates 150 billion dollar in one year in just cricket according to a Hindustan Times article.

The Indian Public Gambling Act levies a punishment of merely Rs.300 on getting caught for conducting or participating in any sort of betting or gambling activity. This gambling law coupled with lack of stringent regulations and strict authorities encourages a situation of tax evasion, money laundering and an organized crime network.

GAME OF SKILL OR CHANCE

Indian Public Gambling Act has defined gambling in two broad categories, games of skill and games of chance. Horse racing is the only sport, which permits betting. There are a couple of other games like lottery, which are not banned under the Indian regulation. In the case of *Dr. K. R. Lakshmanan* v. *State of Tamil Nadu*, the Supreme Court held that horse racing is a game of skill.

The bench was of the opinion that "Betting on horse racing or athletic contests involves the assessment of a contestant's physical capacity and the use of other evaluative skills. Horseracing is an organized institution. There is nothing illegal in horse racing: it is a lawful sport. We have no hesitation in reaching the conclusion that the horse racing is a sport, which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better-trained jockey can touch the winning post." The bench concluded that horse racing is a game, which depends substantially on skill.

In the case of *State of Andhra Pradesh* v. *K. Satyanarayana*, the Supreme Court held Rummy to be not just a game of pure chance. The court stated, "The 'three card' game which goes under different names such as "flush", "brag" etc., is a game of pure chance. Rummy, on the other hand requires a certain amount of skill because the fall of the cards has to be memorized and

the building up of Rummy requires considerable skill in holding and discarding cards. We, cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill."

On analysing the rationale of the judgment, one tumbles on an interesting scenario. In both the above-mentioned cases, the Supreme Court has permitted to be excluded from the scope of ban on gambling under the purview of horse racing and rummy being a game of skill. In the horse racing case, the Supreme Court said that it is not a game of chance because needs to individually evaluate the skillset of the rider and horse as well as the physical attributes such as stamina and strength. Whether the horses are equally fast cannot determine and is a matter of assumption. However that holds true for all group sports such as cricket or football and all individual sports such as tennis or badminton. All of these are a game of skill and not a game of chance. One needs to assess the skillset, strength and stamina for it varies with every individual. These sports are therefore as much a game of skill as is horse racing. A special ability to play at a professional level is acquired by training in all of these sports. One thereby concludes that it is not a gamble but a wager decided by assessing all these unique features in every sport as every sport is maybe having unique skillset but is just as much a game of skill.

The scope of argument of game of skill was further broadened in case of betting in cricket by Justice Neena Krishna Bansal when she made the following observations, "Cricket as a game of skill requires hand-eye-coordination for throwing, catching and hitting. It requires speed, both during fielding chases and between the stumps. It requires stamina and brute strength to wallop boundaries. It requires microscopic levels of precision and mental alertness for batsmen to find gaps or for bowlers to produce variety of styles of deliveries' (medium pace, fast, inswing, outswing, off spin, leg spin, googly). The sport requires strategic masterminds that can select the most efficient fielding positions for piling pressure on the batsmen. Based on above description, cricket cannot be described anything, but as a game of skill. The game of cricket, therefore, cannot be held as a game of chance, but is a game of skill which is exempted under Section 12 of Public Gambling Act, from the definition of Gambling." Therefore betting on cricket is not an offence and invokes no criminal liability.

Coming to the case of *State of Andhra Pradesh* v. *K. Satyanarayana*, the Apex Court justified rummy to be a game of skill, as it requires building up of memory and mathematical calculation of probability. It is true that a game of rummy can be played based on memory and probability but vaguely generalizing this for all is not correct. It was also held in this case that holding and

discarding cards also requires a certain skillset. Furthermore, just like rummy, bridge, poker and blackjack are also just as much a game of building up of memory and mathematical calculation of probability because once a card is drawn out of a deck, the probability of every number card and face card of every suit keeps changing and to remember it while calculating is all about memory. Since it is only played with one deck therefore the probability of every card can be determined and that's why it is not anymore a game of chance. Therefore, other card games like poker and blackjack should also be considered under the definition of a game of skillset. A rationale mind begs a question as to why does the reasoning behind legalising betting on these games not cover and include all other sports of skillset. If the court has excluded these from the ban under gambling then are these judgments incomplete and inconsistent with other such games. Assuming this is the only rationale relied upon by the Court, sports betting should be legalised.

Let us analyse another case of a game of pure chance, which is also excluded from the definition of gambling and regulated under the Schedule 7 List 1. Schedule 7 List 1 of the Constitution of India legalises lotteries organized by government of India or government of state, the laws for which are subject matter to the exclusive jurisdiction of the parliament under Article 246. Lotteries have been excluded explicitly from the scope of the Gambling Legislations in India. The Lotteries (regulation) Act 1998 was enacted by the parliament. Under Section 2(b) of the Act, lottery is defined as distribution of prizes by lot or chance to those persons participating in the chances of a prize by purchasing tickets. The central government has the power to make rules and give directions and by that effect it has laid down instructions for states governments for organizing lotteries. Section 4(d) and Section 4(f) states that the proceeds of the sale of lottery tickets shall be credited into the public account of the State and the prize money unclaimed within a time frame shall become the property of that Government. Only the Centre or State government is permitted to conduct lotteries however the use of these proceeds is unclear and vaguely defined. The state of Punjab has gone to the extent of permitting and regulating an online lottery system. So, the argument of game of skill versus game of chance does not hold true in this case.

The Gambling Act under Section 12 only excludes game of skill from its purview. A game of skill is defined as "one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player" in the case of *Dr. R. K. Lakshmanan* v. *State of Tamil Nadu*. The Court outlined game of chance as is one in which the element of

chance predominates over the element of skill and similarly a game of skill is one in which the element of skill predominates over the element of chance.

Is the Act in contravention of the principle of judgment passed by the Supreme Court or is the Supreme Court, in its interpretation and understanding, in contravention of the act laid down on permissibility of betting on a game of chance?

If the Gambling Act only excludes game of skill from its purview then how come the Constitution of India is including regulation over lotteries, which is entirely a game of chance? If the Constitution of India is to be treated as the grund norm then is the Supreme Court in its interpretation missing out on the legal validity of betting on games of chance. In which, one should inquire as to why are other games of chance not included under regulations and lotteries are the only exception.

Let us analyse the regulatory framework of betting and gambling within the Indian legal structure.

Schedule 7 List 1 Entry No.40 of the Constitution of India legalises lotteries organized by government of India or government of state, the laws for which are subject matter to the exclusive jurisdiction of the parliament under Article 246. Schedule 7 List 2 Entry No.34 of the Constitution of India gives the exclusive jurisdiction to State legislature to regulate and legislate upon betting and gambling under Article 246. So the relevant provision of Schedule 7 List 2 is in contravention of Schedule 7 List 1 of the Constitution of India, as lottery should be classified under betting and gambling. Schedule 7 List 1 is thereby violating the authority of the State and its exclusive jurisdiction to legislate laws and regulations as outlined by Article 246 of the Constitution.

The Indian Public Gambling Act, which provides regulations for the punishment of public gambling and the keeping of common Gaming-houses was passed by the parliament. It has been amended overtime by the parliament. It covers not just game of lottery but any sort of gambling. Gambling was started interpreting in two broad categories of games of skill and chance based on Section 12 of this Act. Question arises of the validity of the Act when compared to the grund norm laid down in the Constitution. If according to Schedule 7 List 2 the state legislature only has the excusive jurisdiction then how comes this over reach of power by the parliament not considered a violation of principle of separation of powers. Since this is ultra vires then the validity of both the provisions in Schedule 7 List 2 and Schedule 7 List 1

can be challenged to get a more consistent rule.

DOCTRINE OF PITH AND SUBSTANCE

It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its "true nature and character," for the purpose of determining whether it is legislation with respect to matters in this list or in that.

PRIORITY IN WHAT RESPECT?

The question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with…No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view.

UNFOLDING THE PITH AND SUBSTANCE

The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the Entry in the Union List, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication. As Latham, C. J., pointed out in *Bank of New South Wales* v. *The Commonwealth*:

"*A power to make laws 'with respect to' a subject matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter: for example, income tax laws apply to*

clergymen and to hotel-keepers as members of the public; but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or banking."

On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by Entry No. 6 and conceivably Entry No. 1 of the State List" and it does not -purport to encroach upon the field of Entry No. 31, though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under Entry No. 31 of the Union List by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited Entry and conceivably the other in the State List. The Judicial Commissioner's order, with respect, cannot be upheld, and it must be set aside. We allow the appeal and reverse the decision, and we declare the Act in all its parts to be intra vires the State Legislature.

The Information Technology Act Rules, 2011, which was passed by the parliament, banned anything "relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever". The parliament has again herein over reached its powers and abused its legally granted authority to legislate over matters by banning online gambling activities.
The State of Sikkim, Daman and Diu and Goa are the only places where the state legislatures have legally permitted gambling under the stringent regulations of the state government. These are the well-known gambling destinations in the country. Goa has permitted land based casinos and boat casino to operate many table games. All related activities are governed under the Goa, Daman and Diu Public Gambling Act of 1976. The state of Sikkim has not only permitted casinos to operate within the state but was also the first state to legalise and license online gambling. These licenses include betting on sports like football cricket rugby. Within the State of Andhra Pradesh, horse racing, rummy and state run lottery systems are the only forms of gambling permitted within the state. The State of Karnataka was involved in the landmark case on gambling which gave the decision that rummy is not considered gambling as it is more of a game of skill than a game of chance. Betting on horse racing and lottery are permitted within the state although Playwin lottery system was discontinued. In the state of Maharashtra horse racing and lottery are the only forms of legally accepted gambling. The Bombay wager Act

specifies online gambling as illegal within the state. Gambling is not allowed in many states like Uttar Pradesh, West Bengal and Tamil Nadu although some of these places are infamous for conducting large scale betting and gambling dens. Around 13 states have permitted lottery systems. Besides Horse racing, other states have either banned any form of betting and gambling or abstained from passing any explicit legislation or instruction on the same regard. This lack of uniformity among different state legislations poses certain risks and questions.

What if one decides to operate a decentralized corporation of betting based on preferred favourable jurisdictions. For example if a betting company is based out of Sikkim and operated in states that do not have legislations explicitly banning conducting of any sort of betting or gambling. States that have abstained from passing any explicit legislation or instruction on gambling need to define the scope of permitting these activities if it aims to or otherwise ban any form of such activity like the state of West Bengal. Again the question arises if whether the states that have legislated their own set of laws on lottery are acting ultra vires their constitutionally granted authority. Since there is a lack of consistency between the centre and state legislature and among state legislatures themselves, one begs to question whether the judgment passed by the Supreme Court of accepting rummy as a game of skill holds true for all states to follow in their respective laws.

ONLINE GAMBLING

The Public Gaming Act of 1867 and other state gambling legislations have made no reference of online gambling. Furthermore there are no laws, which clearly state the criminal liability of any person accessing an international site for gambling or betting on sports. Although there are many state legislations on prevention and prohibition of gambling like the Bengal Public Gambling Act 1887, Bombay Prevention of Gambling Act 1887, Delhi Public Gambling Act 1955 to name a few, there is regulation on online gambling practices. These acts only restrict gambling exercises within physical limits. The Information Technology Act Rules, 2011, which was passed by the parliament, banned anything "relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever". But whether this rule bans any form of betting and gambling in unclear at best. If there is an explicit ban, then in that case whether than ban covers horse racing, rummy and lottery has also not been explicitly mentioned. Since Information Technology Act 2000 is a law passed by the parliament, it is relevant to clarify whether the state legislatures, if they pass laws on online gambling, will be in violation of the Information Technology Act 2000.

The most progressive and structured legislation on gambling in India is the Sikkim Online Gaming (Regulation) Act, 2008. It was passed with an objective to control and regulate online gambling so that the state can execute a tax framework for the same. Earlier the act permitted licensee to offer games throughout India but in 2015 the act was amended. It restricted licensee-offering games within the geographical boundaries of the state. Despite this measure, the online lottery system of the state of Sikkim permits people from all over the country to place bets. This highlights an important in the online gambling space. Since gambling and betting are state specific laws so can a person from a state access a Sikkim based corporation's site for the purpose of gambling and betting? In which case, what will be the punishment for the person caught for accessing a Sikkim based gambling site. Again to prevent this, their needs to be adequate security measures, otherwise who is liable if the person uses a virtual private network to manipulate his location? Let us assume a case wherein a person from Bombay accesses an international sports betting or an international gambling site. The Bombay Prevention of Gambling Act 1887 prevents anyone from conducting or taking part in any sort of betting or gambling but it does not clearly outline the criminal liability of the person accessing international sites. International sites are out of the jurisdiction of India so will the punishment be assumed to be the same as it for participating in gambling within India.

To add on to the inadequate regulatory framework, India is still lacking a data protection bill. The privacy bill was drafted in 2011 during the UPA regime and incorporates most of the amendments that have been included in the General Data Protection Regulation directed by the European Union that will come into force post 2018 except for extended jurisdiction of extra territorial activities, heavy penalties for breach or infringement of regulations applying to processor. The Privacy bill protects citizens from cyber-criminal activities including identity thefts. It prohibits interception of communication other than cases in which it is integral for national security purposes. According to the bill, collection, processing, using or disclosing data without the prior consent of individual is prohibited. There should be a data protection authority whose sole function should be monitoring development in data processing, investigating data security breach and issuing instructions to safeguard security interests in case of compromise as a result of any breach. Contravention of any provision or interception of an offence is made punishable with imprisonment and fine.

The Bill, holistic in its approach in safeguarding private information and strengthening and unifying data protection for all individuals, is still being discussed and examined among various

ministries and under the consideration of the Prime minister's office.

There needs to be a stringent and comprehensive regulation on Internet gambling, which should be included in the respective state laws on gambling. Consumer protection should also be an integral part of the adopted legislation to protect citizens and safeguard their rights. These online portals should be licensed under the respective state laws and others should be discontinued and monitored by state authorities. Online activity should be monitored by a commissioner, which ensures that the licensed sites have complied with the data protection and privacy laws also with the consumer protection laws.

PAYMENT GATEWAYS

The urge for India's personal data privacy bill has never been stronger. With the disruptively evolving technology one has options of e- wallet and other payment gateways, which can circumvent the country's foreign exchange laws. Plus with the evolution of block chain and its various applications, untraceable and anonymous large-scale transactions can be conducted in very little time. This has a direct correlation to gambling because gambling activities and betting involve large transactions. The personal data is at risk without a law, which mandates and regulates minimum data protection measures. Furthermore the inconsistent and outdated regulatory framework in Gambling activities makes crimes like money laundering easier to execute within states that do not have a comprehensive law on the subject. Since there is no clear stand on online gambling regulation in any state besides Sikkim, the revenues generate and the tax collected on the same might as well be unaccounted. Similar is the case with international gambling sites operating in India.

INDIAN CONTRACT ACT

There are two types of contract under the Indian Contract Act. Wagering agreements and contingent agreements. Wagering agreements are essentially when there is a promise to give money or some other for of legal consideration upon the determination of an uncertain event. It is contingent in nature and therefore void. There is not other interest in subject matter of agreement except loss of wager. A contingent agreement on the other hand is defined under section 31 of the Indian Contract Act. The principle of the contract is to do or not to do something (may or may not be uncertain). Such contracts are valid and not considered to be that of a wagering nature. Essentially speaking, an agreement consisting of a bet or gamble is void. The contingency of a contract makes it void in the court of law but not banned. There are no exceptions to this rule however since gambling and betting are allowed under the state

regulations of Sikkim and Goa, contingent contracts by effect should also be allowed for ease in commercial transactions and business.

AUSTRALIA'S INTERACTIVE GAMBLING ACT

The Australian Interactive Gambling Act has been recently amended to include trade promotion gambling and telephone betting services. A telephone betting services is a gambling service under Australian law where service is provided on the basis that dealings with consumers are wholly by way of voice calls made using a carriage service. Trade promotion gambling includes services for conducting of a lottery, where the lottery is conducted in connection with a competition for the promotion of trade or a service for the conduct of a game of chance or of mixed chance and skill, where the game is conducted in connection with a competition for the promotion of trade. The recent amendments in the Australian Interactive Gambling Act discontinued credit to customers of wagering services.

It is considered an offence if the person provides, or offers to provide, credit in connection with the service to a customer, or prospective customer, of the service who is physically present in Australia or the person facilitates or promotes the provision of credit (other than by way of an independently issued credit card), by a third person, in connection with the service to a customer.

These provisions must also be included in the state gambling laws. Credit system in gambling and betting houses and online sites should be mandated as against the regulation because this increases the probability of defaulting in payment and therefore increases the crime rate. Furthermore there are other options and applications of gambling and that's why gambling should not be perceived in a limited scope. Trade promotion gambling and telephone betting services are not prevalent practices even in illegal Indian betting market but should be included in regulations as there are international sites and service providers that may take advantage of a jurisdiction which lacks laws in this domain.

PROPOSED AMENDMENTS TO THE IRREGULARITIES OF THE CURRENT REGULATORY FRAMEWORK

INDIAN PUBLIC GAMBLING ACT

Section 13-17 of the Indian Public Gambling Act, outlines the power of police to apprehend without warrant and penalty to imposed. Section 2 instructs that Section 13-17 of the Indian Public Gambling Act shall extend to whole of the states of United Provinces, East Punjab,

Delhi and the Central Provinces. In case of Kesavananda Bharati v. State of Kerala , it was held that the parliament cannot damage or destroy the framework of the constitution. The case stated that parliament having only such constituent power as is conferred on it by the Constitution, which is given by people unto themselves. Parliament cannot on its own enlarge its own power so as to abrogate its inherent limitation. Being a functionary created under Constitution, Parliament cannot arrogate itself to destroy essential features of Constitution. Parliament cannot destroy basic fundamental or human rights, which were reserved by people for themselves when they gave themselves the constitution. Parliament cannot abrogate the limits of its constituent power by repealing limitations imposed on it and thereby purporting to do what is prohibited by these limitations. Indian Public Gambling Act was passed by the parliament and was imposed on state legislatures. Moving forth, Section 3 lays down the penalty for owning a gaming / gambling house.

Whoever owns or maintains a gaming house is liable to a fine not exceeding Rs.200 or a term of imprisonment under IPC not exceeding 3 months. This penalty is not in proportion with the penalty for breach of Information Technology Act regulations. According to Section 4 of the Indian Public Gambling Act, any person found in any common gaming-house during any gaming or playing therein shall be presumed, until the contrary be proved, to have been there for the purpose of gaming. This principle goes against the fundamental grain of our country's criminal justice system as it lays an unfair burden on the accused to prove his innocence beyond reasonable doubt. Generally in any criminal case, the burden of proof is on the state rather than the accused. Section 5 of the Act authorizes the investigating officer to seize all instruments of gaming and all moneys and securities for money, and article of value, reasonably suspected to have been used or intended to be used for the purpose of gaming. There is ambiguity regarding whether all the seized evidence will be catalogued in accordance with the Indian Evidence Act 1872.

Furthermore there is lack of clarity whether the catalogue of seized evidence will be provided to the accused at the time of seizing it. If the investigation system lacks full disclosure then the accused is at a greater risk coupled with the unfair burden to prove his innocence. According to Section 6, when there is evidence of any cards, dice, gaming tables, cloths, boards or other instruments of gaming are found in any house, it is implied that the house is conducting gambling games and this procured evidence is proof of the gambling activities whether or not people are actually participating in gambling or betting. This assumption holds good unless

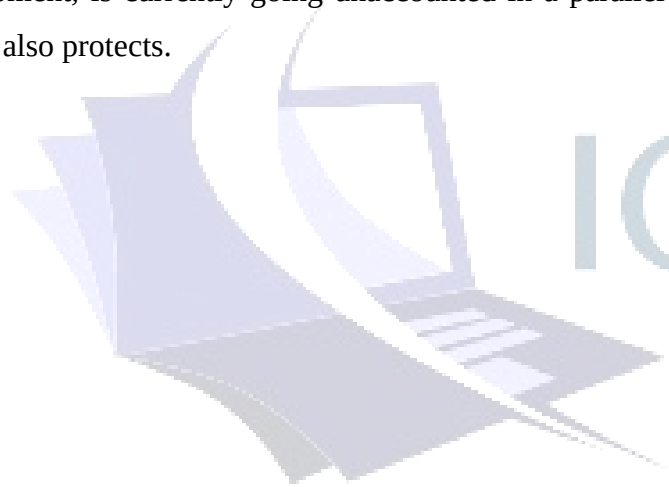
contrary is proved. It appears that adjudication is based on circumstantial evidence. This scenario will force a system where the evidence presented by the accused will not be weighed in equality with the evidence procured by the investigating authorities, which apparently speaks for itself. The principle of proving a criminal action beyond reasonable doubt does not hold well under this scenario.

This just proves my point of how people are viewed as guilty even before evaluating the independent facts of every case and how their explanations are not given equal weight. It also proves that even if there is no action or intention and the person does not use any such material, he is still viewed and punished as guilty. The adjudicating authorities and the proceedings therefore are biased and not fair. One should not be punished based on what appears to be a guilty case based on circumstantial evidence and assumption. This is offensive, biased; cruel and valid ground for harassment. It is completely unjust and unfair to bring accused people under the doubt because of an archaic legal structure. The seizure and sale of proceeds in section 8 of the Act has not been given any specific direction. This vagueness may encourage corruption among officials. The Act has not been amended after the recent judgment given by the Supreme Court declaring lottery and rummy legal on the basis of it being a game of skill. Section 12 provides an exception to any game of mere skill wherever played, so whether it takes into account the recent judgment of rummy and lottery being a game of skill is ambiguous. Destruction of instruments of gaming found in public streets is again vague and may lead to cases of corruption among officials. Any proceeds from seizure or sale of evidence after the case should be given away for some purpose. For example in UK gambling is legalised under strict regulations and the tax on the profits are given to public schools. This prevents any scenario of corruption or side profiteering.

CONCLUSION

Amendments should be made under Entry 42 of Union list and Entry 31 for the purpose of a consistent and a more detail oriented regulation in interstate commerce and other forms of communication. There should be a regulator for sports betting activities and other gambling activities. This regulator should report to an independent body, which also regulates the taxes on such companies whether online, or casino and other gambling houses. The United Kingdom has a gambling commission. This commission investigates owners and activities of such business corporations. There should be a code of practice for sports betting operations. This should not encourage sports fixing. Betting or gambling operations should be audited. Any

such corporation operating without license should not be permitted and should be penalized severely for illegal gambling activities. The commission should have a complaint redressal system, which would secure consumer protection. In case there is any breach of the rules and regulations the commission should have the authority to revoke the licenses and seal the corporation fro any further gambling or betting activities pending inquiry. The investigation procedure should be in accordance with the laws of the country. Consumers should be protected from any dangers or threats of betting or gambling. A fair regulation would also prevent illegal activities like extortion that follow illegal betting and gambling in order. This therefore prevents organized crime in the society and prevents people from its perils. The taxing of proceeds of betting and gambling is in the state list (Entry 65). However to prevent a case scenario of rampant corruption there should be a pre determined purpose and direction of the revenue generated. The enormous revenue, which can help the state governments in development, is currently going unaccounted in a parallel cash economy. Regulating sports betting also protects.



IV

STANDARD FORM CONTRACTS AND CONSUMER PROTECTION (WITH A NOTE ON THE E COMMERCE REALM)[25]

ABSTRACT

The paper focuses on the specific aspect of standard form contracts which have become, in recent years, a staple of contractual transactions. The widespread use of such standard form contracts is greatly owed to its many benefits that have only served to cement its position further. However, if we were to take stock of all the seemingly innocent transactions that are covered by standard forms, we would find that a great many inconsistencies and downright injustices come to light. The paper attempts to clarify the position on the same by first looking at the realm of standard form contracts and its relevance in consumer transactions. An endeavour is undertaken to assess the strength of such standard form contracts in light of the basic ideals of consumer protection and how far standard forms are violative or supportive of the same is also assessed. The changing nature of consumer interactions has made it possible for the boom in the e-commerce platform. Here too standard forms make an appearance, and we aim to analyse the inherent problems in the same. The paper aims ultimately to bring home the point that there remains a great deal of usefulness that we can extract from a standard form contract. However, the ruthless exploitation of customers, the helplessness experienced by consumers due to the unequal power balance that was inherent in such cases, are all now being pushed to the past. In such a situation, it may become pertinent to rework the legal aspects that govern standard form contracts to make it more justifiable and equitable to the consumer at the other end.

[25] Neha Maria Antony, The National University of Advanced Legal Studies (NUALS), Kochi.

STANDARD FORM CONTRACTS AND CONSUMER PROTECTION (WITH A NOTE ON THE E COMMERCE REALM)

INTRODUCTION

Developments in contract law have been largely shaped by influences from many quarters, including the realm of commercial and consumer transactions, where contractual obligations are frequently made. Instruments like standard form contracts were evolved as measures to deal with the several practical shortcomings of the basic contract. Drawing influence from the idea that a pre-determined, ready-for-signing form, containing all the terms and conditions pre made, with a greater deal of latitude given to the drafting party was the epitome of efficiency, such standard forms have slowly become the norm. The success of standard forms is evident in their wide and frequent employment in transactions across various sectors even today. The changing scope of consumer-buyer interactions have ensured that such standard forms spill over into the world of e-commerce. Today it is no surprise for the average consumer to click on plethora of 'I agree' boxes and accepting all terms and conditions as is. But if the rich legacy of judicial precedents on contractual rights and obligations are anything to go by, then we would know the perils of such seemingly 'informed' acceptances. The interplay of consumers and buyers via standard form contracts has several dimensions to it, encompassing several positives and negatives. An analysis of the same in the light of the ideals of consumer protection and taking the modern day example of standard form contracts in e-commerce, we attempt to gain a richer perspective of the same.

STANDARD FORM CONTRACTS

In the world that we live in today, speed and efficiency has come about to trump several other considerations that once held weight. In the world of contracts and its consequent rights and duties, we find a great deal of weight being attached to the same. The emergence of Standard Form Contracts and the position of importance it has come to occupy today is a testament to the fact that parties who have to enter into a large number of contracts with each one of their potential consumers would prefer to have a pre-made contract which only requires the other parties' signature. In most cases, where a large number of contracts have to be entered into on a daily basis with similar terms and conditions as laid out by the stronger party on a take-it or leave-it basis, standard form contracts seem to be the ultimate answer.

The definition purported by Cornell Law School gives a succinct idea of what exactly a

standard form contract is- 'An adhesion contract (also called a 'standard form contract' or a 'boilerplate contract') is a contract drafted by one party (usually a business with stronger bargaining power) and signed by another party (usually one with weaker bargaining power, usually a consumer in need of goods or services). The second party typically does not have the power to negotiate or modify the terms of the contract. Adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit'.

The words 'standard form contract' will be used to include every contract, whether simple or under seal and whether contained in one or more documents, one of the parties to which habitually makes contracts of the same type in a particular form and will allow little, if any, variation from that form. The average man, the man in the street or on the Clapham omnibus, is continually making such contracts and the probability is that they are the most important contracts he ever makes. In a typical scenario, a buyer purchases a good or service and is presented with a pre-printed form contract with terms pertaining to dispute resolution, remedies for product failure, and warranties, among others, with little opportunity to negotiate the terms.

The boilerplate 'fine print' usually specifies the breadth of the parties' obligations to one another, including, to use some prominent examples, terms that govern the extent of the seller's warranties, which party will bear the risk of various types of losses, the extent to which the buyer or seller may recover damages in the event of breach, and the type and location of forums available to resolve disputes between the parties. Such forms are often referred to as 'contracts of adhesion' as one party presents the terms to the other on a take-it-or-leave-it basis with no opportunity for negotiation, although form terms are not necessarily adhesive and not all adhesive terms are presented on a pre-printed form.

According to Avery Katz of the University of Michigan, such contracts have been in wide use for decades, as they provide a way for regular market participants to conserve on transaction costs and realize economies of scale in marketing. It is further established that 'in a mass production economy the terms for exchange of goods need to be standardized in some fashion, as the cost of individual negotiation is high and as a result, many who participate in the market on a regular basis find it worthwhile to develop standard written forms that set out in print the terms upon which the drafter proposes to do business,' often embodying terms which build a fort around the stronger party, embodying a contract where the benefit would nearly always lie in his favour. Though most terms are non-negotiable, some leeway may be given to the other

party often in the form of blank spaces which he can fill in to suit his needs in some way. However this apparent 'choice' given to the consumer is merely asking for his preferences in menial matters and is irrelevant to the ground realities of the contract.

The ideal situation would entail a transaction where 'the standard forms are completely understood by both sides, where there would presumably be no strong welfare concerns regarding their use….If both parties knew the terms of the form contract and bore all costs of negotiation, they would use form contracts whenever the savings in negotiation costs outweighed the advantages of tailoring the bargain to their individual circumstances.' However, the blatant display of market power, the take-it-or-leave-it environment portrayed by the parties in power, and the absence of any customization or suitability to the needs of an individual, have all been seen as the shortcomings of the standard form contract.

Standard form contracts are no longer the novelty, they have become commonplace and over the years, several chinks in the armour of the stronghold of such contracts have been brought to the fore, primarily by legal developments. The oppressive standard forms made by seemingly impenetrable entities which try to get away by smothering its consumers, can no longer get away scot free.

THE NEXUS BETWEEN CONSUMERS AND STANDARD FORM CONTRACTS

From the earlier sections, we now have a fair idea of the benefits and disadvantages that a standard form contract brings to the table. Over the years, in light of the changing landscape of transactions and other developments, especially in the areas of accessibility and communications, the very fundamentals of consumer affairs have undergone a sea change. Thus, it is no surprise that standard form contracts have already cemented its place in consumer transactions and are now frequently and widely employed. Despite the transaction-cost-reducing benefits associated with the use of form contracts, such as reduced drafting and negotiation costs, academics and policy makers have debated their fairness and the desirability of their enforcement especially when it comes to issues raised on behalf of consumers and the protection of their rights. Though it does have several benefits that it accords to both parties, the developments in standard form contracts and the way it has been drafted and presented to the consumers over the years have brought several traits to its form and functionality that favour the drafting party and tries to absolve itself from a great amount of prospective liability. Here, it would not be out of place to refer to the consumer as the weaker party and at the receiving

end of a heavily burdening contract with no scope for negotiation or customization and which is always drafted in heavy legalese and run for pages on end. In such circumstances, we need to ask ourselves- is the individual consumer a hapless figure before the mammoth contracting power of the other party? The problems inherently found in such contracts are widely known.

Over the years, with the growing global voice for consumer protection, scholars have turned their attention to seeking out the defects in standard forms and have sought to suggest practical solutions to rectify them, to make them more supportive or complimentary to consumer rights. When it comes to standard form contracts and consumers, there would be no issue altogether if consumers read what they sign and thus knew what they were getting into. Legal developments and ethical standards ensure that the ones making the standard forms do put everything out there, albeit in the fine print and often incomprehensible legalese, but it is still humanly possible to decipher the terms and conditions of any contract you attach yourself to. Though this is what is expected, it is downright impractical in all senses and the existence of the fine print itself is in itself to deter anyone who might venture to understand it. Another theory often suggested is that by accepting such a standard form contract, a consumer agrees to delegate the authority of deciding the terms of the transaction to the party who makes the contract. This delegation, in effect, waives the consumer's duty to read the contract. Then again another theory suggest that the other rules governing standard forms- be it statutes, regulations, judicial pronouncements, the mandates of a regulating body etc. which would be the ones ensuring that the standard form contract does not contain any hazardous terms within it. Some scholars suggest that the future of standard form contracts, following years of tweaking and reworking especially in the light of judicial moulding, will come to tilt the terms in favour of the consumer. There is also a great deal of support for the bargain theory where a standard form provides a loose framework with the details to be worked out by extensive negotiation and bargaining by the two parties. It is also suggested that the 'duty to read' be substituted by the 'duty to speak' on the part of the ones who draft the contract to let the consumer (who is deemed to not have read the fine print in all cases and circumstances) know any terms that may be potential threats to him. Professor Slawson proposes a set of principles to reconcile the interests of a seller in setting the terms of a form contract with the interests of a buyer in having his reasonable expectations fulfilled. If a buyer approves a part of an agreement, says Slawson, that part becomes an authoritative standard against which the other parts must conform. Incompatible parts, and those on which the buyer has not made a comment, fall away from the contract. Courts are free to ignore them-perhaps saying that they are unconscionable clauses in

an otherwise conscionable contract-if a seller presses for their enforcement.

In terms of the safeguards available against standard forms, there are several 'devices' so to speak, as mostly employed by Courts when testing a contract for validity. For instance we turn to Article II of the Uniform Commercial Code which covers standard forms. Courts have used it on various occasions to bring a form in line with the reasonable expectations of the adhering parties. Generally speaking, contracts are looked upon as engagements in which the parties expect some gain. Where a standard form clashes with that impression of a contract, the form, in light of Article II, is adjusted. Berg v. Stromme is an illustration. In that case, a court refused to give effect to a commercially acceptable disclaimer of warranty clause in a form contract. Where a disclaimer of warranty is written into a form contract, said the court, and the evidence suggests that the item to be purchased was discussed by the parties, the disclaimer will be ignored. Article II also has other uses and interpretations. Courts have used it to test the resiliency of certain clauses in a form contract. Every seller, for example, has a right to limit the remedies available to a buyer, should the seller fail to perform his promises as prescribed by a sales contract. Under Article II, the limited remedy is deemed to have failed of its purpose if the item sold contains numerous defects, and the seller is unable to cure them under the limited remedy.

Further, we find that they concept of unconscionability has been widely applied to contracts of standard forms albeit with varying results and there remains the definite lack of a uniform position with regard to the same. Unconscionability was born in the 18th century and advertised as a moral ethic. Lawyers revived it in the 20th century to bring the consequences of real bargaining in line with industrial reality. In the name of unconscionability, courts have struck clauses in a contract where a party lacked the power to determine the terms of his agreement as seen in cases like *Henningsen* v. *Bloomfield Motors*, Inc. Others have ignored objectionable clauses where a party used wizardry to draw attention away from provisions which the other party would not ordinarily accept. Legislative provisions are also in existence or rather are being incorporated into mainstream contractual law to cover all such situations involving standard form contracts.

Contract law generally provides for the enforcement of the terms in form contracts, thus essentially allowing the drafting party (almost always the seller in consumer contracts but sometimes the buyer in commercial contracts) to create its own private law to govern its transactions. If the non-drafting party indicates his general assent to the form, courts will

enforce the terms contained therein whether or not that party approves of the terms provided, understands those terms, has read them, or even has the vaguest idea what the terms might be about. Limited exceptions are made to this rule, most notably if the terms are found to be 'unconscionable'.

A realization has come about, that a contract is not simply a signature fixed to writing, but a genuine understanding reached by a process of bargaining. It gives the state authority to strike or modify a clause in a contract where free choice is absent; where a term to which a party never agreed is invoked; or where a literal reading of the agreement would cast it beyond the original intent of the parties.

Thus we find that the approach to standard forms have undergone several changes, even in the past few decades which have cemented its position in consumer transactions, while trying to bring in more consumer oriented approaches. There is no doubt as to the fact that standard forms are here to stay and that taking them out of the system is not a viable option. However, from a perusal of all the ideas proposed by scholars, as mentioned above, leads us to the conclusion that a re-working of the legal framework is necessary to make standard forms an ideal middle ground for both the consumers as well as the sellers.

STANDARD FORM CONTRACTS AND ITS COMPLIANCE WITH THE IDEALS OF CONSUMER PROTECTION- AN ANALYTICAL STUDY

If we were to assess the current position with regard to standard forms and if we further tried to measure it against the yardstick of the rights guaranteed to consumers, we would obtain a more or less accurate summation of how far the two aspects go along with each other or even diverge. For instance, let us take the rights conferred upon Indian consumers under the Consumer Protection Act 2019. It enumerates the following rights namely- the right to be protected against the marketing of hazardous goods, the right to information regarding the product, the right to be heard and seek redressal, the right to be assured of a variety of products at competitive prices and the right to consumer awareness. Taking into account the rights which become relevant for our purposes, we find that standard form contracts comply and also fall short, in varying means and degrees, of the ability to safeguard these rights.

A standard form will not have a clear cut demarcation for, or explicitly bring to the attention

of the consumer the presence of any hazardous material within the standard form. Though there exists checks like that of unconscionability, the lack of a determined set of rules which check the existence of such clauses do hinder the ability of standard forms to safeguard the right to the consumers. There is a common trend as seen in the realm of consumer transactions where the standard forms offered in a particular field like say insurance, have nearly identical clauses with only minor differences among them. The choice between not making a contract and making it on the only terms available is no choice at all and docile submission to the standard form, meek signature 'on the dotted line' is the general rule. There is nothing forcing the consumer to opt for a particular choice amongst the many he is offered, but the issue here seems to be the lack of differences among the offers made thus effectively putting the consumer at a disadvantage. This can be understood further as seen in *Central Inland Water Transport Corporation Ltd.* v. *Brojo Nath Ganguly*, where it was held that- 'The courts will not enforce and will, when called upon to do so, strike an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. ..It will apply to situations in which the speaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.' The Court also looks upon the prime defect in standard form contracts as that of denying a proper choice to the consumers- 'In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service forever.'

The right to information regarding the product in question is to a great extent ensured by standard forms which often undertake a lengthy discussion on the product. However, there is no exhaustive list of details to be mandatorily provided within the standard form contract and thus discretion lies with the one offering the standard form. And the problem of consumers not reading the contract in itself is also to be taken into account here as the net result in either case would be that the consumer remains ill informed. 'It is probably also true to say that the vast majority of conditions appearing in the countless types of standard form contracts are designed only to clarify the bargain and to facilitate the operation of the contract. The only cause of

complaint against such conditions is that they are frequently unnecessarily prolix and, therefore, are seldom read by the person who signs or receives the document incorporating them. Other conditions are, however, designed purely to protect the party who produces the standard form from liability.'

The right to seek redressal cannot be taken away completely, but can be limited in favour of the party making the standard form by stipulating that jurisdiction be limited, etc. The right to be heard is also the prerogative of the Courts and thus is mostly inalienable.

One of the root issues that we come across in the interplay of consumers and standard form contracts is the fact that these contracts, though thrown at the consumer at regular intervals, are never read. In a study taking into consideration the web activity of 48,154 visitors to the Web pages of 90 software companies over a period of 1 month in order to gather data as to the possibility of each of these users interacting with any standard form contracts, in the forms of click-wrap, browser-wrap or others like end user license agreements. It was found that 'regardless of how strictly we define a shopper, only one or two in 1,000 shoppers access a product's EULA for at least 1 second, which yields an informed minority of 0.2 per cent'.

When the question arises as to why this happens, we often hear the argument which attributes this to the way such standard form contracts are drafted. Everything about them seems to point to the fact that they were never meant to be understood. Consumer Affairs expert Bernard Black undertakes the task of determining this particular aspect in detail. According to him, factors that are deterrents to consumer comprehension of standard forms include the format (Fine print, long lines, narrow margins, inadequate spacing, altogether very lengthy with no distinguishability between what the important and non-important terms etc.) the language used (confusing jargon, complex legal terms, and the fact that they run for pages before a full stop is sighted), and most importantly the aspect of non-negotiability. He makes a lengthy and convincing argument on why plain language would, to a great extent, resolve many issues standard form contracts throw at the consumer. The example of Citibank is cited as having made the switch to plain language standard forms without having to deal with much adversity. When consumers understand their right and duties, the nuances of the transaction etc., they may refuse and thus create a pressure in the market in favour of the consumer. The article elaborates on the benefit it brings to the ones making the standard form contracts as well- 'Plain language increases business efficiency and the enforceability of contracts, and encourages consumer trust in business.' Another interesting argument is that 'because consumers can read

and understand plain language forms, the forms are more likely to stand up in court. Although courts usually enforce fine print, if the fine print is unfair they may refuse to by calling it unconscionable, requiring a company to prove that it explained the fine print to the consumer, or by finding an ambiguity where none exists and construing it against the drafters.'

Measures that reduce the cost of comprehending the contract terms are likely to be more successful in increasing the fraction of informed consumers. Thus, a regulatory approach, focusing on shortening and simplifying online contracts, standardizing their terms, and providing a standardized summary is more likely to increase readership than an approach focusing solely on disclosure. Regulations that mandate the disclosure of basic credit terms in a standardized manner and large fonts, such as the Schumer box in the United States and the summary box in the United Kingdom can reduce the cost of reading and comprehending the contract terms.

The recent wave in awareness and enforcement of consumer rights, have bled over into the transactions overseen by standard forms as well. We find that a complete disregard of consumer rights cannot be blamed on the standard forms and that with a close reworking of the same; most of its inherent difficulties as faced by consumers can be rectified. The basic problem being that the consumers don't read such forms which in effect is partly influenced by the practical difficulties for the layman consumer to comprehend the way a standard form is drafted along with other considerations. Measures suggested above seem to be worthy of taking into account or borrowing into our legal system, which has recently begun to exhibit an increasing concern towards consumer protection and the need for safeguarding of consumer rights

STANDARD FORM CONTRACTS IN E COMMERCE AND CONSUMER PROTECTION ISSUES

The past few years in India have been witness to an unprecedented boom as far as e-commerce is considered. Statistics reveal an ever climbing graph showing an increase in e-commerce transactions leading to the belief that the average Indian now sees e-commerce as a viable option considering all the pros it entails. Standard form contracts make an appearance here as well. Today, standard form contracts are ubiquitous, as anybody who has been on the rabbit hole called the internet, will know. Such standard form contracts, often called 'click-through' contracts, pop up at regular intervals on our screens and we happily click 'I agree' though what exactly you agree to remains obscure to you. This is an issue that we have gotten so used to

that it feels like it no longer warrants a discourse on it. But it is amply clear from all the experience we have had of human complacence that this issue needs to be addressed as well.

On the face of it, the power in this relationship between a buyer and seller interacting on an online forum seems to be equally distributed. A consumer sitting in the comfort of his home, who is under no compulsion to fall into the take-it-or-leave-it trap, who has ample opportunity to pore over each clause of the standard form handed out to him at every stage of the transaction and use the power of the internet to gauge its meaning, or search for better options. Though yet unclear why we fail to take advantage of our relative freedom in this regard, it is evident that we tend to click away without a second thought. There is enough scope for the ones who draft the contract to introduce terms and conditions that are favourable to them and which may, at the same time be detrimental to the consumer. For example, terms that create inconvenient venues for litigation or arbitration in far-off places and before less than neutral industry arbitrators; that allow for unilateral modification; that permit automatic renewal of subscriptions and licenses. Internet software vendors also confuse consumers by warranting the quality of their products on their websites and then disclaiming them on their e-standard forms.

Concerns have been raised by the inadequacy of the Indian Contract Act, which was drafted in 1872 to meet the baggage dragged in by the changing nature of transactions, especially by way of e commerce. Its general rules, including offer and acceptance, unconscionability, public policy, and fraud only indirectly relate to modern Internet contracting. The different set of problems that a platform like the internet brings in has its own share of difficulties while applying the basic principles of the law of contracts. Though Indian Courts have been proactive in recognising and granting necessary relief in terms of questions regarding unconscionability, public policy etc., these terms when applied to the internet era, don't quite hold the same meaning or connotations. Further, the screening of both parties to the contract who may never come into contact with one another, and as interaction is carried out through a screen, quite literally, implies a destruction of some of the very traditional concepts of dealings by way of contracts. Questions arise on whether 'agreeing' to the terms and conditions of a standard from contract online, will satisfy the requirements of assent for the purposes of the Contract Act when it seems to be a mindless action on the part of the consumer and whether, such assent is deemed to be communicated for the sake of S 3 of the Act. The validity of email as a means to communicate the same, and the binding nature of any agreement thereon was affirmed in the

case of *Trimex International FZE Ltd. Dubai* v. *Vedanta Aluminium Ltd., India*, where an email exchange evidencing the parties' agreement to arbitrate a dispute regarding a contract created a binding arbitration agreement.

As the growing importance of e-transactions seems to be moving from strength to strength, there needs to be a discussion as to what must be done in order to ensure that the consumers in these transactions do not get ruthlessly exploited. Amongst the suggested solutions we find that the most basic ideal would be to actually read the contracts you agree to. The practicality of this suggestion is definitely questionable. The legislature could be called upon to provide a comprehensive law regulating the same or extend the ambit of existing laws to incorporate a greater degree of protection offered to the consumer. This approach is criticised on the grounds that it would take away the parties' freedom to contract and leave several inconsistencies and ambiguities regarding what terms would have to be followed. Another strategy would be to require consumers to click "I agree" next to all of the contentious terms. However, contract formation would become onerous and consumer ability to "speed click" through the terms suggests that little additional reading would result. Clicking "I agree" numerous times may be especially problematic in India, where the very simplicity of entering into contracts digitally facilitates the increased growth of Internet commerce.

The American Law Institute's 'Principles of the Law of Software Contracts' tries to draw attention to the potential role that could be played by certain watchdog groups- 'that public or private rating services could evaluate terms and post the ratings on the Internet.'. The ALI principles rest its faith on early disclosure and 'robust judicial exercise of policing tools'. The 'disclosure strategy' so to speak is embodied in S 2.02 (b) of the same which runs as follows-

§ 2.02 standard-Form transfers of Generally Available software; enforcement of the standard Form:

(b) A consumer adopts a standard form as a contract when a reasonable vendor would believe the consumer intends to be bound to the form.
(c) A consumer will be deemed to have adopted a standard form as a contract if
(1) The standard form is reasonably accessible electronically prior to initiation of the transfer at issue;
(2) Upon initiating the transfer, the consumer has reasonable notice of and access to the standard form before payment or, if there is no payment, before completion of the transfer;

(3) The consumer signifies agreement at the end of or adjacent to the electronic standard form

(4) The consumer can store and reproduce the standard form if presented electronically.

It is vital to bring in more regulation and comprehensive legal basis for keeping the e-commerce transactions in check. Both standard forms and e-commerce are here to stay and thus the interaction between the two needs to be adequately re-worked in support of the consumers. There are also practical difficulties in ascertaining the validity of e-commerce transactions where a minor or otherwise incompetent party may have entered into the contract under the guise of internet anonymity. Furthermore, the enhanced protection given to consumers will indirectly benefit the realm of e-commerce particularly when it comes to increasing the scope of transactions and the enforceability of such contracts particularly in cases like C2C dealings. We also find the law trying to imbibe e-transactions into its fold by passing legislations like the Electronic Commerce Support Act of 1998 which adds concepts like electronic signature etc., to the existing legal machinery in India. We also have the Information Technology which has been updated to deal with the contingencies of modern transactions. Model provisions from across the world needs to be taken into consideration for evolving a comprehensive legal framework in India as the transactions entered into on the e-commerce label are not limited to the territorial limits of one nation.

CONCLUSION

The necessity of standard from contracts and indeed, the irreplaceable nature of these, have come to be an established feature of economic transactions. It has a great deal of positives and though we may try to highlight its negatives, there is no denial of the way standard form contracts have revolutionized the traditional contracting process. It has rendered the once cumbersome process of entering into contracts into an effortless task which one may complete by the literal click of a button, without any change in the heavy burden of terms and conditions that the contract entails. The entrance of standard forms into consumer transactions has been smoothly orchestrated, so much so that most consumers, to this day, do not realize the sheer magnitude of strings of contracts that they are bound with, by virtue of the multiple standard forms they mindlessly become a part of. There are several benefits accorded to both parties in a standard form contract based consumer interaction. But as we have seen, there are several

drawbacks to it as well, which are mostly detrimental to the consumer. However, keeping practical considerations in mind, these difficulties are not insurmountable and can be overcome with the effective interplay of the legislative, the judiciary, increased consumer awareness and some latitude ensured by the drafting parties. With special reference of e-commerce, there seems to be several issues lurking beneath each checkbox marked 'I agree'. Nevertheless, as we have seen from the discussion above, both standard form contracts and e commerce are here to stay and a complete upheaval of the same may not be in our best interests. By accepting the beneficial aspects of the two, and keeping in mind the ideal standards of consumer protection, we can evolve a wholly conducive environment which fosters a healthy interplay between consumers and sellers, with the standard from contracts and e commerce platforms facilitating their exchange.

V

UAPA- NEED OF THE HOUR OR TOOL OF TORTURE[26]

ABSTRACT

The Unlawful Activities (Prevention) Act, 1967 is a draconian law which exclusively and efficaciously deals with effective prevention of acts related to unlawful and terrorist activities and to protect the sovereignty and integrity by imposing reasonable restrictions. The main objective was to provide the government with certain powers to deal with activities against the integrity of the nation. This research paper aims to outline the main features of UAPA 1967, and what were the circumstances that lead to the enforcement of the said act. Earlier there was Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA). It was an anti-terrorism law which came into existence due to the Punjab insurgency. Prevention of Terrorism Act, 2002 (POTA) was passed post the bomb-blast in the parliament. However, TADA and POTA was repealed shortly after as it was arbitrarily used to target political opponents and misuse of power. After POTA was repealed there were several amendments made in UAPA, 1967, which were again repealed as the purpose of the amendments was not justified as the terrorist activities in the country were still increasing. The current amendment made in 2019 in the UAPA 1967 is that the central government is now empowered to designate an individual as terrorist. Petitions were filed in the Supreme Court challenging the constitutional validity of the said amendment act. The contention primarily focuses on the power to the central government to designate an individual as a terrorist without any charges on the basis of being prime suspect, which is a violation of the fundamental rights under the Constitution of India. The present paper shall also attempt to analyse the constitutionality of the Section 35 and Section 36 of the Unlawful Activities (Prevention) Amendment Act, 2019.

[26] Prachi Rathi & Shaivya Pashine, University of Petroleum and Energy Studies, Dehradun.

UAPA- NEED OF THE HOUR OR TOOL OF TORTURE

INTRODUCTION

Terrorism is an old problem with new challenges. It has drastically affected the world economy and people's life. It is a curse in human kind. Thousands of innocent people, who have no link or knowledge of terrorists, have lost their lives in the attacks. In order to understand terrorism, one should/must assess the different views of what exactly constitutes terrorism. "*There is no universally accepted definition of terrorism till date".* The terrorist activities are widened to include people and life of the community in India and in any foreign country. Many affected countries have shown that their legislative countries have taken response to fight against terrorism. This kind of terror attacks are a serious concern to be taken seriously which actually increasing rapidly. India has been facing terrorist problems since few years. To solve the problem of terrorism Indian parliament has enacted various enactments to curb the menace of terrorism. The government of India has taken several legislations with a view to coping with violent activities. It raises genuine security concerns and the attempts to address these concerns through various measures. The Preventive Detention Act, 1950 commonly known as PDA. It was passed to deal with the violent circumstances during the partition of India. The statute authorised powers such as to detain individual for one year without any charges to the government. Then it was observed that to detain an individual a close study is required. The PDA law was finally repealed in 1969 because it was said by the then Minister of home affairs that, to pass more legislations more closure study is required. The Indian Government Unlawful Activities (Prevention) Act 1967 and also for making them stricter such amendment acts in 2019 being passed.

In the contemporary society, terrorism possesses a big threat to the whole world. India, like other countries are also facing the same serious threat regarding the activities related to terrorism which is creating problems for the country maintain and give happy and peaceful life to the citizens. In recent years India has witnessed such brutal and well planned attacks with deadly arms and explosives supported by sophisticated technology available in the form of communication system, transport and various other means of communication. 20^{Th} century is an era of a world, uniting against a common enemy, but also an era of insecurity and fear. The Unlawful Activities (Prevention) Act 1967 was enacted to reduce the insecurity and fear amongst the people regarding the treacherous act of terrorism. Unlawful Activities (Prevention)

Act 1967 is an upgraded version of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) and Prevention of Terrorism Act, 2002 (POTA). The Unlawful Activities (prevention) Act 1967 is a draconian law which exclusively and efficacious deals with effective prevention of unlawful activities targeted against integrity of India. The Act provides for the definition of 'unlawful activities' under ***Section 2 sub-section (1) clause (o)*** of the act.

Sec. 2(1)(o) *"In relation to an individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise)-*

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India;" [27]

By the definition of unlawful activities as mentioned in the act we tend to understand that these are activities which mainly aim to provoke people to do an act which leads to disrupt the country's sovereignty and dignity. The main purpose or objective of the act was to give powers to the central government and to the National Investigation Agency for dealing with the unlawful activities or activities directed against the development and sovereignty of the country. The provisions of the said act are applicable to the whole of India including the state of Jammu and Kashmir. The act was enacted in order to provide effective prevention from the unlawful activities an association which are mentioned under the first schedule of the amendment and provision related to individuals is mentioned under the fourth schedule of the amendment act, 2019. After the above discussion it has becomes equally important to under the meaning of the term "Terrorist act" and "terrorism". The UAP Act 1967 provides the definition of "terrorist act" under Section 15 of the UAP Act 1967 herein as-

Sec. 15*[(1)] Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security* [4]*[, economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, --*

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any

[27] Unlawful Activities (Prevention) Act 1967, s 2(1) (o)

other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause--

(i) Death of, or injuries to, any person or persons; or

(ii) Loss of, or damage to, or destruction of, property; or

(iii) Disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(iii) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or [5][an international or inter-governmental organization or any other person to do or abstain from doing any act; or] commits a terrorist act.

[Explanation.--For the purpose of this sub-section,

(a) "public functionary" means the constitutional authorities or any other functionary notified in the Official Gazette by the Central Government as public functionary;

(b) "high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorized or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.

[(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.][28]

by the definition of terrorist act as mentioned in the act we tend to understand that the acts which cause any kind of damage to man and mankind. Terrorism is a Global issue, but there

[28] Unlawful Activities (Prevention) Act 1967, s 15.

has been a rapid increase in terrorist activities throughout India. Without a proper definition of it, one could neither identify an act of violence as terrorist nor condemn that act. There is a need for appropriate and adequate laws to prevent the terrorism. We all thoroughly agree that the terrorist need to be hunted down and brought to justice wherever they are. Now to clear the definition of *terrorism* the word came from the Latin verb '*terrere'* meaning 'to cause to tremble' but doesn't have any official or universally accepted definition of it. An adequate definition of terrorism is the need of the hour to face international terrorism, which spreads across the world. The role of judiciary is very important to control the terrorism by ensuring the right of access to justice to each and every person, which is basic to the human rights and unless the basic human rights are preserved the threat of terrorism cannot be controlled. There is a need of stringent provisions for the prevention of terrorism. In a country like India if a law regarding terrorism is enacted it should be made so stringent that the culprit be brought to book and does not go scot-free because of the loopholes or lacunas.[29] The laws should conform with 'the rule of law' and 'due process of law'. Due to increase in unlawful activities, terrorism and terrorist activities, it was the need of time to make the amendments in the UAP Act 1967 to fight the individuals behind the terrorist organisation.

REQUIREMENT OF THE AMENDMENT

Parliament approved this crucial amendment Act to an anti-terror law under zero tolerance policy against terrorism and terrorist activities to designate individuals as 'terrorists' if they are suspected to have been involved in terror activities and terror links as currently the NIA is faces many difficulties in the process of investigation and prosecution of terrorism related cases and now the act will facilitate speedy process right from the investigation to the execution of the accused. With the motive or plan to overcome such difficulties being faced by the National Investigation Agency in the investigation and prosecution of terrorism related cases due to legal infirmities and in order to align the domestic law with the international obligations as mandated in several conventions and security council resolutions on the issue, the government proposes to amend the said act. Post enforcement of the amendment Act NIA need not seek permission form the state police for keeping check on anti-terror activities which will eventually save time and resources of the state. Due to the recent amendment the central government can notify or denote an organization as terrorist, or implementing any of the nominal safeguards available to

[29] Caesar Roy: "The Anti- Terrorism Laws" (1st sup. November 2011).

unlawful association. Individuals are now vulnerable to the same fate. The amendment Act will channel the force of the act on designation of individual as 'terrorist'. If the government believes any organization (group of individual) or individual is preparing for, encouraging or involved in terrorism. In these cases decided before it has been seen that if an individual is funding an organization to execute the unlawful activities and terrorist activities. The act gives the Director-General, National Investigation Agency to give approval to attach the property of the person when the case is investigated by the officers of the agency. Therefore it was felt that the UAP Act required the above discussed amendment.

IMPORTANCE OF THE AMENDMENT ACT

This Unlawful activities prevention amendment act passed in 2nd August 2019 by the Rajya Sabha. The amendment Act is the new beginning to fight against the increasing terrorism in the country and there is need to pass such kind of acts in order to safeguard our nation. This initiation was a much needed and a much awaited step taken by the government. This amendment also gives powers to the director general of the National Investigating Agency (NIA) to attach property acquired from proceeds of terrorism, Earlier the law required that the NIA take prior permission from the respective state police chief to attach the proceeds of terrorism which used to delay the then process as often such properties are in different states, but now the power being given to the NIA after the amendment. After this amendment in the Act which basically focuses on giving government a power of designating an individual a terrorist or an organization a terrorist's organization and seizure of all its arms and properties. India in recent weeks has been abuzz with some legal changes that the NDA (National Democratic Alliance) Government has been pursuing with respect to the National security framework.[30]One of these changes is via this act of Unlawful Activities Prevention Act 2019, because there are about 50+ Terrorist incidents including blasts and bombing causing grievous hurt to the people and injuring the people in India and also injuring lakhs of them. Recent Gadchiroli Naxal Bombing causing grievous hurt to the people and causing death of 16 and more people there in Gadchiroli at Deccan plateau Maharashtra and the terror attacks are now increasing day by day and which is becoming very harmful for the country and its people and there are lot many things which comes under the terrorism and that is why there is a strict need of such strict laws to deal with the person involved or indulged in certain terrorism kind of

[30] Amal Sethi, "UAPA Amendment bill tabled in Rajya Sabha" , Aug 01, 2019 https://www.firstpost.com/india/amit-shah-to-table-uapa-amendment-bill-in-rajya-sabha-today-more-police-powers-with-centre-might-be-a-bad-idea-heres-why-7076461.html accessed 24th Sept 2019

activities. To this there are certain grounds mentioned in the amendment Act when a person or an organization can be designated as a terrorist if falling under those grounds mentioned in the amendment Act it can be designated as a terrorist.

Terrorism doesn't only mean only those attacks but there are many more such things. Terrorism has emerged as a major threat to the unity and integrity of India and also is creating a lot disturbance in the sovereignty of the country. The masterminds of terror ask for to attain their objectives by making an environment of concern with a read to destabilize India. Terrorism has no religion; terrorist is against humanity so there should be stringent laws made against terrorism. The major regions affected by terrorist activities in India include Jammu and Kashmir, east-central and south-central India (Naxalism) and the Seven Sisters (North-East). In today's times terrorism is the first and foremost weapon for few individual to prove their point of view and to make government listen and think about what is right and what is wrong in the particular individual's view. *"There is a rebellion against the country, and society inside a militant."*[31] Dissatisfaction, Corruption, Racism, Economic inequality, linguistic differences between the religions, unemployment all these are the fundamental elements of the terrorism, terrorism flourishes after them. Nowadays it's easy to influence people towards terror activities with less investments and more revenue, and it has become a key to become rich within hours or overnight because whenever we see or suspect terror activities it's generally done by the people who have grudges with the state or with the government.

Since we all know India has a high rate of illiteracy and people cannot tolerate anything against their religion which creates a violent attitude towards other religion without any relevant basis. For e.g. Jaish-e-Mohammad and other terror organizations in the name of ***Jihad*** which literally means "to come out of problems, accept and spread the truth and inherit good qualities from another by discard the impurities". These types of strict laws by designating an individual or an organization a terrorist, these strict laws are much needed to make the people in the country feel secure in their own country. These laws are needed because, so that all the people and their property of all the innocent people be prevented from being destroyed and if the one such terrorist will be punished with a rigorous punishment, by seeing that at least, the second terrorist will be in terror, and the second terrorist will not born. The Unlawful Activities (Prevention) Amendment Act, 2019, received the Presidential Assent with the Act finally becoming a law,

[31] John Philip Jenkins, "Terrorism"< https://www.britannica.com/topic/terrorism> accessed on 24th Sept 2019

the government has empowered itself to designate any individual as a terrorist if it believes that the individual has committed or participated in acts of terrorism, prepared for terrorism, promoted terrorism, or is otherwise involved in terrorism. Earlier, only organisations could be designated as terror outfits and its membership and/or support of which was an offence under the UAP Act, 1967.There is a strict need of such acts because then the agencies will four step ahead of terrorists. All countries have this kind of laws to designate an individual a terrorist for e.g. Countries like United States, European Nations and the United Nations, besides countries like china, Pakistan and Israel also have such kind of laws so why not there's a need of such kind of laws in India too. By only seeing the deteriorating conditions of the country this is a much awaited step taken by the government. The Home Minister Shri Shah said that, the proposed Act has a very concerned motive and the simple motive behind the is just to remove terrorism from the country by designating an individual a terrorist so that their plan should not be pre-ponded or postponed and their plan should not get initiated.

The Minister of home affairs Shri Shah said that, though the Act gives some extra powers and liberty to the agency to investigate against individuals who are suspected against some terror activities, but the Act also puts some restrains which will prevent from misusing the powers given to the agency as well as the central government. There aren't any changes being created in arrest or bail provisions. Therefore, it's clear that there'll be no violation of any fundamental rights of the citizens of the country. Also, the burden of proof is on the investigating agency and not on the accused. And there is need to designate an individual as a terrorist so as to they will not be able to form the organisation individually after banning the organisation. The act also extends the definition of the terrorist acts as any act which will threaten the economic security of the country and damages its monetary stability by production, smuggling, or circulation of high quality counterfeit currency. The Act specifically defines everything and then if anyone falling under ambit of it will be designated as a terrorist. But there has been debates related to the constitutionality of the Amendment in the Unlawful Activities (Prevention) Act 1967.

CHALLENGES TO THE AMENDMENT ACT

There were so many contentions made on the amendment Act 2019 by Senior Congress Leader P Chidambaram he says this is in clear violation of an individual's fundamental rights under article 19 and 21 of the Indian Constitution and secondly the main contentious issue was that it will give government this unlimited and unquestionable power to designate an individual a

terrorist. Is this government assuming that the law will not be misused and wrongly applied in future? Can tougher laws related to terrorist attacks would able to prevent Pulwama kind of attack? It was also stated that the Act does not give clear distinguish between unlawful activities and terror activities, and also being stated that this Act does not follow the basic rule of law which says that "*no one is guilty until proven".*

TMC leader Mahua Moitra said that the features or characteristics of the amended Act are anti-people and anti-constitutional as it is against the federal structure of the country, therefore it is very dangerous to amend the act. Many more such contentions being made which is to be discussed one of which is (NCP) Supriya Sule opposing the Act has said that when one such Anti- terror Act was to pass in the state of Gujarat which was refused to be enacted by the then chief Minister Mr. Narendra Modi, and saying that the Federal structure should be maintained now, she also stated that more power leads to more misuse and exploitation of the people. Again apprehensions being raised by Danish Ali (BSP), regarding unconstitutionality of the amended Act in a manner that this act will lead to ill treatment and manipulation in the part of the innocent masses. And a question arose that why, the TADA and POTA acts were being repealed by the house? Some contentions arose which says that arresting an individual on the basis of suspicions alone is "Dangerous"[32]. And the question also arose that, whether those victims will be getting any kind of compensation after being investigated and before that when they were being suspected?

One of the question also arose which says that there is no proper definition of the terrorist in the Act? When the Act was initially introduced in 1967, at that time the ruling government was trolled by stating that the act was for the political empowerment and benefit and not for the purpose of fighting against terrorism in the country, after several amendments in the past and now after the 2019 amendment the same question has been aroused that this amendment Act is for the political benefit of the central government. Some of them think that earlier only the terrorist organisations were being designated as a terrorist but now after this amendment, individuals were also being designated as a terrorists and which people think is a violation of the fundamental rights under article and hence unconstitutional. And after designating an individual a terrorist, state gives power to seizure of the property of that individual.

[32] Tarique Anwar, "UAPA Amendments: Gateway to misuse anti-terror laws"
(News click, 10 Aug 2019) < https://www.newsclick.in/UAPA-amendment-gateway-misuse-anti-terror-law-critics> accessed on 24th Sept 2019

Within a period of time after the amendment Act passed by the Parliament, there has been filed a Public Interest Litigation (PIL) and one petition in the Apex Court challenging the amendment Act by stating that the Act is violation of the Part III Fundamental Rights which is the basic structure of the Constitution of India. The PIL stated that the Act is unconstitutional because it is violation of **Article 14**: Equality before law, **Article 19(1)(a)**: to freedom of speech and expression, and **Article 21**: Protection of life and personal liberty, to all the citizens of the country. The PIL also stated that the Act gave arbitrary, unbound and unlimited powers to designate an individual as a terrorist. Similarly the other petition which also included the Association for Protection of Civil Rights (APCR) it challenged the constitutionality of Section 35 and Section 36 of the amendment Act.

RELEVANCE OF THE AMENDMENT ACT

There were so many acrimonies made and there are justifications to it, as stated by the ministry of home affairs, the main reason to designate an individual as terrorist is, since the original UAP act of 1967 does not contain any provisions or specifications related to individuals and only focuses on the concept of terror organisations. The purpose behind this designation of an individual is that as soon as the law bans an organisation doing unlawful activity and/or involve in any kind of terrorism activities, the individual running the organisation forms an organisation of same kind i.e. involve in unlawful and terrorist activities. The amended Act does not make major changes or any kind of unlawful changes in the arrest and bail of the suspected individual. The right of an arrested person and bail rights as provided in the Criminal Procedure Code, 1973 shall prevail. Therefore, there is no violation of any fundamental right or human rights or any rights related to the freedom of an individual. Hence, it does not demonstrate or certify that the amended Act is unconstitutional or against the basic structure of the constitution.

There is power in the hands of the central government to tag an individual a terrorist in a way as after being banning the organisation only, the individual constituting the organisation can reform the organisation after escaping because now they will no more work with the already settled up organisation because it has been banned now, but to accomplish their motive they'll start or reform the another organisation and which will any way harm the country and its people. So there was a great need of tagging or designating an individual a terrorist to overcome this problem. In a same way Seizure of properties of the people individually and also of the organisation will help not letting an individual to take property in some other name or misuse

of certain laws. And so it was necessary to seize the property of an individual too. It is not just in India, it has stricter laws to fight against terrorism but there are counties around the globe, taking such strict initiations to fight against terrorism which is very important if keeping in mind the increasing terror activities. If there are contentions relating to the law not being misused, so this whole procedure consists not tagging an individual a terrorist but there is a whole four level scrutiny to be followed and then after the full investigation the individual will be designated so. And thus through which it can be guaranteed that this cannot be misused and not if misuse can be one of the contentions then there are so many laws and acts passed which can also be misused? But that doesn't happen and even in this there is no point of misusing the act. These legislations being made and they're not only mere statements, but they are doctrines made which are enshrined to protect the rule of law for the present conditions and also for the near foreseeable future.

One of the Apprehensions rose which is actually very genuine is that, Can such tougher laws be helpful in curbing terrorism from India? So basically this question gives a lot of answers, first of all the terrorists don't have any religion and they give effect to such activities in order fulfil their unlawful agendas, the use the means of violence and disturb the social order in a society, And if they can do such things why will they ever be care about how stricter laws become. The main motive behind this amendment acts are to remove terrorism from the country and do not have any ulterior objective behind the enactment. Instead of dealing with this article in an imperceptible manner, it has to be considered as a very important part of the country which is evolving around the developing Country scheme and narrative of developing India, into a state with a robust surveillance network. These are those decisions taken that reflects the programs being initiated to enforce such laws which are being initiated taken into consideration on the potential for Human rights abuses.

Earlier the level of terrorism was very less i.e. nearly negligible or unrecognized. After the 26th November 2008, commonly known as Bombay attack of 26/11, a need for stricter law was felt by the authorities as the process of investigation against the organization was tedious and time consuming. The 2009 amendments were made keeping in view the laws related to national security. Later, in 2019 when Pulwama attack took place wherein a Jaish-e suicide bomber managed to kill 44 CRPF soldiers and injure around 70 civilians[33], it was then realised that

[33] India Today, "Pulwama Attack-2019" (16th Feb)< https://www.indiatoday.in/india/story/pulwama-attack-2019-everything-about-jammu-and-kashmir-terror-attack-on-crpf-by-terrorist-adil-ahmed-dar-jaish-e-mohammad-1457530-2019-02-16> accessed on 24th Sept 2019.

there was immense increment in terrorism activities and terrorist organizations. Therefore, there is a for need harsh and uncompromising laws in the country. The amendment Act will not ill-treat or manipulate the innocent masses as it has provided for specific grounds to raise, accuse and suspect an individual's involvement in terrorist activity. As we know that the investigation agency is accountable and questioned by the people, so framing innocent people will lead to deterioration of their reputation. These acts were repealed because of no control and unrestrained powers, as the present act UAPA is in up gradation of TADA and POTA act with reasonable restrictions implied to every department of the government. A person is said to be a terrorist when he/she is involved in some kind of terrorism or terrorist activities, the act already provides with the definition of terrorist activities under section 15 of the UAPA. Since the definition has been provided a person doing those kinds of activities will come under the purview of the terrorist.

CONCLUSION

Unlawful activities means any action taken against an individual or association whether by committing an act or by words either spoken or written, or by signs to question disclaims, disrupts or is intended to disrupt the territorial integrity and sovereignty of India. They are those activities which mainly aim to provoke people to do an act which leads to disrupt the country's sovereignty and dignity, hammer the integrity of the nation as a whole. The aim of the act is to provide with effective powers to prevent and control unlawful activities and terrorist activities, powers to the National Investigation Agency and the central government. We would like to conclude by saying these amendments were being made with the purpose to solve the problems related to increase in terrorism and an individual forming a different organization with the same member once the previous organization or association is ban, after the declaration of the organization as "terror group". The Unlawful Activities (Prevention) Act, 2019 if not been able to abolish completely, at least helpful in minimising the terrorism in the country. And, to create a sense of fear amongst the organization or individuals in the country who participate or are involve in any type of terrorist activities like promoting, funding, helping in influencing or brainwashing young people in the country and to take arms and ammunitions against the country. Whether these strict will be helpful in solving the purpose of the central government to minimise the terrorism and enhancing the security of the country? The extra power given to the agency for the purpose of investigation against unlawful activities is beneficial for the agency but it has dangerous repercussions for the individual and organisation sometimes, as

more power can lead to abuse of power. Taking prior permission for investigation mostly results in leak of information, which makes it difficult for the investigating agency to target and catch the right person as information can easily be manipulated. The contentions made by the opposition's leader regarding misuse of power, can be taken into consideration as the Terrorist and disruptive Activities (Prevention) Act, 1985 (TADA) and Prevention of Terrorism Act, 2002 were being repealed due to the misuse of the power by the officials and the higher authorities against the innocent masses. The anti-terror hub stands on three legs- National Investigation Agency (NIA), National Counter Terrorism Centre (NCTC) and National Intelligence Grid (NIDRID). The amendment act only delegate powers to NIA, but is silent about the other two anti-terrorist investigation agencies.

The amendment act does not clearly state the limitation of power given to NIA. The amended act provides a four level scrutiny which will help in investigation and in designating an individual as terrorist but fails to provide with a clear and easy understanding of the process. Despite of the fact that the bill has being passed by the Parliament and is signed by the President, it is still being a debatable issue. After the enforcement of the amendment act, within two months of enactment there has been one Public Interest Litigation and one petition filed before the Hon'ble Supreme Court. Unlike the PDA and UAPA It has been misused rampantly which also led to the politically motivated detentions and violation of the Human rights, from which it can also be assumed that there might be misuse of the latest UAP amended act, 2019 and the supreme authorities having the power can use it to take revenge and fulfil personal grudges from the opponent party. The future years will show whether the amendment act is successful and fulfil the objective of the amendment or not.

VI

CRITICAL ANALYSIS OF ANTI- COMPETITIVE AGREEMENTS: INDIAN PERSPECTIVE[34]

ABSTRACT

Today, in a developing country like India, there exists a contrasting cut-throat competition in the economic competitive market. In the 20th century there has been a significant and crucial departure from the Monopolies Restrictive Trade Practices Act, 1969 to the Competition Act, 2002 revitalizing adequate protection against unfair trade practices, cartels and dominance. There were many factors that were responsible for such a tragic and sudden shift in the economic market sphere such as strategic efforts to remove unfair trade practices, the economic changes that were left overhauled and the pro- trade advancements. Presently, Competition Law is considered to be a valuable legislation that ensures fair competition and efficient regulatory functioning of the Industries in the Indian market. It evolved an entire revolutionary a regime by introducing Section 3 (anti- competitive agreements), Section 4- abuse of dominance and other relevant provisions. It is required to examine, evaluate and prevent the irregularities and discrepancies existing in an open and free market economy due to the prevailing trade practices. One such discrepancy which was significantly noticed was anti-competitive agreements. The researcher here focuses on the transition of the economic sphere of the Indian economy by replacing the Monopolies Restrictive and Trade Practices Act, 1969 (MRTP Act) with the Competition Act, 2002, the building blocks of the concept of "Anti-Competitive Agreements" under the Act, the legal developments with respect to the same and seeks to suggest certain recommendations for a better, wider and clearer interpretation of the Act.

[34] Sukirti Devendra & Rishabh Kanojiya, Symbiosis Law School, Pune.

CRITICAL ANALYSIS OF ANTI- COMPETITIVE AGREEMENTS: INDIAN PERSPECTIVE

INTRODUCTION

This paper centres on the agreements which restrict anti-competition practices under Competition Act, 2002. Competition in market is very essential factor to improve quality, abundance, interest of consumers, innovation of goods and services. Most importantly, it ensures availability of goods and services at affordable prices. It derives forces to increase the competition between domestic and international organization for their survival. Such advent encourages advantages to such concept leads to economic stability and consumer benefits. But, it also leads to many disadvantages when it is not regulated.

The regime of British, exploited abundant resources of India which lead to concentration of such resources. The country failed to reform internal regulation to restrict such exploitation or illegal trade and commerce. After such regime, a new era evolved which enable equal distribution of resources to everyone and to remove disparity among citizens of the country. The government of Indian took a major step, to deeply materialize the wants of resources by formulating provisions such as Article 38 and 39 under the constitution of India. But, the legislation was to encounter several changes and amendments in situation of such kind. Therefore, the advent of Economic Reform Agenda (1992) by the government of Indian opened the market to foreign investment and to trade and commerce.

The market attracted more industrial development and infrastructure leading to monopolistic situation and ineffective competition by exploiting consumers to capture the market share and to make profits. The sole purpose of capturing market share is to earn profits. Thus, to regulate competition in the market, the Competition Act, 2002 was enacted by the parliament after several amendments to Monopolistic and Restrictive Trade Practices Act (MRTP).

WAY FORWARD TO COMPETITION LAW IN INDIA

Even after the enactment and enforcement of the MRTP Act, there was a need of a strategic statute in order to prevent and reduce the concentration of economic power consequential to the public interest, the stagnant monopolies and their respective trade practices. Further the Industrial revolution in the 1990s stressed upon tuning the State policies with respect to the public sector and Government especially over controlling monopolies and the cost of production. The issue and concerns arising in the Indian market economy with respect to

competition were way beyond the ambit of the MRTP Act and it proved to be inadequate to curb the same.

There was an increasing integration of India with countries across the borders welcoming various new challenges of anti-competitive agreements and practices that the Act was not efficiently and effectively equipped with to deal with. The Act completely lacked provisions that could combat the erroneous restrictive trade practices that were conducted in the Indian market relating to the international and domestic cartels. Also with the liberalization and globalization of the world as the market, it became a need to have policies, regulations and laws promoting competition.

Thus in order to promote the social and economic interests of the society at large guaranteed under the Directive principles, Article 38 and Article 39 ,a committee (High level) selected by the Government (1999), suggested and submitted a report (2005). Based on the recommendations of the same, the Competition Act, 2002 was passed in alignment of the various undertaken and to be undertaken international and domestic developments.

Though a controversy arose challenging the validity of the Competition Commission and the selection criterion of the members to the same, the Competition Act (Amendment), 2007 was finally enforced in the year 2009, mainly for promoting competitiveness in the Indian markets along with a general awareness among the shareholders about the various cropping issues and concerns. The most significant feature of this enactment was that it blindly deregulated economically and liberalized the policies (trade), thereby ensuring a free and open market along with contestability.

For Example – Reliance Jio, a telecommunication industry incubated the working of industries by taking control over three fourth of the market share for data services. The industry acquired the huge share control by unreasonable pricing which tend to reduce the competition with other telecommunication industries. Thus, competition law restricted such trade practices and allowed the forces of market to take control over the pricing for concerned industry. Therefore, competition law acts appropriately to encounter such situations and maintain effective competition in the market.

ESSENCE OF COMPETITION LAW IN INDIA

The essence of competition lies in its Applicability of Restriction on trade and commerce. As, discusses above the MRTP Act, 1969 does not comprises provisions to regulate abuse of dominance, cartels, bid rigging and agreements to restrict unfair competition practices. Thus, the legislation intended to cover several new economic systems in its ambit such as:

- Regulation for anti-competition agreements ; and
- Regulations for abuse of dominance ; and
- Regulations for combinations and cartels.

Anti – Competition Agreements in India

Under Section 3 of the act, deals with such anti-competition agreements in relation to production, supply, distribution or acquisition of any goods and services that tends to cause Appreciable Adverse Effect on the economy of the country. Anti – competition agreements are the agreements which provide restrictions clauses up to trade and commerce. When an organization is entering in such agreement with the other, mandatory is shall comprise provisions which restrict distorting, suppressing and reducing competition in the market. The key purpose, to include such agreements is to promote competition and welfare of the consumers. These restrictions are subject to both i.e. goods and services provided, in any industry. These restrictive agreements are likely to Cause Appreciable Adverse Effect on the economy of the country. The agreements deal with exchange between groups of people or organization or association, by restricting transaction of a kind, any arrangements among them and cartels. The agreement prohibits the power or exercising of such powers to certain substantial extends which is executed to deploy unfair trade practices in any exchange of goods and services. Well, these provisions are somehow were adopted from earlier formulated legislation in U.S and U.K. The competition law in itself provides provisions for agreements for their enforcing and regulatory purposes, so as to execution of such agreements by the courts are in "Equity, Justice and Good Conscience."

Applicability of Anti-Competition Agreements

The provisions of the act are applicable to any person or association which is defined under Section 2(h) of the act. But, such associations or enterprises executing any sovereign function are exempted from anti-competition policies. Also, all the bodies of union or state which are tend to execute authorized actions are not covered under the ambit of the act. Those arrangements which are made specifically for conducting export activities are not prohibited until they hamper the competition. The primary objective of such applicability is to foster promotion of effective competition in the market. Further, Section 3(5) it also prescribes essential exemptions from these anti-competition agreements policies:

Protection of Intellectual Property – The act does not permit exploiting of intellectual property

rights or establishing unreasonable intellectual property rights. Although, Reasonable rights are not explained under the act, but test of prudent men lies while deciding the same. These violations fall under Section 3 of the act.

The intellectual property right under the ambit of the act includes:

- Patent pooling
- Tie-in agreements
- Agreements to pay royalty even after patent is expired"

Exports cartels – Exports cartels are no covered under the restrictions or anti – competition agreements of the competition law, 2002, as the country does not want unstable exports which will tend to increase deficits.

Basis of Interpretation of Anti – Competition Agreements

There are certain basic rules and principles for laying down the anti-competition agreements are as follows:

Rule of Reason: The rule of reason was first laid down by the court in, *Standard Oil Co. of New Jersey* v. *United States* which stated "The restrictions under the competitions law are to contain a purpose or logic of enabling pro - competition policies" Generally; this rule is applicable to vertical agreements which prima facie reduce the advancement of valid enhancing benefits for the economy. This rule legitimates the logic behind an action which is restricted by the agreements. In *Business Electronics Corp* v. *Sharp Electronics Corp*, the court stated that "such agreements lays action in relation to certain actions taken to benefit the economy and price of goods and services". Basically, it is related the logic of restricting any action which will impact the competition in economy. The factors which affect, the competition depends on different situations or cases and prevailing conditions in the market.

Rule of Per Se: This rule was established in *Addyston Pipe & Steel Co.* v. *U.S* in 1898, which considers restrictions for activities contrary to the competition law provisions and not to indulge in subsequent inquiry of the same for establishing the harm or purpose of such activities. This rule is applicable to the agreements which are prescribed under Section 3(3) of the act or horizontal agreements and agreements which contain restrictions to price fixing, big rigging and group boycotts. The court in *Fefforson Parish Hospital* v. *Hyde* stated that "The analysis of the market has to be conducted to refrain certain type of trade. But, if such analysis needs to be avoided, and then identify any of the activities should not involve anti-competition conduct." The actions which directly involve or prescribe substance element of the very form

of agreements need to be adjudicated by the authorities.

Rule of Presumption: Under Section 4(2) of Evidence Act, 1872 states the rule of presumption as "A fact is presumed to be proved unless it is disproved." The adjudication authorities is nowhere in a position of presuming any circumstance evolving in a case or can be considered as evidence. But the legislation prescribes its intent to raise a presumption unless it is disapproved.

TYPES OF AGREEMENTS

Horizontal Agreements

These types of agreements is entered between any enterprise or association or persons or between person and association or between any associations of persons carrying business of selling, distributing or involving in similar nature of trade or any services or conducting similar activities. Under Section 3 (3) of the act, such agreements can be entered between the producers, distributors, whole sellers or retailers to restrict activities which involves -

Agreements That Determine Indirectly or Directly the Sale or Purchase Price:

These agreements are basically concerned with the fixation of the price when the actuaries undertaken by the competitors have an impact on the sale or purchase price either indirectly or directly. These include price, credit agreements etc. Such agreements prevent a particular of competition from sustaining and usually entered into by various competitors in order to agree upon and fix a price themselves rather that market forces deciding the same. As a result, the consumers are forced to pay an incremented price that would have determined by the market forces. However, the same can be regulated by the authority if considered absolutely unreasonable.

Agreements which controls or Limits Supply, Investments, Markets, Production, Technical Development or Services:

These agreements may include any form of restriction or limitation on the manufacturing process including Supply, Investments, Markets, Production, Technical Development or Services that may oppose the interests of the consumers by increasing the cost of production and increasing the price of the product or decreasing the technical development, thus lowering the price of the product as the case may be.

Agreements which shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or the number of customers in the market or any other similar way:

These agreements are related to sharing the market either on a location basis or customer's

basis or target customer basis or as the case may be. They are considered to be anti-competitive in nature as these tend to limit the amount of choice available to the consumers, thus restricting competition as well.

Collusive Bidding or Bid Rigging Indirectly or Directly

Section 3(3) of the Act defines Bid-Rigging as "Any agreement between the enterprises or persons referred to in sub-section 3 engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding". Thus as the party to supersede all the other bids is already decided thus, this in itself reduces the amount of competition.

Cartel Agreements

Cartel agreements are considered to be one of the horizontal agreements. It can be possible in certain times; personnel of certain institutions could hold meetings as to make certain arrangements or to conspire against the consumers or policies of Anti-Competition and these arrangements are entered through agreements which can be termed as cartel agreements. Although, the intention of the legislation is not to disarrange such meetings, but to prohibit any execution of arrangements or conspiracy consented in such meetings.

In **United States v. Trenton Potteries Co**. the court observed that "Cartels are such agreements which not only restrict a kind of trade but also affect the principle issues of reasonableness of price fixing of goods and services" Thus, cartel agreement is an arrangement against policies of price fixing, rig bidding and limiting the production, as established under the act. These agreements are considered to be void in the eyes of law as they are pursued in violation of Section 46 and Section 3 of the act, since it ineffectively affect free flow of trade market. By analyzing such impact on trade, it will establish the actual impact is upon consumers but not on competition.

The factors such as barriers for trade, homogeneity of goods and services and high concentration in the market, limited number of buyers, regulations on demand and supply of products lead to formation of cartel agreements. But, these are adjudication of these type of agreements is still a task for the competent authorities. In cases where meeting are covert meetings or they are not disclosed to any other person renders challenge for investigating officers. Unfortunately, even if such meetings are disclosed by the whistle-blowers, there is no regulation to secure and protect their conduct under competition act, 2002.

Vertical agreements

These are the agreements which prohibit anti-competition as under Section 3(4) of the act. It may create an adverse impact on the competition, as it depends on Rule of Reason and Rule of Per Se. The burden to prove such activities does not indulge in any anti-competition purposes lies on the investigating officer or the prosecutor. In comparison to Monopolies and restrictive trade practices act, 1969 (MRTP) these agreements were termed as "Restrictive Trade Agreements" and in Competition Law, 2002, these practices falls under prohibited legal framework but only when they cause or adversely impact on the competition. Thus, it can be evaded on a condition that it practices do not cause any effect to the competition. Further, there are 5 types of vertical agreements under the Act, which are as follows:

Tie-in agreements:

These agreements are defines under Section 3(4) (a). The agreement which prescribes conditions for exchanging goods and services by any purchaser can be termed as Tie-in agreements.

Exclusive supply agreements:

These agreements are entered between a supplier and seller or any other person for acquiring goods and services of such person. As, under Section 3(4) (b) such agreements restrict any person to exchange any goods at any other price which is not fixed by the seller. In re Hindustan Motors Ltd. case the court observed that "it also creates an obligation on any person dealing in such goods to maintain quality standards as prescribed by the seller."

Exclusive jurisdiction agreements:

Under Section 3(4) (d), those agreements which restrict supply, distribution or exchange of any goods or services in any area is termed as Exclusive Jurisdiction agreements. In Consumer Guidance Society v Hindustan Coca Cola the court held that "the memorandum entered between the parties leads to foreclosure of relevant market of it which would be against the provisions of the act" Further, these agreements restrict any person to deal in specific areas and to only specific parities in the defined territory.

Refusal to deal:

These agreements are defines under Section 3(4) (e), these agreements contain restriction to deal or exchange by any method, a particular goods or services with any person or seller of such goods. Thus, any consent between the parties which would lead to refusal to exchange goods and services which restrict competition in the market is tends to be illegal. In *Kapoor Glass Pvt. Ltd.* v *Schott Glass Pvt. Ltd* the court ruled out the agreements made by joint ventures which tend to finish-off competition and contravene the provisions of competition act.

Resale price maintenance:

It includes condition to fix a price in a re-sale as specified by the seller. Otherwise, as consented by both the parties.

STANDARDS TO MEASURE APPRECIABLE ADVERSE EFFECT ON COMPETITION (AAEC)

The agreements which restrict anti-competition practices creates an adverse impact on the economy, thus, the competent authorities has established factors which are analyzed before such adverse impact. The following factors are as follows:

- Driving existing competitors out of market; and
- Advancement of production of goods and services; and
- Advancement of technology, scientific advancement and production or distribution of goods and services;
- Restricting entry into the market.

However, these factors some of the factors affect the economy positively and others negatively. Therefore, under Section 19(3) of the act provides with regulatory standards to analyze the effects of such factors in the economy. These factors can be a barrier to new entrant in the economy, through an agreement between existing competitors to set unreasonable high standards. The existing competitors can refuse to supply any information or products or raw material which would restrict new entrant to produce and distribute goods in the market, this can be done by an exclusive supply agreement. The existing competitors can pursue all consumers by offering them better quality at cheap prices which would result in less productivity of new entrants and their survival would be no possible in the market.

The adverse impact to the competition depends on occurrence of different situations of the market. This adverse impact is a presumption, due to restrictions enforced by horizontal agreements. Thus, legislation impend more focus on these agreements rather on vertical agreements. The court clearly assumes that, the practices or activities are presumed to create an impact on the competition unless there is instance to disapprove such activities. This burden lies on the person or any association, who is charged with the authority or the commission. In such a situation, the court has to execute the law accordingly and decide the real position of such activities. In a case, the respondent cannot prove the non-existence of anti-competition practices but the existing practices are not anti-competition practices can be proved.

Therefore, in *Tata Engineering (TELCO) v. Registrar of Restrictive Trade Agreement*, the court held that "The case involved an articulation of an agreement which restrains a person from trade. Any such agreement is per se bad in law and no agreement can regulate a conduct unless

it is authorized under the law.

IMPLICATIONS

The researcher here mainly focused on the transition of the economic sphere of India as a country due to the enactment and enforcement of well classified and operative legislation, the Competition Act, 2002. Further the researcher stressed upon the building bricks of the statute, i.e., the various concepts that a crucial for the understanding of the term "anti-competitive agreements" within the statute along certain legal issues pertaining the same. However, there is further scope to examine the other provisions like cartels, elimination of dominance etc. provided under the statute along with a deeper understanding and interpretation of the same.

RECOMMENDATIONS AND CONCLUSION

India as a steadily developing country was in a severe need of a statute transformation/modification with respect to competition in the Indian market. The Competition Act, 2002 is not the above transformation but also a well classified, distinctive, transparent foundation to cope up with the dynamic changes taking place in the country. Ten years since its enforcement, it can be easily filtered down that successfully has prioritized the interest of consumers ensured a healthy competitive Indian market simultaneously also promoted and sustained the interest of the various market players and maintained competition, thus boosting the Indian economy in all ways possible. The Act leaves no sense of ambiguity with itself. Even, with respect to "Anti-Competitive Agreements", it clearly demarcates a certain category of agreements under Section 3(1), 3(2), 3(3),3(4) and Section 19(3) as to on what factors, such agreements can be held as illegal and void along with a definite purpose for doing so. It tends to serve the basic purpose of evaluating the potential market and thus eliminating the unfair and restrictive practices from it to the maximum extent possible.

However, the Act is a very young statute; there lies a huge scope of understanding and interpretation. Further it is not that the CCI is merely giving the adjudicatory powers or the appellate tribunals are established. There is need to vest the commission and tribunals with more authoritative and interpretative powers to understand and interpret the law beyond the text. Further, there have been instances where the market players in the dominant position strategically eliminated the new-by market players. There is a need to act upon it at the earliest in the most prudent manner possible along with certain strategic changes in order meet the future developments of the country. The Act has been a massive step towards boosting the

economy and ensuring justice, equity and good conscience among the citizens, but there lies a long way forward towards a brighter future of the country.

VII

JUVENILE JUSTICE SYSTEM IN INDIA: AN OVERVIEW[35]

ABSTRACT

The Justice system in a Country is the most important essential of its welfare. The entire existence of a Nation depends upon the efficiency of its Justice system. More than just punishing offenders of crime, it must aim at preserving peace and tranquillity in the society by safeguarding the interests of its citizens, and acting as a protector to watch over them. The Juvenile Justice System is different from the justice system as a whole, keeping in mind that there must be differential treatment of Juvenile offenders as they cannot be said to equal to adults in terms of their understanding and responsibility of an offence, as well as due to the greater scope of their rehabilitation. Apart from maintaining and ensuring public safety by deterring and reforming the juvenile, the system also aims in the development, rehabilitation and skill development of the individual to facilitate successful reintegration into the society. The Juvenile Justice System is often construed in the narrow sense where it is understood to be merely for the punishment, rehabilitation and reformation of Juvenile offenders. But it has an equally vital role to play in protecting and promoting the welfare of children, and ensuring their proper treatment. The Juvenile Justice system in India is non-adversarial and aims at reformation of the child offenders. It is based on principles of protection and promotion of the interests of children in the Country, as well as safeguarding their rights.

This Article aims at understanding the Juvenile Justice system in India. An overview is provided through definition, comprehension of all the elements involved in the system. By tracing its evolution and examining its current position, the Article will throw light on its development. In addition to this, the author augments recommendations for further development of the Juvenile Justice System in India.

[35] Arundathi K, Symbiosis Law School, Hyderabad.

JUVENILE JUSTICE SYSTEM IN INDIA: AN OVERVIEW

INTRODUCTION

Juvenile justice system is the branch of a justice system which can be differentiated from the justice system as a whole, in terms of the age of the offenders. Juvenile justice is the area or branch of law, mostly in criminal law, which is applicable to people who are not of the age in which they may be held responsible or liable under law for the criminal acts performed by them. Almost all across the world, the age in which one can be culpable for criminal acts is prescribed as 18 years of age, which is the age of majority. In technical terms, one has to be a 'Juvenile' in order to be subjected to the Juvenile justice system. It is generally and invariably used interchangeably with the word 'child'. It is a common belief that children are subjected to this Juvenile justice system. But in law, there is a distinction between the word 'child' and 'juvenile'. Generally, the term 'child' is used to refer to a person who has not attained the age majority, that is, eighteen years of age and is not mature enough to distinguish between right and wrong, correct and incorrect . The UNCRC [36] defines a 'child' as "every human being who is below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[37] There exists is a principle of '*doli incapex*' which means that a child is incapable of criminal intention or malice, and cannot have the *mens rea* to perform or commit a crime.[38] The provisions of penal law also states that a child below the age of seven cannot be convicted. In the age group of seven to twelve, a child can be made liable for a crime only if he/she had the sufficient knowledge regarding the commission and consequences of a crime. Both the terms, despite having similar meanings have different implications in the eyes of law. A child cannot be tried in normal Court proceedings but a Juvenile maybe under trial in Court.

As for the formal definition or classification of the word 'Juvenile', it has been defined in many statutes and legal provisions. The Juvenile Justice (Care & Protection) Act of 1986 has defined a juvenile as "who in case of a boy has not completed age of 16 years and in case of a girl 18 years of age".[39] The Juvenile Justice (Care and Protection of Children) Act of 2000 later has defined 'juvenile' as "a person who has not completed eighteenth year of age."[40] Under Rule 4

[36] The United Nations Convention on the Rights of Child, Nov.20, 1989, 1577 U.N.T.S 3
[37] The United Nations Convention on the Rights of Child art. 1, Nov.20, 1989, 1577 U.N.T.S 3
[38] Meaning of 'Doli Incapax', (December 15,2019,1:00pm), Law Dictionary, https://thelawdictionary.org/doli-incapax/
[39] The Juvenile Justice (Care and Protection of Children) Act, Act No (53 of 1986),Acts of Parliament,1986,S.13
[40]The Juvenile Justice (Care and Protection of Children) Act, Act No(56 of 2000), Acts of Parliament,2000,S.14

of United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the word juvenile is defined as "In those legal and justice systems which recognize the concept of the age as determinant of criminal responsibility for juveniles, the beginning of such age shall not be fixed at an age level that is too low, bearing in mind the facts of emotional, mental and intellectual maturity of the juvenile."[41] Juvenile offenders, or juvenile delinquents are not considered to be criminals and therefore their cases should be handled with great care and understanding by experienced and qualified judges. Earlier State Children Acts used to confer jurisdiction on the children's courts for trying juvenile offenders. In order to ensure trial for such persons, the Code of Criminal Procedure, 1973 apart from other statutes provides for such trial. According to Section 27 of the Code[42], any offence which is not punishable with death or imprisonment for life which is committed by any person who is under the age of sixteen years may be tried by the competent Courts or by any Court which is specially empowered under the Children Act or any other Act for providing for treatment, training and rehabilitation of youthful offenders. The Juvenile Justice (Care and Protection) Act, 2015 gives exclusive jurisdiction to children's Courts while dealing with juveniles accused in respect of all offences and prescribe special procedure in the inquiry and trial of such cases.

In Ancient India, hardly any laws existed to specifically deal with the problem of juvenile delinquency. With the increase in the number of reported cases of child neglect and juvenile delinquency there was a need for legislation to curb and regulate these issues. The British took matters into their own hands and attempted the creating a statute regulating these issues, modelled along the lines of their own laws as followed in England. Subsequently, the Apprentices Act of 1850 [43] was passed as the first ever juvenile legislation in India that dealt with children and made applicable laws to the children of the country as well .According to the provisions of this Act, children who were aged between ten and eighteen years of age, who were found committing crimes as prescribed in the Act was placed in apprenticeship in trade. Later, after ten long years, The Indian Penal Code was passed which dealt with juvenile justice in parts, and had provisions pertaining to underage criminals. Section 82 of the Indian Penal Code [44] permits total immunity to children below the age of seven years old, following the principle of *doli incapax*. Section 83 of the IPC [45]also provides 'qualified immunity' to children

[41] United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Nov.29, 1985, A/RES/40/33.
[42] Code of Criminal Procedure, Act No(2 of 1973),India Code,1973, S.27.
[43] Apprentices Act, Act No(19 of 1850), 1850 (India).
[44] The Indian Penal Code,1860,Act No(45 of 1860),India Code,1860, S.82.
[45]The Indian Penal Code,1860,Act No(45 of 1860),India Code,1860,S.83

in the age group of seven to twelve years of age.

Another important milestone that contributed to the history of the development of the system of juvenile justice in India was the Reformatory School Act[46] that embodied provisions to enable the government to establish and maintain reformatory schools to restrict young criminals until they found employment for themselves. Following this, a 'Jail Committee' was constituted to look into matters of juvenile justice and matters of delinquency, in the year 1919. After independence the Indian legislature passed the 'Children Act', 1960[47] which contained provisions and instructions regarding maintenance, welfare, care and protection of children as well as rehabilitation of children who were delinquent as well as neglected. This Act was not one which could cater to the needs of children all over the Nation. The existence of State laws on the same matter lead to regional discrepancies which in turn resulted in the faulty administration of justice, ambiguity and lack of uniformity of laws across the country. The Supreme Court of India in the case of *Sheela Barse* v. *Union of India* suggested that instead of States having their own Children's Act, the Central Government should bring forth a Parliamentary Legislation to ensure uniformity. It should also prescribe provisions for rehabilitation of children who are lost, destitute, victims of neglect apart from provisions for investigation and trial of offences done by them. The Court also quoted that "Moreover, it is not enough merely to have legislation on the subject, but it is equally, if not more, important to ensure that such legislation is implemented in all earnestness and mere lip sympathy is not paid to such legislation and justification for non-implementation is not pleaded on ground of lack of finances on the part of the State. The greatest recompense which the State can get for expenditure on children is the building up of a powerful human resource ready to take its place in the forward march of the nation[48]".

The necessity for a uniform or standardize Children Act across the country paved the way for the enactment of the Juvenile Justice Act (JJA) 1986. It promoted "the best interest of the juveniles" by incorporating the important provision of the Indian Constitution and the 1974 National Policy Resolution for Children [49]and also add the universally agreed principles for the protection of juveniles such as the United Nations Declaration of the Rights of the Child [50] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice

[46] The Reformatory School Act, Act No(5 of 1876), 1876(India)
[47] The Children Act, Act No(60 of 1960),1960(India)
[48] Sheela Barse v. Union of India, AIR 1773 1986 SCR (3)
[49] National Policy for Children, No(1-14/74-CDD),1974
[50] *Supra* note 2.

(Beijing Rules) 1985[51]. The detention of juveniles in police lock-up or jail was abolished by the Juvenile Justice Act 1986[52]. It specifies two main authorities, a Juvenile Welfare Board and a Juvenile Court, to deal with delinquent juveniles. It also recommended to establish various kinds of institutions for the care and protection of juveniles, a juvenile home for the treatment of neglected juveniles, a special home for delinquent juveniles and an observation home for the temporary reception of juveniles during the pendency of their trial, and an after-care home for the purpose of taking care of juveniles after discharge from an observation home or a special home. The main objective to adopt these different approaches was to protect/save juvenile from criminalization, penalization and stigmatization. With the enactment of the JJA, the "welfare" approach gave way to the "justice". But while implementation of the JJA-1986 various loopholes were experienced like in terms of age determination, separate trials, court proceedings, notification of charges to parents or guardians, filing of reports by probation officer, rehabilitation and after care of juveniles.

Juvenile who stays or kept in government run institutions, did not know the purpose of their stay. In addition, the states and union territories who had formulate their regulations for the implementation of the Juvenile justice Act were not according to the basic structure of Juvenile Welfare Boards, Observation Homes, Juvenile Courts and After-Care Homes. Hardly any required measures are taken for adherence of minimum standards for institutional care such as foster care, sponsorship, adoption, etc. The controversy between the reality and the implementation of the law was felt all with the adoption of the "Convention on the Rights of the Child (CRC) 1989" [53]and it was ratified by the Government of India in 1992. The provisions of the CRC with regard to children in conflict with law were augmented in two other United Nations instruments, firstly the United Nations Guidelines for the Administration of Juvenile Delinquency (Riyadh Guidelines) [54]and the second United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules). [55]

Both provided detailed information about the processes to be followed by the juvenile justice system in dealing with persons below the age of 18 years. The 1993 World Conference on Human Rights [56]held in Vienna and the successive adoption of Vienna Declaration and

[51] *Supra* note 6
[52] *Supra* note 4
[53] *Supra* note 1
[54] United Nations Guidelines for the Administration of Juvenile Delinquency (Riyadh Guidelines),Dec 14,1990, A/RES/45/112
[55] United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Dec 14,1990, A/RES/45/112
[56] World Conference on Human Rights, June 14-25 ,1993, E/CN.4/RES/1994/95

Programme of Action which urged States to ratify and implement promptly the CRC which made a definitive impact on all those concerned with the dilemma of these children in India including the government. In lieu of all the these developments, the government modified the Juvenile Justice Act to make it in coherence with the CRC and a new Act came into force in 2000 named "Juvenile Justice (Care & Protection of Children) Act, 2000".[57] The enactment of this Act endorsed the "justice" as well as the "rights" approach towards children and moreover made use of a better terminology as "juveniles in conflict with law" and "children in need of care and protection". This separation aims to restrain the awful influence on the child who is in need of care and protection from the one who is in conflict with law. The Juvenile Justice Act 2000 brings uniform definition of a juvenile or a child. Juveniles in conflict with law consist of all those children alleged or found to have committed an offence. Juvenile in conflict with law are to be handled by the Juvenile Justice Board and juveniles in need of care and protection deal by child welfare committee. While dealing with juveniles and adolescents it also gave advice to their parents how they prevent their children from delinquency and also arrange counselling for them. It also introduced a broad choice of community programme options for juveniles.

Juvenile Justice Act 2000 was amended in 2006[58] to make it clearer that juvenility would be considered from the "date of commission of offence" for those who have not completed the age of 18 years thus clarifying ambiguities raised in *Arnit Das* v. *State of Bihar*.[59] In the amended Act, it was also clear that a juvenile in conflict with law should not be kept in a police lockup or jail. Further it also specified that the CJM or the CMM has every right to review the pendency of cases in the Board at every six months, and the child protection units should be set up in each and every states and districts to check the implementation of the Act. The Juvenile Justice (Care and Protection) Act, 2015[60] followed this, and is the statute for the same as of now. The Juvenile Justice (Care and Protection of Children) Bill, 2015 was passed by Lok Sabha on 7th May, 2015; was passed by Rajya Sabha on 22nd December, 2015 and received Presidential assent and came into force on 31st December 2015. The JJ (C&P) Act, 2015 provides for strengthened provisions for both children in need of care and protection and children in conflict with law. And in the new Act some important and many new definitions

[57] *Supra* note 5
[58] The Juvenile Justice (Care and Protection of Children) Amendment Act, Act No (33 of 2006),Acts of Parliament,2006,S 2(l)
[59] Arnit Das Vs. State of Bihar,AIR 2005 SCC 488
[60] The Juvenile Justice (Care and Protection of Children) Act, Act No (2 of 2016),Acts of Parliament,2015

also included such as orphaned, abandoned and surrendered children; and petty, serious and heinous offences committed by children; clarity in powers, function and responsibilities of Juvenile Justice Board (JJB) and Child Welfare Committee (CWC); clear the timelines for inquiry by Juvenile Justice Board (JJB); special provisions for serious offences committed by children above the age of sixteen year and also included a new chapter on Adoption to streamline adoption of orphan, abandoned and surrendered children; inclusion of new offences committed against children; and mandatory registration of Child Care Institutions. The Delhi gang rape case [61]was a warning that it should be taken into consideration by the officials to immediate carryout amendments in the definition of juvenile and insert necessary exceptions which would cover the fact and circumstances of that case and which include gravity and heinousness involved in that particular case along with the level maturity and understanding of the offence by the juvenile concerned. There was also a need to bring some reforms in the juvenile laws as there is an increase in serious crimes involving children of 16 to 18 years of age and they are well abide by the fact that below 18 years is the gateway pass for them from the criminal prosecution. So, The Juvenile Justice (Care and Protection of Children) Bill, 2015 [62]was passed. The Act was a modification of various existing laws for the Juvenile Justice and the care and protection of children.

Currently, the law in India recognises two categories of Children, namely- Children in Conflict with Law, and Children in need of Care and Protection. The trial such children, under the category of Children in conflict with law are children aged less than 18 years who are tried by the Juvenile Justice Boards or Juvenile Courts. They aim at trial and detention of such children, while providing them with guidance and support. Such children should not be taken to normal Courts, as provided under CrPC. They must be provided with psychological, social and legal rehabilitation. When the Juvenile law was amended and passed under the JJ Act, 2000, the similar powers relating to inquiry and trial of delinquent children or children in conflict with law were handed to Juvenile Justice Boards and they were vested with powers similar to that of Juvenile Courts and Special Homes under the previous Act which were similar to Juvenile Courts but had more comprehensive and reformative powers than the Juvenile Courts. The terminologies of Juvenile Courts were altogether replaced to constitute it with Juvenile Justice Boards. The Juvenile Justice Board now consisted of Metropolitan or Judicial Magistrate, and two honorary social workers experts at child welfare and psychology. Children in Need of Care

[61] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1
[62] *Supra* note 25

and Protection as well as Children in conflict with law were to be under the purview of Juvenile Justice Boards.

The Constitution of India provides for the facilitation of such special laws for Juveniles. The Fundamental Rights provided under Part III enumerates that as per Article 15(3)[63] of the Constitution, the State shall make special provisions for children and women. Article 39 (f) [64]of the Directive Principles of the State Policy in Part IV of the Constitution lays down a duty towards the State to secure facilities for the healthy development of children and to protect childhood and youth against exploitation and moral and material abandonment.

Several provisions exist under international law as well, in the form of Conventions and Treaties that India is party to. One such important convention is the United Nations Conventions on Rights of Child. Article 36 of the Convention provides that parties shall protect the child against all other forms of exploitation that results to be prejudicial to any aspects of the child's welfare. Any child primarily on account of his dependence and vulnerability deserves to be completely looked after by others. As a child, he needs support and care to survive since the nature does not provide to the human infant any protection at all. The need to survival and protection continues till the child attains maturity and adulthood. The child being the nursery of all civilization and all human potential has to be provided with various institutional and non-institutional system of development which consists of programs pertaining to education, life skills, nutrition, health, shelter and most importantly, the right to childhood. [65] Article 40 of the U.N. Convention reads "*that a child who has been accused of having violated the penal law should have these guarantees, that they be presumed innocent until proven guilty as per law, to be informed promptly of the charges against him and to have legal or other appropriate assistance to defend himself and to have the matter determined without delay by a competent and impartial authority or judicial body, not to be compelled to confess guilty, and to examine witnesses*." [66] In addition, the state can prescribe a minimum age below which children shall be presumed without capacity to infringe penal laws.

Judicial interpretations have supplemented the Juvenile Justice system in a substantial manner. It has led to major developments within the system. A few major cases emphasised on

[63] INDIA CONST. art 15(3)
[64] INDIA CONST. art 39(f)
[65]The United Nations Convention on the Rights of Child art. 36, Nov.20, 1989, 1577 U.N.T.S 3
[66] The United Nations Convention on the Rights of Child art. 40, Nov.20, 1989, 1577 U.N.T.S 3

important aspects to be integrated into the system. In *Umesh Chandra* v. *State of Rajasthan*[67], the Court iterated the relevance of the Juvenile Justice Act in contributing to the justice system of the Country. In *Arnit Das* v. *State of Bihar*[68], the Supreme Court held that the crucial the question regarding whether or not someone may be a juvenile is that the date once he's brought before the competent authority. The same issue was addressed by the 5 judge bench in *Pratap Singh Vs. State of Jharkhand* [69]and it was held that "The reckoning date for the determination of the age of the juvenile is that the date of the offence and not the date once he's made before the authority or within the court". In the *Nirbhaya Case*[70], the Court sent a juvenile to the correctional facility for the gruesome rape of a 23 year old in an incident that shook the entire Nation. In response to this, the Juvenile Justice Act of 2000 was amended to constitute 16 as the age of trial as adult for heinous offences.There was a substantial need for development in law to meet the dynamic needs of the society. It is with critical acclaim that the law of Juvenile Justice has been amended so many times to keep up with the changing requirements. The reduction of age of a 'Juvenile' from 18 to 16 years is a welcome step that will ensure that perpetrators of heinous crimes do not escape the grip of law merely because of their age when their mental capacity to comprehend the nature of act committed is equal to that of any adult person. The process of Juvenile Justice through the Juvenile Justice Board is an extremely time consuming process and it can be observed that in some of the cases, the person who was a minor while committing the offence has often become middle aged by then time the proceeding against him comes to an end. This beats the purpose of such a Court and such a legislation to empower the Court to try Juveniles. On the other hand, this step interferes with the process of law as was observed so far and has given false implications that the age of majority may be reduced to 16 years of age, for a person to be tried as a major in regular Courts.

The new law was framed to harmonize the juvenile laws & make them more reformative and rehabilitative and thereby shred any punitive and regressive image of the juvenile justice system by disassociating them with any reference to Courts in general. The aim of the JJ Board is to hold a child culpable for their criminal activity, not through punishment, but counselling the child to understand their actions and persuade them away from criminal activities in the future. This again shifts the focus from the fact that a crime was committed by such a juvenile in the same manner and with the same knowledge and *mens rea* of any other adult. It focuses

[67] Umesh Chandra v. State of Rajasthan, 1982 AIR (SC) 1057
[68] *Supra* note 24
[69] Pratap Singh v. State of Jharkhand, (2005) 6 SCC (J) 1.
[70] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.

on rehabilitation of the juvenile after a crime instead of deterring the crime itself. It is almost as if he is let free, and provided care and protection despite that fact that he has committed a crime. There are not enough rehabilitation centres to refer offenders to and as a result of this as well, they escape conviction and return to the society and resort to committing the same offence again. This is often the case for offences such a petty thefts and go up to the limit of rape and murder at times. There is often a lack of a flexible procedure for sentencing of the juveniles. This is a sort of system in which the maximum amount of sentence served by a delinquent who indulges in theft to feed himself say partakes in armed robbery in order to feed himself is given the same nature of punishment as a serial rapist. This is one of the most serious problems of the system. There is proven or credible reason which shows that complete rehabilitation can be achieved within a maximum period of three years. The physical and psychological maturity of a person is also disregarded to an extent. In addition, when the laws are put into practice, various discrepancies occur due the reason of amendment of the laws every now and then.

A few major changes to the existing law can go a long way in contributing to its development. A paradigm shift is required from the normal punitive approach of laws towards juvenile delinquency to a reformative one which trains the juveniles to re-integrate back to the society on their return from the rehabilitation home. It is recommended that there must be CCTV surveillance of such rehabilitative centers to prevent mistreatment of the children and surprise visits by Board members to ensure the welfare and proper updates on the children. There must be a wider focus and enforcement of International Covenants and treaties to integrate global perspectives of law into the judicial system. The Juvenile Justice Board is of vital importance and hence must be specially trained in child psychology. The Magistrate should also be given appropriate training in this field. The inquiry to be conducted under the Act must not be delayed and must be concluded within a specific time frame, and this must be strictly complied with.There must also be proper segregation of “child in conflict with law” and “child in need for care and affection” in the rehabilitation center and this must not be existing merely on paper. More importantly, the Juvenile Justice System must reconcile itself for obtaining the ends of Justice. Justice for this purpose must mean Justice for the Juvenile as well as the victim on whom the crime was committed. In conclusion, The Juvenile Justice System in India has developed significantly in the last decade as a result of reformatory laws but it still has a long way to go in being an ideal justice system.

VIII

STRIKING A BALANCE BETWEEN SEDITION LAW AND RIGHT TO FREEDOM OF SPEECH & EXPRESSION[71]

ABSTRACT

Freedom of Speech and freedom of Expression are indispensable conditions for the full development of the person. They constitute the foundation stone for every free and democratic society. The freedom of speech and expression is the first and foremost human right, the first condition of liberty, mother of all liberties, as it makes the life meaningful. However freedom of speech often poses difficult questions, like the extent to which State can regulate individual conduct. Since, individual's autonomy is the foundation of this freedom; any restriction on it is subject to great scrutiny. Although reasonable restrictions can always be imposed on this right in order to ensure its responsible exercise and to ensure that it is equally available to all citizens. The offence of sedition is provided under section 124A of the Indian Penal Code, 1860.The relevance of this section in an independent and democratic nation is the subject of continuous debate. There is an apprehension that this provision might be misused by the Government to suppress dissent and fair criticism. The paper deals with the history of sedition to its evolving during the pre and post constitutional era to what it is today. Also the paper suggests the questions that still need thorough discussions and debates taking into consideration the fact that India is the largest democracy in the world and freedom of speech and expression is the most celebrated fundamental right.

[71] Manu Sharma, Symbiosis Law School, Pune.

STRIKING A BALANCE BETWEEN SEDITION LAW AND RIGHT TO FREEDOM OF SPEECH & EXPRESSION

INTRODUCTION

Freedom of Speech and Expression is the bulwark of democratic government. In a democracy, freedom of speech plays a crucial role in the formation of pubic opinion on social , political and economic matters.[72] it has been variously described as basic human right, a natural right and the like.[73] Many International Organizations have declared freedom of speech as a basic fundamental right.[74] The Constitution of India also guarantees freedom of speech and expression to all citizens.[75] It includes right to express one's views and opinion at any issue through any medium like by words of mouth, writing printing etc. It thus includes the freedom of communication and the right to propagate or publish opinions.[76]However the freedom of speech often poses difficult questions, like the extent to which State can regulate individual conduct. Since, individual's autonomy is the foundation of this freedom; any restriction on it is subject to great scrutiny.[77] Reasonable restrictions can always be imposed on this right in order to ensure its responsible exercise and to ensure that it is equally available to all citizens. The offence of sedition is provided under section 124A of the Indian Penal Code, 1860 (hereinafter IPC). There have been continuous debates and discussions about the relevance of this section in an independent and democratic India. Those opposing it see this provision as a relic of colonial legacy and thereby unsuited in a democracy. There is an apprehension that this provision might be misused by the Government to suppress dissent.

SEDITION LAWS IN INDIA: PRE CONSTITUTION ERA

History of Sedition Law in India

Lord Macaulay's Draft Penal Code of 1837 consisted of Section 113 that corresponded to today's Section 124A of IPC. The punishment for Sedition proposed at that time was life

[72] Associated Press v. U.S., 326 US ; see also UOI v. Naveen Jindal, (2004) SC 1559.
[73] Dharam Dutt v. Union of India, AIR 2004 SC 1295.
[74] International Covenant on Civil and Political Rights,(ICCPR) 1966 art.19 (2), Universal Declaration of Human Rights (UDHR), 1948 art.19.; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res 2106 (XX) Art 5(d)(viii); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) Article 10; ACHPR (adopted 27 June 1971, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M.58 (1982) Article 9; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 no 17955 (ACHR) Article 13.
[75] Chintaman Rao v. State of Madhya Pradesh, AIR 1951 SC 118; State of Madras v. VS Rao, AIR 1952 SC 196.
[76] Radha Mohan Lal v. Rajasthan High Court, AIR 2003 SC 1467.
[77] State of Madras v. VG Row, AIR 1952 SC 196.

imprisonment. Sir John Romilly, Chairman of Second Pre- Independence Law Commission commented upon the quantum of punishment proposed for sedition, on the ground that in UK , the maximum punishment had been three years and he suggested that in India it should not be more than five years. However, this section was not included in IPC when it was enacted in 1860. Consequently sedition was included as an offence under section 124A through Special Act XVII of 1870. This section was parallel with the Treason Felony Act of 1848 that penalized all the seditious expressions. The intention behind introducing this section was to punish an act of exciting feelings of disaffection towards the Government, but this disaffection was to be distinguished from disapprobation.[78] Thus people were free to voice their feelings against the Government as long as they project a will to obey its lawful authority.

In 1898, the section was amended by the Indian Penal Code (Amendment) Act 1898 providing for punishment of transportation for life or any shorter term. The amended section made new changes in the existing definition and also made bringing or attempting to bring in hatred or contempt towards the Government established by law punishable. The provision was further amended in 1995 substituting the punishment as 'imprisonment for life and/or with fine or imprisonment for 3 years and/ or with fine. The British Parliament enacted the Prevention of Seditious Meetings Act in 1907, in order to prevent public meetings likely to lead the offense of sedition or to cause disturbance as meetings against the British rule were held in different parts of India, with the main objective of overthrowing the Government. In 1911, the Act was repealed by The Prevention of Seditious Meeting Act, 1911 which enabled the statutory authorities to prohibit a public meeting in case such meeting was likely to provide disaffection or to cause disturbance in public tranquillity. The violation of the provisions of the Act was made punishable with imprisonment for a term which could extend to six months or fine or both. However the act now stood repealed vide Repealing and Amending (Second) Act.

Pre- Constitutional Rulings

Section 124A was used extensively to curb the political dissent in India. One Mr. Jogendra Chandra Bose was charge with the offense of sedition merely for criticizing the Age of Consent Bill and the negative impact on Indian economy due to British Colonialism. While directing the jury on the case the Court observed that the offence stipulated under Section 124A IPC was milder as compared to what it is in England, as there any overt act in consequence of a seditious

[78] W.R. Donogh, A Treatise on the Law of Sedition and Cognate Offences in British India (Thacker, Spink and Co., Calcutta, 1911).

feeling was penalized, while in India only those acts that were done with *an intention to resist by force or an attempt to excite resistance by force fell under this section*[79]. In another famous case of *Queen Empress* v. *Bal Gangadhar Tilak*,[80] the defendant was charged of sedition for publishing an article in newspaper invoking the example of the great Maratha warrior Shivaji to incite overthrow of British rule. In this case the word disaffection was interpretated widely by including *hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. Disloyalty is perhaps the best general term, comprehending every possibly form of bad feelings to the Government*. The interpretation that, only acts that suggested rebellion or forced resistance to the Government should be given to this section was rejected expressly by the Court leading to the amendment in the Section in 1989 wherein the explanation defining disaffection to include disloyalty and feelings of enmity were added.

Following the Tilak judgment two landmark judgments were *Queen Empress* v. *Ramchandra Narayana*[81] and *Queen Empress* v. *Amba Prasad*.[82] In Ramchandra case, the Court tried to define the expression attempt to excite feelings of disaffection to the Government as equivalent to an attempt to produce hatred towards Government as established by law, to excite political discontent and alienate people from their allegiance. However Court also clarified that every such act did not amount to disaffection provided the accused is loyal at heart and willing to obey and support the Government. The same interpretation was reiterated in Amba Prasad Case. The Court interpreted the section liberally categorically held that it is not necessary that an actual rebellion or mutiny or forcible resistance to the Government or any sort of actual disturbance was caused by the act in question.

These cases brought into light the ambiguity being created by the explanation in interpreting the term disaffection. In order to remove any further misconception in interpretation of Section 124A, legislature introduced Explanation III to the section which excluded 'comments expressing disapprobation' of the action of the Government, but do not intend to lead to an offence under the section. The main intention of legislature behind incorporation of this explanation was to make law more precise. However it can be seen that the British Government was not keen on granting Freedom of Expression to Indians to the extent, enjoyed by the people in England. It can also be said that it was difficult for the British rule to limit the scope of

[79] Queen Emperor v. Jogendur Chandra Bose, (1892) 19 ILR Cal 35.
[80] Queen Empress v. Bal Gangadhar Tilak, ILR (1898) 22 Bom 112.
[81] Queen Empress v. Ramchandra Narayana, ILR (1898) 22 Bom 152.
[82] Queen Empress v. Amba Prasad, ILR (1897) 20 All 55.

sedition to direct incitement to violence or to commit rebellion in view of the fact that the country was under foreign rule and inhabited by multiple races, ethnicity with diverse customs and conflicting creeds.

While the British Government was justifying the enlargement of the ambit of sedition laws, the Court refused to term a speech that condemned Government legislation declaring Communist party of India and various trade unions and labor organization who were voicing against the exploitation by the Government illegal, seditious. It was opined by the Court that imputing seditious intent to such kind of speech would completely suppress freedom of speech and expression in India.[83] This reflects the tendency of the then Government to use sedition to suppress all and any kind of criticism. Realizing the same, Court in *Niharendu Dutt Majumdar* v. *the King Emperor*[84] digressed from the literal interpretation given to the section and held that the offence of sedition was linked to disruption of public order and prevention of anarchy and until and unless speech leads to public disorder or a reasonable anticipation or likelihood of it, it cannot be termed seditious. Later on, this was overruled in *King Emperor* v. *Sadasiv Narayan Bhalerao*,[85] wherein the reading of 'public order' in Section 124A IPC was not accepted and the literal interpretation given in Tilak's case was upheld.

POST- CONSTITUTIONAL DEVELOPMENTS

Sedition was not acceptable to the framers of the Constitution as a restriction on the freedom of speech and expression, but it remained as it is in the penal statute post- independence. After independence, the section came up for consideration for the first time in the landmark case of *Romesh Thapar* v. *State of Madras*,[86] the Apex Court held that unless the freedom of speech and expression threaten the 'security of or tend to overthrow the State', any law imposing restriction upon the same would not fall within the purview of Article 19(2) of the Indian Constitution. Following the ruling the Punjab High Court in *Tara Singh Gopi Chand* v. *The State*[87], held the 124A unconstitutional as it directly contravene Article 19(1)(a) of the Constitution observing that *"law of sedition though necessary during the period of foreign rule has become inappropriate now by the very nature of the change which has come about"*. In 1951 by 1st amendment in Constitution two additional restrictions, namely, 'friendly relations

[83] Kamal Krishna Sircar v. Emperor, AIR 1935 Cal 636.
[84] Niharendu Dutt Majumdar v. the King Emperor, AIR 1942 FC 22.
[85] King Emperor v. Sadasiv Narayan Bhalerao, AIR 1947 PC 84.
[86] Romesh Thapar v. State of Madras, AIR 1950 SC 124.
[87] Tara Singh Gopi Chand v. The State, AIR 1951 Punj. 27

with Foreign State' and 'public order' were added to Article 19(2), for the reason that in Romesh Thapar, Court had held that freedom of speech and expression could be restricted on the grounds of threat to national security and for serious aggravated forms of public disorder that endanger national security and not relatively minor breaches of peace of a purely local significance. The amendment echoed the logic in dissenting opinion of Jt. Saiyad Fazl Ali in case of *Brij Bhushan*[88] , in his opinion serious and grave instances of public disorder and disturbance of public tranquillity might affect the security of public and State. However the constitutional validity of sec.124A came to be challenged again in *Kedar Nath Singh Case*[89], the constitutional bench upheld the validity of sec. 124A and this time kept it at a different pedestal. The Court drew a line of difference between the terms, 'the Government established by law' and 'the persons for the time being engaged in carrying on the administration' and held that "Government established by law is a visible symbol of the State. The very existence of the State will be in jeopardy if the Government established by law is subverted and hence its continued existence is an essential requirement for the stability of the State. That is why 'sedition', as an offence has been characterized, come under Chapter VI relating to offences against the State. At the same time, Court also tried to struck a balance between the right to free *speech and expression and the power of the legislature to restrict such right observing thus that "the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with view to punishing offences against the State, is undertaken. Such legislation has on other hand, fully to protect and guarantee the freedom of expression, which is the sine quo non of a democratic form of the Government that our Constitution has established. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder."* Public disorder has been considered to be a necessary ingredient of sec. 124A after this judgment and it also became necessary to establish that the accused has actually done something, which would threaten the existence of the Government established by law or might cause disorder.[90] In *Common Cause & Anr* v. *UOI*,[91] a prayer was made to issue directions for review of pending cases of sedition in various Courts, where a superior police officer may certify that the 'seditious act' either led to the incitement of violence or had the tendency or the

[88] Brij Bhushan v. State of Delhi, AIR 1962 SC 955.
[89] Kedar Nath Singh v. State of Bihar, AIR 1962 SC 955.
[90] Bilal Ahmed Kaloo v. State of Andhra Pradesh, AIR 1997 SC 3438.
[91] Common Cause & Anr v. UOI, (2016) 15 SCC 269.

intention to create public disorder. The Court granted the prayer and directed that while dealing with offences under 124A, authorities are to be guided by principles laid down in Kedar Nath case. In the famous *Kanhaiya Kumar Case* [92], the Delhi HC observed that while exercising the right to freedom of speech and expression under Article 19 (1) (a) of the Constitution, one has to remember that Part IV, Article 51A of the Constitution provides Fundamental Duties of every citizen, which form the other side of the same coin. The aforesaid judicial pronouncements have been discussed to get an idea as to what amounts to seditious acts. In the light thereof, it could be stated that unless the words used or the actions in question do not threaten the security of the State or of the public, lead to any sort of public disorder which is grave in nature, the act would not fall within the ambit of sec. 124A of IPC.

FREEDOM OF SPEECH AND SEDITION

Democracy is based essentially on free debate and open discussion, for that is the only corrective of Government action in a democratic set up.[93] If democracy means Government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential.[94]

The Hon'ble Supreme Court, while crystallizing the relationship between a democratic society and freedom of speech opined that in a democratic set- up, it is the right of the people to be kept informed about current political, social, economic and cultural life as well as the burning topic and important issues of the day in order to enable them to consider and form a broad opinion about the same and the way in which they are being managed, tackled and administered by the Government.[95] In the case of *S. Khusboo* v. *Kanniamal & Anr*.,[96] observing that the morality and criminality do not co-exist, the Supreme Court opined that free flow of the idea in a society makes its citizen well informed which in turn results into good governance. For the same, it is necessary that people be not in constant feat to face the dire consequences for voicing out their ideas, not consisting with the current celebrated opinion. Emphasizing the importance of the freedom of speech Sec. 66A of the Information and Technology Act, 2000 was declared unconstitutional on the ground that it was in direct conflict with the fundamental right of

[92] Kanhaiya Kumar v. State (NCT of Delhi, (2016) 227 DLT 612.
[93] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[94] Whitney v. California, 247 US 214.
[95] Re Harijai Singh, AIR 1997 SC 73.
[96] S. Khusboo v. Kanniamal & Anr., AIR 2010 SC 3196.

freedom of speech and expression.[97] The Supreme Court held that under the Constitutional scheme, for the democracy to thrive, the liberty of speech and expression 'is a cardinal value and of paramount importance.[98] The freedom of speech not only helps in the balance and stability of a democratic society but also gives a sense of self attainment.[99] In *Indian Express Newspaper (Bombay)(P) Ltd.* v. *Union of India,*[100] the following four purposes of free speech and expression were set out; (a) it helps an individual to attain self- fulfillment, (b) it assists in the discovery of truth, (c) it strengths the capacity of an individual in participating in decision making and (d) provides mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Having discussed the importance of freedom of speech and expression, one cannot deny the fact that right to freedom of speech and expression in isolation is not enough. It has to be understood that to speak or to express a thought it is necessary to be aware of all the aspects and fundamentals of the issue in discussion. Here comes another aspect of the free speech and that is the right to listen, followed by the free flow of the information available. It was held that the right to know is inherent in the right of freedom of speech and expression under art. 19(1)(a).[101] The Bombay HC in the case of Cellular *Operators Association of India* v. *Telecom Regulatory Authority of India*[102] held that right to information rests upon the right to know, which ultimately was an inseparable part of freedom of speech guaranteed under art.19(1)(a).[103]

The other important aspect to be kept in mind is reasonable restriction on the speech and expression which enables the State to impose certain restrictions on the right to free speech is the "harm principle" which means the until and unless a speech does not result into some sort of harm, the same cannot be suppressed. However the yardstick on which this harm is to measured has to be high. The harm is to be of such intensity that it threatens the very existence of the society; it disturbs the public order and results into the chaos in the society.[104] Thus, whenever there is a need to interfere, the Courts have laid down certain rules as touchstones. In case of *S. Rangarajan* v. *P. Jagjivan Ram*[105], it was held that unless there is a danger to the

[97] Shreya Singhal v. Union of India, AIR 2015 SC 1523.
[98] ibid, para 8
[99] Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal, AIR 1995 SC 1236.
[100] Indian Express Newspaper (Bombay) (P) Ltd. v. Union of India, AIR 1986 SC 515.
[101] S. P Gupta v. Union of India, AIR 1982 SC 149
[102] Cellular Operators Association of India v. Telecom Regulatory Authority of India & Ors., AIR 2016 SC 2336.
[103] PUCL v, Union of India, AIR 2003 SC 2363.
[104] Gompers v. Buck's Stove & Range Co., 221 U.S 418(1911).
[105] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.

society and public order, the right to freedom of speech and expression cannot be restricted. The anticipated danger should be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'. The Courts opined the same in subsequent cases.[106]

Also in number of cases, skepticism has been expressed about the potential misuse of sedition law. Justice AP Shah, in one of his writings, warns about the very basis for the logic of sedition law. He compared the idea of sedition to a parochial view of nationalism which often endangers the diversity of opinion rather than protecting them against rebellion. The use of religion in electoral campaigns was challenged under s. 123 of Representation of the People Act, 1951.[107] The contention put forward was that repeated use of open threats to India's constitutional commitment to secularism could be construed as 'disloyalty' and the threat of public nuisance. However, the contention was rejected and it was held that candidate expressed at best a 'hope' for creation of a monolithic rashtra than, in fact, acting on elimination of minorities and thus threatening to eliminate other religions. Significantly, sec.123 of RPA, 1951 covers use of such speed in the campaigns and therefore there is no question of invoking the provisions of sec.124A IPC. Thus, expression of a particular image of the country does not alone amount to a threat to the security of the nation.

EXPRESSION NOT AMOUNTING TO SEDITION

The Courts have been categorical in expressing that every criticism does not amount to sedition and the real intent of the speech must be considered before imputing seditious intent to an act. In *Balwant Singh v. State of Punjab*[108], the Court refused to penalize casual raising of slogans few times against the State by two individuals like [Khalistan Zindabad, Raj Karega Khalsa etc.]. It was opinioned that raising of lonesome slogans, a couple of times by these two people, without any action, did not constitute any threat to the Government of India as by law established nor could the same give rise to feelings of enmity or hatred among different communities or religions or other groups. On the same ruling, it was emphasized that holding an opinion against the Prime Minister or his actions or criticism of the actions of Government

[106] Romesh v. Union of India, AIR 1988 SC 775; see also Nazir Khan & Ors. v. State of Delhi, AIR 2003 SC 4427; see also Union of India & Ors. v. The Motion Picture Association & Ors., etc. AIR 1999 SC 2334.
[107] A P Shah, Free Speech, Nationalism and Sedition, Economic & Political Weekly, Vol. 52, Issue No. 16, 22 Apr, 2017.
[108] Balwant Singh v. State of Punjab, AIR 1995 SC 1785.

or drawing inference from the speeches and actions of the leader of the Government that the leader was against a particular community and was in league with certain other political leaders, cannot be considered as sedition.[109] The need to look into the context of the speech was reiterated by Delhi HC in *Pankaj Butalia* v. *Central Board of Film Certification & Ors*.[110], held that while judging the cases of sedition, it is extremely important to take into consideration the intention. An offense under se.124A IPC has to be ascertained by judging the act 'holistically and fairly without giving undue weight to isolate passages.[111] In case of *Sanskar Marathe* v. *State of Maharashtra*[112], a cartoonist Assem Trivedi was booked under se.124A for defaming the Parliament, Constitution of India and National Emblem and attempting to spread hatred and disrespect against the Government through his cartoons. The Apex Court in the present case distinguished between strong criticism and disloyalty observing that disloyalty to Government established by law does not stand on the same footing as commenting in strong terms upon the measures or acts of Government, or its agencies, so as to ameliorate the condition of the people or to secure the cancellation or alteration of those acts or measures by lawful means, that is to say, without exciting those feelings of enmity and disloyalty which imply excitement of public disorder or the use of violence. In case of *Arun Jaitley* v. *State of U.P*.,[113] , Allahabad High Court opined that a critique by a writer of a judgment of the Supreme Court on National Judicial Appointment Commission does not amount to sedition, it is merely a constructive criticism.

Thus expression of strong condemnation towards the State or its institution can never amount to sedition for the simple reason that no institution or symbol alone embodies the whole country in entirely. In many cases the critique over a failed law expressed through for instance, the burning of national flag or expression of disappointment with the members of Parliament through a visually disparaging cartoon or an image of Parliament cannot amount to sedition because often the protests may be routed in an idea of India which has been frustrated by its elected representatives or a law that has been demeaned or disappointed citizens of India.

PRIVATE MEMBER'S BILL SUGGESTING AMENDMENT

In year 2011, a private member bill titled the Indian Penal Code (Amendment) Bill, was introduced in Rajya Sabha by Mr. D. Raja. The Bill proposed that sec. 124A IPC should be

[109]Javed Habib v. State of Delhi, (2007) 96 DRJ 693.
[110]Pankaj Butalia v. Central Board of Film Certification & Ors., (2015) 221 DLT 29.
[111]Romesh Yashwant Prabhoo v. Prabhakar Kashinath Kunte & Ors., AIR 1996 SC 1113
[112]Sanskar Marathe v. State of Maharashtra, (2015) Cri LJ 3561.
[113] Arun Jaitley v. State of U.P.,2016 (1) ADJ 76.

removed as it is a colonial law used by the Britishers to oppress the speech and criticism against them. But it is still being used in independent and democratic India despite having specialized laws to deal with internal and external threat to destabilize the nation. Another Bill titled The Indian Penal Code (Amendment) Bill, 2015 was introduced in Lok Sabha by Mr. Shashi Tharoor to amend the original section and suggested that only those words/ actions that directly result in the use of violence or incitement of violence should be treated seditious. This proposed amendment revived debates on interpretation of this section. The Courts through various judgments have settled that not only words, either spoken or written, or signs or visible representation that are likely to incite violence should be considered seditious.

SEDITION VIS-A- VIS OTHER STATUTES

Potentiality and impact of expression has always been looked into by Courts to determine the permissibility of its restriction. In order to qualify as sedition, the act must be intentional and must cause hatred. Disturbance of public order has been recognized as an important ingredient of sedition in India. The term 'public order' has been defined and distinguished from 'law and order' and security of State' in *Ram Manohar Lohiya case*[114] wherein the Court observed, that one has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest one represents security of State. This made it easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. Since sedition is an offence against the State, higher standards of proof must be applied to convict a person, which is necessary to protect fair and reasonable criticisms from unwarranted State oppression. Section 124A IPC must be read in consonance with Article 19(2) of the Constitution and the reasonableness of the restriction must be scrutinized carefully on the basis of facts and circumstances of each case.[115]

The Indian Penal Code, 1860, within its ambit covers a wide range of actions threatening the peace of the society. For e.g.- Chapter IV includes offences against State like waging or attempting to wage a war,[116] collecting arms etc. with intention of waging war against India,[117] concealing with intent designed to wage war[118] etc. Chapter VII covers provisions relating to

[114] Ram Manohar Lohiya v. State of Bihar, AIR 1966 SC 740.
[115] Om Kumar v. Union of India, AIR 2000 3689.
[116] The Indian Penal Code, 1860, s.121.
[117] The Indian Penal Code, 1860, s. 122.
[118] The Indian Penal Code, 1860, s.123.

abetting mutiny.[119] Further Chapter VIII covers actions which, if allowed, would disturb public peace. Section 141 IPC defines unlawful assembly and punishment is also provided for the same.[120] The Code also prohibits actions promoting enmity between different groups on grounds of race, religion, language, place of birth etc.[121] Hence these are certain provisions that take care of any activity which might be indulged into for the purpose of waging war against India or causing disruption of public order.

Secondly, the Unlawful Activities Prevention Act, 1967 was enacted to prevent terrorist activities and to freeze the assets and other economic resources belonging to terrorists. The main object has been to enable the State authorities to deal with "activities directed against the integrity and sovereignty of India". In 2012, the Act was amended, removing the vagueness in the definition of 'terrorist act' to include offences which may threaten the economic security of the nation.

The Criminal Law Amendment Act, 1961 was also enacted with the purpose of curbing activities that are likely to jeopardize the security of the country and its frontiers point. The Act deals with cases where someone questions the territorial integrity, which is likely to prejudice safety and security of nation.[122] It is also notable that Central Government may by notification declare 'any area adjoining the frontiers of India, as notified area in which no person shall enter without the permission of designated authority.[123] Furthermore, the Act also empowers the State Government to forfeit any newspaper or book which in its opinion contains material which is contravention to sections 2 and 3(2) of this Act.[124]

THE WAY FORWARD

For the proper functioning of a democracy it is important that its citizen indulge in constructive criticism or debates, pointing out the loopholes in the policy of the Government. Expressions used in such thoughts might be harsh and unpleasant to some, but that does not render the actions to be branded seditious. Section 124A should be invoked only in cases where the intention behind any act is to disrupt public order or to overthrow the Government with violence and illegal means. Every irresponsible exercise of right to free speech and expression cannot be termed seditious. For merely expressing a thought that is not in consonance with the

[119] The Indian Penal Code, 1860, s.131, 132.
[120] The Indian Penal Code, 1860, s.143.
[121] The Indian Penal Code, 1860, s. 153A.
[122] The Criminal Law (Amendment) Act, 1961, s.2.
[123] The Criminal Law (Amendment) Act, 1961, s.3(1).
[124] The Criminal Law (Amendment) Act, 1961, s.4(1).

policy of the Government of the day, a person should not be charged under the section.

Certain issues which need thorough consideration are;

a) Given the fact that 124A was introduced by British to oppress the Indians, how far is it justified today and shouldn't it be redefined in a country like India that is the largest democracy of the world?
b) What is the extent to which the citizens may enjoy the right to offence and at what point this right to offend would qualify as hate speech?
c) What could be the possible safeguards to ensure that the section is not misused?
d) How to strike a balance between s.124A IPC and right to freedom of Speech and Expression?